

3/8/1985

**OREGON
ENVIRONMENTAL QUALITY
COMMISSION MEETING
MATERIALS**



**State of Oregon
Department of
Environmental
Quality**

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OREGON ENVIRONMENTAL QUALITY COMMISSION MEETING

March 8, 1985

Room 1400
Department of Environmental Quality
522 SW Fifth Avenue
Portland, Oregon

A G E N D A

9:00 a.m.

CONSENT ITEMS

These routine items are usually acted on without public discussion. If any item is of special interest to the Commission or sufficient need for public comment is indicated, the Chairman may hold any item over for discussion.

- A. Minutes of January 25, 1985, EQC meeting.
- B. Monthly Activity Report for December, 1984.
- C. Tax Credits.

9:05 a.m.

PUBLIC FORUM

This is an opportunity for citizens to speak to the Commission on environmental issues and concerns not a part of this scheduled meeting. The Commission may discontinue this forum after a reasonable time if an exceptionally large number of speakers wish to appear.

ACTION AND INFORMATION ITEMS

Public testimony will be accepted on the following, except items for which a public hearing has previously been held. Testimony will not be taken on items marked with an asterisk (*). However, the Commission may choose to question interested parties present at the meeting.

- D. Proposed Adoption of Pollution Control Tax Credit Rule Amendments.
- E. Request for a Variance from OAR 340-61-040(5) (a) (Discharge of Pollutants into Public Waters) for Weyerhaeuser Company, Springfield--Truck Road Landfill.
- F. Lava Diversion Project, Deschutes River--Appeal of 401 Certification Denial.
- G. Informational Report on the Vehicle Inspection Program, 1983-84.
- H. Status Report--Development of Noise Emission Inspection Agreement for Tri-Met Diesel Bus Fleet.

WORK SESSION

The Commission reserves this time, if needed, for further consideration of any item on the agenda.

Because of the uncertain length of time needed, the Commission may deal with any item at any time in the meeting except those set for a specific time. Anyone wishing to be heard on any item not having a set time should arrive at 9:00 am to avoid missing any item of interest.

The Commission will have breakfast (7:30 a.m.) at the Imperial Hotel, 400 SW Broadway, Portland. Agenda items may be discussed at breakfast. The Commission will not hold a lunch meeting.

The next Commission meeting will be April 19, 1985 in Salem.

Copies of the staff reports on the agenda items are available by contacting the Director's Office of the Department of Environmental Quality, PO Box 1760, Portland, Oregon 97207, phone 229-5395, or toll-free 1-800-452-4011. Please specify the agenda item letter when requesting.

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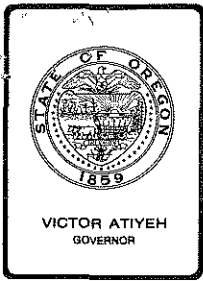
ENVIRONMENTAL QUALITY COMMISSION

March 8, 1985

Breakfast Meeting
Imperial Hotel
400 SW Broadway
Portland

AGENDA

- | | |
|---|--------------------------------|
| 1. Report on Status of Initiating Development
of Noise Inspection Procedures and Standards
for Heavy Trucks and Buses | Ron Householder
John Hector |
| 2. Legislative Update | Stan Biles |
| 3. Coastal Landfills | Ernie Schmidt |



Environmental Quality Commission

Mailing Address: BOX 1760, PORTLAND, OR 97207

522 SOUTHWEST 5th AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

MEMORANDUM

To: Environmental Quality Commission
From: Director
Subject: March 8, 1985, EQC Breakfast Meeting

Report on Status of Initiating Development of Noise
Inspection Procedures and Standards for Heavy Trucks and
Buses

Background

The Environmental Quality Commission adopted a vehicle noise inspection package at its meeting of November 2, 1984. As part of that package, the Department was directed to initiate development of noise inspection procedures and standards for heavy duty trucks and buses that are suitable for use at the Department inspection stations. The Department was further directed to report back to the Commission on that project's progress by April 1, 1985.

The Department staff has been preparing equipment and implementing the necessary procedures so that after April 1, 1985, all light duty cars and trucks will be tested for noise compliance in addition to the emission inspection requirements. While all of the inspection stations have been brought "on-line" by mid-February and have the necessary equipment to conduct the required noise tests, there is still substantial de-bugging of system in progress.

Motorcycles are scheduled to be included July 1. Because this testing will require additional personnel, budget approval is to be requested. Motorcycles, mopeds and scooters, licensed within the Metropolitan Service District boundaries will be tested. It should be noted that off-road motorcycles and ATVs (all terrain vehicles) are not subject to inspection requirements unless they are licensed for street operation. A pilot testing program for motorcycles preparing for the July 1 date has been initiated.

Heavy Duty Vehicle Testing

For inspection purposes, heavy duty vehicles can be categorized into gasoline and diesel-powered vehicle classes. Heavy duty gas vehicles are included in the emissions portion of the inspection program. Heavy duty diesel vehicles are not now included, nor have appropriate emission control test standards and procedures been developed.

Several inspection stations have been noise testing heavy duty gasoline vehicles on a pilot basis since mid-February. While much work has been done developing near field noise tests for light duty vehicles, not much effort has been previously expended in this area for heavy duty vehicles. Nevertheless, as a starting point, the same procedure that is being used for light duty vehicles is being applied to heavy duty gasoline trucks. Because of the wide variety of locations of the exhaust pipe outlets on heavy duty trucks, intra-city cargo vans and some long-haul trucks the current near field noise test needs to be field tested and refined.

The noise inspection program is limited to the determination of engine exhaust noise. Many heavy duty truck noises are beyond the scope of the noise inspection program. Among these noise sources are tire noise, engine compartment noise, on-board pumping, compactor, refrigeration, and power take-offs noises. Air compression brakes, while often prohibited by city ordinance, are not included. Fixed load vehicles, such as compressor tanks and lift trucks, are exempted. All trucks operating under reciprocity licensing agreements with other states are also exempted.

It is proposed that the inspection staff collect and analyze data on heavy duty trucks at the inspection stations. Heavy duty gas trucks are currently the only ones included. At the public hearing on February 19, 1985, which asked for comments on the appropriateness of including heavy duty diesel vehicles in the inspection program, no testimony on testing procedures for heavy duty diesel trucks was received. While the noise/opacity pilot study with Tri-Met helped identify bus problems, the testing and configuration problems of heavy duty trucks need to be studied in order to develop an appropriate test.

The initial observations of 74 heavy duty trucks noise tests made during the later part of February 1985 include:

- 1) Up to 90 percent of the heavy duty gasoline trucks tested had exhaust system outlets located under the truck cargo bed. Using the 20" near field test was extremely difficult and in many cases impossible.
- 2) Less than 5 percent of the heavy duty gasoline trucks tested had vertical exhaust stacks. Vertical stacks require that a ladder or boom be used to access the exhaust outlet to conduct the 20" near field test.

- 3) Five percent of the 1977 and older vehicles exceeded a near field 97 dBA level and 5 percent of the 1978 and newer vehicles exceeded a near field 95 dBA level. Federal vehicle noise standards were applied to new heavy duty trucks starting with the 1978 model year. The federal standard of 83 dBA is measured by a drive-by test procedure, rather than with the stationary near field test.
- 4) The 74 trucks ranged from a low noise level of 80 to a high of 100 dBA. The average sound level reading of the older group (pre-78) was 88 dBA. The average sound level reading of the 1978 and newer truck was 85 dBA.

One factor which may effect the staff's ability to bring heavy duty vehicle noise testing rapidly on-line is the status of Medford I/M. Should the Legislature establish an I/M program for the Medford area, much of the staff's effort might well be required to bring that project on-line within a legislatively set time frame. If that happens, the Department would need to seek guidance from the Commission on what level of resource to expend on heavy duty vehicle exhaust noise testing.

Summary

All of the inspections stations have the capability to conduct the vehicle noise tests. The final "de-bugging" of the system is underway. Mandatory compliance with noise inspection criteria will be after April 1 for cars and light trucks and after July 1 for motorcycles.

Near field test procedures for heavy duty vehicles are not as well defined as they are for light duty vehicles. However, pilot testing has started on a limited basis in order to identify and establish a workable, reliable and realistic test procedure. Very preliminary results have identified several problem areas.

Proposed Course of Action

The project study for heavy duty vehicle noise testing will need to examine a wide range of issues. All of the problems with testing these types of vehicles are not known and will need to be discovered on a trial and error basis. It is proposed that the staff continue to pilot noise test heavy duty vehicles at the inspection stations. The study period will extend through the end of 1985. The staff will then report to the Commission at its April 1986 meeting with the results of the study and possible rule proposals.

Fred Hansen

William P. Jasper:s
229-5081
March 7, 1985

VS1188

HISTORY OF DUMP CLOSURE ON THE OREGON COAST

<u>Site</u>	<u>Type</u>	<u>Action</u>	<u>Date</u>	<u>Current Disposal</u>
Brookings	OBD	Closed	1980	Brookings Incinerator
Agness	OBD	Converted to transfer station	1975	" "
Gold Beach	OBD	Closed	1980	" "
Langlois	OBD	Closed	1973	" "
Port Orford	OBD	Converted to landfill	1980	Port Orford Landfill
Bandon	OBD	Convert. to ash disp.	1980	Beaver Hill Incinerator
Shinglehouse Slough	OD	Closed	1978	" "
Joe Ney	OD	Convert. to demolition landfill	1980	" "
Coquille	OBD	Closed	1973	" "
Myrtle Point	OBD	Closed	1980	" "
Fairview	OD	Closed	1976	" "
Powers	OBD	Variance expires May 1986		Open burning dump
Reedsport	LF			Reedsport Landfill
Florence	LF			Florence Landfill
Waldport	OBD	Convert. to landfill	1980	Waldport Landfill
North Lincoln	OBD	Convert. to demolition landfill	1980	Agate Beach Balefill
Logsdan	OBD	Convert. to transfer station	1980	" "
Toledo	OBD	Closed	1976	" "
Agate Beach	OD	Convert. to balefill	1984	" "
Tillamook	OBD	Convert. to landfill	1980	Tillamook Landfill
Bay City	OBD	Closed	1975	" "
Pacific City	OBD	Convert. to transfer station	1980	" "
Manzanita	OBD	Convert. to transfer station	1980	" "
Elsie	OBD	Convert. to landfill	1983	
Seaside	OBD	Convert. to transfer station	1984	Raymond (WA) Landfill
Cannon Beach	OBD	Closed	1984	" "
Warrenton	OD	Permit for closure issued		
Astoria	OD	Permit expires 3/31/85		

SC2090
3/8/85

THESE MINUTES ARE NOT FINAL UNTIL APPROVED BY THE EQC

MINUTES OF THE ONE HUNDRED SIXTY-THIRD MEETING

OF THE

OREGON ENVIRONMENTAL QUALITY COMMISSION

March 8, 1985

On Friday, March 8, 1985, the one hundred sixty-third meeting of the Oregon Environmental Quality Commission convened in room 1400 of the Department of Environmental Quality offices at 522 SW Fifth Avenue in Portland, Oregon. Present were Commission Chairman James Petersen, and Commission members Mary Bishop, Wallace Brill, Sonia Buist, and Vice Chairman Arno Denecke. Present on behalf of the Department were Director Fred Hansen and several members of the Department staff.

The staff reports presented at this meeting, which contained the Director's recommendations mentioned in these minutes, are on file in the Office of the Director of the Department of Environmental Quality, 522 SW Fifth Avenue, Portland, Oregon. Written information submitted at this meeting is hereby made a part of this record and is on file at the above address.

BREAKFAST MEETING

Commissioner Denecke was absent from the Breakfast Meeting.

1. Legislative Update

Stan Biles, Assistant to the Director, updated the Commission on legislative issues. He said that for the first few weeks of the Legislative Session, staff had been quite busy responding to Legislators' questions about a proposal by Chem-Security, Inc. to construct an incinerator to burn PCB's at their hazardous waste disposal site near Arlington, Oregon. The Senate had passed a bill, with a vote of 26 to 3, which would put the Department in control of the size, siting, wastes to be burned, etc. The House was now considering their own bill. In response to Commissioner Buist, Mr. Biles said that the most anxiety about the project was in the areas of transportation, safety of the incinerator, size of the service area, and the operation of a hazardous waste disposal facility in Oregon in general. Director Hansen said the Department strongly supported the provisions in the Senate Bill.

Mr. Biles gave the Commission packets of bills they might be interested in.

2. Coastal Landfills

Ernest Schmidt of the Department's Solid Waste Division, filled the Commission in on the history of coastal dump closure demonstrating that progress had been made mostly culminating in 1980 when a majority of the dumps were closed. The Department had been working steadily on the remaining open dumps since then. Briefly summarizing, Mr. Schmidt said that the South Coast had elected to go to incineration and the Department would like them to have the best incinerator for their needs; Reedsport and Florence landfills have been significantly upgraded; Tillamook converted most sites to transfer stations and upgraded their landfill. In Clatsop County, Mr. Schmidt continued, the Seaside and Cannon Beach dumps closed in September 1984 and now haul to a landfill in Raymond, Washington, about 70 miles from Seaside. Astoria was considering the same solution and was trying to locate a transfer station. Janet Gillaspie, Manager of the Department's Northwest Region, said that the dump at Warrenton, in the Clatsop Plains area, has been found to be a major contributor to the groundwater contamination there. She said the Region had been working since May of 1983 for closure of the dump, but that Warrenton had been unwilling. This matter would most likely come before the Commission at their next meeting. Regarding Astoria, Ms. Gillaspie said they were trying to get a closure plan but have been unsuccessful so far. Their permit expires the end of March 1985 and the Department has told them they will close the dump if plans are not submitted.

3. Report on Status of Initiating Development of Noise Inspection Procedures and Standards for Heavy Trucks and Buses.

William Jasper of the Department's Vehicle Inspection Program reviewed, with the Commission, a written status report which is made a part of the record of this meeting. Mr. Jasper agreed to send the Commission copies of the U.S. General Accounting Office report on "Vehicle Emissions Inspection and Maintenance Program is Behind Schedule," dated January 16, 1985.

FORMAL MEETING

AGENDA ITEM A: Minutes of the January 25, 1985 EQC Meeting.

It was MOVED by Commissioner Bishop, seconded by Commissioner Buist, and passed unanimously that the Minutes of the January 25, 1985 EQC meeting be approved.

AGENDA ITEM B: Monthly Activity Report for December 1984.

It was MOVED by Commissioner Bishop, seconded by Commissioner Brill, and passed unanimously that the Monthly Activity Report for December 1984 be approved.

AGENDA ITEM C: Tax Credit Applications.

It was MOVED by Commissioner Bishop, seconded by Commissioner Buist, and passed unanimously that the following Tax Credit Applications be approved:

T-1711	ESCO Corporation
T-1717	ESCO Corporation
T-1719	Nicolai Company

PUBLIC FORUM:

Jeanne Orcutt, member of United Citizens in Action, asked for the answer to a question she raised at the last meeting regarding whether the government entities listed had complied with OAR 340-71-335(2) (b).

She said the Department had supplied her with the information on this matter but she did not see where the rule was complied with. Ms. Orcutt asked that the Department assess civil penalties to noncomplying governments. Ms. Orcutt also read into the record a letter she had found from a company which offered a solution to the groundwater contamination problems.

Harold Sawyer, Administrator of the Department's Water Quality Division, acknowledged that the Department had supplied Ms. Orcutt with what information they had on file. He noted a letter from the City of Troutdale which said the City was sewered. Mr. Sawyer said the Department accepted that information, and did not believe a further plan was required. Regarding Clackamas County, Mr. Sawyer said that an area exists in Clackamas County where sewers were needed--primarily to correct surface failing on-site sewage disposal systems, but also to phase out existing cesspool systems. New cesspool systems have not been installed in Clackamas County since 1982. Thus, the problem, although not corrected, has not been made worse by continued installation of systems. Clackamas County had not yet submitted a plan, but the Department was aware of progress and felt no enforcement action was necessary.

In response to Chairman Petersen, Mr. Hansen said the Department would seek a formal compliance schedule or variance request from Clackamas County.

Regarding the letter Ms. Orcutt read, Mr. Sawyer said the Department reviewed the information submitted by the company. Their treatment process does not prevent pollutants from reaching the groundwater. Instead, it would treat the water prior to use. Since it would not alleviate the degradation of the groundwater, it would not meet the requirements of the statute. Therefore, the Department did not pursue it further as an alternative. Mr. Sawyer further commented that the Department had unanswered questions regarding whether the treatment unit actually removed nitrate or whether the ozone used in the treatment process interfered with the colorimetric testing method used to test for nitrates in the effluent. In any event, Mr. Sawyer said the Department did not view this as an acceptable solution to the problem.

John Wujak, resident of Bend and member of the Coalition for the Deschutes, which monitors hydro development in the Deschutes Basin, spoke regarding the 401 Certification process for hydroelectric development projects. He stressed the need for sound planning from the various government entities to make decisions which would benefit the community's interest.

Larry Tuttle, Deschutes County Commissioner, asked to be allowed to comment on upcoming Agenda Item F, the appeal of 401 Certification Denial for the Lava Diversion Project, Deschutes River. Chairman Petersen replied that the Commission would limit comment on that agenda item to legal arguments, but Commissioner Tuttle was welcome to comment during this public forum time. Commissioner Tuttle read a prepared statement which he asked to be accepted into the hearing record. Chairman Petersen agreed.

Commissioner Tuttle said the County had not signed off on the Land Use Consistency Statement as the proposed project would not be in conformance with the comprehensive plan and implementing ordinances.

Commissioner Tuttle also said the County had questions about the standing of General Energy Development (GED). GED was unable to utilize the waters of the state because the waters of the upper Deschutes River have been withdrawn from appropriation. Therefore, he continued, GED was unable to build any project on the upper Deschutes River. GED has entered into a joint venture agreement with Arnold Irrigation District whereby the District will supply GED the municipal preference for the project for a share of the revenue. Commissioner Tuttle said that two Attorney General opinions have concluded that the agreement is insufficient to qualify GED's application to the Water Resources Department as a municipal application.

Commissioner Tuttle also asked that the County be permitted party status in this case. Of concern to the County, he continued, was the information that the Department had continued to work on eight deficient areas after the November 27, 1984 decision by the Director to deny 401 Certification to the project, without additional notice to the public that more information would be considered by the Department after the decision was made.

Chairman Petersen asked the legal counsel for the State and for the applicant to comment on Commissioner Tuttle's remarks during their presentation on Agenda Item F.

J. D. Smith, representing Oregon Shores Conservation Coalition, and Northwest Environmental Defense Center, spoke in regard to the 401 Certification process. Mr. Smith reiterated his testimony at the Commission's January 25, 1985 meeting, saying he felt Section 303 of the Clean Water Act clearly required a consideration of the impact projects would have not only on water quality, but on other beneficial uses of the water.

This ended the public forum.

AGENDA ITEM D: Proposed Adoption of Pollution Control Tax Credit Rule Amendments.

This item asks for adoption of proposed amendments to the Pollution Control Tax Credit Rules which would address problems raised by Legislative Counsel related to refunding fees and problems found by the staff in administering the rules.

Director's Recommendation

Based on the summation in the staff report, it is recommended that the Commission adopt the proposed Pollution Control Tax Credit Rule amendments, Chapter 340, Division 16.

It was MOVED by Commissioner Denecke, seconded by Commissioner Bishop, and passed unanimously that the Director's Recommendation be approved.

AGENDA ITEM E: Request for a Variance from OAR 340-61-040(5) (a) (Discharge of Pollutants into Public Waters) for Weyerhaeuser Company, Springfield--Truck Road Landfill.

This agenda item proposes to allow the Weyerhaeuser Company a variance from the state solid waste rules to allow the discharge of leachate from the Truck Road Landfill. The variance would require that the leachate be discharged to the Eugene-Springfield regional wastewater treatment plant, or equivalent control, by November 1, 1985.

Director's Recommendation

Based on the findings in the summation in the staff report, it is recommended that the Commission grant a variance to the Weyerhaeuser Company, Springfield, Oregon, from OAR 340-61-040(5) (a) for the discharge of pollutants from the Truck Road Landfill into public waters, until November 1, 1985, subject to the following compliance schedule:

1. By May 15, 1985, complete design study to discharge leachate to the regional wastewater treatment plant.
2. By June 1, 1985, submit an alternative treatment and disposal plan to Department staff for review and approval if discharge to the regional wastewater treatment plant is not feasible.
3. By June 15, 1985, submit for Department approval complete engineering design specifications to eliminate the discharge of leachate from the Truck Road Landfill.
4. By October 1, 1985, complete construction of the approved leachate disposal system.
5. By November 1, 1985, eliminate the discharge of leachate to public waters from the Truck Road Landfill.

Commissioner Buist asked if the City of Springfield was in agreement with the proposal. Larry Lowenkron, of the Department's Willamette Valley Region, replied that the City had given preliminary indications they were.

Noting there was no impact on the river, Commissioner Bishop MOVED, and Commissioner Denecke seconded, that the Director's Recommendation be approved. The motion passed unanimously.

AGENDA ITEM F: Lava Diversion Project, Deschutes River--Appeal of 401 Certification Denial.

General Energy Development, Inc. (GED) applied to the Department of Environmental Quality for Water Quality Standards Compliance Certification for the Lava Diversion Project, a planned hydroelectric project on the Deschutes River. Compliance certification is required by Section 401 of the Clean Water Act.

DEQ denied certification for failure to adequately address certain potential water quality impacts and for failure to provide a statement of land use compatibility. The water quality information has been provided and is no longer an issue.

GED continues to dispute DEQ authority to condition certification on submission of a statement of compatibility with the Deschutes County Comprehensive Plan and land use ordinances. GED asks the Environmental Quality Commission to find it meets the requirements of law and is entitled to certification.

For the record, Chairman Petersen acknowledged receipt of the Department's brief, the applicant's brief, and also receipt of the Deschutes County memorandum that was read by Commissioner Tuttle into the public record of this proceeding during the Commission's public forum. He said the parties had, in an effort to expedite a decision, stipulated to the facts, and testimony would consist of attorney arguments on the legal merits. Neil Bryant was present representing the applicant and Michael Huston was representing the Department. A verbatim transcript of their arguments are made a part of record of this meeting.

At the conclusion of the legal arguments, Commissioner Denecke MOVED and Commissioner Buist seconded, that the Commission take this matter under advisement. The motion passed by unanimous consensus. The Commission agreed to meet on March 22, 1985 to deliberate and make their decision.

AGENDA ITEM G: Informational Report on the Vehicle Inspection Program, 1983-84.

This is an informational report providing a summary and update on the operation of the Vehicle Inspection program during 1983 and 1984. This report contains an overview summary followed by various appendices. These appendices describe the program operation, emission

characteristics of vehicles, air quality benefits, and other support documentation.

Among the highlights of this report are:

1. During 1983 and 1984, over 800,000 emission tests have been conducted and over 513,000 Certificates of Compliance have been issued.
2. Computer modeling projections estimate that the inspection program has achieved an emissions reduction of 30% for carbon monoxide and 10.5% for hydrocarbons.
3. Technical compliance with ambient CO standards was measured at the Continuous Air Monitoring (CAM) station in 1984, but not at the other Portland monitoring sites. Technical compliance with the ozone standard was measured at the Carus monitoring site near Canby in 1984.
4. Construction is underway on upgrading the inspection station on Northeast Portland Highway. Construction is scheduled to be completed by mid-May.
5. Compliance with ambient air quality standards is still projected to be achieved by the deadline date of 1987.

Director's Recommendation

It is recommended that the Commission accept this informational report.

Chairman Petersen commented that he was very pleased with the program, and it was considered one of the best in the Nation.

Commissioner Buist asked what vehicles were exempted from the test. William Jasper of the Department's Vehicle Inspection Program replied that basically vehicles which were 20 years old and older, fixed load vehicles, vehicles with farm plates, first-response emergency vehicles, and long-haul trucks used in interstate commerce.

Chairman Petersen asked if this report had been made a part of the record during the legislative hearings on the proposed Medford auto testing program. Director Hansen replied that it had not, but the Department intended to use parts of it in their testimony.

The Commission noted the report and thanked the staff.

AGENDA ITEM H: Status Report--Development of Noise Emission Inspection Agreement for Tri-Met Diesel Bus Fleet.

Noise emission inspection rules for autos, light-duty trucks, and motorcycles were approved by the Commission on November 2, 1984. The Commission then directed the Department to develop, with Tri-Met, an agreement that would ensure that all of Tri-Met's buses are maintained to appropriate noise limits.

It was originally anticipated that a proposed inspection agreement would be completed by this time. Although a new test procedure has been developed, and noise reducing measures identified, additional engineering work must be completed prior to proposing a final agreement. It is now believed a proposed agreement will be ready at the June Commission meeting.

Several nonengineering issues remain in the development of an agreement with Tri-Met. At this time, it is hoped the Commission would comment and provide guidance on these issues identified in the report.

The following items are believed by staff as needing identification or resolution prior to submitting a proposed agreement:

1. Proposed standards for each bus subfleet should be established based upon test data of representative buses of each subfleet. Tri-Met believes this task will be completed by May 1, 1985.
2. An inspection schedule must be established. Tri-Met proposes to test all buses within a 90-day period beginning April, 1985. A schedule of periodic testing must be established to ensure buses are maintained within standards. The Department believes each bus must, at a minimum, be tested annually after the initial test and compliance schedule.
3. A compliance policy must be established. Tri-Met proposes that "generally," noncompliant buses will be repaired within a 60-day period following initial noise testing. The Department believes any bus found in excess of standards during the annual inspection should not be operated until compliance work is completed.
4. Certificate of compliance requirements and fees, if any, must be determined. Tri-Met proposes that this program be of a voluntary nature and neither certificates nor fees are necessary.
5. An audit policy must be established that adequately ensures buses are tested and quieted within the provisions of the agreement.

Director's Recommendation

It is recommended that the Commission concur with the above outline of remaining issues that must be resolved before a final Tri-Met bus noise inspection agreement is proposed. It is anticipated that a proposed agreement will be available for formal Commission consideration at the meeting scheduled for June 7, 1985.

Linore Allison, Livable Streets Coalition, testified that bus noise was a real issue in the neighborhoods. They agreed with the staff report that an official consent agreement with Tri-Met was needed which included fleet inspection monitored by DEQ with official certificates and assessment of fees.

John Charles, Oregon Environmental Council, said they had no objection to a delay in program startup, but would want no further delay after that time. Once the program was operating, then noncompliant vehicles should be taken off the road until they were in compliance. They also agreed with the need for an official agreement with Tri-Met and the audit procedures. Mr. Charles said they would object to anything less than a state-monitored program.


It was MOVED by Commissioner Buist, seconded by Commissioner Denecke, and passed unanimously that the Director's Recommendation be approved.

In an unrelated matter, John Charles, Oregon Environmental Council, asked if the record would be open on the appeal of the 401 denial for the Lava Diversion Project. Chairman Petersen replied that he was not inclined to open the matter for nonparty participation, and that the appropriate time for Mr. Charles to comment would be during the 401 rulemaking process.

There being no further business, the formal meeting was adjourned.

The Commission then agreed to meet at 1:30 p.m. on Friday, March 22, 1985 in Portland to deliberate and make a decision on the 401 Certification denial appeal for the Lava Diversion Project. They asked that the attorneys be present for questions, but they would not take additional testimony.

Respectfully submitted,


Carol A. Spletstaszer
EQC Assistant

CAS:d

THESE MINUTES ARE NOT FINAL UNTIL APPROVED BY THE EQC

MINUTES OF THE ONE HUNDRED SIXTY-SECOND MEETING

OF THE

OREGON ENVIRONMENTAL QUALITY COMMISSION

January 25, 1985

On Friday, January 25, 1985, the one hundred sixty-second meeting of the Oregon Environmental Quality Commission convened in Room 1400 of the Department of Environmental Quality offices at 522 S. W. 5th Avenue in Portland, Oregon. Present were Commission Chairman James Petersen and Commission members Mary Bishop, Wallace Brill, Sonia Buist, and Vice Chairman Arno Denecke. Present on behalf of the Department were Director Fred Hansen and several members of the Department Staff.

The staff reports presented at this meeting, which contained the Director's recommendations mentioned in these minutes, are on file in the office of the Director of the Department of Environmental Quality, 522 S. W. 5th Avenue, Portland, Oregon. Written information submitted at this meeting is hereby made a part of this record and is on file at the above address.

BREAKFAST AGENDA

1. Agency Organization Changes

Director Hansen announced he had recently renamed the Solid Waste Division the Hazardous and Solid Waste Division and appointed Michael Downs as the Administrator. Mr. Downs was formerly the Administrator of the Management Services Division. The Management Services Division Administrator position would be filled on a rotational basis with Lydia Taylor, the Agency's Budget Officer until the first of March and then with Judy Hatton, the Agency's Accounting Services Supervisor, from the first of March until the position is filled. Director Hansen also announced the recent appointment of Carolyn Young, formerly with KOIN TV, as the Agency's Public Information Officer.

2. Meeting with Oregonian Editorial Board

Director Hansen reported on a successful meeting with The Oregonian's Editorial Board in response to their editorial criticizing the Department's actions in regard to the need for an auto testing program in Medford.

3. Review of Governor's Recommended Budget

Lydia Taylor and Michael Downs, of the Agency's Management Services Division, reviewed with the Commission the Department's 1985-87 Governor's recommended budget. The discussion included a handout of materials which is made a part of the record of this meeting.

4. Status Report on Legislation

Stan Biles, Assistant to the Director, reported to the Commission on the status of DEQ legislation and other legislation which would affect the Department.

FORMAL AGENDA

All Commission members were present for the formal meeting.

AGENDA ITEM A: Minutes of the December 14, 1984 EQC meeting.

It was MOVED by Commissioner Bishop, seconded by Commissioner Buist and passed unanimously that the minutes of the December 14, 1984 Commission meeting be approved.

AGENDA ITEM B: Monthly Activity Report for November 1984.

It was MOVED by Commissioner Buist, seconded by Commissioner Bishop and passed unanimously that the monthly activity report for November 1984 be approved.

AGENDA ITEM C: Tax Credit Applications.

David Kobos, owner of the Kobos Company, testified regarding their tax credit application. The Department had recommended denial of this application as the Company had not filed Notice of Intent to Construct and Request for Preliminary Certification for Tax Credit. Mr. Kobos said the Department's report was true and accurate in all its particulars, but he simply had not seen the form in the packet of information that was given to him by Department staff member Harry Demaray. Throughout the construction of the facility, which was over about a one year period, Mr. Kobos said he was in contact with Department representatives and felt that in all ways the intent and purposes of the pollution control laws had been complied with. In summary, Mr. Kobos said that he had no wish to be a polluter and they were very proud of their new installation which had virtually eliminated smoke and odor emissions.

Commissioner Bishop asked why a phone call had not been made to Mr. Kobos to remind him to submit the application. Director Hansen replied that the Department had sent letters to the Kobos Company requesting additional information and explanation why they had not yet submitted the preliminary certification form. There was no response to that letter until the final application came in, which was beyond the 30-day requirement in which additional information needs to be submitted. Director Hansen went on to say the Department recognized the Company took all of their actions in good faith with the expectation that they would receive tax credit. However, the Department did not have the ability to deviate from the Commission's rules.

It was MOVED by Commissioner Buist, seconded by Commissioner Denecke and passed unanimously that the tax credit applications be approved, including application No. T-1714 for the Kobos Company, finding that the company adequately satisfied the technical requirements for preliminary certification.

PUBLIC FORUM:

Robert Forthan, an employee of the Department's Vehicle Inspection Program appeared regarding race relations. Mr. Forthan had also appeared before the Commission at its December meeting. He said he had reviewed with Susan Payseno, Personnel Manager, the Department's affirmative action statistics. Mr. Forthan still contends that even though the State of Oregon apparently has a commitment to minorities working in state government, in his opinion the statistics did not bear this out. He said Ms. Payseno had only given him statistics for full-time employees, however numerous temporary employees had been hired in the last three years, and the Vehicle Inspection Program had not hired any full-time employees since 1981. Mr. Forthan contended that if temporary employees did not apply to the affirmative action statistics, the State of Oregon could get around the affirmative action law by hiring temporary instead of full-time employees. Mr. Forthan said that Ms. Payseno had told him that the State of Oregon had 26,000 employees, of which 1,000 were minorities. He thought that was not equal representation. Mr. Forthan stated calculation of minorities should be done in a different manner. In his view, there were more minorities in the Metropolitan Service District than elsewhere in Oregon and the statistics should be recalculated. Mr. Forthan said he was trying to promote jobs for minorities and would like to go to the Legislature and ask for the same thing.

Chairman Petersen gave Mr. Forthan a copy of an affirmative action report that Susan Payseno had prepared for the Commission and which the Commission was going to discuss at its lunch meeting. Chairman Petersen said he would ask Ms. Payseno some of the questions Mr. Forthan had raised about part-time versus full-time statistics, but basically the report showed the Department has made a positive effort to hire minorities. He encouraged Mr. Forthan to take his concerns to the Legislature because what he was really talking about was a state-wide hiring policy. Director Hansen said that the legislative committee having to do with hiring policies would generally be Human Resources Committees in both the House and the Senate.

This ended the Public Forum.

AGENDA ITEM D: Request for Authorization to Conduct a Public Hearing on Proposed Amendments to Solid Waste Rules Relating to Open Burning of Solid Waste at Disposal Sites. (OAR 340-61-015 and OAR 340-61-040(2)).

At the September 4, 1984 meeting, the Commission approved a course of action for dealing with open dumps which included a Department Task Force. The Department was to examine the issue and develop a policy dealing with open burning of solid waste at disposal sites. The study has been

completed by the Department Task Force. The Department is requesting authorization to conduct public hearings to gather testimony and propose amendments to the Solid Waste Administrative Rules. The proposed rule amendments would allow small rural sites in eastern Oregon which meet the criteria, to continue to open burn under restricted operating conditions. The proposed criteria are based on environmental and economic concerns.

Director's Recommendation

Based on the summation in the staff report, it is recommended that the Commission authorize public hearings to take testimony on the proposed amendments to rules for open burning of solid waste at disposal sites (OAR 340-61-015 and OAR 340-61-040(2)).

Commissioner Denecke asked if it was true as stated in the report that the state could not be sued for permitting open burning. Michael Huston of the Attorney General's office replied it was at least the prevailing view of the federal courts, as well as EPA, that recourse does not provide a remedy against a state regulatory agency. In addition, Director Hansen indicated the liability was not one of financial risk, but one of closing the site or stopping the practice.

Chairman Petersen asked what evidence the Department had to state that if all open burning was stopped, some local governments may abandon their disposal operations. Bob Brown, of the Department's Hazardous and Solid Waste Division, replied that Lake County indicated during discussions on the variance application procedures that if they could not burn, they could not afford to operate the sites and would essentially close them and let people go back to what they had been doing before, which was dumping on BLM land. Chairman Petersen asked if that was a lawful option for the counties. Mr. Brown replied that the statutes did not allow the Department to order a county government to provide a solid waste disposal facility. Commissioner Brill asked if there were any approved sites that were privately operated. Mr. Brown replied that he did not think any of them were operated privately, but instead were operated by local governments.

It was MOVED by Commissioner Denecke, seconded by Commissioner Buist and passed unanimously that the Director's recommendation be approved.

AGENDA ITEM F: Request for Adoption of Rules for Granting Water Standard Compliance Certification Pursuant to Requirements of Section 401 of the Federal Clean Water Act.

At the September 14, 1984 Commission meeting, the staff presented some proposed procedural rules for Department certification of federal licenses or permits pursuant to Section 401 of the Clean Water Act. At that meeting, the Commission authorized the Department to proceed through the public hearing process. A hearing was held on November 28, 1984 and the proposed rules have been modified in part in response to those public comments.

Director's Recommendation

Based on the summation in the staff report, the Director recommends that the Commission adopt the rules OAR 340-48-005 to OAR 340-48-040 as presented in Attachment A to the staff report.

Jack Smith testified on behalf of the Oregon Shores Conservation Coalition and Northwest Environmental Defense Center. Mr. Smith provided written copies of his testimony to members of the Commission. He noted the Commission had in their staff report a letter from Lynn Frank, Director of the Department of Energy, which stated that this issue was of great importance to the state and its citizens. Mr. Smith agreed. He said in order for the state to play a meaningful role in the federal decision-making process on hydroelectric facilities, the state must have an effective instrument for coordinated review of those facilities and that Section 401 certification was such an instrument. Mr. Smith said the Federal Clean Water Act stated very clearly that no license or permit shall be granted if certification has been denied by the state. DEQ has a responsibility he continued, to exercise a far more aggressive role in asserting the state's interest in federal licensing and permitting activities affecting the state's waters than is presently proposed in the rules. The burden in Section 401 was on the applicant to provide information or evidence supporting certification and through that process to convince the state why they should not deny that certification. In reviewing the Department's files of over 200 applications dating from 1982, Mr. Smith found only two which had been denied. The first one was the Gold Hill Project, which was denied because the Oregon Legislature withdrew that section of the Rogue River from hydroelectric development; and the second was the Lava Diversion Project on the Deschutes River, which was denied just recently because of some very specific water quality considerations, and because of failure on the part of the applicant to secure a statement from Deschutes County that the project was compatible with the local land use plan. Also, in reviewing the applications, they only found one file that had any identifiable public notification of actions. From this brief review, Mr. Smith stated that it had been their observation the Department has historically simply waived the opportunity or obligation that it has to deny certification of compliance of FERC license applications as being in compliance with the water quality requirements of Section 303 of the Clean Water Act. Basically, the reason for being concerned with this Section 303 water quality requirement in the context of 401 certification or denial, he continued, was the establishment of any such allowable pollutant load would necessarily turn out to be a function of stream flow, or stream flow conditions.

It was their view Mr. Smith said, that the rules as proposed did not clearly enough indicate or recognize the quite broad authority that is granted to the state by Section 401 to assert the state's interest in protecting the use of its waters from such federally licensed or permitted activities. Mr. Smith then made some specific recommendations for changes to the rules.

340-48-015... must provide the licensing or permitting agency a certification from the Department that [any such discharge] any such activity will comply with...

340-48-020, add the following subsections:

Information and evidence demonstrating that the project is compatible and consistent with all the designated uses of the affected waters.

(3)... assist the DEQ to adequately evaluate the project impacts on water quality or designated beneficial uses of the affected waters...

340-48-025, addition under subsection (2):

Findings: "That the project is compatible and consistent with all the designated uses of the affected waters."

Mr. Smith said it was their belief the above changes would make more clear the role that Section 401 actually provides to the State of Oregon in controlling federally licensed or permitted activities affecting the waters of the state, and also the responsibility that DEQ has in affirmatively exercising that particular role.

Commissioner Denecke asked where the Water Policy Review Board would fit into the picture. Mr. Smith replied that the federal law states that the state shall establish water quality standards which shall include designated uses. The Oregon Water Quality Laws place the establishment of designated beneficial uses within the preview of the Water Policy Review Board. Commissioner Denecke replied that it appeared to him that if the Commission were to adopt Mr. Smith's suggestions, they would be covering ground and doing things that the statute allots to a different body. Harold Sawyer, Administrator of the Department's Water Quality Division, replied that was a concern the Department had also. For hydroelectric projects in particular, he continued, the Water Resources Department and the Water Policy Review Board were involved in making decisions on the granting of water rights. Land use was also involved, and the Department of Energy might be involved if an energy facility site certificate was required. How all of these agency actions fit together was an issue that the Legislature was going to be wrestling with in a number of bills that would be presented to them, he said.

Also, in response to Commissioner Denecke, Mr. Sawyer said although he had not had an opportunity to review Mr. Smith's amendments in detail, his initial reaction was that they were probably within the general intent of what the Department was trying to do. However, he would like opportunity to sit down with the Department's legal counsel and review those amendments before they were adopted.

Chairman Petersen asked Mr. Smith if in commenting that the Department's response to clarification request was cursory, did he believe that the Department's approvals in the past were improper. Mr. Smith replied that, although he would not use the word 'improper', the Department's review did not address the basic question of how projects would disrupt any of the designated uses for those waters.

In response to Chairman Petersen, Director Hansen said although he did not have an extensive history of this program, he believed the Department should have a broad level of responsibility to evaluate a whole series

of factors in going through the 401 sign-off certification waiver or denial process. He said the proposed language changes appeared to be along the lines of what the Department was trying to accomplish, but he would be concerned about the Commission adopting those changes without making sure that no problems would result. His preference would be to have time to evaluate those changes.

John Churchill, professor at Portland State University, stated his background was in the field of administration of water policy, particularly at the federal level where he helped draft Public Law 92-500 (Clean Water Act) and the 1965 Act on water quality standards. He also worked with the Department for two years in setting up the Water Quality 208 Program for the State of Oregon. Mr. Churchill said he would like to see a good set of rules that would not have to be continually amended. He said Section 401 was written into the Federal Clean Water Act to give states the authority to control federal actions which would affect their ability to manage the water quality of their state. 401 was a tool to make the federal licensing procedures consistent with state policies and was a very deliberate attempt by the federal government to give the state authority over federal actions in order to comply with their program. Mr. Churchill continued that he thought it was very important that the burden of information be placed on the applicant prior to the time that the public is asked to review the application. Mr. Churchill questioned why the requirements were passed by the federal government in 1972, and the Department of Environmental Quality still did not have a written set of regulations in 1985. He suggested that as long as it had taken this long, why not wait another month so that a good set of regulations could be developed.

Mr. Churchill also commented on the appeals procedures that only allowed the applicant to appeal after a permit is denied and not the public that would be affected. At present, the only appeal someone other than the applicant would have would be to the courts. Mr. Churchill said he thought citizens should have the right to appeal to the Commission as well as applicants.

John Charles, Director of the Oregon Environmental Council. Mr. Charles agreed with Mr. Smith and Mr. Churchill and also requested that the package of rules be put on hold for another month for further review.

In addition, Mr. Charles was also concerned with a much broader policy issue, which they had raised before - that of allowing citizens, in addition to applicants, the right of appeal on permit issuance. He proposed the following rule language:

"Any person adversely affected or aggrieved by the conditions or limitations of any permit issued by the Department may request a hearing by the Commission or an authorized representative."

He did not feel this procedure would delay the issuance of permits as staff contends.

In response to Commissioner Denecke, Mr. Sawyer said that the Department had approximately one dozen applications for certification pending now, plus one denial appeal which the Commission would most likely hear at their next meeting.

It was MOVED by Commissioner Buist, seconded by Commissioner Bishop and passed unanimously that this item be tabled until the Commission's next meeting. Chairman Petersen added a request that on Page 3 of the rules, Subsection 5, the language be tightened up. Specifically, the terms "useful" and "significant."

AGENDA ITEM E: Public Hearing and Proposed Adoption of Amendments to Rule Regulating the Use of Cesspools and Seepage Pits (OAR 340-71-335).

At their December 14, 1983 meeting, and at Multnomah County's request, the Commission adopted a temporary rule amendment which delays implementation of the prohibition pertaining to cesspool and seepage pit use. The temporary rule was drafted without the customary input from Multnomah County or other affected and concerned parties, because the prohibition was to become effective on January 1, 1985. The staff indicated they would return before the Commission at its January meeting with a request for proposed adoption of amendments to the cesspool seepage pit rule. This then is intended to be a public hearing at the end of which the Department would ask the Commission to take final action.

Chairman Petersen asked that as there were numerous people who wished to speak on this particular agenda item, they limit their testimony to no more than three minutes. He also asked that to the extent the same arguments had been made by prior witnesses, current witnesses refrain from repeating the same arguments over again.

John Lang, Administrator of the Bureau of Environmental Services, City of Portland, testified that the Portland City Council had discussed this rule proposal in a public hearing earlier in the week. He said Commissioner Bogle had requested he inform the Commission that the City Council in their informal discussion generally supported the rule as proposed. Most of the City Council members were extremely concerned about allowing discharge of pollutants to continue on an increasing level in this area through cesspools or seepage pits. Although the City Council felt it was not desirable, he continued, they also felt it was necessary to allow the level of discharge that currently exists to continue if it can be controlled without increasing for a short period of time until the city had the sewer installations under way so that connections could be made and the discharge level actually reduced. Mr. Lang also said that there would be testimony later on in the hearing recommending some modifications in the rule dealing with the way it is to be administered, and he would be happy to answer any questions about those proposed amendments. Generally the city would support those amendments, except for a specific number of cesspool and seepage pit hookups. Mr. Lang said the City of Portland felt that conservatively there may be 125 cesspools and seepage pits disconnected in 1985 in the area. He felt any

modifications to the rule should be limited to allowing no more than 125 new cesspools or seepage pits to be installed, which would maintain the same level of discharge that now exists.

William Snell, builder in east Multnomah County, testified that he had developed a subdivision in the area last fall but failed to get permits for a couple of lots he had yet to build on, so this rule directly impacted him. He said right now was the best environment that has existed for either building or buying houses in quite a long time, as the interest rates are reasonable. He suggested if the Commission were going to restrict building in unsewered sections of the county that perhaps it would be possible to look at increasing the density in sewerred sections of the county so that housing units could continue to be developed. Mr. Snell also addressed the economic impact of the rule which he felt would be to put people out of work in the building industry and would also affect businesses in the entire area.

Chairman Petersen asked Mr. Snell if he was aware that the temporary rule did not stop development but merely says that in order for a development to proceed with temporary sewerage systems, there has to be a comparable number of systems disconnected. The intent of the Commission was not to stop development but to allow development without allowing the water pollution problems to get worse. Mr. Snell agreed that both development and water pollution were issues that the Commission needed to be concerned about, but the proposals he had heard suggested that there would be an absolute cap on the number of cesspool permits that are issued in the coming few months.

Jim Sitzman, Department of Land Conservation and Development, submitted testimony from Jim Ross, Director of the Department. Mr. Sitzman said DLCD supported the Department's proposed amendments limiting the increase of disposal of waste into the subsurface of the area affected. Mr. Sitzman said that they found the Land Use Consistency Statement did not deal with Goal 10 on housing and Goal 14 on urbanization as extensively as perhaps they should be, and certainly not as extensively as Goal 6 on water quality and Goal 11 on public facilities. They believe that if those findings were more complete, the potential impact on development would be more clearly identified.

Chairman Petersen reiterated this was a temporary rule that was implemented to get the Department through the next six months, wherein after the results were received of questions submitted to local jurisdictions the Commission would take action.

Maurice Smith, representing the Columbia Group of the Sierra Club, testified that he believed it was time to take positive action to prevent further damage to the aquifer in the area. They strongly supported DEQ's efforts to provide for eventual installation of sewers throughout the area. Given the clear superiority of seepage pits over cesspools, he continued, the Columbia Group of the Sierra Club opposed further installation of cesspools in the Inverness, Columbia and Gresham sewage treatment plant areas. They proposed language to amend 340-71-335 to prohibit construction of cesspools, but allow construction of new seepage pits when existing cesspool or seepage pits within the affected area had been eliminated by

connection to a public sewer facility. He said that the problem of mid-county groundwater pollution had been around for many years, and they were pleased to see that action was being taken to correct it.

Charles Hales, Pat Ritz and Dick Cooley, Homebuilders Association of Metropolitan Portland. Mr. Hales testified that they understood the Commission intended at its December 14 adoption of the temporary rule, to allow development to continue in mid-county, pending submission of the final plans from the jurisdictions involved and pending the declaration of a threat to drinking water. Unfortunately, he continued, as a practical matter, the temporary rule works as an out right moratorium, at least in the short run. Basically, the temporary rule provides that a new cesspool permit No. 1 is issued when abandonment permit No. 1 is issued. However, that first abandonment permit has yet to be issued this year, and there are currently 106 applications for new cesspools to accompany building permits pending with the City of Portland. He said they were there to propose an amendment to the rule that would alleviate that problem. Mr. Cooley testified that a policy which limited development in the unsewered portions of Multnomah County was counterproductive to the installation of sewers. He said that since 1975, a developer installing a new cesspool has been required to waive his right to remonstrate against sewer improvements and agree to connect to sewers when available. He also believed the current rules require that dry lines be put in and that cesspools be located to accommodate future connections. These commitments, especially on behalf of large cesspool users such as the Portland Adventist Medical Center and Woodland Park Hospital, would make a significant impact in the area. Mr. Cooley reiterated that prohibiting cesspools in the county would not help sewer the county and was in fact counterproductive.

Pat Ritz testified that where permits are contingent upon hookups to sewers, it would be nearly impossible for a builder or realtor to judge the availability of a lot for development. Therefore, the Homebuilders were asking for a certain number of permits to be available during 1985 to accommodate those applications already pending. Mr. Ritz was also concerned about the economic impact and the questions that the gentleman from LDCD had as to whether or not certain economic goals had been properly considered. He cited a couple of new industrial developments in the area which would bring jobs to the area and urged that they be able to provide housing for those workers.

Mr. Hales commented that the Homebuilders agree the principal solution to the water quality problem in the area is sewerage, and they wanted to see that proceed as quickly as possible.

Commissioner Bishop commented this had been a problem since she had been on the Commission and that she wanted it resolved before her time on the Commission was up. She felt that the time to resolve it was now.

Mr. Hales presented the following proposed amendments to the rule:

340-71-335(2)(b)(A)... if an equivalent sewage load into an existing cesspool or seepage pit within the affected area [is] has been eliminated by connection to a public sewerage facility.

340-71-335(2) (b) (E)... shall be required to install dry sewers at the time of development [.] if existing engineering data can be provided by the agent to allow such dry lines to be later connected to a sewer. When insufficient data are available, the person applying for a construction-installation permit may, as an alternative, post a bond or deposit for the cost of the remaining sewer construction needed to connect the affected buildings to a public sewerage facility.

340-71-335(2) (c) subsection (2) (b) of this rule shall be administered in a manner so [as to preclude any net increase in] that the net cesspool or seepage pit discharge into the ground on December 31, 1985 are not significantly greater than discharges on January 1, 1985. To insure that discharge goals are met, the agent of the Department of Environmental Quality may issue construction installation permits not to exceed 200 equivalent dwelling units for new cesspools or seepage pits during 1985. If discharge is greater than 200 equivalent dwelling units are eliminated by connection to a public sewerage facility during 1985, the total construction-installation permits issued during the year may increase to equal the discharge load which has been eliminated.

Pat Gillis, State Representative, District 20, testified he had the opportunity to visit with several residents of the affected area while he was campaigning, and found that environmental concerns were prominent in their minds. However, they had not yet been convinced there was substantial evidence of a threat to the groundwater. Also, he continued, residents in the area were concerned about economic development in east county. Representative Gillis said the residents in east county were not going to give up their cesspools when there was no guarantee that sewers were going to be installed for the next 12 to 20 years.

Bill Whitfield, Permit Manager for Multnomah County, testified that as the proposed rule now stands, the county had a concern about the connection to a public sewage facility as being the only criteria for cesspool abandonment in trading off a cesspool abandonment for a new cesspool permit. He maintained if a cesspool was abandoned it should count as an opportunity for a new cesspool installation, providing the discharge from the new development does not exceed the discharge that was removed from the abandoned system. Mr. Whitfield presented the following proposed changes to the proposed rule:

340-71-335(2) (b) (A)... An existing cesspool or seepage pit within the affected has been eliminated [by connection to a public sewerage facility].

340-71-335(2) (b) (C) - Delete this entire paragraph, as it is already more appropriately stated in OAR 340-71-335(4) (a).

340-71-335(2) (c)... Monthly reports shall be submitted to DEQ on or before the [5th] 15th day of the following month.

George Perkins, resident of east Multnomah County, testified that with this moratorium he would now owe more on his house than it was worth. He was also speaking for his father-in-law who developed a piece of property to provide for his retirement and now has two lots that cannot be developed. He said that most people think that sewers are coming, they expect it and they are willing to accept it if there is a threat to the groundwater. He urged that a moratorium be delayed for at least two to five years to allow people to plan better for it and take steps to remedy their personal situations. He asked if it would be possible to divert the groundwater usage to industrial use and save Bull Run water for drinking water.

Chairman Petersen replied that the basic issues Mr. Perkins had raised were exhaustively discussed at previous public hearing and suggested that Mr. Perkins talk with Harold Sawyer of the Water Quality Division who could provide him answers to these questions.

Burke Raymond, Multnomah County, presented a resolution from the Multnomah County Board in support of increasing the number of cesspool permits by 125 based on the county's best estimates that at least 125 cesspools will be taken out of service in 1985. The resolution had yet to be acted on formally, but Mr. Raymond expected that would probably happen within the next week. Mr. Raymond said the Board was also concerned about the issue of dry sewers and urged that the installation of dry sewers be done on a case-by-case basis. Mr. Raymond said that he wanted to convey to the Commission that the Multnomah County Board supported and agreed with the position of the Portland City Council. Chairman Petersen asked Mr. Raymond how they arrived at the number of 125. Mr. Raymond replied they took the number of cesspools that were disconnected last year, which was 25, and tried to run an estimate on what they thought was going to hookup as a result of primarily the construction of the new Sandy-122nd Avenue trunk, and the biggest input there was the Woodland Park Hospital, which should be connected some time in the summer of 1985, and is equivalent to about 80 cesspools. That brings the total to 105, and the county put a factor on top of that to allow some amount of flexibility anticipating some additional connections along that new sewer line. Mr. Raymond said he believed the Homebuilders felt that in addition to the numbers the county had come up with, they looked at additional connections along the Burnside line, east of 146th Avenue and additional connections along the new Sandy-122nd Line. Mr. Raymond said he did not know specifically how the Homebuilders arrived at the figure of 200, but he thought that was the rationale they used.

Commissioner Buist asked how the number from Woodland Park Hospital, for instance being equal to 80 cesspools, was computed. Mr. Raymond replied it was a formula which was established by the engineering profession in which they calculate the number of gallons of water that a person will on the average contribute to the sewer system and then multiply that times the average household population as established by census information, which gives the household gallonage that on the average is going to be put into the sewer system, which then establishes the EDU (equivalent dwelling unit). They then looked at various other classifications of planned use, which in the case of hospitals is measured by how many beds it takes on the average to equal one house and the one-for-one cesspool abandonment hookup ratio takes that into account.

Jeanne Orcutt, cited 340-71-335(2)(b) in which governmental entities responsible for providing sewer service are required to submit an assessment of the feasibility of imposing user fees or area taxes on existing systems and appropriate exemptions from such fees or taxes not later later than July 1, 1983, and by July 1, 1984 submit to the Department detailed plans scheduling priorities, phasing and financial mechanisms for sewerage the entire cesspool area. She asked if Clackamas County, Troutdale and any other governmental entities in Multnomah County, other than Portland, Gresham and the Central County Service District, had complied with that directive. Harold Sawyer replied that the issue was addressed in part during the previous public hearings. He continued that Troutdale was not included because it had been identified as not having cesspools, but there were a few cesspools the Department was aware of remaining in Clackamas County along the Johnson Creek trunk. However, no additional cesspool permits had been issued in Clackamas County since 1982 or 1983. Mr. Sawyer said he did not know if final plans were in yet. As Clackamas County chose not to issue any more cesspool permits, the Department considered the requirement met. Ms. Orcutt maintained that Troutdale still had cesspools. In response from a question from Chairman Petersen, Mr. Sawyer said that if Ms. Orcutt found an active cesspool in Troutdale, the Department would try to get it connected to an available sewer system.

Ms. Orcutt asked what the penalty was for not complying with Oregon Administrative Rules. Mr. Hansen replied for water quality violations, it was a minimum of \$50 to \$10,000 per day. Ms. Orcutt requested that if there had been a violation for not complying with the rule, the Department either require compliance or impose a penalty. Chairman Petersen asked the staff to report back to the Commission on whether they believed that the law had been complied with, and on what they based that belief.

Ms. Orcutt reiterated she did not believe there was a threat to drinking water in east Multnomah County, but that if the Commission finds a threat to drinking water exists, then the most economical solution is to supply Bull Run water to the few remaining residents who now receive well water.

Dennis Ward appeared on behalf of Arlene Westenfelder, a resident of Troutdale. Ms. Westenfelder is trying now to sell property to provide for her retirement and according to a representative from a real estate firm, if the moratorium goes through, it would cost her at least half the value of her property. When Ms. Westenfelder purchased her property, she was in compliance with the Multnomah County code at the time and should not now be penalized. Chairman Petersen replied that some of the questions that the Commission had asked the local jurisdictions to reply to by July would answer some of Ms. Westenfelder's concerns, primarily on the source of financing and the elimination or minimization of hardship as much as possible on the residents of the area.

John Miller testified in strong support of the sewers. In response from questions from Chairman Petersen, Mr. Miller said he felt that there should be no cesspools in the area until sewers are available.

George Ward, George D. Ward & Associates, Consulting Engineers, testified his firm did innovative alternative sewerage design. He said they are aware of the problem and felt they knew some of the solutions. He asked the Commission to consider amending its rule to provide for an interim type of treatment or disposal, rather than imposing a total moratorium. Chairman Petersen replied that the Commission expected, when the final rules were adopted in the summer of 1985, to have interim rules that would take into consideration the transition period, so that orderly development could continue without compounding the pollution problem.

Pat Brown testified in regard to the information on cesspool equivalencies of hospitals. She said few of the hospitals in the area were operating at full capacity which should be taken into account when cesspool equivalencies are calculated. Ms. Brown is a member of the United Citizens in Action and stated that they did not feel that a threat to drinking water had been proven. They said their position was they were not against sewers as long as the Commission pursued the most economical solution to the problem, and they also opposed the implementation of a seepage fee. Ms. Brown also said that she did not feel that high density should be allowed while the Commission was considering the ban. In addition, Ms. Brown said the Commission should take into consideration flag lots so buyers are aware of the additional amount of money it would cost them to connect to a sewer.

Chairman Petersen asked if the staff had an opinion about the number of permits to be put in the bank up front. Mr. Sawyer replied that the Department had tried to review with jurisdictions just what was planned to provide a foundation for a number there would be some reasonable assurance could be achieved during the course of a year. It appears to the Department that 125 is within reason to achieve in the way of system abandonments through connection.

Commissioner Bishop said because there was a rush to get permits between the middle of December and the end of December, how could a single developer be kept from obtaining the rest of the remaining permits, whether it be 125 or 200. Mr. Hales of the Homebuilders replied they intend to ask the County Board of Commissioners to adjust the length of time of those permits were good for to a shorter duration so that hoarding does not take place.

Chairman Petersen then went through the following proposed changes to OAR 340-71-335.

(2) (b) (A) A cesspool or seepage pit system to serve a new sewage load may be permitted only if an equivalent sewage load into an existing cesspool or seepage pit within the affected area [has been] is eliminated. [by connecting it to a public sewerage facility.]

(2) (b) [(C) Any new or repair cesspool or seepage pit system installed shall be located between the structure and the location of the point where the connection to a sewer will eventually be made so as to minimize future disruption and cost of sewer connections.]

(2) (b) [(E)] (D) After the effective date of this rule, any land development the involves the construction of streets, and all subdivisions platted after the effective date shall be required to install dry sewers at the time of the development [.] if existing engineering data can be provided by the agent to allow such dry lines to be later connected to a sewer. When insufficient data are available, the person applying for a construction-installation permit may, as an alternative, post a bond or deposit for the cost of the remaining sewer construction needed to connect the affected buildings to a public sewerage facility.

(2) (c) Subsection (2) (b) of this rule shall be administered in a manner so [as to preclude any net increase in] that the net cesspool or seepage pit discharges into the ground[.] on December 31, 1985 are not greater than discharges on January 1, 1985. To insure that such discharge goals are met, the agent of the Department of Environmental Quality may issue construction-installation permits not to exceed 200 Equivalent Dwelling Units for new cesspools or seepage pits during 1985. If discharge is greater than 200 equivalent dwelling units are eliminated [by connection to a public sewerage facility] during 1985, the total construction-installation permits issued during the year may be increased to equal the discharge load which has been eliminated....

(2) (c)... Monthly reports shall be submitted to DEQ on or before the [5th] 15th day of the following month.

(3) Criteria for approval[:]. [except as provided for in Section (2) of this rule, seepage pits and cesspools may be used for sewage disposal on sites that meet the following site criteria:]

It was MOVED by Commissioner Bishop, seconded by Commissioner Denecke and passed unanimously that the Director's recommendation, including the above amendments, be approved.

Chairman Petersen thanked the citizens, the Homebuilders, the County and the City for their constructive efforts in coming up with some solutions to a very difficult problem.

AGENDA ITEM G: Proposed redesignation of the Medford-Ashland AQMA as attainment for Ozone and proposed revision of the State Implementation Plan.

The Medford-Ashland area has been designated as nonattainment for three air pollutants: suspended particulate, carbon monoxide and ozone. The Medford-Ashland area has been in compliance with the ozone standards since 1979 and has been expected to stay in compliance with the ozone standard in future years. This agenda item proposes to redesignate the Medford-Ashland area as attainment for ozone. The Department did not receive any adverse comments on this proposal at a December 4, 1984 public hearing.

Director's Recommendation

Based on the Summation in the staff report, the Director recommends that the Commission:

1. Redesignate the Medford-Ashland AQMA as an attainment area for ozone;
2. Replace the ozone attainment strategy for the Medford-Ashland AQMA (Section 4.8 of the State Implementation Plan) with an ozone maintenance strategy containing a revised growth cushion as a revision to the State Clean Air Implementation Plan.

It was MOVED by Commissioner Bishop, seconded by Commissioner Brill and carried unanimously that the Director's recommendation be approved.

AGENDA ITEM H: Request for a variance from emission limits for total reduced sulfur (TRS) compounds from kraft mill recovery furnaces and lime kilns, OAR 340-25-165(a) (b), and OAR 340-25-630(2) (b) and (c), by International Paper Company, Gardiner, Oregon.

The recovery furnaces and lime kiln at the International Paper Company kraft mill near Gardiner cannot maintain full time compliance with total reduced sulfur compound emission regulations. This company has submitted acceptable compliance strategies and schedules and has requested a variance from applicable TRS regulations until their problems are corrected in 1986.

The Department has recommended approval of the variance because the compliance program is acceptable and environmental impacts would be minimal.

Director's Recommendation

Based on the findings in the Summation in the staff report, it is recommended that the Commission approve the compliance schedules set forth in Attachment 1 to the staff report and grant a variance to International Paper Company, Gardiner, from OAR 340-25-165(1) (a) and -630(2) (b) until September 18, 1986, and from OAR 340-25-165(1) (b) and -630(2) (e) until May 18, 1986, with the following conditions:

1. The operating improvements which have been implemented shall employed during the period of this variance as a means of minimizing TRS emissions.
2. Quarterly progress reports shall be submitted to the Department until compliance is achieved.
3. This variance may be revoked if the Department determines that these conditions are not being met or if unforeseen deterioration of air quality occurs.

It was MOVED by Commissioner Denecke, seconded by Commissioner Buist and passed unanimously that the Director's recommendation be approved.

AGENDA ITEM I: Status report: Noise Rule Exemption for Alcohol and Nitromethane from Fuel Drag Race Vehicles.

The noise control rules for motor racing exempt two categories of drag race vehicles from muffler requirements, because it was determined that reasonable control technology did not exist at the time of adoption. These rules require this exemption to be reevaluated at this time, approximately four years after adoption of this rule.

The Department now believes that muffler technology may be feasible for one category of these vehicles, unless a rule amendment may be required. The other category for which muffler technology appears still not feasible should again be reevaluated after a period of two more years.

Director's Recommendation

It is recommended that the Commission concur in the following:

1. An exemption for nitromethane-fueled drag race vehicles is necessary until further engine or muffler development indicates noise controls are technically feasible.
2. The Department should initiate rulemaking to remove the exemption for alcohol-fueled drag race vehicles as mufflers appear feasible. This class of vehicles, however, could continue to be eligible for exemptions from muffler requirements for national events.
3. The Department should report to the Commission prior to January 31, 1987 on muffler technology for top fuel drag race vehicles.

It was MOVED by Commissioner Bishop, seconded by Commissioner Brill and passed unanimously that the Director's recommendation be approved.

AGENDA ITEM J: Proposed Adoption of Amendments to Hazardous Waste Rules to Provide That Only Those Liquid Organic Hazardous Waste Which can be Beneficially Used Will Be Banned From Landfilling After January 1, 1985.

The landfilling of liquid organics at the Arlington Hazardous Waste Disposal Site is of critical concern to the Department due to the potential for contamination of groundwater and surface waters.

As a result of this concern, the Department recommended, and the Commission adopted a prohibition on landfilling certain liquid organics as of January 1, 1985.

In evaluating the breadth of the current ban, the Department has concluded that certain liquid organics will merely be transported to landfills in other states, rather beneficially used or incinerated. The Department believes that such a shift to other landfills is not a desirable environmental result, due in part to the increased probability of transportation-related spills.

Therefore, the Director recommends the Commission adopt the rule amendments to OAR Chapter 340 Division 104, which would retain the present ban on landfilling ignitable liquid wastes and grant the Department the authority to ban from landfilling on a case-by-case basis other liquid hazardous wastes which can be used beneficially, or where there is a more desirable disposable option available.

Director's Recommendation

It is recommended that the Environmental Quality Commission adopt amendments to OAR Chapter 340, Division 104, as presented in Attachment 5 to the staff report to retain the present landfill ban on ignitable liquids and to allow the Department to determine which other hazardous wastes should be banned from landfilling at Arlington on a case-by-case basis.

It was MOVED by Commissioner Denecke, seconded by Commissioner Buist and passed unanimously that the Director's recommendation be approved. This ended the formal meeting.

LUNCH MEETING

1. Affirmative Action

Susan Payseno, the Department's Personnel Manager, reviewed for the Commission the Department's Affirmative Action Plan, statistics and objectives, which are outlined in a report that is hereby made a part of the record of this meeting.

In regard to the Vehicle Inspection Program, Chairman Petersen expressed that he wanted to be sure that discrimination/discretion is not a problem at the Department's Vehicle Inspection Stations.

2. Agency questions on principles and procedures used in EQC review of Agency enforcement actions.

Due to the shortness of time, this item was postponed until March when the Commission will take it up at a work session at 3:00 p. m. on March 7, the afternoon before the regularly scheduled Commission meeting, March 8.

3. Status report on backyard burning.

John Kowalczyk of the Department's Air Quality Division said that the fall ban had worked quite well. There were approximately 35 burn days, which was normal for a fall burning period. He said the major workload for the Division was in processing the hardship permit applications. Approximately 329 permits were issued for the fall burning season.

Judy Johndohl of the Department's Northwest Region Office felt the media was helpful in implementation of the ban. There was good coverage on just what the backyard burn ban was, and who it affected.

Ms. Johndohl said the Department had received 41 complaints during the fall burning season, 33 of which were for people without hardship permits, and 8 were for people who did hold hardship permits.

Bill Bree of the Department's Solid Waste Division said that yard debris processors felt that there was an increase in their business due to the ban.

John Lang of the City of Portland said that if the City itself denies funding again for composting, they were prepared to fund it in their bureau. The City would like to do a pilot program this spring to determine the cost of curbside collection. Mr. Lang said he believed all City Commissioners supported the ban, but many see METRO as being responsible for collection instead of the City. He suggested a letter to the City Council, expressing support for them to implement the Task Force recommendations could be helpful.

Chairman Petersen asked the staff to draft a letter expressing support to cities that are not already supporting alternatives to backyard burning, and another letter to cities that have implemented alternatives encouraging more.

There was some discussion about the Department's enforcement policy, and Chairman Petersen said he wanted to be flexible during the first year to avoid creating more hostility than necessary.

4. Citizen Appeal Right.

The Commission asked that the staff work that had been done previously on this issue be sent to them for review.

5. Future Meeting Dates.

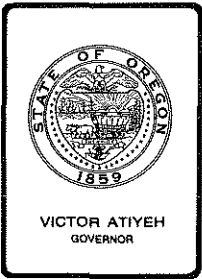
The following dates were approved for 1985. March 8, in Portland; April 19, in Salem; June 7 and July 19 (location to be determined); September 6, in Bend; October 18, in Portland; November 22, in Eugene.

There being no further business, the meeting was adjourned.

Respectfully submitted,



Carol Splettstaszer
EQC Assistant



Environmental Quality Commission

Mailing Address: BOX 1760, PORTLAND, OR 97207

522 SOUTHWEST 5th AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

MEMORANDUM

To: Environmental Quality Commission

From: Director *FH*

Subject: Agenda Item No. B, March 8, 1985, EQC Meeting
December 1984 Program Activity Report

Discussion

Attached are the September and October 1984 Program Activity Reports.

ORS 468.325 provides for Commission approval or disapproval of plans and specifications for construction of air contaminant sources.

Water Quality and Solid Waste facility plans and specifications approvals or disapprovals and issuance, denials, modifications and revocations of air, water and solid waste permits are prescribed by statutes to be functions of the Department, subject to appeal to the Commission.

The purposes of this report are:

1. To provide information to the Commission regarding the status of reported activities and an historical record of project plan and permit actions;
2. To obtain confirming approval from the Commission on actions taken by the Department relative to air contaminant source plans and specifications; and
3. To provide logs of civil penalties assessed and status of DEQ/EQC contested cases.

Recommendation

It is the Director's recommendation that the Commission take notice of the reported program activities and contested cases, giving confirming approval to the air contaminant source plans and specifications.

Fred Hansen

SChew:d
MD26
229-6484
Attachment

DEPARTMENT OF ENVIRONMENTAL QUALITY

Monthly Activity Report

December 1984

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DEPARTMENT OF ENVIRONMENTAL QUALITY

MONTHLY ACTIVITY REPORT

AQ, WQ, HZ/SW Divisions
(Reporting Unit)

December 1984
(Month and Year)

SUMMARY OF PLAN ACTIONS

	Plans Received		Plans Approved		Plans Disapproved		Plans Pending
	<u>Month</u>	<u>FY</u>	<u>Month</u>	<u>FY</u>	<u>Month</u>	<u>FY</u>	
<u>Air</u>							
Direct Sources	4	44	9	38	0	0	31
Small Gasoline Storage Tanks Vapor Controls	-	-	-	-	-	-	-
Total	4	44	9	38	0	0	31
<u>Water</u>							
Municipal	2	78	5	76	1	4	14
Industrial	1	40	1	38	0	0	15
Total	3	118	6	114	1	4	29
<u>Solid Waste</u>							
Gen. Refuse	6	22	6	21	-	-	10
Demolition	-	-	-	-	-	-	1
Industrial	5	14	5	15	-	-	7
Sludge	-	1	-	2	-	-	-
Total	11	37	11	38	-	-	18
<u>Hazardous Wastes</u>							
	1	5	1	5	-	-	-
<u>GRAND TOTAL</u>	19	204	27	195	1	4	78

DEPARTMENT OF ENVIRONMENTAL QUALITY
AIR QUALITY DIVISION

MONTHLY ACTIVITY REPORT
DIRECT SOURCES
PLAN ACTIONS COMPLETED

COUNTY	NUMBER	SOURCE	PROCESS DESCRIPTION	DATE OF ACTION	ACTION
WASHINGTON	017	MERK WEAVER ENT INC	BAGHOUSE	12/10/84	APPROVED
JACKSON	019	BIOMASS-ONE/L.P.	POWER PLANT EQUIPMENT	12/19/84	APPROVED
LINN	034	FRERES LUMBER CO INC	CYCLONE AND WASTE BOX	12/14/84	APPROVED
POLK	036	PRAEGITZER INDUSTRIES INC	FUME TREATMENT SYSTEM	12/12/84	APPROVED
MARION	043	HUMANE SOCIETY	CREMATORY REPLACEMENT	12/21/84	APPROVED
POLK	045	TOWMOTOR CORP	PAINT BOOTHS	12/12/84	APPROVED
MULTNOMAH	897	OWENS-CORNING FIBERGLAS	PROCESS CHANGE	06/15/83	APPROVED
MULTNOMAH	915	MOBIL OIL CORP	NEW FLOATING ROOF	08/03/83	APPROVED
CROOK	919	LOUISIANA PACIFIC CORP.	WELLONS CELL W/MULTICLONE	12/14/84	APPROVED

TOTAL NUMBER QUICK LOOK REPORT LINES 9

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DEPARTMENT OF ENVIRONMENTAL QUALITY

MONTHLY ACTIVITY REPORT

Air Quality Division
(Reporting Unit)

December, 1984
(Month and Year)

SUMMARY OF AIR PERMIT ACTIONS

	Permit Actions Received		Permit Actions Completed		Permit Actions Pending	Sources Under Permits	Sources Reqr'g Permits
	Month	FY	Month	FY			
<u>Direct Sources</u>							
New	1	19	1	20	12		
Existing	1	16	0	20	17		
Renewals	32	97	8	83	123		
Modifications	<u>2</u>	<u>16</u>	<u>7</u>	<u>44</u>	<u>11</u>		
Total	36	148	16	167	163	1423	1452
<u>Indirect Sources</u>							
New	1	3	0	3	1		
Existing	0	0	0	0	0		
Renewals	0	0	0	0	0		
Modifications	<u>0</u>	<u>1</u>	<u>0</u>	<u>1</u>	<u>0</u>		
Total	<u>1</u>	<u>4</u>	<u>0</u>	<u>4</u>	<u>1</u>	<u>227</u>	<u>228</u>
<u>GRAND TOTALS</u>	37	152	16	171	164	1650	1680

Number of
Pending Permits

Comments

42	To be reviewed by Northwest Region
17	To be reviewed by Willamette Valley Region
12	To be reviewed by Southwest Region
11	To be reviewed by Central Region
11	To be reviewed by Eastern Region
24	To be reviewed by Program Operations Section
39	Awaiting Public Notice
<u>7</u>	Awaiting end of 30-day Public Notice Period
163	

DEPARTMENT OF ENVIRONMENTAL QUALITY
AIR QUALITY DIVISION

MONTHLY ACTIVITY REPORT
DIRECT SOURCES
PERMITS ISSUED

COUNTY	SOURCE	PERMIT NUMBER	APPL. RECEIVED	STATUS	DATE ACHIEVED	TYPE APPL. PSEL
COLUMBIA	REICHOLD CHEMICALS INC	05	2042 00/00/00	PERMIT ISSUED	11/30/84	
DESCHUTES	CASCADE FOREST PRODUCTS	09	0014 09/07/84	PERMIT ISSUED	11/30/84	RNW
JOSEPHINE	SOUTHERN OREGON PLYWOOD	17	0015 05/10/84	PERMIT ISSUED	11/30/84	RNW
BAKER	ASH GROVE CEMENT WEST INC	01	0029 00/00/00	PERMIT ISSUED	12/05/84	MOD
CLACKAMAS	RSG FOREST PRODUCTS INS	03	1778 00/00/00	PERMIT ISSUED	12/05/84	MOD
CLATSOP	PALMBERG PAVING CO	04	0001 12/13/83	PERMIT ISSUED	12/05/84	RNW
UMATILLA	J-H MANUF. CO. INC.	30	0062 00/00/00	PERMIT ISSUED	12/05/84	MOD
PORT.SOURCE	YAQUINA QUARRIES	37	0193 00/00/00	PERMIT ISSUED	12/05/84	MOD
DESCHUTES	DAW FOREST PRODUCTS CO	09	0019 00/00/00	PERMIT ISSUED	12/07/84	MOD
JEFFERSON	RAJNEESH NEO-SANNYAS INTL	16	0021 00/00/00	PERMIT ISSUED	12/07/84	MOD
LINCOLN	NORTH LINCOLN HOSPITAL	21	0039 06/06/84	PERMIT ISSUED	12/07/84	RNW
MULTNOMAH	PORT OF PORTLAND	26	2909 08/14/84	PERMIT ISSUED	12/17/84	NEW
COLUMBIA	WATTERS CONCRETE PRODUCTS	05	2493 09/07/84	PERMIT ISSUED	12/19/84	RNW
DOUGLAS	CHAMPION BUILDING PRODUCT	10	0037 09/02/83	PERMIT ISSUED	12/19/84	RNW
JACKSON	TIMBER PRODUCTS CO.	15	0025 06/07/83	PERMIT ISSUED	12/19/84	RNW
LINN	OREGON FIR SUPPLY	22	2521 06/05/84	PERMIT ISSUED	12/19/84	RNW

TOTAL NUMBER QUICK LOOK REPORT LINES 16

DEPARTMENT OF ENVIRONMENTAL QUALITY

MONTHLY ACTIVITY REPORT

Water Quality Division
(Reporting Unit)

December 1984
(Month and Year)

PLAN ACTIONS COMPLETED - 6

* County	* Name of Source/Project * /Site and Type of Same	* Date of * Action	* Action	* * *
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MUNICIPAL WASTE SOURCES - 5

Klamath	Willamette Ski Pass Resort Intermittent Recirculating Sand Filter	11-9-84	Tacit Approval	
Washington	U.S.A. - Durham Lower Tualatin Int. Overflow	12-17-84	Provisional Approval	
Deschutes	Sisters Hotel Restaurant Addition Septic Tank Dose Tank and Drain Field	12-24-84	Final Comments to Regional Office	
Deschutes	U.S. Army Evaluation Bldg. Septic Tank and LPD Disposal System	1-3-85	Provisional Approval	
Tillamook	Pacific Campground (Roger Larson) Package Plant, Sand Filter and River Outfall	1-3-85	Rejected	

DEPARTMENT OF ENVIRONMENTAL QUALITY

MONTHLY ACTIVITY REPORT

Water Quality Division
(Reporting Unit)

December 1984
(Month and Year)

PLAN ACTIONS COMPLETED - 6

* County	* Name of Source/Project	* Date of	* Action	*
*	* /Site and Type of Same	* Action	*	*
*	*	*	*	*

INDUSTRIAL WASTE SOURCE - 1

Malheur	Ore-Ida Foods, Inc. Two Continuous Feed Horizontal Centrifuges Ontario	12-3-84	Approved	
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SUMMARY OF ACTIONS TAKEN
ON WATER PERMIT APPLICATIONS IN DEC 84

9 JAN 85

SOURCE CATEGORY & PERMIT SUBTYPE	NUMBER OF APPLICATIONS FILED						NUMBER OF PERMITS ISSUED						APPLICATIONS PENDING PERMIT ISSUANCE (1)			CURRENT TOTAL OF ACTIVE PERMITS		
	MONTH			FISCAL YEAR			MONTH			FISCAL YEAR			NPDES	WPCF	GEN	NPDES	WPCF	GEN
	NPDES	WPCF	GEN	NPDES	WPCF	GEN	NPDES	WPCF	GEN	NPDES	WPCF	GEN						
DOMESTIC																		
NEW	0	1	0	0	4	1	1	0	0	2	2	3	1	6	0			
RW	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0			
RWO	1	2	0	17	11	0	1	0	0	18	6	0	35	17	0			
MW	0	1	0	1	1	0	1	0	0	1	0	0	1	1	0			
MWO	1	1	0	11	3	0	0	0	0	6	3	0	6	1	0			
TOTAL	2	5	0	29	19	1	3	0	0	27	11	3	44	25	0	242	140	68
INDUSTRIAL																		
NEW	1	2	1	3	6	7	0	0	2	0	1	20	5	11	0			
RW	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0			
RWO	4	0	0	24	11	0	6	2	0	18	7	0	29	13	0			
MW	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0			
MWO	0	0	0	11	4	0	2	1	0	6	6	0	2	1	0			
TOTAL	5	2	1	38	21	7	8	3	2	25	14	20	36	25	0	180	154	260
AGRICULTURAL																		
NEW	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0			
RW	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0			
RWO	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0			
MW	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0			
MWO	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0			
TOTAL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	13	60
GRAND TOTAL	7	7	1	67	40	8	11	3	2	52	25	23	80	50	0	424	307	388

1) DOES NOT INCLUDE APPLICATIONS WITHDRAWN BY THE APPLICANT, APPLICATIONS WHERE IT WAS DETERMINED A PERMIT WAS NOT NEEDED, AND APPLICATIONS WHERE THE PERMIT WAS DENIED BY DEQ.

IT DOES INCLUDE APPLICATIONS PENDING FROM PREVIOUS MONTHS AND THOSE FILED AFTER 31-DEC-84.

NEW - NEW APPLICATION
 RW - RENEWAL WITH EFFLUENT LIMIT CHANGES
 RWO - RENEWAL WITHOUT EFFLUENT LIMIT CHANGES
 MW - MODIFICATION WITH INCREASE IN EFFLUENT LIMITS
 MWO - MODIFICATION WITHOUT INCREASE IN EFFLUENT LIMITS

CAT	PERMIT NUMBER	SUB-TYPE	SOURCE ID	LEGAL NAME	CITY	COUNTY/REGION	DATE ISSUED	DATE EXPIRES
=====								
GENERAL: LOG PONDS								
=====								
IND	400	GEN04	NEW	9316 BOHEMIA, INC.	DOUGLAS CO	DOUGLAS /SWR	10-DEC-84	31-DEC-85
=====								
GENERAL: GRAVEL MINING								
=====								
IND	1000	GEN10	NEW	16595 CLACKAMAS COUNTY DEPARTMENT OF ENVIRONMENTAL SERVICES	BARTON	CLACKAMAS /NWR	17-DEC-84	31-DEC-86
=====								
NPDES								
=====								
DOM	3430	NPDES	MW	94266 WEASKU INN, INC.	GRANTS PASS	JOSEPHINE /SWR	05-DEC-84	31-AUG-86
DOM	100009	NPDES	RWO	96110 LAKEWOOD UTILITIES, LTD	AURORA	MARION /WVR	05-DEC-84	31-JUL-89
IND	3483	NPDES	MWO	32670 GEORGIA-PACIFIC RESINS, INC.	COOS BAY	COOS /SWR	10-DEC-84	31-JAN-87
IND	3774	NPDES	MWO	32864 GEORGIA-PACIFIC RESINS, INC.	EUGENE	LANE /WVR	10-DEC-84	31-DEC-88
IND	100012	NPDES	RWO	33556 GILMORE STEEL CORPORATION	PORTLAND	MULTNOMAH /NWR	20-DEC-84	30-NOV-89
IND	100013	NPDES	RWO	66618 PACIFIC POWER & LIGHT COMPANY	PORTLAND	MULTNOMAH /NWR	20-DEC-84	30-NOV-89
IND	100014	NPDES	RWO	66083 PACIFIC CARBIDE & ALLOYS CO.	PORTLAND	MULTNOMAH /NWR	20-DEC-84	30-NOV-89
IND	100015	NPDES	RWO	19142 CONE LUMBER COMPANY	GOSHEN	LANE /WVR	20-DEC-84	30-NOV-89
IND	100016	NPDES	RWO	18677 COLUMBIA PLYWOOD CORPORATION	KLAMATH FALLS	KLAMATH /CR	20-DEC-84	30-NOV-89
IND	100017	NPDES	RWO	75765 ROCK CREEK SAND & GRAVEL CO.	CLACKAMAS	CLACKAMAS /NWR	20-DEC-84	31-DEC-89
DOM	100018	NPDES	NEW	66063 LARSON, ROGER L.	TILLAMOOK	TILLAMOOK /NWR	20-DEC-84	30-JUN-89

CAT	PERMIT NUMBER	TYPE	SUB-TYPE	SOURCE ID	LEGAL NAME	CITY	COUNTY/REGION	DATE ISSUED	DATE EXPIRES
=====									
WPCF									
=====									
IND	3707	WPCF	MWO	32650	GEORGIA-PACIFIC RESINS, INC.	MILLERSBRG	LINN /WVR	10-DEC-84	30-JUN-88
IND	100010	WPCF	RWO	89650	TRASK RIVER GRAVEL, INC.	TRASK RIVER	TILLAMOOK /NWR	20-DEC-84	30-NOV-89
IND	100011	WPCF	RWO	58767	MT. ANGEL MEAT CO.	MT ANGEL	MARION /WVR	20-DEC-84	31-OCT-89

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1/1

DEPARTMENT OF ENVIRONMENTAL QUALITY

MONTHLY ACTIVITY REPORT

Solid Waste Division
(Reporting Unit)

December 1984
(Month and Year)

SUMMARY OF SOLID AND HAZARDOUS WASTE PERMIT ACTIONS

	Permit Actions Received		Permit Actions Completed		Permit Actions Pending	Sites Under Permits	Sites Reqr'g Permits
	Month	FY	Month	FY			
<u>General Refuse</u>							
New	1	6	1	9	3		
Closures	-	1	-	4	10		
Renewals	2	16	2	4	27		
Modifications	-	1	-	2	2		
Total	3	24	3	19	42	168	168
<u>Demolition</u>							
New	-	-	-	-	-		
Closures	-	1	2	2	2		
Renewals	-	-	-	-	-		
Modifications	1	1	1	1	-		
Total	1	2	3	3	2	12	12
<u>Industrial</u>							
New	-	2	-	3	5		
Closures	-	2	1	4	8		
Renewals	-	6	1	7	10		
Modifications	-	2	-	2	-		
Total	-	12	2	16	23	100	100
<u>Sludge Disposal</u>							
New	-	-	-	1	-		
Closures	-	-	-	2	-		
Renewals	-	-	-	4	-		
Modifications	-	-	-	-	-		
Total	-	-	-	7	-	17	17
<u>Hazardous Waste</u>							
New	-	2	-	3	4		
Authorizations	161	923	161	923	-		
Renewals	-	-	-	-	1		
Modifications	-	-	-	-	-		
Total	161	925	161	926	5	15	19
<u>GRAND TOTALS</u>	165	963	169	971	72	312	316

SC1992.B
MAR.5S (11/84)

DEPARTMENT OF ENVIRONMENTAL QUALITY

MONTHLY ACTIVITY REPORT

<u>Solid Waste Division</u>	<u>December 1984</u>
(Reporting Unit)	(Month and Year)

PERMIT ACTIONS COMPLETED

* County	* Name of Source/Project * /Site and Type of Same	* Date of * Action	* Action	*
Multnomah	H.G. LaVelle Landfill Closed facility	12/1/84	Closure permit issued	*
Multnomah	Killingsworth Landfill Existing facility	12/6/84	Permit amended	*
Polk	Garden Grow Co. New composting facility	12/14/84	Letter authorization issued	*
Benton	Coffin Butte Landfill Existing facility	12/17/84	Permit renewed	*
Coos	Weyerhaeuser Co. Horse Flats Landfill Closed facility	12/24/84	Closure permit issued	*
Deschutes	Fryrear Landfill Existing facility	12/24/84	Permit renewed	*
Lane	Weyerhaeuser Co. Last Chance Landfill Existing facility	12/24/84	Permit renewed	*
Polk	Fowler's Landfill Existing facility	12/28/84	Closure permit issued	*

DEPARTMENT OF ENVIRONMENTAL QUALITY

MONTHLY ACTIVITY REPORT

Solid Waste Division

(Reporting Unit)

December 1984

(Month and Year)

HAZARDOUS WASTE DISPOSAL REQUESTS

CHEM-SECURITY SYSTEMS, INC., GILLIAM CO.

WASTE DESCRIPTION

* * Date *	* Type *	* Source *	* Present *	* Quantity * Future *	* *
------------------	----------------	------------------	-------------------	-----------------------------------	--------

TOTAL REQUESTS GRANTED - 161

OREGON - 52

12/6	Drained/flushed PCB transformers	Electric util.	0	10,000 cu.ft.	
12/6	PCB-contaminated rags, gloves, clothing, dirt, etc.	" "	0	500 drums	
12/6	Drained/flushed PCB transformers	" "	0	10,000 cu.ft.	
12/6	PCB-contaminated debris	" "	0	50 drums	
12/6	Outdated phenyl acid phosphate/n-butyl alcohol in original containers	Electronic co.	1 drum	0	
12/6	Outdated vinyl toluene in original container	" "	1 drum	0	
12/6	Metal-organic soaps and solvents	" "	6.8 cu.ft.	0	
12/6	Outdated synthetic resin and solvents in original containers	" "	5 drums	0	
12/6	Outdated synthetic resin, pigment and solvents in original containers	" "	35 gal.	0	

* * Date *	* Type *	* Source *	* Quantity *		* * *
			Present	Future	
12/6	Outdated Al powder/ solvents in original container	Electronic co.	1 drum	0	
12/6	Dichloropropene and propylene dichloride	University	1 drum	0	
12/6	Methyl isothiocyanate	" "	1 drum	0	
12/6	Oily caustic sludge with heavy metals	Drum reclama- tion	0	100 drums	
12/6	Machine coolant con- taining oil (13%), water soluble emulsion (2%) and water (85%)	Electronic co.	9 drums	36 drums	
12/6	Outdated ethyl acetate	Business forms	1 drum	0	
12/6	Lead soap in mineral spirits	" "	3 drums	0	
12/6	Outdated Varkyd 354-50X resin consisting of phenolic modified alkyd resin and xylene	" "	1 drum	0	
12/6	Outdated xylene	" "	3 drums	0	
12/7	Pentachlorophenol/ creosote-contaminated dirt (solid)	Wood treatment	0	44,000 gal.	
12/12	Spent mixed solvents: chlorinated hydrocar- bons, alcohols, ethers, aliphatic and aromatic hydrocarbons	Printing	0	22 drums	
12/12	Transformers containing PCB-contaminated oil coolants	Battery co.	318 gal.	0	
12/12	Paint sludge containing xylene, MIK, petroleum, distillates, isophorone and heavy metals	Electronic co.	17 drums	68 drums	
12/12	Spent dimethylformamide solvent	" "	0	4 drums	

SC1992.E
MAR.15 (1/82)

* * Date *	* Type *	* Source *	* Quantity *	
			* Present *	* Future *
12/12	Paint sludge containing methylene chloride, 1,1,1-trichloroethane, trichloroethylene and heavy metals	Electronic co.	0	12 drums
12/12	Obsolete paint products	" "	6 drums	0
12/12	Spent Oakite 156 stripping solution containing water, 2-butoxyl ethanol, methylene chloride, non-volatile paint vehicles and heavy metals	Mfg. of windows & doors	0	10 drums
12/13	Arsenic-contaminated lube oil	Mfg. of semi-conductor	0	12 drums
12/13	Petroleum tank bottoms with lead	Oil co.	1 drum	0
12/13	Solder stripping solution containing inorganic fluorides, peroxide, water, tin and lead	Mfg. of circuit boards	1 drum	4 drums
12/13	Sulfuric acid solution with epoxy resins and copper	" "	5 drums	60 drums
12/13	Hydrochloric acid solution with thiourea, tin and lead	" "	1 drum	5 drums
12/14	Spent detergent cleaner containing aromatic hydrocarbons, 2-butoxyethanol, 2-aminoethanol and water (pH ~14)	Oil co.	2 drums	0
12/14	Drainage sump mud with octanoic acid, bromoxynil, 2,4-D and MCPA	Herbicide mfg.	0	40 drums
12/18	Dewatered sludge containing lead	Electronic co.	20 drums	240 drums

SC1992.E
MAR.15 (1/82)

* * Date *	* Type *	* Source *	* Quantity *		* Future *
			* Present *	* Future *	
12/18	Acidic tin-lead soln.	Electronic co.	1 drum	4 drums	
12/18	Methylene chloride with water, organic solvents, alcohol, acrylic/methacrylic ester monomers and wetting agents	" "	1 drum	12 drums	
12/18	Isopropyl alcohol with water, flux, dirt, oil and grease	Waste solvent recycling	15 drums	15 drums	
12/18	Methylene chloride/trichlorotrifluoroethane with water, cyclopentane, dirt, oil and grease	" "	10 drums	120 drums	
12/18	Paint sludge containing thinners, oil, dirt and grease	" "	15 drums	15 drums	
12/18	Acetone sludge with dirt, oil and grease	" "	15 drums	15 drums	
12/18	Methylene chloride/trichlorotrifluoroethane still bottoms with cyclopentane	" "	10 drums	120 drums	
12/18	Vinyl/polyurethane paint sludge containing xylene, MIBK, isophorone, petroleum distillates, water and cadmium	Electronic co.	17 drums	68 drums	
12/18	Mixed chlorinated solvents containing methylene chloride, 1,2-dichloroethane, 1,1,1-trichloroethane and trichloroethylene with glycol ether and alcohol	" "	1 drum	12 drums	
12/19	Rags/clay soaked with kerosene or dipropylene glycol or Teneco 500-100 or D-75 solvent	Chemical co.	0	10 drums	

SC1992.E
MAR.15 (1/82)

* * Date *	* Type *	* Source *	* Quantity *		* *
			* Present *	* Future *	
12/19	Dilute sulfuric acid solution	Oil co.	1 drum	0	
12/19	Solid materials contaminated with 1,1,1-trichloroethane, acetone, IPA, Freon, xylene, naphtha and photoresist	Semiconduct. mfg.	7 drums	360 drums	
12/19	Spent hexane/acetone solvent	Food processor	0	4 drums	
12/21	Pentachlorophenol-contaminated sand	Paint co.	0	4 drums	
12/28	Trichloroethane/acetone/ethylene glycol-contaminated soil, rocks, etc.	Spill	60 tons & 20 drums	0	
12/28	Trichloroethane-contaminated water	" "	3 drums	0	
12/28	Acetone-contaminated water	" "	3 drums	0	
12/28	Outdated groove filler consisting of tall oil soap, naphtha and xylene (solid)	Railcar mfg.	1 drum	0	

WASHINGTON - 55

12/6	Outdated phenoxy herbicides in original containers	Lumber & wood products co.	468 gal.	0	
12/6	Guthion & Paraquat pesticide-contaminated floor sweep and plastic gloves	Spill	1 drum	0	
12/6	Unwanted Chipman low volatile brush killer (2,4-D/2,4,5-T)	Waste mgmt. co.	2 drums	0	
12/6	Unwanted Esteron brush killer o.s.(2,4-D/2,4,5-T)	" "	2 drums	0	
12/6	Unwanted Tordon 101 brush killer (2,4-D)	" "	3 drums	0	

SC1992.E
MAR.15 (1/82)

* * Date *	* Type *	* Source *	* Quantity *		* Future *
			* Present *	* Future *	
12/6	Pentachlorophenol in P-9 oil	Paper co.	47 drums	0	
12/6	Low molecular weight polypropylene with degradation products, impurities and water	Mfg. of fibers	0	37 drums	
12/6	Surfactant consisting of alkyl aryl polyether alcohol and water	" "	0	28 drums	
12/6	Drained and flushed PCB transformers	Chemical co.	0	100 units	
12/6	Spent drained lead acid storage batteries	" "	0	300 units	
12/6	PCB capacitors	" "	0	200 units	
12/6	PCB-contaminated electrical equipment	" "	0	100 units	
12/6	PCB-containing light ballasts, etc.	" "	0	100 drums	
12/6	Activated carbon contaminated with creosote	Railroad	0	4200 cu.ft.	
12/6	Creosote sludge	" "	0	40 drums	
12/12	PCB-contaminated Therminol-66	Chemical co.	3 drums	0	
12/12	Thiobis (methyl-tert-butyl phenol) (TB (MTBP)) residue containing chlorophenolic tar and solvents heptane/toluene	Chemical co.	0	65 drums	
12/12	Spent toluene with acetone and organics	Chemical co.	0	4 5-gal. cans	
12/12	Outdated Weedar 64 containing 2,4-D (active ingredient)	Forest Service	1 30-gal. drum	0	
12/12	Outdated 2,4-D (low volatile ester) herbicide	" "	1 30-gal drum	0	

SC1992.E
MAR.15 (1/82)

* * * * *	* * * * *	* * * * *	* * * * *	* * * * *	Quantity		* * * * *
					Present	Future	
Date	Type	Source	Present	Future			
12/12	Cetamate pesticide with dimethyl carbate (active ingredient)	Hotel	1 drum	0			
12/12	PCB-contaminated dirt, absorbent material, clothing, rags, etc.	Waste mgmt. co.	0	1500 cu.yd.			
12/12	PCB-contaminated transformer oil	Electric util.	0	6 drums			
12/12	Coal tar-extended urethane sludge containing xylene, mineral spirits, IPA and glycol ether EE acetate	Mfg. of coatings	0	8 drums			
12/13	Mixed chlorinated and non-chlorinated solvents: 1,1,1-trichloroethane, tetrachloroethylene, methylene chloride, trichloroethylene, MEK, n-propyl acetate, methanol, IPA, n-butyl alcohol and toluene	Chemical co.	0	10,000 gal.			
12/13	Various household chemicals in lab packs	City gov't.	2 drums	0			
12/13	Mixed solvents (hexane, methanol, acetone, acetonitrile, ethyl ether, petroleum ether, chloroform, methyl chloride and ethyl acetate) with pesticides	State agency	0	150 gal.			
12/13	Dewatered calcium chloride sludge	Mfg. of calcium chloride	0	40 drums			
12/13	Solidified electroplating tank sludge containing Cd and Cr	Electroplating	0	10 drums			
12/13	Wood coating residue with ketone, alcohols, ester, aliphatic and aromatic hydrocarbons (solid)	Mfg. of wooden cabinets	0	38 drums			

* * * * *	* * * * *	* * * * *	* * * * *	* * * * *	Quantity		* * * * *
					Present	Future	
Date	Type	Source					
12/14	Spray booth coating residue containing aliphatic and aromatic hydrocarbons, ketones, alcohols, esters and floor sweepings (solid)	Mfg. of wooden cabinets	0			37 drums	
12/14	Coating sludge containing V.M. and petroleum naphtha, toluene, ethylbenzene, xylene, ethanol, 2-propanol, 2-methyl-1-propanol, tall alkyd and urea resin	" "	0			55 drums	
12/14	Coating sludge containing nitro cellulose, resin ester, vegetable oil and butylated urea resin	" "	0			55 drums	
12/14	Heavy metal-contaminated sludge consisting of absorbents, soil, gravel, paint solids, phenol and paint solvents	Chemical co.	20 drums			240 drums	
12/14	Dewatered industrial sewage sludge containing heavy metals	Sewage treat.	27 cu.yd.	0			
12/14	Degreasing liquid containing water, cresylic acid and chlorinated hydrocarbons	Engine repair shop	1000 gal.	0			
12/19	Formaldehyde solution with biological matter	Electric util.	0			1 drum	
12/19	Lead-contaminated oily foamite/water	Shipbuilding	8000 gal.	0			
12/19	Brine sludge with lead	Chemical co.	0			25 drums	
12/19	Boiler tube ash containing sulfate salts of nickel, iron, magnesium and calcium	" "	0			10 drums	

SC1992.E
MAR.15 (1/82)

* * Date *	* Type *	* Source *	* Quantity *	
			* Present *	* Future *
12/19	Heavy metal-contaminated mixed acids consisting of HCl, HF, HNO ₃ , H ₂ SO ₄ , H ₂ CrO ₄ and H ₃ PO ₄ from chemical milling, pickling and etching processes	Waste mgmt. co.	0	260,000 gal.
12/19	Paint sludge and MEK still bottoms	Boatbuilding	0	125 drums
12/19	Lead-contaminated caustic hot dip tank bath	Rebuilding engines	0	7 drums
12/19	Sulfuric acid solution containing mercuric sulfate, silver nitrate and potassium dichromate	Lumber & wood products co.	0	60 gal.
12/21	Oily sludge/tank bottoms with heavy metals	Chemical co.	0	500,000 gal.
12/21	Used heat transfer fluid (Therminol) containing benzoated ethyl benzene	Chemical co.	0	20 drums
12/21	Outdated water-based paint product	Electronic co.	0	1 drum
12/21	Outdated oil-based paint product	" "	0	1 drum
12/21	Copper sulfate crystal crystal	Mfg. of circuit boards	0	5 cu.yd.
12/28	Carbon contaminated with phenol, chlorophenols and dichlorophenol	Chemical co.	0	500 drums
12/28	PCB ballasts	State agency	2 drums	0
12/28	Carbon filter media and calcium chloride sludge with lead	Chemical co.	0	10 drums

* * Date *	* Type *	* Source *	* Quantity *	
			* Present *	* Future *
12/28	Pentachlorophenol/ mineral spirit- contaminated soil, absorbents, etc.	Spill	400 drums	0
12/28	Latex paint and wash- water with phenyl mercury acetate	Paint mfg.	0	55 drums
12/28	Oil-based paints and sludges	" "	0	50 drums
OTHER STATES - 54				
12/6	Drained and flushed PCB transformers	Electric util. (WY)	0	2000 cu.ft.
12/6	PCB-contaminated debris	" "	0	200 drums
12/6	Neutralized hydro- chloride acid sludge	Defense Dept. (Guam)	0	360 drums
12/6	Dewatered filter solids (diatomaceous earth, cellulose, calcium carbonate) with 2,4-D	Chemical co. (MT)	0	200 tons
12/6	Various small quanti- ties of chemicals in lab packs	Oil co. (Alberta)	0	5 drums
12/6	Spent 1,1,1-trichloro- ethane with methylene chloride, oil, dirt and grease	Chemical co. (ID)	2 drums	8 drums
12/6	Laboratory solvents: benzene/xylene with CuSO ₄ and Cu ₃ (PO ₄) ₂	" "	0	5 drums
12/6	Various small quanti- ties of chemicals in lab packs	Chemical co. (Alberta)	0	50 drums
12/6	Various small quanti- ties of chemicals in lab packs	University (B.C.)	3 drums	0
12/6	Epoxy traffic paint with lead	State agency (AK)	0	2 drums

SC1992.E
MAR.15 (1/82)

* * Date *	* Type *	* Source *	* Quantity *		* Future *
			* Present *	* Future *	
12/12	Paint sludge with heavy metals	Painting (MT)	0	3300 gal.	
12/12	Mercury-contaminated soil	Chemical co. (Alberta)	250 cu.yd.	250 cu.yd.	
12/12	Paint sludge in lacquer thinner	Electronic co. (ID)	3 drums	36 drums	
12/12	Soil stabilized oil/water separator sludge with heavy metals and natural gas-derived hydrocarbons	Natural gas plant (Alberta)	50 cu.yd.	0	
12/12	PCB-contaminated soil (PCBs < 2.5 ppm)	" "	10 cu.yd.	0	
12/12	Small quantities of chemicals in lab packs	Chemical co. (B.C.)	5 drums	0	
12/13	Unmarketable pesticide product Fruitone T containing 2,4,5-T	Chemical co. (ID)	1 drum	0	
12/13	Spent activated alumina pellets with fluoride (solid)	Oil co. (MT)	0	150 drums	
12/13	Fe scale with caustic soda, cresylic compounds and heavy metals (solid)	" "	0	50 drums	
12/13	Tetraethyl lead-contaminated soil, sand & debris	" "	0	5 drums	
12/13	HF acid-contaminated alkylolation tar or debris	" "	0	20 drums	
12/13	Spent zinc oxide catalyst	" "	0	150 drums	
12/13	Spent SiO ₂ /Al ₂ O ₃ catalyst	" "	0	400 cu.yd.	
12/13	Carbon black oil tank sludge with Ba, Cd, Cr and Pb (solid)	" "	1000 cu.yd.	0	
12/13	Leaded gasoline tank bottoms (solid)	" "	0	34 drums	

SC1992.E
MAR.15 (1/82)

* * Date *	* Type *	* Source *	* Quantity *	
			* Present *	* Future *
12/13	Pentachlorophenol in diesel oil	State agency (AK)	0	1 drum
12/13	Paint stripping sludge containing methylene chloride and IPA	" "	0	3 drums
12/13	Waste traffic paint containing lead	" "	0	2 drums
12/13	Polyurethane foam Part A (diphenyl methane diisocyanate)	" "	0	1 drum
12/13	Varnish reducing compound (petroleum distillate)	" "	0	1 drum
12/14	Arsenic-contaminated paper, gloves, empty bottles, floor-dry, etc.	I.C. mfg. (ID)	6 drums	24 drums
12/14	Chrome-contaminated machine coolant U-7 consisting of water and aliphatic hydrocarbon	Electronic co. (ID)	6 drums	6 drums
12/19	Mercury-contaminated sand, rocks, asphalt, etc. (solid)	Chemical co. (B.C.)	0	360 drums
12/19	Mercury sulfide-contaminated mud	" "	0	12 drums
12/19	Cadmium-contaminated X-ray film fixer solution consisting of water, ammonium thiosulfate, acetic acid, gluconic acid, boric acid, potassium alum and sodium sulfite	Chemical co. (UT)	0	475 drums
12/19	Hydrochloric acid sludge	Defense Dept. (Guam)	30 drums	360 drums

SC1992.E
MAR.15 (1/82)

* * Date *	* * Type *	* * Source *	* * Quantity *	
			* Present *	* Future *
12/21	Fly ash stabilized carbon tetrachloride with tetrachloroethylene, hexachloroethylene, hexachlorobutadiene and hexachlorobenzene	Chemical co. (UT)	0	32 drums
12/21	Carbon tetrachloride/water with tetrachloroethylene, hexachloroethylene, hexachlorobutadiene and hexachlorobenzene	" "	0	32 drums
12/21	Dip tank bottoms containing pentachlorophenol and tetrachlorophenol	Lumber co. (B.C.)	6 drums	66 drums
12/21	Pentachlorophenol-contaminated soil, wood chips, etc.	Lumber co. (MT)	0	6 drums
12/21	Skin decontamination kit and mercury batteries in lab packs	Defense (AK)	11 drums	0
12/21	Outdated brush killer containing sodium arsenite in lab packs	" "	0	400 gal.
12/21	Outdated chlordane insecticide	" "	0	1000 gal.
12/21	Spent carbonaceous filter granules (Catacarb filter system)	Oil co. (MT)	0	40 drums
12/21	Petroleum oily scales, asbestos, dirt, asphalt, etc., contaminated with heavy metals	" "	0	75 drums
12/21	Spent diethanolamine filter cartridges with selenium	" "	0	50 drums
12/21	Spent iron chromate shift converter catalyst	" "	0	200 drums
12/21	Spent fuel filter clay with barium, chrome & lead	" "	0	35 drums

* * Date *	* Type *	* Source *	* Present *	* Quantity *		* Future *
12/28	Ammonium compound	Defense (AK)	0			20 drums
12/28	Outdated paints	" "	0			4000 gal.
12/28	Spent battery acid (40% H ₂ SO ₄)	" "	0			25 drums
12/28	Spent concentrated sulfuric acid	" "	0			200 gal.
12/28	Spent phosphoric acid solution	" "	0			350 gal.
12/28	Spent ammonium hydroxide solution	" "	0			750 gal.

DEPARTMENT OF ENVIRONMENTAL QUALITY

MONTHLY ACTIVITY REPORT

Noise Control Program (Reporting Unit)	December, 1984 (Month and Year)
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SUMMARY OF NOISE CONTROL ACTIONS

Source Category	New Actions Initiated		Final Actions Completed		Actions Pending	
	<u>Mo</u>	<u>FY</u>	<u>Mo</u>	<u>FY</u>	<u>Mo</u>	<u>Last Mo</u>
Industrial/ Commercial	4	66	3	39	149	148
Airports			2	8	1	1

DEPARTMENT OF ENVIRONMENTAL QUALITY

MONTHLY ACTIVITY REPORT

Noise Control Program (Reporting Unit)	December, 1984 (Month and Year)
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FINAL NOISE CONTROL ACTIONS COMPLETED

<u>County</u>	<u>Name of Source and Location</u>	<u>Date</u>	<u>Action</u>
Multnomah	Bunge Corporation Portland	12/84	No Violation
Multnomah	Tico Taco Portland	12/84	In Compliance
Benton	Corvallis Kennels Corvallis	12/84	In Compliance
Multnomah	Mt. Hood Medical Center Heliport Gresham	12/84	Boundary Approved
Wasco	Underhill Airport	12/84	Boundary Approved

CIVIL PENALTY ASSESSMENTS
 DEPARTMENT OF ENVIRONMENTAL QUALITY
 1984

CIVIL PENALTIES ASSESSED DURING MONTH OF DECEMBER, 1984:

<u>Name and Location of Violation</u>	<u>Case No. & Type of Violation</u>	<u>Date Issued</u>	<u>Amount</u>	<u>Status</u>
Gienger Enterprises, Inc. dba/Modoc Tie Co. Chiloquin, Oregon	AQOB-CR-84-152 Open burned pro- hibited materials.	12/27/84	\$50	Awaiting response to notice.
Jay Miller Builder, Inc. Tualatin, Oregon	AQOB-NWR-84-154 Open burned con- struction waste.	12/27/84	\$50	Awaiting response to notice.
G M & J M, Inc. dba/Honda of St. Johns Portland, Oregon	NP-NWR-84-156 Advertised uncertified motorcycles (5 days of violation).	12-27-84	\$125	Paid 1-7-85.
Unified Sewerage Agency of Washington County	WQ-NWR-84-153 Unauthorized discharge of untreated sewage to Tualatin River.	12/27/84	\$500	Paid 1-7-85.

VAK:b
 GB4130

December 1984
DEQ/EQC Contested Case Log

<u>ACTIONS</u>	<u>LAST MONTH</u>	<u>PRESENT</u>
1 Preliminary Issues	3	3
2 Discovery	1	0
3 Settlement Action	3	6
4 Hearing to be scheduled	0	0
5 Hearing scheduled	12	10
6 HO's Decision Due	2	2
7 Briefing	1	1
8 Inactive	8	8
SUBTOTAL of cases before hearings officer.	<u>30</u>	<u>30</u>
9 HO's Decision Out/Option for EQC Appeal	1	0
10 Appealed to EQC	1	1
11 EQC Appeal Complete/Option for Court Review	0	0
12 Court Review Option Pending or Taken	0	0
13 Case Closed	0	1
TOTAL Cases	<u>32</u>	<u>32</u>

15-AQ-NWR-81-178 15th Hearing Section case in 1981 involving Air Quality Division violation in Northwest Region jurisdiction in 1981; 178th enforcement action in the Department in 1981.

\$ Civil Penalty Amount

ACDP Air Contaminant Discharge Permit

AG1 Attorney General 1

AQ Air Quality Division

AQOB Air Quality, Open Burning

CR Central Region

DEC Date Date of either a proposed decision of hearings officer or a decision by Commission

ER Eastern Region

FB Field Burning

Hrng Rfrl Date when Enforcement Section requests Hearing Section schedule a hearing

Hrngs Hearings Section

NP Noise Pollution

NPDES National Pollutant Discharge Elimination System wastewater discharge permit.

NWR Northwest Region

OSS On-Site Sewage Section

P Litigation over permit or its conditions

Prtys All parties involved

Rem Order Remedial Action Order

Resp Code Source of next expected activity in case

SS Subsurface Sewage (now OSS)

SW Solid Waste Division

SWR Southwest Region

T Litigation over tax credit matter

Transcr Transcript being made of case

Underlining New status or new case since last month's contested case log

WQ Water Quality Division

WVR Willamette Valley Region

December 1984

DEQ/EQC Contested Case Log

Pet/Resp Name	Hrng Rqst	Hrng Rfrl	Hrng Date	Resp Code	Case Type & No.	Case Status
WAH CHANG	04/78	04/78		Prtys	16-P-WQ-WVR-78-2849-J NPDES Permit Modification	Current permit in force. Hearing deferred.
WAH CHANG	04/78	04/78		Prtys	03-P-WQ-WVR-78-2012-J NPDES Permit Modification	Current permit in force. Hearing deferred.
SPERLING, Wendell dba/Sperling Farms	11/25/81	11/25/81	03/17/83	Dept	23-AQ-FB-81-15 FB Civil Penalty of \$3,000	Proposed order reflecting EQC decision to be issued.
OLINGER, Bill Inc.	09/10/82	09/13/82	10/20-21/83 11/2-4/83 11/14-15/83 5/24/84	Hrngrs	33-WQ-NWR-82-73 WQ Civil Penalty of \$1,500	Decision due.
HAYWORTH FARMS, INC., and HAYWORTH, John W.	01/14/83	02/28/83	04/04/84	Prtys	50-AQ-FB-82-09 FB Civil Penalty of \$1,000	Briefing.
McINNIS ENT.	06/17/83	06/21/83		Prtys	52-SS/SW-NWR-83-47 SS/SW Civil Penalty of \$500	Hearing deferred pending conclusion of court action.
McINNIS ENTERPRISES, LTD., et al.	09/20/83	09/22/83		Prtys	56-WQ-NWR-83-79 WQ Civil Penalty of \$14,500	Scheduled hearing deferred to follow circuit court proceedings.
McINNIS ENTERPRISES, LTD., et al.	10/25/83	10/26/83		Prtys	59-SS-NWR-83-33290P-5 SS license revocation	Scheduled hearing deferred to follow circuit court proceedings.

December 1984

DEQ/EQC Contested Case Log

Pet/Resp Name	Hrng Rqst	Hrng Rfrl	Hrng Date	Resp Code	Case Type & No.	Case Status
WARRENTON, City of	8/18/83	10/05/83		Prtys	57-SW-NWR-PMT-120 SW Permit Appeal	Settlement action.
CLEARWATER IND., Inc.	10/11/83	10/17/83		Prtys	58-SS-NWR-83-82 SS Civil Penalty of \$1000	Hearing deferred pending conclusion of court action.
CLEARWATER IND., Inc.	01/13/84	01/18/84		Prtys	02-SS-NWR-83-103 SS Civil Penalty of \$500	Hearing deferred pending conclusion of court action.
HARPER, Robert W.	03/13/84	03/21/84		Prtys	03-AQ-FB-83-23 FB Civil Penalty of \$1,000	Settlement action.
KUENZLI, Lee A.	03/17/84	03/28/84	11/08/84	Hrngrs	04-AQ-FB-83-01-- FB Civil Penalty of \$500-----	<u>Penalty reduced to \$300. No appeal to EQC. Case closed.</u>
MALPASS, David C.	03/26/84	03/28/84	02/05/85	Prtys	05-AQ-FB-83-14 FB Civil Penalty of \$500	Hearing scheduled.
LOE, Roger E.	03/27/84	03/28/84	11/13/84	Hrngrs	06-AQ-FB-83-15 FB Civil Penalty of \$750	Decision due.
SIMMONS, Wayne	03/27/84	04/05/84	02/19/85	Prtys	07-AQ-FB-83-20 FB Civil Penalty of \$300	Hearing scheduled.
COON, Mike	03/29/84	04/05/84		Prtys	08-AQ-FB-83-19 FB Civil Penalty of \$750	Scheduled hearing deferred to allow settlement discussion.

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December 1984

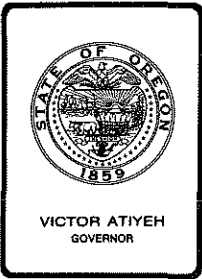
DEQ/EQC Contested Case Log

Pet/Resp Name	Hrng Rqst	Hrng Rfrl	Hrng Date	Resp Code	Case Type & No.	Case Status
BIELENBERG, David	03/28/84	04/05/84	12/11/84	Prtys	09-AQ-FB-83-04 FB Civil Penalty of \$300	Hearing scheduled.
BRONSON, Robert W.	03/28/84	04/05/84	03/05/85	Prtys	10-AQ-FB-83-16 FB Civil Penalty of \$500	Hearing scheduled.
NEWTON, Robert	03/30/84	04/05/84	03/12/85	Prtys	11-AQ-FB-83-13 FB Civil Penalty of \$500	Hearing scheduled.
KAYNER, Kurt	04/03/84	04/05/84	01/08/85	<u>Hrngs</u>	12-AQ-FB-83-12 FB Civil Penalty of \$500	<u>Decision due.</u>
BUYSERIE, Gary	03/26/84	04/05/84	01/15/85	Prtys	13-AQ-FB-83-21 FB Civil Penalty of \$300	<u>Scheduled hearing postponed to allow settlement discussion.</u>
BUYSERIE, Gary	03/26/84	04/05/84	09/25/84	Prtys	14-AQ-FB-83-22 FB Civil Penalty of \$750	<u>Scheduled hearing postponed to allow settlement discussion.</u>
GORACKE, Jeffrey dba/Goracke Bros.	04/10/84	04/12/84	03/26/85	Prtys	15-AQ-FB-83-22 FB Civil Penalty of \$500	Hearing scheduled.
DOERFLER FARMS	04/30/84	05/08/84	01/29/85	Prtys	16-AQ-FB-83-11 FB Civil Penalty of \$500	Hearing scheduled.

December 1984

DEQ/EQC Contested Case Log

Pet/Resp Name	Hrng Rqst	Hrng Rfrl	Hrng Date	Resp Code	Case Type & No.	Case Status
TRANSCO Industries, Inc.	06/05/84	06/12/84	02/27/85	Prtys	17-HW-NWR-84-45 HW Civil Penalty of \$2,500	Hearing scheduled.
TRANSCO Industries, Inc.	06/05/84		02/27/85	Prtys	18-HW-NWR-84-46 HW Compliance Order	Hearing scheduled.
INTERNATIONAL PAPER CO.	06/12/84	06/12/84		Prtys	19-WQ-SWR-84-29 WQ Civil Penalty of \$7,450	Preliminary issues.
VANDERVELDE, Roy	06/12/84	06/12/84		Prtys	20-WQ-WVR-84-01 WQ Civil Penalty of \$2,500	Preliminary issues.
WESTERN PACIFIC LEASING CORP., dba/Killingsworth Fast Disposal	06/01/84	07/23/84		Prtys	22-SW-NWR-84 Solid Waste Permit Modification	Preliminary issues.
NORTHWEST BASIC INDUSTRIES, dba/Bristol Silica and Limestone Co.	08/21/84	08/28/84		Prtys	23-AQ-SWR-84-82 AQ Civil Penalty of \$1,000	<u>Respondent's request for dismissal denied pending completion of binding settlement agreement or payment of penalty.</u>
CLEARWATER INDUSTRIES, INC.	10/11/84	10/11/84		Prtys	24-SS-NWR-84-P Sewage Disposal Service License Denial	Hearing deferred pending conclusion of court actions.



Environmental Quality Commission

Mailing Address: BOX 1760, PORTLAND, OR 97207

522 SOUTHWEST 5th AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

MEMORANDUM

To: Environmental Quality Commission
From: Director
Subject: Agenda Item C, March 8, 1985, EQC Meeting

Tax Credit Applications

Director's Recommendations

It is recommended that the Commission take the following action:

1. Issue tax credit certificates for facilities subject to old tax credit laws:

Appl. No.	Applicant	Facility
T-1711	ESCO Corporation	Dust handling system modification
T-1717	ESCO Corporation	Dust conveying system modification

2. Issue a tax credit certificate for a facility subject to 1983 tax credit legislation.

Appl. No.	Applicant	Facility
T-1719	Nicolai Company	Hammerhog, storage and conveying equipment


Fred Hansen

SChew
229-6484
2/12/85

Agenda Item C
Page 2
March 8, 1985

Proposed March 8, 1985 Totals:

Air Quality	\$ 21,572.81
Water Quality	-0-
Hazardous/Solid Waste	295,798.00
Noise	-0-
	<hr/>
	317,370.81

1985 Calendar Year Totals:

Air Quality	9,559.74
Water Quality	330,798.00
Hazardous/Solid Waste	-0-
Noise	-0-
	<hr/>
	340,357.74

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

1. Applicant

ESCO Corporation
Manufacturing Division
2141 N.W. 25th Avenue
P.O. Box 10123
Portland, OR 97210

The applicant owns and operates a steel foundry at 2141 N.W. 25th Avenue, Portland, Oregon.

Application was made for tax credit for an air pollution control facility.

2. Description of Claimed Facility

The facility described in this application consists of a dust handling system modification.

Request for Preliminary Certification for Tax Credit was made on September 27, 1982 and approved on October 27, 1982.

The facility is not subject to the provisions of the new tax credit law, Chapter 637, Oregon Law 1983.

Construction was initiated on the claimed facility on November 18, 1982, completed on May 13, 1983, and the facility was placed into operation on May 13, 1983.

Facility Cost: \$9,697.00 (Complete Documentation by copies of invoices was provided.)

3. Evaluation of Application

The claimed facility, a modification of an existing dust handling system, was required by the Department to reduce fugitive emissions generated during the handling and disposal of metallic dust collected in 13 dust collectors. The modification consists of metal covers installed on 11 existing dumpsters and installation of modification kits on the 13 dust collectors to provide funnel adapters on the dust collector outlets. Prior to installation of the claimed facility, the collected dust was handled in open dumpsters which utilized plastic bags to contain the dust. This method resulted in frequent breakage

of the plastic bags and/or disconnection of the bags from dust collector outlet connections, during filling, which contributed significantly to the fugitive problem.

The claimed facility has been inspected by Department personnel and has been found to be operating in compliance with permit conditions and Department regulations, having virtually eliminated this source of fugitive emissions.

All material collected by the claimed facility is disposed of at the Sauvie Island landfill. Therefore, the only return on the investment in the facility is the savings realized from a reduction in the number of plastic bags purchased each year due to reduced breakage. The annual cash flow estimated by the applicant as a result of the cost savings is \$300.00. In accordance with the "Guidelines on Cost Allocation", 80% or more of the facility cost is allocable to pollution control based on the estimated \$300.00 cash flow, a 10-year life, and the facility cost of \$9,697.00.

The application was received on November 2, 1984, additional information was received on a revised application December 10, 1984, and the application was considered complete on December 10, 1984.

4. Summation

- a. The facility was constructed in accordance with the requirements of ORS 468.175, regarding preliminary certification.
- b. The facility was constructed on or after January 1, 1967, as required by ORS 468.165(1)(a).
- c. The facility is designed for and is being operated to a substantial extent for the purpose of preventing, controlling, or reducing air pollution.
- d. The facility is necessary to satisfy the intents and purposes of ORS Chapter 468 and the rules adopted under that chapter.
- e. The portion of the facility cost that is properly allocable to pollution control is 80% or more.

5. Director's Recommendation

Based upon the findings in the Summation, it is recommended that a Pollution Control Facility Certificate bearing the cost of \$9,697.00 with 80% or more allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. T-1711.

W.J. FULLER:a
AA4805
(503) 229-5749
February 7, 1985

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

1. Applicant

ESCO Corporation
Manufacturing Division
2141 N.W. 25th Avenue
P.O. Box 10123
Portland, OR 97210

The applicant owns and operates a steel foundry at Plant #3 on S.W. Yeon Avenue, Portland, Oregon.

Application was made for tax credit for an air pollution control facility.

2. Description of Claimed Facility

The facility described in this application consists of a dust conveying system modification.

Request for Preliminary Certification for Tax Credit was made on April 28, 1982 and approved on June 7, 1982.

The facility is not subject to the provisions of the new tax credit law, Chapter 637, Oregon Law 1983.

Construction was initiated on the claimed facility in November 1982, completed on May 13, 1983, and the facility was placed into operation on May 13, 1983.

Facility Cost: \$11,875.81 (Complete Documentation by copies of invoices was provided.)

3. Evaluation of Application

The claimed facility, a dust conveying system modification, consists of a cross feed conveyor and one covered box with adaptor. This claimed facility was installed to reduce fugitive emissions at plant #3 by adapting the existing plant #3 dust handling system to accommodate covered dumpster boxes. Prior to installation of the claimed facility, open dumpsters with disposable bags were used to contain the dust. This method resulted in frequent breakage of the plastic bags and disconnection of the bags from the dust collector outlets contributing significantly to the fugitive problem.

The claimed facility has been inspected by Department personnel and has been found to be operating in compliance with Department regulations and permit conditions. It should be noted that plant #3 fugitive emissions from the dust collectors have been virtually eliminated.

All dust collected is transported to the Sauvie Island landfill for disposal. Therefore, the only return on the investment in the facility is the savings associated from the purchase of a lesser number of plastic bags. The annual cash flow resulting from this cost savings is estimated by the applicant to be \$200.00.

In accordance with the "Guidelines on Cost Allocation", there is no rate of return on the investment in the facility resulting from the \$200.00 annual cash flow, a 10-year life and a claimed facility cost of \$11,875.81. Therefore, 80% or more of the facility cost is allocable to pollution control.

The application was received on December 11, 1984 and the application was considered complete on December 11, 1984.

4. Summation

- a. The facility was constructed in accordance with the requirements of ORS 468.175, regarding preliminary certification.
- b. The facility was constructed on or after January 1, 1967, as required by ORS 468.165(1)(a).
- c. The facility is designed for and is being operated to a substantial extent for the purpose of preventing, controlling, or reducing air pollution.
- d. The facility is necessary to satisfy the intents and purposes of ORS Chapter 468 and the rules adopted under that chapter.
- e. The portion of the facility cost that is properly allocable to pollution control is 80% or more.

5. Director's Recommendation

Based upon the findings in the Summation, it is recommended that a Pollution Control Facility Certificate bearing the cost of \$11,875.81 with 80% or more allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. T-1717.

W.J. FULLER :a
AA4806
(503) 229-5249
February 7, 1985

STATE OF OREGON - DEPARTMENT OF ENVIRONMENTAL QUALITY

Tax Relief Application Review Report

1. Applicant

Nicolai Company
 Portland
 500 N.E. Multnomah
 Portland, OR 97232

The applicant owns and operates a door manufacturing company at Portland, Oregon.

Application was made for tax credit for a solid waste resource recovery facility.

2. Description of Claimed Facility

The facility described in this application is Hammerhog, storage and conveying equipment consisting of:

Truck Bins Enclosure	33,415.86
Truck Bins	36,103.00
Wood Hog System	40,473.14
Conveyor System	62,709.00
High Pressure Blow and Piping System	71,758.00
Electrical System	40,568.98
Engineering, In-House Labor, Miscellaneous	<u>10,770.39</u>

Total: \$295,798.00

Request for Preliminary Certification for Tax Credit was made on March 14, 1984 and approved on March 20, 1984.

The facility is subject to the 1983 tax credit legislation.

Construction was initiated on the claimed facility July 15, 1984, completed August 15, 1984 and the facility was placed into operation August 8, 1984.

Facility Cost: \$295,798 (Accountant's Certification was provided).

3. Evaluation of Application

The sole purpose of the facility is to convert material that would otherwise be solid waste (material had previously been picked up by a local collector and disposed at an area landfill) to hog fuel to be used at the Nicolai Company in existing boilers to produce a usable source of power and/or sold. The annual value of the recovered waste is \$39,600 based on 2,200 tons at \$18 per ton. Oregon law relating to solid waste disposal does impose standards at least equivalent to federal law (State Solid Waste Plan submitted to EPA has been approved as equivalent to requirements of RCRA). Annual cost of operation was given as \$50,536. After discussion with the company, a value of \$12,000 was established as avoided cost of disposing of the waste in accordance with OAR 340-16-030(1)(a). By subtracting the \$12,000 from annual operation, a cost of \$38,536 was established. Using the formula found in OAR 340-16-030(6), an annual cash flow of \$1,064 and a factor of 278 was established. Using Table 1 referenced in the same section, a return on investment of 0% was established and, therefore, the project is 100% eligible.

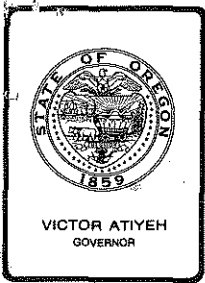
4. Summation

- a. Facility was constructed in accordance with the requirements of ORS 468.175, regarding preliminary certification.
- b. As required by ORS 468.165, the facility was under construction on or after January 1, 1973.
 - (1) The sole purpose of the facility is to produce a fuel for burning from material that would otherwise be solid waste.
 - (2) The end product of the utilization is a usable source of power.
 - (3) The Oregon law regulating solid waste imposes standards at least substantially equivalent to the federal law.
- c. Facility is designed for and is being operated for the sole purpose of preventing, controlling or reducing a substantial quantity of solid waste.
- d. The facility is necessary to satisfy the intents and purposes of ORS Chapter 459, and the rules adopted under that chapter and complies with DEQ statutes and rules.
- e. The portion of the facility cost that is properly allocable to pollution control is 100%.

5. Director's Recommendation

Based upon the findings in the Summation, it is recommended that a Pollution Control Facility Certificate bearing the cost of \$295,798, with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. T-1719.

Ernest A. Schmidt:b
229-5157
February 7, 1985



Environmental Quality Commission

Mailing Address: BOX 1760, PORTLAND, OR 97207

522 SOUTHWEST 5th AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

MEMORANDUM

To: Environmental Quality Commission

From: Director

Subject: Agenda Item No. D, March 8, 1985, EQC Meeting

Proposed Adoption of Pollution Control Tax Credit Rule Amendments, Chapter 340, Division 16.

Background and Problem Statement

On June 29, 1984, the Commission adopted pollution control tax credit rules. Since that time, the Legislative Counsel has commented on these rules, stating that portions of the rules need to be amended to bring them within the scope of the enabling legislation. In addition, it appears that, contrary to the rules' intent, certain provisions of the rules impose unnecessary restraints on the applicants for preliminary certification. The following proposed rule changes are intended to remedy these problems.

In December, 1984, the Commission authorized the Department to hold a hearing on the proposed Pollution Control Tax Credit Rule Amendments. This hearing was held on January 17, 1985.

The significant issues staff took to hearing are as follows:

1. Definitions of Commencement of Erection, Construction or Installation
- OAR 340-16-010.

"Commencement of erection, construction or installation" is currently defined to include "site clearing, grading, dredging, landfilling or similar physical change made in preparation for a facility." This definition is important in determining when an application for preliminary certification must be submitted, since an application for preliminary certification must be submitted before commencement of erection, construction or installation. This may create a problem since site clearing, etc., often occurs several months before construction of the pollution control facility begins. Since the applicant may not have plans for the pollution control equipment until close to the actual date of erection, construction or installation a hardship would be imposed if the applicant becomes ineligible for tax credit due to failure to apply for preliminary certification before "site clearing, grading, dredging, landfilling or similar physical change made in preparation for a facility."

The intent of the statute is to allow DEQ the opportunity to review facility plans and recommend necessary facility changes before erection, construction or installation begins. This review does not need to be done before site preparation. Therefore, the proposed rule amendment eliminates "site clearing, grading, dredging, landfilling or similar physical changes made in preparation for a facility" from the definition of "commencement of construction, erection or installation."

2. Deadline for Preliminary Certification Application - OAR 340-16-015(1).

Currently the rule requires an applicant to file an application before "commencement of erection, construction or installation of a facility" and an application shall not be considered filed until 30 days after the Department receives the application (OAR 340-16-015(1) (a) and (b)). In other words, an application must be received by the Department 30 days before commencement of erection, construction or installation.

The intent of this requirement is to assure the Department adequate time to review an application and submit comments to the applicant, before construction begins. This requirement, however, has proved to be overly restrictive, especially in those cases where the applicant wants to begin construction immediately and submits a complete application for preliminary certification for Department review less than 30 days before construction would begin. The proposed rule amendment would allow the applicant to proceed with construction without waiting 30 days after the Department receives the preliminary certification application, if the Department finds the application complete and sends to applicant notice of receipt of this complete application. The rule has, also, been reworded to clarify the currently confusing language which states that "an application must be filed before construction, erection or installation" and "an application will not be considered filed until 30 days after receipt" (OAR 340-16-015(1) (b)). The recommended amendment states simply that a preliminary certification application "must be filed 30 days before commencement of erection, construction or installation" (OAR 340-16-015(1) (a)).

3. Formula for Determining Percent Allocable - OAR 340-16-030(6) (e).

The proposed rule amendments change the abbreviations in the formula so that they better identify the factors in the formula which they represent. Therefore, annual percent return on investment would be represented by ROI, instead of R_A , and reference annual percent return on investment would be represented by RROI, instead of R_R .

4. Revocation of Certification - OAR 340-16-035(5).

The current practice of the Commission is to withhold revocation of certification of a pollution control facility when operation of a facility ceases if the certificate holder indicates in writing that the facility will be put back into operation within a "reasonable time." This practice

assures that the certification will not be revoked for a facility which will continue to be used for pollution control at some later date, but which, due to a temporary shutdown of part or all of the business, the pollution control facility is not in use at this time. The proposed rule amendment reflects this practice, thereby providing clear guidance to certificate holders. The proposed rule amendment would require the facility to be returned to operation within 5 years or the certificate would be revoked. Five years is deemed to be a "reasonable time" by the Department.

5. Refund of Processing Fee for Final Certification Application - OAR 340-16-045(3) (a), (3) (c) and (4).

The Legislative Counsel has commented on the current rules, stating they appear to be inconsistent with pertinent statutory provisions related to processing fee refunds and, therefore, are not within the intent and scope of the enabling legislation (Attachment V). The tax credit legislation specifically allows refund of the processing fee when an application is rejected. Legislative Counsel indicates that these are the only circumstances when a processing fee may be refunded (ORS 468.165(4) and (5)). The proposed rule amendments delete those portions of the rule which allow refunds, in whole, under other circumstances including when the application is not completed within 180 days of receipt and when the application is withdrawn. Also deleted is the portion of the rule which allows partial refunds to be made when the final certified cost is less than the facility cost claimed in the original application. To avoid unfair treatment of applicants who fail to complete their application within 180 days of a Department request for additional information, a proposed amendment to OAR 340-16-020(1) (h) would order the Department to reject the application without prejudice to reapply, thereby allowing the Department to refund the application processing fee. Proposed rule amendments would also allow an application to be withdrawn and resubmitted without paying any additional processing fee unless the cost of the facility has increased (OAR 340-16-020(1) (h)).

Rule Development Process

Upon receiving hearing authorization, the Department mailed the proposed rule to the Associated Oregon Industries and the Oregon Environmental Council. The hearing notice alone was mailed to all applicants receiving at least two tax credits within the last two years and a list of 130 parties who have previously expressed interest in the tax credit program. The hearing notice was also mailed to the standard list of Oregon cities, counties and citizens who desire to be kept informed of DEQ rulemaking activities. Twenty of the parties requested and were mailed copies of the proposed rules. The hearing was held in Portland on January 17, 1985 and the Hearings Officer's Report is Attachment IV.

Testimony was received on the following issues and, where noted, proposed changes were made:

1. Associated Oregon Industries testified in favor of the proposed amendments related to refunding processing fees and amendments related to exempting applicants with completed preliminary certification applications from having to wait thirty days after DEQ receives the application to start construction.
2. Crown Zellerbach provided suggestions for rule amendment improvements.
 - a. Specific wording was recommended to provide greater clarity to OAR 340-16-015(b) and (c) (as indicated in Attachment IV, Letter from Crown Zellerbach). This section has been modified to clarify the section's meaning, though the specific language recommended by Crown Zellerbach was not used.
 - b. A proposal was also made by Crown Zellerbach to allow the Department to withhold revocation of a certificate, as proposed in OAR 340-16-035, if the certificate holder indicates in writing that the facility will be returned to operation within five years, rather than three years as stated in the rule amendment which went to hearing. The Department had originally used three years as an estimate of the longest reasonable time a facility would be closed before being reopened. At the recommendation of Crown Zellerbach, which is familiar with factory shutdowns and how long they may be estimated to last, the Department has amended the rule to allow revocation to be withheld if the certificate holder indicates that the facility will be returned to operation within five years.
 - c. Crown Zellerbach recommended the addition of the following sentence to OAR 340-16-035(5):

"In the event the facility is not returned to operation as indicated, the Department shall revoke the certificate."

The Department agrees that the addition of the sentence would clarify the rule's intent and has added this wording to the rule.

Alternatives and Evaluation

1. The definition of commencement of construction (OAR 340-16-010(2)) could be left as it is, it could be amended to delete the phrase "including site clearing, grading, dredging, landfilling or similar physical change made in preparation for the facility," or it could be amended to include a more specific definition of commencement of construction. The Department chose the latter alternative because it provides greater guidance and flexibility

to the applicant without limiting the Department's opportunity to review the application before erection, construction or installation of the facility.

2. The requirement for applications to be submitted 30 days before commencement of erection, construction or installation could remain unchanged, could be written to accommodate those cases where the Department requires erection, construction or installation to begin immediately or could allow erection, construction or installation to proceed in any case where a completed application has been received by the Department. The Department chose the latter alternative because it would allow construction to proceed if a completed application is received by the Department, whether the Department has required erection, construction or installation to proceed immediately or whether the applicant for some other reason must begin construction immediately. This allows the Department the opportunity to review the application before construction while still allowing the construction to commence, thereby avoiding undue hardship to applicants.
3. The Department agrees with the Legislative Counsel that the rules related to processing fees for final certification applications (OAR 340-16-045) go beyond the intent and scope of the enabling legislation by allowing fee refunds in cases other than where the application is rejected. The following alternatives are available to address this problem:
 - a. Allow refunds only upon rejection of a final application, and retain current rules related to application rejections. Under current rules rejection of an application would occur only when the facility is not eligible for tax credit or when the Commission fails to act on an application before the 120th day after the filing of a complete application.
 - b. Allow refunds only upon rejection of a final application and amend current rules to require the Department to reject applications not completed within 180 days of a Department request for additional information. This would, thereby, allow refund of fees to applicants not interested in pursuing pollution control tax credits at this time and follows the focus of the current rule to refund the fee under these circumstances (OAR 340-16-045(3) (a)).
 - c. Allow refunds only upon rejection of a final application and amend current rules to make an additional processing fee unnecessary if an applicant withdraws an application and reapplies later, unless the cost of the facility increases. Similar to the current rule (OAR 340-16-045(3) (c)), the proposed rule amendment would not penalize an applicant for withdrawal and resubmittal of an application since a second processing fee would not be required for resubmittal.

Alternatives b and c were chosen by the Department because they are consistent with statutory authority and provide fairer treatment to the applicant.

During development of these proposed rules, assistance was sought from the air and water quality, solid waste, and noise control divisions of the Department; the Association of Oregon Industries; the Oregon Environmental Council; the Department of Revenue; and the Oregon Attorney General's Office. Comments were received from all Department divisions and the Association of Oregon Industries. These comments were incorporated into the proposed rule amendments as appropriate.

Summation

1. The Commission adopted pollution control tax credit rules June 29, 1984.
2. Through application of the current rules, the Department has determined that certain provisions of the rules impose unnecessary restraints on applicants for preliminary certification. The proposed rule amendments would eliminate these problems.
3. The Legislative Counsel has determined that portions of the rules related to fees need to be amended to bring them within the scope of the enabling legislation. The proposed rule amendments would eliminate these problems.

Director's Recommendation

Based on the summation, it is recommended that the Commission adopt the proposed Pollution Control Tax Credit Rule Amendments, Chapter 340, Division 16.



Fred Hansen
Director

- Attachments:
- I Statement of Need for Rules
 - II Statement of Land Use Consistency
 - III Public Notice of Rule Amendments Adoption
 - IV Hearing Officer's Report
 - V Proposed Amendments to Chapter 340, Division 16
 - VI Letter to DEQ from Legislative Counsel

Maggie Conley:d
229-6408
February 12, 1985
MD1555

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF AMENDING)
OAR CHAPTER 340,) STATEMENT OF NEED FOR RULES
DIVISION 16)

Statutory Authority:

Amendment of the Pollution Control Tax Credit Rules is consistent with enabling legislation, ORS 468.150 to 468.190.

Need for Rule Amendments:

Through application of the current rules, it has been determined that certain provisions of the rules impose unnecessary restraints on applicants for preliminary certification. In addition, Legislative Counsel has determined that portions of the rules needed to be amended to bring them within the scope of the enabling legislation.

Principal Documents Relied Upon:

Existing state statute, ORS 468.150 to 468.190 and existing state rules OAR Chapter 340-16-010 to 340-16-050.

Fiscal and Economic Impact:

Amending the rules to allow construction of pollution control facilities to begin within 30 days of filing an application for preliminary certification, under certain circumstances, would probably allow more applicants to be eligible for tax credits. Amending the rules to allow refund of processing fees only when an application for final certification is rejected may result in more applicants losing part or all of their processing fee under circumstances where they previously might have received a refund. However, the Department has also proposed to amend the rules so that applicants who withdraw their application and reapply would not pay an additional processing fee unless the cost of the facility increased. Also, if an application is not completed within 180 days of the Department's request for additional information, the application is rejected and the processing fee refunded.

The overall impact of the rule would not be significant or adverse to small business.

Attachment II
Agenda Item No.
March 8, 1985 EQC Meeting

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF AMENDING)
OAR CHAPTER 340,)
DIVISION 16) LAND USE CONSISTENCY

The proposal described appears to be consistent with all statewide planning goals. Specifically, the rule amendments comply with Goal 6 because they would provide tax credits for pollution control facilities, thereby contributing to the protection of air, water and land resource quality.

Public comment on this proposal is invited and may be submitted in the manner described in the accompanying Public Notice of Rules Adoption.

It is requested that local, state and federal agencies review the proposal and comment on possible conflicts with their programs affecting land use and with statewide planning goals within their jurisdiction. The Department of Environmental Quality intends to ask the Department of Land Conservation and Development to mediate any apparent conflicts thereby brought to its attention.

After public hearing, the Commission may adopt permanent rules identical to the proposal, adopt modified rules on the same subject matter, or decline to act. The Commission's deliberation should come on March 8, 1985 as part of the agenda of a regularly scheduled Commission meeting.

MC:d
MD1557

A CHANCE TO COMMENT ON...

Pollution Control Tax Credit Rule Amendments Public Hearing

Date Prepared: November 14, 1984
Hearing Date: January 17, 1985
Comments Due: January 17, 1985

**WHO IS
AFFECTED:**

Amendment of the rules will affect people applying for pollution control tax credits.

**WHAT IS
PROPOSED:**

The DEQ proposes to adopt amendments to OAR Chapter 340, Division 16 to improve the the Pollution Control Tax Credit Rules (OAR 340-16-010 through 340-16-050) so that requirements for applying for pollution control tax credit are less restrictive and so the rules are within the bounds of the enabling legislation.

**WHAT ARE THE
HIGHLIGHTS:**

Amendment of the rules would make the process for applying for preliminary certification less restrictive.

Amendment of the rules would allow refund of the processing fee only when the application is rejected.

Amendment of the rules would require the Department to reject an application and refund the processing fee if the application is not completed within 180 days of Department request for additional information. Applicant would be allowed to reapply under these circumstances.

**HOW TO
COMMENT:**

Copies of the proposed rule amendments can be obtained from:

Sherry Chew
Management Services Division
P.O. Box 1760
Portland, OR 97207
Telephone: 229-6484
toll-free 1-800-452-4011



P.O. Box 1760
Portland, OR 97207

8/10/82

FOR FURTHER INFORMATION:

Contact the person or division identified in the public notice by calling 229-5696 in the Portland area. To avoid long distance charges from other parts of the state, call ~~1-800-452-7813~~ and ask for the Department of Environmental Quality. ~~1-800-452-4011~~



Written comments should be sent to the same address by January 17, 1985. Verbal comments may be given during the public hearing scheduled as follows:

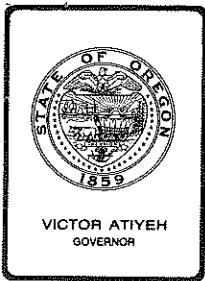
3:00 p.m.
January 17, 1985
Room 1400
522 SW Fifth Avenue
Portland, Oregon

**WHAT IS THE
NEXT STEP:**

After the public hearing, the Environmental Quality Commission may adopt rules identical to those proposed, modify the rules or decline to act. The Commission's deliberations should come on March 8, 1985 as part of the agenda of a regularly scheduled Commission meeting.

ATTACHMENTS:

Statement of Need for Rules (including Fiscal Impact)
Statement of Land Use Consistency



Environmental Quality Commission

Mailing Address: BOX 1760, PORTLAND, OR 97207

522 SOUTHWEST 5th AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

ATTACHMENT IV
Agenda Item No.
March 8, 1985
EQC Meeting

MEMORANDUM

TO: Environmental Quality Commission DATE: February 10, 1985

FROM: Maggie Conley, Hearing Officer

SUBJECT: Report from Hearing held January 17, 1985

Proposed Pollution Control Tax Credit Rules

Summary of Procedure

Two people attended the hearing, which was held at 10:00 a.m. in Portland, 522 SW Fifth, Room 1400. Maggie Conley, Intergovernmental Coordinator for DEQ, presided. Also, attending from DEQ were Mike Downs and Sherry Chew from the Management Services Division.

One person provided oral testimony at the hearing. One written comment was received before the January 17, 1985 deadline.

Summary of Testimony

Oral

Tom Donaca, Associated Oregon Industries (AOI), testified in favor of the rule. He supported the proposed amendments to OAR 340-16-020(1)(g) and (h) and agreed with the attorney general's opinion related to processing fees. Donaca also indicated AOI's support of the amendments to OAR 340-16-015 which would exempt certain preliminary certification applicants from waiting at least thirty days after DEQ receives the application to construct the pollution control facility.

Written Testimony

Diane Perry, Crown Zellerbach, submitted written comments. She suggested reordering and modifying OAR 340-16-015(b) and (c) to provide greater clarity to the rule. Perry also suggested that the Department be allowed to withhold revocation of a certificate as proposed in OAR 340-16-035 if the certificate holder indicates in writing that the facility will be returned to operation within five years, rather than three years as the rule now indicates. She also suggested additional language which states that "In the event the facility is not returned to operation as indicated, the Department shall revoke the certificate."

MC:d
MD1559



January 16, 1985

Ms. Maggie Conley
Intergovernmental Coordination Section
Department of Environmental Quality
P.O. Box 1760
522 S.W. Fifth Avenue
Portland, Oregon 97204

RE: Proposed rule changes, Pollution Control Tax Credits,
OAR Ch. 340, Div. 16

Dear Ms. Conley:

In order to provide greater clarity to the rule, we propose that changes to OAR 340-16-015 (b) and (c) be reordered and modified as indicated on the attached mark up of the proposed rule.

We further propose that the Department be allowed to withhold revocation of a certificate, as proposed in OAR 340-16-035, if the certificate holder indicates in writing that the facility will be returned to operation within five years. Five years is a reasonable planning horizon. Added to this subsection should be the following:

"In the event the facility is not returned to operation as indicted, the Department shall revoke the certificate."

Thank you for the opportunity to comment on these rules.

Sincerely,


C. Dianne Perry
Public Affairs Manager, Oregon

3020B/bb

Attachment

cc: W.B. Freck

preliminary certification with the Department of Environmental Quality 30 days before the commencement of erection, construction or installation of the facility. 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 application shall be considered filed 30 days after the Department has received the application.]

c. ~~(c)~~ ~~(c)~~ If the application is filed less than 30 days before commencement of construction [construction commenced before the application is filed], and the Department has not notified the applicant in writing that the application will be rejected as incomplete due to failure to comply with ORS 465.175(1) and OAR 340-16-015(a), the application is complete.

b. ~~(b)~~ If the Department reviews the application within 30 days of filing, and finds it complete, the Department may notify the applicant in writing that the application is complete and ready for processing and then the applicant may proceed with construction without waiting 30 days and without being rejected as incomplete.

MAKE THIS A MANDATORY "SHALL"

(d) [(d)] The Commission may waive the filing of the application if it finds the filing inappropriate because special circumstances render the filing unreasonable and if it finds such facility would otherwise qualify for tax credit certification pursuant to ORS 468.150 to 468.190.

NOTE: Underlined _____ material is new. Bracketed [] material is deleted.

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of Modifying)
OAR 340-16-010, 340-16-015,)
340-16-020, 340-16-035, and)
340-16-045)
Proposed Modification

340-16-015 PURPOSE

The purpose of these rules is to prescribe procedures and criteria to be used by the Department and Commission for issuance of tax credits 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.

340-16-010 DEFINITIONS

- (1) "Circumstances beyond the control of the applicant" means facts, conditions and circumstances which applicant's due care and diligence would not have avoided.
- (2) "Commencement of erection, construction or installation" means the beginning of a continuous program of on-site construction, erection or modification of a facility which is completed within a reasonable time, and shall not include [including] site clearing, grading, dredging, landfilling or similar physical change made in preparation for the facility.
- (3) "Commission" means Environmental Quality Commission.
- (4) "Department" means Department of Environmental Quality.
- (5) "Facility" means a pollution control facility.

NOTE: Underlined ____ material is new. Bracketed [] material is deleted.

- (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.
- (7) "Principal purpose" means the most important or primary purpose. Each facility may have only one principal purpose.
- (8) "Reconstruction or replacement" means the provision of a new facility with qualities and pollution control characteristics equivalent to the original facility. This does not include repairs or work done to maintain the facility in good working order.
- (9) "Sole purpose" means the exclusive purpose.
- (10) "Special 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. Special circumstances shall not include cases where applicant was unaware of tax credit certification requirements or applied for preliminary certification in a manner other than that prescribed in 340-16-015(1).
- (11) "Substantial completion" means the completion of erection, installation, modification, or construction of all elements of the 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.

340-16-015 PROCEDURES FOR RECEIVING PRELIMINARY TAX CREDIT CERTIFICATION

(1) Filing of Application

- (a) Any person proposing to apply for certification of a pollution control facility pursuant to ORS 468.165, shall file an application for preliminary certification with the Department of Environmental Quality 30 days before the commencement of erection, construction or installation of the facility. 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 application shall be considered filed 30 days after the Department has received the application.]

NOTE: Underlined ____ material is new. Bracketed [] material is deleted.

(b) [(c)] If the application is filed less than 30 days before commencement of construction [construction commenced before the application is filed], the application will be rejected as incomplete due to failure to comply with ORS 465.175(1) and OAR 340-16-015(a). However, if the Department reviews the application within 30 days of filing, and finds it complete, the Department shall notify the applicant in writing that the application is complete and ready for processing, and that the applicant may proceed with construction without waiting 30 days and without being rejected as incomplete.

(c) [(d)] The Commission may waive the filing of the application if it finds the filing inappropriate because special circumstances render the filing unreasonable and if it finds such facility would otherwise qualify for tax credit certification pursuant to ORS 468.150 to 468.190.

(d) [(e)] Within 30 days of the filing of an application the Department shall request any additional information that applicant needs to submit in order for the application to be considered complete. After examination thereof, the Department may request corrections and revisions to the plans and specifications. The Department may, also, require any other information necessary to determine whether the proposed construction is in accordance with Department statutes, rules and standards.

(e) [(f)] 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 (d) above, the application shall be deemed complete 30 days after filing [on the date it is considered filed].

(f) [(g)] Notice of the Department's recommended action to deny an 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.

(2) Approval of Preliminary Certification

(a) If the Department determines that the proposed facility is eligible it shall issue a preliminary certificate approving the erection, construction or installation within 60 days of receipt of a completed application. It is not necessary for this certificate to include a determination of the full extent a facility is eligible for tax credit.

NOTE: Underlined ___ material is new. Bracketed [] material is deleted.

- (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 construction must comply with the plans, specifications and any corrections or revisions thereto, if any, previously submitted.
- (c) Issuance of a preliminary tax credit certification does not guarantee final tax credit certification.

(3) Denial of Preliminary Certification

If the Department determines that the erection, construction or installation 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.

(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.

340-16-020 PROCEDURES FOR RECEIVING FINAL TAX CREDIT CERTIFICATION

(1) Filing of Application

- (a) A written application for final tax credit certification shall be made 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 construction is in accordance with Department statutes, rules and standards.
- (c) 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.
- (d) The application shall be filed within two years of substantial completion of construction of the facility. Failure to file a timely application shall make the facility ineligible for tax credit certification.
- (e) 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 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.
 - (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 applicant fails to submit requested information within 180 days of the date when the Department requested the information, the application will be rejected, unless applicant requests in writing additional time to submit requested information.
- (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 certify the actual cost of the facility and the portion of the actual cost properly allocable to pollution control, resource recovery or recycling as set forth in ORS 468.190. Each certificate shall bear a separate serial number for each such facility.
 - (B) No determination of the proportion of the actual cost of the facility to be certified shall be made until receipt of the application.
 - (C) If two or more facilities constitute an operational unit, the commission may certify such facilities under one certificate.
 - (D) 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 begun before December 31, 1988.

NOTE: Underlined ____ material is new. Bracketed [] material is deleted.

(E) Certification of a pollution control facility qualifying under ORS 468.165(1) shall be granted for a period of 10 consecutive years. The 10-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 from the date of its first certification by the Commission.

(F) 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 to 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, resource 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 within 120 days after the filing of the application. Failure of the Commission to act constitutes rejection of the application.

(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 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.

340-16-025 QUALIFICATION OF FACILITY FOR TAX CREDITS

(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, 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; 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.
- (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 resource recovery process which obtains useful material or energy resources from material that would otherwise be solid waste as defined in ORS 459.005, hazardous waste as defined in ORS 459.410, or used oil as defined in ORS 468.850;
 - (e) Subsequent additions to a solid waste facility, made either to an already certified facility or to an operation which would have qualified as a facility but for the fact that it was erected, constructed or installed before January 1, 1973, which will increase the production or recovery of useful materials or energy over the amount being produced or recovered by the original facility whether or not the materials or energy produced or recovered are similar to those of the original facility.
 - (f) The treatment, substantial reduction or elimination of or redesign to treat, substantially reduce or eliminate hazardous waste as defined in ORS 459.410; or
 - (g) 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 flammers 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.
- (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 solid waste, hazardous waste or used oil facility that makes an insignificant contribution to the purpose of utilization of solid waste, hazardous waste or used oil including the following specific items:
 - (A) Office buildings and furnishings;
 - (B) Parking lots and road improvements;
 - (C) Landscaping;
 - (D) External lighting;
 - (E) Company signs;
 - (F) Artwork; and
 - (G) Automobiles.
 - (e) Facilities not directly related to the operation of the industry or enterprise seeking the tax credit;
 - (f) 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.
- (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, resource 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 459.410 or used oil as defined in ORS 468.850:
 - (i) By burning, mechanical processing or chemical processing; or
 - (ii) Through the production, processing, presegregation, or use of:
 - (I) Materials for their heat content or other forms of energy of or from the material; or
 - (II) Materials which have useful chemical or physical properties and which may be used for the same or other purposes; or
 - (III) 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 a usable source of power or other item of real economic value;
 - (D) The end product of the utilization, other than a usable source of power, 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 459.410.
- (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) and 468.175;
 - (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.

340-16-030 DETERMINATION OF PERCENTAGE OF CERTIFIED FACILITY COST
ALLOCABLE TO POLLUTION CONTROL

- (1) Definitions
 - (a) "Annual operating expenses" means the estimated costs of operating the claimed facility 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.
 - (b) "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.
 - (c) "Claimed facility cost" means the actual cost of the claimed facility minus the salvage value of any facilities removed from service.
 - (d) "Gross annual income" means the estimated total annual income from the claimed facility derived from sale or reuse of recovered materials or energy or any other means.
 - (e) "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, if applicable:
 - (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 increase 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) For facilities that have received preliminary certification and on which construction has been completed before January 1, 1984, the portion of actual costs properly allocable shall be:
 - (a) Eighty percent or more.
 - (b) Sixty percent or more but less than 80 percent.
 - (c) Forty percent or more but less than 60 percent.
 - (d) Twenty percent or more but less than 40 percent.
 - (e) Less than twenty percent.
- (4) For facilities on which construction has been completed after December 31, 1983, 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.
- (5) In considering the factors listed in 340-16-030 to establish the portion of costs allocable to pollution control, the Commission will use the factor, or combination of factors, that results in the smallest portion of costs allocable.
- (6) When the estimated annual percent return on investment in the facility, 340-16-030(2)(b), is used to establish the portion of costs allocable to pollution control, the following steps will be used:
 - (a) Determine the claimed facility cost, average annual cash flow and useful life of the claimed facility.

- (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:

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

Where: I_R 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 stockholders' equity 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:

$$\left[P_A = \frac{R_R - R_A}{R_R} \times 100\% \right]$$

$$\left[P_A = \frac{RROI - ROI}{RROI} \times 100\% \right]$$

Where: P_A is the portion of actual costs properly allocable to pollution control in percent, rounded off to the nearest whole number.
 ROI [R_A] is the annual percent return on investment from Table 1.
 $RROI$ [R_R] is the reference annual percent return on investment from Table 2.

If ROI [R_A] is greater than or equal to $RROI$ [R_R], then the portion of actual costs properly allocable to pollution control shall be zero percent.

NOTE: Underlined _____ material is new. Bracketed [] material is deleted.

TABLE 1

 RETURN ON INVESTMENT PERCENTAGE
 BASED ON R.O.I. FACTOR (FACILITY COST/AVRG. ANNUAL CASH FLOW)
 AND THE EXPECTED USEFUL LIFE OF THE NEW FACILITY
 01/06/84

X R.O.I.	EXPECTED USEFUL LIFE IN YEARS									
	1	2	3	4	5	6	7	8	9	10
0.00	1.000	2.000	3.000	4.000	5.000	6.000	7.000	8.000	9.000	10.000
0.25	0.998	1.993	2.985	3.975	4.963	5.948	6.931	7.911	8.889	9.864
0.50	0.995	1.985	2.970	3.950	4.926	5.896	6.862	7.823	8.779	9.730
0.75	0.993	1.978	2.956	3.926	4.889	5.846	6.795	7.737	8.672	9.600
1.00	0.990	1.970	2.941	3.902	4.853	5.795	6.728	7.652	8.566	9.471
1.25	0.988	1.963	2.927	3.878	4.818	5.746	6.663	7.568	8.462	9.346
1.50	0.985	1.956	2.912	3.854	4.783	5.697	6.598	7.486	8.361	9.222
1.75	0.983	1.949	2.898	3.831	4.748	5.649	6.535	7.405	8.260	9.101
2.00	0.980	1.942	2.884	3.808	4.713	5.601	6.472	7.325	8.162	8.983
2.25	0.978	1.934	2.870	3.785	4.679	5.554	6.410	7.247	8.066	8.866
2.50	0.976	1.927	2.856	3.762	4.646	5.503	6.349	7.170	7.971	8.752
2.75	0.973	1.920	2.842	3.739	4.613	5.462	6.289	7.094	7.878	8.640
3.00	0.971	1.913	2.829	3.717	4.580	5.417	6.230	7.020	7.786	8.530
3.25	0.969	1.907	2.815	3.695	4.547	5.373	6.172	6.946	7.696	8.422
3.50	0.966	1.900	2.802	3.673	4.515	5.329	6.115	6.874	7.608	8.317
3.75	0.964	1.893	2.788	3.651	4.483	5.285	6.058	6.803	7.521	8.213
4.00	0.962	1.886	2.775	3.630	4.452	5.242	6.002	6.733	7.435	8.111
4.25	0.959	1.879	2.762	3.609	4.421	5.200	5.947	6.664	7.351	8.011
4.50	0.957	1.873	2.749	3.588	4.390	5.158	5.893	6.596	7.269	7.913
4.75	0.955	1.866	2.736	3.567	4.360	5.117	5.839	6.529	7.188	7.816
5.00	0.952	1.859	2.723	3.546	4.329	5.076	5.786	6.463	7.108	7.722
5.25	0.950	1.853	2.711	3.525	4.300	5.035	5.734	6.393	7.029	7.629
5.50	0.948	1.846	2.698	3.505	4.270	4.996	5.683	6.335	6.952	7.538
5.75	0.946	1.840	2.685	3.485	4.241	4.956	5.632	6.272	6.876	7.448

TABLE 1

RETURN ON INVESTMENT PERCENTAGE
 BASED ON R.O.I. FACTOR (FACILITY COST/AVRG. ANNUAL CASH FLOW)
 AND THE EXPECTED USEFUL LIFE OF THE NEW FACILITY
 01/06/84

X R.O.I.	EXPECTED USEFUL LIFE IN YEARS									
	11	12	13	14	15	16	17	18	19	20
0.00	11.000	12.000	13.000	14.000	15.000	16.000	17.000	18.000	19.000	20.000
0.25	10.837	11.807	12.775	13.741	14.704	15.665	16.623	17.580	18.533	19.484
0.50	10.677	11.619	12.556	13.489	14.417	15.340	16.259	17.173	18.082	18.987
0.75	10.521	11.435	12.342	13.243	14.137	15.024	15.905	16.779	17.647	18.505
1.00	10.368	11.255	12.134	13.004	13.865	14.713	15.562	16.393	17.225	18.046
1.25	10.218	11.079	11.930	12.771	13.601	14.420	15.230	16.030	16.819	17.599
1.50	10.071	10.908	11.732	12.543	13.343	14.131	14.908	15.673	16.426	17.169
1.75	9.927	10.740	11.538	12.322	13.093	13.850	14.595	15.327	16.046	16.753
2.00	9.787	10.575	11.349	12.106	12.849	13.578	14.292	14.992	15.678	16.351
2.25	9.649	10.415	11.164	11.896	12.612	13.313	13.998	14.668	15.323	15.964
2.50	9.514	10.258	10.983	11.691	12.381	13.055	13.712	14.353	14.979	15.589
2.75	9.382	10.104	10.807	11.491	12.157	12.805	13.435	14.049	14.646	15.227
3.00	9.253	9.954	10.635	11.296	11.938	12.561	13.166	13.754	14.324	14.877
3.25	9.126	9.807	10.467	11.106	11.725	12.324	12.905	13.467	14.012	14.539
3.50	9.002	9.663	10.303	10.921	11.517	12.094	12.651	13.190	13.710	14.212
3.75	8.880	9.523	10.142	10.740	11.315	11.870	12.405	12.920	13.417	13.896
4.00	8.760	9.385	9.986	10.563	11.118	11.652	12.166	12.659	13.134	13.590
4.25	8.644	9.250	9.833	10.391	10.927	11.440	11.933	12.406	12.859	13.294
4.50	8.529	9.119	9.683	10.223	10.740	11.234	11.707	12.160	12.593	13.003
4.75	8.417	8.990	9.537	10.059	10.557	11.033	11.482	11.921	12.335	12.731
5.00	8.306	8.863	9.394	9.899	10.380	10.833	11.274	11.690	12.085	12.462
5.25	8.198	8.740	9.254	9.742	10.206	10.647	11.066	11.465	11.843	12.202
5.50	8.093	8.619	9.117	9.590	10.038	10.462	10.865	11.246	11.608	11.950
5.75	7.989	8.500	8.933	9.441	9.873	10.282	10.668	11.034	11.379	11.706

TABLE 1

 RETURN ON INVESTMENT PERCENTAGE
 BASED ON R.O.I. FACTOR (FACILITY COST/AVRG. ANNUAL CASH FLOW)
 AND THE EXPECTED USEFUL LIFE OF THE NEW FACILITY
 01/26/84

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R.O.I.	EXPECTED USEFUL LIFE IN YEARS									
	21	22	23	24	25	26	27	28	29	30
0.00	21.000	22.000	23.000	24.000	25.000	26.000	27.000	28.000	29.000	30.000
0.25	20.433	21.380	22.324	23.266	24.205	25.143	26.077	27.010	27.940	28.868
0.50	19.888	20.794	21.676	22.563	23.446	24.324	25.198	26.063	26.933	27.794
0.75	19.363	20.211	21.053	21.889	22.719	23.542	24.359	25.171	25.976	26.775
1.00	18.857	19.660	20.456	21.243	22.023	22.795	23.560	24.316	25.066	25.808
1.25	18.370	19.131	19.882	20.624	21.357	22.081	22.796	23.503	24.200	24.889
1.50	17.900	18.621	19.331	20.030	20.720	21.399	22.068	22.727	23.376	24.016
1.75	17.448	18.130	18.801	19.461	20.109	20.746	21.372	21.987	22.592	23.186
2.00	17.011	17.658	18.292	18.914	19.523	20.121	20.707	21.281	21.844	22.396
2.25	16.590	17.203	17.803	18.389	18.962	19.523	20.072	20.608	21.132	21.645
2.50	16.185	16.765	17.332	17.885	18.424	18.951	19.464	19.965	20.454	20.930
2.75	15.793	16.343	16.879	17.401	17.908	18.402	18.883	19.351	19.806	20.249
3.00	15.415	15.937	16.444	16.936	17.413	17.877	18.327	18.764	19.188	19.600
3.25	15.050	15.545	16.024	16.488	16.938	17.373	17.795	18.203	18.599	18.982
3.50	14.698	15.167	15.620	16.058	16.482	16.890	17.285	17.667	18.036	18.392
3.75	14.358	14.803	15.232	15.645	16.043	16.427	16.797	17.154	17.498	17.829
4.00	14.029	14.451	14.857	15.247	15.622	15.983	16.330	16.663	16.984	17.292
4.25	13.712	14.112	14.496	14.864	15.217	15.556	15.881	16.193	16.492	16.779
4.50	13.405	13.784	14.148	14.495	14.828	15.147	15.451	15.743	16.022	16.289
4.75	13.108	13.468	13.812	14.141	14.454	14.753	15.039	15.312	15.572	15.820
5.00	12.821	13.163	13.489	13.799	14.094	14.375	14.643	14.898	15.141	15.372
5.25	12.544	12.868	13.176	13.469	13.747	14.012	14.263	14.502	14.728	14.944
5.50	12.275	12.583	12.875	13.152	13.414	13.662	13.898	14.121	14.333	14.534
5.75	12.015	12.308	12.584	12.846	13.093	13.326	13.547	13.756	13.954	14.141

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TABLE 1

RETURN ON INVESTMENT PERCENTAGE
 BASED ON R.O.I. FACTOR (FACILITY COST/AVRG. ANNUAL CASH FLOW)
 AND THE EXPECTED USEFUL LIFE OF THE NEW FACILITY
 01/06/84

% R.O.I.	EXPECTED USEFUL LIFE IN YEARS									
	1	2	3	4	5	6	7	8	9	10
6.00	0.943	1.833	2.673	3.465	4.212	4.917	5.582	6.210	6.802	7.360
6.25	0.941	1.827	2.661	3.445	4.184	4.879	5.533	6.149	6.728	7.274
6.50	0.939	1.821	2.648	3.426	4.156	4.841	5.485	6.089	6.656	7.189
6.75	0.937	1.814	2.636	3.406	4.128	4.804	5.437	6.030	6.585	7.105
7.00	0.935	1.803	2.624	3.387	4.100	4.767	5.389	5.971	6.515	7.024
7.25	0.932	1.802	2.612	3.368	4.073	4.730	5.343	5.914	6.447	6.943
7.50	0.930	1.796	2.601	3.349	4.046	4.694	5.297	5.857	6.379	6.864
7.75	0.928	1.789	2.589	3.331	4.019	4.658	5.251	5.802	6.312	6.786
8.00	0.926	1.783	2.577	3.312	3.993	4.623	5.206	5.747	6.247	6.710
8.25	0.924	1.777	2.566	3.294	3.967	4.588	5.162	5.693	6.182	6.635
8.50	0.922	1.771	2.554	3.276	3.941	4.554	5.119	5.639	6.119	6.561
8.75	0.920	1.765	2.543	3.258	3.915	4.520	5.075	5.587	6.057	6.489
9.00	0.917	1.759	2.531	3.240	3.890	4.486	5.033	5.535	5.995	6.418
9.25	0.915	1.753	2.520	3.222	3.865	4.453	4.991	5.484	5.935	6.348
9.50	0.913	1.747	2.509	3.204	3.840	4.420	4.950	5.433	5.875	6.279
9.75	0.911	1.741	2.498	3.187	3.815	4.387	4.909	5.384	5.817	6.211
10.00	0.909	1.736	2.487	3.170	3.791	4.355	4.868	5.335	5.759	6.145
10.25	0.907	1.730	2.476	3.153	3.767	4.324	4.829	5.287	5.702	6.079
10.50	0.905	1.724	2.465	3.136	3.743	4.292	4.789	5.239	5.646	6.015
10.75	0.903	1.718	2.454	3.119	3.719	4.261	4.751	5.192	5.591	5.951
11.00	0.901	1.713	2.444	3.102	3.696	4.231	4.712	5.146	5.537	5.889
11.25	0.899	1.707	2.433	3.086	3.673	4.200	4.674	5.101	5.484	5.828
11.50	0.897	1.701	2.423	3.070	3.650	4.170	4.637	5.056	5.431	5.768
11.75	0.895	1.696	2.412	3.053	3.627	4.141	4.600	5.011	5.379	5.709

TABLE 1

RETURN ON INVESTMENT PERCENTAGE
 BASED ON R.O.I. FACTOR (FACILITY COST/AVRG. ANNUAL CASH FLOW)
 AND THE EXPECTED USEFUL LIFE OF THE NEW FACILITY
 01/06/84

X R.O.I.	EXPECTED USEFUL LIFE IN YEARS									
	11	12	13	14	15	16	17	18	19	20
6.00	7.867	8.384	8.853	9.295	9.712	10.106	10.477	10.828	11.158	11.470
6.25	7.787	8.270	8.725	9.153	9.556	9.935	10.291	10.627	10.943	11.241
6.50	7.689	8.159	8.600	9.014	9.403	9.768	10.111	10.432	10.735	11.019
6.75	7.593	8.050	8.477	8.878	9.253	9.605	9.935	10.243	10.532	10.803
7.00	7.499	7.943	8.358	8.745	9.108	9.447	9.763	10.059	10.336	10.594
7.25	7.406	7.838	8.240	8.616	8.966	9.292	9.596	9.880	10.145	10.391
7.50	7.315	7.735	8.126	8.489	8.827	9.142	9.434	9.706	9.959	10.194
7.75	7.226	7.635	8.014	8.365	8.692	8.995	9.276	9.537	9.779	10.004
8.00	7.139	7.536	7.904	8.244	8.559	8.851	9.122	9.372	9.604	9.813
8.25	7.053	7.439	7.796	8.126	8.430	8.712	8.971	9.212	9.433	9.638
8.50	6.969	7.345	7.691	8.010	8.304	8.575	8.825	9.055	9.268	9.463
8.75	6.886	7.252	7.582	7.897	8.181	8.442	8.683	8.904	9.107	9.294
9.00	6.805	7.161	7.487	7.786	8.061	8.313	8.544	8.756	8.950	9.129
9.25	6.726	7.071	7.388	7.678	7.943	8.186	8.408	8.612	8.798	8.968
9.50	6.647	6.984	7.291	7.572	7.828	8.062	8.276	8.471	8.650	8.812
9.75	6.570	6.898	7.196	7.468	7.716	7.942	8.147	8.335	8.505	8.661
10.00	6.495	6.814	7.103	7.367	7.606	7.824	8.022	8.201	8.365	8.514
10.25	6.421	6.731	7.012	7.267	7.499	7.709	7.899	8.072	8.228	8.370
10.50	6.348	6.650	6.923	7.170	7.394	7.596	7.779	7.945	8.095	8.231
10.75	6.277	6.570	6.836	7.075	7.291	7.486	7.663	7.822	7.966	8.095
11.00	6.207	6.492	6.750	6.982	7.191	7.379	7.549	7.702	7.839	7.963
11.25	6.138	6.416	6.666	6.891	7.093	7.274	7.438	7.584	7.716	7.835
11.50	6.070	6.341	6.583	6.801	6.997	7.172	7.329	7.470	7.596	7.710
11.75	6.003	6.267	6.503	6.714	6.903	7.072	7.223	7.358	7.480	7.588

TABLE 1

RETURN ON INVESTMENT PERCENTAGE
 BASED ON R.O.I. FACTOR (FACILITY COST/AVPG. ANNUAL CASH FLOW)
 AND THE EXPECTED USEFUL LIFE OF THE NEW FACILITY
 01/06/84

% R.O.I.	EXPECTED USEFUL LIFE IN YEARS									
	21	22	23	24	25	26	27	28	29	30
6.00	11.764	12.042	12.303	12.550	12.783	13.003	13.211	13.406	13.591	13.765
6.25	11.521	11.784	12.032	12.266	12.485	12.692	12.887	13.070	13.242	13.404
6.50	11.285	11.535	11.770	11.991	12.198	12.392	12.575	12.746	12.907	13.059
6.75	11.057	11.294	11.517	11.725	11.921	12.104	12.275	12.436	12.586	12.727
7.00	10.836	11.061	11.272	11.469	11.654	11.826	11.987	12.137	12.278	12.409
7.25	10.621	10.836	11.036	11.222	11.396	11.558	11.709	11.850	11.981	12.104
7.50	10.413	10.617	10.807	10.983	11.147	11.299	11.441	11.573	11.696	11.810
7.75	10.212	10.406	10.585	10.752	10.907	11.050	11.184	11.307	11.422	11.529
8.00	10.017	10.201	10.371	10.529	10.675	10.810	10.935	11.051	11.158	11.258
8.25	9.827	10.002	10.164	10.313	10.451	10.578	10.696	10.804	10.905	10.997
8.50	9.644	9.810	9.963	10.104	10.234	10.354	10.465	10.566	10.660	10.747
8.75	9.465	9.623	9.769	9.902	10.025	10.138	10.242	10.337	10.425	10.506
9.00	9.292	9.442	9.580	9.707	9.823	9.929	10.027	10.116	10.198	10.274
9.25	9.124	9.267	9.398	9.517	9.627	9.727	9.819	9.903	9.980	10.050
9.50	8.961	9.097	9.221	9.334	9.438	9.532	9.618	9.697	9.769	9.835
9.75	8.803	8.932	9.049	9.157	9.254	9.343	9.425	9.498	9.566	9.627
10.00	8.649	8.772	8.883	8.985	9.077	9.161	9.237	9.307	9.370	9.427
10.25	8.499	8.616	8.722	8.818	8.905	8.984	9.056	9.121	9.180	9.234
10.50	8.354	8.465	8.566	8.657	8.739	8.814	8.881	8.942	8.997	9.047
10.75	8.212	8.318	8.414	8.500	8.578	8.648	8.712	8.769	8.821	8.868
11.00	8.075	8.176	8.266	8.348	8.422	8.488	8.548	8.602	8.650	8.694
11.25	7.941	8.037	8.123	8.201	8.270	8.333	8.389	8.440	8.485	8.526
11.50	7.811	7.903	7.984	8.058	8.124	8.183	8.236	8.283	8.326	8.364
11.75	7.685	7.772	7.850	7.919	7.981	8.037	8.087	8.131	8.171	8.207

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TABLE 1

RETURN ON INVESTMENT PERCENTAGE
 BASED ON R.O.I. FACTOR (FACILITY COST/AVRG. ANNUAL CASH FLOW)
 AND THE EXPECTED USEFUL LIFE OF THE NEW FACILITY
 01/06/84

% R.O.I.	EXPECTED USEFUL LIFE IN YEARS									
	1	2	3	4	5	6	7	8	9	10
12.00	0.893	1.690	2.402	3.037	3.605	4.111	4.564	4.968	5.328	5.650
12.25	0.891	1.685	2.392	3.021	3.583	4.082	4.528	4.925	5.278	5.593
12.50	0.889	1.679	2.381	3.006	3.561	4.054	4.492	4.882	5.228	5.536
12.75	0.887	1.674	2.371	2.990	3.539	4.026	4.457	4.840	5.180	5.481
13.00	0.885	1.668	2.361	2.974	3.517	3.998	4.423	4.799	5.132	5.426
13.25	0.883	1.663	2.351	2.959	3.496	3.970	4.388	4.758	5.084	5.372
13.50	0.881	1.657	2.341	2.944	3.475	3.943	4.355	4.718	5.038	5.320
13.75	0.879	1.652	2.331	2.929	3.454	3.915	4.321	4.678	4.992	5.267
14.00	0.877	1.647	2.322	2.914	3.433	3.889	4.288	4.639	4.946	5.216
14.25	0.875	1.641	2.312	2.899	3.413	3.862	4.256	4.600	4.902	5.166
14.50	0.873	1.636	2.302	2.884	3.392	3.836	4.224	4.562	4.858	5.116
14.75	0.871	1.631	2.293	2.869	3.372	3.810	4.192	4.524	4.814	5.067
15.00	0.870	1.626	2.283	2.855	3.352	3.784	4.160	4.487	4.772	5.017
15.25	0.868	1.621	2.274	2.841	3.332	3.759	4.129	4.451	4.729	4.971
15.50	0.866	1.615	2.264	2.826	3.313	3.734	4.099	4.415	4.688	4.925
15.75	0.864	1.610	2.255	2.812	3.293	3.709	4.068	4.379	4.647	4.879
16.00	0.862	1.605	2.246	2.798	3.274	3.685	4.039	4.344	4.607	4.833
16.25	0.860	1.600	2.237	2.784	3.255	3.660	4.009	4.309	4.567	4.789
16.50	0.858	1.595	2.228	2.770	3.236	3.636	3.980	4.274	4.527	4.745
16.75	0.857	1.590	2.219	2.757	3.218	3.613	3.951	4.241	4.489	4.701
17.00	0.855	1.585	2.210	2.743	3.199	3.589	3.922	4.207	4.451	4.659
17.25	0.853	1.580	2.201	2.730	3.181	3.566	3.894	4.174	4.413	4.617
17.50	0.851	1.575	2.192	2.716	3.163	3.543	3.866	4.142	4.376	4.575
17.75	0.849	1.570	2.183	2.703	3.145	3.520	3.839	4.109	4.339	4.534

TABLE 1

RETURN ON INVESTMENT PERCENTAGE
 BASED ON R.O.I. FACTOR (FACILITY COST/AVRG. ANNUAL CASH FLOW)
 AND THE EXPECTED USEFUL LIFE OF THE NEW FACILITY
 01/06/84

X R.O.I.	EXPECTED USEFUL LIFE IN YEARS									
	11	12	13	14	15	16	17	18	19	20
12.00	5.938	6.194	6.424	6.628	6.811	6.974	7.120	7.250	7.366	7.469
12.25	5.873	6.123	6.346	6.544	6.721	6.878	7.019	7.143	7.255	7.354
12.50	5.810	6.053	6.270	6.462	6.633	6.785	6.920	7.040	7.147	7.241
12.75	5.748	5.985	6.195	6.381	6.547	6.693	6.823	6.939	7.041	7.132
13.00	5.687	5.918	6.122	6.302	6.462	6.604	6.729	6.840	6.938	7.025
13.25	5.627	5.852	6.050	6.225	6.380	6.516	6.637	6.743	6.837	6.921
13.50	5.568	5.787	5.979	6.149	6.299	6.431	6.547	6.649	6.739	6.819
13.75	5.510	5.723	5.910	6.075	6.220	6.347	6.459	6.557	6.644	6.720
14.00	5.453	5.660	5.842	6.002	6.142	6.265	6.373	6.467	6.550	6.623
14.25	5.397	5.599	5.776	5.931	6.066	6.185	6.289	6.380	6.459	6.529
14.50	5.341	5.538	5.710	5.861	5.992	6.106	6.206	6.294	6.370	6.437
14.75	5.287	5.479	5.646	5.792	5.919	6.029	6.126	6.210	6.283	6.347
15.00	5.234	5.421	5.583	5.724	5.847	5.954	6.047	6.128	6.198	6.259
15.25	5.181	5.363	5.521	5.658	5.777	5.881	5.970	6.048	6.115	6.174
15.50	5.130	5.307	5.461	5.594	5.709	5.803	5.895	5.969	6.034	6.090
15.75	5.079	5.252	5.401	5.530	5.641	5.738	5.821	5.893	5.955	6.009
16.00	5.029	5.197	5.342	5.468	5.575	5.668	5.749	5.818	5.877	5.929
16.25	4.979	5.144	5.285	5.406	5.511	5.601	5.678	5.745	5.802	5.851
16.50	4.931	5.091	5.222	5.346	5.447	5.534	5.609	5.673	5.728	5.775
16.75	4.883	5.039	5.173	5.287	5.385	5.469	5.541	5.603	5.655	5.700
17.00	4.836	4.988	5.118	5.229	5.324	5.405	5.475	5.534	5.584	5.628
17.25	4.790	4.938	5.065	5.172	5.264	5.343	5.410	5.467	5.515	5.557
17.50	4.745	4.889	5.012	5.117	5.206	5.281	5.346	5.401	5.447	5.487
17.75	4.700	4.841	4.960	5.062	5.148	5.221	5.283	5.336	5.381	5.419

TABLE 1

 RETURN ON INVESTMENT PERCENTAGE
 BASED ON R.O.I. FACTOR (FACILITY COST/AVRG. ANNUAL CASH FLOW)
 AND THE EXPECTED USEFUL LIFE OF THE NEW FACILITY
 01/06/84

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%	EXPECTED USEFUL LIFE IN YEARS									
	21	22	23	24	25	26	27	28	29	30
12.00	7.562	7.645	7.718	7.784	7.843	7.896	7.943	7.984	8.022	8.055
12.25	7.442	7.521	7.591	7.653	7.709	7.759	7.803	7.842	7.877	7.908
12.50	7.326	7.401	7.467	7.526	7.579	7.626	7.667	7.704	7.737	7.766
12.75	7.212	7.283	7.347	7.403	7.453	7.497	7.536	7.571	7.602	7.629
13.00	7.102	7.170	7.230	7.283	7.330	7.372	7.409	7.441	7.470	7.496
13.25	6.994	7.059	7.116	7.166	7.211	7.250	7.285	7.316	7.343	7.367
13.50	6.889	6.951	7.005	7.053	7.095	7.132	7.165	7.194	7.219	7.242
13.75	6.787	6.845	6.897	6.942	6.982	7.017	7.048	7.075	7.099	7.120
14.00	6.687	6.743	6.792	6.835	6.873	6.906	6.935	6.961	6.983	7.003
14.25	6.590	6.643	6.690	6.731	6.766	6.798	6.825	6.849	6.870	6.889
14.50	6.495	6.546	6.590	6.629	6.663	6.693	6.718	6.741	6.761	6.778
14.75	6.403	6.451	6.493	6.530	6.562	6.590	6.615	6.636	6.654	6.670
15.00	6.312	6.359	6.399	6.434	6.464	6.491	6.514	6.534	6.551	6.566
15.25	6.225	6.269	6.307	6.340	6.369	6.394	6.415	6.434	6.450	6.465
15.50	6.139	6.181	6.217	6.249	6.276	6.299	6.320	6.337	6.353	6.366
15.75	6.055	6.095	6.130	6.159	6.185	6.208	6.227	6.243	6.258	6.270
16.00	5.973	6.011	6.044	6.073	6.097	6.118	6.136	6.152	6.166	6.177
16.25	5.893	5.930	5.961	5.988	6.011	6.031	6.048	6.063	6.076	6.087
16.50	5.815	5.850	5.880	5.905	5.927	5.946	5.962	5.976	5.988	5.999
16.75	5.739	5.772	5.801	5.825	5.846	5.864	5.879	5.892	5.903	5.913
17.00	5.665	5.696	5.723	5.746	5.766	5.783	5.798	5.810	5.820	5.829
17.25	5.592	5.622	5.648	5.670	5.689	5.705	5.718	5.730	5.740	5.748
17.50	5.521	5.550	5.574	5.595	5.613	5.628	5.641	5.652	5.661	5.669
17.75	5.452	5.479	5.502	5.522	5.539	5.553	5.565	5.576	5.584	5.592

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TABLE 1

RETURN ON INVESTMENT PERCENTAGE
 BASED ON R.O.I. FACTOR (FACILITY COST/AVRG. ANNUAL CASH FLOW)
 AND THE EXPECTED USEFUL LIFE OF THE NEW FACILITY
 01/06/84

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EXPECTED USEFUL LIFE IN YEARS

% R.O.I.	1	2	3	4	5	6	7	8	9	10
18.00	0.847	1.566	2.174	2.690	3.127	3.498	3.812	4.078	4.303	4.494
19.25	0.846	1.561	2.166	2.677	3.110	3.475	3.785	4.046	4.267	4.454
18.50	0.844	1.556	2.157	2.664	3.092	3.453	3.758	4.015	4.232	4.415
18.75	0.842	1.551	2.148	2.651	3.075	3.431	3.732	3.985	4.198	4.377
19.00	0.840	1.547	2.140	2.639	3.058	3.410	3.706	3.954	4.163	4.339
19.25	0.839	1.542	2.131	2.626	3.041	3.388	3.680	3.925	4.130	4.302
19.50	0.837	1.537	2.123	2.613	3.024	3.367	3.655	3.895	4.096	4.265
19.75	0.835	1.532	2.115	2.601	3.007	3.346	3.629	3.866	4.063	4.228
20.00	0.833	1.528	2.106	2.589	2.991	3.326	3.605	3.837	4.031	4.192
20.25	0.832	1.523	2.098	2.577	2.974	3.305	3.580	3.809	3.999	4.157
20.50	0.830	1.519	2.090	2.564	2.958	3.285	3.556	3.781	3.967	4.122
20.75	0.828	1.514	2.082	2.552	2.942	3.265	3.532	3.753	3.936	4.088
21.00	0.826	1.509	2.074	2.540	2.926	3.245	3.508	3.726	3.905	4.054
21.25	0.825	1.505	2.066	2.529	2.910	3.225	3.484	3.699	3.875	4.021
21.50	0.823	1.500	2.058	2.517	2.895	3.205	3.461	3.672	3.845	3.986
21.75	0.821	1.496	2.050	2.505	2.879	3.186	3.438	3.645	3.815	3.955
22.00	0.820	1.492	2.042	2.494	2.864	3.167	3.416	3.619	3.786	3.923
22.25	0.818	1.487	2.034	2.482	2.848	3.148	3.393	3.593	3.757	3.892
22.50	0.816	1.483	2.027	2.471	2.833	3.129	3.371	3.568	3.729	3.860
22.75	0.815	1.478	2.019	2.459	2.818	3.111	3.349	3.543	3.701	3.830
23.00	0.813	1.474	2.011	2.448	2.803	3.092	3.327	3.518	3.673	3.799
23.25	0.811	1.470	2.004	2.437	2.789	3.074	3.306	3.493	3.646	3.769
23.50	0.810	1.465	1.996	2.426	2.774	3.056	3.284	3.469	3.619	3.740
23.75	0.808	1.461	1.989	2.415	2.760	3.038	3.263	3.445	3.592	3.711

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TABLE 1

RETURN ON INVESTMENT PERCENTAGE
 BASED ON R.O.I. FACTOR (FACILITY COST/AVRG. ANNUAL CASH FLOW)
 AND THE EXPECTED USEFUL LIFE OF THE NEW FACILITY
 01/06/84

R.O.I.	EXPECTED USEFUL LIFE IN YEARS									
	11	12	13	14	15	16	17	18	19	20
18.00	4.656	4.793	4.910	5.008	5.092	5.162	5.222	5.273	5.316	5.353
18.25	4.613	4.746	4.860	4.955	5.036	5.105	5.162	5.211	5.253	5.288
18.50	4.570	4.700	4.810	4.903	4.982	5.048	5.104	5.151	5.191	5.224
18.75	4.528	4.655	4.762	4.852	4.928	4.992	5.046	5.091	5.130	5.162
19.00	4.486	4.611	4.715	4.802	4.876	4.938	4.990	5.033	5.070	5.101
19.25	4.446	4.567	4.668	4.753	4.824	4.884	4.934	4.976	5.012	5.041
19.50	4.406	4.523	4.622	4.705	4.774	4.832	4.880	4.921	4.954	4.983
19.75	4.366	4.481	4.577	4.657	4.724	4.780	4.827	4.866	4.898	4.926
20.00	4.327	4.439	4.533	4.611	4.675	4.730	4.775	4.812	4.843	4.870
20.25	4.289	4.398	4.489	4.565	4.628	4.680	4.723	4.760	4.790	4.815
20.50	4.251	4.358	4.446	4.520	4.581	4.631	4.673	4.708	4.737	4.761
20.75	4.214	4.318	4.404	4.475	4.534	4.583	4.624	4.657	4.685	4.708
21.00	4.177	4.278	4.362	4.432	4.489	4.536	4.576	4.608	4.635	4.657
21.25	4.141	4.240	4.321	4.389	4.444	4.490	4.528	4.559	4.585	4.606
21.50	4.105	4.202	4.281	4.347	4.401	4.445	4.481	4.511	4.536	4.557
21.75	4.070	4.164	4.242	4.305	4.358	4.400	4.436	4.465	4.488	4.508
22.00	4.035	4.127	4.203	4.265	4.315	4.357	4.391	4.419	4.442	4.460
22.25	4.001	4.091	4.164	4.224	4.274	4.314	4.347	4.374	4.396	4.414
22.50	3.968	4.055	4.127	4.185	4.233	4.272	4.303	4.329	4.350	4.368
22.75	3.935	4.020	4.090	4.146	4.193	4.230	4.261	4.286	4.306	4.323
23.00	3.902	3.985	4.053	4.108	4.153	4.189	4.219	4.243	4.263	4.279
23.25	3.870	3.951	4.017	4.071	4.114	4.149	4.178	4.201	4.220	4.235
23.50	3.838	3.917	3.982	4.034	4.076	4.110	4.138	4.160	4.178	4.193
23.75	3.807	3.884	3.947	3.997	4.038	4.071	4.098	4.120	4.137	4.151

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TABLE 1

RETURN ON INVESTMENT PERCENTAGE
 BASED ON R.O.I. FACTOR (FACILITY COST/AVPG. ANNUAL CASH FLOW)
 AND THE EXPECTED USEFUL LIFE OF THE NEW FACILITY
 01/06/84

% R.O.I.	EXPECTED USEFUL LIFE IN YEARS									
	21	22	23	24	25	26	27	28	29	30
18.00	5.384	5.410	5.432	5.451	5.467	5.480	5.492	5.502	5.510	5.517
18.25	5.317	5.342	5.363	5.381	5.397	5.409	5.420	5.429	5.437	5.444
18.50	5.252	5.276	5.296	5.313	5.328	5.340	5.350	5.359	5.366	5.372
18.75	5.189	5.212	5.231	5.247	5.261	5.272	5.282	5.290	5.297	5.303
19.00	5.127	5.149	5.167	5.182	5.195	5.206	5.215	5.223	5.229	5.235
19.25	5.066	5.087	5.104	5.119	5.131	5.141	5.150	5.157	5.163	5.168
19.50	5.007	5.026	5.043	5.057	5.069	5.079	5.086	5.093	5.099	5.104
19.75	4.948	4.967	4.983	4.996	5.007	5.017	5.024	5.031	5.036	5.041
20.00	4.891	4.909	4.925	4.937	4.948	4.956	4.964	4.970	4.975	4.979
20.25	4.836	4.853	4.867	4.879	4.889	4.897	4.904	4.910	4.915	4.919
20.50	4.781	4.797	4.811	4.823	4.832	4.840	4.846	4.852	4.856	4.860
20.75	4.727	4.743	4.756	4.767	4.776	4.783	4.790	4.795	4.799	4.802
21.00	4.675	4.690	4.703	4.713	4.721	4.728	4.734	4.739	4.743	4.746
21.25	4.624	4.638	4.650	4.660	4.668	4.674	4.680	4.685	4.688	4.691
21.50	4.573	4.587	4.598	4.608	4.615	4.622	4.627	4.631	4.635	4.638
21.75	4.524	4.537	4.548	4.557	4.564	4.570	4.575	4.579	4.582	4.585
22.00	4.476	4.488	4.499	4.507	4.514	4.520	4.524	4.528	4.531	4.534
22.25	4.428	4.440	4.450	4.458	4.465	4.470	4.475	4.478	4.481	4.484
22.50	4.382	4.393	4.403	4.410	4.417	4.422	4.426	4.429	4.432	4.434
22.75	4.336	4.347	4.356	4.364	4.369	4.374	4.378	4.381	4.384	4.386
23.00	4.292	4.302	4.311	4.318	4.323	4.328	4.332	4.335	4.337	4.339
23.25	4.248	4.258	4.266	4.273	4.278	4.282	4.286	4.289	4.291	4.293
23.50	4.205	4.214	4.222	4.229	4.234	4.238	4.241	4.244	4.246	4.248
23.75	4.163	4.172	4.179	4.185	4.190	4.194	4.197	4.200	4.202	4.203

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TABLE 1

RETURN ON INVESTMENT PERCENTAGE
BASED ON R.O.I. FACTOR (FACILITY COST/AVRG. ANNUAL CASH FLOW)
AND THE EXPECTED USEFUL LIFE OF THE NEW FACILITY
 01/06/84

% R.O.I.	EXPECTED USEFUL LIFE IN YEARS									
	1	2	3	4	5	6	7	8	9	10
24.00	0.806	1.457	1.981	2.404	2.745	3.020	3.242	3.421	3.566	3.682
24.25	0.805	1.453	1.974	2.393	2.731	3.003	3.222	3.398	3.539	3.653
24.50	0.803	1.446	1.967	2.383	2.717	2.986	3.201	3.375	3.514	3.625
24.75	0.802	1.444	1.959	2.372	2.703	2.968	3.181	3.352	3.488	3.596
25.00	0.800	1.440	1.952	2.362	2.689	2.951	3.161	3.329	3.463	3.571

TABLE 1

RETURN ON INVESTMENT PERCENTAGE
 BASED ON R.O.I. FACTOR (FACILITY COST/AVRG. ANNUAL CASH FLOW)
 AND THE EXPECTED USEFUL LIFE OF THE NEW FACILITY
 01/06/84

X R.O.I.	EXPECTED USEFUL LIFE IN YEARS									
	11	12	13	14	15	16	17	18	19	20
24.00	3.776	3.851	3.912	3.962	4.001	4.033	4.059	4.080	4.097	4.110
24.25	3.745	3.819	3.879	3.926	3.965	3.996	4.021	4.041	4.057	4.070
24.50	3.715	3.787	3.845	3.892	3.929	3.959	3.983	4.003	4.018	4.031
24.75	3.686	3.756	3.812	3.858	3.894	3.923	3.946	3.965	3.980	3.992
25.00	3.656	3.725	3.780	3.824	3.859	3.887	3.910	3.928	3.942	3.954

TABLE 1

 RETURN ON INVESTMENT PERCENTAGE
 BASED ON R.O.I. FACTOR (FACILITY COST/AVRG. ANNUAL CASH FLOW)
 AND THE EXPECTED USEFUL LIFE OF THE NEW FACILITY
 01/06/84

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% R.O.I.	EXPECTED USEFUL LIFE IN YEARS									
	21	22	23	24	25	26	27	28	29	30
24.00	4.121	4.130	4.137	4.143	4.147	4.151	4.154	4.157	4.159	4.160
24.25	4.081	4.089	4.096	4.101	4.106	4.109	4.112	4.114	4.116	4.113
24.50	4.041	4.049	4.055	4.060	4.065	4.068	4.071	4.073	4.075	4.076
24.75	4.002	4.009	4.015	4.020	4.024	4.028	4.030	4.032	4.034	4.035
25.00	3.963	3.970	3.976	3.981	3.985	3.988	3.990	3.992	3.994	3.995

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Table 2

Reference Annual Percent Return on Investment

<u>Year Construction Completed</u>	<u>Reference Percent Return</u>
1975	19.1
1976	19.8
1977	21.0
1978	21.9
1979	22.5
1980	23.0
1981	23.6
1982	23.4
1983	21.5
1984	19.9

Calculation of the reference percent return was made by averaging the average annual percent return before taxes on stockholders' equity for all 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, for the five years prior to the year shown.

340-16-035 PROCEDURE TO REVOKE CERTIFICATION

- (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 paragraph (a) of subsection (1) of this section, 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) If the certification of a pollution control or solid waste, hazardous wastes or used oil facility is ordered revoked pursuant to paragraph (b) of subsection (1) of this section, 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) The Department 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 Department shall revoke the certificate.

340-16-040 PROCEDURES FOR TRANSFER OF A TAX CREDIT CERTIFICATE

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.

NOTE: Underlined _____ material is new. Bracketed [] material is deleted.

340-16-045 FEES FOR FINAL TAX CREDIT CERTIFICATION

- (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[:]
 - [(a) The Department determines the application is incomplete for processing and applicant fails to submit requested information within 180 days of date when the Department requested the information; or]
 - [(b)][The] the application is rejected[; or]
 - [(c) The applicant withdraws the application before final certification or denial by the Commission.]
- [(4) The application processing fee shall be refunded in part if the final certified cost is less than the facility cost claimed in the original application. The refund shall be calculated by subtracting one-half of one percent of the actual certified cost of the facility from the amount of the application processing fee submitted with the application. If that calculation yields zero or a negative number, no refund shall be made.]
- (4) [(5)] The fees shall not be considered by the Environmental Quality Commission as part of the cost of the facility to be certified.
- (5) [(6)] All fees shall be made payable to the Department of Environmental Quality.

340-16-050 TAXPAYERS RECEIVING TAX CREDIT

- (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.

NOTE: Underlined _____ material is new. Bracketed [] material is deleted.

- (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.

THOMAS G. CLIFFORD
LEGISLATIVE COUNSEL



ATTACHMENT VI
Agenda Item No.
3/8/1985 EQC Meeting

STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

October 17, 1984

To: Office of the Director
Department of Environmental Quality
P.O. Box 1760
Portland, Oregon 97207

From: Robert W. Lundy
Chief Deputy Legislative Counsel

Enclosed is a copy of our staff report ARR 5664, reflecting our review of rules of the Environmental Quality Commission relating to pollution control facility tax credits.

The staff report includes a negative determination under Question 1.

The Legislative Counsel Committee requests your response to that determination. The Committee wishes to consider that response when it considers the report at its next meeting.

We would appreciate receiving that response by November 6, 1984.

Encl.

DEPARTMENT OF ENVIRONMENTAL QUALITY
R E M E M B E R D
OCT 18 1984
OFFICE OF THE DIRECTOR

LEGISLATIVE COUNSEL
S101 State Capitol
Salem, Oregon 97310

ARR Number: 5664

October 12, 1984

Administrative Rule Review
REPORT
to the
Legislative Counsel Committee
(Pursuant to ORS 183.720)

State Agency: Environmental Quality Commission

Rule: Pollution control facility tax credits

These rules were filed with the Secretary of State on July 13, 1984, and became effective on that date.

The rules consist of new rules (designated OAR 340-16-005 to 16-050), amendments of existing rules (OAR 340-11-200, which appears to be new rule 16-045, and 340-26-001) and repeal of an existing rule (OAR 340-26-030).

The amendment of rule 26-001 and repealed rule 26-030 deal with tax credits for approved alternative field sanitation methods and facilities, a matter incorporated in the new rules. The new rules include provisions relating to purpose, definitions, procedures for receiving preliminary and final tax credit certification, qualification of facilities for tax credits, determination of percentage of certified facility cost allocable to pollution control, procedure to revoke certification, procedures for transfer of tax credit certificates, fees for final tax credit certification and taxpayers receiving tax credits.

The rules are described as "needed to carry out the statutory authority given the EQC to adopt rules and to provide better guidance to the DEQ staff, the EQC and tax credit applicants." The rules also purport to reflect changes in the statutes relating to the pollution control tax credit program made by the 1983 legislature.

DETERMINATIONS

(Questions 1 and 2 pursuant to ORS 183.720(3))

(Question 3 pursuant to request of Committee)

1. Does the rule appear to be within the intent and scope of the enabling legislation purporting to authorize its adoption? No, in part. The enabling legislation is ORS 468.020 and 468.150 to 468.190.
2. Does the rule raise any constitutional issue other than described in Question 1? No.
3. Does violation of the rule subject the violator to a criminal or civil penalty? Yes. ORS 468.140 (1)(c) imposes a civil penalty for violation of any rule of the commission adopted pursuant to ORS chapter 468, and that penalty may apply in respect to some provisions of these rules.

DISCUSSION AND COMMENT

Intent and scope of enabling legislation

Two provisions of these rules of the Environmental Quality Commission relating to pollution control facility tax credits appear to be inconsistent with pertinent statutory provisions and, for that reason, do not appear to be within the intent and scope of the enabling legislation.

The rule in question is new OAR 340-16-045, relating to fees for final tax credit certification. The rule provisions in question appear in subsections (3) and (4) of the rule, which read:

(3) The application processing fee shall be refunded in whole if:

(a) The Department determines the application is incomplete for processing and applicant fails to submit requested information within 180 days of date when the Department requested the information; or

(b) The application is rejected; or

(c) The applicant withdraws the application before final certification or denial by the Commission.

(4) The application processing fee shall be refunded in part if the final certified cost is less than the facility cost claimed in the original application. The refund shall be calculated by subtracting one-half of one percent of the actual certified cost of the facility from the amount of the application processing fee submitted with the application. If that calculation yields zero or a negative number, no refund shall be made.

The pertinent statutory provisions appear in ORS 468.165 (4) and (5), which read:

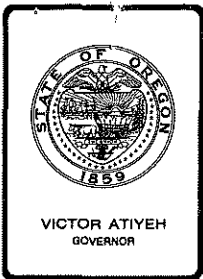
(4) The application shall be accompanied by a fee established under subsection (5) of this section. The fee may be refunded if the application for certification is rejected.

(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 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. The fee may vary according to the size and complexity of the facility. The fees shall not be considered by the commission as part of the cost of the facility to be certified.

ORS 468.165 (4) permits an application fee to be refunded in whole only if the application for certification is rejected. The provisions in OAR 340-16-045 (3)(a) and (c) allowing the fee to be refunded in its entirety if the applicant fails to provide additional information or if the applicant withdraws the application before the commission approves or denies the certification appear to include instances for allowing a refund that are not permitted under the statute.

To the extent excess fees are refunded under subsection (4) of the rule, the rule appears to conflict with ORS 468.165 (5), which specifically addresses the disposition of excess fees by stating that "[a]ny excess fees shall be held by the department and shall be used by the commission to reduce any future fee increases."



Environmental Quality Commission

Mailing Address: BOX 1760, PORTLAND, OR 97207

522 SOUTHWEST 5th AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

MEMORANDUM

To: Environmental Quality Commission

From: Director

Subject: Agenda Item E, March 8, 1985, EQC Meeting

Request for Variance from OAR 340-61-040(5)(a) (Discharge of Pollutants into Public Waters) for Weyerhaeuser Company, Springfield - Truck Road Landfill

Background

The Weyerhaeuser Company owns a closed industrial waste disposal site located southeast of Springfield, Oregon, known as the Truck Road Landfill. This 20-acre site opened in the late 1940s and closed during the fall of 1982. It was used primarily to dispose of log pond dredgings and fly ash. In the past, the site also received woodwaste, lime grits and miscellaneous mill trash. The last Solid Waste Disposal Permit expired December 31, 1982.

Although the landfill no longer receives waste, leachate will continue to discharge for many years because of the location and topography of the site. Leachate flows range from 3 gallons per minute (gpm) in the summer to several hundred gpm during storm events. Leachate flows are 70 gpm or less 90% of the time. The leachate is characterized by high levels of color, conductivity, total dissolved solids, sodium, bicarbonate alkalinity, total organic carbon, biochemical oxygen demand (BOD), chemical oxygen demand (COD) and lignin-tannin. Leachate discharges through an easement across private land in a drainage ditch for a distance of approximately 1/2 mile before it enters the Willamette River. During the winter months, the leachate is joined by area storm water runoff and reaches the river. During the summer, leachate does not reach the river. Sampling of the river has not shown any adverse impact.

Weyerhaeuser made a number of significant on-site improvements between 1978 and 1982 attempting to reduce the amount of leachate. An extensive drain system was installed to divert non-contaminated surface water from the landfill. Contouring and covering were improved and the working/filling area was reduced. In October 1979, the company decided to close the landfill because their consulting engineer's report showed leachate treatment and disposal alternatives were ". . . technically unfeasible or cost-prohibitive or impractical."

In October 1983, a new law went into effect that required sites that closed after January 1980 to obtain a closure permit from the Department. Weyerhaeuser has applied for the required permit; however, it cannot be issued if the site does not comply with Department rules (OAR 340-61-026(3)).

Weyerhaeuser has applied for a temporary variance to allow the discharge of leachate until November 1, 1985. The requested variance would allow the Department to issue the closure permit and allow Weyerhaeuser time to design and construct a sewer line to transport the leachate to the regional wastewater treatment plant (RWWTTP).

ORS 459.225(3) allows the Commission to grant such a variance if conditions exist that are beyond the control of the applicant or render strict compliance unreasonable, burdensome, or impractical.

Alternatives and Evaluation

The following alternatives exist for dealing with this situation:

1. Sewer the leachate and transport it to the regional sewer system.

Since the site closed in 1982, there has been significant growth by the City of Springfield in the direction of the landfill. Electrical power and sewers are now available in the vicinity of the site, and the potential exists to treat the leachate at the Eugene-Springfield regional wastewater treatment plant, an advanced secondary treatment facility. At this time, the sewer system is approximately 1/4 mile from the site.

Weyerhaeuser has applied for a temporary variance to allow the discharge of leachate until November 1, 1985. During that time, they propose to collect the leachate and design and construct a line to the sewer system, pending acceptance of the waste by the Metropolitan Wastewater Management Commission. The initial estimated cost of this option is approximately \$150,000. They have proposed the following schedule for completion of this project:

- a. January through April 1985 - Consultant study, preliminary engineering.
- b. May 1985 - Submit proposal to DEQ and Metropolitan Wastewater Management Commission (MWMC) of Eugene-Springfield.
- c. June 1985 - Complete engineering; submit internal appropriations request.
- d. July 1985 - Notice of Construction to DEQ.
- e. August through September 1985 - Construction.
- f. October 1985 - Project start-up.
- g. November 1, 1985 - Project completion.

Weyerhaeuser has also obtained a temporary easement allowing the discharge of leachate through the drainage ditch across the Gordon Tripp property. That drainage ditch flows to the Willamette River. This temporary easement will expire on November 1, 1985.

This option provides the best treatment of the leachate at the lowest cost.

2. Collect the leachate and dispose of it on-site.

Traditional on-site treatment of leachate has consisted of collection and storage in a pond followed by spray irrigation, using on-site soils for treatment and disposal. At this site, the limited amount of property owned by Weyerhaeuser and the steep topography preclude this as a viable option. Forty to fifty acres would be needed to adequately dispose of the volume of leachate that is generated; however, the entire site is only half that size. In the staff's opinion, the potential for groundwater contamination and uncontrolled runoff of leachate with subsequent discharge to surface water would increase under this alternative.

3. Transport and treat the leachate at the Weyerhaeuser Springfield pulp mill wastewater treatment system.

This alternative was investigated in the past by Weyerhaeuser's consulting engineer. The cost of constructing a pump station and a three-mile long sewer line to the mill's treatment system would be in excess of \$357,000 (1979 dollars) and seems prohibitive compared with the cost of the 1/4 mile sewer line to the MWMC sewer option. In addition, the pulp mill wastewater treatment system is near capacity now and has already had some water quality standard violations. It is unlikely that the existing mill wastewater system could adequately treat the volume and strength of the leachate generated at the Truck Road Landfill.

4. Do nothing.

Legally this is not an alternative. Either a water quality permit to allow permanent discharge or control and acceptable treatment of the leachate is required. The issuance of a water quality permit is really not a viable long-term option either. The land where the leachate drains is zoned residential and will undoubtedly be fully developed with housing in the near future. New subdivisions are only a few hundred yards away now. The continued discharge of leachate through a newly developed residential area will result in nuisance complaints and is unacceptable.

Reviewing the above alternatives, Department staff recommends that off-site treatment of leachate at the regional wastewater treatment plant is the most practical alternative. It will remove leachate from the area, and treat and dispose of it properly. No practical alternative exists that could immediately stop the discharge of leachate. A requirement should be

added to the applicant's schedule requiring that by June 1, 1985, Weyerhaeuser Company present the Department some alternative solution if it is found that leachate cannot be disposed at the regional wastewater treatment plant.

The following alternatives are available to the Commission:

1. Grant the variance as requested by the applicant with final completion date of November 1, 1985. This would allow time for planning, design and construction of facilities and allow issuance of the closure permit.
2. Grant the variance with a compliance date sooner than November 1, 1985. Since it's not likely that sewers could be built prior to the above date, the Commission might require an attempt at on-site treatment and disposal. Because of previously described site constraints (small area and steep slopes), on-site treatment and disposal is not considered a viable solution even on a temporary basis. Further, little would be gained environmentally since leachate discharges diminish during the summer months.
3. Deny the variance request and require immediate compliance. Again, because of site constraints, leachate will continue to be generated and discharged. Proper control facilities must be carefully planned and constructed. Pursuing this alternative would lead only to enforcement without a practical solution.

Summation

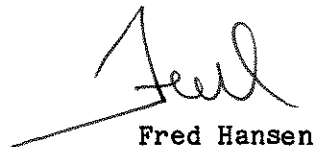
1. The Weyerhaeuser Company closed its Truck Road Landfill located in Springfield, Oregon, in 1982.
2. The company undertook extensive measures to control or eliminate leachate generated from the landfill. However, because of its location and topography, leachate continues to be generated and discharged off-site, ultimately reaching the Willamette River during the winter months in violation of administrative rules. Sampling of the river has not shown adverse impact.
3. Weyerhaeuser Company has requested a variance which would allow them to continue to discharge leachate until November 1, 1985. On that date the company intends to discharge all leachate to the regional wastewater treatment plant. Connection to the regional sewer system would provide the best treatment of the leachate at the lowest cost.
4. The Commission is authorized by ORS 459.225 to grant a variance if circumstances exist that are beyond the control of the applicant or render strict compliance unreasonable, burdensome or impractical.
5. A new law went into effect requiring disposal sites which closed after January 1980 to obtain a Solid Waste Disposal Site Closure Permit.
6. Because leachate is discharged in violation of the solid waste rules, the Department cannot issue a solid waste permit without a variance.

7. The decision as to whether or not the leachate will be accepted at the sewage treatment plant rests solely with the Metropolitan Wastewater Management Commission, not Weyerhaeuser.
8. These circumstances are found to render strict compliance unreasonable, burdensome or impractical:
 - a. The leachate discharge cannot be immediately connected to the sewer system. Time is needed to negotiate acceptance of the leachate with MWMC, design the leachate transport line and construct the transport line from the landfill to the sewer system.
 - b. Requiring immediate compliance would lead to enforcement without a practical solution. No practical alternatives exist that could immediately stop the discharge of leachate.

Director's Recommendation

Based on the findings in the Summation, it is recommended that the Commission grant a variance to the Weyerhaeuser Company, Springfield, Oregon, from OAR 340-61-040(5)(a) for the discharge of pollutants from the Truck Road Landfill into public waters, until November 1, 1985, subject to the following compliance schedule:

1. By May 15, 1985, complete design study to discharge leachate to the regional wastewater treatment plant.
2. By June 1, 1985, submit an alternative treatment and disposal plan to Department staff for review and approval if discharge to the regional wastewater treatment plant is not feasible.
3. By June 15, 1985, submit for Department approval complete engineering design specifications to eliminate the discharge of leachate from the Truck Road Landfill.
4. By October 1, 1985, complete construction of the approved leachate disposal system.
5. By November 1, 1985, eliminate the discharge of leachate to public waters from the Truck Road Landfill.


Fred Hansen

Attachment: 1. Letter from Weyerhaeuser dated January 3, 1985, requesting variance.

Joseph F. Schultz
Larry H. Lowenkron
229-6237
February 21, 1985
SC2058



Weyerhaeuser Company

RECEIVED

JAN - 8 1985

P.O. Box 275
Springfield, Oregon 97477
A/C 503 • 746-2511

January 3, 1985

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY
SALEM, OFFICE

Solid Waste Division
Dept. of Environmental Quality
RECEIVED
JAN 16 1985

Larry Lowenkron
Regional Engineer
Dept. of Environmental Quality
895 Summer Lane
Salem, Oregon 97310

Ref: Your letter of 11/14/84

Dear Larry:

We request a temporary variance per ORS 459.225, to discharge leachate from our truck road landfill. We intend to sewer the leachate no later than November 1, 1985, pending acceptance of the waste by the City of Springfield and the Metropolitan Waste-water Management Commission.

Enclosed for your reference are copies of preliminary approvals from the City of Springfield, Dept. of Public Works and an easement agreement with our affected neighbor.

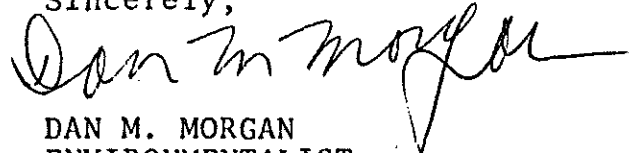
Following is a preliminary timetable outlining our control strategy:

Jan-April:	Consultant study, preliminary engineering
May:	Submit proposal to DEQ, MWMC, Springfield
June:	Complete engineering; Submit internal appropriation Request
July:	NOC to DEQ
Aug-Sept:	Construction
Oct:	Start-up
Nov. 1:	Project completion

We intend to meet with our consultant, CH₂M Hill, next week. If there are any changes in this timetable as a result of this meeting, I will let you know.

I hope that this is sufficient to receive the requested variance.
However, if you do need further information, please call me.

Sincerely,



DAN M. MORGAN
ENVIRONMENTALIST

DMM/pa

Enclosures (3)

cc: Jerry Bollen (11)
Bill Chase (10)
Bob Dickson (35)

TEMPORARY EASEMENT

Effective as of the 3rd day of January, 1985, Gordon Tripp, 36676 Brand S Road, Springfield, Oregon 97478, hereinafter designated as "TRIPP" hereby grants to Weyerhaeuser Company, P.O. Box 275, Springfield, Oregon 97477, hereinafter designated as the "PERMITTEE" the non-exclusive right, license and permission to enter, be upon, and use TRIPP'S property in the SW $\frac{1}{4}$ of Section 3, Township 18 South, Range 2 West, as designated on the attached Exhibit A. This permission is granted for the purpose of the temporary discharge of leachate from PERMITTEE'S adjoining landfill into the existing drainage ditch and to complete engineering and design work related to a permanent leachate control strategy.

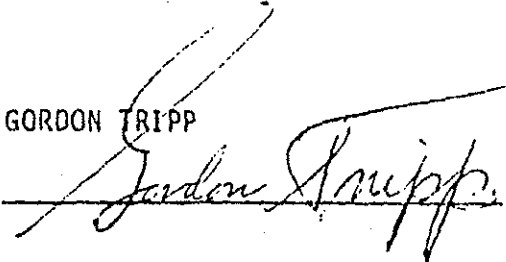
In consideration for the foregoing easement, PERMITTEE will take no future legal action concerning a permanent right-of-way across TRIPP'S property.

The following terms and conditions shall apply:

1. PERMITTEE assumes all risks of injury or damage to its property or that of third parties in connection with the exercise of rights granted by this easement.
2. PERMITTEE shall pay for any damage to TRIPP'S property resulting from operations under this permit.
3. This easement shall expire on November 1, 1985.

IN WITNESS WHEREOF, TRIPP has executed this easement in duplicate and PERMITTEE has accepted its terms as of the above date.

GORDON TRIPP



WEYERHAEUSER COMPANY

BY 

Quincy M. Powers
Region Vice President

STEPHEN D. GAGER
D.L.C. 61

SW Cor DLC 61

NE Cor DLC 48

WOVERNAEUSER
LANDFILL



LOT 6

DRAINAGE DITCH

TRIPP PROPERTY

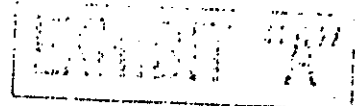
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JOHN SMITH
D.L.C. 48

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SPRINGFIELD BRANCH

PT. SEC. 3 T. 18 S. R. 2 W. W.M.



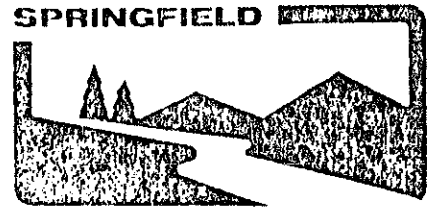
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BRANCH OWNERSHIP

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CITY OF SPRINGFIELD

Department of Public Works

1885-1985 Springfield Centennial year

December 18, 1984

Mr. Dan Morgan
Weyerhaeuser Company
P. O. Box 275
Springfield, OR 97478

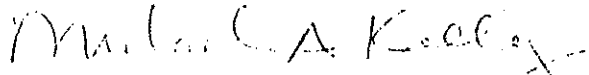

Subject: Leachate From Truck Road Landfill

Dear Mr. Morgan:

We have received a copy of a November 14, 1984 letter to you from the Department of Environmental Quality outlining the requirements for leachate control at the subject site. Although this site is outside the corporate limits of Springfield, we would be most happy to assist you in any way we can. I know that you have had some preliminary discussions with John Thomas on this topic but we have had no specific requests made of us to date.

Please contact me at your convenience if we can be of assistance.

Very truly yours,


Michael A. Kelly
Director of Public Works 

MAK:sk

cc: John Thomas



Environmental Quality Commission

Mailing Address: BOX 1760, PORTLAND, OR 97207

522 SOUTHWEST 5th AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

MEMORANDUM

TO: Environmental Quality Commission DATE: March 8, 1985

FROM: Linda K. Zucker, ^{LB}Hearings Officer

SUBJECT: Agenda Item F - Appeal of DEQ Denial of Clean Water Act, Section 401 Certification to Lava Diversion Project, FERC No. 5205, Deschutes River, Oregon.

General Energy Development, Inc. (GED) applied to the Department of Environmental Quality (DEQ) for water quality standards compliance certification for the Lava Diversion Project, a planned hydroelectric project on the Deschutes River. Compliance certification is required by Section 401 of the Clean Water Act.

DEQ denied certification for failure to adequately address certain potential water quality impacts and for failure to provide a statement of land use compatibility. The water quality information has been provided and is no longer an issue.

GED continues to dispute DEQ authority to condition certification on submission of a statement of compatibility with the Deschutes County Comprehensive Plan and land use ordinances. GED asks the Environmental Quality Commission to find it meets the requirements of law and is entitled to certification.

Because no factual issues exist, the parties have agreed to have this matter brought before the Commission without a prior hearing. Instead, the parties have submitted the attached memoranda outlining their legal arguments. A summary of the memoranda precedes them.

LKZ:d
HDL624
Attachments

SUMMARY OF LEGAL MEMORANDA

FACTS

General Energy Development, Inc. (GED or Applicant) holds Permit No. 5205 issued by the Federal Energy Regulatory Commission (FERC) to plan and design the Lava Diversion Hydro Project on the Deschutes River south of Bend, Oregon. Before FERC may issue a license to construct, the project must satisfy the requirements of Section 401 of the Clean Water Act. Section 401(a)(1) states that the licensed applicant shall provide the licensing agency (here FERC) "a certificate from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of section 301, 302, 303, 306 and 307 of this Act." These listed sections pertain to water quality effluent limitations, water quality standards, implementation plans, national performance standards and toxic and pretreatment effluent standards. None of the sections pertain to or mention compatibility with state, county, or local land use regulation. However, Section 401(d) also requires the state certifying agency to set out in the certification limitations or requirements to assure compliance with "any other appropriate requirement of State law. . ."

Relying on Section 401(d) and on state law requiring state agency decisions affecting land use to be made in accordance with local comprehensive plans and ordinances, the Oregon Department of Environmental Quality (DEQ) has denied certification to GED for its failure to supply DEQ with a statement that the project is compatible with the Deschutes County Comprehensive Plan and land use ordinances. This was the first time the DEQ has required a Section 401 applicant to obtain a "statement of compatibility."

In December, 1983 Deschutes County passed ordinances limiting hydroelectric development on the Deschutes River pending completion of a study assessing the cumulative impacts on the environment of numerous planned projects. Until the study is completed, any hydroelectric project must meet the special standards of the ordinances and must obtain a conditional use permit. GED has not obtained a conditional use permit from the County. Deschutes County has requested DEQ to withhold issuing any Section 401 certificates until after the study is over.

FIRST ISSUE

As a matter of law, was Deschutes County in error in failing to grant a statement of land use compatibility?

Applicant's Argument

Deschutes County land use law allows hydroelectric projects as conditional uses. Assuming compatibility with state land use law is a proper concern of DEQ when certifying projects under Section 401 of the Clean Water Act, DEQ should certify this project because it is authorized by state land use law. The test for DEQ to use in determining that the project should be certified is not whether a conditional use permit will ultimately be issued for this project, but simply whether hydroelectric projects are authorized by land use law.

Department's Argument

Oregon law requires DEQ decisions affecting land use to be compatible with local comprehensive plans and ordinances. While Deschutes County has passed an ordinance calling for a moratorium on proposed hydro development on the Deschutes River until July 1, 1985, the ordinance makes hydro projects eligible for conditional use permits prior to that date. GED could apply for such a permit but has not done so. Consequently, GED is not able to present a final determination that the project would be compatible with the standards of the ordinance. DEQ relies on local government's determination of land use compatibility and will not provide Section 401 certification without such a determination.

In any case, this issue should be resolved by GED and the county.

SECOND ISSUE

Can DEQ deny Section 401 certification under the Clean Water Act for reasons other than water quality?

Applicant's Argument

DEQ is going beyond its statutory power in requiring a statement of land use compatibility from Deschutes County. Land use compatibility is unrelated to Section 401 certification. Case law establishes that in the Federal Power Act Congress has preempted state licensing and permitting functions for hydroelectric power projects. Congress has delegated to the states only the limited duty to assure that project construction and operation will not violate applicable state water quality standards. Land use compatibility is unrelated to water quality standards. The county land use plan has nothing to do with water quality concerns. DEQ's previous failure to require compatibility statements recognizes this limitation.

The Clean Water Act, Section 401 does not allow the State of Oregon to delegate the question of water quality to Deschutes County. The power to decide whether a hydroelectric project will be built cannot be delegated to local government, as local veto would undermine the entire federal regulatory plan for hydroelectric licensing.

Department's Argument

The Clean Water Act establishes a joint system of state and federal control to preserve, protect and improve the nation's waters. In Section 401 Congress granted the states veto power over federal hydro project licensing by requiring applicants for licenses to obtain state certification. Section 401 provides a state two means of conditioning or refusing to certify a hydro project. First, under Section 401(a), state certification may be withheld if the project would have an adverse effect on water quality. Second, Section 401(d) provides the project must comply with "any other appropriate requirement of State law. . ."

Under the provisions of Section 401(d), DEQ believes it may condition certification on a project's ability to obtain a statement of land use compatibility from local government.

When possible, statutes should be read to give effect to their plain meaning. Section 401 first says the state may require compliance with listed water quality criteria. It then says projects must meet any other appropriate requirement of state law. The plain meaning of the section is that both water quality criteria and other appropriate requirements of state law may be considered. This cumulative language demonstrates an intention to extend the scope of Section 401 beyond water quality standards.

Federal law does not preempt state law in this case. Developing case law supports an increasingly broad view of state authority to regulate power projects where the state action is not in direct conflict with federal law. In this case federal law provides that state law must be satisfied before a Section 401 permit is issued. State law provides that comprehensive plans and ordinances must be considered by DEQ before providing Section 401 certification. Oregon land use laws are not in conflict with either the Federal Power Act or the Clean Water Act. In denying certification DEQ satisfied both federal and state law.

Section 401(d) requires--or at least authorizes--consideration of state land use law in deciding whether to grant Section 401 certification. State land use law requires DEQ to consider comprehensive plans and land use ordinances when making decisions affecting land use. DEQ's coordination agreement with the state land use agency identifies Section 401 certification as a decision affecting land use. Moreover, because hydroelectric development on the Deschutes River clearly has a significant impact on present or future land uses, it is considered a land use decision. Consequently, DEQ must consider the Deschutes County land use plan, ordinances and determinations during the Section 401 certification process. Deschutes County has concluded and advised DEQ that the Lava Diversion Project is not consistent with the County's ordinances.

Case law supports DEQ's deference to local government determinations of land use compatibility.

As a matter of policy Oregon should be assertive in leading the nation in using Section 401 certification as a tool of effective comprehensive planned development of land and water resources. Certification is an important vehicle for influencing hydro power development decisions. DEQ's decision supports the Deschutes County planning effort and accords with the position and policies of the Oregon Department of Fish and Wildlife, Oregon Department of Energy, State Representative Tom Throop, and Save Benham Falls Committee.

THIRD ISSUE

Has DEQ violated the consistency standard of ORS 183.484 by failing to require previous Section 401 applicants to obtain a statement of compatibility?

Applicant's Argument

ORS 183.484(4)(b)(B) requires DEQ to be consistent in its application of standards and practices. DEQ contends that its coordination agreement with the state land use agency requires DEQ to condition Section 401 certification on an applicant's submission of a statement of land use compatibility. Several hydro developments have received Section 401 certification since January, 1983 without submitting a statement of compatibility. DEQ has not previously required a land use compatibility statement as a precondition to certification. Prior agency practice indicates that the statement is not necessary under Section 401.

DEQ's coordination agreement with the land use agency lists and summarizes DEQ programs, rules and decisions affecting land use. These lists deal with water quality and the programs deal with sewage works, industrial wastes, and similar concerns; they do not deal with hydroelectric licensing or Section 401 certification. This absence and DEQ's prior failure to require statements of compatibility indicate that the coordination agreement does not require it.

Department's Argument

Under Oregon law inconsistent agency action or departure from prior agency practice can be set aside if the inconsistency is not explained by the agency. While this project was the first project required to supply the DEQ with a local compatibility statement, this change in procedure was fully explained to the applicant. In a letter to the applicant, DEQ explained that it had been advised by legal counsel of the compatibility requirement in its coordination agreement with the land use agency, but

that DEQ had previously overlooked this provision. DEQ has since required at least 12 other hydroelectric projects to supply the statement and now requires local land use compatibility statements of all applicants for Section 401 certification.

Finally, even if this DEQ action were found to be inconsistent, the certification denial in this case is a proper change to correct prior erroneous agency procedure.

LKZ:d
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BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY

In Re:)
LAVA DIVERSION PROJECT)
FERC NO. 5205)
DESCHUTES RIVER, OREGON)

EQC
Hearing Section

DEC 13 1985

FACTS

General Energy Development, Inc. (GED) holds Permit No. 5205 from the Federal Energy Regulatory Commission (FERC) to plan and design the Lava Diversion Hydro Project on the Deschutes River south of Bend, Oregon. Before licensing by FERC, Section 401 of the Clean Water Act, 33 USC §1341 states that the licensed applicant shall provide the licensing agency (FERC) a "certification from the state in which the discharge originates or will originate . . . that the discharge will comply with the applicable provisions of §1311, 1312, 1313, 1316, and 1317 of [USC., Title 33]." These sections pertain to water quality affluent limitations, water quality standards, and implementation plans, national performance standards and toxic and pre-treatment affluent standards. None of the water quality sections pertain or mention compatibility with state, county, or local land use plans.

The staff of the Department of Environmental Quality (DEQ) has determined that the project, in addition to complying with water quality standards, must also obtain a "statement of compatibility" from Deschutes County. The "statement of compatibility" would state that the proposed use is allowed by

1 Deschutes County's comprehensive plan. This is the first time
2 the Department of Environmental Quality has required a 401 appli-
3 cant to obtain a "statement of compatibility".

4 On November 27, 1984, the DEQ issued its evaluation and
5 denied the requested certification on two grounds: First, eight
6 areas of potential water quality impacts were not adequately
7 addressed by GED. Secondly, GED was unable to obtain the cer-
8 tificate of compatibility from Deschutes County.

9 The questions regarding water quality impacts have now
10 been addressed by the applicant and are no longer at issue. The
11 only questions remaining concern the statement of compatibility
12 from Deschutes County.

13 In December of 1983, Deschutes County passed Ordinances
14 No. 83-058 and 83-066, copies of these ordinances are attached.
15 These ordinances allow hydro development on the Deschutes River
16 as a conditional use. They also impose a study period. During
17 the study period, small hydro development is permitted only if
18 the requirements of the ordinances are met. Deschutes County has
19 requested the DEQ withhold issuing any 401 certificates until
20 after the study period has been completed. During the interim,
21 the Deschutes County has refused to issue a statement of
22 compliance to GED.

23 Neil R. Bryant represents Arnold Irrigation District.
24 Arnold Irrigation District is involved in the development of the
25 project.

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ISSUES

1. Whether or not as a matter of law, Deschutes County was in error in failing to grant the statement of compatibility.
2. Whether or not the DEQ can deny 401 certification under the Clean Water Act for reasons other than water quality.
3. Whether or not the DEQ has violated the consistency standard of APA 183.484 by not requiring previous 401 applicants to obtain a statement of compatibility.

ARGUMENT

1. Deschutes County has adopted ordinances allowing for small hydro development under a conditional use process. Although the ordinances establish a study period, a conditional use permit can still be granted during the interim according to the terms of the ordinance. Consequently, the project is compatible with the plan. The issue is not whether or not a conditional use will ultimately be issued, but simply that the plan allows for such a use. The DEQ is not asking that Deschutes County make a decision as to whether or not the project will be granted a conditional use permit, but simply to acknowledge that such a use is allowed under the ordinances.

By judicial notice of the Deschutes County ordinances, the DEQ can acknowledge the compatibility.

2. The FERC regulations require that a water certificate be filed with the application for hydroelectric licensing. The certificate states that the project comply with

1 the Clean Water Act, §401. The §401 certificate pertains to
2 water quality standards and implementation plans. None of these
3 pertinent sections pertain to or mention compatibility with
4 state, county, or local land use plans.

5 The DEQ is going beyond its statutory authorization when
6 it requires a statement of land use compatibility from Deschutes
7 County. Land use compatibility is unrelated to §401 certificates.

8 As the New York Court of Appeals has explained:

9 "Section 21 (SUBD. [b]) of the Federal Water
10 Pollution Control Act [predecessor of present
11 §401] relinquishes only one element of the
12 otherwise exclusive jurisdiction granted the
13 Power Commission by the Federal Power Act. It
14 authorizes States to determine and certify
15 only the narrow question whether there is
16 'reasonable assurance' that the construction
17 and operation of a proposed project 'will not
18 violate applicable water quality standards' of
19 the State. That is all that Section 21 (SUBD.
20 [b]) did and all that it was designed to do.
21 Congress did not empower the States to recon-
22 sider matters, unrelated to their water quali-
23 ty standards, which the Power Commission has
24 within its exclusive jurisdiction under the
25 Federal Power Act." In the Matter of de Rham
26 vs. Diamond, 343 N.Y.S.2d 84, 295 NW2d 763,
768 (N.Y. 1973) (emphasis added).

19 The United States Supreme Court has clearly stated that
20 Congress has preempted state licensing and permit functions for
21 hydroelectric power through the Federal Power Act, 16 USC §92
22 et. seq. First Iowa Hydro-electric Cooperative vs. FPC, 383 US
23 152 (1946). However, Congress has delegated to the states cer-
24 tain limited functions. One of these limited functions is the
25 authority to protect the quality of the state's water through
26

1 Section 401 of the Clean Water Act. This limited delegation of
2 authority to the state does not allow the DEQ the right to regu-
3 late hydroelectric development with respect to matters other than
4 water quality. The DEQ has exceeded its delegated authority by
5 requiring a certificate of compatibility.

6 In Port Authority of New York vs. Williams, 469 N.Y.S.2d
7 620, 457 NE2d 726 (N.Y. 1983), the New York Court of Appeals
8 held:

9 "In acting on the application for State
10 Section 401 certification of a hydroelectric
11 project as a prerequisite to the issuance of a
12 Federal license therefor, the [New York] Com-
13 missioner of Environmental Conservation is
14 limited to determining whether, applicable
water quality standards will be met and is not
empowered to base his decision on a balancing
of need for the project against adverse
environmental impact." 457 NE2d at 727

15 In Power Authority of New York, supra, the Commissioner
16 of Environmental Conservation was responsible for issuing the 401
17 certificate for the State of New York. The commissioner did not
18 limit his determination to water quality standards, but included
19 the requirement of a balancing of the needs of a project against
20 adverse environmental impact. The court responded:

21 "Congress, by the Federal Power Act (U.S.
22 Code, tit. 16, §792 et seq), has vested the
23 Federal Power Commission with broad respon-
24 sibility for the development of national poli-
25 cies in the area of electric power, granting
26 it sweeping powers and a specific planning
responsibility with respect to the regulation
and licensing of hydroelectric facilities
affecting the navigable waters of the United
States. The Commission's jurisdiction with

1 respect to such projects preempts all State
2 licensing and permit functions. [Footnotes
and authorities omitted.]

3 Section 21 (subd. [b]) of the Federal Water
4 Pollution Control Act relinquishes only one
5 element of the otherwise exclusive jurisdic-
6 tion granted the Power Commission by the
7 Federal Power Act. It authorizes States to
8 determine and certify only the narrow question
9 whether there is 'reasonable assurance' that
10 the construction and operation of a proposed
11 project 'will not violate applicable water
12 quality standards' of the State. That is all
13 that section 21 (subd. [b] did, and all that
14 it was designed to do. Congress did not
15 empower the States to reconsider matters,
16 unrelated to their water quality standards,
17 which the Power Commission has within its
18 exclusive jurisdiction under the Federal Power
19 Act.

20 With this in mind, it is clear that the State
21 Commissioner was required only to consider
22 water quality standards which may be affected
23 by discharges from Con Ed's project into the
24 Hudson River -- in other words, to ascertain
25 whether the project would offend against the
26 applicable regulations (6 NYCRR 701.3)
governing 'Class B' waters, the classification
of the River at Cornwall (6 NYCRR 858.4). It
is equally clear that the Commissioner has
neither the authority nor the duty to delve
into the many other issues -- which had been
investigated and decided by the Federal Power
Commission in the course of the extensive pro-
ceedings it had conducted". Matter of de
Rham, supra, 457 NE2d at 730, at 763.
[Emphasis added]

21 The Oregon Attorney General's Opinion dated December 13,
22 1983 (OP-5506) concludes that state statutes are pre-empted by
23 Federal statutes when state authority ". . . stands as an
24 obstacle to the accomplishment and execution of the full process
25 and objectives of Congress". Petty vs. Campbell, 402 US 637, 649
26

1 (1971), quoting Hines vs. Badidowitz, 312 US 52, 67 (1941).

2 Clearly, compliance with Deschutes County's land use
3 plan has nothing to do with water quality concerns. The DEQ has
4 recognized this in the past by not requiring a compatibility sta-
5 tement. It is the DEQ's responsibility to determine water
6 quality issues. The counties do not have the personnel qualified
7 to make water quality decisions for small hydroelectric projects.
8 The DEQ is mandated to provide this service.

9 The Clean Water Act §401 does not allow the State of
10 Oregon to delegate the question of water quality to Deschutes
11 County. If this were the case, every county, every municipality,
12 in Oregon would have the power to decide whether or not a
13 hydroelectric project would be built. Local vetoes over
14 hydroelectric projects would undermine the entire Federal
15 regulatory plan for the licensing of hydroelectric.

16 3. APA 183.484 (4)(b)(B) requires that the DEQ be con-
17 sistent in its applications of standards and practices. This
18 consistency would also apply to the 401 certifications. To the
19 best of our knowledge, this is the first time the DEQ has
20 required a statement of land use compatibility under a 401 cer-
21 tification. The DEQ maintains that this is required pursuant to
22 an "Agreement for Coordination with Land Conservation and
23 Development Commission" dated January, 1983. Several other hydro
24 developments have received 401 certifications since January of
25 1983 without the requirement of a statement of compatibility.

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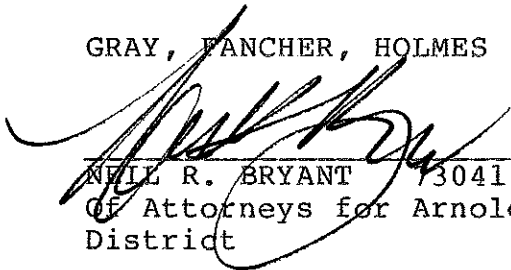
1 Prior agency practice indicates such a statement is not
2 necessary.

3 It is not reasonable to require a statement of com-
4 patibility for the reasons stated above and the fact that the
5 Agreement for Coordination is not intended to cover this
6 situation. Attached to the Agreement for Coordination is a list
7 and summary of DEQ programs, rules, and decisions affecting land
8 use. These lists deal with water quality and includes nothing
9 that pertains to hydroelectric licensing or 401 certification.
10 Most of the programs deal with sewerage works, industrial waste,
11 and similar concerns. It is logical to assume DEQ has not
12 required a statement of compatibility in the past, because the
13 Agreement for Coordination did not require it under existing
14 programs.

15
16 CONCLUSION

17 The 401 certificate should be issued because the appli-
18 cant has met the water quality standards of the State of Oregon.
19 DEQ is without authority to base its decision upon other grounds
20 than their water quality.

21 GRAY, FANCHER, HOLMES & HURLEY

22
23 
24 NEIL R. BRYANT 3041
25 Of Attorneys for Arnold Irrigation
26 District

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Amending *
Deschutes County Zoning Ordin- *
ance of 1979, Ordinance No. *
PL-15, as Amended, by the *
Addition of the Deschutes *
River Combining Zone, Provid- *
ing For a Study Period, Pro- *
viding For Exceptions, Pro- *
viding for Repeal; and *
Declaring an Emergency. *

ORDINANCE NO. 83-058

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY,
OREGON, ORDAINS as follows:

Section 1. Ordinance No. PL-15, Deschutes County Zoning Ordinance of 1979, as amended, is amended by the addition of Section 4.195, Deschutes River Combining Zone, as set out below:

"Section 4.195. Deschutes River Combining Zone.

DR. In any Deschutes River Combining Zone the requirements and standards of this Section shall apply in addition to those specified in this Ordinance for the underlying zone and other applicable combining zones. In the event of a conflict in requirements and standards of this Section with the requirements and standards for the underlying zone, or other applicable combining zones, the provisions of this Section shall take precedence.

- (1) Purpose. The purpose of the Deschutes River Combining Zone is to maintain the quality and quantity of the streamflows; to protect fish and wildlife; and protect the visual, environmental, and aesthetic attributes of the Deschutes River, its tributaries, diversion points, and adjacent areas within the area of the DR Zone.
- (2) Application of Section. This Section shall apply to all land use actions in the area of the DR Zone defined as 200' from the mean high water mark, 200' measured at a right angle from the river meander, or the identified floodplain, whichever is greater on and along the Deschutes River, Little Deschutes River, Spring River, Fall River, Tumalo Creek, Paulina Creek, Squaw Creek, and the Crooked River, as identified on the Deschutes

River Combining Zone map, marked Exhibit "A", attached hereto and by this reference incorporated herein.

- (3) Uses Permitted Conditionally. In a zone or zones with which the DR Zone is combined, those uses not otherwise exempt from this Section shall be permitted conditionally. The requirements and standards of this Section shall apply in addition to the general conditional use criteria and specific use standards set forth in Article 8, the requirements and standards for the underlying zone, and the requirements and standards of all other applicable combining zones.
- (4) Specific Use Requirements and Standards. The following requirements and standards apply to land uses within the DR Zone.
 - (A) The use shall maintain existing stream flow of any affected river or stream at present quality and quantity.
 - (B) The use shall conserve and protect fish and wildlife habitat.
 - (C) The use shall maintain public access to any affected river or stream.
 - (D) The use shall maintain the scenic, visual, environmental and aesthetic qualities of the affected river or stream.
 - (E) The use shall not impair recreational opportunities of the river or stream by the public.
 - (F) The use shall have no significant negative impact, individually or cumulatively, on existing and viable potential uses of the river or stream.
 - (G) Any application for a hydroelectric project shall affirmatively show that the use will further the purpose of this Section, and that the applicant has sufficiently addressed the issues to be resolved during the study period as set forth in this Section.
 - (H) The use shall meet the State of Oregon Department of Environmental Quality noise standards.

- (I) That fill and removal activities meet State of Oregon requirements and provide for the reclamation of disturbed areas so that no significant short or long term negative impacts occur.
 - (J) That when the use is on or affects Federal or State land, that the use is in conformance with any integovernmental planning agreement between Deschutes County and affected Federal or State agencies.
 - (K) That any special district involved in any manner with an application for a land use permit has complied with the requirements of ORS 197.185 and the proposed activity is in conformity with the special district's inter-governmental cooperative agreement with Deschutes County if the district does not otherwise have an acknowledged comprehensive land use plan.
- (5) Study Period. A study shall be conducted as set out below by a joint task force to be appointed by the Board of County Commissioners.
- (A) There is hereby declared a study period for all land use activities within the area within the DR Zone.
 - (B) The study period shall be for the period February 1, 1984 to July 31, 1985. Following review and public hearing, and prior to the termination date, and if deemed necessary by the Board of County Commissioners, the date of termination of the study period may be extended by ordinance for a subsequent period of up to six months.
 - (C) The study period shall include, but not be limited to, the following:
 - 1. Detailed mapping and instream flow studies of the Deschutes River, its tributaries, its diversion points, and its adjacent areas to allow precise review of the boundaries of the overlay zone.
 - 2. The development of a river system model at standards not less stringent than those adopted by the Northwest Power Planning Council to complete the re-

quirements of the studies identified in Section 1204, Northwest Power Planning Council "Columbia River Basin Fish and Wildlife Program" and Chapter 10, Sections 14.2 and 14.3, Northwest Power Planning Council, "Northwest Conservation and Electric Power Plan".

3. Identification of uses and development that may be permitted utilizing the balancing tests set forth in Statewide Planning Goal 5, and establish detailed standards and criteria for development within the DR zone.
4. The study of the individual and cumulative effects of all known and potential hydroelectric sites and sources on the Deschutes River, its tributaries, diversion points, adjacent areas, and stream flows.
5. The development of a program in recognition of the cumulative effects to balance the conflicting uses of the natural resource and the hydroelectric projects as required by Statewide Planning Goal 5.
6. The study of river and stream diversion canals to the extent funding is identified for such purposes.
7. Identification of current and potential river uses, and the economic value of such uses.
8. Preparation of amendments to the Comprehensive Plans and implementing ordinances to balance the conflicting uses on the Deschutes River, its tributaries, diversion points, adjacent areas, and streamflows.

(D) During the study period, the County shall participate with the Power Council in the completion of the Power Council's hydroelectric study and take affirmative action with respect to the apparent conflict between the provisions of PURPA and the Northwest Power Act in order to help facilitate resolution of the conflict.

- (6) Exemptions. The following shall be exempt from this Section:
- (A) Continuation of a conforming or nonconforming use, or a conforming or nonconforming structure, constructed prior to January 1, 1984.
 - (B) A use or structure, including a conforming or nonconforming use, or a conforming or nonconforming structure, for which a minor site plan for the construction, alteration, restoration, or replacement is necessary.
 - (C) Construction or reconstruction of a single family residence.
 - (D) The reconstruction or repair of an existing dam, provided such reconstruction or repair does not alter the characteristics of the water impoundment and does not otherwise affect existing stream flow.
 - (E) Any use or accessory use permitted outright or conditionally in the underlying zone pursuant to a Cluster Development approval, Planned Development approval, Destination Resort approval, Dude Ranch approval, Planned Community approval, master plan approval, or site plan approval dated prior to January 1, 1984.
 - (F) The employment of land for farm or forest use."

Section 2. This Ordinance is repealed February 1, 1986, or upon the completion of the study provided for in Section 4.195 of Ordinance No. PL-15, Deschutes County Zoning Ordinance of 1979, as amended, and the adoption of a recommended comprehensive plan and implementing ordinance amendments, whichever occurs first.

Section 3. This Ordinance being necessary for the immediate preservation of public peace, health and safety, an emergency is declared to exist, and this Ordinance takes effect on its passage.

DATED this _____ day of _____, 1983.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ALBERT A. YOUNG, Chairman

ATTEST:

LOIS BRISTOW PRANTE, Commissioner

Recording Secretary

LAURENCE A. TUTTLE, Commissioner

LEGISLATIVE FINDINGS

The following Legislative Findings are hereby made in support of adoption of Ordinance No. 83-058.

1. Statewide Planning Goal 5 requires the users of land within the State "[t]o conserve open space and protect natural and scenic resources", by developing "[p]rograms that will: (1) insure open space, (2) protect scenic and historic areas and natural resources for future generations, and (3) promote healthy and visually attractive environments in harmony with the natural landscape character" Statewide Planning Goal 5 further provides that, "[w]here conflicting uses have been identified the economic, social, environmental and energy consequences of the conflicting uses shall be determined and programs developed to achieve the goal."
2. The Deschutes County Year 2000 Comprehensive Plan (Plan), portions of which are set forth in Appendix "A", identify uses for the Deschutes River, its tributaries, diversions, adjacent areas, and stream flows, all of which are herein-after referred to as the "Deschutes River", which are intended to implement Statewide Planning Goal 5.
3. Hydroelectric projects on or adjacent to the Deschutes River, or which divert water from the Deschutes River, conflict with the Plan and no program has been developed by Deschutes County to achieve Statewide Planning Goal 5.
4. The Plan provides that tourism and recreation are critically important components of the local economy. The economic elements of the Plans make it imperative that the Deschutes River be preserved as a resource to be utilized by tourists.
5. A number of Federal acts and actions have been promulgated which may impact the Deschutes River, such as the Northwest Conservation and Electric Power Plan (Power Plan) developed pursuant to the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act) as adopted by the Northwest Power Planning Council (Power Council), the Columbia River Basic Fish and Wildlife Program (Fish Plan) as adopted by the Power Council, the Public Utilities Regulatory Policy Act (PURPA), and the U. S. Forest Service Deschutes Forest Plan (Forest Plan).
6. The Forest Plan designates segments of the Deschutes River as a recreational area and proposes its inclusion under the Wild and Scenic Rivers Act.

7. A number of applications for hydroelectric generating facilities and diversions have been filed for river and streams in the Deschutes River Basin.
8. The Fish Plan and Power Plan adopted by the Power Council identify serious potential cumulative impacts from hydroelectric generating and diversion facilities which cannot be assessed by evaluating projects on a case by case basis.
9. The necessary studies, including environmental impact studies, to determine the cumulative impacts of the construction and operation of hydroelectric diversion, generating, and transmission facilities on the economic, social, environmental and energy consequences of identified and potential conflicting uses of the Deschutes River which are a condition precedent to the implementation of programs to meet Statewide Planning Goal 5 have not yet been accomplished.
10. The Deschutes River, conserved as open space and protected as a natural and scenic resource, is a critically important component to the tourism and recreation industry in Deschutes County.
11. Hydroelectric generating and diversion facilities impact open space, natural and scenic resources, and recreational opportunities which are among the basic elements of a successful tourist industry.
12. The Federal Power Act (FPA) which created FERC specifically recognizes "state action". The Act provides that FERC's powers shall not be exercised as ". . . affecting . . . or in any way to interfere with the laws of the respective state relating to the control, appropriation, use, or distribution of water used . . . for municipal or other uses . . .", and Section 9(b) of the FPA requires compliance with local laws implementing state action before developing the use, diversion, or appropriation of water, water course bed, or watercourse bank.
13. The Power Plan states that the Power Council will conduct, during the next two years, a stream-by-stream analysis to rank hydroelectric sites according to their impacts on fish and wildlife.
14. The Oregon Economic Department has determined that in 1982 out-of-state tourism spent \$100,000,000 in Deschutes County.
15. The Department of Fish and Wildlife has estimated fishing and hunting generate up to \$10,000,000.00 to the Deschutes County economy annually.

16. The condition of the Deschutes River may be irreparably damaged as a tourist attraction, a recreational resource, a fish and wildlife habitat, a scenic waterway, and a generally clean and safe natural resource by the unstudied placement of any of the proposed hydroelectric generating facilities or other major new facilities within rural Deschutes County.
17. The State Attorney General has recognized local jurisdiction's land use role in the use and development of water resources such as found in the Deschutes River Basin, and the authority of the local jurisdiction to adopt ordinances regulating the land use aspect of such resources.
18. That exemptions from the standards and criteria in the Ordinance are based upon the recognition of prior approvals and uses which at most represent minor impacts and are in conformance with the Plan and implementing ordinances, or may be continued pursuant to existing State law.

DATED this _____ day of _____, 1983.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ALBERT A. YOUNG, Chairman

ATTEST:

LOIS BRISTOW PRANTE, Commissioner

Recording Secretary

LAURENCE A. TUTTLE, Commissioner

APPENDIX "A"

The following are excerpts from pertinent portions of Deschutes River Goals and Policies contained in the Deschutes County Year 2000 Comprehensive Plan, adopted November 1, 1979:

WATER RESOURCES

"GOAL

1. To maintain existing water supplies at present quality and quantity. . . ."

"POLICIES

3. The County shall conduct a study of the legal, economic and environmental consequences of the use of irrigation water for non-agricultural uses. . . ." (pg. 170)

FISH AND WILDLIFE

"GOALS

1. To conserve and protect existing fish and wildlife areas. . . .
3. To develop and manage the lands and waters of this County in a manner that will enhance, where possible, the production and public enjoyment of wildlife.
4. To develop and maintain public access to lands and waters and the wildlife resources thereon. . . ."

"POLICIES

4. Because public access to fish and wildlife areas is so important to the economic and livability aspects of Deschutes County, walking easements and periodic boat access points shall be provided in areas where public river access is limited, as determined appropriate by the County and State Department of Fish and Wildlife.
5. Consistent with Policy 4 and in order to protect the sensitive riparian areas, as well as to protect people and property from flood damage, the Zoning Ordinance shall prohibit development (except floating docks) within 100 ft. of the mean high water mark of a perennial or intermittent stream or lake. . . . Variances shall also be possible where

it is shown that the structure is removed from the riparian area because of a high bluff or steep slope. . . ." (pg. 164)

OPEN SPACES, AREAS OF SPECIAL CONCERN AND ENVIRONMENTAL QUALITY

"GOAL

2. To maintain and improve the quality of air, water and land resources of Deschutes County. . . ."

"POLICIES

1. A. On lands outside Urban Growth boundaries and rural service centers . . . and along all other streams and roadways for which landscape management is prescribed on the 1990 Comprehensive Plan, a case by case review area shall be established. This area is not to extend more than a quarter mile on either side of the center line of roadways, nor more than 200 ft. from either side of the rivers measured from the mean high water level.

Within the prescribed area, new structures (excluding fences, existing structures or other structures less than \$1,000.00 in total value), shall be subject to review by the County at the time of application for building or zoning permit. . . .

2. Considerations should be given to designation of appropriate segments of Fall, Deschutes, Little Deschutes and Crooked Rivers as Scenic Waterways. Reasonable protective and State agency coordinative measures should be instituted. . . .
6. Because management of State and Federal lands effects areas under the County's jurisdiction and vice versa, better coordination of land use planning between the County, U.S.F.S., State Land Board, Bureau of Land Management and other agencies shall be sought. . . .
9. Loss of riparian areas and other important open spaces because of dam construction for recreation or other purposes should be minimized." (pg. 153)

RECREATION

"GOALS

1. To satisfy the recreational needs of the residents of and visitors to Deschutes County." (pg. 117)

ECONOMY

"GOALS

2. To enhance and maintain the existing natural resource, commercial and industrial segments of the local economy. . . ."

"POLICIES

1. The importance of tourism to the local economy is well known, but there also exists considerable potential for strengthening and improving this segment of the economy. The County shall assist in the development of a long range plan to encourage tourism (including destination resorts) and recreation locally. This study will include consideration of the impacts likely to be created by increasingly expensive gasoline.
2. Private commercial activities consistent with other County policies which enhance tourism shall be encouraged by the County. . . ." (pg. 87)

RURAL DEVELOPMENT

"GOAL

1. To preserve and enhance the open spaces rural character scenic values and natural resources of the County. . . ." (pg. 49)

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Amending *
Deschutes County Ordinance *
No. PL-11, Bend Urban Growth *
Boundary Zoning Ordinance, *
as Amended, by the Addition of*
the Deschutes River Combining *
Zone, Providing For a Study *
Period, Providing For Repeal, *
and Declaring an Emergency. *

ORDINANCE NO. 83-066

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY,
OREGON, ORDAINS as follows:

Section 1. Deschutes County Ordinance No. PL-11, Bend Urban Growth Boundary Zoning Ordinance, as amended, is amended by the addition of Section 23A, Deschutes River Combining Zone, as set out below:

"Section 23A. Deschutes River Combining Zone. DR.
In any Deschutes River Combining Zone the requirements and standards of this Section shall apply in addition to those specified in this Ordinance for the underlying zone. In the event of a conflict in requirements and standards of this Section with the requirements and standards for the underlying zone, the provisions of this Section shall take precedence.

- (1) Purpose. The purpose of the Deschutes River Combining Zone is to maintain the quality and quantity of the streamflows; to protect fish and wildlife; and protect the visual, environmental, and aesthetic attributes of the Deschutes River, its tributaries, diversion points, and adjacent areas within the area of the DR Zone.
- (2) Application of Section. This Section shall apply to land use actions in the area of the DR Zone defined as the areas of special interest or 100' from the mean high water mark, whichever is greater on and along the Deschutes River and Tumalo Creek, as identified on the Deschutes River Combining Zone map, marked Exhibit "A", attached hereto and by this reference incorporated herein.

- (3) Uses Permitted Conditionally. In a zone with which the DR Zone is combined, those uses not otherwise exempt from this Section shall be permitted conditionally. The requirements and standards of this Section shall apply in addition to the general conditional use criteria set forth in Section 29, and the requirements and standards for the underlying zone.
- (4) Specific Use Requirements and Standards. The following requirements and standards apply to land uses within the DR Zone.
- (A) The use shall maintain existing stream flow of any affected river or stream at present quality and quantity.
 - (B) The use shall conserve and protect fish and wildlife habitat.
 - (C) The use shall maintain the scenic, visual, environmental and aesthetic qualities of the affected river or stream, and shall not diminish the economic benefits of tourism to the local economy.
 - (D) The use shall not impair recreational opportunities of the river or stream by the public.
 - (E) The use shall have no significant negative impact, individually or cumulatively, on existing and viable potential uses of the river or stream.
 - (F) Any application for a hydroelectric project shall affirmatively show that the use will further the purpose of this Section, and that the applicant has sufficiently addressed the issues to be resolved during the study period as set forth in this Section.
 - (G) The use shall meet the State of Oregon Department of Environmental Quality noise standards.
 - (H) That fill and removal activities meet State of Oregon requirements and provide for the reclamation of disturbed areas so that no significant short or long term negative impacts occur.

- (I) That when the use is on or affects Federal or State land, that the use is in conformance with any intergovernmental planning agreement between Deschutes County and affected Federal or State agencies.
 - (J) That any special district involved in any manner with an application for a land use permit has complied with the requirements of ORS 197.185 and the proposed activity is in conformity with the special district's intergovernmental cooperative agreement with Deschutes County if the district does not otherwise have an acknowledged comprehensive land use plan.
- (5) Study Period. A study shall be conducted as set out below by a joint task force to be appointed by the Board of County Commissioners.
- (A) There is hereby declared a study period for all land use activities within the area within the DR Zone.
 - (B) The study period shall be for the period February 1, 1984 to July 31, 1985. Following review and public hearing, and prior to the termination date, and if deemed necessary by the Board of County Commissioners, the date of termination of the study period may be extended by ordinance for a subsequent period of up to six months.
 - (C) The study period shall include, but not be limited to, the following:
 - 1. Detailed mapping and instream flow studies of the Deschutes River, its tributaries, its diversion points, and its adjacent areas, including areas of special interest, to allow precise review of the boundaries of the overlay zone.
 - 2. The development of a river system model at standards not less stringent than those adopted by the Northwest Power Planning Council to complete the requirements of the studies identified in Section 1204, Northwest Power Planning Council "Columbia River Basin Fish and Wildlife Program" and Chapter 10, Sections 14.2 and 14.3, Northwest Power

Planning Council, "Northwest Conservation and Electric Power Plan".

3. Identification of uses and development that may be permitted utilizing the balancing tests set forth in Statewide Planning Goal 5, and establish detailed standards and criteria for development within the DR zone.
4. The study of the individual and cumulative effects of all known and potential hydroelectric sites and sources on the Deschutes River, its tributaries, diversion points, adjacent areas, and stream flows.
5. The development of a program in recognition of the cumulative effects to balance the conflicting uses of the natural resource and the hydroelectric projects as required by Statewide Planning Goal 5.
6. The study of river and stream diversion canals to the extent funding is identified for such purposes.
7. Identification of current and potential river uses, and the economic value of such uses.
8. Preparation of amendments to the Comprehensive Plans and implementing ordinances to balance the conflicting uses on the Deschutes River, its tributaries, diversion points, adjacent areas, areas of special interest, and streamflows.

(D) During the study period, the County shall participate with the Power Council in the completion of the Power Council's hydroelectric study and take affirmative action with respect to the apparent conflict between the provisions of PURPA and the Northwest Power Act in order to help facilitate resolution of the conflict.

(6) Exemptions. The following shall be exempt from this Section:

- (A) Continuation of a conforming or nonconforming use, or a conforming or nonconforming structure, constructed prior to January 1, 1984.
- (B) A use or structure, including a conforming or nonconforming use, or a conforming or nonconforming structure, for which a minor site plan for the construction, alteration, restoration, or replacement is necessary.
- (C) Construction or reconstruction of a single family residence.
- (D) The reconstruction or repair of an existing dam, provided such reconstruction or repair does not alter the characteristics of the water impoundment and does not otherwise affect existing stream flow.
- (E) Any use or accessory use permitted outright or conditionally in the underlying zone pursuant to a Destination Resort approval, Planned Unit Development approval, master plan approval, or site plan approval dated prior to January 1, 1984.

Section 2. This Ordinance is repealed February 1, 1986, or upon the completion of the study provided for in Section 23A of Ordinance No. PL-11, Bend Urban Growth Boundary Zoning Ordinance, as amended, and the adoption of a recommended comprehensive plan and implementing ordinance amendments, whichever occurs first.

Section 3. This Ordinance being necessary for the immediate preservation of public peace, health and safety, an emergency is declared to exist, and this Ordinance takes effect on its passage.

DATED this _____ day of _____, 1983.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ALBERT A. YOUNG, Chairman

ATTEST:

LOIS BRISTOW PRANTE, Commissioner

Recording Secretary

LAURENCE A. TUTTLE, Commissioner

LEGISLATIVE FINDINGS

The following Legislative Findings are hereby made in support of adoption of Ordinance No. 83-066.

1. Statewide Planning Goal 5 requires the users of land within the State "[t]o conserve open space and protect natural and scenic resources", by developing "[p]rograms that will: (1) insure open space, (2) protect scenic and historic areas and natural resources for future generations, and (3) promote healthy and visually attractive environments in harmony with the natural landscape character" Statewide Planning Goal 5 further provides that, "[w]here conflicting uses have been identified the economic, social, environmental and energy consequences of the conflicting uses shall be determined and programs developed to achieve the goal."
2. The Bend Area General Plan (Plan), portions of which are set forth in Appendix "A", identify uses for the Deschutes River, its tributaries, diversions, adjacent areas, and stream flows, all of which are hereinafter referred to as the "Deschutes River", which are intended to implement Statewide Planning Goal 5.
3. Hydroelectric projects on or adjacent to the Deschutes River, or which divert water from the Deschutes River, conflict with the Plan and no program has been developed by Deschutes County to achieve Statewide Planning Goal 5.
4. The Plan provides that tourism and recreation are critically important components of the local economy. The economic elements of the Plans make it imperative that the Deschutes River be preserved as a resource to be utilized by tourists.
5. A number of Federal acts and actions have been promulgated which may impact the Deschutes River, such as the Northwest Conservation and Electric Power Plan (Power Plan) developed pursuant to the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act) as adopted by the Northwest Power Planning Council (Power Council), the Columbia River Basic Fish and Wildlife Program (Fish Plan) as adopted by the Power Council, the Public Utilities Regulatory Policy Act (PURPA), and the U. S. Forest Service Deschutes Forest Plan (Forest Plan).
6. A number of applications for hydroelectric generating facilities and diversions have been filed for in the Deschutes River Basin.
7. The Fish Plan and Power Plan adopted by the Power Council identify serious potential cumulative impacts from hydro-

electric generating and diversion facilities which cannot be assessed by evaluating projects on a case by case basis.

8. The necessary studies, including environmental impact studies, to determine the cumulative impacts of the construction and operation of hydroelectric diversion, generating, and transmission facilities on the economic, social, environmental and energy consequences of identified and potential conflicting uses of the Deschutes River which are a condition precedent to the implementation of programs to meet Statewide Planning Goal 5 have not yet been accomplished.
9. The Deschutes River, conserved as open space and protected as a natural and scenic resource, is a critically important component to the tourism and recreation industry in Deschutes County.
10. Hydroelectric generating and diversion facilities impact open space, natural and scenic resources, and recreational opportunities which are among the basic elements of a successful tourist industry.
11. The Federal Power Act (FPA) which created FERC specifically recognizes "state action". The Act provides that FERC's powers shall not be exercised as ". . . affecting . . . or in any way to interfere with the laws of the respective state relating to the control, appropriation, use, or distribution of water used . . . for municipal or other uses . . .", and Section 9(b) of the FPA requires compliance with local laws implementing state action before developing the use, diversion, or appropriation of water, water course bed, or watercourse bank.
12. The Power Plan states that the Power Council will conduct, during the next two years, a stream-by-stream analysis to rank hydroelectric sites according to their impacts on fish and wildlife.
13. The Oregon Economic Department has determined that in 1982 out-of-state tourism spent \$100,000,000 in Deschutes County.
14. The Department of Fish and Wildlife has estimated fishing and hunting generate up to \$10,000,000.00 to the Deschutes County economy annually.
15. The condition of the Deschutes River may be irreparably damaged as a tourist attraction, a recreational resource, a fish and wildlife habitat, a scenic waterway, and a generally clean and safe natural resource by the unstudied placement of any of the proposed hydroelectric generating facilities or other major new facilities in and around the City of Bend.

16. The State Attorney General has recognized local jurisdiction's land use role in the use and development of water resources such as found in the Deschutes River Basin, and the authority of the local jurisdiction to adopt ordinances regulating the land use aspect of such resources.
17. That exemptions from the standards and criteria in the Ordinance are based upon the recognition of prior approvals and uses which at most represent minor impacts and are in conformance with the Plan and implementing ordinances, or may be continued pursuant to existing State law.

DATED this _____ day of _____, 1983.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ALBERT A. YOUNG, Chairman

ATTEST:

LOIS BRISTOW PRANTE, Commissioner

Recording Secretary

LAURENCE A. TUTTLE, Commissioner

APPENDIX A
Bend Area General Plan
Pertinent Deschutes River Goals and Policies

Open Lands -

The open land section of the plan deals with three basic types, forests, urban area reserve, and areas of special interest - private and public open space.

Areas of Special Interest - Private and Public Open Space

1. The banks and canyon of the Deschutes River shall be retained as public or private open space throughout its entire length within the planning area except in the intensively developed central part of the community.
2. Major rock outcrops, stands of trees or other prominent natural features shall be preserved as a means of retaining the visual character and quality of the community.

Outside the Urban Growth Boundary the policies and requirements of the Deschutes County Year 2000 Comprehensive Plan shall apply. Decisions along the boundary that may impact natural resource lands outside the boundary will be coordinated with the County, and preference will be given to the protection of such adjacent resources through the development review process. Areas of special interest identify lands along the banks of the Deschutes River. These areas are also basic habitat. The following policies and goals shall also apply.

Fish and Game

The primary goals for the protection of the fish and wildlife habitat within the urban area are:

1. To conserve the existing riparian zone along the Deschutes River.
2. To provide for public access to this scenic and attractive resource.
3. To provide more park and trails along the river.
4. To allow the community flexibility in reviewing development proposals within the areas of special interest that would award superior design; that grant public access and dedication of land to the public; that grant scenic or development easements to a public body or recognized conservation organization; and still maintains the scenic resources and protects or enhances the wildlife habitat or that can be judged to be a reasonable trade-off in values for the public.

Strategies and Policies:

1. The city and county shall preserve areas of the banks and canyons of the Deschutes River in public or private open space throughout its entire length within the Urban Growth Boundary, except in the intensively developed central part of the city. Areas so preserved will allow residential densities to be higher in the developable portion of the parcel affected.
2. The city and county shall review development proposals that include land in areas designated as areas of special interest for the public benefits that can be gained under preservation or development. The city and county may allow those developments that are not subject to natural hazards; that would not inflict irreversible harm to the riparian zone; that would enhance public open space, parks, and access; that have excellence of design, provide via easement or fee title access for the public to the river, either as park or trails; and carry out the intent of the plan to enhance the variety and livability of the Bend Urban Area.

3. Any development within 100 feet of the water's edge shall be subject to a conditional use and design review procedure, taking into account the goals for the areas of special interest and the protection of fish and wildlife habitat.
4. The county and city shall apply the requirements of the deer winter range overlay zone to any development in the urban reserve area adjacent to or within one mile of the WA designation on the county plan or zoning maps.

The Deschutes River represents a significant sensitive area within the Urban Growth Boundary, and the upmost care shall be taken in any development that occurs so that the public is benefitted by any changes that may occur in the existing character of the river or riparian zone.

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION ^{EQC} Hearing Section
OF THE STATE OF OREGON

FEB 26 1985

In Re:)
)
LAVA DIVERSION PROJECT) BRIEF OF RESPONDENT DEPARTMENT
FERC No. 5205) OF ENVIRONMENTAL QUALITY
Deschutes County, Oregon)

STATEMENT OF THE CASE

Summary of Facts

General Energy Development, Inc., (GED) holds Permit No. 5205 issued by the Federal Energy Regulatory Commission (FERC) to plan and design the Lava Diversion Hydro Project on the Deschutes River south of Bend, Oregon. Before FERC may issue a license to construct, § 401 of the Clean Water Act states that the license applicant shall provide the licensing agency (here FERC) a "certification from the state in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of §§ 301, 302, 303, 306 and 307 of this act . . . and with any other appropriate requirements of state law set forth in such certification" 33 U.S.C. § 1341.

The Oregon Department of Environmental Quality (DEQ) denied issuance of certification on two bases. First, eight areas of potential water quality impacts were not adequately addressed by GED. These areas have now been addressed to the satisfaction of the DEQ and are no longer at issue here. Second, GED did not supply DEQ a statement of compatibility with the Deschutes County

comprehensive plan and land use ordinances. Oregon law requires that any state agency decision which affects land use be made in accordance with local comprehensive plans and ordinances. DEQ's land use procedures provide the statement of compatibility shall be issued by the appropriate local government. Deschutes County has not issued this statement.

In December of 1983 Deschutes County passed ordinances Nos. 83-058 and 83-066. (The first of the two similar ordinances is included in the appendices at App 11.) These ordinances limit hydroelectric development on the Deschutes River pending the completion of a study assessing the cumulative impacts upon the environment of the numerous planned projects. Until the study is completed, any project must meet the special standards of the ordinance and obtain a conditional use permit. No such study has yet been completed, and GED has not yet applied for a conditional use permit.

Since no factual issues exist, the parties have agreed to have this matter brought before the commission without a prior hearing. The only issues presented for the commission are legal and policy issues.

Summary of Argument

GED raises three issues in its appeal of DEQ's denial of § 401 certification. The three issues and DEQ's position thereon may be summarized as follows:

1) As a matter of law, did Deschutes County err in failing to grant a statement of land use compatibility?

Deschutes County was not in error for failing to grant a statement of compatibility. Deschutes County's current zoning ordinances allow hydroelectric development on the Deschutes River only upon receipt of a conditional use permit. Deschutes County has never received a conditional use permit request from GED. Therefore, as the county property advised DEQ, there has not yet been a determination that the GED project is consistent with the Deschutes County plan and ordinances.

2) Can DEQ deny § 401 certification for reasons other than water quality?

Yes, DEQ can, and probably must, deny § 401 certification for a project that has not complied with state land use laws. § 401 of the Clean Water Act allows the state to consider appropriate requirements of state law other than water quality requirements in granting § 401 certification. The statute's plain language and most relevant case law support a broad interpretation of the state's authority. In Oregon, state land use law requires state agencies to act in compliance with local comprehensive plans and ordinances. DEQ, following its regular land use procedures, requested that Deschutes County determine whether the project complied with the Deschutes County plan and ordinances. Since Deschutes County did not issue a statement of compatibility, DEQ property withheld § 401 certification.

3) Did DEQ violate the consistency standard of ORS 183.484 by not requiring previous § 401 applicants to obtain a statement of compatibility?

DEQ did not violate the consistency standard of ORS 183.484 by not requiring previous applicants to obtain a statement of compatibility. The reason GED was the first company required to supply a county compatibility statement was explained to GED by letter. Therefore, the consistency standard was met. Furthermore, DEQ was changing from erroneous to correct procedure. Case law provides that correct agency procedure should not be reversed for inconsistency with prior erroneous procedure.

DEQ's argument on each of these issues is set forth in full below.

ANSWER TO FIRST ISSUE

As a matter of law, Deschutes County was not in error for failing to grant the statement of compatibility.

ARGUMENT

State agency decisions affecting land use must be compatible with local comprehensive plans and ordinances. Oregon's land use laws provide in pertinent part:

. . . state agencies shall carry out their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use . . . in a manner compatible with . . . [c]omprehensive plans and land use regulations . . . ORS 197.180(1(b)(A) (Emphasis added).

Deschutes County Zoning Ordinance No. 83-058 was passed in response to the potential adverse cumulative effects of the numerous proposed hydroelectric projects on the Deschutes River and its tributaries, diversions, adjacent areas, and stream

flows. The ordinance limits hydroelectric development until July 31, 1985 to allow for completion of a cumulative effects study. The study is intended to allow compliance with Statewide Planning Goal 5 which requires the users of land within the state "[t]o conserve open space and protect natural and scenic resources by developing [p]rograms that will: (1) insure open spaces, (2) protect scenic and historical areas and natural resources of future generations, and (3) promote healthy and visually attractive environments in harmony with the natural landscape character . . ." OAR 660-15-000. No programs have been developed to implement Goal 5. Development of proposed hydroelectric projects on the Deschutes River could severely impact the county's ability to implement programs designed to meet Goal 5. Inability to meet Goal 5 could result in diminution in the tens of millions of tourist dollars spent annually in Deschutes County by tourists drawn to the area for its recreational opportunities. See Deschutes County Ordinance No. 83-058.

(App. 11.)

Until the cumulative effects study is completed, the ordinance allows hydroelectric projects only as a conditional use. However, Deschutes County has never received an application for a conditional use permit from GED. (App. 23-24, October 10, 1984 letter from Deschutes County Commission to DEQ.) As a result, Deschutes County has not issued GED a statement of compatibility with the county's comprehensive plan and land use ordinances. Until the permit process is complete, there is no final deter-

mination that a project will be compatible with the standards of the ordinance. Therefore, Deschutes County was correct in not issuing GED a statement of compatibility.

DEQ's practice of relying upon a local government's interpretation of its own land use ordinances makes good sense as a matter of practical administration and policy. As a matter of law, this practice has also been specifically upheld by the Oregon courts. Schreiner's Gardens v. DEQ, 71 Or App 381, _____ P2d _____ (1984) (upholding DEQ's reliance on Marion County's land use findings with respect to the waste burning facility).

Even if DEQ could overrule a local government's interpretation of its own ordinances, there is no reason to do so in this case. It is beyond debate that Deschute County's current ordinances require that hydroelectric projects obtain a conditional use permit and that no such permit has been issued in this case. If GED is dissatisfied with the result in this case, its remedy is with the county, not DEQ.

ANSWER TO SECOND ISSUE

DEQ can deny § 401 certification for reasons other than water quality.

ARGUMENT

A. Introduction

The Clean Water Act establishes a joint system of state and federal control designed to preserve, protect and improve the nation's waters. The Environmental Protection Agency

(EPA) serves as the overseer of the programs implemented under the Clean Water Act. However, the Act grants the states broad regulatory powers. This is apparent in the purposes and policy of the Act set out in 33 U.S.C. § 1251 as follows:

. . . it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources . . . (Emphasis added.)

Mindful of this purpose, Congress granted the states regulatory veto power of FERC's hydroelectric project licensing authority by requiring FERC applicants for licenses to obtain state certification. Without state certification, or a waiver from the state, FERC may not grant a license to construct or operate a hydroelectric power facility. § 401 provides in pertinent part:

Any applicant for a federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the state in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of §§ 301, 302, 303, 306 and 307 of this act. . . and with any other appropriate requirements of state law set forth in such certification.
33 U.S.C. § 1341.

Thus, § 401 provides a state two means of conditioning or refusing to certify a hydro project. First, under § 401(a), state certification may be withheld if the project would impact water quality. Second, § 401(d) provides the project must comply with

"any other appropriate requirements of state law." The scope of § 401(d) is at issue in this case.

B. Plain Meaning

Whenever possible, statutes are to be construed to give effect to their plain meaning. The plain meaning of § 401 is clear. By requiring compliance with particular sections listing water quality criteria and then providing that projects must meet "other appropriate requirements of state law", it is clear Congress did not intend to limit the scope of § 401(d) to state laws pertaining to water quality. § 401(d), in addition to the "other appropriate requirement" language, also lists the water quality criteria sections. By explicitly requiring compliance with "other appropriate requirements of state law", Congress intended the states flexibility in considering § 401 certification. A plain meaning reading of § 401 supports DEQ's action of denying certification to GED for failing to comply with Oregon's land use laws.

C. Case Precedent

The case law interpreting the scope of § 401 also supports the action taken by DEQ.

In Roosevelt Campobello Int'l Park Comm'n v. Environmental Protection Agency, 684 F2d 1041 (1st Circuit 1982), the State of Maine imposed conditions on a proposed oil refinery under the State Siting Law. EPA declined to incorporate these conditions into the NPDES permit granted to the project applicant. The circuit court addressed two issues: 1) were the state conditions

water quality related, and (2) was EPA required to include the conditions in its NPDES permit? The Administrative Law Judge (ALJ) held that the state may not impose permit restrictions unrelated to water quality standards, effluent limitations or schedules of compliance. The court disagreed stating:

Petitioners argue, with some force, that the conditions listed above are related to water quality . . . We believe that the ALJ made a more fundamental error by seeking to determine which requirements of state law were appropriately affixed to the state's certification. Section 401 of the CWA empowers the state to certify that a proposed discharge will comply with the Act and 'with any other appropriate requirement of state law.' Id. at 1036.

The court in essence rendered the first issue moot by its holding on the second issue. It was unnecessary to determine whether the conditions were water quality related because states may impose conditions not related to water quality on § 401 certification as long as the conditions are supported in state law.

Following this reasoning, DEQ was correct in denying certification to GED. By failing to obtain a statement of compatibility with the Deschutes County plan and ordinances, GED was not in compliance with Oregon state law. State law requires this statement of compatibility before agencies may act. Therefore, DEQ has the discretion, if not a mandate, to assure compliance with the Oregon land use law when taking action under § 401.

The New York courts have also considered the scope of § 401. In de Rham v. Diamond and Consolidated Edison Co., 32 NY2d 34, 295 NE2d 763 (1973), environmental groups sought to overturn the

State Commission of Environmental Conservation's granting of certification. The issues were: 1) whether the commissioner acted arbitrarily and capriciously, and 2) would the project damage water quality leading to impact upon the fishery resource?

The court stated:

Congress did not empower the states to reconsider matters, unrelated to their water quality standards, which the Power Commission has within its exclusive jurisdiction under the Federal Power Act . . . [T]he Commissioner has neither the authority nor the duty to delve into the many other issues which had been investigated and decided by the Federal Power Commission . . . Id. at 768 (Emphasis added).

The court was indicating the state agency may not reconsider matters under the jurisdiction of the Power Commission that had already been investigated. The Power Commission had already conducted a study assessing the probable damage to fishery resources. Therefore, the CEC could not reconsider this matter. However, many matters of state law affecting hydropower projects are not under the jurisdiction of FERC. Therefore, FERC would not have considered them. Under § 401(d), states may consider state laws during § 401 certification proceedings.

FERC has not considered whether the GED project would meet the Deschutes County comprehensive plan and land use ordinances. When DEQ requested a certificate of compliance with the plan and ordinances, it was not reconsidering anything FERC had already investigated. This assessment was purely a state law requirement. Therefore, DEQ properly considered the Deschutes County plan and ordinances, which it must consider under state law, in denying GED's application for certification.

Furthermore, in de Rham, the court did not directly address language resembling current § 401(d). The issues were restricted to the petitioner's concerns regarding whether the state commission had adequately addressed water quality concerns. The petitioner was not claiming the commission failed to consider "other appropriate requirements of state law". Rather, the petitioner claimed that licensing of the facility would lead to water quality degradation. The difference in breadth of the inquiry in de Rham as compared with the case at hand diminishes the value of any dictum in de Rham discussing the scope of § 401(d).

The New York courts also addressed § 401 in Power Authority of State of New York v. Williams, 60 NY2d 315, 457 NE2d 726 (1983). In this case, the State Department of Environmental Conservation denied the power authority's application for a § 401 certification. This denial was predicated solely on water quality standards. The issue on appeal was whether the state department could consider granting a § 401 certification because the project offered the sole means to meet the energy needs described in the State Energy Master Plan even when the project would violate applicable water quality standards. The court held that the state department could not balance the need for the project with the water quality impacts the project would produce, as mandated in the State Energy Law, because this balancing test was within FERC's jurisdiction.

Williams is clearly distinguishable from the case at hand. In Williams, the state department could not comply with both

federal and state law. "[W]hen compliance with federal and state regulations is a physical impossibility", state law may be preempted. Florida Lime and Avacodo Growers, Inc. v. Paul, 373 US 132, 142-43 (1963). However, as discussed above, DEQ acted within the bounds of both state and federal law. In this case, DEQ was not acting in violation of the Clean Water Act. To the contrary, DEQ was considering "other appropriate requirements of state law" when it required compliance with the Deschutes County plan and ordinances. Therefore, DEQ's action was proper.

D. FERC Preemption

Opposing counsel contends the Federal Power Act preempts state licensing and permit functions for hydropower except for water quality concerns preserved by § 401 and cites First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n, 328 US 152 (1946). The precedential value of First Iowa has been weakened by recent court opinions.

In California v. United States, 438 US 645 (1978), the court interpreted § 8 of the Reclamation Act, 43 U.S.C. § 383, as applied to conditions placed by the State of California on water permits issued for the construction of the New Melones Dam. § 8 provides:

. . . nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation 43 U.S.C. § 383.

This language is very similar to that in § 27 of the Federal Power Act. Despite the plain language meaning of § 27, the Supreme

Court in First Iowa determined § 27 merely preserved proprietary rights, i.e., that the section's only function was preservation of a state's right to compensation for injury to vested water rights. The court looked to interpretations of § 8 of the Reclamation Act for guidance. First Iowa, supra at 176. In California v. United States, the court held that the conditions imposed by California were valid, if the condition actually imposed was not inconsistent with the congressional directives as to the New Melones Dam. See California v. United States. This language should also be read to limit § 27 of the Federal Power Act since the court has discussed § 27 of the Federal Power Act and § 8 of the Reclamation Act interchangeably. Thus, a state law not in direct conflict with a federal law, i.e., when compliance with both federal and state law is not physically impossible, is valid.

In this case, there is no direct conflict. Federal law provides that state law must be satisfied before issuance of a § 401 permit. State law provides that comprehensive plans and ordinances must be considered by DEQ before providing § 401 certification. Both federal and state law were concurrently satisfied by DEQ's action. Therefore, state law is not preempted and DEQ's action was proper and valid.

In another recent Supreme Court case, the "superagency" powers FERC has assumed regarding hydropower licensing have been further limited. Escondido Mutual Water Co. v. La Jolla Band of Mission Indians. _____ US _____, 104 S Ct 2105, 80 L Ed 2d 753

(1984) involved the meaning of § 4(e) of the Federal Power Act, 16 U.S.C. § 797(e). This section gives the agency having jurisdiction over federal reservations the power to impose conditions on FERC power projects passing over these lands. FERC rejected or modified conditions imposed by the Secretary of the Interior upon a project passing through several Indian reservations. The court held that the conditions were binding upon FERC.

In reaching this decision, the Supreme Court has recognized that FERC licensing involves shared powers and that FERC does not have exclusive jurisdiction over hydropower licensing.

E. State Land Use Laws

Any DEQ decision which affects land use must be made pursuant to local comprehensive plans and land use ordinances. ORS chapter 197 provides in pertinent part:

. . . state agencies shall carry out their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use . . . in a manner compatible with . . . comprehensive plans and land use regulations . . . ORS 197.180(1)(b)(A).

The land use laws also require that each state agency prepare and submit to the Land Conservation and Development Commission (LCDC) a coordination agreement. ORS 197.180(2)-(6). Among other requirements, the agreement must list the agency's rules and programs affecting land use. See OAR Chapter 660, Division 330 (LCDC's administrative rule on state agency coordination agreements).

DEQ has adopted such an agreement, and it has been reviewed and approved by LCDC. (Pertinent portions are attached at

App 1-10.) The agreement specifically identifies § 401 certification as a decision affecting land use. (App 10.)

DEQ's coordination agreement is consistent with Oregon case law, which has broadly construed what actions constitute land use decisions. In Peterson v. Klamath Falls, 299 Or 249, _____ P2d _____ (1977), a decision by the City of Klamath Falls to annex land outside its borders was held to be a land use decision. Peterson also established the general test of what is a land use decision: will the decision have "a significant impact on present or future land uses . . ."? Id. at 254.

There is little doubt that a decision involving a hydroelectric project on the Deschutes River will have such a "significant impact". Water is the blood of arid Deschutes County. Water related recreation results in the annual influx of tens of millions of tourist dollars into Deschutes County. The availability of water has a direct effect upon the county's ability to accommodate growth.

The Final Deschutes County Year 2000 Comprehensive Plan, adopted in November of 1979, recognizes the vital importance of water resources to the county:

Water in adequate quality and quantity is important to all communities, but in a semi-arid region such as where Deschutes County is located it is of particular importance . . . Unfortunately, inadequate information exists on water supplies and on water quality. The County Health Division, Oregon Health Division, DEQ, and U.S. Geological Survey are all presently involved with studies or ongoing programs to provide a greater understanding of the area's water resources. Given the unexpected continued growth of the area and the existence of water quality and quantity problems already, the

results of these studies will prove useful in updating this plan and safely accommodating the new growth while protecting existing industries and residents. Deschutes County Comprehensive Plan at 138-39. . . . The County shall conduct a study of the legal, economic and environmental consequences of the use of irrigation water for non-agricultural uses. Deschutes County Comprehensive Plan at 140.

Other decisions regarding utilization of water resources have been held to be land use decisions by the Oregon courts. For example, the Department of Fish and Wildlife's determination of whether or not to issue a salmon hatchery permit was held to be a land use decision. Federation of Independent Seafood Harvesters v. Fish and Wildlife Commission, 291 Or 452, 632 P2d 777 (1981). Similarly, a state permit authorizing the spraying of the pesticide Sevin in the Tillamook Bay was held to be a land use decision. Audubon Soc'y v. Department of Fish and Wildlife, 67 Or App 776, 681 P2d 135 (1984).

DEQ has regularly relied upon a local government's interpretation of its own ordinances. This approach has been specifically upheld by the Oregon courts. Most notably, the Court of Appeals recently held that DEQ properly relied on the decisions of Marion County regarding whether the operation of a waste burning facility met the Marion County plan and ordinances. Schreiner's Gardens v. DEQ, 71 Or App 381, _____ P2d _____ (1984). Schreiner's Gardens is directly parallel to this case in that the county's ordinances required a conditional use permit, and DEQ issued its permit subsequent to and in reliance upon the local permit.

Contrary to petitioners assertion, DEQ has not delegated to Deschutes County veto power over proposed hydroelectric facilities. Rather, DEQ is simply deferring interpretation of Deschutes County's ordinances to the body best able to perform this function, the body which promulgated these ordinances.

F. Summary Discussion of the Law as Applied to this Case

As the above discussion should demonstrate, DEQ is allowed to, if not required to, consider state land use law in deciding whether to grant § 401 certification.

§ 401 plainly states that "a discharge will comply with any other appropriate requirements of state law". State land use law requires DEQ to consider comprehensive plans and land use ordinances when making decisions affecting land use. DEQ's coordination agreement with LCDC lists § 401 certification as a decision affecting land use. Furthermore, a major decision affecting the use of waters in Deschutes County clearly has a "significant impact on present or future land uses", thereby satisfying the Petersen test as a land use decision.

Therefore, at least under current statutes and rules, DEQ must consider the Deschutes County plan and ordinances during § 401 certification. Deschutes County has concluded and advised DEQ that the Lava Diversion Project is not consistent with the county's ordinances. As a result, DEQ properly denied § 401 certification to GED.

DEQ has traditionally deferred to local government's interpretation of its own ordinances. This approach has been

upheld by the Oregon courts. Schreiner's Garden v. DEQ, 71 Or App 381, _____ P2d _____ (1984). DEQ was therefore correct to do so in this case.

The pervasive preemptive powers assumed by FERC under the Federal Power Act have diminished since First Iowa. The Supreme Court in California v. U.S. provided that state law not in direct conflict with federal law is valid and therefore not preempted. In this case, Oregon's land use laws are not in conflict with either the Federal Power Act or the Clean Water Act. The land use laws were promulgated to serve purposes different from either federal act. In fact, § 401 mandates that DEQ certify pursuant to "other appropriate requirements of state law". DEQ has obeyed both state and federal law in denying certification to GED.

Although the courts have been divided on the exact breadth of § 401, the most relevant case law supports DEQ's action in this case. In Roosevelt Campobello, the First Circuit chastised EPA for omitting from an NPDES permit conditions imposed by the State of Maine on a proposed oil refinery under the State Siting Law. The court held that § 401(d) allows imposition of conditions unrelated to water quality. In the case at hand, DEQ conditioned § 401 certification with the requirement that GED obtain a land use compatibility statement from Deschutes County. Following the reasoning of the First Circuit, this action was valid.

The important policy considerations underlying DEQ's decision in this case should also not be overlooked. Oregon leads the nation in comprehensive planned development of land and water

resources. Efficient use and development of the state's rich water resources is an integral part of the state's land use planning goals. § 401 certification is an important, if not the only, vehicle through which Oregon may influence hydropower development decisions on waters within the state. Until the courts or Congress clearly narrow the scope of § 401, Oregon should join the states that have taken an assertive view of their authority.

Deschutes County Ordinance No. 83-058 called for a hydro power development study to assess cumulative impacts upon the Deschutes River basin. The Oregon Department of Fish and Wildlife, Oregon Department of Energy, State Representative Tom Throop, and Save Benham Falls Committee all support the county's efforts. (App 27-39.) Thus, DEQ's decision in this case was not only within its apparent legal authority, but also was compelled by important policy considerations.

ANSWER TO THIRD ISSUE

DEQ has not violated the consistency standard of ORS 183.484 by failing to require previous § 401 applicants to obtain a statement of compatibility.

ARGUMENT

Petitioner claims that DEQ acted inconsistently with its prior practice by requiring a statement of compatibility in this case. The Administrative Procedures Act provides in pertinent part:

The court shall remand the order to the agency if it finds the agency's exercise of discretion to be: . . . [i]nconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency . . . ORS 183.484(4)(b)(B) (Emphasis added).

This project was the first project required to supply the DEQ with a local compatibility statement. However, this change in procedure was explained to GED in a letter dated September 7, 1984. (App 40, 41.) The letter stated:

In the process of evaluating these requests, we consulted with our legal counsel. We were advised that ORS 197.180 requires DEQ actions which affect land use to be compatible with acknowledged comprehensive plans and in compliance with statewide planning goals. This statute also requires agencies to submit a program for coordination to Land Conservation and Development Commission (LCDC) for approval. DEQ's coordination program, which was certified by LCDC on March 30, 1983, lists certification pursuant to section 401 of the Clean Water Act as an action affecting land use. This coordination program specifies that DEQ will rely on a statement of compatibility from the appropriate planning agency.

DEQ has overlooked this provision and has not been properly addressing land use issues in the 401 certification process for the limited number of applications filed directly with DEQ.

In this manner, the change in procedure was fully explained by the DEQ and, therefore, was not in violation of the consistency standard of ORS 183.484.

Since becoming aware of the land use compatibility statement requirement, DEQ has required at least twelve proposed hydroelectric projects to supply these statements. (App 64-81.)

Indeed, DEQ now requires local land use compatibility statements of all applicants for § 401 certification.

Furthermore, even if the DEQ action in this case were found to be inconsistent, the action would not be remanded by the courts. The Oregon courts have clearly held that changing procedure to correct prior erroneous procedure does not merit remand of proper procedures. See, e.g. Roth v. LCDC, 57 Or App 611, 646 P2d 85 (1982).

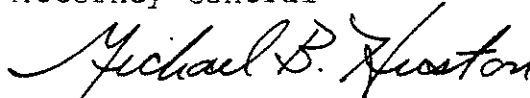
In conclusion, DEQ was correct in requiring a statement of compatibility in this case. GED was informed that DEQ was changing procedure to correct past inadequacies. The new procedures are correct, and the Administrative Procedures Act does not require agencies to continue prior erroneous or undesirable procedures. Subsequent applicants for § 401 certification have been required to supply DEQ with statements of compatibility with local comprehensive plans and ordinances.

CONCLUSION

DEQ acted within its legal power in denying § 401 certification to GED. For the legal and policy reasons discussed above, this denial should be upheld.

Respectfully submitted,*

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*This brief was primarily researched and written by Christopher Rycewicz, a second-year law school student on externship with the Oregon Department of Justice.

APPENDICES

STATE OF OREGON
DEPARTMENT OF ENVIRONMENTAL QUALITY
AGREEMENT FOR COORDINATION
WITH
LAND CONSERVATION AND DEVELOPMENT COMMISSION

JANUARY 1985



Intergovernmental Coordination Section
1522 S.W. Fifth Avenue
P.O. Box 1760
Portland, Oregon 97201

DEPARTMENT OF ENVIRONMENTAL QUALITY
 AGREEMENT FOR COORDINATION WITH
 LAND CONSERVATION AND DEVELOPMENT COMMISSION

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DEPARTMENT OF ENVIRONMENTAL QUALITY
AGREEMENT FOR COORDINATION WITH
LAND CONSERVATION AND DEVELOPMENT COMMISSION

I. Introduction

The Department of Environmental Quality (DEQ) agreement for coordination with the Land Conservation and Development Commission (LCDC) has been prepared to meet the requirements of ORS 197.180(2), and the LCDC Administrative Rule on state agency coordination agreements (OAR 660-30-000, amended July 9, 1982)

These requirements, termed Key Elements pursuant to the rule are:

1. List of agency rules and programs affecting land use.
2. Program for cooperation with and technical assistance to local governments in the development of comprehensive plans.
3. Program for assuring compliance with the Statewide Planning Goals and compatibility with local comprehensive plans.
4. Program for coordination with other governmental agencies and bodies.

The Department's agreement presented here includes a DEQ Land Use Coordination Handbook and DEQ Procedures Manual.

The DEQ Land Use Handbook (hereafter referred to as Handbook) is to guide both writers and reviewers of local comprehensive land use plans in how to incorporate the Department's pollution control programs into the local plan. The handbook includes an introduction and sections for air quality, water quality, solid waste management, and noise control and identifies those agencies with whom DEQ coordinates its activities.

The DEQ Procedures Manual describes how land use compatibility statements will be incorporated into all DEQ Programs and Decisions affecting local government.

II. The Key Elements of DEQ's Coordination Agreement

A. List of Agency Rules and Programs Affecting Land Use.

A summary of DEQ statutes, rules, programs and decisions and an identification of those affecting land use is included in Attachments 1 and 2.

B. Program for Cooperation with and Technical Assistance to Local Governments.

1. Participation in Comprehensive Plan Development, Acknowledgment Review, Periodic Review and Plan Amendment Review:

- a. The DEQ Intergovernmental Coordinator will review plan materials to determine how completely they address DEQ programs affecting land use. Assistance of the DEQ region or branch office and headquarters programs and the local planner and DLCD field representative will be solicited. This is to aid in identifying local environmental problems, appropriate environmental policies and in finding the appropriate references in the plans.
- b. All Comments and Objections will be compiled and adjusted for consistency by the Intergovernmental Coordinator, who then gains DEQ Director approval on any objections and routes the official DEQ response to the local jurisdiction and DLCD.

2. Provision of Technical Assistance to Local Governments.

a. Information from DEQ:

- (1) The Handbook lists information which is available upon request. The Department can provide other information on request about specific items not contained in the publications referred to in the Handbook.
- (2) Informational reports and other items such as those listed in the Handbook will routinely be mailed as soon as they are available to those on DEQ mailing lists including each DLCD field representative, the DLCD Director, the DLCD State Agency Coordinator, and each local planning coordinator. The Department expects the local coordinator to advise the cities and counties of material for review. Additional copies may be requested from DEQ headquarters or regions, but budget constraints preclude us from routinely sending a copy to each city and county in Oregon.
- (3) The DEQ staff listed in the Handbook are designated as land use liaisons to assist in development and review of local comprehensive plans.

- (4) As necessary and financially feasible, DEQ will conduct workshops to acquaint local planners with DEQ programs affecting land use.
- (5) As part of the plan update and periodic review process, DEQ will advise local jurisdictions of what new DEQ programmatic changes should be included in the plan. The DEQ will also formally notify the jurisdictions of any special subjects of environmental concern the jurisdiction should focus on in the plan update.

b. DEQ assistance:

- (1) Requests for technical assistance should be made to the DEQ Intergovernmental Coordinator.
- (2) DEQ program, region, and public affairs staff are available on a limited basis to brief or hold discussions with local planners and citizen groups. Where appropriate, local officials will be invited to accompany DEQ staff on field investigations to promote mutual understanding.

c. Program for Assuring Conformance with the Goals and Compatibility with Comprehensive Plans.

The DEQ programs and decisions are related primarily to LCDC Goals 6 (Air, Water and Land Resources Quality) and 11 (Public Facilities and Services). DEQ implementation of environmental quality programs may also relate to other LCDC Goals. DEQ understands that all 19 LCDC Goals must be considered by local governments and overall Goal conformance and comprehensive plan compatibility assessment developed by the appropriate local government in considering any proposed project or program. It is beyond DEQ's authority and expertise to make such conclusory assessment.

The following will be used by DEQ to assure that its programs, rules and decisions affecting land use conform with the Statewide Planning Goals and are compatible with local comprehensive plans.

1. Programs and Rules Affecting Land Use

- a. DEQ initially reviewed its programs and rules affecting land use in 1978, noting that revisions to rules would begin if DEQ found a program or rule not in conformance.

- b. To assure that new DEQ programs and rules affecting land use conform with LCDC Goals and are compatible with the local comprehensive plan, DEQ will send a public notice of new or amended programs and rules, and other appropriate items affecting local comprehensive plans to affected local governments, state and federal agencies as much in advance of DEQ's final decision as possible, but with at least the minimum notice required by law. This public hearing notice will state DEQ's determination of Goal compliance and plan compatibility. (See the DEQ Procedures Manual for details about the notice.)
- c. The DLCD may request a public hearing to review any concerns with the rule or program. If no request is received by the DEQ within 15 days, it will be assumed that the DLCD agrees with the DEQ findings regarding Goal compliance and plan compatibility.

* 2. Decisions Affecting Land Use

- a. Non site-specific decisions affecting land use, such as plans, grants and other items affecting local plans, will follow public notice procedures outlined in Section C. 1. above.
- b. The DEQ administrative procedures for all site-specific decisions on new or expansion projects affecting land use require a "statement of compatibility" with the acknowledged local comprehensive plan and zoning requirements or the LCDC Goals from the appropriate jurisdiction(s). The site-specific decisions affecting land use include: DEQ permits, facility plans, construction grants and loans, and notices of construction. (See Attachment 2 for list.) General procedures for submission of this "statement of compatibility" are outlined below.
 - (1) When an applicant applies, it must supply with the application to DEQ a "statement of compatibility," or evidence that the applicant has applied for such a statement before DEQ can accept the application as complete for processing. The local statement must indicate the compatibility of the proposed project under ORS, Chapter 197 with the Statewide Planning Goals or LCDC acknowledged local comprehensive plan and ordinances.

- (2) If DEQ receives an affirmative local statement of compatibility, DEQ will rely on it as evidence that there has been a determination of compatibility with the Statewide Planning Goals or LCDC acknowledged local comprehensive plan and ordinances.
- (3) If DEQ does not receive a local statement with the permit application one of the following circumstances will apply:
 - (a) If the applicant has applied for but not yet received a local statement of compatibility, the DEQ may proceed with review of the application and inform the applicant that DEQ's decision (e.g. issuance of a permit) is not a finding of compatibility with the Statewide Planning Goals or the acknowledged comprehensive plan and that the DEQ's action is conditioned upon the applicant receiving a land use approval from the affected local government. If the applicant, however, is the local jurisdiction, the application will not be processed until the statement of compatibility is received.
 - (b) If a negative statement of compatibility is received stating that the project is incompatible with the acknowledged plan and ordinances or the Goals, DEQ will notify the applicant that a decision cannot be made on the application. If the decision has already been made conditionally, it cannot become effective.
- (4) Where more than one local jurisdiction has planning authority over a specific site, we will expect statements of compatibility from each of these jurisdictions (e.g., city and county in urbanizing area). See Procedures Manual for details.
- (5) The Department may petition LCDC for a compatibility determination and statement where:
 - (a) A city or county negative compatibility determination and statement or no statement at all has been issued on a proposal needed to meet DEQ program requirements (e.g., sewage treatment plant modifications) or

where a negative determination by a local jurisdiction is in a Goal area under DEQ jurisdiction by statute; or

- (b) A proposal appears to have major impact requiring a State determination of compatibility in addition to the local statement.

D. Program for Coordination with Other Governmental Agencies and Bodies.

The Department's program for coordination of DEQ actions with affected state and federal agencies and special districts includes the following. (See Attachment 3 for list of agencies.)

1. Provision of information and call for comment on DEQ plans, programs, and decisions affecting land use as described above in Section II C (above).
2. DEQ reaction to information and calls for comment from other agencies, including notices from the Executive Department, Intergovernmental Relations Division's "A-95" state clearinghouse and "One-Stop Permit" coordination center.

DEQ/DLCD COORDINATION AGREEMENT

Attachment 1

List and Summary of DEQ Programs, Rules and Decisions Affecting Land Use

A. SOLID WASTE

<u>Program/Decision</u>	<u>Summary</u>	<u>Citations: State & Federal Laws and Rules</u>
1. Resource Conservation and Recovery Act	Provides for protection of health and the environment and conservation of material and energy resources; prohibits open dumps and provides funding.	Public Law 94-580 (Federal)
a. Planning & Implementation	Establishes agencies responsible for planning and implementation within solid waste areas.	(C) 255.20 (Federal)
b. Open Dump Inventory	State to provide to EPA for publication a list of open dumps to be upgraded or closed.	State Plan, OAR 340-61-017 (effective 1-30-80)
2. State Solid Waste Plan	Compilation of regional plans and state policy toward solid waste (published in 1978).	ORS 459.015 - OAR 340-61-015
3. Completion of Local Solid Waste Plan		
a. Counties with Plans not completed (2)	Finish development of a local solid waste plan - approved by DEQ.	ORS 459.015 - OAR 340-61-015
b. Update Existing Plans	Update plans to reflect current volumes, practices and direction.	ORS 459.015 - OAR 340-61-015
4. Grants for Secondary Planning	Provide money for expanded solid waste studies leading to implementation only on a hardship basis.	ORS 468.220(E)
5. Loans for Implementation	Provide assistance for construction of specific systems or facilities. Must be detailed in or compatible with comprehensive plan.	ORS 468.220(F)
6. Plan Review	Review and approve plans for specific facility operation and construction. Must be compatible with comprehensive plan.	ORS 459.235 - OAR 340-61-005 (amended September 1981)

T-1

D. WATER QUALITY (cont.)

Program/Decision

Summary

Citations: State & Federal
Laws and Rules

7. Award of State Grant and Loan financial assistance for sewerage works construction

DEQ may purchase bonds for local share of eligible sewerage works construction. DEQ may, if specifically approved by the legislature or legislative emergency legislative emergency board, grant funds in hardship cases for sewerage works construction. Funds come from State Pollution Control Bond Fund.

ORS 468.195 et seq
OAR 340-81-005
et seq

8. Adoption of standards and plans for sewage and industrial waste disposal of water quality

EQC adopts and DEQ implements such rules and standards are deemed necessary to control waste water disposal so as to prevent water pollution, health hazards and nuisance conditions. EQC also adopts and DEQ implements such standards and rules as are necessary to ensure that beneficial uses of public waters are not impaired inadequate water quality.

ORS 454.605 et seq
ORS 468.020, 035,
705 through 735,
OAR 340-71 through -73,
PL 92-500
Sections 303 and 208

Rules presently exist for on-site sewage disposal. These will be amended from time to time based on new information and experience. Initial elements of statewide Water Quality Management Plan have been established by rule. These include beneficial uses to be protected, water quality standards, minimum design criteria for point source controls and general policies. The state plan is updated as necessary.

9. Certification of Water Quality standards compliance prior to federal permit issuance

DEQ must issue a certification that water quality standards will not be violated before any federally issued permit or license can be granted to a non-federal permittee for actions in or adjacent to a waterway which may result in a discharge of pollutants to the waterway.

Section 401
PL 92-500

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Amending *
 Deschutes County Zoning Ordin- *
 ance of 1979, Ordinance No. *
 PL-15, as Amended, by the *
 Addition of the Deschutes *
 River Combining Zone, Provid- *
 ing For a Study Period, Pro- *
 viding For Exceptions, Pro- *
 viding for Repeal; and *
 Declaring an Emergency. *

ORDINANCE NO. 83-058

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY,
 OREGON, ORDAINS as follows:

Section 1. Ordinance No. PL-15, Deschutes County Zoning Ordinance of 1979, as amended, is amended by the addition of Section 4.195, Deschutes River Combining Zone, as set out below:

"Section 4.195. Deschutes River Combining Zone.

DR. In any Deschutes River Combining Zone the requirements and standards of this Section shall apply in addition to those specified in this Ordinance for the underlying zone and other applicable combining zones. In the event of a conflict in requirements and standards of this Section with the requirements and standards for the underlying zone, or other applicable combining zones, the provisions of this Section shall take precedence.

- (1) Purpose. The purpose of the Deschutes River Combining Zone is to maintain the quality and quantity of the streamflows; to protect fish and wildlife; and protect the visual, environmental, and aesthetic attributes of the Deschutes River, its tributaries, diversion points, and adjacent areas within the area of the DR Zone.
- (2) Application of Section. This Section shall apply to all land use actions in the area of the DR Zone defined as 200' from the mean high water mark, 200' measured at a right angle from the river meander, or the identified floodplain, whichever is greater on and along the Deschutes River, Little Deschutes River, Spring River, Fall River, Tumalo Creek, Paulina Creek, Squaw Creek, and the Crooked River, as identified on the Deschutes

River Combining Zone map, marked Exhibit "A", attached hereto and by this reference incorporated herein.

- (3) Uses Permitted Conditionally. In a zone or zones with which the DR Zone is combined, those uses not otherwise exempt from this Section shall be permitted conditionally. The requirements and standards of this Section shall apply in addition to the general conditional use criteria and specific use standards set forth in Article 8, the requirements and standards for the underlying zone, and the requirements and standards of all other applicable combining zones.
- (4) Specific Use Requirements and Standards. The following requirements and standards apply to land uses within the DR Zone.
 - (A) The use shall maintain existing stream flow of any affected river or stream at present quality and quantity.
 - (B) The use shall conserve and protect fish and wildlife habitat.
 - (C) The use shall maintain public access to any affected river or stream.
 - (D) The use shall maintain the scenic, visual, environmental and aesthetic qualities of the affected river or stream.
 - (E) The use shall not impair recreational opportunities of the river or stream by the public.
 - (F) The use shall have no significant negative impact, individually or cumulatively, on existing and viable potential uses of the river or stream.
 - (G) Any application for a hydroelectric project shall affirmatively show that the use will further the purpose of this Section, and that the applicant has sufficiently addressed the issues to be resolved during the study period as set forth in this Section.
 - (H) The use shall meet the State of Oregon Department of Environmental Quality noise standards.

- (I) That fill and removal activities meet State of Oregon requirements and provide for the reclamation of disturbed areas so that no significant short or long term negative impacts occur.
 - (J) That when the use is on or affects Federal or State land, that the use is in conformance with any integovernmental planning agreement between Deschutes County and affected Federal or State agencies.
 - (K) That any special district involved in any manner with an application for a land use permit has complied with the requirements of ORS 197.185 and the proposed activity is in conformity with the special district's intergovernmental cooperative agreement with Deschutes County if the district does not otherwise have an acknowledged comprehensive land use plan.
- (5) Study Period. A study shall be conducted as set out below by a joint task force to be appointed by the Board of County Commissioners.
- (A) There is hereby declared a study period for all land use activities within the area within the DR Zone.
 - (B) The study period shall be for the period February 1, 1984 to July 31, 1985. Following review and public hearing, and prior to the termination date, and if deemed necessary by the Board of County Commissioners, the date of termination of the study period may be extended by ordinance for a subsequent period of up to six months.
 - (C) The study period shall include, but not be limited to, the following:
 - 1. Detailed mapping and instream flow studies of the Deschutes River, its tributaries, its diversion points, and its adjacent areas to allow precise review of the boundaries of the overlay zone.
 - 2. The development of a river system model at standards not less stringent than those adopted by the Northwest Power Planning Council to complete the re-

quirements of the studies identified in Section 1204, Northwest Power Planning Council "Columbia River Basin Fish and Wildlife Program" and Chapter 10, Sections 14.2 and 14.3, Northwest Power Planning Council, "Northwest Conservation and Electric Power Plan".

3. Identification of uses and development that may be permitted utilizing the balancing tests set forth in Statewide Planning Goal 5, and establish detailed standards and criteria for development within the DR zone.
4. The study of the individual and cumulative effects of all known and potential hydroelectric sites and sources on the Deschutes River, its tributaries, diversion points, adjacent areas, and stream flows.
5. The development of a program in recognition of the cumulative effects to balance the conflicting uses of the natural resource and the hydroelectric projects as required by Statewide Planning Goal 5.
6. Identification of current and potential river uses, and the economic value of such uses.
7. Preparation of amendments to the Comprehensive Plans and implementing ordinances to balance the conflicting uses on the Deschutes River, its tributaries, diversion points, adjacent areas, and streamflows.

(D) During the study period, the County shall participate with the Power Council in the completion of the Power Council's hydroelectric study and take affirmative action with respect to the apparent conflict between the provisions of PURPA and the Northwest Power Act in order to help facilitate resolution of the conflict.

(6) Exemptions. The following shall be exempt from this Section:

- (A) Continuation of a conforming or nonconforming use, or a conforming or nonconforming structure, constructed prior to January 1, 1984.
- (B) A use or structure, including a conforming or nonconforming use, or a conforming or nonconforming structure, for which a minor site plan for the construction, alteration, restoration, or replacement is necessary.
- (C) Construction or reconstruction of a single family residence.
- (D) The reconstruction or repair of an existing dam, provided such reconstruction or repair does not alter the characteristics of the water impoundment and does not otherwise affect existing stream flow.
- (E) Any use or accessory use permitted outright or conditionally in the underlying zone pursuant to a Cluster Development approval, Planned Development approval, Destination Resort approval, Dude Ranch approval, Planned Community approval, master plan approval, or site plan approval dated prior to January 1, 1984.
- (F) The employment of land for farm or forest use."

Section 2. This Ordinance is repealed February 1, 1985, or upon the completion of the study provided for in Section 4.195 of Ordinance No. PL-15, Deschutes County Zoning Ordinance of 1979, as amended, and the adoption of a recommended comprehensive plan and implementing ordinance amendments, whichever occurs first.

Section 3. This Ordinance being necessary for the immediate preservation of public peace, health and safety, an emergency is declared to exist, and this Ordinance takes effect on its passage.

DATED this 21st day of Dec, 1983.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

Albert A. Young
ALBERT A. YOUNG, Chairman

Lois Bristow Prante
LOIS BRISTOW PRANTE, Commissioner

Laurence A. Tuttle
LAURENCE A. TUTTLE, Commissioner

ATTEST:

Annette Pearson
Recording Secretary

LEGISLATIVE FINDINGS

The following Legislative Findings are hereby made in support of adoption of Ordinance No. 83-058.

1. Statewide Planning Goal 5 requires the users of land within the State "[t]o conserve open space and protect natural and scenic resources", by developing "[p]rograms that will: (1) insure open space, (2) protect scenic and historic areas and natural resources for future generations, and (3) promote healthy and visually attractive environments in harmony with the natural landscape character" Statewide Planning Goal 5 further provides that, "[w]here conflicting uses have been identified the economic, social, environmental and energy consequences of the conflicting uses shall be determined and programs developed to achieve the goal."
2. The Deschutes County Year 2000 Comprehensive Plan (Plan), portions of which are set forth in Appendix "A", identify uses for the Deschutes River, its tributaries, diversions, adjacent areas, and stream flows, all of which are herein-after referred to as the "Deschutes River", which are intended to implement Statewide Planning Goal 5.
3. Hydroelectric projects on or adjacent to the Deschutes River, or which divert water from the Deschutes River, conflict with the Plan and no program has been developed by Deschutes County to achieve Statewide Planning Goal 5.
4. The Plan provides that tourism and recreation are critically important components of the local economy. The economic elements of the Plans make it imperative that the Deschutes River be preserved as a resource to be utilized by tourists.
5. A number of Federal acts and actions have been promulgated which may impact the Deschutes River, such as the Northwest Conservation and Electric Power Plan (Power Plan) developed pursuant to the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act) as adopted by the Northwest Power Planning Council (Power Council), the Columbia River Basic Fish and Wildlife Program (Fish Plan) as adopted by the Power Council, the Public Utilities Regulatory Policy Act (PURPA), and the U. S. Forest Service Deschutes Forest Plan (Forest Plan).
6. The Forest Plan designates segments of the Deschutes River as a recreational area and proposes its inclusion under the Wild and Scenic Rivers Act.

7. A number of applications for hydroelectric generating facilities and diversions have been filed for river and streams in the Deschutes River Basin.
8. The Fish Plan and Power Plan adopted by the Power Council identify serious potential cumulative impacts from hydroelectric generating and diversion facilities which cannot be assessed by evaluating projects on a case by case basis.
9. The necessary studies, including environmental impact studies, to determine the cumulative impacts of the construction and operation of hydroelectric diversion, generating, and transmission facilities on the economic, social, environmental and energy consequences of identified and potential conflicting uses of the Deschutes River which are a condition precedent to the implementation of programs to meet Statewide Planning Goal 5 have not yet been accomplished.
10. The Deschutes River, conserved as open space and protected as a natural and scenic resource, is a critically important component to the tourism and recreation industry in Deschutes County.
11. Hydroelectric generating and diversion facilities impact open space, natural and scenic resources, and recreational opportunities which are among the basic elements of a successful tourist industry.
12. The Federal Power Act (FPA) which created FERC specifically recognizes "state action". The Act provides that FERC's powers shall not be exercised as ". . . affecting . . . or in any way to interfere with the laws of the respective state relating to the control, appropriation, use, or distribution of water used . . . for municipal or other uses . . .", and Section 9(b) of the FPA requires compliance with local laws implementing state action before developing the use, diversion, or appropriation of water, water course bed, or watercourse bank.
13. The Power Plan states that the Power Council will conduct, during the next two years, a stream-by-stream analysis to rank hydroelectric sites according to their impacts on fish and wildlife.
14. The Oregon Economic Department has determined that in 1982 out-of-state tourism spent \$100,000,000 in Deschutes County.
15. The Department of Fish and Wildlife has estimated fishing and hunting generate up to \$10,000,000.00 to the Deschutes County economy annually.

- 16. The condition of the Deschutes River may be irreparably damaged as a tourist attraction, a recreational resource, a fish and wildlife habitat, a scenic waterway, and a generally clean and safe natural resource by the unstudied placement of any of the proposed hydroelectric generating facilities or other major new facilities within rural Deschutes County.
- 17. The State Attorney General has recognized local jurisdiction's land use role in the use and development of water resources such as found in the Deschutes River Basin, and the authority of the local jurisdiction to adopt ordinances regulating the land use aspect of such resources.
- 18. That exemptions from the standards and criteria in the Ordinance are based upon the recognition of prior approvals and uses which at most represent minor impacts and are in conformance with the Plan and implementing ordinances, or may be continued pursuant to existing State law.

DATED this 21st day of Dec, 1983.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

Albert A. Young
ALBERT A. YOUNG, Chairman

Lois Bristow Prante
LOIS BRISTOW PRANTE, Commissioner

Laurence A. Tuttle
LAURENCE A. TUTTLE, Commissioner

ATTEST:

Annette Pearson
Recording Secretary

APPENDIX "A"

The following are excerpts from pertinent portions of Deschutes River Goals and Policies contained in the Deschutes County Year 2000 Comprehensive Plan, adopted November 1, 1979:

WATER RESOURCES"GOAL

1. To maintain existing water supplies at present quality and quantity. . . ."

"POLICIES

3. The County shall conduct a study of the legal, economic and environmental consequences of the use of irrigation water for non-agricultural uses. . . ." (pg. 170)

FISH AND WILDLIFE"GOALS

1. To conserve and protect existing fish and wildlife areas. . . .
3. To develop and manage the lands and waters of this County in a manner that will enhance, where possible, the production and public enjoyment of wildlife.
4. To develop and maintain public access to lands and waters and the wildlife resources thereon. . . ."

"POLICIES

4. Because public access to fish and wildlife areas is so important to the economic and livability aspects of Deschutes County, walking easements and periodic boat access points shall be provided in areas where public river access is limited, as determined appropriate by the County and State Department of Fish and Wildlife.
5. Consistent with Policy 4 and in order to protect the sensitive riparian areas, as well as to protect people and property from flood damage, the Zoning Ordinance shall prohibit development (except floating docks) within 100 ft. of the mean high water mark of a perennial or intermittent stream or lake. . . . Variances shall also be possible where

it is shown that the structure is removed from the riparian area because of a high bluff or steep slope. . . ." (pg. 164)

OPEN SPACES, AREAS OF SPECIAL CONCERN AND ENVIRONMENTAL QUALITY

"GOAL

2. To maintain and improve the quality of air, water and land resources of Deschutes County. . . ."

"POLICIES

1. A. On lands outside Urban Growth boundaries and rural service centers . . . and along all other streams and roadways for which landscape management is prescribed on the 1990 Comprehensive Plan, a case by case review area shall be established. This area is not to extend more than a quarter mile on either side of the center line of roadways, nor more than 200 ft. from either side of the rivers measured from the mean high water level.

Within the prescribed area, new structures (excluding fences, existing structures or other structures less than \$1,000.00 in total value), shall be subject to review by the County at the time of application for building or zoning permit. . . .

2. Considerations should be given to designation of appropriate segments of Fall, Deschutes, Little Deschutes and Crooked Rivers as Scenic Waterways. Reasonable protective and State agency coordinative measures should be instituted. . . .
6. Because management of State and Federal lands effects areas under the County's jurisdiction and vice versa, better coordination of land use planning between the County, U.S.F.S., State Land Board, Bureau of Land Management and other agencies shall be sought. . . .
9. Loss of riparian areas and other important open spaces because of dam construction for recreation or other purposes should be minimized." (pg. 153)

RECREATION

"GOALS

1. To satisfy the recreational needs of the residents of and visitors to Deschutes County." (pg. 117)

ECONOMY"GOALS

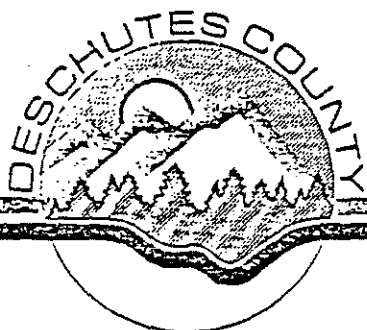
2. To enhance and maintain the existing natural resource, commercial and industrial segments of the local economy. . . ."

"POLICIES

1. The importance of tourism to the local economy is well known, but there also exists considerable potential for strengthening and improving this segment of the economy. The County shall assist in the development of a long range plan to encourage tourism (including destination resorts) and recreation locally. This study will include consideration of the impacts likely to be created by increasingly expensive gasoline.
2. Private commercial activities consistent with other County policies which enhance tourism shall be encouraged by the County. . . ." (pg. 87)

RURAL DEVELOPMENT"GOAL

1. To preserve and enhance the open spaces rural character scenic values and natural resources of the County. . . ." (pg. 49)



Board of Commissioners

Courthouse Annex / Bend, Oregon 97701 / (503) 388-6570

October 10, 1984

Albert A. Young
Lois Bristow Prante
Laurence A. Tuttle

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Department of Environmental Quality
Water Quality Division
P. O. Box 1760
Portland, Oregon 97207

RECEIVED
OCT 12 1984

WATER QUALITY CONTROL

Re: General Energy Development, Inc.
Preliminary Permit No. 5205 FERC
Request For Certification of Compliance With Water Quality
Standards and Requirements

Your notice dated September 5, 1984, indicates that the above applicant has requested certification from DEQ that water quality standards and requirements will not be violated by construction and operation of a proposed hydroelectric project near Benham Falls on the Deschutes River south of Bend. It is our understanding that the certification requested is pursuant to Section 401 of the Federal Clean Water Act, and the applicant has filed a copy of his application with the Department.

Deschutes County is currently engaged in the study of the Upper Deschutes Basin in accordance with Deschutes County Ordinance No. 83-058. Included within the study is an assessment of cumulative and individual impacts of known and potential hydroelectric projects on land and resource uses within that portion of the Basin. There are concerns implicit in the County's ordinances that such projects may cause a degradation of the water quality. The ordinance identifies the proposed use as conditional and does not allow approval as being in compliance with the requirements and standards of the ordinance unless the applicant affirmatively shows that the use furthers the purposes of the ordinance and the applicant addresses the issue to be resolved during the study period provided for in the ordinance.

Even though certification pursuant to Section 401 of the Federal Clean Water Act may not directly be a land use action regulated by Deschutes County, it is clear that the Department of Environmental Quality must issue its permits in accordance with the

Department of Environmental Quality
October 10, 1984
Page 2

local comprehensive plans and implementing ordinances. Deschutes County's Plan and implementing ordinances provide an opportunity for General Energy Development, Inc. to make application for a conditional use permit.


It is impossible for Deschutes County to find that the proposed hydroelectric project near Benham Falls on the Deschutes River south of Bend is in conformance with the Comprehensive Plan and implementing ordinances with respect to the requested certification under Section 401 of the Federal Clean Water Act without reviewing the whole of the project in accordance with the standards and procedures applicable to such a request.

Any review by Deschutes County would include not only direct influences during construction and operation due to increases in turbidity, settlement and erosion, but also the effect on minimum stream flows sufficient for pollution control, the effect on fish and wildlife, recreation, and other issues. Since the developer, General Energy Development, Inc., has not made application to the County, those issues cannot be addressed.

As a consequence, until such time as an application has been made by General Energy Development, Inc., and that application has been found to be in conformance with the Comprehensive Plan and implementing ordinances, Deschutes County opposes the issuance of a Section 401 Federal Clean Water Act certification. This position is consistent with our letter of May 10, 1984. A copy of the ordinance and May 10, 1984, letter are attached.

Sincerely,

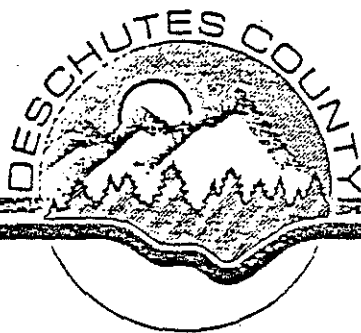
BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON


ALBERT A. YOUNG, Chairman


LOIS BRISTOW PRANTE, Commissioner


LAURENCE A. TUTTLE, Commissioner

BOCC/RLI/dw



Board of Commissioners

Courthouse Annex / Bend, Oregon 97701 / (503) 388-6570

Albert A. Young
Lois Bristow Prante
Laurence A. Tuttle

May 10, 1984

Mr. Fred Hansen, Director
Department of Environmental Quality
P. O. Box 1760
Portland, Oregon 97207RE: Lava Diversion Hydroelectric Project; FERC No. 5205; Oregon
HE 475,64551.

Dear Mr. Hansen:

Arnold Irrigation District and General Energy Development, Inc. (GED) have proposed a hydroelectric project at Benham Falls, one of the most environmentally sensitive areas on the Deschutes River, and one which is important economically and culturally to our community. To address this issue and several others, Deschutes County and the City of Bend are actively engaged in a study of the Deschutes River and its tributaries. This study is being coordinated with interested state and federal agencies, including your regional office in Bend. The results of this study and subsequent plan will have important impacts on the vital interests of the people of our county. With this letter we are asking your assistance.

It is our understanding that GED will soon be requesting your agencies waiver or approval of the required state certification of water quality for this project. Our proposal is that GED's request be held with no action taken by your staff until the completion of our study in 1985. This will allow a more complete evaluation and reasonable resolution of this important issue. Further, this delay by your department would be consistent with Oregon law, which requires intergovernmental coordination and cooperation on matters of mutual concern.

Page 2
May 10, 1984

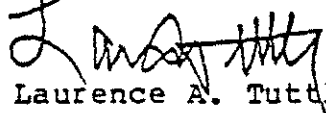
Our staff has discussed this matter with Mr. Glen Carter, of your office, to assure coordination with your department's activities.

Very truly yours,

DESCHUTES COUNTY BOARD OF COMMISSIONERS


Albert A. Young, Chairman


Lois Bristow Prante, Commissioner


Laurence A. Tuttle, Commissioner

BOCC:ap

TOM THROOP
DESCHUTES AND KLAMATH COUNTIES
DISTRICT 54

REPLY TO ADDRESS INDICATED:

House of Representatives
Salem, Oregon 97310
P.O. Box 643
Bend, Oregon 97709



APP 27
COMMITTEES
Chairman:
Reveries
Member:
Environment and Energy

HOUSE OF REPRESENTATIVES
SALEM, OREGON
97310

October 12, 1984

Department of Environmental Quality
Water Quality Division
Post Office Box 1760
Portland, Oregon 97207

Dear Sirs,

The certification from the Department that water quality standards and requirements will not be violated by the construction and operation of the Benham Falls project clearly should not be issued until the Deschutes River study here in Deschutes County has been completed. The area in question contains the most sensitive fish and wildlife habitat on the entire upper Deschutes River system. At this time, adequate information does not exist to determine that water quality standards and requirements will not be violated by this construction and operation.

It is also essential that the County participate in the decision to certify or not certify. Your state agency is required to coordinate with local comprehensive land-use plans and joint participation in this decision-making process is the appropriate vehicle to meet this coordination requirement. The County is extremely familiar with the area and its issues and is in an excellent position to determine with the Department whether or not the certification is appropriate or inappropriate.

Sincerely,

Representative Tom Throop
Deschutes and Klamath Counties

RECEIVED
OCT 16 1984

WATER QUALITY CONTROL

STATEMENT
of the
OREGON DEPARTMENT OF FISH AND WILDLIFE
to the
FEDERAL ENERGY REGULATORY COMMISSION
regarding
THE NEED FOR CUMULATIVE ENVIRONMENTAL ASSESSMENT
of proposed
HYDROPOWER DEVELOPMENT IN THE DESCHUTES RIVER BASIN

The Oregon Department of Fish and Wildlife (Department, ODFW) supports and recommends cumulative environmental assessment of all proposed hydropower projects in the Deschutes River Basin, particularly the Upper Deschutes Basin. The Upper Deschutes Basin is defined as the Deschutes River and its tributaries above the confluence of the Deschutes with Lake Billy Chinook (formed by Round Butte Dam).

There are numerous potential hydroelectric sites in the Deschutes River Basin. As of this date 11 applications for permits and licenses for development of hydroprojects in the Upper Deschutes River Basin are pending before FERC. This represents a total of 15 separate hydroelectric sites. The Department believes that there are common factual and legal issues in these proposed developments, and that the most efficient and meaningful review of the projects will occur through the development of comprehensive data on the projects in the Basin. Therefore, the Department requests that the review of these projects be conducted by FERC in a coordinated manner. Specifically, ODFW requests that these applications be assigned to an administrative law judge and be consolidated for review.

Statutory Authority

The Department of Fish and Wildlife is the state agency designated by the Oregon legislature to manage Oregon's fish and wildlife resources (ORS Chapter 496). The Department has an interest in any activities which have the potential to impact fish and wildlife resources in the state. The proposed development of hydroelectric projects in the Upper Deschutes Basin has the potential to have a significant adverse impact on these resources.

In addition, the Department is the state agency vested with jurisdiction over the management of fish and wildlife resources pursuant to the Fish and Wildlife Coordination Act, 16 USC § 662.

The Department previously has sought intervention in three of the proposed Deschutes River projects and has submitted comments on one other. In the Petitions for Intervention and Comments, the Department has detailed specific concerns about the impacts on fish and wildlife resources of each project.

However, the Department is also concerned about the need to identify the potential for interrelated and cumulative impacts of the proposed projects on the fish and wildlife populations of the area, as well as social, aesthetic, economic and energy impacts. ODFW believes that the development and consideration of information concerning these cumulative and interrelated impacts are essential to meaningful consideration of the permit and license applications for these projects.

Historical Perspective

The current proposals for hydroelectric development in the Upper Deschutes River from Wickiup to Lake Billy Chinook have caused the Department to examine the river both historically and with future projections to determine the potential fate of fish and wildlife resources. The focal point of both proponents and adversaries has been fish and wildlife populations and the associated recreation and economic benefits. The Deschutes is a highly regulated stream and has undergone great change and suffered much damage.

Irrigation in the Deschutes Basin began in 1871 when water was diverted from Squaw Creek. Individual developments were consolidated and expanded in 1895. The first recorded diversion from the Deschutes River was made in 1899 by the construction of the Swalley Ditch. Early irrigation was carried out primarily for purposes of supplementing feed for range livestock and for the production of farm commodities for local consumption. Power was first produced in 1914 with completion of the Deschutes Power and Light Company plant at North Canal Dam in Bend. Irrigation development of Upper Deschutes area continued through the early 1900's and culminated in the completion of Wickiup Dam in 1947. Six irrigation districts--Swalley, Central Oregon, Crook County Improvement, Arnold, Tumalo, and North Unit--now divert water from the river in the vicinity of Bend and have storage in Crane Prairie and Wickiup Reservoirs and in Crescent Lake.

Habitat

The Upper Deschutes is primarily a low gradient, slow moving, meandering stream with a sand-silt substrate. There are small, isolated pockets of spawning gravel within these areas. There are four major falls within the upper basin including Pringle, Benham, Dillon and Lava Island. The areas immediately below these falls are moderate gradients with moderate velocities. These areas contain pools and riffles with braided channels. The substrate contains gravels suitable for salmon spawning. The riparian habitat is diverse, well established, and provides good edge or pocket water which provides fish cover. Because of the relative quality and quantity of gravel and suitable velocities, these are the few areas in the main upper Deschutes where spawning occurs. It also provides excellent rearing habitat. These areas provide the finest fishery habitat within the Upper Deschutes Basin. We depend upon these limited spawning areas for seeding areas downstream. There are several proposed projects at these various falls. If these projects were built it is possible that they could impact fish populations not only within their respective diversion reaches, but also downstream outside the project area. This greatly concerns the Department and is one of the main reasons why we support cumulative environmental assessment.

Fish

The Deschutes River contains six species of game fish including brown trout, rainbow trout, brook trout, kokanee, coho and whitefish as well as tui chub, a nongame, detrimental species. Since completion of Wickiup Dam in 1947, there has been slow but continual loss of fisheries habitat and corresponding loss of game fish populations from Wickiup to Benham Falls. For example, brown trout redd counts in the river reach from Wickiup Dam to Pringle Falls have declined from ninety two in 1954 to one in 1970. Widely fluctuating river flows caused by irrigation releases have eliminated through erosion most of the riparian areas in this area. For example, prior to completion of Wickiup Dam, the extreme record low flow was 341 cfs. After completion, the winter flow has dropped as low as 5 cfs. Summer regulated flows are also higher than unregulated flows (up to 2,280 cfs). Extensive bank erosion caused by these

widely fluctuating flows has resulted in sedimentation of this entire reach of river. This "cementing" of river gravels has virtually eliminated natural trout spawning in this area. The regulated flow plus the natural flat gradient does not allow the river to cleanse the gravels as normally happens in a natural flowing stream. A large percentage of natural reproduction in the river above Benham Falls occurs in tributaries such as Spring River and Fall River. Attempts to improve riparian and in-stream habitat over many years have been only marginally successful. Costs to substantially improve this section of river are prohibitive.

Attempts to augment the natural populations of brown and rainbow trout have not been successful. Fingerling and catchable size brown trout were experimentally released in the upper river from 1965 to 1968. Returns of marked and tagged fish indicated poor survival and there was no indication these fish contributed to the wild spawning population.

Rainbow populations have suffered the same fate as brown trout in terms of loss of spawning and rearing habitat. Their reintroduction by stocking has not been successful due to the presence of Ceratomyxa shasta, a disease specific to rainbow. The ODFW currently stocks 30,000 catchable size rainbow annually from Wickiup to Sunriver to provide a recreation fishery. Carry-over of these fish to the next year is precluded by Ceratomyxa which causes fish mortality once the water temperature reaches 50°F or more.

With help from local sportsmen's clubs, 115 cubic yards of spawning gravel were placed in Spring River to augment natural spawning habitat and increase production of wild brown trout. The gravel is heavily used by brown trout and we believe that natural seeding of fry and fingerling is occurring downstream from Spring River to below Benham Falls.

The ODFW has recently used Deschutes River brood stock to develop a strain of Ceratomyxa resistant hatchery rainbow for use in waters containing this disease. In 1984, in conjunction with the Sunriver Anglers, a local angling club, a hatchbox was installed in Spring River and Fall River. Each box was stocked with 13,000 eyed Deschutes rainbow eggs. If this experiment is successful, there may be additional plants in the future.

In 1978, ODFW determined the reach of river between Benham Falls and Bend was suited for both wild rainbow trout and brown trout production. Recognizing

that spawning area in this stretch of river is available but limited, ODFW eliminated all legal trout stocking to reduce competition with wild fish. The Department is now managing this section of river as a wild trout stream. Angling success indicates a slow but steady increase in the brown trout population. Many small wild rainbow are also being taken. Although angling pressure dropped after the stocking program was eliminated, it is now increasing annually, based on random creel census and observation.

Wildlife

The wildlife habitat within the Upper Deschutes River Basin contains yellow and lodgepole pine, bitter and buck brush, diverse riparian vegetation adjacent to the river, sloughs and numerous wetlands connected to or near the river, and the river itself. This diverse habitat contains many wildlife species which include eight species of game mammals, 18 species of game birds and waterfowl, eight species of furbearers, 17 species of raptors and owls and many nongame birds and animals, shorebirds, reptiles and amphibians.

Roosevelt elk are a year-round game animal in the area around Benham Falls. This important herd has been growing for the past 10-15 years and now number approximately 60. Previously, their winter range was from Sunriver to Dillon Falls in the meadows and trees along the river that provided both forage and thermal cover. The expanded development of Sunriver properties eliminated meadows used by the elk and the herd now winters almost exclusively in the Ryan Ranch area just downstream from Benham Falls. Mule deer utilize the river reach and adjacent cover for fawning and summer range.

Waterfowl are common on the river and wetlands in the basin. Sloughs are used extensively by nesting waterfowl. The more common species include mallards, cinnamon and blue wing teal, and Canadian geese.

Furbearers such as beaver, mink, and river otter use the river, marsh and riparian areas. Bobcats, coyotes and marten use areas further from the river.

Miscellaneous small mammals such as squirrels, chipmunks, mice, and rabbits are numerous throughout the area.

Raptors utilizing the river area and vicinity include osprey, redtailed hawks, kestrels, great horned owls, goshawks, and golden and bald eagles. There are two documented peregrine falcon sitings within the Upper Deschutes Basin.

Project Impacts

The Deschutes River Basin is an important recreational fishing area. Tourism related to the recreational opportunities of the area is a vital component of the local economy. Thus, any impacts on recreational fishing sites and resident fishing populations must be based on an understanding of cumulative impacts of proposed projects.

The proposed projects have the potential to detrimentally affect these fish populations by impacting streamflows required for spawning, incubation, rearing and instream movement. Wildlife also may be adversely impacted by the proposed projects. The projects may significantly alter wildlife's use of project sites through destruction or alteration of existing wildlife habitat.

In addition to common impacts on the resources, the proposed projects have numerous locational, design and operational features in common. Thus, in addition to the benefits of coordinated review of the projects for purposes of determining the impact on fish and wildlife resources, coordinated review will allow efficient and meaningful evaluation of project operations to insure efficiently planned development of power production.

As mentioned above, the projects have the potential to detrimentally affect fish and wildlife populations through regulation and diversion of stream flow, which influences not only aquatic habitat for fish, but riparian and wetland habitat utilized by wildlife. In 1978, the Department filed a Fish and Wildlife Resource Protection Plan ("Plan") with Deschutes County as guidance for developing a county land use plan consistent with statewide land use planning goals for protection and maintenance of fish and wildlife habitat. The Plan identified "sensitive" habitats for fish and wildlife. These sensitive habitats for fisheries and associated water quality requirements include "streams and rivers", "lake and reservoirs", and "head-water areas." (See page 5 of Plan).

For wildlife habitat, specific sensitive areas were identified for big game (see page 9 of Plan). Both short and long term construction and operation activity could cause relocation or reduction of numbers to big game herds. Riparian vegetation was regarded generally as a sensitive habitat for upland game. Specific areas, including the main stems of the Deschutes and Little Deschutes River, were identified as sensitive for waterfowl production (see page 15 of Plan). All of the above habitats were regarded as generally valuable for production of furbearers and non-game wildlife. It was recommended in the Plan that land use activities within these sensitive habitats should be limited to those which were non-destructive and non-disruptive of the fish and wildlife habitat values. All of the proposed projects in the Upper Deschutes Basin are located within, or would affect sensitive fish and wildlife habitats identified by the Department for Deschutes County.

Deschutes County Ordinance

On December 21, 1983, the Deschutes County Commissioners adopted, under its land-use planning authority, a Deschutes River Combining Zone encompassing areas physically affected by the proposed projects in the Upper Deschutes Basin. The court ordinance provides for an 18-month study "of the individual and cumulative effects of all known and potential hydroelectric sites and sources on the Deschutes River, its tributaries, diversion points, adjacent areas, and stream flows." The study period has been set for the period February 1, 1984 through July 31, 1985. The Department supported this ordinance as consistent with the statutory fish and wildlife policy of the State of Oregon and as a necessary amendment to the Deschutes County Comprehensive Land Use Plan to assure consistency with the statutory fish and wildlife policy. The Department is a participant in the Study Team formed under the ordinance and will provide recommendations on the requirements of the study to identify potential hydroelectric impacts on fish and wildlife measures.

Upon completion of the Study described above, the Department will be better able to specify appropriate fish and wildlife measures for any hydroelectric

projects which may be subsequently constructed within the Deschutes River Combining Zone. Also, the Department will be better able to specify consistent measures for conservation and development of fish and wildlife populations or habitats affected by more than one project, thus avoiding cumulative impacts.

Power Planning Act

An additional reason supporting consolidated review is that the Upper Deschutes Basin is included in the planning area of the Northwest Power Planning and Conservation Act. The Power Planning Council (NWPPC) is presently organizing site ranking, cumulative impacts and critical reach criteria for new hydroelectric projects as required by the NWPPC Fish and Wildlife Program. The Department is participating in this effort. It is presently too early to assess how these studies would affect the proposed projects. One purpose of the Deschutes County ordinance is to assist in the completion of the NWPPC Study.

The Department believes that a consolidated review of the applications for development of hydroelectric projects in the Deschutes River Basin is the most reasonable and efficient method to achieve the purposes of the Federal Power Act which as stated by the United States Supreme Court is to:

" * * * promote the comprehensive development of water resources of the nation * * * instead of the piecemeal, restrictive, negative approach of the River and Harbor Act under the federal law previously enacted." First Iowa Hydro-Electric Cooperative v. F.P.C., 328 US 152, 180 (1946).

The Pacific Northwest Electric Power Planning and Conservation Act also contemplates coordinated review of hydroelectric projects in a single river drainage. 16 USC §§ 839, et seq. Section 1204(a) of the Fish and Wildlife program provides that:

"The Federal Project operators and regulators shall review all applications or proposals for hydroelectric development in a single river drainage simultaneously through consolidated hearings, environmental impact statements of assessments, or other appropriate methods. This review shall assess cumulative environmental effects of existing and proposed hydroelectric development on fish and wildlife." Sec. 1204(b)(1).

Thus, the above provisions of the Power Act recognize the value of the coordinated approach requested by the Department in this matter.

Fish and Wildlife Coordination Act

Further, the coordinated review process is consistent with the provisions of the Fish and Wildlife Coordination Act. The pertinent provisions of the Act provide that whenever the waters of any stream or body of water are to be impounded, diverted, controlled or modified pursuant to a federal permit or license, the federal agency must consult with the state agency with authority over the wildlife resources in the affected area:

" * * * with a view to the conservation of wildlife resources by preventing loss of or damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development." 16 USC § 662(a).

The federal agency is required to give "full consideration" to the recommendations of the state agency and the project plan should include:

" * * * such justifiable means and measures for wildlife purposes as the reporting agency (the state agency) finds should be adopted to obtain maximum overall project benefits." 16 USC § 662(b).

The Department believes that in the case of the Deschutes River Basin, the projects' impacts and appropriate measures for fish and wildlife protection may best be determined through a coordinated review process.

Conclusion

Therefore, for the above reasons, the Department requests that all of the proposed Deschutes River Basin projects be assigned to an administrative law judge who shall coordinate the review process and specifically shall conduct consolidated hearings as determined to be appropriate pursuant to the provisions of the Administrative Procedures Act, 5 USC § 385.502. The specific actions the Department requests FERC to take are as follows:

1. The Commission will consolidate the Deschutes River Basin projects into a single proceedings, with procedures to be used and hearings to be held as determined by an administrative law judge to be necessary to achieve meaningful consideration of common issues and cumulative impacts.
2. The Commission will require project developers to submit additional information to allow evaluation of individual and cumulative project impacts, including, but not limited to:
 - (a) Studies of site specific and cumulative impacts of the proposed projects on fish and wildlife resources consistent with the findings of the Deschutes County hydroelectric impacts study.
 - (b) Studies of available enhancement and protection measures to reduce project impacts.
 - (c) Preparation of an Exhibit E consistent with implementation requirements of Deschutes County Ordinance 83-058.
 - (d) Projects impact, including impacts on recreation, angling, hunting and access (including boating).
3. The Commission shall notify all present and future applicants for hydroelectric projects in the Deschutes River Basin of the requirements of the consolidated proceeding.
4. In taking any action regarding projects subject to this consolidated proceedings, the Commission shall make written findings regarding the consistency of the action with the Northwest Power Act, specifically with pertinent portions of the Fish and Wildlife program.

5. The Department shall be made a party to all proceedings concerning projects subject to this consolidated proceedings.
6. A condition shall be included in all exemption orders on projects in the Upper Deschutes Basin which enables the Department to subsequently modify terms and conditions of the order to address matters identified in cumulative impact studies.

Summary

The Deschutes River has suffered substantial losses in fish habitat and fish numbers due to impoundment construction and operation, and disease. Attempts to increase habitat and fish populations through artificial means have only been partially successful. Many of the proposed projects in the Deschutes Basin, as they are presently proposed, could have significant short and long term adverse impacts to fish and wildlife populations and their habitats. The Department feels that any further significant degradation of the environment, whether short or long term, is not acceptable. The Department recommends that cumulative environmental assessment is necessary to completely evaluate the impacts of a proposed hydropower project within the Deschutes River Basin.



Department of Energy

LABOR & INDUSTRIES BUILDING, ROOM 102, SALEM, OREGON 97310 PHONE 378-4040
TOLL FREE 1-800-221-8035

May 8, 1984

Kenneth F. Plumb, Secretary
Federal Energy Regulatory Commission
825 North Capitol Street NE
Washington, DC 20426

Dear Secretary Plumb:

The Oregon Department of Energy urges you to develop a methodology to measure the cumulative impacts of multiple hydroelectric projects operating and planned in a particular river basin. The Northwest Power Planning Council and Bonneville Power Administration are working to develop such a methodology. We recommend that the Federal Energy Regulatory Commission work in concert with those efforts and with the state jurisdictions which have the responsibility for managing our resources, of which water is the lifeblood.

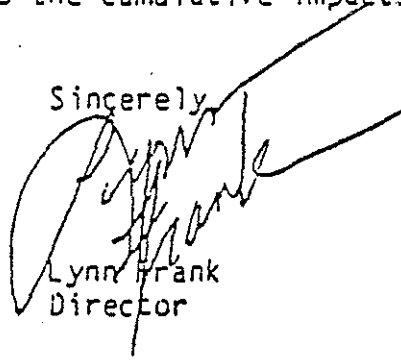
Many of the small-scale hydroelectric projects which have been proposed may not cause significant environmental impacts by themselves. However, the development of multiple projects on a single stream may result in disproportionate cumulative impacts. The Federal Energy Regulatory Commission and the many other agencies involved in regulation of hydroelectric projects need a better method for identifying all of the adverse impacts of each project. This should include impacts which become significant only because of their interaction with impacts of other development activities which come before the agencies for licensing or exemption. Such a method must permit an assessment of environmental impacts caused by projects which are operating, under construction, and in the exemption or licensing phase. That method must provide or have the ability to assess other economic and environmental demands on a river, including but not limited to, industry, migration, fisheries and recreation.

Hydroelectric projects have been proposed at several sites in the Upper Deschutes basin in Central Oregon. Some of these could adversely affect tourism and recreation which constitute a major part of Deschutes County's economic base and is one of Oregon's top three industries.

Kenneth F. Plumb, Secretary
May 8, 1984
Page 2

Given the interest in project development in the basin, we urge the Federal Energy Regulatory Commission to give priority to acquisition of the information needed to assess the cumulative impacts of projects proposed in the basin.

Sincerely,

A handwritten signature in black ink, appearing to read "Lynn Frank", is written over the word "Sincerely,". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Lynn Frank
Director

LF:dmp
58451(D4,F2)

Save Benham Falls Committee

P.O. Box 6013 • Bend, Oregon 97708

October 12, 1984

Steering Committee

John Wujack - Chairman

Harry Barker

Davenport Brown Jr.

John Fishburn

Richard Foster

Jeff Frank

Leardsley Graham

Matt Holmes

Ken Mathisen

Brian Meece

Bill Meyer

Lee Meyer

Carolyn Meyer

John Meyer, Treas.

Orly Robinson

Foster Rucker

Phillip Rummell

Mark Sandberg

Eric Schulz

Josh Thompson

Tom Throop

Barbara Young

Lyde Young

Gentlemen:

The Benham Falls Committee, a citizens group of wildlife biologists, engineers, recreationalists, and natural resource managers from the Bend/Sunriver communities urges you to deny a #401 water quality permit to General Energy Development of Medford for their proposed Lava Diversion Project at Benham Falls on the Deschutes River.

The Deschutes River serves as the drinking water source for hundreds of Central Oregon residents and currently falls below the safe standards as set by your department. Any further reduction in water quality may cause harm to the health of these users.

An increase in turbidity during construction will have catastrophic effects on the Wild Trout Fishery below Benham Falls. This opinion may be affirmed by contacting the Central Office of the Oregon Department of Fish and Wildlife in Bend.

Increased turbidity may also pose a threat to the mechanically delivered irrigation systems that make up our second largest industry with an estimated direct benefit of over 200 million dollars to our agricultural interest.

Our largest industry, tourism, (calculated to be a 215 million dollar industry) would be directly threatened by:

1. lost aesthetic appeal
2. lost resort revenue (the Inn of the 7th Mountain has established a successful white water program in the area with over 1,000 guests being escorted through Benham Falls yearly.
3. particulate suspension will cause a heating to the Deschutes River which will effect the Fishery (this area is currently the only remaining portion of the main stem Deschutes that allows angling from a boat or other device, a most cherished recreation for many handicapped Central Oregonians and vacationers.

As you may know, the City of Bend and Deschutes County adopted ordinances last December calling for a study of the Deschutes River

Save Benham Falls Committee

P.O. Box 6013 • Bend, Oregon 97708

Steering Committee
 John Wujack - Chairman
 Larry Barker
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 Alan Ochs - Treas.
 Caryl Robinson
 Foster Rucker
 Phillip Rummeli
 Mark Sandberg
 Mac Schulz
 Josh Thompson
 Rep. Tom Throop
 Barbara Young
 Lyde Young

Combining Zone. This study has been overwhelmingly supported by Oregon's Congressional Delegation, the Northwest Power Planning Council, and thousands of Oregon residents. An issuance of a 401 permit before this study is finished would be a slap in the face to the thousands that have expressed concern for the natural resources of this area.

If The Benham Falls Committee may be of further assistance to you in this matter, please feel welcome to contact us.

Sincerely,



John L. Wujack



Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5595

September 7, 1984

CLE.	APP 10
TO	
<i>Sawyer</i>	
<i>Huston</i>	
<i>Sawyer</i>	
Huston	MAI

CERTIFIED MAIL

• Mr. Donald P. McCurdy, President
 General Energy Development
 216 E. Barnett St.
 Medford, OR 97501

*Copy also sent
 via regular
 mail 9-10-84*

Re: FERC No. 5205
 Lava Division Project
 Deschutes River, Oregon

Dear Mr. McCurdy:

By letter of November 28, 1983, Campbell-Craven, Environmental Consultants, requested a water quality standards compliance certification, or waiver, for the above referenced project, as required by Section 401 of the Federal Clean Water Act. We replied on December 1, 1983, that we would not commence action on the certification request until having opportunity to review an Exhibit E Environmental Report for the project.

On August 20, 1984, we received from you the four-volume application to FERC for project licensing, that includes Exhibit E.

Please be advised that public notice of receipt of your Exhibit E and request for certification pursuant to Section 401 of the Federal Clean Water Act is being circulated to known interested persons and agencies and forwarded to the Secretary of State for publication in the Bulletin. Comments are being requested by October 15, 1984. A copy of this notice is attached for your information.

As you know, the Deschutes County Board of Commissioners has asked this Department by letter dated May 10, 1984, to hold your application with no action until completion of a study by them in 1985. Arnold Irrigation District (by letter dated June 5, 1984) and General Energy Development, Inc. (by letter dated June 12, 1984) have taken exception to the request of Deschutes County and urged us to proceed with evaluation of the project.

In the process of evaluating these requests, we consulted with our legal counsel. We were advised that ORS 197.180 requires DEQ actions which affect land use to be compatible with acknowledged comprehensive plans and in compliance with statewide planning goals. This statute also requires agencies to submit a program for coordination to the Land Conservation and Development Commission (LCDC) for approval. DEQ's coordination program, which was certified by LCDC on March 30, 1983, lists certification pursuant to Section 401 of the Clean Water Act as an action affecting land use. This coordination program specifies that "DEQ" will rely on a statement of compatibility from the appropriate planning agency.

Ronald P. McCurdy
September 7, 1984
Page 2

APP 41

DEQ has overlooked this provision and has not been properly addressing land use issues in the 401 certification process for the limited number of applications filed directly with DEQ.

This oversight makes it apparent that rules are needed to clearly establish procedures for 401 certification. The Department will seek authorization from the Environmental Quality Commission on September 14, 1984, to hold a hearing on proposed rules. We are enclosing a copy of the staff report for your information. Since your application for certification predates these proposed rules, action on your application will not be based on these draft rules but will be based on existing statutory authorities.

In order to address the land use compatibility determination required by Oregon law and our agreement with LCDC, we request that you obtain from Deschutes County and forward to us by October 15, 1984, a statement of compatibility with the acknowledged comprehensive plan or of consistency with statewide planning goals.

We interpret the letter from Campbell-Craven dated November 28, 1983, as the date of your first application for certification. Thus, we must act to issue or deny certification on your application by no later than November 28, 1984 to remain within the 1 year time frame established in Section 401 of the Clean Water Act. We apologize for the short time for response to the land use compatibility requirement.

We are aware that you may be unable to obtain the necessary statement of compatibility from Deschutes County. If you are unable to obtain such a statement, it is our opinion that we will have to propose denial of certification at this time pending resolution of land use issues.

presently serve as a...
potential impacts of the...
land use compatibility...
plan... statewide planning...

Sincerely,

Original Signed By
Fred Hansen

SEP 10 1984

Fred Hansen
Director

ELS:t
WT264
Attachments

cc: Arnold Irrigation District
Federal Energy Regulatory Commission
Central Region, DEQ



Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

November 27, 1984

Richard E. Craven
Campbell-Craven
Environmental Consultants
9170 S.W. Elrose
Tigard, OR 97223

Re: Lava Diversion Project,
FERC No. 5205,
Deschutes River, Oregon

Dear Mr. Craven:

By a letter dated November 28, 1983, you requested water quality standards compliance certification for the above subject project, as is required by Section 401 of the Federal Clean Water Act. We responded on December 1, 1983, stating that we would not commence action on the certification process until having an opportunity to review an Exhibit E Environmental Report for the project.

We received the Environmental Report on August 20, 1984. As prescribed by law, we made public notice of your request on September 5, 1984, and received comments through October 15, 1984. During this same period, we evaluated the Environmental Report, plus the additional project information Exhibits A, B, C, D, F, and G which are part of your submittal for FERC licensing. Subsequently, we evaluated the comments which were received in response to our public notice of your project certification request.

Our findings, conclusions, and recommendation, pursuant to your request, are contained in the attached report "Evaluation of Request for Water Quality Requirements Compliance Certification for Proposed Lava Diversion Hydroelectric Project, Deschutes River, near Bend, Oregon (FERC No. 5205)," November 27, 1984.

Based on the findings and reasoning contained in that report, I hereby deny your request for water quality standards compliance certification for the Lava Diversion Project, FERC Number 5205. This denial is rendered without prejudice, and the request for certification may be made again if and when the current reasons for denial are removed.

Sincerely,

Fred Hansen
Director

GDC:t
WT462
Attachment

cc: Donald P. McCurdy
General Energy Development, Inc.

Evaluation of Request for Water Quality Requirements
Compliance Certification for Proposed Lava Diversion
Hydroelectric Project, Deschutes River Near Bend, Oregon
(FERC No. 5205)

by

Department of Environmental Quality

November 27, 1984

Introduction

General Energy Development, Inc. (GED) holds Preliminary Permit No. 5205 from the Federal Energy Regulatory Commission (FERC) to plan and design the Lava Diversion Hydroelectric Project on the Deschutes River at Benham Falls, south of Bend. Before construction licensing by FERC may proceed, federal law requires certification by the state Department of Environmental Quality (DEQ) of the project's compliance with water quality standards and related requirements. A state condition of certification is that the project must also be compatible with the county's comprehensive land use plan and/or Statewide Planning Goals. Thus, the DEQ's responsibility and authority in responding to the request for project certification are limited to making two determinations:

1. Is the project compatible with the county's comprehensive land use plan and/or statewide planning goals?
2. Is there reasonable assurance that the project will not violate applicable water quality standards and related requirements?

Hydropower development in Deschutes County is a conditional use under terms of the county's comprehensive land use plan.

In addition to the Lava Diversion Hydroelectric Project, there are eleven other hydropower sites in the Upper Deschutes River Basin on which applicants have filed for permits or licenses from the FERC. Deschutes County officials took note of this large hydropower interest and sensed the possibility that such river developments could possibly have cumulative adverse impacts on present environmental conditions and cultural uses of the area. As a consequence, the county passed Ordinance No. 83-058 which gives them from February 1, 1984, to July 31, 1985, to study the situation and determine whether such hydropower developments would truly fit well with key elements of their land use plan. Until the study is finished, Deschutes County officials will not issue a conditional use permit for any of the proposed hydroelectric sites in the Upper Deschutes River zone of contention.

GED's environmental consultants, Campbell-Craven, requested DEQ certification for the Lava Diversion Project by letter dated November 28, 1983 (received by DEQ on November 29, 1983). DEQ, in turn, requested further supporting information which was received on August 20, 1984.

The DEQ made public notice of the certification request on September 5, 1984, (Appendix A) and received public comment through October 15, 1984.

Project Description

This project description was taken from information Exhibit A, that the applicant submitted to the FERC for licensing purposes.

The project site is located in Sections 8, 9, 16, and 17 of Township 19 South, Range 11 East of the Willamette Meridian. It is situated entirely on federal lands in the Deschutes National Forest. A project plan is shown in Appendix B.

Evaluation of Request for Water Quality Requirements Compliance Certificate
for Proposed Lava Diversion Hydroelectric Project, Deschutes River Near Bend,
Oregon (FERC No. 5205)

Page 2

The facility is designated for year-round operation as a run-of-river project with no storage of water. The controlled flows in the Deschutes River in the project area dictate the equipment required to maximize the power benefits of the project while allowing the bypass flows necessary to protect other recognized beneficial uses.

Current uses of the Deschutes River will not be altered by the project, except in the reach from the weir to the powerhouse. Relocations of private individuals or prior improvements will not be required to permit construction and operation of the project.

The project will have eight components: (1) a control weir, (2) an intake structure, (3) a tunnel to convey water from the intake to the powerhouse, (4) a surge tank, (5) a pipeline, (6) a powerhouse, (7) a tailrace and (8) access roads necessary for construction and operation of the project. These are briefly described as follows:

- (1) A rectangular concrete control weir will be installed near the head of the Benham Falls. Benham Falls is 3,800 feet long and drops 103 feet. The weir will have a 140-foot crest, which will be totally submerged assuming flows in excess of 350 cfs.

The weir will measure bypassed flows and transmit these measurements to the powerhouse. A processor will compare the released flows to the project rule curve for releases and adjust the turbines to assure compliance with the required bypass flow. The weir is intended to maintain approximate existing upstream river levels during operation of the project. The applicant believes this will protect present recreation, wetland, and waterfowl uses of that river zone.

- (2) The intake structure for the project will be constructed of reinforced concrete. It will be set on the left bank of the Deschutes River, with intake portals parallel to the flow of the river.

The structure will be fronted by a trash rack with two inch openings. The bar screen on the trash rack will be constructed to facilitate cleaning with a motorized rake.

The applicant expects that fish will be prevented from entering the conduit by screening with 0.25 inch openings.

- (3) An 1,800-foot horseshoe shaped, concrete lined tunnel will be constructed to convey water from the intake structure to the powerhouse. The tunnel will have a 6.5-foot radius crown dropping from the radius point to a rectangular base and a grade of 0.0078 foot per foot. The upstream end of the tunnel will be set at an elevation of 4,120 feet (U.S.G.S. datum), and the outlet, which will be at the base of the surge tank, will be at an elevation of 4,106 feet. Two conduits will be installed in the tunnel cavity for controls and power for the intake structure.

Evaluation of Request for Water Quality Requirements Compliance Certification
for Proposed Lava Diversion Hydroelectric Project, Deschutes River Near Bend,
Oregon (FERC No. 5205)

Page 3

- (4) A restricted orifice type surge tank 51 feet in diameter and 36-foot deep will be constructed at the transition point of the tunnel to penstock. The transition will be from the 13-foot diameter horseshoe type tunnel to a 14-foot diameter welded steel pipe. The tank will have a floor elevation of 4,129 feet and a top elevation of 4,165 feet.
- (5) A 14-foot diameter pipe will extend from the tunnel outlet approximately 50 feet. It will then be split with a 40-foot bifurcation. The two resulting 9-foot, 6-inch diameter pipes will extend the remaining 410 feet to the powerhouse.

The pipeline will have a wall thickness of 1/2 inch and will be buried between the tank and the powerhouse.

- (6) A low-level powerhouse will be constructed of reinforced concrete. The structure will be 62 feet by 71 feet 4 inches and will rise from a foundation elevation of 4,025 feet to a roof elevation of 4,071 feet. The powerhouse will be located on the left bank, 250 feet away from the Deschutes River. The powerhouse will be equipped with three generators having a combined rating of 11,825 kva, at a 95 percent power factor.

Additional mechanical equipment, such as air, oil, and cooling water systems, will be located in the powerhouse where appropriate. Electrical systems necessary for operation of the project will include station service, control boards, monitoring equipment, switchgear, and an auxiliary power supply. Further, a fire protection system will be provided for the powerhouse.

- (7) A 250-foot tailrace will be excavated from the powerhouse to the Deschutes River. The discharge from the powerhouse will vary from 80 cfs to 1,800 cfs, and the tailwater will vary in height from an elevation of 4,036.9 feet to an elevation of 4,040.3 feet.

The discharge velocities at full capacity of the powerhouse will be 5.0 fps. These will dissipate to 1.5 fps at the river re-entry point.

The tailrace cross-section expands gradually as it proceeds to the Deschutes River. At its confluence with the river, the re-entry channel will be 135 ft. wide at the bottom and 165 ft. wide at the top.

- (8) The Applicant will utilize existing roads and, where necessary, construct new roads to provide access to the project during construction and operation. All new roads will be built to USFS standards. The road system utilized for operation of the project will be part of the USFS's planned road system.

The old railroad grade, which currently provides access to the Benham Falls Viewpoint, will be utilized for both construction and operation of the project.

Evaluation of Request for Water Quality Requirements Compliance Certificate
for Proposed Lava Diversion Hydroelectric Project, Deschutes River Near Bend,
Oregon (FERC No. 5205)

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Road grades which are modified to permit movement of construction equipment will be restored to their prior condition following construction of the project.

In sum, access to the intake area will be provided by the following means:

Reconstructed roadway to top of hill	- 1,800 feet
Utilization of existing road	- 1,000 feet
New access road downhill to intake	- 1,370 feet

The total roadway to be constructed for the project is as follows:

General area access	- 1,400 feet
Surge tank	- 290 feet
Powerhouse	- 570 feet
Weir	- 1,250 feet
Intake	- 3,170 feet
<u>Total roadway</u>	<u>6,680 feet</u>

Power generated by the project will be sold to the Pacific Power & Light Company. The powerhouse for the project will be located 1,600 feet east of the Midstate transmission line. Power generated at the powerhouse will be transmitted underground at 69 kv to the Midstate line.

PERTINENT DATA FOR THE PROJECT

1. General

Stream	Deschutes River
Location	Deschutes National Forest Deschutes County Sections 8, 9, 16 and 17 T. 19S., R. 11E., W.M.
State	Oregon
Location on River	
Powerhouse	River Mile 179.9
Control Weir	River Mile 181.0
Intake	River Mile 182.4

2. Hydrology

Drainage Area	1,759 sq. mi.
Average Annual Discharge (27 years)	1,460 cfs
Minimum Daily Flow (27 years)	438 cfs (1970)
Maximum Daily Flow (27 years)	3,410 cfs (1964)

Evaluation of Request for Water Quality Requirements Compliance Certification
for Proposed Lava Diversion Hydroelectric Project, Deschutes River Near Bend,
Oregon (FERC No. 5205)

Page 5

3. Control Weir

Type	Rectangular
Crest Length	140'
Throat Elevation	4,145.57

4. Intake

Type	Passive Screen
Opening	9 x 200
Approach Velocity	1 fps Maximum
Screen Size	Wedge Wire - 1/4" Spacing

5. Tunnel

Size	13' Horseshoe (150.9 S.F.)
Length	1,800 L.F.
Entrance Invert	Elev. 4,120
Exit Invert	Elev. 4,106

6. Surge Tank

Type	Differential type w/orifice
Size	51' dia. x 36' high
Material	Prestressed-post tensioned concrete
Location	
Top	Elev. 4,165
Bottom	Elev. 4,129

7. Pipeline

Length	500 L.F.
Type	Welded steel
Size	9.6' diameter

8. Powerhouse

Type	Reinforced concrete
Size	62' x 71'-4"
Foundation	Elev. 4,025
Roof	Elev. 4,071

9. Power Plant

Turbines	
Hydraulic Capacity	1 at 800 cfs 1 at 500 cfs 1 at 200 cfs
Rated Head	107 feet

Evaluation of Request for Water Quality Requirements Compliance Certification
for Proposed Lava Diversion Hydroelectric Project, Deschutes River Near Bend,
Oregon (FERC No. 5205)

Page 6

Generators

Nameplate rating	1 at 6,350 KVA
(at 95 percent PF)	1 at 3,925 KVA
	1 at 1,575 KVA

10. Generation

Capacity	11,250 KW
Average Annual Energy	52,555,000 kWh
Average Annual Power	6,000 KW
Plant Factor	53 percent

Project Environmental Report

When applying for a project license from the Federal Energy Regulatory Commission, the applicant must present an "Exhibit E" Environmental Report which identifies the real and potential environmental impacts likely to be caused by the project's construction and operation. Additionally, the report must show how such impacts will be prevented or minimized to acceptable levels.

Campbell-Craven, Environmental Consultants, prepared the environmental report. Both "principals" in the firm have long professional histories in natural resources management and associated consulting services. The chapters of their environmental report cover: (1) Description of Locale, (2) Water Use and Quality, (3) Fish, Wildlife, and Botanical Resources, (4) Historic and Archeological Resources, (5) Socioeconomic Impacts, (6) Geographical and Soil Resources, (7) Recreational Resources, (8) Aesthetic Resources, (9) Land Use and Management, (10) Alternative Locations, Designs, and Energy Sources, and (11) List of Literature.

Chapters 2 and 9 address the two issues that the DEQ must consider when processing the project certification request. Thus, at this point, the DEQ evaluation is narrowed to those two elements of the Environmental Report.

Based on communications with agencies who reviewed the project proposal, the license applicant proposes to undertake the following mitigation measures with respect to water quality and stream flows:

1. The powerhouse/tailrace and intake structure will be constructed in the dry without placing a cofferdam in the River.
2. The intake structure will be sited in the location recommended by Oregon Department of Fish and Wildlife (ODFW).
3. The tailrace and intake areas near the shoreline will be riprapped to minimize erosion from wave action.
4. The discharge velocity in the tailrace will be about 1.5 feet/second. This will prevent erosion of the riprap area of the tailrace or of the river channel.

Evaluation of Request for Water Quality Requirements Compliance Certificate for Proposed Lava Diversion Hydroelectric Project, Deschutes River Near Bend, Oregon (FERC No. 5205)

Page 7

5. Sediment catchment basins will be located near all areas that may drain construction materials into the river.
6. Fueling stations for equipment will be located away from the river and the project area to minimize the possibility of spills into the river. Contingency plans will be developed in consultation with the agencies to effectively handle spills.
7. The existing willows and alders on the face of the dike will be preserved during weir construction and the dike will be plugged to prevent erosion.
8. The applicant will evaluate the effect of lowered velocities on sediment accumulation to identify the potential for sedimentation above the weir and determine if a study is required.
9. To minimize impacts of the cofferdam placement and removal at the weir location, construction will be scheduled for the late fall when river flow and visitor use are lower. Construction of each cofferdam will require approximately ten days. The upstream cofferdam will be constructed in late September/October and the downstream cofferdam will be constructed in late November. The weir will be completed and the cofferdams removed by mid-December of the same year. The applicant will coordinate with ODFW, U.S. Forest Service (USFS) and DEQ to minimize turbidity and sedimentation and subsequent impacts on fish resources, water quality and recreation.
10. A minimum flow of 660 cfs will be left in the bypass reach of the river and over Benham Falls.

The agencies which were consulted by the applicant have not recommended any operation mitigation measures with respect to stream flows and water quality.

The applicant proposes to periodically review project facilities and operations, particularly in the area near the intake, weir, powerhouse, and the access road to the intake, to determine if modifications of activities are necessary to decrease impacts relating to erosion. If necessary, the applicant proposes to modify operation of the project to reduce erosion.

The project license applicant fully recognizes the authority and applicability of the Deschutes County Comprehensive Land Use Plan and one goal therein to assist in the provision for adequate local energy supplies. Likewise, the applicant recognizes Deschutes County Ordinance No. 83-058 which places new restrictions on future developments along the Deschutes River and other rivers in Deschutes County, for the purposes of maintaining quality and quantity of streamflows and protecting the visual, environmental and aesthetic attributes of the rivers. Various standards for land uses within the Deschutes River Combining Zone (DR zone) are specified, including the requirement that an application for a hydroelectric project will show that the use will further the purpose of the ordinance. The ordinance also

Evaluation of Request for Water Quality Requirements Compliance Certificate for Proposed Lava Diversion Hydroelectric Project, Deschutes River Near Bend, Oregon (FERC No. 5205)
Page 8

specifies that a study shall be conducted for various purposes, including the identification of the individual and cumulative effects to all known and potential hydroelectric sites and sources on the Upper Deschutes River. The ordinance will be repealed February 1, 1986, or upon the completion and adoption of a recommended comprehensive plan and implementing ordinance amendments.

DEQ Evaluation

A. Applicable Water Quality Regulations and DEQ Evaluations

Oregon Administrative Rules (OAR) Chapter 340, Division 41, Rule 562, lists the beneficial uses for which water quality will be protected in the Deschutes River upstream from the Bend diversion dam. They are: Public Domestic Water Supply, Private Domestic Water Supply; Industrial Water Supply; Irrigation; Livestock Watering; Anadromous Fish Passage; Salmonid Fish Rearing; Salmonid Fish Spawning; Resident Fish & Aquatic Life; Wildlife and Hunting; Fishing; Boating; Water Contact Recreation; and Aesthetic Quality. Established water quality standards were designed to support and maintain these uses.

Under provisions of ORS 536.300(2), the Water Policy Review Board recognizes hydropower development as a beneficial water use throughout the Deschutes River Basin. However, this use has no corresponding DEQ water quality protection requirement because hydropower production is not likely to be water quality dependent.

OAR 340-41-026 lists the Policies and Guidelines Generally Applicable to All (river) Basins Statewide. These are mainly anti-degradation in nature, except where the DEQ Director or his designee may allow lower water quality on a short-term basis in order to respond to emergencies or to otherwise protect public health and welfare.

OAR 340-41-565 lists specific water quality standards for the Deschutes River Basin. For the purpose of relating water quality standards to potential water quality impacts of the proposed project, the pertinent standards are hereafter listed and DEQ staff evaluation follows each one:

340-41-565(2)(a) Dissolved Oxygen (DO) concentrations shall not be less than 90 percent of saturation at the seasonal low, or less than 95 percent of saturation in spawning areas during spawning, incubation, hatching, and fry stages of salmonid fishes.

Water quality monitoring in the Upper Deschutes River shows that the dissolved oxygen standards are met at most seasons of the year. There have been infrequent cases of slight D.O. reductions due to natural causes. The proposed hydropower project will have no waste discharges or flow regulation needs that would be expected to adversely impact the river's present D.O. regime.

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340-41-565(2)(b) No measurable (temperature) increases shall be allowed outside of the assigned mixing zone, as measured relative to a control point immediately upstream from a discharge when stream temperatures are 58°F. or greater; or more than 0.5°F. increase due to a single source discharge when receiving water temperatures are 57°F. or less; or more than 2°F. increase due to all sources combined when stream temperatures are 56°F. or less, except for specifically limited duration activities which may be authorized by DEQ under such conditions as DEQ and the Department of Fish and Wildlife may prescribe

Existing water temperature regimes in the Upper Deschutes River are suitable for all phases of salmonid fish life. The maximum water temperature recorded between water years 1968 and 1979 at the Benham Falls gage was 17°C, and the minimum 0°C. A probability analysis showed the water temperature to be below 16°C, 98% of the time--distributed mostly between 3° and 14°C.

Water temperatures and stream flows are directly related due to upstream reservoir releases and groundwater contributions. High temperatures correspond to high flows because of seasonal warming and the release of water from the reservoirs. Low temperatures correspond to low flows because of the seasonal cooling and greater contribution of cooler groundwater to the flow.

The project is not designed to cause any additional pooling or changes in the river level above the weir that would significantly increase the present degree of solar incidence. A minimum flow of 660 cfs is specified to remain in the bypass zone, over Benham Falls. While this lesser flow may slow the velocity slightly, it is not expected to result in an appreciable water temperature change from the range existing before the project's construction. The only minor changes in bankline vegetation will occur during weir construction, at the intake structure, and at the tailrace entry to the river. Here, also, the combination of these shoreline changes should not result in an appreciable change in pre-construction river temperatures.

The project is not expected to have a significant impact on the existing temperature regime in the river.

The very small amount of bearing cooling water that will emit from the plant is not expected to have a measureable impact on the river water temperature.

340-41-565(2)(c) No more than a 10 percent cumulative increase in natural stream turbidities (JTU) shall be allowed, as measured relative to a control point immediately upstream of the turbidity causing activity. However, limited duration activities necessary to address an emergency or to accommodate essential dredging, construction or other legitimate activities and which cause the standard to be exceeded may be authorized provided all practicable turbidity control techniques have been applied and one of the following has been granted:

Evaluation of Request for Water Quality Requirements Compliance Certificate
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- (1) Emergency activities: Approval coordinated by DEQ with the Department of Fish and Wildlife under conditions they may prescribe to accommodate response to emergencies or to protect public health and welfare.
- (2) Dredging, Construction or other Legitimate Activities: Permit or certification authorized under terms of Section 401 or 404 (Permit and Licenses, Federal Water Pollution Control Act) or OAR 141-85-100 et seq. (Removal and Fill Permits, Division of State Lands) with limitations and conditions governing the activity set forth in the permit or certificate.

The placement and removal of coffer dams, plus final opening of the powerhouse "tailrace" channel, during project construction, will cause short-term turbidity increases in the river. The project applicant has proposed mitigation measures that will prevent and/or control these impacts in compliance with the applicable rule. Subsequent operation of the plant should have no impact on existing stream turbidity levels.

340-41-565(2)(d) pH values shall not fall outside the range of 6.5 and 8.5.

~~No discharge of materials that would affect the river's existing pH~~ values are proposed by the applicant. Operation of facilities should not alter river pH values.

340-41-565(2)(e) Organisms of the coliform group where associated with fecal sources (MPN or equivalent MF using a representative number of samples): [shall not exceed] A log mean of 200 fecal coliform per 100 milliliters based on a minimum of 5 samples in a 30-day period with no more than 10 percent of the samples in a 30-day period exceeding 400 per 100 ml.

The applicant has not discussed methods of sewage disposal for either the construction or operation periods of the project.

No discharge of fecal coliform bearing wastes is proposed by the applicant.

340-41-565(2)(f) Bacterial pollution or other conditions deleterious to waters used for domestic purposes, livestock watering, irrigation, bathing, or shellfish propagation, or otherwise injurious to public health shall not be allowed.

No discharge of bacterial pollutants from the plant or plant site is proposed by the applicant.

340-41-565(2)(g) The liberation of dissolved gases, such as carbon dioxide, hydrogen sulfide, or other gases, in sufficient quantities to cause objectionable odors or to be deleterious to fish or other aquatic life, navigation, recreation, or other reasonable uses made of such waters shall not be allowed.

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No discharge of substances from the plant or plant site that will result in the liberation of noxious or toxic gases is proposed by the applicant.

340-41-565(2)(h) The development of fungi or other growths having a deleterious effect on stream bottoms, fish or other aquatic life, or which are injurious to health, recreation, or industry shall not be allowed.

No discharge of substances from the plant or plant site that will result in the development of deleterious fungi or other harmful growths is proposed by the applicant.

340-41-565(2)(i) The creation of tastes or odors or toxic or other conditions that are deleterious to fish or other aquatic life or affect the potability of drinking water or the palatability of fish or shellfish shall not be allowed.

No discharges of substances that are likely to cause tastes, odors, or toxic conditions in the river are proposed by the applicant. The traces of oil and grease emitting with bearing cooling water at the powerhouse are so small that they should not contribute to taste, odor, or toxic problems in the river.

340-41-565(2)(j) The formation of appreciable bottom or sludge deposits or the formation of any organic or inorganic deposits deleterious to fish or other aquatic life or injurious to public health, recreation, or industry shall not be allowed.

No discharge of materials from the plant or plant site that will cause bottom sludges or deleterious deposits in the river is proposed by the applicant.

Natural sediment in the Upper Deschutes River is largely composed of volcanic material, with little organic matter. Thus, it has almost no potential to chemically depreciate water quality.

A question has been raised whether the reduction of flow velocity in the approximate 1-1/2 miles of river channel between the intake structure and the control weir will result in detrimental deposits of sediment from passing water-- similar to what has happened in Mirror Pond at Bend. Since a minimum flow of 660 cfs will be maintained in the bypass channel and over the falls, sediment deposition upstream from the weir does not appear to be a serious factor. However, the applicant has not yet fully addressed the potential for this happening. Neither has the applicant fully addressed the potential need for sediment removal and disposal from certain areas of the project after plant operation begins.

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340-41-565(2)(k) Objectional discoloration, scum, oily sleek or floating solids, or coating of aquatic life with oil films shall not be allowed.

There may be a trace of oil and/or grease in the bearing cooling water that emits from the plant. However, past experience and monitoring of such plants have shown the volume to be only minutely detectable in the laboratory and unseen by the eye. It does not occur in a concentration that would be deleterious to aquatic life, or make the water unfit for human or other animal consumption.

340-41-565(2)(l) Aesthetic conditions offensive to the human senses of sight, taste, smell, or touch shall not be allowed.

Some observers from the public sector believe the power project will destroy the present aesthetic quality of the river zone in and around Benham Falls. While this observation may have merit, the aesthetic changes will not be of a type regulated by water quality control rules. There is no project impact that is likely to change the present aesthetic quality of the river water during plant operation.

340-41-565(2)(m) Radioisotope concentrations shall not exceed maximum permissible concentrations (MPC's) in drinking water, edible fishes or shellfishes, wildlife, irrigated crops, livestock and other dairy products, or pose an external radiation hazard.

No discharges of radioisotopes are proposed by the applicant. Natural background levels of the radioisotopes in construction materials are expected.

340-41-565(2)(n) The concentration of total dissolved gas relative to atmospheric pressure at the point of sample collection shall not exceed one hundred and ten percent (110%) of saturation, except when stream flow exceeds the 10-year, 7-day average flood. However, for Hatchery receiving waters and waters of less than 2 feet in depth, the concentration of total dissolved gas relative to atmospheric pressure at the point of sample collection shall not exceed one hundred and five percent (105%) of saturation.

Dissolved gas supersaturation usually results when large volumes of water are plunged over structures into deep pools, where the atmospheric gas entrainment due to the plunge cannot quickly equilibrate with the atmospheric pressure. Water carried in tunnels and penstocks is not usually subject to further gas entrainment. Water for the Lava Diversion Project will be carried in closed conduits and discharged into a relatively shallow stream where turbulence will rapidly equilibrate dissolved gas pressures with the atmospheric sources.

340-41-565(2)(o) Dissolved chemical substances: Guide concentrations listed below shall not be exceeded unless otherwise specifically authorized by DEQ upon such conditions as it may deem necessary to carry

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out the general intent of this plan and to protect the beneficial uses
set forth in rule 340-41-562: (mg/L)

(A) Arsenic (As)	0.01
(B) Barium (Ba)	1.0
(C) Boron (Bo)	0.5
(D) Cadmium (Cd)	0.003
(E) Chromium (Cr)	0.02
(F) Copper (Cu)	0.005
(G) Cyanide (Cn)	0.005
(H) Fluoride (F)	1.0
(I) Iron (Fe)	0.1
(J) Lead (Pb)	0.05
(K) Manganese (Mn)	0.05
(L) Phenols (totals)	0.001
(M) Total Dissolved Solids	500.0
(N) Zinc (Zn)	0.01

No discharges of dissolved chemicals from the plant or plant site are proposed by the applicant. Any metals leached by water passing over metallic equipment would be only trace in concentration and with little or no potential for violating the water quality standards.

340-41-565(2)(p) Pesticides and other Organic Toxic Substances shall not exceed those criteria contained in the 1976 edition of the EPA publication "Quality Criteria for Water". These criteria shall apply unless supporting data show conclusively that beneficial uses will not be adversely affected by exceeding a criterion by a specific amount or that a more stringent criterion is warranted to protect beneficial uses.

It is not unusual that herbicides are used sparingly in grounds maintenance programs at power plants and electrical substations. However, no pesticides or other organic toxic substances are proposed to be used at the plant site by the applicant.

340-41-565(3) Where the natural quality parameters of waters of the Deschutes Basin are outside the numerical limits of the above assigned water quality standards, the natural water quality shall be the standard.

This standard is set to recognize the variations in water quality that occur naturally. For instance, natural turbidity levels in the Deschutes River may seasonally exceed the standard.

Outside of the controlled water quality impacts that may occur temporarily during construction, the project operation is not expected to cause any water quality changes that would be outside the range of naturally occurring conditions.

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B. Land Use Compatibility

Hydroelectric power site development is a conditional use pursuant to requirements of the Deschutes County Comprehensive Land Use Plan. Since a number of sites in the Upper Deschutes River Basin have pending permits for hydropower development, Deschutes County officials have declared a moratorium, in the form of Ordinance No. 83-058, to delay the issuance of all conditional use permits until an overall hydropower site development impact study can be completed. Thus, the county will not consider the issuance of a conditional use permit for the proposed Lava Diversion Hydroelectric Project until terms of the Ordinance are met. On this basis, the county officials have opposed DEQ issuance of a water quality standards compliance certification for the project.

Potential Water Quality Impacts Not Adequately Addressed

The DEQ believes the following list of potential water quality impacts related to construction and operation of the project have not been adequately addressed by the applicant:

1. A trash collection rack is planned for the water intake. Where and how will the trash collections be disposed in compliance with solid waste and water pollution control regulations?
2. Fuel for emergency equipment, oil, and grease would be expected to be stored and used on site during normal plant operation. A plan is needed for their use and disposal of containers that will prevent spills or discharge to the water.
3. Transformer oils and hydraulic fluids for control systems are general products on site at hydroelectric power plants. A storage and use plan, plus a spill contingency plan, are needed to give maximum assurance that these products will not enter the water.
4. A plan and designated equipment are needed for the collection and proper disposal of toilet wastes and solid wastes both during plant construction and operational phases.
5. A considerable amount of concrete will be used in the project. If it is to be mixed on site, a plan is needed to show how wash waters, waste concrete, and yard drainage will be kept out of the river.
6. There is a potential for sediment deposition in the 1.4 miles of river channel between the intake structure and the flow regulation weir. If this occurs, what are the likely environmental impacts? The applicant proposes to address this issue at a later date.
7. It is not uncommon that maintenance dredging is needed at river-run hydroelectric projects to remove detrimental sediment deposits. The applicant should address this issue with a plan for both dredging and spoils disposal.

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8. Herbicides are frequently used in grounds maintenance programs around power plants and substations. The applicant needs to also address this issue.

Summary of Public Comments

Twenty-two letters of public comment on the project were received by the DEQ, and are identified in Appendix C. A summary of each letter, by appended identification number, is as follows:

- 1) Opposes certification on basis that a multiple of proposed hydroelectric projects in the Upper Deschutes River Basin may have undetermined adverse cumulative effects.
- 2) Opposes the project on the basis of the site's greater importance for recreation and fishery values. Requests that DEQ honor a county ordinance that calls for greater study of possible adverse cumulative impacts from a multiple of proposed hydroelectric projects in the Upper Deschutes River Basin.
- 3) Opposes the project because it will likely have adverse impacts on aesthetic values and the local economy.
- 4) Opposes the project because of the site's great importance for recreation, fish production, big game habitat, and aesthetic values. Also, raises the question of whether the project complies with state planning goals.
- 5) Expresses concern that the project construction activities will cause untenable turbidity and sediment downstream. Eroded soils from access road construction could be a source of river turbidity and sediment. Concern that the project may violate the nitrogen gas supersaturation standard. Fluctuating discharges may increase downstream bank erosion. Suggests that the construction license be withheld until assurances can be given for proper resolution of the above listed concerns.
- 6) Opposes the project because it may adversely affect the tourist trade which is attracted by recreational offerings.
- 7) Requests the withholding of DEQ certification until Deschutes County completes its study of possible cumulative effects from the proposed development of multiple hydroelectric projects in the Upper Deschutes River Basin.
- 8) Believes the project would devastate existing river values and urges DEQ denial of project certification until Deschutes County completes its cumulative impacts study.
- 9) Requests that DEQ withhold project certification until Deschutes County completes its cumulative impacts study.

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- 10) Opposes the project on the basis of its destroying the beauty of public lands and adversely impacting fish production. Also, there would likely be other hydroelectric projects to follow that would result in cumulative adverse impacts.
- 11) Wants assurance that water quality standards will not be violated. Urges that the project not be permitted until Deschutes County completes its cumulative impacts study.
- 12) Confirms that hydropower development is a conditional use in the Deschutes County comprehensive land use plan. Says the project proponent has not applied to the county for a conditional land use permit. Before issuing a conditional land use permit, the county would have to know that the project would not have untenable, adverse impacts on the water quality, fish, wildlife, recreation, and "other issues". Deschutes County opposes the issuance of DEQ certification until the project has been found to be in conformance with the County comprehensive land use plan and implementing ordinances.
- 13) Opposes the DEQ issuance of water quality standards compliance certification until Deschutes County completes its cumulative impacts study.
- 14) Requests DEQ denial of project certification until Deschutes County completes its cumulative impacts study.
- 15) Requests DEQ denial of project certification until Deschutes County completes its study of cumulative impacts.
- 16) Opposes the project because of its potential for adverse impacts on water quality, fisheries, recreation, tourism, local irrigation, and economic base related to these river uses. Requests that the DEQ withhold project certification until Deschutes County completes its cumulative impacts study.
- 17) Requests DEQ denial of project certification until Deschutes County completes its cumulative impacts study. Stresses the need for county participation in the decision-making process.
- 18) Requests that DEQ withhold project certification until Deschutes County completes its cumulative impacts study. Also, requests that Deschutes County participate in the decision-making process.
- 19) Requests that DEQ withhold project certification until Deschutes County completes its cumulative impacts study. Declares that county participation is essential in the decision-making process.
- 20) The project design and siting have changed from the original proposal. The 2.2 miles of river in the diversion reach contain fine fishery habitat. There has already been significant loss of fishery habitat in the Upper Deschutes River due to its regulation for irrigation purposes.

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The project could have a number of adverse impacts on fish as these factors play out through reduced flows, reduced water velocities, higher stabilized water levels, and potentially degraded water quality. Recommends that DEQ withhold project certification until the applicant can give assurances that the project impacts will be eliminated or reduced to acceptable levels.

- 21) The Upper Deschutes is listed in the State Parks System Plan as a potential study river for inclusion in the State Scenic Waterways System. Present, high levels of recreational use require that existing river and shore line conditions be maintained. Raises the question of whether the project is compatible with the local comprehensive land use plan.
- 22) Emphasizes that state law requires that DEQ action must be consistent with the local comprehensive land use plan or statewide land use planning goals.

The twenty-two responses to the DEQ public notice fall largely into five categories as follows:

1. Twenty oppose DEQ certification until county officials complete their cumulative impacts and land use compatibility study. Most of the opposition is prefaced with a concern that the project may be detrimental to existing aesthetic, recreation, fisheries, wildlife, and tourism attraction values.
2. Hydropower development is a conditional use in the county comprehensive land use plan. The applicant has not filed for a conditional use permit.
3. The applicant has not given adequate assurances of being able to protect water quality and other environmental values during project construction and operation. Certification should be withheld until adequate assurances are provided.
4. The project design and siting have changed from the original proposal. It has a number of characteristics that could cause damage to fishery production. Certification should be withheld until the applicant gives assurances that the project impacts can be eliminated or reduced to acceptable levels.
5. The Deschutes River zone in question is proposed for study as a possible addition to the Scenic Waterways System.

There were no comments in favor of the project.

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DEQ Conclusions

1. The DEQ has identified eight activities associated with project construction and/or operation whose potential for water quality impairment have not been adequately addressed in the environmental report.
2. Except as noted in number one above, the project proponent's major programs to protect water quality during construction and operation appear adequate to comply with state water quality control regulations.
3. Except as noted in number one above, operation of the project is not likely to have any appreciable adverse impact on water quality, i.e. it is expected to comply with state water quality control regulations.
4. Hydropower site development in Deschutes County requires a conditional land use permit.
5. The project proponent has not yet applied for a conditional land use permit.
6. Deschutes County will not consider the issuance of a conditional land use permit until the study requirements mandated in County Ordinance No. 83-058 have been completed.
7. Deschutes County will not at this time issue a land use compatibility statement for the proposed Lava Diversion Hydroelectric Project.
8. The DEQ must have assurance that the project is compatible with the county's comprehensive plan and land use ordinances, or state planning goals, before issuing a water quality standards compliance certification statement.

DEQ Recommendation

Based on the information presented in this report, the DEQ recommends that water quality standards compliance certification for the project be denied until the following two requirements are met:

1. The project applicant adequately addresses the eight potential water quality impacts of the project identified by the DEQ.
2. The project applicant obtains a land use compatibility statement from Deschutes County officials.

Oregon Department of Environmental Quality

A CHANCE TO COMMENT ON...

A REQUEST FOR CERTIFICATION OF COMPLIANCE WITH
WATER QUALITY STANDARDS AND REQUIREMENTS

Date Prepared: 9-5-84
Notice Issued: 9-5-84
Comments Due: 10-15-84

**WHO IS THE
APPLICANT:**

General Energy Development, Inc.
261 East Barnett Street
Medford, OR 97501

**WHAT IS
REQUESTED:**

The applicant has requested certification from DEQ that water quality standards and requirements will not be violated by construction and operation of a proposed hydroelectric project near Benham Falls on the Deschutes River south of Bend, Oregon. The certification is requested pursuant to Section 401 of the Federal Clean Water Act. The applicant has filed with DEQ background information on the total project proposal to support the certification request.

**WHAT ARE THE
HIGHLIGHTS:**

The applicant holds Preliminary Permit No. 5205 from the Federal Energy Regulatory Commission (FERC) to plan and design the project. Before construction licensing by FERC may proceed, federal law requires certification by the State (DEQ) of compliance with water quality standards and requirements. State law requires that DEQ action be consistent with the local comprehensive plan or statewide planning goals.

**HOW IS THE
PUBLIC AFFECTED:**

The project involves public lands and waters of the State that presently serve other beneficial uses. Comments are invited regarding potential impacts of the project on water quality and beneficial water uses, and on compatibility of the project with the local comprehensive plan or statewide planning goals.

HOW TO COMMENT:

Written comments should be presented to DEQ by October 15, 1984, at the following address:

Department of Environmental Quality
Water Quality Division
P. O. Box 1760
Portland, OR 97207

**WHAT IS THE
NEXT STEP:**

At the conclusion of the comment period, the DEQ will evaluate public comments and all information available and make a final determination to grant or deny certification.



P.O. Box 1760
Portland, OR 97207

8/10/82

FOR FURTHER INFORMATION:

Contact the person or division identified in the public notice by calling 229-5696 in the Portland area. To avoid long distance charges from other parts of the state, call 1-800-452-4011, and ask for the Department of Environmental Quality.

1-800-452-4011



APPENDIX C

Letter No.	Date of Letter	Signature(s)	Representing
1)	9/30/84	Laurie LeFors	Self
2)	10/1/84	Marti Gerdes	Self
3)	10/1/84	Jean & Joseph Berger	Self
4)	10/3/84	Mike Johns	Self
5)	10/5/84	David Mohla, Supervisor	Deschutes National Forest
6)	10/5/84	Mr. & Mrs. Keith Corwin	Self
7)	10/7/84	P. W. Chase	Self
8)	10/8/84	Eric Schulz	Central Oregon Flyfishers
9)	10/8/84	Brian Meece	Citizens Realty Group
10)	10/9/84	Kenneth Corwin	Self
11)	10/9/84	Fred Ehlen	Sunriver Anglers
12)	10/10/84	Deschutes County Commissioners(3)	Deschutes County
13)	10/11/84	Robert Robinson	Coalition for the Deschutes
14)	10/11/84	Jane Poor	Self
15)	10/11/84	Richard & Carolyn Miller	Contemporary Homes
16)	10/12/84	John Wujack	Save Benham Falls Committee
17)	10/12/84	Tom Throop	State Representative, District 54
18)	10/12/84	Lawson La Gate	Self
19)	10/15/84	Stephen Toomey	Frank Ruegg Real Estate
20)	10/15/84	Michael Weland	Oregon Fish & Wildlife Dept.
21)	10/16/84	Alan Cook	Oregon Parks & Recreation Division
22)	10/22/84	JRK (initials only)	Dept. of Land Conservation & Development

GDC:l
 WL3843
 11/5/84

Department of Environmental Quality

APP 64

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

September 10, 1984

Al Peters
• Energy Planning Associates
3182 Timberlake Dr.
Hillsboro, OR 97123

Re: FERC No. 7903
Squaw Creek Project
Deschutes County, Oregon

Dear Mr. Peters:

This is to acknowledge receiving your letter and attachments dated September 3, 1984, in which you announce the beginning of feasibility studies for the above referenced project.

At some point in the federal licensing process, FERC will likely require that you submit a water quality standards compliance certification for the project from our Department. An application to DEQ for such certification must contain, at minimum, the following information:

- (a) Legal name and address of the project owner.
- (b) Legal name and address of owner's designated official representative, if any.
- (c) Legal description of the project location.
- (d) A complete description of the project proposal, using written discussion, maps, diagrams, and other necessary materials.
- (e) Name of involved waterway.
- (f) Copies of the environmental background information required by the federal permitting or licensing agency.
- (g) Copy of any public notice and supporting information, issued by the federal permitting or licensing agency for the project.
- (h) A statement from the appropriate local planning agency that the project is compatible with the acknowledged local comprehensive plan or that the project is consistent with statewide planning goals if the local plan is not acknowledged.

We may have some useful water quality data from Squaw Creek in our files. Andy Schaedel at our laboratory, 229-5983, can tell you more about it.

Sincerely,

Glen D. Carter
Water Quality Division

CEC:l
WL3662



Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

September 21, 1984

Kenneth H. Plumb, Secretary
Federal Energy Regulatory Commission
Washington DC 20426

Re: FERC No. 3459-001
Mason Dam Hydroelectric Project;
Power River, Baker County, Oregon,
Cascade Water Power Development Corp.

Dear Secretary Plumb:

I had a telephone discussion on September 17, 1984, with your environmental staff person Robert Krska, regarding water quality standards compliance certification need for the above referenced project. Considering the local concern caused by competing applications for the project site, I am writing to clarify and verify the major items of our discussion.

By FERC public notice of February 28, 1983, we learned of the above application for license. We assumed this would be a license "to construct" since there was no mention of a preliminary permit process.

The applicant hired CH₂M-Hill consultants to develop the information exhibits required for FERC licensing. On January 10, 1983, CH₂M-Hill requested from our agency a water quality standards compliance certification letter for the project, as is required by Section 401 of the Federal Clean Water Act. On February 18, 1983, we advised CH₂M-Hill that we would not take action on their certification request until having an opportunity to review the upcoming Exhibit E Report.

In developing the Exhibit E information, CH₂M-Hill and the applicant discovered there were substandard dissolved oxygen concentrations in the water supply that would need further assessment. By letter of August 3, 1983, CH₂M-Hill outlined for our agency a plan to gather further dissolved oxygen data from the project site. We approved their plan on August 9, 1983. Since that date, we have received no further word from either CH₂M-Hill or the license applicant. Consequently, we have taken no further action on their request for project certification.

There is also another piece of state-required information missing from the applicant's request for project certification. State law requires the applicant for "401 certification" to provide our Department with a statement from the local land use planning agency (Baker County Planning Department) that the project is compatible with the acknowledged local comprehensive plan before we can act to issue such certification. We have not yet received that statement.

Kenneth H. Plumb
 September 21, 1984
 Page 2

It would normally be included in the package of supporting information we receive from the applicant or his consultant. In discussing this matter with the Baker County Planning Department Director, I learned that a land use compatibility statement has not been issued for the project.

Thus, without the dissolved oxygen problem assessment and the land use compatibility statement, we do not yet have a completed application for project certification. I wish to advise you that our Department does not consider the one-year time period for state response, as allowed by Section 401 of the Federal Clean Water Act, to begin until we have in hand all of the required and requested information necessary to evaluate a project for certification. For your use, I am enclosing a list of the minimum information items that a completed application for project certification must contain in Oregon.

For your knowledge, we are fully aware of the competing major license application for this project site by the Baker County Court. It is under FERC No. 7732, published October 18, 1983. We have not yet received either the Exhibit E Environmental Report or request for water quality standards compliance certification from the license applicant.

If you wish to discuss this matter further, please call me at (503) 229-5358.

Sincerely,

Glen D. Carter

Glen D. Carter
 Water Quality Division

GDC:l
 WL3697

Enclosure

cc: Larry Smith, Judge, Baker County Court
 Diane Stone, Director, Baker County Planning Department
 George Smith, Cascade Water Power Development Corp.
 John Lincoln, CH₂M-Hill, Boise, Idaho
 Duane West, Oregon Fish and Wildlife Department
 William Young, Director, Oregon Water Resources Department
 Steve Gardels, Eastern Region, DEQ

blind cc: Bob Krska - FERC

State of Oregon
Department of Environmental Quality
1984

A completed application for State certification of a project's compliance with applicable water quality standards, as required by Section 401 of the Federal Clean Water Act, shall contain, at a minimum, the following information:

- (a) Legal name and address of the project owner.
- (b) Legal name and address of owner's designated official representative, if any.
- (c) Legal description of the project location.
- (d) A complete description of the project proposal, using written discussion, maps, diagrams, and other necessary materials.
- (e) Name of involved waterway, lake, or other water body.
- (f) Copies of the environmental background information required by the federal permitting or licensing agency.
- (g) Copy of any public notice and supporting information, issued by the federal permitting or licensing agency for the project.
- (h) A statement from the appropriate local planning agency that the project is compatible with the acknowledged local comprehensive plan or that the project is consistent with statewide planning goals if the local plan is not acknowledged.

The Department of Environmental Quality reserves the right to request any additional information necessary to complete an application or to assist the Department to adequately evaluate the project impacts on water quality. Failure to complete an application or provide any requested additional information within the time specified in the request shall be grounds for denial or certification.

GDC:l
WL3698

FILED
OCT 24 1984
ACORNIA PAULUS
SECRETARY OF STATE

Oregon Department of Environmental Quality

APP 68

A CHANCE TO COMMENT ON...

A REQUEST FOR CERTIFICATION OF COMPLIANCE WITH
WATER QUALITY STANDARDS AND REQUIREMENTS

Date Prepared: 10/24/84
Notice Issued: 11/15/84
Comments Due: 12/15/84

Competing Applications for Federal License

WHO ARE THE APPLICANTS: (1) Cascade Water Power Development Corp. (2) Baker County Court
P.O. Box 1016 Courthouse
Idaho Falls, ID 83402 Baker, OR 97814

WHAT IS REQUESTED: The applicants have requested certification from DEQ that water quality standards and requirements will not be violated by construction and/or operation of a proposed major hydroelectric project at the existing Mason Dam outlet on the Powder River in Baker County, Oregon. The certification is requested pursuant to Section 401 of the Federal Clean Water Act. The applicants have filed with DEQ background information on their respective project proposals to support their certification requests.

WHAT ARE THE HIGHLIGHTS: The applicants hold license application numbers 3459 and 7732, respectively, from the Federal Energy Regulatory Commission (FERC) to plan and design their projects. Before construction licensing by FERC may proceed, federal law requires certification by the State (DEQ) of compliance with water quality standards and requirements. State law requires that DEQ action be consistent with the local comprehensive plan or statewide planning goals. Baker County has advised DEQ by letter that their comprehensive plan contains the following statement of policy: "Potential energy producing sites shall be protected from irreversible loss and encouraged to be developed."

HOW IS THE PUBLIC AFFECTED: The project site involves public lands and waters of the State that also serve other beneficial uses. Comments are invited regarding potential impacts of the project on water quality and beneficial water uses, and on compatibility of the project with the local comprehensive plan or statewide planning goals.

HOW TO COMMENT: Written comments should be presented to Glen Carter of the DEQ by December 15, 1984, at the following address:

Department of Environmental Quality
Water Quality Division
P. O. Box 1760
Portland, OR 97207

WHAT IS THE NEXT STEP: At the conclusion of the comment period, the DEQ will evaluate public comments and all information available and make a final determination to grant or deny certification.



WL3817

P.O. Box 1760
Portland, OR 97207

8 10 82

FOR FURTHER INFORMATION:

Contact the person or division identified in the public notice by calling 229-5696 in the Portland area. To avoid long distance charges from other parts of the state, call 1-800-452-7813, and ask for the Department of Environmental Quality



Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

September 27, 1984

Mr. Frederick D. Ehlers
 P.O. Box 7148
 Klamath Falls, OR 97602

Re: FERC No. 6552
 Sprague River
 Hydroelectric Project
 Klamath County, Oregon

Dear Mr. Ehlers:

This is a reply to your letter of June 25, 1984, in which you request water quality standards compliance certification, or waiver, for the above referenced project. As supporting information, you also sent Exhibit E, the environmental report that is part of the project license application to FERC.

We have recently been advised that the abbreviated method we were using to process hydroelectric project water quality certification requests was not in full compliance with federal and state public disclosure laws. Consequently, I must ask you for further background information that is vital to our meeting those legal requirements.

Attached hereto is a list of the minimum required informational items that constitute a completed application for project certification. In your case, I believe you can best satisfy items (a) through (g) by sending us a full set of the information exhibits you sent to FERC in your license application. Item (h), the land use consistency statement, you will have to get from the County Planning Department and submit to us.

We must issue or deny certification within one year of the date of receiving the request, which was July 2, 1984. Consequently, we must ask that you return the requested information to us by March 1, 1985, so we will have time to make the required public notice of your request within the one year time limit.

If you fail to submit the requested information by March 1, 1985, we will deny your request, without prejudice, and you may then re-apply for certification at a time of your convenience.

I apologize for putting you to this extra effort. Please call me at 1-800-452-4011 if you need further information on this matter.

Sincerely,

Glen D. Carter
 Aquatic Biologist
 Water Quality Division

GDC:t
 WT311
 Attachment

State of Oregon
Department of Environmental Quality
1984

A completed application for State certification of a project's compliance with applicable water quality standards, as required by Section 401 of the Federal Clean Water Act, shall contain, at a minimum, the following information:

- (a) Legal name and address of the project owner.
- (b) Legal name and address of owner's designated official representative, if any.
- (c) Legal description of the project location.
- (d) A complete description of the project proposal, using written discussion, maps, diagrams, and other necessary materials.
- (e) Name of involved waterway, lake, or other water body.
- (f) Copies of the environmental background information required by the federal permitting or licensing agency.
- (g) Copy of any public notice and supporting information, issued by the federal permitting or licensing agency for the project.
- (h) A statement from the appropriate local planning agency that the project is compatible with the acknowledged local comprehensive plan or that the project is consistent with statewide planning goals if the local plan is not acknowledged.

The Department of Environmental Quality reserves the right to request any additional information necessary to complete an application or to assist the Department to adequately evaluate the project impacts on water quality. Failure to complete an application or provide any requested additional information within the time specified in the request shall be grounds for denial or certification.

Oregon Department of Environmental Quality

A CHANCE TO COMMENT ON...

A REQUEST FOR CERTIFICATION OF COMPLIANCE WITH
WATER QUALITY STANDARDS AND REQUIRMENTS

Date Prepared: 10/18/84
Notice Issued: 11/15/84
Comments Due: 12/15/84

**WHO IS THE
APPLICANT:**

Frederick D. Ehlers
P.O. Box 7148
Klamath Falls, OR 97602

**WHAT IS
REQUESTED:**

The applicant has requested certification from DEQ that water quality standards and requirements will not be violated by construction and operation of a proposed hydroelectric project on the North Fork Sprague River near Bly, Oregon. The certification is requested pursuant to Section 401 of the Federal Clean Water Act. The applicant has filed with DEQ background information on the total project proposal to support the certification request.

**WHAT ARE THE
HIGHLIGHTS:**

The applicant holds Preliminary Permit No. 6552 from the Federal Energy Regulatory Commission (FERC) to plan and design the project. Before construction licensing by FERC may proceed, federal law requires certification by the State (DEQ) of compliance with water quality standards and requirements.

**HOW IS THE
PUBLIC AFFECTED:**

The project involves public lands and waters of the State that presently serve other beneficial uses. Comments are invited regarding regarding potential impacts of the project on water quality and beneficial water uses, and on compatibility of the project with the local comprehensive plan or statewide planning goals.

HOW TO COMMENT:

Written comments should be presented to DEQ by December 15, 1984, at the following address:

Department of Environmental Quality
Water Quality Division
P. O. Box 1760
Portland, OR 97207

**WHAT IS THE
NEXT STEP:**

At the conclusion of the comment period, the DEQ will evaluate public comments and all information available and made a final determination to grant or deny certification.

WL3798



P.O. Box 1760
Portland, OR 97207

FOR FURTHER INFORMATION:

Contact the person or division identified in the public notice by calling 229-5696 in the Portland area. To avoid long distance charges from other parts of the state, call 1-800-452-7813.

Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

September 28, 1984

Al Peters
 • Energy Planning Associates
 Biez Timberlake Dr.
 Hillsboro, OR 97123

FERC 6145

Re: Proposed Grave Creek
 Hydroelectric Project
 Josephine County, Oregon

Dear Mr. Peters:

This is a reply to your letter of August 3, 1984, in which you request a water quality standards compliance certification, or waiver, for the above referenced project. In support of your request, you also sent a draft copy of Application for License Before the Federal Energy Regulatory Commission, Grave Creek Hydroelectric project, September 1984.

In addition to the supporting documents contained in the above license application, we must receive the following information before we will commence processing your certification request:

1. A technical assessment of whether the long penstock, with approximately 500 feet drop, will entrain dissolved nitrogen gas at levels harmful to downstream fish life. If so, explain the engineering technique to be used to prevent nitrogen gas supersaturation.
2. A detailed listing of what ^e real and potential adverse water quality impacts might be during project construction, their duration, and how they will be minimized or prevented.
3. A copy of any public notice and supporting information, issued by the federal permitting or licensing agency for the project.
4. A statement from the appropriate local planning agency that the project is compatible with the acknowledged local comprehensive plan or that the project is consistent with statewide planning goals if the local plan is not acknowledged.

Since you do a considerable amount of consulting work on small hydroelectric project license applications, I am enclosing a general list of the information items that we require to support requests for water quality standards compliance certification.

Please call me at 229-5358 if you wish to discuss any of this subject in greater detail.

Sincerely,

Glen D. Carter
 Water Quality Division

GDC:l
 WL3708
 Enclosure

cc: Oregon Fish & Wildlife Dept. FWS

State of Oregon
Department of Environmental Quality
1984

A completed application for State certification of a project's compliance with applicable water quality standards, as required by Section 401 of the Federal Clean Water Act, shall contain, at a minimum, the following information:

- (a) Legal name and address of the project owner.
- (b) Legal name and address of owner's designated official representative, if any.
- (c) Legal description of the project location.
- (d) A complete description of the project proposal, using written discussion, maps, diagrams, and other necessary materials.
- (e) Name of involved waterway, lake, or other water body.
- (f) Copies of the environmental background information required by the federal permitting or licensing agency.
- (g) Copy of any public notice and supporting information, issued by the federal permitting or licensing agency for the project.
- (h) A statement from the appropriate local planning agency that the project is compatible with the acknowledged local comprehensive plan or that the project is consistent with statewide planning goals if the local plan is not acknowledged.

The Department of Environmental Quality reserves the right to request any additional information necessary to complete an application or to assist the Department to adequately evaluate the project impacts on water quality. Failure to complete an application or provide any requested additional information within the time specified in the request shall be grounds for denial or certification.

GDC:1
WL3698



Department of Environmental Quality

APP 74

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

October 15, 1984

Gail Marshall
Wildcat Hydro, Inc.
12825 S.W. 20th Court
Beaverton, OR 97005

Re: FERC No. 4574
Three Lynx Creek
Hydro Project

Dear Gail Marshall:

This is to acknowledge your letter of October 9, 1984, in which you announce that the above referenced project no longer qualifies for exemption from FERC licensing, and that you will now apply for a minor hydroelectric project license.

If the FERC should require that you obtain a water quality standards compliance certification from our agency to submit to them as part of your application for the "minor" license, there are certain pieces of information we need from you to commence that process and meet public disclosure requirements. Enclosed is a sheet that lists the items of information that constitute a completed application for water quality certification.

Sincerely,

Glen D. Carter
Aquatic Biologist
Water Quality Division

GDC:t
WT371
Enclosure

cc: Northwest Region, DEQ

State of Oregon
Department of Environmental Quality
1984

A completed application for State certification of a project's compliance with applicable water quality standards, as required by Section 401 of the Federal Clean Water Act, shall contain, at a minimum, the following information:

- (a) Legal name and address of the project owner.
- (b) Legal name and address of owner's designated official representative, if any.
- (c) Legal description of the project location.
- (d) A complete description of the project proposal, using written discussion, maps, diagrams, and other necessary materials.
- (e) Name of involved waterway, lake, or other water body.
- (f) Copies of the environmental background information required by the federal permitting or licensing agency.
- (g) Copy of any public notice and supporting information, issued by the federal permitting or licensing agency for the project.
- (h) A statement from the appropriate local planning agency that the project is compatible with the acknowledged local comprehensive plan or that the project is consistent with statewide planning goals if the local plan is not acknowledged.

The Department of Environmental Quality reserves the right to request any additional information necessary to complete an application or to assist the Department to adequately evaluate the project impacts on water quality. Failure to complete an application or provide any requested additional information within the time specified in the request shall be grounds for denial or certification.

GDC:1
WL3698

Oregon Department of Environmental Quality

A CHANCE TO COMMENT ON...

A REQUEST FOR CERTIFICATION OF COMPLIANCE WITH
WATER QUALITY STANDARDS AND REQUIREMENTS

Date Prepared: 12-6-84
Notice Issued: 1-2-85
Comments Due: 2-1-85

**WHO IS THE
APPLICANT:**

Gail Marshall
Wildcat Hydro, Inc.
12825 S.W. 20th Court
Beaverton OR 97005

**WHAT IS
REQUESTED:**

The applicant has requested certification from DEQ that water quality standards and requirements will not be violated by construction and operation of a proposed minor hydroelectric project on Three Lynx Creek near Ripplebrook, Clackamas County, Oregon. The certification is requested pursuant to Section 401 of the Federal Clean Water Act. The applicant has filed with DEQ background information on the total project proposal to support the certification request.

**WHAT ARE THE
HIGHLIGHTS:**

The applicant holds Permit No. 4574 from the Federal Energy Regulatory Commission (FERC) to plan and design the project. Before construction licensing by FERC may proceed, federal law requires certification by the State (DEQ) of compliance with water quality standards and requirements. State law requires that DEQ action be consistent with the local comprehensive plan or statewide planning goals.

**HOW IS THE
PUBLIC AFFECTED:**

The project involves waters of the State that also serve other beneficial uses. Comments are invited regarding potential impacts of the project on water quality and beneficial water uses, and on compatibility of the project with the local comprehensive plan or statewide planning goals.

HOW TO COMMENT:

Written comments should be presented to Glen Carter of the DEQ by January 15, 1985, at the following address:

Department of Environmental Quality
Water Quality Division
P. O. Box 1760
Portland, OR 97207

**WHAT IS THE
NEXT STEP:**

At the conclusion of the comment period, the DEQ will evaluate public comments and all information available and make a final determination to grant or deny certification.



WL3917

FOR FURTHER INFORMATION:

Contact the person or division identified in the public notice by calling 229-5696 in the Portland area. To avoid long distance charges from other parts of the state, call 1-800-452-7813 and ask for the Department of Environmental Quality.

APP 77

Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696



November 13, 1984

Michael R. Giddings
Liaison Officer, City of Halfway
P.O. Box 154
La Grande, OR 97850

Re: FERC No. 8094
Pine Creek Project
Halfway, Oregon

Dear Mr. Giddings:

In response to your letter of October 29, 1984, I am your DEQ contact person for matters relative to the above referenced project.

At some point in your dealings with the FERC for a project license, they may require a water quality standards compliance certification statement from our agency. Enclosed is a listing of the informational items that a completed application for certification must contain.

Sincerely,

Glen D. Carter
Aquatic Biologist
Water Quality Division

GDC:l
WL3862

Enclosure

Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696



December 11, 1984

Mr. Al Peters
Energy Planning Associates
3182 S.E. Timberlake Drive
Hillsboro, OR 97123

Re: Freemont Power Project,
FERC No. 6628,
Lake and Lost Creeks,
Grant County, Oregon

Dear Mr. Peters:

This is to acknowledge your letter of November 7, 1984 (received in this office November 26, 1984), in which you request water quality standards compliance certification for the above referenced hydroelectric project. With your request, you have also sent a copy of the information exhibits that went to the FERC in support of the project license application. In addition to these materials, we need one more document to make a completed application for project certification. That is a land use compatibility statement from the Grant County Planning Department--or their statement of compatibility with statewide planning goals if the County does not have an approved comprehensive plan.

We are withholding any further action on your request until the land use compatibility statement arrives.

Sincerely,

Glen D. Carter
Aquatic Biologist
Water Quality Division

GDC:t
WL3937

cc: Northwest ^{east} Region, DEQ

Department of Environmental Quality

APP 79

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696



[Handwritten signature]
February 21, 1985

Dale Hatch
Pioneer Hydropower, Inc.
P.O. Box 1071
Twin Falls, ID 83303

Re: FERC Project Nos. 6650,
6651, 6652, 6655

Dear Mr. Hatch:

This is a reply to your letter and attachments of January 14, 1985, in which you propose to conduct further feasibility studies of the above referenced project sites in Oregon's Hood and Clackamas River Basins.

If you proceed to apply for FERC licensing of the individual projects, federal law requires that you obtain four separate water quality standards compliance certification letters from our Department. Attached to this letter is a list of information items that a request for certification must contain.

Sincerely,

Glen D. Carter
Aquatic Biologist
Water Quality Division

GDC:t
WT599

Attachment



Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

February 7, 1985

William G. Miller
 Project Director
 Resource Management International, Inc.
 1010 Hurley Way, Suite 500
 Sacramento, CA 95825

Dear Mr. Miller:

Your letter of January 25, 1985 regarding the Salt Caves Hydroelectric Project (PERC 3313) has been received. This letter notifies the Department that the City of Klamath Falls requests certification of the project pursuant to Section 401 of the Federal Clean Water Act.

Please be advised that your letter as received is not a complete and sufficient application for 401 certification. A request for certification must be supported by the following:

- (a) Legal name and address of the project owner.
- (b) Legal name and address of owner's designated official representative, if any.
- (c) Legal description of the project location.
- (d) A complete description of the project proposal, using written discussion, maps, diagrams, and other necessary materials. (This description should describe the project in terms understandable by the public. It should be supported by more detailed technical material as appropriate.)
- (e) Name of involved waterway, lake, or other water body.
- (f) Copies of the environmental background information required by the federal permitting or licensing agency. (This information is expected to describe project impacts on water quality and beneficial uses of water in the project area, both during construction and during operation after construction.)
- (g) Copy of any public notice and supporting information, issued by the federal permitting or licensing agency for the project.
- (h) A statement from the appropriate local planning agency that the project is compatible with the acknowledged local comprehensive plan or that the project is consistent with statewide planning goals if the local plan is not acknowledged.

William G. Miller
February 7, 1985
Page 2

The Department of Environmental Quality reserves the right to request any additional information necessary to complete an application or to assist the Department to adequately evaluate the project impacts.

Upon receipt of a complete and sufficient application, the Department will issue a public notice inviting comments by interested individuals and agencies within 30 days. A hearing may be held if there is significant public interest.

The Department would expect to complete its evaluation of your application and public comments received thereon and take final action to issue or deny certification within 90 days of receipt of your completed application and issuance of a public notice, assuming no hearing is held and subsequent submittal of additional information is not required.

The Department will cooperate with the Department of Water Resources and the Energy Facility Siting Council in their review of your project. However, please be advised that the 401 certification process is a distinctly separate and independent process administered by the Department of Environmental Quality.

We will anticipate receiving your completed application in the near future.

Sincerely,

Fred Hanson
Director

FH:d
ED1514

92nd CONGRESS }
1st Session

SENATE

{ REPORT
No. 92-414

FEDERAL WATER POLLUTION CONTROL ACT
AMENDMENTS OF 1971

REPORT

OF THE

COMMITTEE ON PUBLIC WORKS
UNITED STATES SENATE

TOGETHER WITH

SUPPLEMENTAL VIEWS

TO ACCOMPANY

S. 2770



OCTOBER 28, 1971.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1971

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TITLE IV—PERMITS AND LICENSES

SECTION 401—CERTIFICATION

This section, largely taken from present law, requires that any applicant for a Federal license or permit provide the licensing agency with a certification from the State in which the discharge occurs that any such discharge will comply with Sections 301 and 302.

This section is substantially section 21(b) of existing law (enacted as a part of the Water Quality Improvement Act of 1970) amended to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants.

Subsection (a) (7) has contained a grandfather provision allowing facilities on which construction under a Federal license or permit began before April 3, 1970, three years before any certification would be required. This provision is amended in this bill to except permits under section 402 of this Act or section 13 of the Rivers and Harbors Act of 1899. Certification will be required for all such permits from the date of enactment on, regardless of the time construction of the facility began.

Existing law is further modified by section 401 of this bill to include a definition of certification. The certification provided by a State in connection with any Federal license or permit must set forth effluent limitations and monitoring requirements necessary to comply with the provisions of this Act or under State law and such a certification becomes an enforceable condition on the Federal license or permit.

In addition, the provision makes clear that any water quality requirements established under State law, more stringent than those requirements established under this Act, also shall through certification become conditions on any Federal license or permit. The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements.

It should also be noted that the Committee continues the authority of the State or interstate agency to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State or jurisdiction of the interstate agency. Should such an affirmative denial occur no license or permit could be issued by such Federal agencies as the Atomic Energy Commission, Federal Power Commission, or the Corps of Engineers unless the State action was overturned in the appropriate courts of jurisdiction.

SECTION 402—NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

The Administrator may issue a permit for the discharge of pollutants into the navigable waters, or beyond, if the discharge meets applicable requirements of Sections 209, 301, 302, 306, 307, or 308. Any permit issued under Section 13 of the 1899 Refuse Act prior to June 30, 1972, shall be considered a permit pursuant to this section.

SENATE CONSIDERATION OF THE REPORT OF THE
CONFERENCE COMMITTEE, OCTOBER 4, 1972

AMENDMENT OF FEDERAL WATER POLLUTION CONTROL ACT

Mr. MUSKIE. Mr. President, I submit a report of the committee of conference on S. 2770, and ask for its immediate consideration.

The PRESIDING OFFICER (Mr. Cannon). The report will be stated by title.

The legislative clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2770) to amend the Federal Water Pollution Control Act, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses this report, signed by all the conferees.

The PRESIDING OFFICER. Is there objection to the consideration of the conference report?

There being no objection, the Senate proceeded to consider the report.

Mr. MUSKIE. Mr. President, may I say to my colleagues that we have a 30-minute time agreement here and we should not be troubled by the size of the documentation before me as I shall not take more than 2 minutes to present the report and then there will be several colloquies on points in the report which are of interest to particular Senators. Thus, we should be able to cover the ground quickly in the next 30 minutes.

Mr. President, the conference report on the Federal Water Pollution Control Act Amendments of 1972 is the pending business of the Senate. The Senate approved this legislation on November 2, 1971; the House acted on March 29; and the conference committee began its deliberations on May 11 of this year. Since that first session, we have held 39 meetings of the conference, often starting early in the morning and running late into the evening.

I have been a Member of the Senate for 13 years, and I have never before participated in a conference which has consumed so many hours, been so arduous in its deliberations, or demanded so much attention to detail from the members. The difficulty in reaching agreement on this legislation has been matched only by the gravity of the problems with which it seeks to cope.

Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers, and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us.

We have ignored this cancer for so long that the romance of environmental concern is already fading in the shadow of the grim realities

SENATE CONSIDERATION OF THE REPORT OF THE
CONFERENCE COMMITTEE, OCTOBER 4, 1972

AMENDMENT OF FEDERAL WATER POLLUTION CONTROL ACT

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There being no objection, the Senate proceeded to consider the report.

Mr. MUSKIE. Mr. President, may I say to my colleagues that we have a 30-minute time agreement here and we should not be troubled by the size of the documentation before me as I shall not take more than 2 minutes to present the report and then there will be several colloquies on points in the report which are of interest to particular Senators. Thus, we should be able to cover the ground quickly in the next 30 minutes.

Mr. President, the conference report on the Federal Water Pollution Control Act Amendments of 1972 is the pending business of the Senate. The Senate approved this legislation on November 2, 1971; the House acted on March 29; and the conference committee began its deliberations on May 11 of this year. Since that first session, we have held 39 meetings of the conference, often starting early in the morning and running late into the evening.

I have been a Member of the Senate for 13 years, and I have never before participated in a conference which has consumed so many hours, been so arduous in its deliberations, or demanded so much attention to detail from the members. The difficulty in reaching agreement on this legislation has been matched only by the gravity of the problems with which it seeks to cope.

Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers, and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us.

We have ignored this cancer for so long that the romance of environmental concern is already fading in the shadow of the grim realities

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"In many States there is no legal authority to finance the payment of salaries from State funds based on a hope, or belief, that Federal funds will sooner or later be forthcoming. In addition, the uncertainty of retroactive pay would encourage employees to seek employment elsewhere. Replacement of these valued and experienced employees, when Federal funds do become available, would be extremely difficult. We do not believe the Nation can or should tolerate such a severe disruption in the continuity of its protection of the water environment."

Mr. President, I do not believe that the men and women whose valuable talents have meant so much to progress in water pollution control on the Federal, state and local levels should be held hostage while debate continues over the future shape and scope of the Federal effort. Since only Congress can provide the means to continue their work—either by insisting that S. 2770 become law, or by sustaining a veto and fulfilling its responsibility to enact continuing authority, I urge that you act one way or the other on this legislation before the end of this week so that Congress will have an opportunity to respond.

Sincerely,

EDMUND S. MUSKIE,
U.S. Senator.

LETTER FROM WILLIAM RUCKELSHAUS, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION ADMINISTRATION, TO THE OFFICE OF MANAGEMENT AND BUDGET, OCTOBER 11, 1972, RECOMMENDING PRESIDENTIAL APPROVAL OF S. 2770, THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

The essential provisions of each Title of the bill are set out below:

Title I—RESEARCH AND RELATED PROGRAMS

1. Goals and Policy—A national goal to eliminate the discharge of pollutants by 1985 is announced. An interim goal—the attainment of water quality to support fish and wildlife and recreation by 1983—is also provided.

2. The law would be changed to provide that EPA determine the need for and the value of water storage in Federal water resource projects for purposes of water quality control.

3. No hydroelectric projects can include storage for the purpose of water quality control unless the Administrator certifies the need. (This is a new provision.)

4. The old section 3(c), Basin Planning Projects, and Federal support are retained.

5. There is a requirement that a national water quality surveillance system monitoring the quality of navigable water, the contiguous zone and ocean be established. EPA is to utilize the resources of NASA, NOAA, USGS, and the Coast Guard in designing such a system.

6. Research on tools and techniques for making cost-benefit studies of activities subject to regulation under the Act shall be conducted and reported to the Congress.

7. The enrolled bill requires that EPA construct the National Marine Water Quality Laboratory.

8. Research and demonstrations on vessel waste systems have been transferred from EPA to the Coast Guard.

9. A waste oil disposal and utilization study is required with a report to the Congress within 18 months.

10. Annual reports will be required on research activities devoted toward developing methods and systems for reducing the total flow of sewage.

Grants for research and development

1. Grants are provided for demonstration river programs.
2. Grants are authorized to assist in the development of waste management methods directed toward no discharge of pollutants and toward new and improved testing methods.

State program grants

1. State program grants authority under existing law is substantially revised.
2. Authorizations are increased to \$60 million in Fiscal Year 1973 and \$75 million in Fiscal Year 1974.

discharger can demonstrate to the satisfaction of the Administrator that a proposed effluent limitation based upon best practicable control technology and available control technology is more stringent than necessary to protect fish and shellfish, etc., in which event a less stringent effluent limitation may apply. Cooling water intake structures will require best available control technology.

Title IV—PERMITS AND LICENSES

1. A State certification mechanism like that now provided by Section 21 of the Federal Water Pollution Control Act is in the enrolled bill, provided that in place of water quality standards as the determinative criteria, the effluent limitations, guidelines and other requirements of the new law are substituted.

2. No discharge of any pollutant will be permitted, except as authorized by a permit issued under the new Act. No Refuse Act permit may be issued after enactment of the legislation. However, Refuse Act permits heretofore issued shall continue in force and effect as though issued under authority of this enrolled bill.

3. States may be authorized to continue existing permit programs for the purpose of issuing permits under this bill from the date of enactment for up to 180 days after enactment. Such State-issued permits are subject to Federal veto.

4. EPA will issue guidelines identifying an adequate State program. EPA in its permit program must conform to these guidelines. After State assumption of a permit-issuing authority, EPA will retain the right, unless waived, to review and approve any permit which affects another State, or any proposed permit, to determine adherence to requirements under the enrolled bill. EPA, after notice and public hearing, may withdraw State permit-issuing authority in the event it determines State failure to adequately implement the requirements of the enrolled bill.

5. When application for a permit has been made, but no final disposition with respect to such application is made prior to December 31, 1974, prosecutions with respect to the discharge which is the subject of such permit application may not be commenced.

6. The Administrator is required to promulgate within 180 days after enactment criteria with respect to ocean waters. These criteria addressing the effect of pollutants on marine ecosystems, etc., parallel the criteria in the ocean dumping legislation now pending. Permits for discharge into the territorial sea, the contiguous zone or ocean waters must be in accord with these criteria.

7. The Corps shall continue to issue dredge and fill permits in accordance with criteria comparable to the EPA ocean discharge criteria. EPA may restrict the discharge of dredge material in specified sites if the Administrator determines that such discharge will have an unacceptable adverse effect on municipal water supplies, fishery resources or recreational areas.

8. Additional criteria and a potential additional permit would be required for the disposal of sewage sludge into the navigable waters, notwithstanding the fact that a permit for such dumping may have been obtained pursuant to the ocean dumping Act.

Title V—GENERAL PROVISIONS

1. The enrolled bill provides that the Administrator may seek injunctive relief to restrain any discharge that presents an imminent and substantial danger to public health and welfare (the latter limited to effect on livelihood).

2. Standing to sue is provided citizens or groups to enforce non-discretionary actions of the Administrator or to enforce effluent standards or limitations or orders of the Administrator. Such standing is limited to persons having an interest which is or may be adversely affected. Such suits may not be maintained prior to the rendering of 60-day notice to the alleged violator, the Administrator, and the State concerned or in the event that the Administrator or a State is diligently prosecuting such violation.

3. The Attorney General shall represent the Administrator in all litigation in which the Attorney General fails to take appropriate action within a reasonable time, in which event the Administrator may be represented by his own attorneys.

4. Provisions are made in the law to protect employees who have cooperated in the enforcement and implementation of the enrolled bill.

5. A judicial review of Administrator's action in promulgating standards, including new source performance standards, effluent limitations, prohibitions, or in issuing or denying any permit may be obtained by interested persons in the U.S. Court of Appeals for the appropriate Circuit.

FEDERAL WATER POLLUTION CONTROL ACT
AMENDMENTS OF 1972

MARCH 11, 1972.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BLATNIK, from the Committee on Public Works, submitted the following

REPORT

together with

ADDITIONAL AND SUPPLEMENTAL VIEWS

[To accompany H.R. 11896]

The Committee on Public Works, to whom was referred the bill (H.R. 11896) to amend the Federal Water Pollution Control Act, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

* * * * *

BACKGROUND

America's waters are in serious trouble, thanks to years of neglect, ignorance and public indifference. Almost from its inception in 1946 the Committee on Public Works has been trying to bring to reality an effective properly funded program to restore and enhance the quality of our waters and to insure their future as a lasting national asset.

Prior to the Reorganization Act of 1946 there had been some legislation enacted in this general field—The Refuse Act of 1899, the Public Health Service Act of 1912 and the Oil Pollution Act of 1924. However, it was not until after the Committee on Public Works was established and considered the problem of water pollution control to be sufficiently serious for national attention that, in 1948, the first comprehensive measure aimed specifically at that problem was enacted. This landmark legislation was Public Law 80-845.

Public Law 80-845 essentially had a five-fold purpose:

1. Authorized the Surgeon General to assist in and encourage State studies and plans, interstate compacts, and creation of uniform State laws to control pollution.

In the case of any activity for which there is not an applicable effluent limitation or other limitation under sections 301(b) and 302, applicable standard under sections 306 and 307 and applicable regulation under section 316, the State would so declare in its certification.

The State is required to provide public notice with respect to all applications received by it for certification and, to the extent that the State determines it appropriate, to establish procedures for holding public hearings with respect to specific applications. If a State or interstate agency has no authority to make such a certification, then the certification must be obtained from the Administrator of EPA.

In order to insure that sheer inactivity by the State, interstate agency or Administrator as the case may be, will not frustrate the Federal application, a requirement, that if within a reasonable period, which cannot exceed 1 year, after it has received a request to certify the State, interstate agency, or Administrator, as the case may be, fails to act on the request for certification, then the certification requirement is waived. If a State refuses to give a certification, the courts of that State are the forum in which the applicant must challenge the refusal if the applicant wishes to do so. No Federal license or permit shall be granted unless this certification has first been obtained or there has been a waiver of the requirement as provided by this subsection. Denial of certification by a State, interstate agency, or the Administrator, as the case may be, results in a complete prohibition against the issuance of the Federal license or permit.

Subsection (a) (2) of section 401 provided that when a licensing or permitting agency receives an application and a certification, it must immediately notify the Administrator thereof. Whenever such a discharge may affect the quality of the waters of any other State as determined by the Administrator then the Administrator shall, within 30 days of the date he is notified of the application for the Federal license or permit, notify such other State, the licensing or permitting agency, and the applicant. If within 60 days thereafter the State so determined to be affected determines that the discharge will affect the quality of its waters so as to violate any water quality requirements in that State and within that 60-day period notifies the Administrator and the licensing or permitting agency of its objection to the issuance of the license or permit and requests a public hearing on its objection, such a public hearing shall be held by the licensing or permitting agency. At that hearing the Administrator shall submit his evaluation and recommendations with respect to the objection to the licensing or permitting agency. Based upon the recommendations of the State, the Administrator, and any additional evidence presented at the hearing, the agency shall condition the license or permit so as to insure compliance with applicable water quality requirements. If conditions cannot insure this compliance, the license or permit shall not be issued.

In the case where a Federal license or permit is required both as to the construction of a facility and its operation, the initial certification required for the construction license or permit shall fulfill the requirements of this subsection with respect to certification for a Federal license or permit to operate that facility unless the certifying State, interstate agency, or Administrator, as the case may be, after having been given notice of the application for an operating license

or permit by the agency to whom the application is made notifies the agency within 60 days that there is no longer reasonable assurance of compliance with applicable provision of sections 301, 302, 306, 307, and 316 because of changes since the construction license or permit certification was issued in (1) the construction or operation of the facility, (2) the characteristics of the waters into which the discharge is made, (3) the water quality criteria applicable to those waters, or (4) applicable effluent limitations or other requirements. This paragraph is made inapplicable if the applicant for the operating license or permit has not provided the certifying State, interstate agency, or Administrator, as the case may be, with notice of any proposed changes in the construction or operation of the facility which changes may result in violation of sections 301, 302, 306, 307, or 316.

Before the initial operation of a federally licensed or permitted facility or activity with respect to which a certification has been obtained under this provision which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee is required to provide an opportunity to the certifying State, agency, or Administrator as the case may be, to review the manner of operation of the facility for the purpose of assuring that applicable effluent limitations or other applicable water quality requirements will not be violated. Upon notification by such certifying State, agency, or Administrator, as the case may be, that operation of this facility will violate applicable effluent limitations or other limitations the Federal agency may, after public hearings suspend the license or permit until notification is received from the certifying State, agency or Administrator, as the case may be, that there is reasonable assurance that the facility or activity will not violate applicable provisions of sections 301, 302, 306, 307 or 316. This right to review the manner of operation of a facility or activity is not to be construed as authority to the State, agency, or Administrator, as the case may be, to impose operational requirements with respect to that facility or activity.

If a judgment is entered under the Federal Water Pollution Control Act that a federally licensed or permitted facility or activity has been operated in violation of applicable provisions of sections 301, 302, 306, 307 or 316, then the Federal license or permit with respect to which a certification has been obtained under this provision may be suspended or revoked by the Federal agency issuing that license or permit.

No Federal agency is to be deemed to be an applicant for the purposes of this subsection.

If the actual construction of a facility has been lawfully commenced prior to April 3, 1970 (the date of enactment of the Water Quality Improvement Act of 1970), then no certification is to be required for a license or permit issued thereafter to operate such facility except that if such a license or permit is issued without this certification it shall terminate April 3, 1973 unless before such date a proper certification is submitted to the licensing or permitting agency and the person having that license or permit otherwise meets the requirements of this subsection.

Subsection (b) provides that nothing in this section is to be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with applicable

water quality requirements. The Committee notes that the Administrator is authorized to provide technical assistance to States. The Administrator is also authorized to review all State water quality standards. The Administrator is also authorized to review all State water quality standards. The Administrator is also authorized to review all State water quality standards.

Subsection (c) authorizes the Administrator to charge for the cost of disposal areas under the jurisdiction of the Administrator. The Administrator is authorized to charge for the cost of disposal areas under the jurisdiction of the Administrator. The Administrator is authorized to charge for the cost of disposal areas under the jurisdiction of the Administrator.

Subsection (d) provides that the Administrator is authorized to charge for the cost of disposal areas under the jurisdiction of the Administrator. The Administrator is authorized to charge for the cost of disposal areas under the jurisdiction of the Administrator.

It should be clearly noted that the provisions of sections 401 and 402 are for activities which discharge into the territorial seas.

Section 402—National Program

During the Committee's study of water pollution and reappearing was the Water Pollution Control Act of 1970. The Corps of Engineers and the Environmental Protection Agency have been working together to develop a national program. Information gathered during the study indicates that the two programs are complementary and should be coordinated. The overall administrative structure of the Corps of Engineers and the Environmental Protection Agency should be coordinated.

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water quality requirements. The Administrator is also directed to provide technical assistance to carry out the purposes of this Act.

The Committee notes that a similar provision in the 1970 Act has been interpreted to provide authority to the Administrator to independently review all State certifications. This was not the Committee's intent. The Administrator may perform services of a technical nature, such as furnishing information or commenting on methods to comply with limitations, standards, regulations, requirements or criteria, but only upon request of a State, interstate agency or Federal agency.

Subsection (c) authorizes the Chief of Engineers to permit the use of spoil disposal areas under his jurisdiction by a Federal licensee or permittee, to charge for that use, with the moneys received to be deposited in miscellaneous receipts of the Treasury. In considering the "public interest" the Chief of Engineers should take into consideration the necessity to maintain non-Federal dock and berthing facilities which are essential to the functioning of the Federal navigation project. In determining the needs and utilization of spoil disposal areas under the jurisdiction of the Chief of Engineers, he should give appropriate consideration to the related requirements of the non-Federal dredging activities and should consider their needs for disposal on the same basis as those of the Federal Government. Where local interests donate land, or shares in the costs of construction of spoil disposal areas, local interest should be permitted reasonable use of the area, utilizing the same standards as set forth in the two preceding sentences, at nominal charge.

Subsection (d) provides that any certifications must set forth any effluent limitations and other limitations and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations (section 301, 302) or standard of performance (section 307), prohibition, effluent standard or pretreatment standard (section 307), or any regulation (section 316) of the Federal Water Pollution Control Act, and the effluent limitations and other limitations and any monitoring requirements will become a condition on any Federal license or permit.

It should be clearly noted that the certifications required by section 401 are for activities which may result in any discharge into navigable waters. It is not intended that State certification is or will be required for discharges into the contiguous zone or the oceans beyond the territorial seas.

Section 402—National pollutant discharge elimination system

During the Committee's extensive hearings—oversight and legislative—on water pollution control, one question which kept appearing and reappearing was the appropriate relationship between the Federal Water Pollution Control Act and the permit program initiated by the Corps of Engineers under the authority of the Refuse Act of 1899. Information gathered during the hearings made it abundantly clear that the two programs needed to be consolidated and not left to go in their own direction. The Committee was particularly concerned that the overall administration of the Refuse Act permit program was in the Corps of Engineers and not EPA. Although the Committee has

103 CONGRESS }
1st Session }

SENATE

{ REPORT
No. 92-1236

FEDERAL WATER POLLUTION CONTROL ACT
AMENDMENTS OF 1972

SEPTEMBER 28, 1972.—Ordered to be printed

Mr. MUSKIE, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany S. 2770]

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2270) to amend the Federal Water Pollution Control Act, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment struck out all of the Senate bill after the enacting clause and inserted a substitute text.

With respect to the amendment of the House, the Senate recedes from its disagreement to the amendment of the House, with the amendment which is a substitute for both the Senate bill and the House amendment. The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below except for minor technical and clarifying changes made necessary by reason of the conference agreement.

SHORT TITLE

Senate bill

Provides that the Act may be cited as the "Federal Water Pollution Control Act Amendments of 1971".

House amendment

Provides that the Act may be cited as the "Federal Water Pollution Control Act Amendments of 1972".

Conference substitute

The conference substitute is the same as the House amendment.

Both the Senate bill and the House amendment provide for complete revisions of the Federal Water Pollution Control Act. The revision would consist of five titles and hereafter the references in this statement are to the sections and titles of the proposed revision of the Federal Water Pollution Control Act.

TITLE I—RESEARCH AND RELATED PROGRAMS

DECLARATION OF GOALS AND POLICY

Senate bill

Section 101 establishes a policy to eliminate the discharge of pollutants by 1985, restore the natural chemical, physical, and biological integrity of United States waters, and reach an interim goal of water quality for swimming and fish propagation by 1981.

(99)

Section 101 also prohibits the discharges of pollutants, provides for Federal financial assistance for waste treatment facilities, development programs, initiates a research program to find technological methods to improve water quality, and requires the Administration Agency to develop minimum standards for enforcement of the proposed amendments.

Section 101 sets an objective of restoring the physical and biological integrity of navigable waters by 1985, and protection of fish, shellfish, and wildlife in water by 1981.

Other national policies stated in the Act are for construction of waste treatment management plants, major research and demonstration projects to achieve the zero-discharge goal.

Section 101 (c) calls on the President to set goals which are at least comparable to the goals of the Act.

Section 101 (f) sets a national policy of "reduction" of paperwork and duplication of available manpower and funds.

Section 101 (g) would require the Administration to consider all potential impacts of the Act on the air.

Conference substitute

The conference substitute is based on the House amendment.

1) The interim goal of water quality is 1983, instead of 1981.

2) The terms "abate" and "reduce" are replaced by the terms "reduction".

3) Subsection (g) of the House

COMPREHENSIVE PROGRAMS FOR

Senate bill

Section 102 grants the Administration authority for eliminating pollution in navigable waters. The section also provides for grants for river basin planning. Subsection (b) makes it clear that the Administration must provide for adequate waste treatment at the source. The Administration must determine when low flow augments the effectiveness of supplementing pollution control

controlling, and abating pollution specifically, including financing of programs after fiscal 1976.

Conference substitute

Section 317 is the same as the House amendment.

TITLE IV—PERMITS AND LICENSES

CERTIFICATION

Senate bill

Section 401 requires any applicant for a Federal license or permit to provide the licensing agency with a State certification. The State would be required to certify that the discharge complies with sections 301 and 302.

House amendment

Section 401 requires any applicant for a Federal license or permit which may result in any discharge into navigable waters to provide a certification from the originating State that the discharge complies with sections 301, 302, 306, 307, and 316 of the Act.

Conference substitute

This section is the same as the House amendment, except as follows:

(1) Subsection (a) (7) of this section, which provides that where actual construction of a facility began before January 3, 1970, that a license or permit to operate such facility shall not be subject to the certification requirements until April 3, 1973, has been modified to exempt permits issued under section 402 of this Act.

(2) Subsection (d), which requires a certification to set forth effluent limitations, other limitations, and monitoring requirements necessary to insure compliance with sections 301, 302, 306, and 307, of this Act, has been expanded to also require compliance with any other appropriate requirement of State law which is set forth in the certification.

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

Senate bill

Section 402 transfers the 1899 Refuse Act permit program from the Corps of Engineers to the Administrator.

The section authorizes the Administrator to issue a permit for the discharge of pollutants into the navigable waters, the waters of the contiguous zone, or the oceans.

Before a permit can be issued, an applicant must meet the requirements of sections 209, 301, 302, 306, 307, 308, and 403. Any permit issued under section 13 of the Refuse Act prior to June 30, 1972, would be considered a permit pursuant to section 402 of this Act.

Under section 402, the Administrator can delegate permit authority to a State if the State program is adequate. Any State receiving such authority is required to send the Administrator a copy of all permit applications. The State cannot issue a permit until the Administrator determines the application meets all requirements of the Act.

The Administrator is authorized to waive the review authority over specific classes or sizes of plants and over individual plants if he does so within 30 days of receipt of the permit application.

Rec'd 3/8/85
EPC mtg
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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

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In Re:)
LAVA DIVERSION PROJECT)
FERC NO. 5205)
DESCHUTES RIVER, OREGON)

MEMORANDUM OF DESCHUTES COUNTY

INTRODUCTION

On November 28, 1983, General Energy Development, Inc. (GED), through their consultant, Campbell-Craven, Environmental Consultants, submitted a letter requesting water quality standards compliance certification, or waiver, for the above referenced project pursuant to Section 401 of the Federal Clean Water Act. By letter dated September 7, 1984, (Exhibit "A"), the Department of Environmental Quality (Department) informed GED that it was circulating public notice of its application and that the application would require a statement of land use compatibility from Deschutes County in accordance with the Agency's coordination program adopted pursuant to ORS 197.180. Deschutes County received the public notice of GED's application from the Department on September 17, 1984 (Exhibit "B"). Deschutes County also received a letter from GED on October 2, 1984, (Exhibit "C") requesting "a statement of compatibility with the Deschutes County Comprehensive Plan".

Page

1 Deschutes County responded directly to the Department
2 by letter dated October 10, 1984, (Exhibit "D") saying, in
3 part that:

4 "It is impossible for Deschutes County to find
5 that the proposed hydroelectric project near
6 Benham Falls on the Deschutes River south of Bend
7 is in conformance with the Comprehensive Plan and
8 implementing ordinances with respect to the re-
9 quested certification under Section 401 of the
10 Federal Clean Water Act without reviewing the
11 whole of the project in accordance with the
12 standards and procedures applicable to such a
13 request."

14 and

15 ". . . until such time as an application has been
16 made by General Energy Development, Inc., and
17 that application has been found in conformance
18 with the Comprehensive Plan and implementing
19 ordinances, Deschutes County opposes the issuance
20 of a Section 401 Federal Clean Water Act certifi-
21 cation. . . ."

22 GED's application for water quality standards compliance
23 certification was denied by the Department by letter dated
24 November 27, 1984 (Exhibit "E"). The Department identified
25 eight activities associated with the project construction
26 and operation whose potential for water quality impairment
had not been adequately addressed in the environmental
report and that GED had failed to obtain a land use
compatibility statement from Deschutes County.

Deschutes County learned that the November 27, 1984,
denial of GED's application had been appealed to the
Environmental Quality Commission (Commission) on February
27, 1985.

Page

DISCUSSION

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2 1. Standing of GED.

3 GED was the Applicant for the water quality standards
4 compliance certification. GED, however, is unable to
5 utilize the waters of the State because the waters of the
6 upper Deschutes River have been withdrawn from appropria-
7 tion. Therefore, GED is unable to build any project on the
8 Deschutes River. Arnold Irrigation District (District) has
9 entered into a joint venture agreement where the District
10 will supply GED the municipal preference for the project
11 for a share in the revenue of the project (Exhibit "F").
12 Two Attorney General Opinions (Exhibits "G" and "H") have
13 analyzed the agreement between the District and GED. The
14 Opinions conclude that the agreement is insufficient to
15 qualify GED's application before the Water Resources
16 Department as a municipal application because the District
17 has not retained sufficient beneficial interest and control
18 to make it appear that the proposal is other than a "subter-
19 fuge to allow a private developer to use the municipal
20 application process". Opinion of Larry D. Thomson, Assist-
21 ant Attorney General, dated October 24, 1983. GED is pre-
22 cluded from appropriating water for the project and the
23 District does not have an agreement which will allow GED to
24 utilize their municipal powers. The District is not an
25 applicant to this proceeding. Under these circumstances,
26 GED does not have standing to apply for the water quality

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1 standards compliance certification.

2 2. District's Appeal.

3 Deschutes County was not made a party to the above
4 proceedings, but was allowed to comment pursuant to the
5 public notice as a member of the public and was a necessary
6 party to the proceeding before the Department. To
7 Deschutes County's knowledge, GED has not participated in
8 the appeal of the Department's decision to the Commission.
9 It appears that the District has received some special
10 status, and was allowed to stipulate to a briefing schedule
11 and file a brief with the Commission raising legal argu-
12 ments. Because of Deschutes County's role in determining
13 compatibility with the Statewide Land Use Goals, the local
14 Comprehensive Plan, and implementing ordinances, Deschutes
15 County should be given equal status with the District and
16 be entitled to participate in the Commission's hearing in
17 at least the same capacity as the District.

18 The District was kind enough to supply Deschutes
19 County with copies of the briefs on the afternoon of
20 Tuesday, March 5, 1985. Given such a short period of time
21 from the date of receipt of that information and the
22 hearing before the Commission on Friday, March 8, 1985,
23 there was insufficient time to respond to the legal issues
24 raised on behalf of GED by the District. Deschutes County
25 does, however, concur with the Department's position set
26 forth in their brief as to the legal issues under consider-

Page

1 ation.

2 3. Evidence Outside the Record.

3 The Department and the District acknowledge in their
4 briefs that the Department continued to work on the eight
5 (8) deficient areas after the November 27, 1984, decision.
6 No additional notice was given to the public that addition-
7 al information would be considered by the Department after
8 the decision. It is of great concern to Deschutes County,
9 who has attempted to participate in this process, but has
10 not been given party status or considered necessary to the
11 proceedings, that factual issues could be determined after
12 the public hearings process had been closed by the Depart-
13 ment. This strikes the appearance of some private arrange-
14 ment between the Developer and the Department.

15 We believe that if the eight (8) issues are to be re-
16 solved by subsequent evidence submitted by GED, at a mini-
17 mum, a new notice should be issued with an opportunity to
18 the public to review and participate in the application, as
19 amended, relating to those eight (8) items. The appeal
20 from the decision to the Commission should not consider new
21 evidence developed outside that record.

22 4. New Hearing.

23 Evidence was considered by the Department outside the
24 scope of the review process. We believe that, if that
25 evidence is to be considered, it should not be considered
26 as an appeal of the November 27, 1984, decision, but should

Page


1 be considered as a refiled or amended application. GED's
2 application should be returned to the Department for new
3 proceedings on the application, as supplemented.

4 CONCLUSION

5 The application of GED for a water quality standards
6 compliance certification pursuant to Section 401 of the
7 Federal Clean Water Act should be denied. In the alterna-
8 tive, Deschutes County should be made a party with at least
9 the same status as the Arnold Irrigation District, and be
10 entitled to participate in the rehearing of the supplement-
11 ed application on remand before the Department.

12 Respectfully submitted,

13 DESCHUTES COUNTY, OREGON

14 
15 RICHARD L. ISHAM, OSB #75-195
16 Deschutes County Legal Counsel
17 Attorney For DESCHUTES COUNTY



Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

September 7, 1984

CERTIFIED MAIL

• Mr. Donald P. McCurdy, President
General Energy Development
216 E. Barnett St.
Medford, OR 97501

Re: FERC No. 5205
Lava Division Project
Deschutes River, Oregon

Dear Mr. McCurdy:

By letter of November 28, 1983, Campbell-Craven, Environmental Consultants, requested a water quality standards compliance certification, or waiver, for the above referenced project, as required by Section 401 of the Federal Clean Water Act. We replied on December 1, 1983, that we would not commence action on the certification request until having opportunity to review an Exhibit E Environmental Report for the project.

On August 20, 1984, we received from you the four-volume application to FERC for project licensing, that includes Exhibit E.

Please be advised that public notice of receipt of your Exhibit E and request for certification pursuant to Section 401 of the Federal Clean Water Act is being circulated to known interested persons and agencies and forwarded to the Secretary of State for publication in the Bulletin. Comments are being requested by October 15, 1984. A copy of this notice is attached for your information.

As you know, the Deschutes County Board of Commissioners has asked this Department by letter dated May 10, 1984, to hold your application with no action until completion of a study by them in 1985. Arnold Irrigation District (by letter dated June 5, 1984) and General Energy Development, Inc. (by letter dated June 12, 1984) have taken exception to the request of Deschutes County and urged us to proceed with evaluation of the project.

In the process of evaluating these requests, we consulted with our legal counsel. We were advised that ORS 197.180 requires DEQ actions which affect land use to be compatible with acknowledged comprehensive plans and in compliance with statewide planning goals. This statute also requires agencies to submit a program for coordination to the Land Conservation and Development Commission (LCDC) for approval. DEQ's coordination program, which was certified by LCDC on March 30, 1983, lists certification pursuant to Section 401 of the Clean Water Act as an action affecting land use. This coordination program specifies that "DEQ" will rely on a statement of compatibility from the appropriate planning agency.

Donald F. McCurdy
September 7, 1984
Page 2

DEQ has overlooked this provision and has not been properly addressing land use issues in the 401 certification process for the limited number of applications filed directly with DEQ.

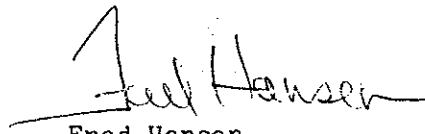
This oversight makes it apparent that rules are needed to clearly establish procedures for 401 certification. The Department will seek authorization from the Environmental Quality Commission on September 14, 1984, to hold a hearing on proposed rules. We are enclosing a copy of the staff report for your information. Since your application for certification predates these proposed rules, action on your application will not be based on these draft rules but will be based on existing statutory authorities.

In order to address the land use compatibility determination required by Oregon law and our agreement with LCDC, we request that you obtain from Deschutes County and forward to us by October 15, 1984, a statement of compatibility with the acknowledged comprehensive plan or of consistency with statewide planning goals.

We interpret the letter from Campbell-Craven dated November 28, 1983, as the date of your first application for certification. Thus, we must act to issue or deny certification on your application by no later than November 28, 1984 to remain within the 1 year time frame established in Section 401 of the Clean Water Act. We apologize for the short time for response to the land use compatibility requirement.

We are aware that you may be unable to obtain the necessary statement of compatibility from Deschutes County. If you are unable to obtain such a statement, it is our opinion that we will have to propose denial of certification at this time pending resolution of land use issues.

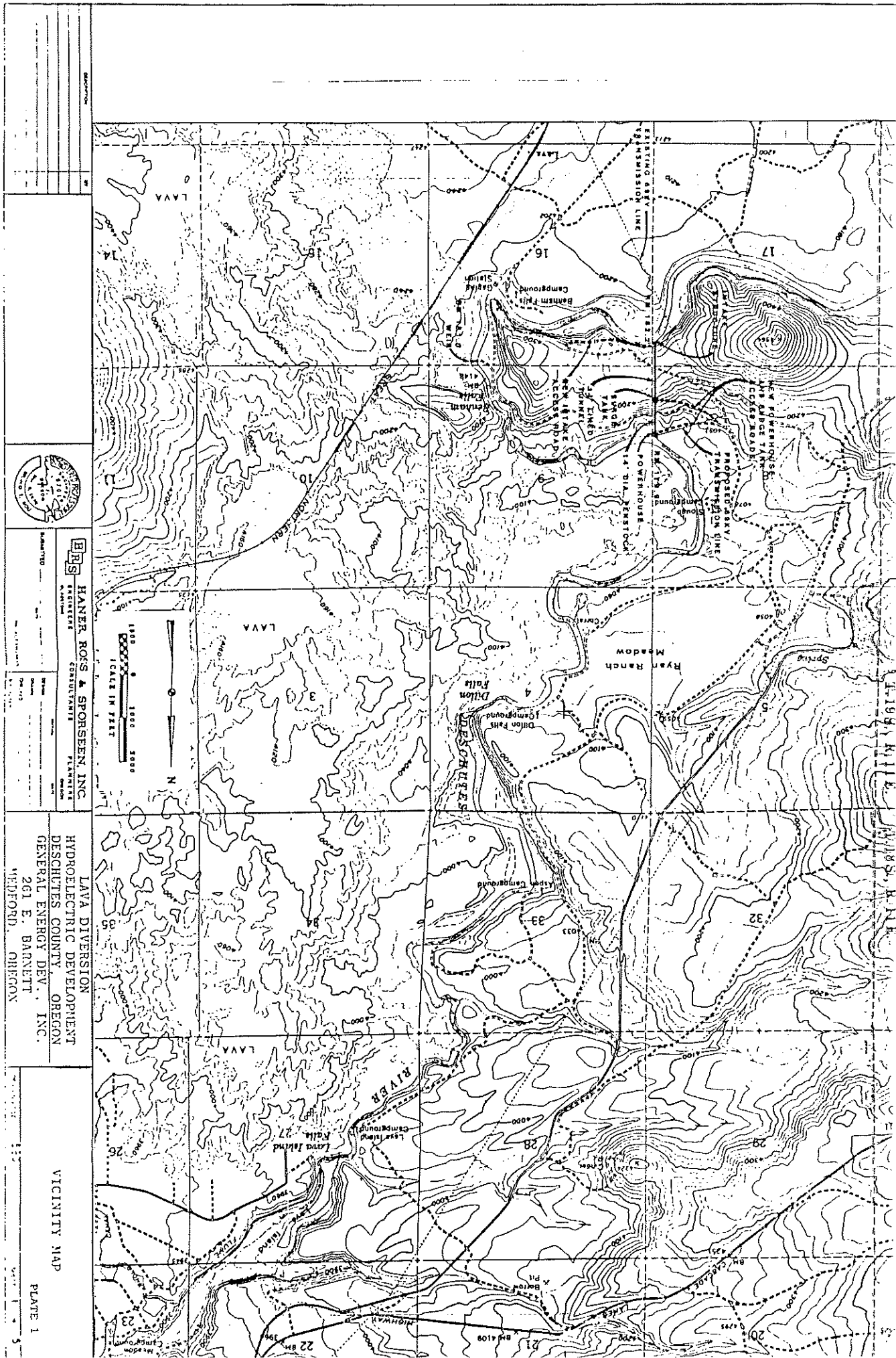
Sincerely,



Fred Hansen
Director

HLS:t
WT264
Attachments

cc: Arnold Irrigation District
Federal Energy Regulatory Commission
Central Region, DEQ



A CHANCE TO COMMENT ON...

A REQUEST FOR CERTIFICATION OF COMPLIANCE WITH
WATER QUALITY STANDARDS AND REQUIREMENTS

SEP 17 1984

Date Prepared: 9-5-84
Notice Issued: 9-5-84
Comments Due: 10-15-84

BOARD OF COMMISSIONERS

BY [Signature]

WHO IS THE APPLICANT:

General Energy Development, Inc.
261 East Barnett Street
Medford, OR 97501

WHAT IS REQUESTED:

The applicant has requested certification from DEQ that water quality standards and requirements will not be violated by construction and operation of a proposed hydroelectric project near Benham Falls on the Deschutes River south of Bend, Oregon. The certification is requested pursuant to Section 401 of the Federal Clean Water Act. The applicant has filed with DEQ background information on the total project proposal to support the certification request.

WHAT ARE THE HIGHLIGHTS:

The applicant holds Preliminary Permit No. 5205 from the Federal Energy Regulatory Commission (FERC) to plan and design the project. Before construction licensing by FERC may proceed, federal law requires certification by the State (DEQ) of compliance with water quality standards and requirements. State law requires that DEQ action be consistent with the local comprehensive plan or statewide planning goals.

HOW IS THE PUBLIC AFFECTED:

The project involves public lands and waters of the State that presently serve other beneficial uses. Comments are invited regarding potential impacts of the project on water quality and beneficial water uses, and on compatibility of the project with the local comprehensive plan or statewide planning goals.

HOW TO COMMENT:

Written comments should be presented to DEQ by October 15, 1984, at the following address:

Department of Environmental Quality
Water Quality Division
P. O. Box 1760
Portland, OR 97207

WHAT IS THE NEXT STEP:

At the conclusion of the comment period, the DEQ will evaluate public comments and all information available and make a final determination to grant or deny certification.



P.O. Box 1760
Portland, OR 97207

8/10/82

FOR FURTHER INFORMATION:

Contact the person or division identified in the public notice by calling 229-5696 in the Portland area. To avoid long distance charges from other parts of the state, call 1-800-452-7913, and ask for the Department of Environmental Quality.

1-800-452-4011





General Energy Development

INCORPORATED

SPECIALISTS IN HYDRO — ELECTRIC DEVELOPMENT

October 2, 1984

RECEIVED

OCT 4 1984

Mrs. Lois Prante
Mr. Larry Tuttle
Mr. Abe Young
Deschutes County Commissioner's Office
Courthouse Annex
Bend, OR 97701

Dear Deschutes County Commissioner's:

Enclosed please find a copy of a letter from the Oregon Department of Environmental Quality dated September 7, 1984. Pursuant to this letter, General Energy Development is requesting a statement of compatibility with the Deschutes County comprehensive plan.

The statement of compatibility is not an endorsement or approval of the project, but rather acknowledgement that the project is not in conflict with the comprehensive plan. The county planning department has a detailed description of the project, and a project plan is enclosed to ensure the location.

According to DEQ testimony for SB 225 hearings, there would not be a water quality problem in this reach of the river at the minimum stream flow of 660 cfs, which flow has been incorporated in the project design.

Should the Commissioner's reach the conclusion that this application be denied, I request that the specific reasons for such denial be forwarded to my attention. Please note the time frame in the DEQ letter.

Your attention to this matter is appreciated.

Sincerely,

Donald P. McCurdy

DPM:ds

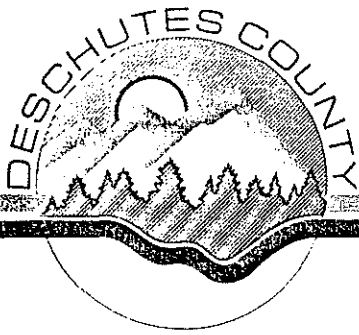


EXHIBIT D

Board of Commissioners

Courthouse Annex / Bend, Oregon 97701 / (503) 388-6570

October 10, 1984

Albert A. Young
Lois Bristow Prante
Laurence A. Tuttle

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Department of Environmental Quality
Water Quality Division
P. O. Box 1760
Portland, Oregon 97207

Re: General Energy Development, Inc.
Preliminary Permit No. 5205 FERC
Request For Certification of Compliance With Water Quality
Standards and Requirements

Your notice dated September 5, 1984, indicates that the above applicant has requested certification from DEQ that water quality standards and requirements will not be violated by construction and operation of a proposed hydroelectric project near Benham Falls on the Deschutes River south of Bend. It is our understanding that the certification requested is pursuant to Section 401 of the Federal Clean Water Act, and the applicant has filed a copy of his application with the Department.

Deschutes County is currently engaged in the study of the Upper Deschutes Basin in accordance with Deschutes County Ordinance No. 83-058. Included within the study is an assessment of cumulative and individual impacts of known and potential hydroelectric projects on land and resource uses within that portion of the Basin. There are concerns implicit in the County's ordinances that such projects may cause a degradation of the water quality. The ordinance identifies the proposed use as conditional and does not allow approval as being in compliance with the requirements and standards of the ordinance unless the applicant affirmatively shows that the use furthers the purposes of the ordinance and the applicant addresses the issue to be resolved during the study period provided for in the ordinance.

Even though certification pursuant to Section 401 of the Federal Clean Water Act may not directly be a land use action regulated by Deschutes County, it is clear that the Department of Environmental Quality must issue its permits in accordance with the

Department of Environmental Quality
October 10, 1984
Page 2

local comprehensive plans and implementing ordinances. Deschutes County's Plan and implementing ordinances provide an opportunity for General Energy Development, Inc. to make application for a conditional use permit.


It is impossible for Deschutes County to find that the proposed hydroelectric project near Benham Falls on the Deschutes River south of Bend is in conformance with the Comprehensive Plan and implementing ordinances with respect to the requested certification under Section 401 of the Federal Clean Water Act without reviewing the whole of the project in accordance with the standards and procedures applicable to such a request.

Any review by Deschutes County would include not only direct influences during construction and operation due to increases in turbidity, settlement and erosion, but also the effect on minimum stream flows sufficient for pollution control, the effect on fish and wildlife, recreation, and other issues. Since the developer, General Energy Development, Inc., has not made application to the County, those issues cannot be addressed.

As a consequence, until such time as an application has been made by General Energy Development, Inc., and that application has been found to be in conformance with the Comprehensive Plan and implementing ordinances, Deschutes County opposes the issuance of a Section 401 Federal Clean Water Act certification. This position is consistent with our letter of May 10, 1984. A copy of the ordinance and May 10, 1984, letter are attached.

Sincerely,

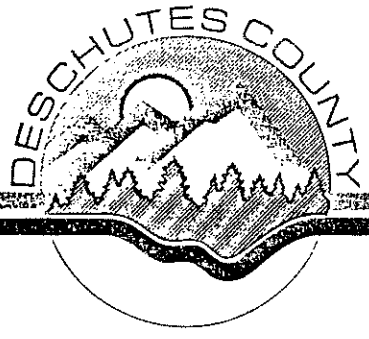
BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON


ALBERT A. YOUNG, Chairman


LOIS BRISTOW PRANTE, Commissioner


LAURENCE A. TUTTLE, Commissioner

BOCC/RLI/dw



Board of Commissioners

Courthouse Annex / Bend, Oregon 97701 / (503) 388-6570

Albert A. Young
Lois Bristow Prante
Laurence A. Tuttle

May 10, 1984

Mr. Fred Hansen, Director
Department of Environmental Quality
P. O. Box 1760
Portland, Oregon 97207

RE: Lava Diversion Hydroelectric Project; FERC No. 5205; Oregon
HE 475,64551.

Dear Mr. Hansen:

Arnold Irrigation District and General Energy Development, Inc. (GED) have proposed a hydroelectric project at Benham Falls, one of the most environmentally sensitive areas on the Deschutes River, and one which is important economically and culturally to our community. To address this issue and several others, Deschutes County and the City of Bend are actively engaged in a study of the Deschutes River and its tributaries. This study is being coordinated with interested state and federal agencies, including your regional office in Bend. The results of this study and subsequent plan will have important impacts on the vital interests of the people of our county. With this letter we are asking your assistance.

It is our understanding that GED will soon be requesting your agencies waiver or approval of the required state certification of water quality for this project. Our proposal is that GED's request be held with no action taken by your staff until the completion of our study in 1985. This will allow a more complete evaluation and reasonable resolution of this important issue. Further, this delay by your department would be consistent with Oregon law, which requires intergovernmental coordination and cooperation on matters of mutual concern.

Page 2
May 10, 1984

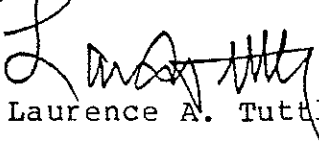
Our staff has discussed this matter with Mr. Glen Carter, of your office, to assure coordination with your department's activities.

Very truly yours,

DESCHUTES COUNTY BOARD OF COMMISSIONERS


Albert A. Young, Chairman


Lois Bristow Prante, Commissioner


Laurence A. Tuttle, Commissioner

BOCC:ap

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Amending *
Deschutes County Zoning Ordin- *
ance of 1979, Ordinance No. *
PL-15, as Amended, by the *
Addition of the Deschutes *
River Combining Zone, Provid- *
ing For a Study Period, Pro- *
viding For Exceptions, Pro- *
viding for Repeal; and *
Declaring an Emergency. *

ORDINANCE NO. 83-058

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY,
OREGON, ORDAINS as follows:

Section 1. Ordinance No. PL-15, Deschutes County Zoning
Ordinance of 1979, as amended, is amended by the addition of
Section 4.195, Deschutes River Combining Zone, as set out below:

"Section 4.195. Deschutes River Combining Zone.
DR. In any Deschutes River Combining Zone the
requirements and standards of this Section shall apply
in addition to those specified in this Ordinance for
the underlying zone and other applicable combining
zones. In the event of a conflict in requirements and
standards of this Section with the requirements and
standards for the underlying zone, or other applicable
combining zones, the provisions of this Section shall
take precedence.

- (1) Purpose. The purpose of the Deschutes River
Combining Zone is to maintain the quality and
quantity of the streamflows; to protect fish and
wildlife; and protect the visual, environmental,
and aesthetic attributes of the Deschutes River,
its tributaries, diversion points, and adjacent
areas within the area of the DR Zone.

- (2) Application of Section. This Section shall apply
to all land use actions in the area of the DR Zone
defined as 200' from the mean high water mark,
200' measured at a right angle from the river
meander, or the identified floodplain, whichever
is greater on and along the Deschutes River,
Little Deschutes River, Spring River, Fall River,
Tumalo Creek, Paulina Creek, Squaw Creek, and the
Crooked River, as identified on the Deschutes

River Combining Zone map, marked Exhibit "A", attached hereto and by this reference incorporated herein.

- (3) Uses Permitted Conditionally. In a zone or zones with which the DR Zone is combined, those uses not otherwise exempt from this Section shall be permitted conditionally. The requirements and standards of this Section shall apply in addition to the general conditional use criteria and specific use standards set forth in Article 8, the requirements and standards for the underlying zone, and the requirements and standards of all other applicable combining zones.
- (4) Specific Use Requirements and Standards. The following requirements and standards apply to land uses within the DR Zone.
 - (A) The use shall maintain existing stream flow of any affected river or stream at present quality and quantity.
 - (B) The use shall conserve and protect fish and wildlife habitat.
 - (C) The use shall maintain public access to any affected river or stream.
 - (D) The use shall maintain the scenic, visual, environmental and aesthetic qualities of the affected river or stream.
 - (E) The use shall not impair recreational opportunities of the river or stream by the public.
 - (F) The use shall have no significant negative impact, individually or cumulatively, on existing and viable potential uses of the river or stream.
 - (G) Any application for a hydroelectric project shall affirmatively show that the use will further the purpose of this Section, and that the applicant has sufficiently addressed the issues to be resolved during the study period as set forth in this Section.
 - (H) The use shall meet the State of Oregon Department of Environmental Quality noise standards.

- (I) That fill and removal activities meet State of Oregon requirements and provide for the reclamation of disturbed areas so that no significant short or long term negative impacts occur.
 - (J) That when the use is on or affects Federal or State land, that the use is in conformance with any intergovernmental planning agreement between Deschutes County and affected Federal or State agencies.
 - (K) That any special district involved in any manner with an application for a land use permit has complied with the requirements of ORS 197.185 and the proposed activity is in conformity with the special district's inter-governmental cooperative agreement with Deschutes County if the district does not otherwise have an acknowledged comprehensive land use plan.
- (5) Study Period. A study shall be conducted as set out below by a joint task force to be appointed by the Board of County Commissioners.
- (A) There is hereby declared a study period for all land use activities within the area within the DR Zone.
 - (B) The study period shall be for the period February 1, 1984 to July 31, 1985. Following review and public hearing, and prior to the termination date, and if deemed necessary by the Board of County Commissioners, the date of termination of the study period may be extended by ordinance for a subsequent period of up to six months.
 - (C) The study period shall include, but not be limited to, the following:
 - 1. Detailed mapping and instream flow studies of the Deschutes River, its tributaries, its diversion points, and its adjacent areas to allow precise review of the boundaries of the overlay zone.
 - 2. The development of a river system model at standards not less stringent than those adopted by the Northwest Power Planning Council to complete the re-

quirements of the studies identified in Section 1204, Northwest Power Planning Council "Columbia River Basin Fish and Wildlife Program" and Chapter 10, Sections 14.2 and 14.3, Northwest Power Planning Council, "Northwest Conservation and Electric Power Plan".

3. Identification of uses and development that may be permitted utilizing the balancing tests set forth in Statewide Planning Goal 5, and establish detailed standards and criteria for development within the DR zone.
4. The study of the individual and cumulative effects of all known and potential hydroelectric sites and sources on the Deschutes River, its tributaries, diversion points, adjacent areas, and stream flows.
5. The development of a program in recognition of the cumulative effects to balance the conflicting uses of the natural resource and the hydroelectric projects as required by Statewide Planning Goal 5.
6. Identification of current and potential river uses, and the economic value of such uses.
7. Preparation of amendments to the Comprehensive Plans and implementing ordinances to balance the conflicting uses on the Deschutes River, its tributaries, diversion points, adjacent areas, and streamflows.

(D) During the study period, the County shall participate with the Power Council in the completion of the Power Council's hydroelectric study and take affirmative action with respect to the apparent conflict between the provisions of PURPA and the Northwest Power Act in order to help facilitate resolution of the conflict.

(6) Exemptions. The following shall be exempt from this Section:

- (A) Continuation of a conforming or nonconforming use, or a conforming or nonconforming structure, constructed prior to January 1, 1984.
- (B) A use or structure, including a conforming or nonconforming use, or a conforming or nonconforming structure, for which a minor site plan for the construction, alteration, restoration, or replacement is necessary.
- (C) Construction or reconstruction of a single family residence.
- (D) The reconstruction or repair of an existing dam, provided such reconstruction or repair does not alter the characteristics of the water impoundment and does not otherwise affect existing stream flow.
- (E) Any use or accessory use permitted outright or conditionally in the underlying zone pursuant to a Cluster Development approval, Planned Development approval, Destination Resort approval, Dude Ranch approval, Planned Community approval, master plan approval, or site plan approval dated prior to January 1, 1984.
- (F) The employment of land for farm or forest use."

Section 2. This Ordinance is repealed February 1, 1985, or upon the completion of the study provided for in Section 4.195 of Ordinance No. PL-15, Deschutes County Zoning Ordinance of 1979, as amended, and the adoption of a recommended comprehensive plan and implementing ordinance amendments, whichever occurs first.

Section 3. This Ordinance being necessary for the immediate preservation of public peace, health and safety, an emergency is declared to exist, and this Ordinance takes effect on its passage.

DATED this 21st day of Dec, 1983.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

Albert A. Young
ALBERT A. YOUNG, Chairman

Lois Bristow Pranta
LOIS BRISTOW PRANTA, Commissioner

Laurence A. Tuttle
LAURENCE A. TUTTLE, Commissioner

ATTEST:

Annette Pearson
Recording Secretary

LEGISLATIVE FINDINGS

The following Legislative Findings are hereby made in support of adoption of Ordinance No. 83-058.

1. Statewide Planning Goal 5 requires the users of land within the State "[t]o conserve open space and protect natural and scenic resources", by developing "[p]rograms that will: (1) insure open space, (2) protect scenic and historic areas and natural resources for future generations, and (3) promote healthy and visually attractive environments in harmony with the natural landscape character" Statewide Planning Goal 5 further provides that, "[w]here conflicting uses have been identified the economic, social, environmental and energy consequences of the conflicting uses shall be determined and programs developed to achieve the goal."
2. The Deschutes County Year 2000 Comprehensive Plan (Plan), portions of which are set forth in Appendix "A", identify uses for the Deschutes River, its tributaries, diversions, adjacent areas, and stream flows, all of which are herein-after referred to as the "Deschutes River", which are intended to implement Statewide Planning Goal 5.
3. Hydroelectric projects on or adjacent to the Deschutes River, or which divert water from the Deschutes River, conflict with the Plan and no program has been developed by Deschutes County to achieve Statewide Planning Goal 5.
4. The Plan provides that tourism and recreation are critically important components of the local economy. The economic elements of the Plans make it imperative that the Deschutes River be preserved as a resource to be utilized by tourists.
5. A number of Federal acts and actions have been promulgated which may impact the Deschutes River, such as the Northwest Conservation and Electric Power Plan (Power Plan) developed pursuant to the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act) as adopted by the Northwest Power Planning Council (Power Council), the Columbia River Basic Fish and Wildlife Program (Fish Plan) as adopted by the Power Council, the Public Utilities Regulatory Policy Act (PURPA), and the U. S. Forest Service Deschutes Forest Plan (Forest Plan).
6. The Forest Plan designates segments of the Deschutes River as a recreational area and proposes its inclusion under the Wild and Scenic Rivers Act.

7. A number of applications for hydroelectric generating facilities and diversions have been filed for river and streams in the Deschutes River Basin.
8. The Fish Plan and Power Plan adopted by the Power Council identify serious potential cumulative impacts from hydroelectric generating and diversion facilities which cannot be assessed by evaluating projects on a case by case basis.
9. The necessary studies, including environmental impact studies, to determine the cumulative impacts of the construction and operation of hydroelectric diversion, generating, and transmission facilities on the economic, social, environmental and energy consequences of identified and potential conflicting uses of the Deschutes River which are a condition precedent to the implementation of programs to meet Statewide Planning Goal 5 have not yet been accomplished.
10. The Deschutes River, conserved as open space and protected as a natural and scenic resource, is a critically important component to the tourism and recreation industry in Deschutes County.
11. Hydroelectric generating and diversion facilities impact open space, natural and scenic resources, and recreational opportunities which are among the basic elements of a successful tourist industry.
12. The Federal Power Act (FPA) which created FERC specifically recognizes "state action". The Act provides that FERC's powers shall not be exercised as ". . . affecting . . . or in any way to interfere with the laws of the respective state relating to the control, appropriation, use, or distribution of water used . . . for municipal or other uses . . .", and Section 9(b) of the FPA requires compliance with local laws implementing state action before developing the use, diversion, or appropriation of water, water course bed, or watercourse bank.
13. The Power Plan states that the Power Council will conduct, during the next two years, a stream-by-stream analysis to rank hydroelectric sites according to their impacts on fish and wildlife.
14. The Oregon Economic Department has determined that in 1982 out-of-state tourism spent \$100,000,000 in Deschutes County.
15. The Department of Fish and Wildlife has estimated fishing and hunting generate up to \$10,000,000.00 to the Deschutes County economy annually.

- 16. The condition of the Deschutes River may be irreparably damaged as a tourist attraction, a recreational resource, a fish and wildlife habitat, a scenic waterway, and a generally clean and safe natural resource by the unstudied placement of any of the proposed hydroelectric generating facilities or other major new facilities within rural Deschutes County.
- 17. The State Attorney General has recognized local jurisdiction's land use role in the use and development of water resources such as found in the Deschutes River Basin, and the authority of the local jurisdiction to adopt ordinances regulating the land use aspect of such resources.
- 18. That exemptions from the standards and criteria in the Ordinance are based upon the recognition of prior approvals and uses which at most represent minor impacts and are in conformance with the Plan and implementing ordinances, or may be continued pursuant to existing State law.

DATED this 21st day of Dec, 1983.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

Albert A. Young
ALBERT A. YOUNG, Chairman

Lois Bristol Prante
LOIS BRISTOW PRANTE, Commissioner

Laurence A. Tuttle
LAURENCE A. TUTTLE, Commissioner

ATTEST:

Annette Pearson
Recording Secretary

it is shown that the structure is removed from the riparian area because of a high bluff or steep slope. . . ." (pg. 164)

OPEN SPACES, AREAS OF SPECIAL CONCERN AND ENVIRONMENTAL QUALITY

"GOAL

2. To maintain and improve the quality of air, water and land resources of Deschutes County. . . ."

"POLICIES

1. A. On lands outside Urban Growth boundaries and rural service centers . . . and along all other streams and roadways for which landscape management is prescribed on the 1990 Comprehensive Plan, a case by case review area shall be established. This area is not to extend more than a quarter mile on either side of the center line of roadways, nor more than 200 ft. from either side of the rivers measured from the mean high water level.

Within the prescribed area, new structures (excluding fences, existing structures or other structures less than \$1,000.00 in total value), shall be subject to review by the County at the time of application for building or zoning permit. . . .

2. Considerations should be given to designation of appropriate segments of Fall, Deschutes, Little Deschutes and Crooked Rivers as Scenic Waterways. Reasonable protective and State agency coordinative measures should be instituted. . . .
6. Because management of State and Federal lands effects areas under the County's jurisdiction and vice versa, better coordination of land use planning between the County, U.S.F.S., State Land Board, Bureau of Land Management and other agencies shall be sought. . . .
9. Loss of riparian areas and other important open spaces because of dam construction for recreation or other purposes should be minimized." (pg. 153)

RECREATION

"GOALS

1. To satisfy the recreational needs of the residents of and visitors to Deschutes County." (pg. 117)

ECONOMY

"GOALS

2. To enhance and maintain the existing natural resource, commercial and industrial segments of the local economy. . . ."

"POLICIES

1. The importance of tourism to the local economy is well known, but there also exists considerable potential for strengthening and improving this segment of the economy. The County shall assist in the development of a long range plan to encourage tourism (including destination resorts) and recreation locally. This study will include consideration of the impacts likely to be created by increasingly expensive gasoline.
2. Private commercial activities consistent with other County policies which enhance tourism shall be encouraged by the County. . . ." (pg. 87)

RURAL DEVELOPMENT

"GOAL

1. To preserve and enhance the open spaces rural character scenic values and natural resources of the County. . . ." (pg. 49)



Department of Environmental Quality

522 S.W. FIFTH AVENUE, BOX 1760, PORTLAND, OREGON 97207 PHONE: (503) 229-5696

November 27, 1984

Richard E. Craven
Campbell-Craven
Environmental Consultants
9170 S.W. Elrose
Tigard, OR 97223

Re: Lava Diversion Project,
FERC No. 5205,
Deschutes River, Oregon

Dear Mr. Craven:

By a letter dated November 28, 1983, you requested water quality standards compliance certification for the above subject project, as is required by Section 401 of the Federal Clean Water Act. We responded on December 1, 1983, stating that we would not commence action on the certification process until having an opportunity to review an Exhibit E Environmental Report for the project.

We received the Environmental Report on August 20, 1984. As prescribed by law, we made public notice of your request on September 5, 1984, and received comments through October 15, 1984. During this same period, we evaluated the Environmental Report, plus the additional project information Exhibits A, B, C, D, F, and G which are part of your submittal for FERC licensing. Subsequently, we evaluated the comments which were received in response to our public notice of your project certification request.

Our findings, conclusions, and recommendation, pursuant to your request, are contained in the attached report "Evaluation of Request for Water Quality Requirements Compliance Certification for Proposed Lava Diversion Hydroelectric Project, Deschutes River, near Bend, Oregon (FERC No. 5205)," November 27, 1984.

Based on the findings and reasoning contained in that report, I hereby deny your request for water quality standards compliance certification for the Lava Diversion Project, FERC Number 5205. This denial is rendered without prejudice, and the request for certification may be made again if and when the current reasons for denial are removed.

Sincerely,

Fred Hansen
Director

GDC:t
WT462
Attachment

cc: Donald P. McCurdy
General Energy Development, Inc.

Evaluation of Request for Water Quality Requirements
Compliance Certification for Proposed Lava Diversion
Hydroelectric Project, Deschutes River Near Bend, Oregon
(FERC No. 5205)

by

Department of Environmental Quality

November 27, 1984

Introduction

General Energy Development, Inc. (GED) holds Preliminary Permit No. 5205 from the Federal Energy Regulatory Commission (FERC) to plan and design the Lava Diversion Hydroelectric Project on the Deschutes River at Benham Falls, south of Bend. Before construction licensing by FERC may proceed, federal law requires certification by the state Department of Environmental Quality (DEQ) of the project's compliance with water quality standards and related requirements. A state condition of certification is that the project must also be compatible with the county's comprehensive land use plan and/or Statewide Planning Goals. Thus, the DEQ's responsibility and authority in responding to the request for project certification are limited to making two determinations:

1. Is the project compatible with the county's comprehensive land use plan and/or statewide planning goals?
2. Is there reasonable assurance that the project will not violate applicable water quality standards and related requirements?

Hydropower development in Deschutes County is a conditional use under terms of the county's comprehensive land use plan.

In addition to the Lava Diversion Hydroelectric Project, there are eleven other hydropower sites in the Upper Deschutes River Basin on which applicants have filed for permits or licenses from the FERC. Deschutes County officials took note of this large hydropower interest and sensed the possibility that such river developments could possibly have cumulative adverse impacts on present environmental conditions and cultural uses of the area. As a consequence, the county passed Ordinance No. 83-058 which gives them from February 1, 1984, to July 31, 1985, to study the situation and determine whether such hydropower developments would truly fit well with key elements of their land use plan. Until the study is finished, Deschutes County officials will not issue a conditional use permit for any of the proposed hydroelectric sites in the Upper Deschutes River zone of contention.

GED's environmental consultants, Campbell-Craven, requested DEQ certification for the Lava Diversion Project by letter dated November 28, 1983 (received by DEQ on November 29, 1983). DEQ, in turn, requested further supporting information which was received on August 20, 1984.

The DEQ made public notice of the certification request on September 5, 1984, (Appendix A) and received public comment through October 15, 1984.

Project Description

This project description was taken from information Exhibit A, that the applicant submitted to the FERC for licensing purposes.

The project site is located in Sections 8, 9, 16, and 17 of Township 19 South, Range 11 East of the Willamette Meridian. It is situated entirely on federal lands in the Deschutes National Forest. A project plan is shown in Appendix B.

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The facility is designated for year-round operation as a run-of-river project with no storage of water. The controlled flows in the Deschutes River in the project area dictate the equipment required to maximize the power benefits of the project while allowing the bypass flows necessary to protect other recognized beneficial uses.

Current uses of the Deschutes River will not be altered by the project, except in the reach from the weir to the powerhouse. Relocations of private individuals or prior improvements will not be required to permit construction and operation of the project.

The project will have eight components: (1) a control weir, (2) an intake structure, (3) a tunnel to convey water from the intake to the powerhouse, (4) a surge tank, (5) a pipeline, (6) a powerhouse, (7) a tailrace and (8) access roads necessary for construction and operation of the project. These are briefly described as follows:

- (1) A rectangular concrete control weir will be installed near the head of the Benham Falls. Benham Falls is 3,800 feet long and drops 103 feet. The weir will have a 140-foot crest, which will be totally submerged assuming flows in excess of 350 cfs.

The weir will measure bypassed flows and transmit these measurements to the powerhouse. A processor will compare the released flows to the project rule curve for releases and adjust the turbines to assure compliance with the required bypass flow. The weir is intended to maintain approximate existing upstream river levels during operation of the project. The applicant believes this will protect present recreation, wetland, and waterfowl uses of that river zone.

- (2) The intake structure for the project will be constructed of reinforced concrete. It will be set on the left bank of the Deschutes River, with intake portals parallel to the flow of the river.

The structure will be fronted by a trash rack with two inch openings. The bar screen on the trash rack will be constructed to facilitate cleaning with a motorized rake.

The applicant expects that fish will be prevented from entering the conduit by screening with 0.25 inch openings.

- (3) An 1,800-foot horseshoe shaped, concrete lined tunnel will be constructed to convey water from the intake structure to the powerhouse. The tunnel will have a 6.5-foot radius crown dropping from the radius point to a rectangular base and a grade of 0.0078 foot per foot. The upstream end of the tunnel will be set at an elevation of 4,120 feet (U.S.G.S. datum), and the outlet, which will be at the base of the surge tank, will be at an elevation of 4,106 feet. Two conduits will be installed in the tunnel cavity for controls and power for the intake structure.

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- (4) A restricted orifice type surge tank 51 feet in diameter and 36-foot deep will be constructed at the transition point of the tunnel to penstock. The transition will be from the 13-foot diameter horseshoe type tunnel to a 14-foot diameter welded steel pipe. The tank will have a floor elevation of 4,129 feet and a top elevation of 4,165 feet.
- (5) A 14-foot diameter pipe will extend from the tunnel outlet approximately 50 feet. It will then be split with a 40-foot bifurcation. The two resulting 9-foot, 6-inch diameter pipes will extend the remaining 410 feet to the powerhouse.

The pipeline will have a wall thickness of 1/2 inch and will be buried between the tank and the powerhouse.

- (6) A low-level powerhouse will be constructed of reinforced concrete. The structure will be 62 feet by 71 feet 4 inches and will rise from a foundation elevation of 4,025 feet to a roof elevation of 4,071 feet. The powerhouse will be located on the left bank, 250 feet away from the Deschutes River. The powerhouse will be equipped with three generators having a combined rating of 11,825 kva, at a 95 percent power factor.

Additional mechanical equipment, such as air, oil, and cooling water systems, will be located in the powerhouse where appropriate. Electrical systems necessary for operation of the project will include station service, control boards, monitoring equipment, switchgear, and an auxiliary power supply. Further, a fire protection system will be provided for the powerhouse.

- (7) A 250-foot tailrace will be excavated from the powerhouse to the Deschutes River. The discharge from the powerhouse will vary from 80 cfs to 1,800 cfs, and the tailwater will vary in height from an elevation of 4,036.9 feet to an elevation of 4,040.3 feet.

The discharge velocities at full capacity of the powerhouse will be 5.0 fps. These will dissipate to 1.5 fps at the river re-entry point.

The tailrace cross-section expands gradually as it proceeds to the Deschutes River. At its confluence with the river, the re-entry channel will be 135 ft. wide at the bottom and 165 ft. wide at the top.

- (8) The Applicant will utilize existing roads and, where necessary, construct new roads to provide access to the project during construction and operation. All new roads will be built to USFS standards. The road system utilized for operation of the project will be part of the USFS's planned road system.

The old railroad grade, which currently provides access to the Benham Falls Viewpoint, will be utilized for both construction and operation of the project.

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Road grades which are modified to permit movement of construction equipment will be restored to their prior condition following construction of the project.

In sum, access to the intake area will be provided by the following means:

Reconstructed roadway to top of hill	- 1,800 feet
Utilization of existing road	- 1,000 feet
New access road downhill to intake	- 1,370 feet

The total roadway to be constructed for the project is as follows:

General area access	- 1,400 feet
Surge tank	- 290 feet
Powerhouse	- 570 feet
Weir	- 1,250 feet
Intake	- 3,170 feet
<u>Total roadway</u>	<u>6,680 feet</u>

Power generated by the project will be sold to the Pacific Power & Light Company. The powerhouse for the project will be located 1,600 feet east of the Midstate transmission line. Power generated at the powerhouse will be transmitted underground at 69 kv to the Midstate line.

PERTINENT DATA FOR THE PROJECT

1. General

Stream	Deschutes River
Location	Deschutes National Forest Deschutes County Sections 8, 9, 16 and 17 T. 19S., R. 11E., W.M.
State	Oregon
Location on River	
Powerhouse	River Mile 179.9
Control Weir	River Mile 181.0
Intake	River Mile 182.4

2. Hydrology

Drainage Area	1,759 sq. mi.
Average Annual Discharge (27 years)	1,460 cfs
Minimum Daily Flow (27 years)	438 cfs (1970)
Maximum Daily Flow (27 years)	3,410 cfs (1964)

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3. Control Weir

Type	Rectangular
Crest Length	140'
Throat Elevation	4,145.57

4. Intake

Type	Passive Screen
Opening	9 x 200
Approach Velocity	1 fps Maximum
Screen Size	Wedge Wire - 1/4" Spacing

5. Tunnel

Size	13' Horseshoe (150.9 S.F.)
Length	1,800 L.F.
Entrance Invert	Elev. 4,120
Exit Invert	Elev. 4,106

6. Surge Tank

Type	Differential type w/orifice
Size	51' dia. x 36' high
Material	Prestressed-post tensioned concrete
Location	
Top	Elev. 4,165
Bottom	Elev. 4,129

7. Pipeline

Length	500 L.F.
Type	Welded steel
Size	9.6' diameter

8. Powerhouse

Type	Reinforced concrete
Size	62' x 71'-4"
Foundation	Elev. 4,025
Roof	Elev. 4,071

9. Power Plant

Turbines	
Hydraulic Capacity	1 at 800 cfs 1 at 500 cfs 1 at 200 cfs
Rated Head	107 feet

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Generators

Nameplate rating	1 at 6,350 KVA
(at 95 percent PF)	1 at 3,925 KVA
	1 at 1,575 KVA

10. Generation

Capacity	11,250 KW
Average Annual Energy	52,555,000 kWh
Average Annual Power	6,000 KW
Plant Factor	53 percent

Project Environmental Report

When applying for a project license from the Federal Energy Regulatory Commission, the applicant must present an "Exhibit E" Environmental Report which identifies the real and potential environmental impacts likely to be caused by the project's construction and operation. Additionally, the report must show how such impacts will be prevented or minimized to acceptable levels.

Campbell-Craven, Environmental Consultants, prepared the environmental report. Both "principals" in the firm have long professional histories in natural resources management and associated consulting services. The chapters of their environmental report cover: (1) Description of Locale, (2) Water Use and Quality, (3) Fish, Wildlife, and Botanical Resources, (4) Historic and Archeological Resources, (5) Socioeconomic Impacts, (6) Geographical and Soil Resources, (7) Recreational Resources, (8) Aesthetic Resources, (9) Land Use and Management, (10) Alternative Locations, Designs, and Energy Sources, and (11) List of Literature.

Chapters 2 and 9 address the two issues that the DEQ must consider when processing the project certification request. Thus, at this point, the DEQ evaluation is narrowed to those two elements of the Environmental Report.

Based on communications with agencies who reviewed the project proposal, the license applicant proposes to undertake the following mitigation measures with respect to water quality and stream flows:

1. The powerhouse/tailrace and intake structure will be constructed in the dry without placing a cofferdam in the River.
2. The intake structure will be sited in the location recommended by Oregon Department of Fish and Wildlife (ODFW).
3. The tailrace and intake areas near the shoreline will be riprapped to minimize erosion from wave action.
4. The discharge velocity in the tailrace will be about 1.5 feet/second. This will prevent erosion of the riprap area of the tailrace or of the river channel.

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5. Sediment catchment basins will be located near all areas that may drain construction materials into the river.
6. Fueling stations for equipment will be located away from the river and the project area to minimize the possibility of spills into the river. Contingency plans will be developed in consultation with the agencies to effectively handle spills.
7. The existing willows and alders on the face of the dike will be preserved during weir construction and the dike will be plugged to prevent erosion.
8. The applicant will evaluate the effect of lowered velocities on sediment accumulation to identify the potential for sedimentation above the weir and determine if a study is required.
9. To minimize impacts of the cofferdam placement and removal at the weir location, construction will be scheduled for the late fall when river flow and visitor use are lower. Construction of each cofferdam will require approximately ten days. The upstream cofferdam will be constructed in late September/October and the downstream cofferdam will be constructed in late November. The weir will be completed and the cofferdams removed by mid-December of the same year. The applicant will coordinate with ODFW, U.S. Forest Service (USFS) and DEQ to minimize turbidity and sedimentation and subsequent impacts on fish resources, water quality and recreation.
10. A minimum flow of 660 cfs will be left in the bypass reach of the river and over Benham Falls.

The agencies which were consulted by the applicant have not recommended any operation mitigation measures with respect to stream flows and water quality.

The applicant proposes to periodically review project facilities and operations, particularly in the area near the intake, weir, powerhouse, and the access road to the intake, to determine if modifications of activities are necessary to decrease impacts relating to erosion. If necessary, the applicant proposes to modify operation of the project to reduce erosion.

The project license applicant fully recognizes the authority and applicability of the Deschutes County Comprehensive Land Use Plan and one goal therein to assist in the provision for adequate local energy supplies. Likewise, the applicant recognizes Deschutes County Ordinance No. 83-058 which places new restrictions on future developments along the Deschutes River and other rivers in Deschutes County, for the purposes of maintaining quality and quantity of streamflows and protecting the visual, environmental and aesthetic attributes of the rivers. Various standards for land uses within the Deschutes River Combining Zone (DR zone) are specified, including the requirement that an application for a hydroelectric project will show that the use will further the purpose of the ordinance. The ordinance also

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specifies that a study shall be conducted for various purposes, including the identification of the individual and cumulative effects to all known and potential hydroelectric sites and sources on the Upper Deschutes River. The ordinance will be repealed February 1, 1986, or upon the completion and adoption of a recommended comprehensive plan and implementing ordinance amendments.

DEQ Evaluation

A. Applicable Water Quality Regulations and DEQ Evaluations

Oregon Administrative Rules (OAR) Chapter 340, Division 41, Rule 562, lists the beneficial uses for which water quality will be protected in the Deschutes River upstream from the Bend diversion dam. They are: Public Domestic Water Supply, Private Domestic Water Supply; Industrial Water Supply; Irrigation; Livestock Watering; Anadromous Fish Passage; Salmonid Fish Rearing; Salmonid Fish Spawning; Resident Fish & Aquatic Life; Wildlife and Hunting; Fishing; Boating; Water Contact Recreation; and Aesthetic Quality. Established water quality standards were designed to support and maintain these uses.

Under provisions of ORS 536.300(2), the Water Policy Review Board recognizes hydropower development as a beneficial water use throughout the Deschutes River Basin. However, this use has no corresponding DEQ water quality protection requirement because hydropower production is not likely to be water quality dependent.

OAR 340-41-026 lists the Policies and Guidelines Generally Applicable to All (river) Basins Statewide. These are mainly anti-degradation in nature, except where the DEQ Director or his designee may allow lower water quality on a short-term basis in order to respond to emergencies or to otherwise protect public health and welfare.

OAR 340-41-565 lists specific water quality standards for the Deschutes River Basin. For the purpose of relating water quality standards to potential water quality impacts of the proposed project, the pertinent standards are hereafter listed and DEQ staff evaluation follows each one:

340-41-565(2)(a) Dissolved Oxygen (DO) concentrations shall not be less than 90 percent of saturation at the seasonal low, or less than 95 percent of saturation in spawning areas during spawning, incubation, hatching, and fry stages of salmonid fishes.

Water quality monitoring in the Upper Deschutes River shows that the dissolved oxygen standards are met at most seasons of the year. There have been infrequent cases of slight D.O. reductions due to natural causes. The proposed hydropower project will have no waste discharges or flow regulation needs that would be expected to adversely impact the river's present D.O. regime.

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340-41-565(2)(b) No measurable (temperature) increases shall be allowed outside of the assigned mixing zone, as measured relative to a control point immediately upstream from a discharge when stream temperatures are 58°F. or greater; or more than 0.5°F. increase due to a single source discharge when receiving water temperatures are 57°F. or less; or more than 2°F. increase due to all sources combined when stream temperatures are 56°F. or less, except for specifically limited duration activities which may be authorized by DEQ under such conditions as DEQ and the Department of Fish and Wildlife may prescribe

Existing water temperature regimes in the Upper Deschutes River are suitable for all phases of salmonid fish life. The maximum water temperature recorded between water years 1968 and 1979 at the Benham Falls gage was 17°C, and the minimum 0°C. A probability analysis showed the water temperature to be below 16°C, 98% of the time--distributed mostly between 3° and 14°C.

Water temperatures and stream flows are directly related due to upstream reservoir releases and groundwater contributions. High temperatures correspond to high flows because of seasonal warming and the release of water from the reservoirs. Low temperatures correspond to low flows because of the seasonal cooling and greater contribution of cooler groundwater to the flow.

The project is not designed to cause any additional pooling or changes in the river level above the weir that would significantly increase the present degree of solar incidence. A minimum flow of 660 cfs is specified to remain in the bypass zone, over Benham Falls. While this lesser flow may slow the velocity slightly, it is not expected to result in an appreciable water temperature change from the range existing before the project's construction. The only minor changes in bankline vegetation will occur during weir construction, at the intake structure, and at the tailrace entry to the river. Here, also, the combination of these shoreline changes should not result in an appreciable change in pre-construction river temperatures.

The project is not expected to have a significant impact on the existing temperature regime in the river.

The very small amount of bearing cooling water that will emit from the plant is not expected to have a measureable impact on the river water temperature.

340-41-565(2)(c) No more than a 10 percent cumulative increase in natural stream turbidities (JTU) shall be allowed, as measured relative to a control point immediately upstream of the turbidity causing activity. However, limited duration activities necessary to address an emergency or to accommodate essential dredging, construction or other legitimate activities and which cause the standard to be exceeded may be authorized provided all practicable turbidity control techniques have been applied and one of the following has been granted:

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- (1) Emergency activities: Approval coordinated by DEQ with the Department of Fish and Wildlife under conditions they may prescribe to accommodate response to emergencies or to protect public health and welfare.
- (2) Dredging, Construction or other Legitimate Activities: Permit or certification authorized under terms of Section 401 or 404 (Permit and Licenses, Federal Water Pollution Control Act) or OAR 141-85-100 et seq. (Removal and Fill Permits, Division of State Lands) with limitations and conditions governing the activity set forth in the permit or certificate.

The placement and removal of coffer dams, plus final opening of the powerhouse "tailrace" channel, during project construction, will cause short-term turbidity increases in the river. The project applicant has proposed mitigation measures that will prevent and/or control these impacts in compliance with the applicable rule. Subsequent operation of the plant should have no impact on existing stream turbidity levels.

340-41-565(2)(d) pH values shall not fall outside the range of 6.5 and 8.5.

No discharge of materials that would affect the river's existing pH values are proposed by the applicant. Operation of facilities should not alter river pH values.

340-41-565(2)(e) Organisms of the coliform group where associated with fecal sources (MPN or equivalent MF using a representative number of samples): [shall not exceed] A log mean of 200 fecal coliform per 100 milliliters based on a minimum of 5 samples in a 30-day period with no more than 10 percent of the samples in a 30-day period exceeding 400 per 100 ml.

The applicant has not discussed methods of sewage disposal for either the construction or operation periods of the project.

No discharge of fecal coliform bearing wastes is proposed by the applicant.

340-41-565(2)(f) Bacterial pollution or other conditions deleterious to waters used for domestic purposes, livestock watering, irrigation, bathing, or shellfish propagation, or otherwise injurious to public health shall not be allowed.

No discharge of bacterial pollutants from the plant or plant site is proposed by the applicant.

340-41-565(2)(g) The liberation of dissolved gases, such as carbon dioxide, hydrogen sulfide, or other gases, in sufficient quantities to cause objectionable odors or to be deleterious to fish or other aquatic life, navigation, recreation, or other reasonable uses made of such waters shall not be allowed.

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No discharge of substances from the plant or plant site that will result in the liberation of noxious or toxic gases is proposed by the applicant.

340-41-565(2)(h) The development of fungi or other growths having a deleterious effect on stream bottoms, fish or other aquatic life, or which are injurious to health, recreation, or industry shall not be allowed.

No discharge of substances from the plant or plant site that will result in the development of deleterious fungi or other harmful growths is proposed by the applicant.

340-41-565(2)(i) The creation of tastes or odors or toxic or other conditions that are deleterious to fish or other aquatic life or affect the potability of drinking water or the palatability of fish or shellfish shall not be allowed.

No discharges of substances that are likely to cause tastes, odors, or toxic conditions in the river are proposed by the applicant. The traces of oil and grease emitting with bearing cooling water at the powerhouse are so small that they should not contribute to taste, odor, or toxic problems in the river.

340-41-565(2)(j) The formation of appreciable bottom or sludge deposits or the formation of any organic or inorganic deposits deleterious to fish or other aquatic life or injurious to public health, recreation, or industry shall not be allowed.

No discharge of materials from the plant or plant site that will cause bottom sludges or deleterious deposits in the river is proposed by the applicant.

Natural sediment in the Upper Deschutes River is largely composed of volcanic material, with little organic matter. Thus, it has almost no potential to chemically depreciate water quality.

A question has been raised whether the reduction of flow velocity in the approximate 1-1/2 miles of river channel between the intake structure and the control weir will result in detrimental deposits of sediment from passing water-- similar to what has happened in Mirror Pond at Bend. Since a minimum flow of 660 cfs will be maintained in the bypass channel and over the falls, sediment deposition upstream from the weir does not appear to be a serious factor. However, the applicant has not yet fully addressed the potential for this happening. Neither has the applicant fully addressed the potential need for sediment removal and disposal from certain areas of the project after plant operation begins.

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340-41-565(2)(k) Objectional discoloration, scum, oily sleek or floating solids, or coating of aquatic life with oil films shall not be allowed.

There may be a trace of oil and/or grease in the bearing cooling water that emits from the plant. However, past experience and monitoring of such plants have shown the volume to be only minutely detectable in the laboratory and unseen by the eye. It does not occur in a concentration that would be deleterious to aquatic life, or make the water unfit for human or other animal consumption.

340-41-565(2)(l) Aesthetic conditions offensive to the human senses of sight, taste, smell, or touch shall not be allowed.

Some observers from the public sector believe the power project will destroy the present aesthetic quality of the river zone in and around Benham Falls. While this observation may have merit, the aesthetic changes will not be of a type regulated by water quality control rules. There is no project impact that is likely to change the present aesthetic quality of the river water during plant operation.

340-41-565(2)(m) Radioisotope concentrations shall not exceed maximum permissible concentrations (MPC's) in drinking water, edible fishes or shellfishes, wildlife, irrigated crops, livestock and other dairy products, or pose an external radiation hazard.

No discharges of radioisotopes are proposed by the applicant. Natural background levels of the radioisotopes in construction materials are expected.

340-41-565(2)(n) The concentration of total dissolved gas relative to atmospheric pressure at the point of sample collection shall not exceed one hundred and ten percent (110%) of saturation, except when stream flow exceeds the 10-year, 7-day average flood. However, for Hatchery receiving waters and waters of less than 2 feet in depth, the concentration of total dissolved gas relative to atmospheric pressure at the point of sample collection shall not exceed one hundred and five percent (105%) of saturation.

Dissolved gas supersaturation usually results when large volumes of water are plunged over structures into deep pools, where the atmospheric gas entrainment due to the plunge cannot quickly equilibrate with the atmospheric pressure. Water carried in tunnels and penstocks is not usually subject to further gas entrainment. Water for the Lava Diversion Project will be carried in closed conduits and discharged into a relatively shallow stream where turbulence will rapidly equilibrate dissolved gas pressures with the atmospheric sources.

340-41-565(2)(o) Dissolved chemical substances: Guide concentrations listed below shall not be exceeded unless otherwise specifically authorized by DEQ upon such conditions as it may deem necessary to carry

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out the general intent of this plan and to protect the beneficial uses set forth in rule 340-41-562: (mg/L)

(A) Arsenic (As)	0.01
(B) Barium (Ba)	1.0
(C) Boron (Bo)	0.5
(D) Cadmium (Cd)	0.003
(E) Chromium (Cr)	0.02
(F) Copper (Cu)	0.005
(G) Cyanide (Cn)	0.005
(H) Fluoride (F)	1.0
(I) Iron (Fe)	0.1
(J) Lead (Pb)	0.05
(K) Manganese (Mn)	0.05
(L) Phenols (totals)	0.001
(M) Total Dissolved Solids	500.0
(N) Zinc (Zn)	0.01

No discharges of dissolved chemicals from the plant or plant site are proposed by the applicant. Any metals leached by water passing over metallic equipment would be only trace in concentration and with little or no potential for violating the water quality standards.

340-41-565(2)(p) Pesticides and other Organic Toxic Substances shall not exceed those criteria contained in the 1976 edition of the EPA publication "Quality Criteria for Water". These criteria shall apply unless supporting data show conclusively that beneficial uses will not be adversely affected by exceeding a criterion by a specific amount or that a more stringent criterion is warranted to protect beneficial uses.

It is not unusual that herbicides are used sparingly in grounds maintenance programs at power plants and electrical substations. However, no pesticides or other organic toxic substances are proposed to be used at the plant site by the applicant.

340-41-565(3) Where the natural quality parameters of waters of the Deschutes Basin are outside the numerical limits of the above assigned water quality standards, the natural water quality shall be the standard.

This standard is set to recognize the variations in water quality that occur naturally. For instance, natural turbidity levels in the Deschutes River may seasonally exceed the standard.

Outside of the controlled water quality impacts that may occur temporarily during construction, the project operation is not expected to cause any water quality changes that would be outside the range of naturally occurring conditions.

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B. Land Use Compatibility

Hydroelectric power site development is a conditional use pursuant to requirements of the Deschutes County Comprehensive Land Use Plan. Since a number of sites in the Upper Deschutes River Basin have pending permits for hydropower development, Deschutes County officials have declared a moratorium, in the form of Ordinance No. 83-058, to delay the issuance of all conditional use permits until an overall hydropower site development impact study can be completed. Thus, the county will not consider the issuance of a conditional use permit for the proposed Lava Diversion Hydroelectric Project until terms of the Ordinance are met. On this basis, the county officials have opposed DEQ issuance of a water quality standards compliance certification for the project.

Potential Water Quality Impacts Not Adequately Addressed

The DEQ believes the following list of potential water quality impacts related to construction and operation of the project have not been adequately addressed by the applicant:

1. A trash collection rack is planned for the water intake. Where and how will the trash collections be disposed in compliance with solid waste and water pollution control regulations?
2. Fuel for emergency equipment, oil, and grease would be expected to be stored and used on site during normal plant operation. A plan is needed for their use and disposal of containers that will prevent spills or discharge to the water.
3. Transformer oils and hydraulic fluids for control systems are general products on site at hydroelectric power plants. A storage and use plan, plus a spill contingency plan, are needed to give maximum assurance that these products will not enter the water.
4. A plan and designated equipment are needed for the collection and proper disposal of toilet wastes and solid wastes both during plant construction and operational phases.
5. A considerable amount of concrete will be used in the project. If it is to be mixed on site, a plan is needed to show how wash waters, waste concrete, and yard drainage will be kept out of the river.
6. There is a potential for sediment deposition in the 1.4 miles of river channel between the intake structure and the flow regulation weir. If this occurs, what are the likely environmental impacts? The applicant proposes to address this issue at a later date.
7. It is not uncommon that maintenance dredging is needed at river-run hydroelectric projects to remove detrimental sediment deposits. The applicant should address this issue with a plan for both dredging and spoils disposal.

Evaluation of Request for Water Quality Requirements Compliance Certificate
for Proposed Lava Diversion Hydroelectric Project, Deschutes River Near Bend,
Oregon (FERC No. 5205)

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8. Herbicides are frequently used in grounds maintenance programs around power plants and substations. The applicant needs to also address this issue.

Summary of Public Comments

Twenty-two letters of public comment on the project were received by the DEQ, and are identified in Appendix C. A summary of each letter, by appended identification number, is as follows:

- 1) Opposes certification on basis that a multiple of proposed hydroelectric projects in the Upper Deschutes River Basin may have undetermined adverse cumulative effects.
- 2) Opposes the project on the basis of the site's greater importance for recreation and fishery values. Requests that DEQ honor a county ordinance that calls for greater study of possible adverse cumulative impacts from a multiple of proposed hydroelectric projects in the Upper Deschutes River Basin.
- 3) Opposes the project because it will likely have adverse impacts on aesthetic values and the local economy.
- 4) Opposes the project because of the site's great importance for recreation, fish production, big game habitat, and aesthetic values. Also, raises the question of whether the project complies with state planning goals.
- 5) Expresses concern that the project construction activities will cause untenable turbidity and sediment downstream. Eroded soils from access road construction could be a source of river turbidity and sediment. Concern that the project may violate the nitrogen gas supersaturation standard. Fluctuating discharges may increase downstream bank erosion. Suggests that the construction license be withheld until assurances can be given for proper resolution of the above listed concerns.
- 6) Opposes the project because it may adversely affect the tourist trade which is attracted by recreational offerings.
- 7) Requests the withholding of DEQ certification until Deschutes County completes its study of possible cumulative effects from the proposed development of multiple hydroelectric projects in the Upper Deschutes River Basin.
- 8) Believes the project would devastate existing river values and urges DEQ denial of project certification until Deschutes County completes its cumulative impacts study.
- 9) Requests that DEQ withhold project certification until Deschutes County completes its cumulative impacts study.

Evaluation of Request for Water Quality Requirements Compliance Certification for Proposed Lava Diversion Hydroelectric Project, Deschutes River Near Bend, Oregon (FERC No. 5205)

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- 10) Opposes the project on the basis of its destroying the beauty of public lands and adversely impacting fish production. Also, there would likely be other hydroelectric projects to follow that would result in cumulative adverse impacts.
- 11) Wants assurance that water quality standards will not be violated. Urges that the project not be permitted until Deschutes County completes its cumulative impacts study.
- 12) Confirms that hydropower development is a conditional use in the Deschutes County comprehensive land use plan. Says the project proponent has not applied to the county for a conditional land use permit. Before issuing a conditional land use permit, the county would have to know that the project would not have untenable, adverse impacts on the water quality, fish, wildlife, recreation, and "other issues". Deschutes County opposes the issuance of DEQ certification until the project has been found to be in conformance with the County comprehensive land use plan and implementing ordinances.
- 13) Opposes the DEQ issuance of water quality standards compliance certification until Deschutes County completes its cumulative impacts study.
- 14) Requests DEQ denial of project certification until Deschutes County completes its cumulative impacts study.
- 15) Requests DEQ denial of project certification until Deschutes County completes its study of cumulative impacts.
- 16) Opposes the project because of its potential for adverse impacts on water quality, fisheries, recreation, tourism, local irrigation, and economic base related to these river uses. Requests that the DEQ withhold project certification until Deschutes County completes its cumulative impacts study.
- 17) Requests DEQ denial of project certification until Deschutes County completes its cumulative impacts study. Stresses the need for county participation in the decision-making process.
- 18) Requests that DEQ withhold project certification until Deschutes County completes its cumulative impacts study. Also, requests that Deschutes County participate in the decision-making process.
- 19) Requests that DEQ withhold project certification until Deschutes County completes its cumulative impacts study. Declares that county participation is essential in the decision-making process.
- 20) The project design and siting have changed from the original proposal. The 2.2 miles of river in the diversion reach contain fine fishery habitat. There has already been significant loss of fishery habitat in the Upper Deschutes River due to its regulation for irrigation purposes.

Evaluation of Request for Water Quality Requirements Compliance Certification for Proposed Lava Diversion Hydroelectric Project, Deschutes River Near Bend, Oregon (FERC No. 5205)

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The project could have a number of adverse impacts on fish as these factors play out through reduced flows, reduced water velocities, higher stabilized water levels, and potentially degraded water quality. Recommends that DEQ withhold project certification until the applicant can give assurances that the project impacts will be eliminated or reduced to acceptable levels.

- 21) The Upper Deschutes is listed in the State Parks System Plan as a potential study river for inclusion in the State Scenic Waterways System. Present, high levels of recreational use require that existing river and shore line conditions be maintained. Raises the question of whether the project is compatible with the local comprehensive land use plan.
- 22) Emphasizes that state law requires that DEQ action must be consistent with the local comprehensive land use plan or statewide land use planning goals.

The twenty-two responses to the DEQ public notice fall largely into five categories as follows:

1. Twenty oppose DEQ certification until county officials complete their cumulative impacts and land use compatibility study. Most of the opposition is prefaced with a concern that the project may be detrimental to existing aesthetic, recreation, fisheries, wildlife, and tourism attraction values.
2. Hydropower development is a conditional use in the county comprehensive land use plan. The applicant has not filed for a conditional use permit.
3. The applicant has not given adequate assurances of being able to protect water quality and other environmental values during project construction and operation. Certification should be withheld until adequate assurances are provided.
4. The project design and siting have changed from the original proposal. It has a number of characteristics that could cause damage to fishery production. Certification should be withheld until the applicant gives assurances that the project impacts can be eliminated or reduced to acceptable levels.
5. The Deschutes River zone in question is proposed for study as a possible addition to the Scenic Waterways System.

There were no comments in favor of the project.

Evaluation of Request for Water Quality Requirements Compliance Certification
for Proposed Lava Diversion Hydroelectric Project, Deschutes River Near Bend,
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DEQ Conclusions

1. The DEQ has identified eight activities associated with project construction and/or operation whose potential for water quality impairment have not been adequately addressed in the environmental report.
2. Except as noted in number one above, the project proponent's major programs to protect water quality during construction and operation appear adequate to comply with state water quality control regulations.
3. Except as noted in number one above, operation of the project is not likely to have any appreciable adverse impact on water quality, i.e. it is expected to comply with state water quality control regulations.
4. Hydropower site development in Deschutes County requires a conditional land use permit.
5. The project proponent has not yet applied for a conditional land use permit.
6. Deschutes County will not consider the issuance of a conditional land use permit until the study requirements mandated in County Ordinance No. 83-058 have been completed.
7. Deschutes County will not at this time issue a land use compatibility statement for the proposed Lava Diversion Hydroelectric Project.
8. The DEQ must have assurance that the project is compatible with the county's comprehensive plan and land use ordinances, or state planning goals, before issuing a water quality standards compliance certification statement.

DEQ Recommendation

Based on the information presented in this report, the DEQ recommends that water quality standards compliance certification for the project be denied until the following two requirements are met:

1. The project applicant adequately addresses the eight potential water quality impacts of the project identified by the DEQ.
2. The project applicant obtains a land use compatibility statement from Deschutes County officials.

EXHIBIT E

Oregon Department of Environmental Quality

A CHANCE TO COMMENT ON...A REQUEST FOR CERTIFICATION OF COMPLIANCE WITH
WATER QUALITY STANDARDS AND REQUIREMENTSDate Prepared: 9-5-84
Notice Issued: 9-5-84
Comments Due: 10-15-84

- WHO IS THE APPLICANT:** General Energy Development, Inc.
261 East Barnett Street
Medford, OR 97501
- WHAT IS REQUESTED:** The applicant has requested certification from DEQ that water quality standards and requirements will not be violated by construction and operation of a proposed hydroelectric project near Benham Falls on the Deschutes River south of Bend, Oregon. The certification is requested pursuant to Section 401 of the Federal Clean Water Act. The applicant has filed with DEQ background information on the total project proposal to support the certification request.
- WHAT ARE THE HIGHLIGHTS:** The applicant holds Preliminary Permit No. 5205 from the Federal Energy Regulatory Commission (FERC) to plan and design the project. Before construction licensing by FERC may proceed, federal law requires certification by the State (DEQ) of compliance with water quality standards and requirements. State law requires that DEQ action be consistent with the local comprehensive plan or statewide planning goals.
- HOW IS THE PUBLIC AFFECTED:** The project involves public lands and waters of the State that presently serve other beneficial uses. Comments are invited regarding potential impacts of the project on water quality and beneficial water uses, and on compatibility of the project with the local comprehensive plan or statewide planning goals.
- HOW TO COMMENT:** Written comments should be presented to DEQ by October 15, 1984, at the following address:
- Department of Environmental Quality
Water Quality Division
P. O. Box 1760
Portland, OR 97207
- WHAT IS THE NEXT STEP:** At the conclusion of the comment period, the DEQ will evaluate public comments and all information available and make a final determination to grant or deny certification.



P.O. Box 1760
Portland, OR 97207
6/10/82

FOR FURTHER INFORMATION:

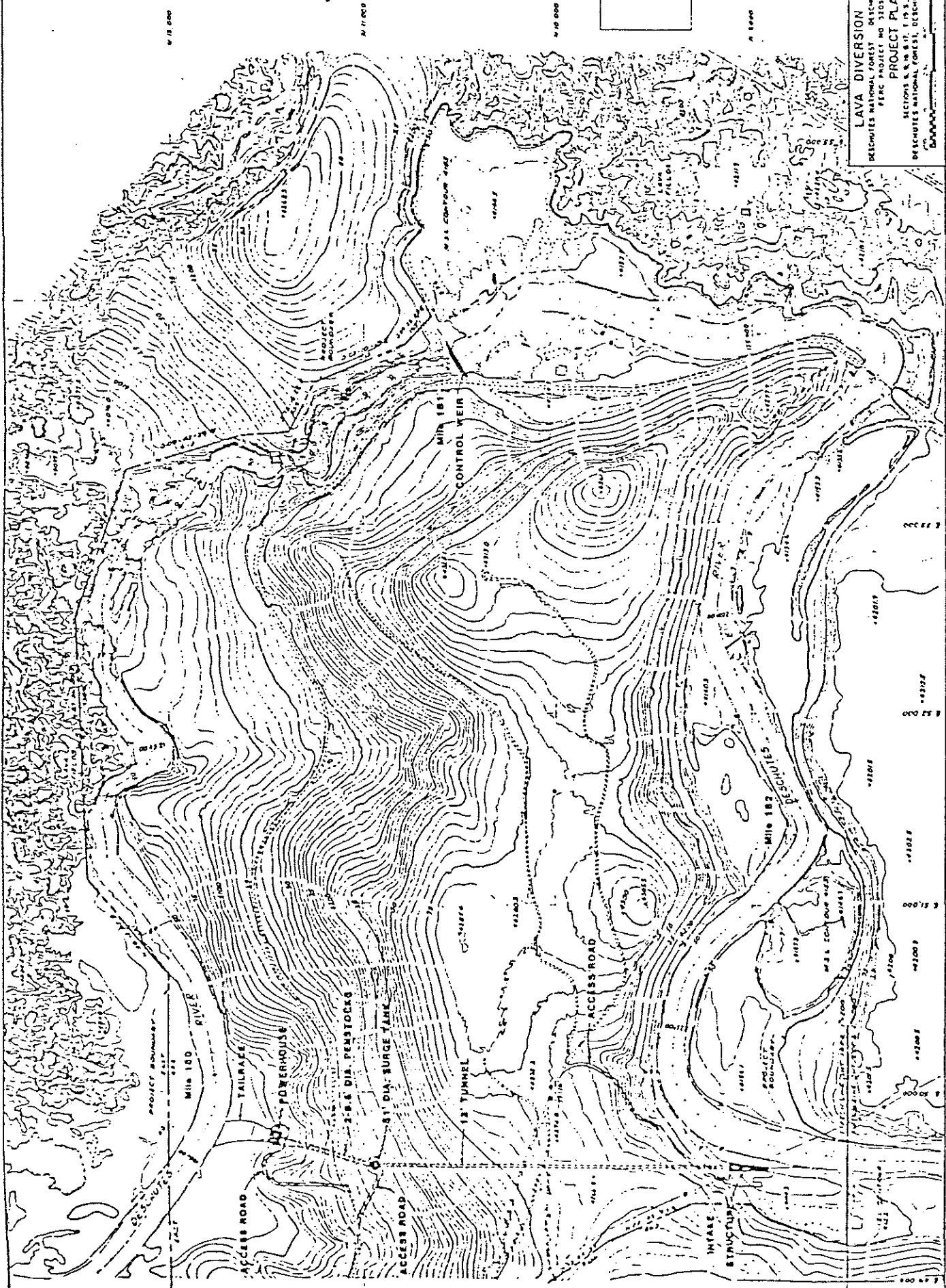
Contact the person or division identified in the public notice by calling 229-5696 in the Portland area. To avoid long distance charges from other parts of the state, call 1-800-452-4011, and ask for the Department of Environmental Quality.

1-800-452-4011



EXHIBIT E

APPENDIX B



LAVA DIVERSION PROJECT
 DESCHUTES NATIONAL FOREST, DESCHUTES COUNTY, OREG.
 FEPC PROJECT NO 3103 OREGON
PROJECT PLAN
 SECTION 8, 18 & 17, T 19 S, R 12 E, W 4
 DESCHUTES NATIONAL FOREST, DESCHUTES COUNTY, OREG.

PREPARED FOR
GENERAL ENERGY DEVELOPMENT, INC.
 HANSEL ROSE & SNOISEN, INC.
 CONSULTANTS



VERTICAL DATUM
 ELEVATIONS FROM AERIAL PHOTOGRAMMETRY & JANUARY 84
 CONTOUR INTERVAL 5 FEET

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
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APPENDIX C

Letter No.	Date of Letter	Signature(s)	Representing
1)	9/30/84	Laurie LeFors	Self
2)	10/1/84	Marti Gerdes	Self
3)	10/1/84	Jean & Joseph Berger	Self
4)	10/3/84	Mike Johns	Self
5)	10/5/84	David Mohla, Supervisor	Deschutes National Forest
6)	10/5/84	Mr. & Mrs. Keith Corwin	Self
7)	10/7/84	P. W. Chase	Self
8)	10/8/84	Eric Schulz	Central Oregon Flyfishers
9)	10/8/84	Brian Meece	Citizens Realty Group
10)	10/9/84	Kenneth Corwin	Self
11)	10/9/84	Fred Ehlen	Sunriver Anglers
12)	10/10/84	Deschutes County Commissioners(3)	Deschutes County
13)	10/11/84	Robert Robinson	Coalition for the Deschutes
14)	10/11/84	Jane Poor	Self
15)	10/11/84	Richard & Carolyn Miller	Contemporary Homes
16)	10/12/84	John Wujack	Save Benham Falls Committee
17)	10/12/84	Tom Throop	State Representative, District 54
18)	10/12/84	Lawson La Gate	Self
19)	10/15/84	Stephen Toomey	Frank Ruegg Real Estate
20)	10/15/84	Michael Weland	Oregon Fish & Wildlife Dept.
21)	10/16/84	Alan Cook	Oregon Parks & Recreation Division
22)	10/22/84	<i>Tom Kainant</i> JRK (initials only)	Dept. of Land Conservation & Development

GDC:1
 WL3843
 11/5/84

AGREEMENT WITH RESPECT TO WATER RIGHTS

THIS AGREEMENT is made and entered into as of this ___ day of June, 1984, by and between GENERAL ENERGY DEVELOPMENT, INC., a Nevada corporation (hereinafter referred to as "GED") and ARNOLD IRRIGATION DISTRICT, a municipal corporation of the State of Oregon (hereinafter referred to as "ARNOLD").

RECITALS

A. GED is the holder of a preliminary permit issued February 12, 1982 by the Federal Energy Regulatory Commission (hereinafter referred to as "FERC") under the Federal Power Act (as amended) for the proposed Upper Deschutes Water Power Project No. 5205 (hereinafter referred to as "the Project").

B. In order to construct and operate the Project, GED will be required to obtain a permit to appropriate, for nonconsumptive purposes, surface waters of the State of Oregon pursuant to the laws of the State of Oregon and applicable regulations of the Oregon Water Resources Department (hereinafter referred to as "OWRD").

C. OWRD has taken the position that the waters of the Upper Deschutes River and its tributaries have been heretofore withdrawn from appropriation for the benefit of certain irrigation and power projects, and that only irrigation districts such as ARNOLD may apply for and acquire the right to appropriate the waters necessary for operation of the Project.

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D. GED and ARNOLD desire to establish an arrangement by which GED may acquire the water rights it needs to construct and operate the Project, and by which ARNOLD may secure a long-term revenue stream enabling it to improve and maintain its existing irrigation facilities.

OPERATIVE PROVISIONS

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the parties hereby agree as follows:

1. Application for Water Rights. Unless otherwise provided herein, promptly after the parties' execution of this Agreement, GED will prepare, and ARNOLD will execute and submit to OWRD, an application for a permit to appropriate for nonconsumptive purposes such amount of the surface waters of the Upper Deschutes River and its tributaries as may be required for the construction and operation of the Project. In the event that the scope of the Project is changed as a result of studies that may be conducted during the preliminary permit period, ARNOLD will, upon request of GED or OWRD, execute and submit to OWRD any necessary or desirable amendments to the previously-described application to OWRD or will execute and submit to OWRD any necessary or desirable applications for amendment of any permit issued by OWRD in connection with the Project. GED will bear all

- 3 -

application fees, and all legal, engineering, administrative and other costs involved in obtaining from OWRD the requisite water appropriation permit and any amendments thereto. ARNOLD will cooperate fully with GED in obtaining the requisite permit and any amendments thereto, provided that GED will reimburse ARNOLD, upon receipt of proper invoices, for all reasonable and documented out-of-pocket expenditures, including reasonable attorneys' fees, incurred by ARNOLD in connection with the provision of such cooperation. It is understood by GED that Neil R. Bryant, Esquire, of Gray, Fancher, Holmes & Hurley, Bend, Oregon, is the attorney for ARNOLD, even though GED is paying ARNOLD's reasonable attorneys' fees.

2. Lease of Water Rights. ARNOLD hereby agrees that, promptly upon issuance of the water appropriation permit described in Section 1 hereof, ARNOLD will lease the permit, as may be amended (and all rights to appropriate and utilize water thereunder), to GED upon the following terms and subject to the following conditions:

(a) Term of Lease, Transfer of Ownership, and Post-Transfer Royalty Arrangement. The nonrenewable term of ARNOLD's lease of water rights to GED for the purposes of Project operation shall be 25 years, and such lease term shall commence upon the day that the Project first demonstrates the capacity for continuous generation of electrical power for sale. After the

- 4 -

expiration of the term of the lease, ownership of the Project shall be irrevocably vested in ARNOLD, and ARNOLD shall thereupon take possession of the Project property and shall thereafter be responsible for the operation and maintenance of the Project. After such time as the Project becomes the property of ARNOLD, ARNOLD shall pay GED annual royalty payments for the lesser of 25 years, or until such time as ARNOLD, in its sole discretion, abandons the Project. The annual royalty payments paid to GED by ARNOLD pursuant to this provision shall be in an amount equal to the greater of ten percent (10%) of the annual gross revenues or thirty percent (30%) of the annual net revenues of the Project. Annual gross revenues of the Project shall be defined as the sum of all revenues received from the sale of power generated by the Project in any calendar year. Annual net revenues of the Project shall be defined as the sum of all revenues received from the sale of power generated by the Project in any calendar year, less all costs of operation of the Project for such year. Royalty payments payable to GED pursuant to this provision shall be paid to GED quarterly, as of each March 31st, June 30th, September 30th, and December 31st. Such royalty payments shall be paid to GED within 30 days after the end of each quarter in respect of which the relevant gross or net revenues were received. Nothing in this Agreement shall prevent ARNOLD and GED from renegotiating the terms of the royalty arrangement described herein, in the

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event that the annual gross or net revenues of the Project, following the transfer of ownership of the Project to ARNOLD, are materially different from the parties' present expectations regarding the levels of such revenues at such point in time.

(b) Rental. As annual rental for the lease of the water appropriation permit and all rights to appropriate and utilize water thereunder, GED shall pay to ARNOLD, on or before the 45th day after the end of each of GED's fiscal years during the term of the lease, commencing with the fiscal year of GED in which the Project first demonstrates the capacity for continuous generation of electrical power and actually generates electrical power and delivers same to a utility for resale to the utility's customers or to private individuals, a sum calculated as follows:

(i) One percent (1%) of the Project's annual gross revenues received during each of GED's fiscal years comprising the first 24 months after the generation and delivery of electrical power from the Project first commences;

(ii) Two percent (2%) of the Project's annual gross revenues received during each of GED's fiscal years comprising the next succeeding 96 months; and

(iii) Three percent (3%) of the Project's annual gross revenues received during each of GED's fiscal years for the remainder of the lease term.

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(c) Commencement and Completion of Construction.

The lease shall provide that GED shall commence construction of the Project as soon as practicable after all requisite governmental permits and authorizations for construction have been received and a contract for the sale of all electrical power generated by the Project has been entered into; and such construction shall be completed within three years thereafter unless such construction is hindered or delayed for reasons beyond the control of GED.

(d) Operation of the Project. During the term of ARNOLD's lease of water rights hereunder to GED for Project operation, GED warrants that it shall operate and maintain the Project in accordance with such practices and standards as are commonly observed in the hydroelectric power generating industry. GED further represents that it will consult with ARNOLD regarding all material decisions relating to Project operation or maintenance, during the term of ARNOLD's lease of water rights hereunder to GED.

(e) Termination. The lease may be terminated by GED only in the event that ARNOLD fails to perform its obligations thereunder (and failed to cure, or commence in good faith to cure, any default within 60 days after receipt of written notice specifying the nature of such default), or in the event of material physical damage to or destruction of the Project (in which

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latter event GED may terminate the lease effective upon the date of loss or destruction if GED determines within 180 days thereafter that it is not feasible to rebuild the Project). The lease may be terminated by either GED or ARNOLD upon (i) acquisition of the Project by the State of Oregon or by any municipality thereof, pursuant to the provisions of ORS § 537.290 or of ORS § 543.610, (ii) condemnation, or (iii) sale of the Project under threat of condemnation (in any of which events either GED or ARNOLD may terminate the lease effective as of the date of transfer to the acquirer or condemnor). Upon termination of the lease for any reason other than loss or destruction of the Project, GED agrees to restore that portion of ARNOLD's irrigation system adversely affected by construction or operation of the Project to its pre-Project condition. Upon termination of the lease for any reason other than loss or destruction of the Project, GED also agrees to restore the Project property adversely affected by GED to its pre-Project condition. The lease may be terminated by ARNOLD only in the event that GED fails to perform its obligations thereunder (and fails to cure, or commence in good faith to cure, any default within 60 days after receipt of written notice specifying the nature of such default), or in the event that construction and operation of the Project interferes with ARNOLD's irrigation projects and its ability to furnish water to its irrigation customers, or in the event that construction and operation

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of the Project unreasonably interferes with the licensing, construction, or operation of any hydroelectric project on the Deschutes River for which ARNOLD has heretofore commenced the planning and licensing process.

(e) Inspection of Books and Records. During the term of ARNOLD's lease of water rights to GED hereunder for Project operation, ARNOLD shall have the right to inspect and audit GED's books and records, insofar as they directly apply to the Project, upon request, at reasonable times and places. During the period of time after ownership of the Project is vested in ARNOLD, and while GED is still receiving royalty payments pursuant to paragraph 2(a) of this agreement, GED shall have the right to inspect and audit ARNOLD's books and records, insofar as they directly apply to the Project, upon request, at reasonable times and places.

3. Development of the Project. GED will be solely responsible for the development, financing, licensing, construction, operation, and maintenance of the Project. Until ARNOLD owns the Project, ARNOLD's sole responsibility hereunder shall be to apply for the OWRD water appropriation permit, to lease water rights available under such permit to GED as provided herein, and promptly to furnish GED with all notices and information received by ARNOLD with respect to such permit in order that GED will have a reasonable opportunity to protect its interests thereunder.

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This agreement shall not be deemed to create a partnership or joint venture between GED and ARNOLD, and GED has no authority to bind ARNOLD to any contract or to sign any document on ARNOLD's behalf. The indemnities exchanged by ARNOLD and GED herein shall survive the termination of the lease or of this agreement.

4. Indemnification. During the term of ARNOLD's lease of water rights hereunder to GED for Project operation, GED hereby agrees that it shall, at its sole cost and expense, indemnify and hold ARNOLD harmless from any and all demands, claims, causes of action, or liabilities that may arise out of Project development, construction, or operation, or that may arise out of GED's or ARNOLD's activities pursuant to this Agreement. GED shall not be obliged to indemnify ARNOLD, however, with respect to such Project-related acts of ARNOLD as constitute gross negligence or willful misconduct. ARNOLD hereby agrees that, following the transfer of ownership of the Project to ARNOLD, ARNOLD shall, at its sole cost and expense, indemnify GED and hold GED harmless from any and all demands, claims, causes of action, or liabilities that may arise out of Project operation, provided that no such demand, claim, cause of action, or liability relates to a Project-related fact, event, occurrence, or omission that arose or took place before the date of transfer of ownership of the Project to ARNOLD.

5. Insurance. During the term of ARNOLD's lease of water rights hereunder to GED for Project operation, GED agrees to procure and maintain in full force and effect, for the benefit of GED and ARNOLD, insurance underwritten by responsible parties and providing full coverage against:

(a) any liability under the worker's compensation law of the State of Oregon;

(b) any form of employer's liability;

(c) liability for bodily injury or property damage attributable to Project operation;

(d) physical loss or destruction of the Project or of any material component thereof; and

(e) any other liability or potential loss deemed by GED and ARNOLD to represent a reasonably insurable risk. GED shall see to it that ARNOLD is named as co-insured on all policies of insurance secured and maintained pursuant to this provision, and GED shall provide ARNOLD with copies of all such policies of insurance.

6. Termination of the Agreement.

(a) This agreement shall immediately terminate and be of no further force or effect in the event that OWRD declines to issue the water appropriation permit, or in the event that OWRD or any other governmental agency having jurisdiction over the Project declines to issue any permit or authorization

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necessary for construction or operation of the Project (and all periods for judicial review of such agency decision or decisions have expired).

(b) GED may terminate this agreement and all further rights and obligations hereunder if, prior to the grant of the lease contemplated in paragraph 2 hereof, GED determines that it will not go forward with construction of the Project or has no need for the lease. GED may also terminate this agreement in the event that ARNOLD fails to perform any of its obligations hereunder (and fails to cure, or commence in good faith to cure, any default within 60 days after receipt of written notice specifying the nature of such default).

(c) ARNOLD may terminate this agreement in the event that GED fails to perform any of its obligations hereunder (and fails to cure, or commence in good faith to cure, any default within 60 days after receipt of written notice specifying the nature of such default).

(d) This agreement shall become void and of no further force and effect upon execution and delivery of the lease contemplated in paragraph 2 hereof; provided, however, that all terms and conditions hereof which by their nature are to survive such termination shall be incorporated into the lease agreement.

(e) Upon any termination pursuant to subparagraphs (b) or (c) of this paragraph 4, ARNOLD shall, upon request,

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assign to GED any and all pending applications for the OWRD water appropriation permit described in paragraph 1 hereof.

7. Assignments. This agreement and the rights and obligations of the parties hereto shall inure to the benefit of and be binding upon the respective successors and assigns of the parties hereto; provided, however, that GED shall not assign its rights hereunder to a third party without the prior written consent of ARNOLD, which consent shall not be unreasonably withheld; and provided further that no such consent shall be required for a partial assignment of this agreement to a third party who enters into a joint venture or partnership with GED for the development of the Project or for a mortgage or pledge of this agreement as security for financing of the Project or any portion thereof.

8. Representations of GED. GED represents and warrants to ARNOLD that:

(a) GED is a corporation duly organized, validly existing, and in good standing under the laws of the State of Nevada and is authorized to conduct business in the State of Oregon; and

(b) GED will provide ARNOLD with a copy of a duly adopted resolution of the Board of Directors of GED approving this agreement and authorizing its execution on GED's behalf by an authorized officer of GED.

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9. Attorneys' Fees; Applicable Law. In the event that any suit or action is instituted to enforce or interpret any of the terms or conditions of this agreement, or otherwise arises hereunder, the losing party shall pay to the prevailing party, in addition to the costs and disbursements allowed by statute, such sum or sums as the court or courts hearing such matter may adjudge reasonable as attorneys' fees in such suit or action, upon appeal thereof, or in connection with any petition for review thereof. This agreement shall be construed under the laws of the State of Oregon and venue for any dispute hereunder shall lie in Deschutes County, Oregon.

10. Notices. Any notices which may be necessary or desirable hereunder shall be deemed to be delivered upon delivery in person or upon the expiration of 24 hours after such notice has been mailed, certified or registered mail, postage prepaid, to the appropriate party at the following stated address or at such address as to which a party may give notice as set forth in this Section:

If to GED: 261 East Barnett Street
Medford, Oregon 97501

If to ARNOLD: 37 NW Irving Avenue
Bend, Oregon 97701

11. Force Majeure. Obligations of the parties hereunder may be suspended upon the request of either party during any period in which such party's performance is prevented or

substantially impeded by any occurrence, circumstance or event beyond the reasonable control of such party.

12. Compliance with Law. Except as otherwise provided in paragraph 1 hereof, this agreement shall become effective upon its approval by the OWRD as required by law; and ARNOLD agrees that it will promptly upon execution hereof diligently pursue such approval; provided, however, that GED will prepare (for review and approval by ARNOLD's attorney), all documents required for such approval, and will reimburse ARNOLD for all reasonable and documented out-of-pocket expenses incurred by ARNOLD in connection therewith.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in duplicate by their duly authorized representatives as of the date and year first above written.

ARNOLD IRRIGATION DISTRICT

GENERAL ENERGY DEVELOPMENT, INC.

By: _____

By: Donald P. McCurdy, President

DAVE FROHNMAYER
ATTORNEY GENERAL

EXHIBIT G William F. Gary
XXXXXXXXXXXX
DEPUTY ATTORNEY GENERAL



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4620

RECEIVED
OCT 25 1983
WATER RESOURCES DEPT.
SALEM, OREGON

October 24, 1983

Chris L. Wheeler
Deputy Director
Water Resources Department
555 13th Street NE
Salem, OR 97310

Re: Arnold Irrigation District/General Energy Development, Inc.

Dear Chris:

This confirms our telephone conversation of October 18, 1983. It is my opinion that the agreement between Arnold Irrigation District and General Energy Development, Inc. dated May 26, 1983, involving the proposed hydroelectric project on the Upper Deschutes River does not comply with the standards set forth in our department's March 30, 1983 letter to the Water Resources Department Director for a private developer by contract to qualify as a municipality under ORS chapters 537 and 543.

Under the proposed contract, the Water District has not retained sufficient beneficial interest and control to make it appear that the proposal is other than a subterfuge to allow the private developer to use the municipal application process.

This also confirms that you do not wish any further opinions from us at this time in connection with this application. We will close our file on this unless we hear further from you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Larry D. Thomson".

Larry D. Thomson
Assistant Attorney General

LDT:tla

DAVE FROHNMAYER
ATTORNEY GENERAL



EXHIBIT H William F. Gary
~~STATE ATTORNEY~~
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

GENERAL COUNSEL DIVISION
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4620

RECEIVED

MAY 10 1984
WATER RESOURCES DEPT
SALEM, OREGON

May 9, 1984

Larry Jebousek
Administrator
Water Rights Division
Water Resources Department
555 - 13th Street NE
Salem, OR 97310

Dear Mr. Jebousek:

I have reviewed the proposed agreement between GED and Arnold Irrigation District as transmitted to me by Neil Bryant's April 24, 1984 letter. I believe you have seen that agreement. I have also discussed it with Don Buell. I share Mr. Buell's conclusion that the agreement as proposed vests insufficient control in Arnold Irrigation District to consider the application under this contractual arrangement as a municipal application. As you will recall in our March 30, 1983 letter discussing the Winchester Water Control District arrangement, we concluded that it was a close call on the facts of that case as to whether the application was truly a municipal application. The proposed GED agreement seems to fall substantially short of even the Winchester arrangement in several respects.

There is no clear ending of the lease term so that the project comes solely within the control of Arnold Irrigation District. At the end of 25 years, GED reserves the right to indefinitely continue the possession and use of the project until abandoned by GED even though nominal title passes to Arnold Irrigation District. The indefinite extension also includes a formula royalty payment beyond the control of Arnold Irrigation District to modify.

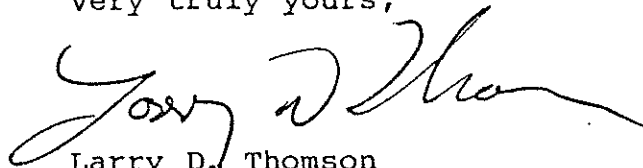
It does not appear that Arnold Irrigation District has attempted to maintain control of the project as a municipal project. For example, Arnold Irrigation District can only terminate the arrangement for breach of the contract or by exercising its right of eminent domain under the statutes. On the other hand, GED may terminate for any reason upon 180 days' written notice. Further, the proposed agreement includes almost

Larry Jebousek
May 9, 1984
Page Two

no apparent benefit to the irrigation district beyond the generation of a long term revenue stream. That revenue stream is not adjustable based upon any change of circumstances or renegotiation should it appear that GED is reaping a windfall through the project.

I also recommend that any contractual arrangement incorporate by reference the provisions of ORS 537.290 to avoid any question that the municipality reserves the right to take over the dams, plants and other structures under the terms set forth in that statute or any successor provision. I believe that intent is clear in the proposed agreement by incorporation of ORS 543.610, but I do not believe ORS ch 543 applies on these facts. We are treating this as a municipal application under ORS ch 537.

Very truly yours,



Larry D. Thomson
Assistant Chief Counsel
General Counsel Division

LDT:tla31
Enclosures
DOJ File 690-001-G0008-83


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STATE OF OREGON)
) ss. CERTIFICATE OF SERVICE
County of Deschutes)

I hereby certify that I served a true copy of the fore-
going Memorandum of Deschutes County, certified by me as
such, on the following party(s) at the address indicated
below by mail:

Neil R. Bryant	Michael Huston
Gray, Fancher, Holmes	Department of Environmental
& Hurley	Quality
P. O. Box 1151	Box 1760
Bend, Oregon 97709	Portland, Oregon 97207

DATED this 7th day of March, 1985.

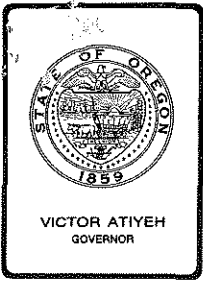

RICHARD L. ISHAM, OSB #75-195
Deschutes County Legal Counsel

STATE OF OREGON)
) ss.
County of Deschutes)

I hereby certify that the foregoing copy of Memorandum
of Deschutes County is a true and correct copy of the
original thereof.

Dated this March 7, 1985.

RICHARD L. ISHAM, OSB #75-195
Deschutes County Legal Counsel



Environmental Quality Commission

Mailing Address: BOX 1760, PORTLAND, OR 97207

522 SOUTHWEST 5th AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

MEMORANDUM

To: Environmental Quality Commission

From: Director

Subject: Agenda Item No. G, March 8, 1985, EQC Meeting

Informational Report on the Vehicle Inspection Program,
1983-1984

Background

ORS 481.190 provides that motor vehicles registered within the boundaries of the Metropolitan Service District, which includes the city of Portland, meet emission standards established by the Environmental Quality Commission prior to vehicle registration or re-registration. The Department of Environmental Quality operates this motor vehicle emission inspection program. The program began operation in July 1975. Since that time, the Department has prepared periodic update reports on the inspection program operation. The first of these reports was presented to the Commission at its January 18, 1977 meeting. Subsequent reports were submitted in 1979, 1981, and 1983.

Evaluation

Attached is a new informational report prepared by the Department for your consideration. The purpose of the report is to provide a summary and update on the operation of the Vehicle Inspection Program during 1983 and 1984. The report contains an overview summary followed by various appendices. These appendices describe the program operation, emission characteristics of vehicles, air quality benefits, and other support documentation about the program.

Among the highlights of this report are the following:

- 1) During 1983 and 1984, over 800,000 emission tests have been conducted and over 513,000 Certificates of Compliance issued.

- 2) The Mobile3 computer model for emission credits indicate that the inspection program has achieved emission reductions of 30 percent carbon monoxide (CO) and 10.5 percent hydrocarbons (HC). If an annual inspection program had been implemented, the computer estimates a 38 percent reduction in CO and a 16 percent reduction in HC.
- 3) Technical compliance with ambient CO standards was measured at the CAMS station in 1984 but not at the other Portland area monitoring sites. Technical compliance with the ozone standard was measured at the Carus monitoring site in 1984.
- 4) Contractural agreements for the upgrading of the inspection station on Northeast Portland Highway were completed. Construction is underway and is scheduled to be completed prior to this summer.
- 5) Compliance with ambient air quality standards is still projected to be achieved by the deadline dates of 1987.

Director's Recommendation

It is recommended that the Commission accept this informational report.



Fred Hansen

Attachment: Report on Vehicle Inspection Program, 1983-1984
VS1113

William P. Jasper:s
229-5081
February 21, 1985

State of Oregon
Environmental Quality Commission

Report on the Vehicle Inspection Program
1983-1984

Prepared for Presentation at the
March 8, 1985
Environmental Quality Commission Meeting

February 1985

Prepared by
Department of Environmental Quality
Vehicle Inspection Program

Report on the Vehicle Inspection Program
1983-1984

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Report on the Vehicle Inspection Program
1983 - 1984

Background and Legislative History

Motor vehicles are a significant source of air pollution in the United States and in most other industrial countries around the world. Automobile emission controls are now found on over 90 percent of all passenger cars manufactured throughout the world. The major air pollutants produced by motor vehicles are carbon monoxide, hydrocarbon gases and oxides of nitrogen. Particulate matter including lead compounds are also produced. In many urban areas the buildup in concentrations of these pollutants and the associated reactions in the atmosphere have given rise to public health concerns. In recognition of a national motor vehicle pollution problem, Congress enacted the 1965 Clean Air Act Amendments. This action initiated a federal motor vehicle pollution control program, which applied the 1966 California Auto Emission Standards nationally in 1968. This 1965 act did not produce the results Congress had intended. Subsequently, the Clean Air Act Amendments of 1970 were enacted.

The Clean Air Act Amendments of 1970 established a national air quality control program with specific goals, objectives and timetables. New motor vehicle emission standards were announced. The states were required to submit implementation plans that outline how these national goals and objectives were to be met within the state and within the specific time schedule.

Oregon's implementation plan was originally submitted by the Governor in 1972. This was followed in 1973 by a Transportation Control Strategy for the Portland metropolitan area, which specified in greater detail methodology chosen by the state to control automotive-caused air pollutants. The state's plan relied on a combination of control measures at various governmental levels to obtain compliance with the national standards. These control measures included traffic flow improvements in the city, a parking/traffic circulation plan, significant mass transit improvements, an annual motor vehicle emission control inspection, and the federal new vehicle emission control program. The state's plan did not meet its objectives due to delays in the federal new vehicle program and the enactment by the State Legislature of a biennial inspection program, rather than the projected annual program.

The Clean Air Act Amendments of 1977 extended the time schedule for compliance with national ambient air standards to 1982. If a state implements all reasonable control measures--including a legally enforceable plan for a motor vehicle inspection/maintenance program--and still is unable to project compliance with the national standards, then an extension of the time schedule until as late as 1987 is possible. States which did not implement a reasonable schedule are liable under the terms of the act to have sanctions applied. Sanctions can include the denial of federal funds

for state air program grants, funds for highway or sewer projects, or the application of a moratorium on further industrial growth by very large industrial complexes.

The Environmental Quality Commission last adopted revised Portland area control strategies for carbon monoxide and ozone in 1982. The years 1983 and 1984 were marked by the implementation of those strategies for the Portland metropolitan area.

During the 1983 Oregon Legislative Assembly, two bills were passed which impacted the Vehicle Inspection Program. One bill exempted from the inspection requirements vehicles which were older than 20 years of age. The other piece of legislation allowed Jackson County to implement under its Home Rule Charter a vehicle inspection program. The Jackson County Commission passed an I/M ordinance and referred it to the voters. The ordinance was not ratified at a special election.

On the federal level there was much talk of Congressional review and reauthorization of the Clean Air Act. No Congressional action was taken. The U.S. Environmental Protection Agency, during 1983 and 1984, continued its efforts to reduce the lead content in gasoline and establish revised emission standards for new heavy duty trucks. EPA continued its efforts to have states implement I/M programs where needed. By the end of 1984, 25 states and the District of Columbia had I/M programs operating within their borders. Three additional states are scheduled to implement I/M programs in 1985. Two states--New Mexico and Ohio--face sanctions, and three other states have areas that are in nonattainment of federal ambient health standards

A summary of inspection program related actions of the Environmental Quality Commission are listed in Appendix A.

Operation of the Portland Area Vehicle Inspection Program

Since July 1, 1975, the Department of Environmental Quality has operated a motor vehicle emission inspection program in the Portland area, specifically within the boundaries of the Metropolitan Service District. The program boundaries are legislatively set. By state law, vehicles registered within these boundaries must comply with the emission control standards and obtain a Certificate of Compliance prior to motor vehicle registration renewal.

The certificates are available from Department-operated inspection centers. A \$7.00 fee, which totally supports the program, is charged for the issuance of the certificate. Table 1 summarizes the testing activity during 1983 and 1984. Figure 1 shows the testing volume on a monthly basis. Six test centers are currently operated in the Portland metropolitan area. A map of the test area is shown in Figure 2.

The Department's inspection program is part of Oregon's Clean Air Act State Implementation Plan and the revised carbon monoxide and ozone control strategies. The purpose of the inspection program is to reduce carbon monoxide and ozone emissions through improved vehicle maintenance. The emission reductions obtained help meet ambient air standards.

The general discussion of the state's inspection and maintenance program is contained in Appendix B. During these past two years, over 513,000 Certificates of Compliance were issued. This is a 1.8 percent decrease from that of the previous period. Inspector staff size during the past two years ranged between 34 and 44. The change in inspector staff size and the year-to-year testing volume variations are due to the way the biennial vehicle licensing was implemented in 1974. In 1974, most all vehicles received two-year licenses. As a result, in 1975 there were hardly any vehicles re-registered. This resulted in a disproportionate workload from even to odd years. This still persists to a minor degree today. During the previous biennium, the staff ranged between 32 and 52. In addition to the state's inspection program, private motor vehicle fleets of 100 or more vehicles and publicly-owned fleets of 50 or more vehicles can qualify for self-inspection status. The 45 licensed fleets account for approximately 2 percent of the area's motor vehicles.

Training for the program's employees and for fleet inspectors has been maintained during the past two years. As a result of Commission action, all fleet inspectors are now required to take the fleet inspector training course every two years. This action received support from fleet administrators, and it allows the fleet inspector to remain current with the fleet inspection requirements.

Contractual agreements for upgrading the inspection facility on Northeast Portland Highway were prepared and finalized. Construction commenced in January 1985 with all improvements scheduled to be finalized by April/May 1985.

In the spring of 1984, the Environmental Quality Commission received a petition to incorporate noise testing and standards into the inspection program. As a result of this citizen petition, public hearings were held. In November 1984, the Commission directed the Department to include noise testing as part of the vehicle inspection testing program. The EQC set a startup date of April 1, 1985 for cars and light trucks. Motorcycles are to be included in the noise testing program July 1, 1985.

Emission Reduction from Motor Vehicles

The purpose of an inspection/maintenance program is to improve ambient air quality by achieving emission reduction from motor vehicles. Various studies have been made on the effectiveness of inspection/maintenance programs nationwide. Several studies have reviewed the Portland program. In terms of EPA's official review of the Oregon inspection program, it is projected to be sufficient to achieve the EPA minimum requirement of a 25 percent reduction in both HC and CO emissions by

December 31, 1987. These are emission reductions based upon data obtained from vehicles tested with the federal test procedure. If the program were on an annual, rather than on a biennial basis, the emission reductions are estimated to be over 10 percent greater.

Emission reductions are calculated by computer modeling techniques and projected over many years of program operation. During the past two years, EPA upgraded its emissions model to be more versatile and to take into account various inspection program enhancements. For example, emission reduction credit is now given for including an emission equipment tampering inspection. Calculations indicate that an additional two percent emission reduction is now credited to the Portland program due to the incorporation of the emission equipment tampering inspection. The updated Mobile3 model also showed that over the past few years the emission factors had not shown continued reduction. This was primarily due to the aging of the local car fleet because of the decline in new car sales. The average age of the vehicles in this area has been increasing, while the rate of new car replacement is down. Much of this can be attributed to the poor regional economy.

Tailpipe measurements obtained from the area's motor vehicles are used to monitor day-to-day compliance with inspection program standards. When a vehicle is manufactured, it generally complies with the current vehicle standards. As the vehicle ages, emissions increase. This deterioration is due to many factors: parts within the vehicle lose their effectiveness or require replacement; some repairs that are made do not adequately address the required maintenance; often preventive maintenance practices are ignored (leading to rapid and sudden deterioration of the vehicle), and in some instances, pollution control equipment is removed. The inspection test is an effective tool to identify high emitting vehicles. When repaired, these failed vehicles alone show a measured idle emission reduction of up to 70 percent for carbon monoxide and 65 percent for hydrocarbons. When these failed vehicles are repaired and included back into the fleet population, idle carbon monoxide and hydrocarbon emission reductions of 43 percent and 40 percent are achieved. The general discussion of emission characteristics of cars and trucks is contained in Appendix C.

Reported costs for repairs remain low. In the recent survey of repair costs, overall average repair costs were reported at \$27.35. In reviewing this data, several repair categories were studied. The simple non-complex repair, which can include the quick-fix, was the least expensive. Repairs which indicated more complete maintenance were higher. Complex repairs, indicative of major part replacement and engine repair, were the highest.

New motor vehicles have substantial technological advances incorporated into their emission control system. Examples of this type of vehicle are the 1981 and newer vehicles which use on-board computers to optimize engine functions. These computer systems have been made even more sophisticated during the past two years. Initial studies on these vehicles indicate that

they maintain acceptable exhaust emission levels. Emission control failure, however, results in levels of emissions equal to or exceeding those of non-emission controlled vehicles. The inspection program test is effective in identifying high emissions from these newer vehicles. The 1981 and newer vehicles have emission warranty protection if they are less than five years of age and have accumulated less than 50,000 miles. The emission performance warranty protects the consumer by providing that vehicles which fail the short test, like the test conducted by the Department, will at no cost to the owner have parts replaced or receive the necessary repairs to pass the inspection.

As new cars replace older vehicles, the overall vehicle fleet emissions decrease. Economic conditions over the past several years have affected motor vehicle sales. Poor new cars sales, compared with that in the late 70's, have continued. This has resulted in a decrease in the rate of turnover of the car fleet. The result of that decrease in vehicle replacement means that the average emissions from the area's motor vehicles is higher than projected several years ago.

Air Quality Trends

The motor vehicle emission inspection program is an important element in Portland's overall Transportation Control Strategy. The current ozone and carbon monoxide control strategies include the emission inspection program as a key element. Carbon monoxide violation days have decreased from 120 days in 1972 to 0 days in 1984 at the downtown continuous air monitoring station (CAMS). While this location measured technical compliance during 1984, other air monitors in the Portland area have had CO violations during 1984. The excellent meteorology--for CO dispersement--during this winter, coupled with a population decline also contributed to this measured technical compliance. A consultant, hired by the city of Portland, is conducting an independent analysis of carbon monoxide air quality in downtown Portland. That report will give a better picture of the carbon monoxide emission characteristics in the core area. Preliminary results of that report indicate that the carbon monoxide standard will not be met in 1985 as originally forecast. This report and a carbon monoxide sampling study completed in December 1984 will be used to reassess the carbon monoxide attainment strategy for the Portland downtown area.

Technical compliance was also measured at the ozone monitor at Carus. Again, excellent weather conditions, as well as the control measures and the recent economic decline, are all major factors in this compliance. There is strong evidence, however, that the technical compliance cannot be maintained without continued strong enforcement of all of the elements of the ozone control strategy. A more detailed discussion on the recent air quality trends is contained in Appendix D.

Population and Traffic Trends

In previous reports, population and traffic trends were discussed. Traffic and population trends have been reviewed and updated and are presented in more detail in Appendix E. The various indicators reviewed showed that over the past two years there has been a decline in population for both people and cars. Traffic volumes have remained flat. This fact, coupled with poor new car sales, indicate that older, higher emitting cars are continuing to be driven higher mileages. This is in contrast to past observations.

Status of Other I/M Programs

Appendix F lists the status of the on-going I/M programs in the United States. Currently, there are programs operating in 25 states and the District of Columbia. Three additional states are scheduled to start very soon. Three other states are likely to be required to implement an I/M program. The state of Washington is scheduled to expand its I/M program to the Spokane area during July of 1985.

Summary

During 1983-1984, over 800,000 emission tests were conducted and over 513,000 Certificates of Compliance were issued at the six Portland area inspections centers.

The Vehicle Inspection Program has helped reduce the air pollution contributions of the area's motor vehicles since 1975. Significant improvements both in terms of emission reductions from individual vehicles and the vehicle fleet in general have been documented. The inspection program and the emission reductions achieved as a result of the program are important elements in the carbon monoxide and ozone pollution control strategies.

During 1983-1984, legislation was adopted and implemented exempting vehicles more than 20 years of age from the inspection requirements. The Commission was petitioned to exercise the statutory authority to include noise testing. As a result of that action, effective April 1985, noise compliance will be made a part of the overall Vehicle Inspection Program. Effective July 1985, motorcycles will be subject to compliance with the noise standards.

The relatively poor performance of the regional economy has resulted in a decline in population. Test volume has declined slightly as a result of there being fewer cars in the area. Technical compliance with the ambient air standards appears achievable. With economic improvement, it will be necessary to maintain strong enforcement of all of the control strategies in order to maintain compliance with the ambient emission standards.

VS1064

Table 1

Department of Environmental Quality
Vehicle Inspection Program

ACTIVITY SUMMARY FOR JANUARY 1983 THROUGH DECEMBER 1984

EMISSION INSPECTION TESTS

Light Duty 787,234
Heavy Duty 26,905
Total 814,139

By Location:
Gresham 165,014
Milwaukie 153,360
Northeast 158,745
Hillsboro 64,937
Northwest 72,581
Beaverton 199,502

Certificates of Compliance Issued - 513,463

LIGHT DUTY VEHICLE EMISSION CONTROL TEST SUMMARY (July 83 - Dec 84 only)

	Total Number	Total Percentage	Vehicle Category			
			1981+	1975-1980	1968-1974	Pre-1968
Pass Emission Test	387,949	64%	91%	65%	56%	67%
Test Failed For:						
Excessive Carbon Monoxide (CO)	58,455	10%	2%	10%	12%	10%
Excessive Hydrocarbons (HC)	50,741	8%	1%	8%	11%	10%
Excessive HC and CO at idle	36,029	6%	1%	8%	5%	4%
Either CO or HC @ 2500 rpm	1,543	-%	2%	-%	-%	-%
Disconnected Emission Control Equipment	38,372	6%	1%	8%	9%	-%
Other Causes (i.e., smoke, dilution, idle speed)	30,939	5%	1%	4%	8%	11%

Figure 1

TESTING VOLUME AT DEQ INSPECTION STATIONS

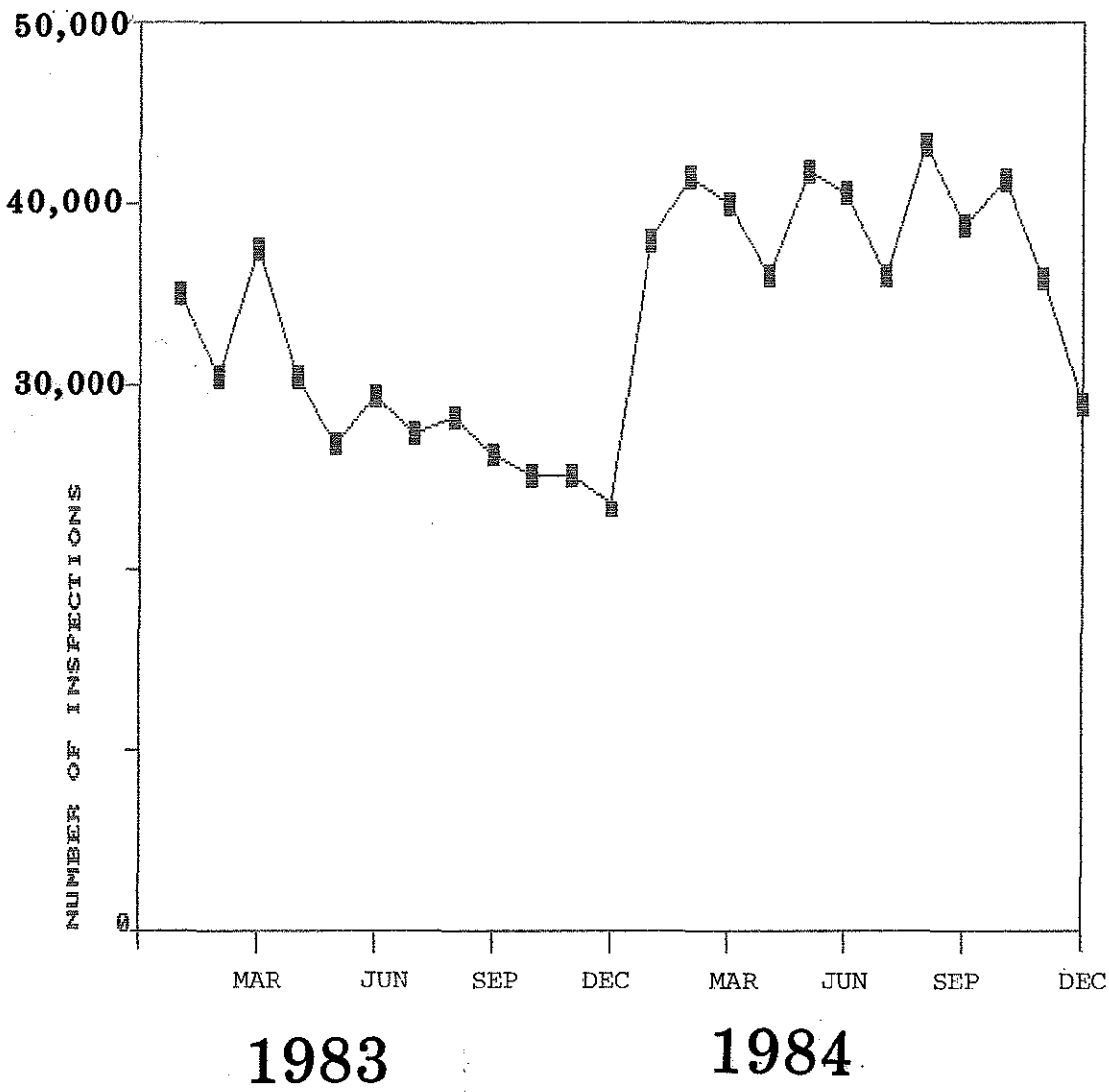
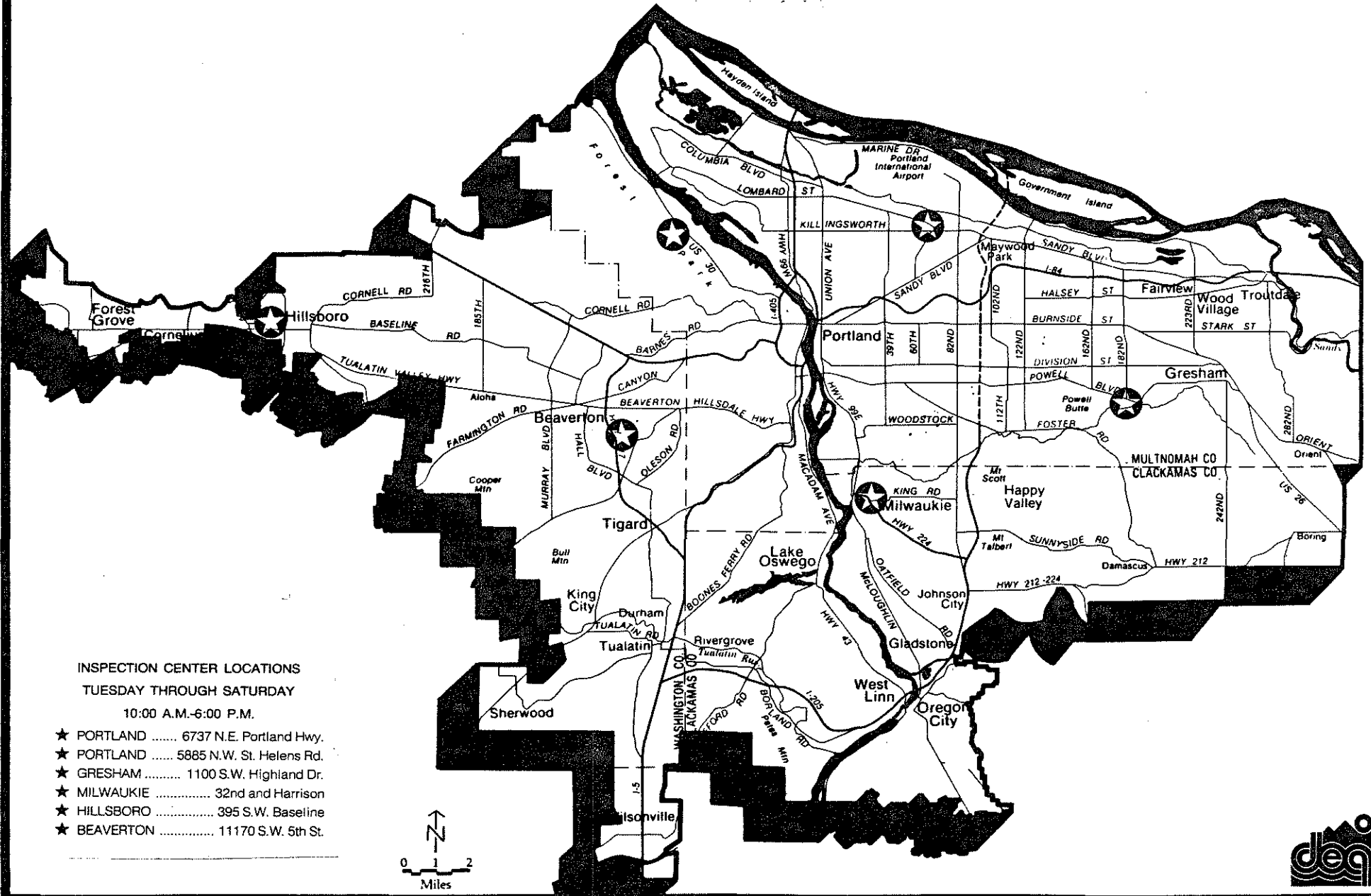
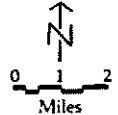


Figure 2



INSPECTION CENTER LOCATIONS
 TUESDAY THROUGH SATURDAY
 10:00 A.M.-6:00 P.M.

- ★ PORTLAND 6737 N.E. Portland Hwy.
- ★ PORTLAND 5885 N.W. St. Helens Rd.
- ★ GRESHAM 1100 S.W. Highland Dr.
- ★ MILWAUKIE 32nd and Harrison
- ★ HILLSBORO 395 S.W. Baseline
- ★ BEAVERTON 11170 S.W. 5th St.



DEQ Inspection Area

Summary of Oregon
Environmental Quality Commission
Vehicle Inspection Program
Related Actions
During 1983-1984

<u>Date</u>	<u>Action</u>
April 8, 1983	Received informational report on I/M program for 1981/1982.
August 19, 1983	Gave authorization for public hearing to consider simplification of the underhood inspection and other changes.
November 1, 1983	Adopted changes affecting vehicle inspection operating procedures, the underhood inspection and other changes.
May 18, 1984	Received a petition to incorporate noise testing into the inspection program.
June 29, 1984	Gave authorization to hold public hearings on incorporating noise testing into I/M program.
November 2, 1984	Adopted rules concerning noise testing to be effective April 1, 1985, and accepted the informational report of the Portland Metropolitan Area Diesel Exhaust Study Task Force.
December 14, 1984	Gave authorization to hold public hearing on changes in fleet licensing and other changes.

VS1067

Inspection Program Operations

ORS 481.190 provides that motor vehicles registered within the boundaries of the Metropolitan Service District, the greater Portland metropolitan area, comply with the emission control test method, criteria and standards established by the Environmental Quality Commission. Compliance is required in order to register or renew the registration of a motor vehicle. Passenger cars and light duty trucks, which constitute the bulk of the inspection workload, are on a biennial registration renewal schedule and are tested every two years. Heavy duty trucks and government-owned vehicles are tested on an annual basis. Certain classes of vehicles have been legislatively exempted from the emission control test requirements.

The primary goal of the inspection program is to reduce automotive caused air pollution by promoting proper vehicle maintenance. To do this, an acceptable level of service is required for the public at the inspection facilities. Service levels are maintained by providing sufficient and convenient facilities, by maintaining reasonable customer waiting times, by maintaining a trained and helpful staff, and by maintaining the equipment in good condition. The Department of Environmental Quality currently operates six motor vehicle inspection centers in the greater Portland metropolitan area.

Incorporation of Noise Testing

In the spring of 1984, the Environmental Quality Commission received a petition from the Coalition for Livable Streets. As a result of this citizen petition, public hearings were held. In November of 1984, the Environmental Quality Commission directed the Department to include noise testing as part of the current vehicle emission testing program. The EQC set a start-up date of April 1, 1985 for noise testing of passenger cars, vans and pickup trucks. Motorcycles are to be included in the noise testing program July 1, 1985. A report on heavy duty truck noise testing and noise control options of Tri-Met buses is to be provided to the EQC prior to April 1, 1985.

There will be no fee increase as a result of this addition to the test. The noise test for passenger cars, vans and pickups is fast and simple. A noise measurement is taken 20 inches from the tailpipe when the engine is running at 2500 RPM. The 2500 RPM point is a part of the existing emission test, and the noise test will be conducted concurrently with the emissions test. Noise limits for front-engine vehicles is 93 dBA and 95 dBA for rear-engine vehicles. Motorcycle noise limits are set at 102 dBA for pre-1976 model year motorcycles and 99 dBA for 1976 and newer motorcycles.

Operational and Program Highlights

During 1983-1984, the program staff has conducted or participated in a wide range of studies and activities. There was a survey of randomly selected vehicle licenses from shopping center and work parking lots in the Portland metropolitan area. The registration information was then cross-referenced with the driver's license files. Vehicles registered outside of the MSD area were additionally cross-referenced in that town's phone book as an additional verification of residence. This survey data, composed of 1 percent of the vehicles in this area, indicated about 5 percent of those vehicles may have been improperly registered. This is about the same percentage of people who indicate that they have car insurance when they, in fact, do not have vehicle insurance.

The U.S. Environmental Protection Agency (EPA) conducted its national survey on auto emission control equipment tampering, including Portland in its 1984 study. The Department staff assisted EPA's contractor in obtaining information regarding the type and frequency of tampering with emission control equipment that may be occurring in this area. Two types of surveys were conducted; one at inspection stations and the other using roadside inspections. To assist in the roadside inspection, cooperation and support staff was provided by the Oregon State Police and the city of Beaverton Police Department. Results of that national survey should be available in late 1985.

An agreement between the Department and the federal GSA was finalized during 1984. This agreement simplifies some procedures by providing invoiced billing for the 600 federal vehicles assigned to the Portland metropolitan area.

The Department staff has continued its educational environmental awareness efforts utilizing its powertrain demonstration unit. During the past two years, over 30 seminars have been made to groups around the state. This is an important educational tool in explaining emission control to groups, particularly high school and community college students.

Direct service at the inspection stations is supported by administrative and engineering efforts. Administrative and engineering staff work on a variety of related tasks and projects in providing efficient program operation, and educational and support efforts for the automotive service industry. Efforts in these areas are important since individuals who repair motor vehicles must be aware of what is expected and why.

With the biennial licensing cycle for passenger cars and light duty truck registrations, the emission inspections are not spread evenly throughout the two-year period. This caused the Department a problem in the past, but over time, the test load variations have been reduced, and there is now a more uniform testing volume. Figure B-1 shows the month's test volumes during 1983 and 1984. Figure B-2 shows daily testing activity for 1984. Testing hours for this past two-year period remained unchanged with a 10:00 a.m. - 6:00 p.m., Tuesday through Saturday operation schedule. During this period approximately 790,000 light duty vehicle inspections were conducted at the Department's facilities and over 500,000 certificates were issued.

Program staff has worked with the Department's regional staff and provides assistance in areas of vehicle emission control. A fuel dispensing facility and lead-in-gasoline sampling kit was prepared and supplied to each region so they could respond directly on complaints about gas stations. Misfueling is defined as using leaded gasoline in place of unleaded gasoline. The program staff provided direct assistance and consultation to the Coos Bay Office in their field investigation of tampering with emission control equipment by the North Bend Police Department. That action resulted in a conviction in the local circuit court against the mechanic involved and a civil penalty assessment by EPA against the North Bend Police Department.

The Department has conducted a pilot study of testing techniques for diesel buses. One hundred and seventy-two diesel buses were tested using three different tests. These tests were solely for the purpose of measuring opacity or smoke levels and for measuring noise levels. As one result of the testing, Tri-Met is becoming more aware of the need for improved noise maintenance on its buses. Discussions are in progress that could lead to an agreement on improved noise maintenance. An outgrowth of that agreement would be the long-term inclusion of opacity and gaseous emissions checks into Tri-Met's maintenance schedule.

In 1983, a program employe received a cash award and Governor's citation under the Oregon Bankable Ideas Program. The award was given for a maintenance cost savings suggestion. The suggestion has been implemented. In 1984, the Milwaukie Station staff received a letter of commendation from the Governor and recognition by the Commission for quick thinking in a life threatening situation by applying CPR to a heart attack victim.

The program staff has always had numerous questions and complaints from the public regarding used car and truck sales. Many of the calls received at our office report that a car or truck, recently purchased or purchased some time back, when finally tested is failed because of disconnected emission control equipment. While the Fair Trade Practices Act provides very limited protection for those individuals purchasing cars from licensed dealers, "caveat emptor"--let the buyer beware--best explains the consumer protection available for used car buyers.

When talking with individuals on this subject, all the program staff can suggest is if the vehicle was bought from a dealer, is to go back and talk with the dealer, or file a complaint with the financial fraud division of the Department of Justice or the Better Business Bureau. Even then it still is the individual's responsibility to make the necessary repairs. If the individual purchased the vehicle from a private party, there is no recourse. Currently, the best solution is to have a vehicle that they are about to purchase checked by an independent person before the purchase is made.

Vehicle owner's in this situation repeatedly remark that the inspection requirement should apply to all used car transactions, regardless of

whether the vehicle's license is valid. If an inspection was required also for title transfers, potentially this type of complaint and problem could be reduced.

Another type of vehicle which has been troublesome is referred to as a "grey market" car. "Grey market" cars and trucks are those vehicles initially manufactured for sale outside of the United States. Federal law prohibits importation of these vehicles (with certain exceptions), unless these vehicles are modified to meet federal safety and emission standards. During 1983, over 50,000 of these vehicles entered the United States. Oregon Motor Vehicles Division indicates that over 12 percent of these vehicles were registered in Oregon.

The U.S. Customs Service must clear all vehicles imported into the U.S., and federal law prohibits operation of these vehicles in the U.S. until final compliance with safety and emission standards is made. Oregon licensing law, however, currently allows for registration of these vehicles prior to final compliance.

The Oregon Motor Vehicles Division has proposed legislative changes to give that agency the authority to require proof of compliance to federal standards. At this time, the inspection program staff are requiring proof of initial entry, via Customs documentation, as a method of determining that the vehicle has entered the federal compliance process. While the number of grey market cars, which include Canadian configuration vehicles, is relatively small, the issue involved is one of equity and compliance with the law.

Fleet Operations

To complement the day-to-day inspection activities, the Department manages a licensed fleet inspection program. There are currently 48 licensed fleet inspection operations which may self-inspect their vehicles. To qualify as a fleet, a company or governmental agency must have a fleet of 100 or more Oregon registered vehicles (50 for a governmental agency) and have an approved exhaust gas analyzer. Fleet employees must complete a training session to be licensed as a fleet inspector. Changes in the licensed fleet program during the past two years now require that the training be repeated every two years. During the 1983-84 period, the 45 licensed fleets issued approximately 10,000 certificates of compliance. This represents about two percent of the total program's inspection activity. A listing of the licensed fleets is shown in Table B-1.

In 1984, program staff investigated policy and rules violations at one of the licensed fleets, the Portland Motor Pool (Oregon Department of General Services). The investigation resulted in temporary revocation of the fleet inspection licenses, until retraining could be accomplished. As a result of the investigation and retraining, one of the licensed fleet inspectors was unable to be licensed.

Facilities Operations

The 1983-84 period was characterized by continued operations at all of the

inspection stations. The city of Beaverton awarded a 1983 "Beautiful Beaverton" to the Department for its inspection station in Beaverton. The award cited the "visual impact and imagination" of the facility site. Negotiations in 1983 and 1984 resulted in plans being approved for construction of a new building replacing the existing operation on Northeast Portland Highway. Construction is scheduled to be completed by mid-1985. The improvements, financed and made by the property owner, will result in a three lane covered station, similar to the Gresham facility, replacing the current open air operation.

Inspector Training

Because of the somewhat cyclic testing volume, some of the inspection program staff continue to be hired on a seasonal and part-time basis. During this past two-year period, the inspector staff size has ranged from 34 to 44. Because of various turnover factors, training of inspection program personnel is an on-going task. New program personnel receive 32 hours of classroom training, followed by a month of on-the-job training. Training provides the new inspectors with the necessary background information, knowledge and skills. Similar types of training efforts are provided for the inspectors of the licensed fleets. A two-day training class is scheduled every month so the nearly 150 inspectors can retain their licenses. All inspectors, whether they are employed by the Department or a licensed fleet, must pass the written examination.

Calibration and Maintenance

To assure accuracy of the vehicles' exhaust, a rigorous program of equipment calibration and maintenance is conducted. The Department's exhaust gas analyzers are calibrated with a gas of known concentration every three hours during the day. A quick electronic calibration is done hourly to check analyzer drift. The calibration gases used at the stations are named against primary standard gases. These primary standards can be traced to national standards.

The exhaust gas analyzers were manufactured and purchased in 1974. A rigorous equipment maintenance program is conducted on the program's exhaust gas analyzers by the maintenance group. Periodic quality audits are made. These quality audits are random spot checks on overall analyzer accuracy. These surveys indicate continued reliable operation. During the 23 random audits conducted in 1983-1984, there were only 9 exceedances observed of equipment out of calibration to a point where customer vehicles might be adversely affected. Considering that there are usually 25 analyzers available for testing operation, 9 exceedances represents a potential error rate of about 1 1/2 percent. As most vehicle emission failures are for deviations significantly above the emission outpoint, the actual potential error rate becomes minute.

Replacement for the program's 10 year old exhaust gas analyzers is in the planning stage. It is expected that authorization will be sought for capital expenditure to replace this equipment during the 1987-1989 biennium.

Review of Operating Rules and Procedures

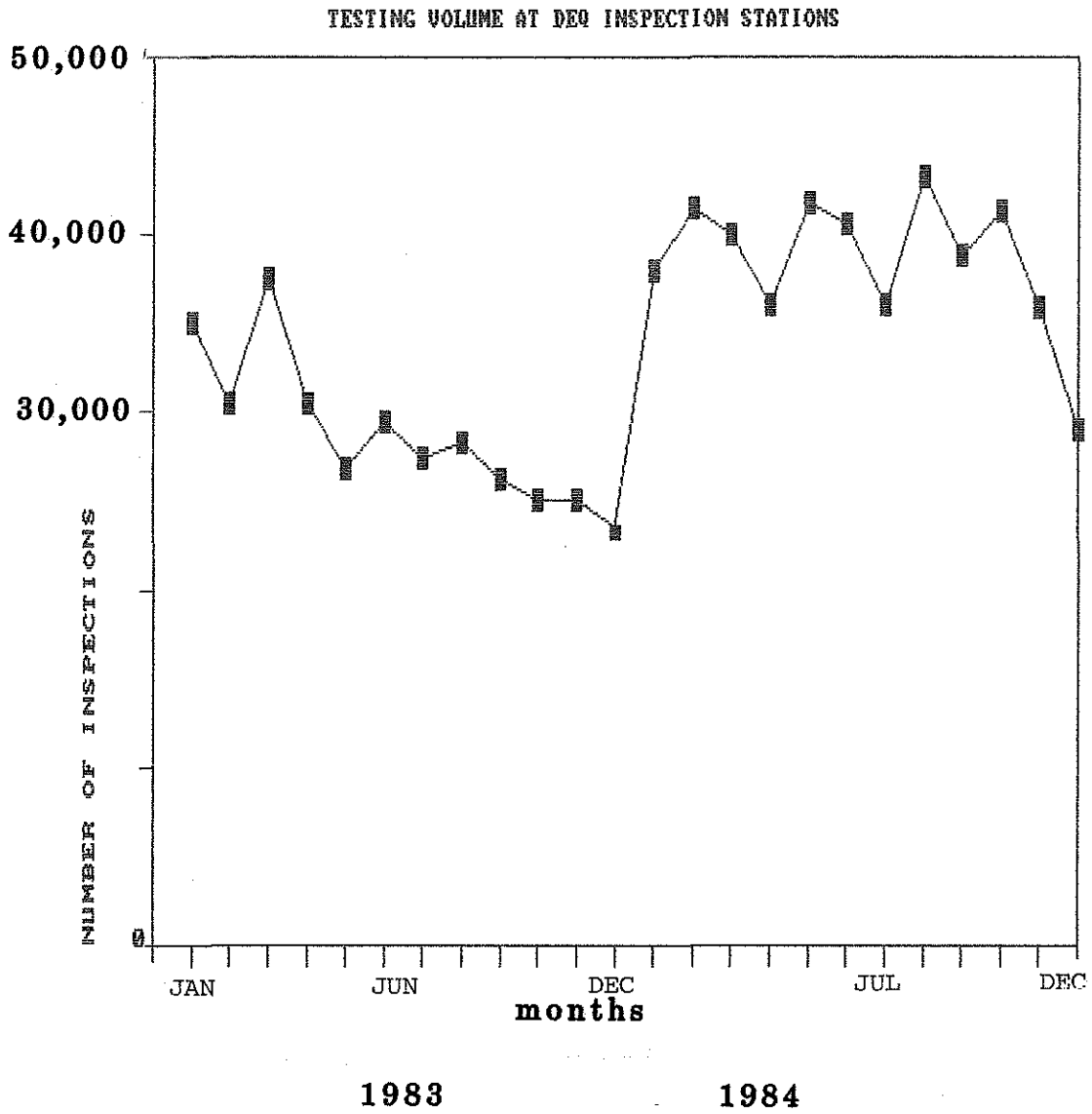
The inspection program standards and procedures are reviewed every year. This process, including public hearings, follows the Administrative Procedures Act. During these past two years, there were changes in the program rules affecting the fleet inspection program. These changes provided alternative testing schedules, eliminated the use of battery-powered exhaust gas analyzers and instituted periodic renewal tests for the licensed fleet inspector. In the fall of 1983, changes were incorporated to simplify the underhood inspection for emission control equipment for 1974 and older cars.

TABLE B-1
STATE OF OREGON
DEPARTMENT OF ENVIRONMENTAL QUALITY
VEHICLE INSPECTION PROGRAM
LIST OF LICENSED FLEET OPERATIONS

001 Portland Motor Pool
002 Mobile Chef (Canteen Co.)
003 City of Portland - Bureau of Fleet Maintenance
004 U.S. Postal Maintenance Facility
005 Oregon State Highway Division
006 Washington County Public Works
007 General Telephone Company
009 Northwest Natural Gas Co.
010 Portland General Electric (5 locations)
011 Pacific Northwest Bell Telephone
012 Clackamas County Public Works
013 Multnomah County
014 United Parcel Service
015 Port of Portland
016 Portland School District #1
017 Pacific Power and Light Co.
018 Beaverton School District #48
019 Sunset Fuel Company
020 Carnation Company
021 ARA Transportation
022 City of West Linn
023 Power Rents, Inc.
024 Tri-Met Transportation
026 City of Lake Oswego
027 N. Clackamas School District #1
028 Washington County Fire District #1
029 Lake Oswego School District #7
030 Consolidated Freightways
031 City of Oregon City
032 Oregon City School District
033 City of Milwaukie
034 Portland Bottling Co.
035 Unified Sewerage Co.
036 Parkrose School District #3
037 Tektronix, Inc.
038 David Douglas School District
039 City of Forest Grove
040 Oregon National Guard
041 Reynolds School District
042 City of Beaverton
043 Hillsboro School District
044 Oregon Air National Guard
045 Tualatin Fire District
046 City of Hillsboro
047 City of Tualatin Maintenance

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Figure B-1



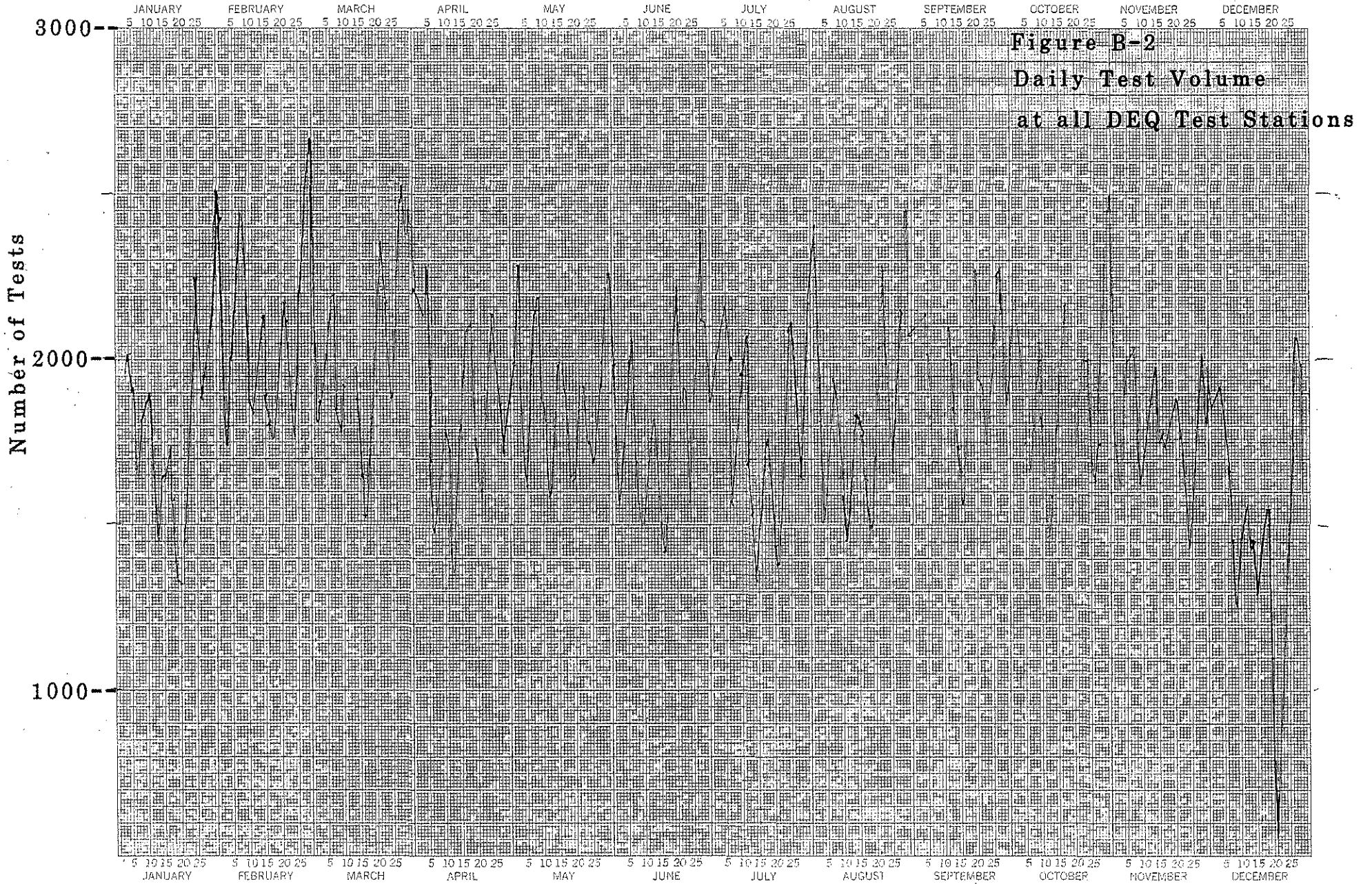


Figure B-2
Daily Test Volume
at all DEQ Test Stations

Emissions from Cars and Trucks

A stated goal of the Vehicle Inspection Program is to test vehicles and to identify vehicles that have high emissions so that corrective repairs can be made. This inspection and compliance process is tied to Oregon's vehicle registration system. Oregon's vehicle passenger car registrations, including pickup trucks, are valid for two year periods. Within that two year cycle, vehicle registrations are spaced and staggered. At the time of registration renewal, a vehicle owner receives notice to renew the vehicle's license, and have the inspection test. The vehicle is brought to an inspection station, and upon passing the test, a Certificate of Compliance is issued. The owner may then complete the registration process.

Table C-1 is the overall pass-fail summary for the inspection program for the current biennium. This inspection data is useful to examine emission trends, to compare comparable classes of vehicles over time, and to document the emission effects. Other uses include examining the pass rates associated with different makes of cars and trucks in order to identify vehicles that might have inherent emission problems or to identify problems with the emission test. Comparisons can be made before and after repair. The inspection data is also used as input into the computer models for air quality modeling.

A small number of vehicles are responsible for most of the emissions. In past summaries, emphasis was placed on vehicle class emission distributions. The general character of these has not changed over the past several years and little is added duplicating the previous analysis, other than to show that the results remain consistent. Figures C-1 through C-6 are typical emission distribution curves generated from inspection program data. They indicate that the majority of the vehicles have satisfactory emissions. In these charts the area under the curves are a measure of relative emission contribution.

The character of Oregon's vehicle fleet has changed. In late 1982, only 40 percent of the vehicle tests were on vehicles newer than 1975 model year. In 1984, that percentage has increased to 60 percent of the fleet. Figure C-7 shows the current vehicle age distribution. 1975 represents a major change in emission control technology change - catalysts. The next major change occurred in 1981 with the incorporation of microprocessor controls. Using the modeling capabilities of Mobile3, EPA's computer model for determining emission factors, the average car can be created and analyzed. Figure C-8 and C-9 shows those emission factors for two of the three statutorily controlled pollutants -- carbon monoxide and hydrocarbons. These charts show the effectiveness of the inspection program when compared to the alternative of not having a program. Also shown is the effect that

is predicted if the inspections were to have been conducted on an annual basis, rather than on the current biennial basis. These charts indicate that there is substantial benefit from the inspection program. For the 1984 model year, the average passenger car is 31.6 percent cleaner for carbon monoxide and 11 percent cleaner for hydrocarbons than if there was no inspection program requirement. The benefit of annual inspections is even greater. If an annual inspection had been implemented rather than the current system, there would have been an additional 10 percent improvement for carbon monoxide and an additional 8 percent improvement for hydrocarbons.

The relative percentage of failures among categories, as well as the pass rate, has changed over the past two year period. Table C-2 shows a comparison of comparable time periods in the 1981-1982 and 1983-1984 biennium. This chart shows an overall increase in pass rate and associated decreases in certain failure categories. These changes are the result of several different factors. Chief among these would be improved vehicle maintenance. Another is the increase in new vehicles, coupled with the elimination of vehicles more than 20 years of age, and another is the result of the easing of the underhood inspection criteria for vehicles older than the 1975 model year vehicle.

Because the inspection cycle is incorporated within Oregon's biennial registration cycle, new cars and trucks are not normally seen in large numbers at inspection stations until the vehicles are two years of age. As a result, the 1981 and 1982 model years vehicles are the largest group of new configuration vehicles that have recently been tested at the inspection stations. These vehicles are of interest because they incorporate the newest in emission control technologies. The way that these vehicles maintain good control performance is important for the long-range compliance with ambient air standards. Table C-3 shows the summary by make groupings of various 1981 and 1982 vehicles. This list is a composite and includes summary information for both passenger car and pickup trucks. Some makes have very high pass rates with Honda vehicles having the best performance overall. For other makes, some of the vehicle sample sizes were not large enough to draw firm conclusions, and for still others, the lower pass rates, such as in the low 80 percentile or below, raises flags as to possible in-field emission control performance problems. When the data is reviewed, common traits among many of the groups that have high failure rates are found. These traits include the use of "open loop" or non-computer controlled emissions systems and large numbers of pickup trucks, which also do not use the advanced computer electronics.

When the emission data from pickup trucks and vans only are reviewed, the differences in pass rate is much lower. Table C-4 shows pass rate data for pickup trucks and vans. It is important to keep pickup trucks and vans included in the inspection program because of the large percentage of trucks in use in this area. When these vehicles are proportionally added to the Mobile3 emissions model, their effect is substantial.

There are currently two parts to the inspection process -- the testing and measurement of the exhaust gas concentrations, and the visual examination of the vehicle's pollution control equipment. A third component -- the noise test -- will become mandatory April 1, 1985.

The discussion preceding briefly summarizes some of the data and results of the emission inspection tests. The following will describe the more misunderstood portion of the inspection test -- the visual examination of factory installed pollution control equipment.

The visual examination of factory installed pollution control equipment is an important portion of the inspection. It helps establish the validity of the idle test for correlation purposes with the larger, more complex federal test procedure. The federal test procedure is used for certifying the emission performance of new cars and trucks. The examinations for emission equipment is included because disconnection, alteration, and poor maintenance of emission control equipment can lead to high tailpipe emissions during the driving modes, even when idle emissions are below the inspection test cut points. Thus, the vehicles overall emissions are reduced when all of the emission control systems are intact and operating properly. Currently, six percent of all vehicles inspected are identified as having disconnected or inoperable emission control equipment. Table C-5 shows how these observations are divided into the various model year categories. The various cut points and measurements of the relative amount of tampering can be seen by examining the data.

In late 1983, the underhood inspection criteria were eased for vehicles older than 1975. For these 1970-1974 model year vehicles, only positive crankcase ventilation, air injection and evaporative emission control systems are being checked at the inspection stations. Figure C-10 illustrates the emission equipment disconnection rates between the 1975-1980 and 1981 and new model year vehicles. Table C-6 contrasts this with national surveys. As can be seen from these tables, the incidence of observed emission equipment disconnection or tampering is significantly below that observed in national surveys. It is more common to observe tampered emission equipment on a vehicle that has moved from out-of-state or out-of-area, than on a vehicle which has operated primarily in this area.

There are several ways that the emission benefits of an inspection program are measured. Two major techniques involve measuring the changes in idle emissions of vehicles that are repaired and using computer models to contrast the effect of vehicles subject to the inspection with those that would be if there had not been an inspection. Computer modeling was displayed in Figures C-8 and C-9. Data for measurement of emissions before and after repairs was obtained in conjunction with a cost of repair survey made in 1983. Table C-7 lists the average emission reductions with the average idle carbon monoxide emission reductions ranging from 53 percent to 73 percent. Weekly average idle hydrocarbon emission reductions ranged from 37 to 62 percent.

The cost of repairs associated with emission tests are outlined in Table C-8 and C-9. Two survey techniques were used. In one technique, the vehicle owner was asked to voluntarily respond to a series of questions about cost and the type of repair work performed. In the other technique, the motorist was queried about repair costs prior to the inspection. The first technique had been used previously in other studies and had been judged to be the less offensive technique to the motorist. The summary results listed in Table C-8 indicate that the polled responses are higher in dollar amount than those supplied by from the returned questionnaires. Information on costs expended prior to the inspection was also obtained from the group that was polled. These costs appear to be associated with more regular maintenance rather than repairs necessary to pass the test. The relative sameness among the various repair classification categories indicate that most of those expenses, in this writer's opinion, were for the standard tune-up or normal scheduled maintenance rather than for repairs of specific malfunctions or adjustments. These costs are in line with prevailing costs for a complete tune-up, which includes diagnostics and general maintenance.

The costs associated with repairs only are less than the costs associated with general maintenance and repair. Table C-9 shows these costs for the categories of repair facilities, including self-repair. The types of repairs performed were significantly different among the various classes. Self-repair and service station classifications had the lowest average costs, but also performed the simplest repairs. Independent garages and new car dealers, on the other hand, showed higher average repair costs but were performing more complicated repairs. This would indicate that the costs reflect the measure of service performed. While this survey did not specifically address the subject, as a rule of thumb, total auto repair costs are divided into two-thirds labor and one-third parts.

Emission reductions from heavy duty gasoline trucks also contribute significantly to pollution reductions. Heavy duty gasoline trucks are estimated to contribute two percent of the areas vehicle miles travelled, with most of all of those miles in the congested urban areas. Heavy duty gasoline trucks have been included in the inspection program since 1977. The same test and procedure is applied to heavy duty gas trucks that are used for passenger cars. Emission reductions from this group of vehicles are sizeable. Table C-10 lists the overall pass-fail rates for heavy duty trucks in 1983 and 1984. Heavy duty gasoline trucks have an air pollution affect greater than their numbers would indicate. They represent about three percent of the vehicle population and contribute two percent of the total vehicle miles travelled. They emit eight percent of the carbon monoxide and five percent of the hydrocarbon for all mobile sources. By requiring emission control inspection of heavy duty gasoline-powered vehicles, the overall emission contribution of this vehicle class is significantly reduced.

Summary

The inspection program, which operates on a biennial basis, includes both passenger cars, pickup trucks and vans, and heavy duty gasoline-powered trucks. Emission reductions from all vehicle classes have been documented. Emission reductions of over 50 percent average idle carbon monoxide and 45 percent average idle hydrocarbon emission reductions has been shown for passenger cars and light trucks. Comparable emission reductions are obtained from gasoline-powered heavy duty trucks. Pollution control equipment on all light duty motor vehicles and heavy duty motor vehicles is checked in conjunction with the emission inspection. When compared to national surveys, the observance rate of emission control disconnection is less than the national average. Costs associated with compliance of the emission inspection have been reviewed.

The emission inspection program has and continues to document emission reductions from the motor vehicle fleet in the Portland metropolitan area. These emission reductions are substantial and are obtained at a reasonable cost. Emission reductions will help the area maintain compliance with national ambient health standards.

VA4842

Table C-1

Department of Environmental Quality
Vehicle Inspection Program

ACTIVITY SUMMARY FOR JANUARY 1983 THROUGH DECEMBER 1984

EMISSION INSPECTION TESTS

Light Duty 787,234
Heavy Duty 26,905
Total 814,139

By Location:
Gresham 165,014
Milwaukie 153,360
Northeast 158,745
Hillsboro 64,937
Northwest 72,581
Beaverton 199,502

Certificates of Compliance Issued - 513,463

LIGHT DUTY VEHICLE EMISSION CONTROL TEST SUMMARY (July 83 - Dec 84 only)

	Total Number	Total Percentage	Vehicle Category			
			1981+	1975-1980	1968-1974	Pre-1968
Pass Emission Test	387,949	64%	91%	65%	56%	67%
Test Failed For:						
Excessive Carbon Monoxide (CO)	58,455	10%	2%	10%	12%	10%
Excessive Hydrocarbons (HC)	50,741	8%	1%	8%	11%	10%
Excessive HC and CO at idle	36,029	6%	1%	8%	5%	4%
Either CO or HC @ 2500 rpm	1,543	-%	2%	-%	-%	-%
Disconnected Emission Control Equipment	38,372	6%	1%	8%	9%	-%
Other Causes (i.e., smoke, dilution, idle speed)	30,939	5%	1%	4%	8%	11%

Table C-2
 Department of Environmental Quality
 Vehicle Inspection Program

Comparison of 1981-1982 and 1983-1984 FY
 TESTING VOLUMES AND TEST RESULTS

	July 1981 - Dec 1982	July 1983 - Dec 84
Light Duty Tests	539,448	604,243
Heavy Duty Tests	18,070	20,118
TOTAL	557,518	624,361
Certificate of Compliance Issued	 339,873	 395,762

LIGHT DUTY EMISSION TEST RESULTS (PERCENT)

Pass Emission Test	61.7	64.2
Failed for Carbon Monoxide	11.1	9.6
Failed for Hydrocarbons	8.3	8.4
Failed for Both HC & CO	6.1	5.9
Failed for Either HC & CO @ 2500 rpm	0.0	0.2
Failed for Emission Equipment Disconnect	6.4	6.3
Failed for Other Causes	6.4	5.1

Table C-3
 Department of Environmental Quality
 Vehicle Inspection Program

PASS RATES OF 1981 & 1982 VEHICLES*

	<u>n</u>	<u>1981</u>	<u>n</u>	<u>1982</u>
Audi	13	92	22	100
Buick	87	94	107	94
Cadillac	12	92	25	96
Chevrolet 4 cyl	60	86	73	90
Chevrolet 6 cyl	40	95	91	91
Chevrolet 8 cyl	48	81	74	80
Chrysler	8	100	16	100
Dodge 4 cyl	23	91	55	91
Dodge 8 cyl	4	75	12	83
Ford 4 cyl	54	78	85	82
Ford 6 cyl	48	83	30	87
Ford 8 cyl	91	74	97	79
GMC	--	--	33	82
Honda	81	99	157	97
Mazda	30	83	55	89
Mercury	21	86	55	96
Nissan 4 cyl	95	75	246	85
Nissan 6 cyl	9	67	17	94
Oldsmobile	61	84	58	90
Plymouth	39	85	35	86
Pontiac	26	88	62	87
Subaru	25	92	83	96
Toyota 4 cyl	87	87	234	95
VW	25	80	62	89
Volvo	12	100	40	98

* Includes light duty pickups and vans; does not include diesel vehicles

n = sample size

Table C-4
 Department of Environmental Quality
 Vehicle Inspection Program

Pass Fail Rates of
 1/2 ton and 3/4 tons Pickup Trucks
 October 1984

<u>Model Year</u> <u>Class</u>	<u>% Pass Test</u>	<u>Failed</u> <u>HC</u>	<u>Failed</u> <u>CO</u>	<u>% Failed</u> <u>Both HC & CO</u>	<u>% Failed</u> <u>Emsn Disc</u>
1964-1967					
1/2 ton	70	13	5	-	-
3/4 ton	61	9	10	4	-
1968-1969					
1/2 ton	60	12	7	7	-
3/4 ton	56	25	9	5	-
1970-1971					
1/2 ton	53	15	8	2	10
3/4 ton	54	21	12	6	2
1972-1974					
1/2 ton	51	15	12	5	7
3/4 ton	54	10	16	8	7
1975-1980					
1/2 ton	67	8	7	6	8
3/4 ton	56	13	12	8	8
1981+					
1/2 ton	90	2	4	2	2
3/4 ton	70	10	5	4	10

Table C-5
 Department of Environmental Quality
 Vehicle Inspection Program

Observed Emission Equipment Disconnect Rate (Tampering)
 By Model Year Groupings
 Percent of all tests

<u>Equipment Type</u>	<u>1970-1974</u>	<u>1975-1980</u>	<u>1981+</u>
Positive Crankcase Ventilation System (PCV)	1.99	1.05	0.17
Fuel Filler Inlet Restrictor	--	0.76	0.08
Thermal Air Cleaner System (TAC)	--	1.64	0.33
Air Injection Reactor Systems (includes Pulse Air)	1.54	1.0	0.17
Catalytic Converter	--	0.94	0.17
Evaporative Emission Control System (EVAP)	3.46	1.1	0.5
Exhaust Gas Recirculation (EGR)	--	1.8	0.5
Spark Control	--	0.67	0.08

Table C-6
 Department of Environmental Quality
 Vehicle Inspection Program

Observed Emission Equipment Disconnect Rate (Tampering)
 Contrast 1983 National Survey with Oregon

	<u>USEPA Data</u>	<u>Ore DEQ Data*</u>
PCV	5%	1%
Fuel Restrictor	7%	1%
Thermal Air Cleaner	1%	1%
Air	7%	1%
CAT	7%	1%
EVAP	5%	1%
EGR	13%	1%
Spark	1%	1%
	—	—
Total	26%	8%

* Includes only 1975-1980 model year vehicles.

Table C-7
 Department of Environmental Quality
 Vehicle Emission Program

Average Emission Reduction During
 a Month Study Period of Emissions
 Before and After Repair (May 83)

	<u>Carbon Monoxide, %</u>		<u>Hydrocarbon, ppm</u>	
	<u>Average</u>	<u>Median</u>	<u>Average</u>	<u>Median</u>
<u>2nd Week</u>				
initial reading	4.05	2.85	461	300
after repair	1.22	0.3	290	145
change	2.88	1.5	171	110
% change	70	89	37	52
<u>3rd Week</u>				
initial reading	3.7	3.9	360	245
after repair	1.0	0.6	137	125
change	2.6	2.9	223	152
%change	73	85	62	49
<u>4th Week</u>				
initial reading	2.94	2.7	422	195
after repair	1.4	0.7	219	120
change	1.5	1.1	245	70
%change	53	74	48	38

Table C-8
 Department of Environmental Quality
 Vehicle Inspection Program

Average Cost of Repair
 May 1983

	VOLUNTARY RESPONSE		POLLED RESPONSE
Overall Average Cost of Repair	15.28		31.27
Excluding Zero Entries	24.60		46.11
 New Car Dealers % Total	 6%		 7%
Average Age of Vehicle		1978	
Average Cost of Repair	31.78		42.62
Excluding Zero Entries	37.94		63.25
 Service Station % Total	 29%		 22%
Average Age of Vehicle		1973	
Average Cost of Repair	13.51		23.85
Excluding Zero Entries	16.12		27.87
 Independent Garages % Total	 19%		 24%
Average Age of Vehicle		1973	
Average Cost of Repair	36.48		70.49
Excluding Zero Entries	44.32		85.97
 Self Repair % Total	 40%		 42%
Average Age of Vehicle		1970	
Average Cost of Repair	7.65		9.81
Excluding Zero Entries	26.44		35.33

Table C-9

Department of Environmental Quality
 Vehicle Inspection Program

Polled Response Average Expenditure
 in Dollars of Those Reporting Expenditures
 Prior to Initial Test

	<u>All Responses</u>	<u>Excluding \$0 Responses</u>
Overall Average Cost	74.25	87.58
Work Performed by New Car Dealers (17%)	93.96	112.56
Work Performed by Service Stations (21%)	88.55	95.16
Work Performed by Independent Garages (28%)	104.14	118.26
Work Performed by "Self" (34%)	30.81	45.13

Table C-10

Department of Environmental Quality
Vehicle Inspection Program

HEAVY-DUTY GASOLINE VEHICLE TEST SUMMARY
1983 and 1984

EMISSION INSPECTION TESTS	26924
OVERALL PERCENTAGE PASS	65%

Pre-1970 Trucks (4325)

Pass Emission Test	63.7%
Tests Failed for Carbon Monoxide (CO)	6.5%
Tests Failed for Hydrocarbons (HC)	12.3%
Tests Failed for Both HC & CO	2.9%
Tests Failed for CO @ 2500 rpm	19.3%
Tests Failed for Other Causes	5.1%

1970-1973 Trucks (5215)

Pass Emission Test	62.9%
Tests Failed for Carbon Monoxide (CO)	8.6%
Tests Failed for Hydrocarbons (HC)	11.7%
Tests Failed for Both HC and CO	4.0%
Tests Failed for CO @ 2500 rpm	6.9%
Tests Failed for Emission Equipment Disconnects	2.9%
Tests Failed for Other Causes	3.4%

1974-1978 Trucks (10517)

Pass Emission Test	62.8%
Tests Failed for Carbon Monoxide (CO)	10.1%
Tests Failed for Hydrocarbons (HC)	12.6%
Tests Failed for Both HC and CO	3.4%
Tests Failed for CO @ 2500 rpm	4.0%
Tests Failed for Emission Equipment Disconnects	4.7%
Tests Failed for Other Causes	2.3%

1979 and Later Trucks (6867)

Pass Emission Test	73.6%
Tests Failed for Carbon Monoxide (CO)	2.9%
Tests Failed for Hydrocarbons (HC)	11.6%
Tests Failed for Both HC and CO	1.4%
Tests Failed for CO @ 2500 rpm	1.0%
Tests Failed for Emission Equipment Disconnects	7.3%
Tests Failed for Other Causes	2.0%

Figure C-1

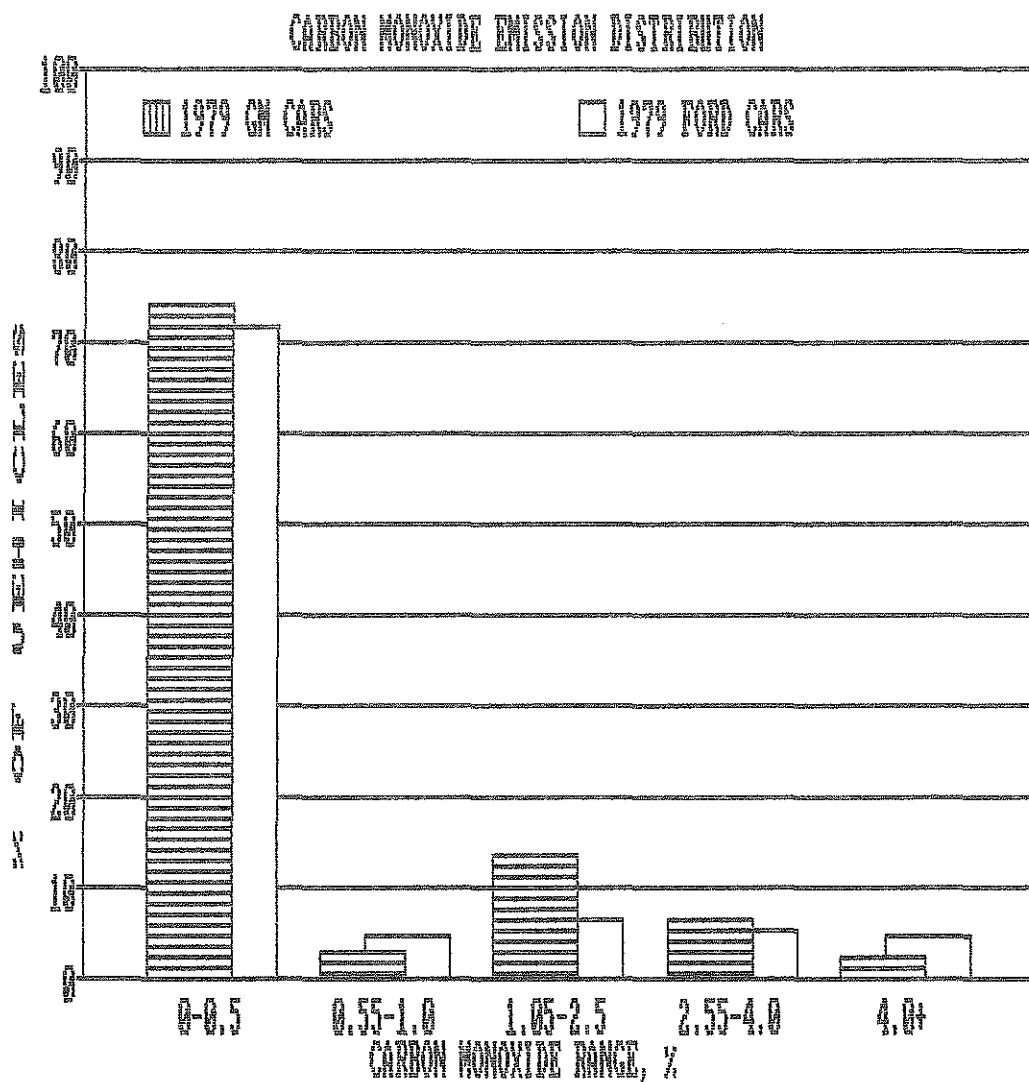


Figure C-2

HYDROCARBON EMISSION DISTRIBUTION

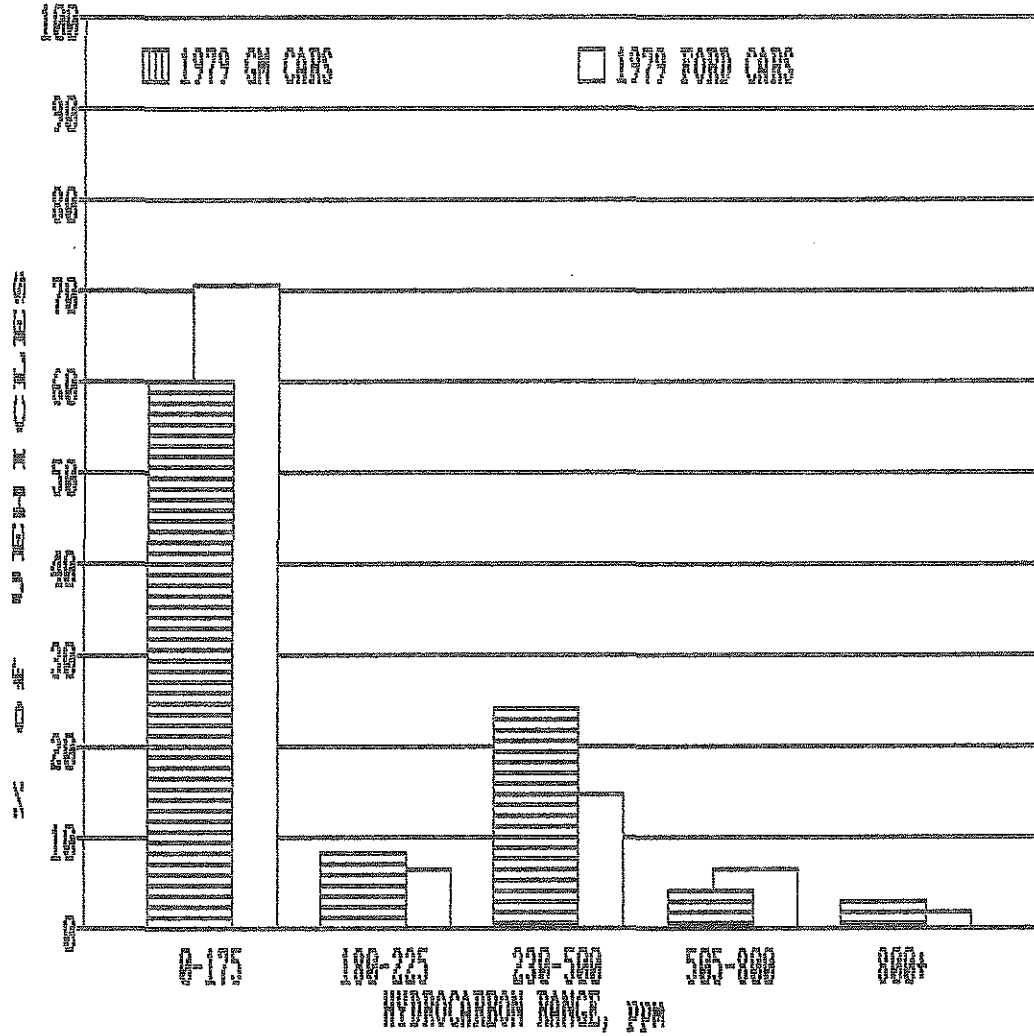


Figure C-3a

CARBON MONOXIDE EMISSION DISTRIBUTION

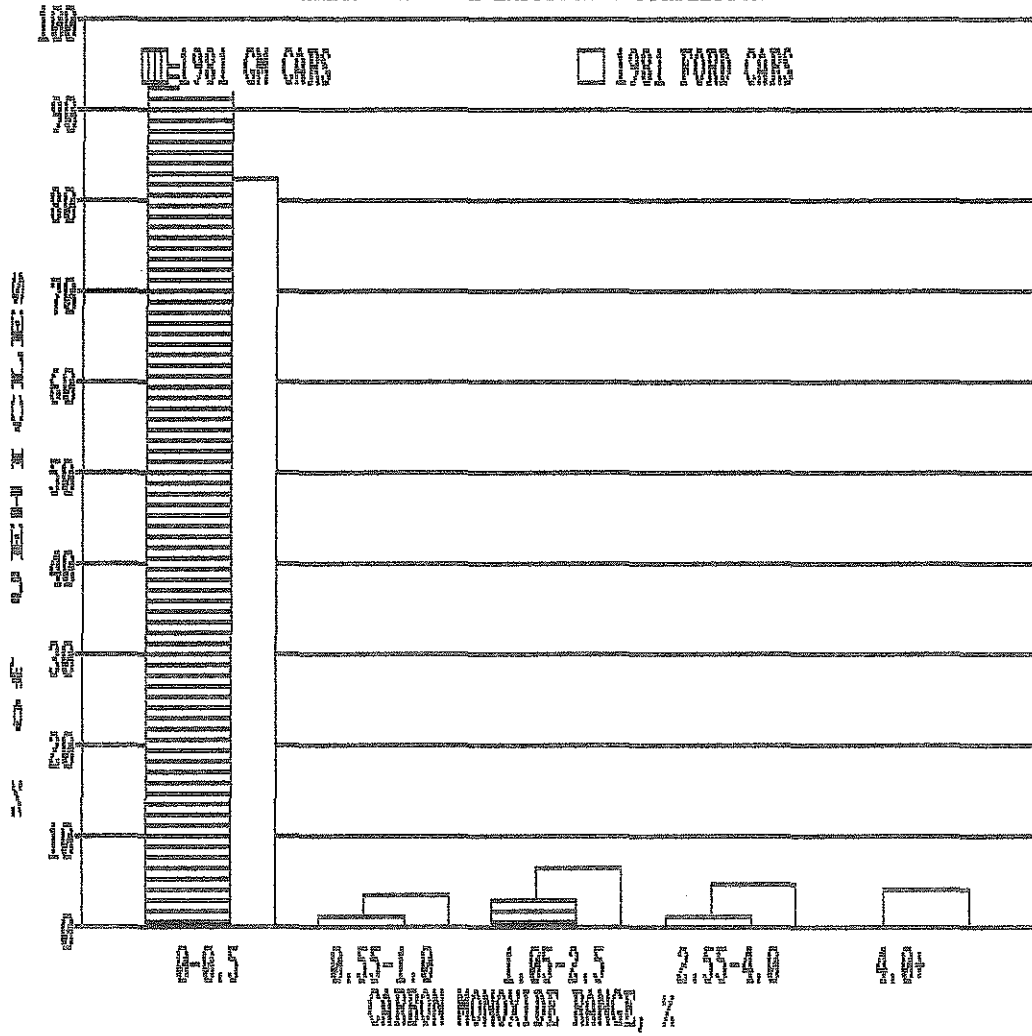


Figure C-3b

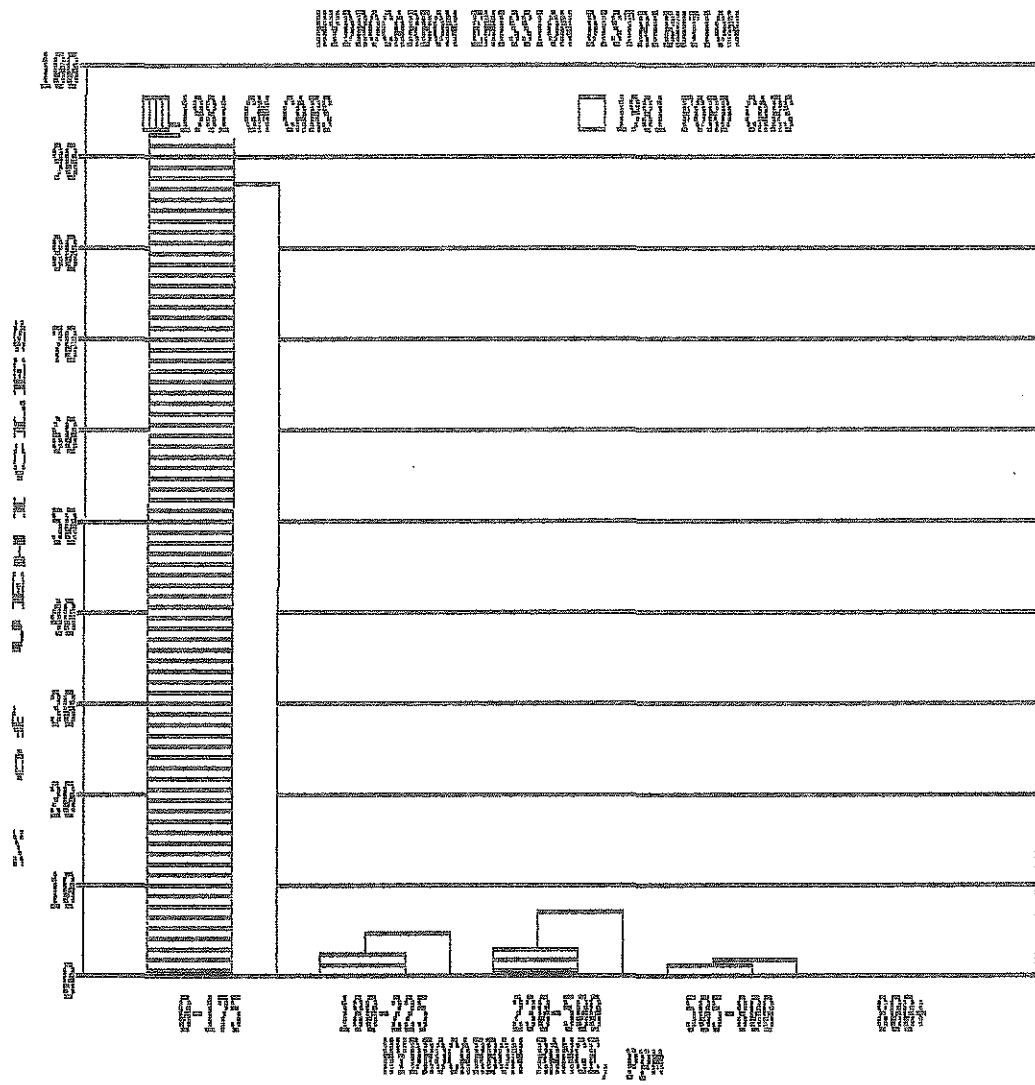


Figure C-4a

CARBON MONOXIDE EMISSION DISTRIBUTION

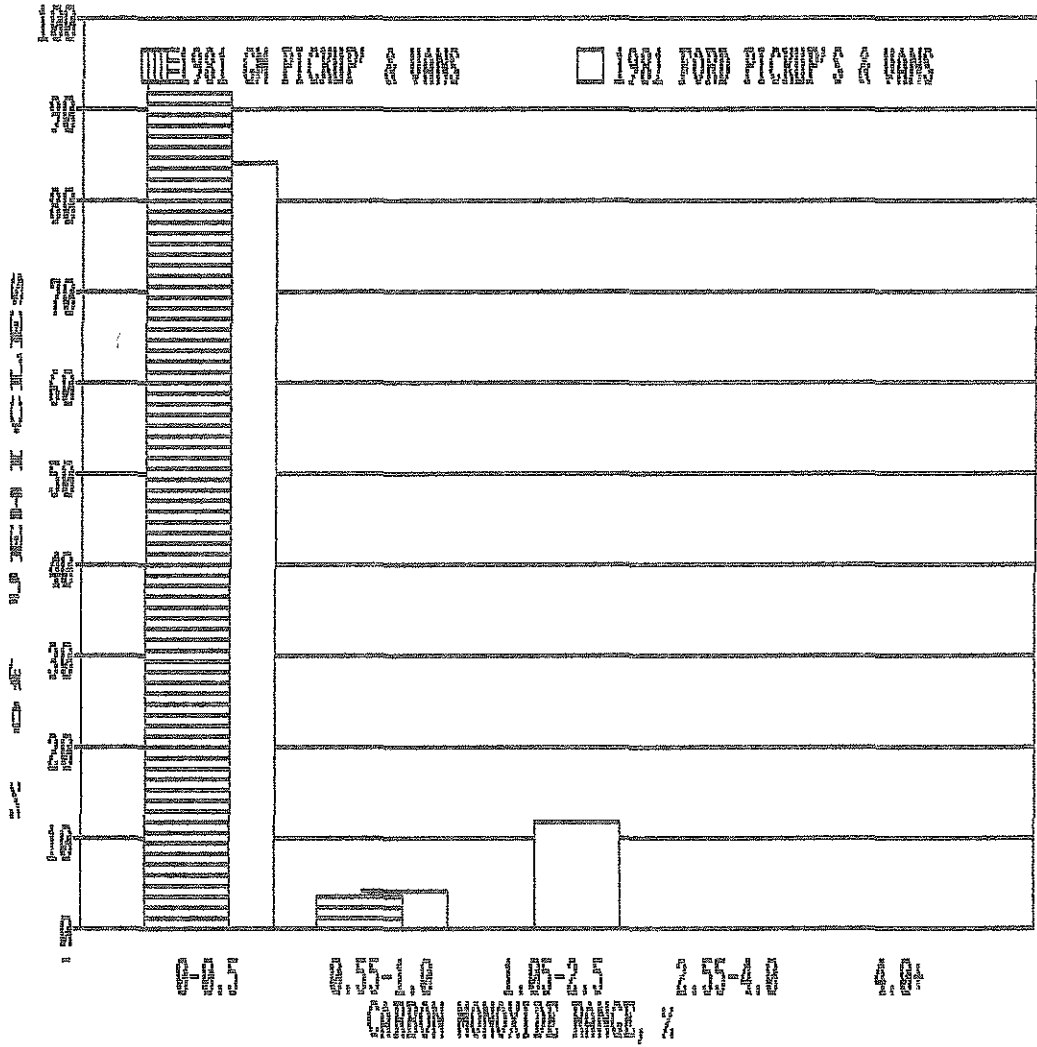


Figure C-4b

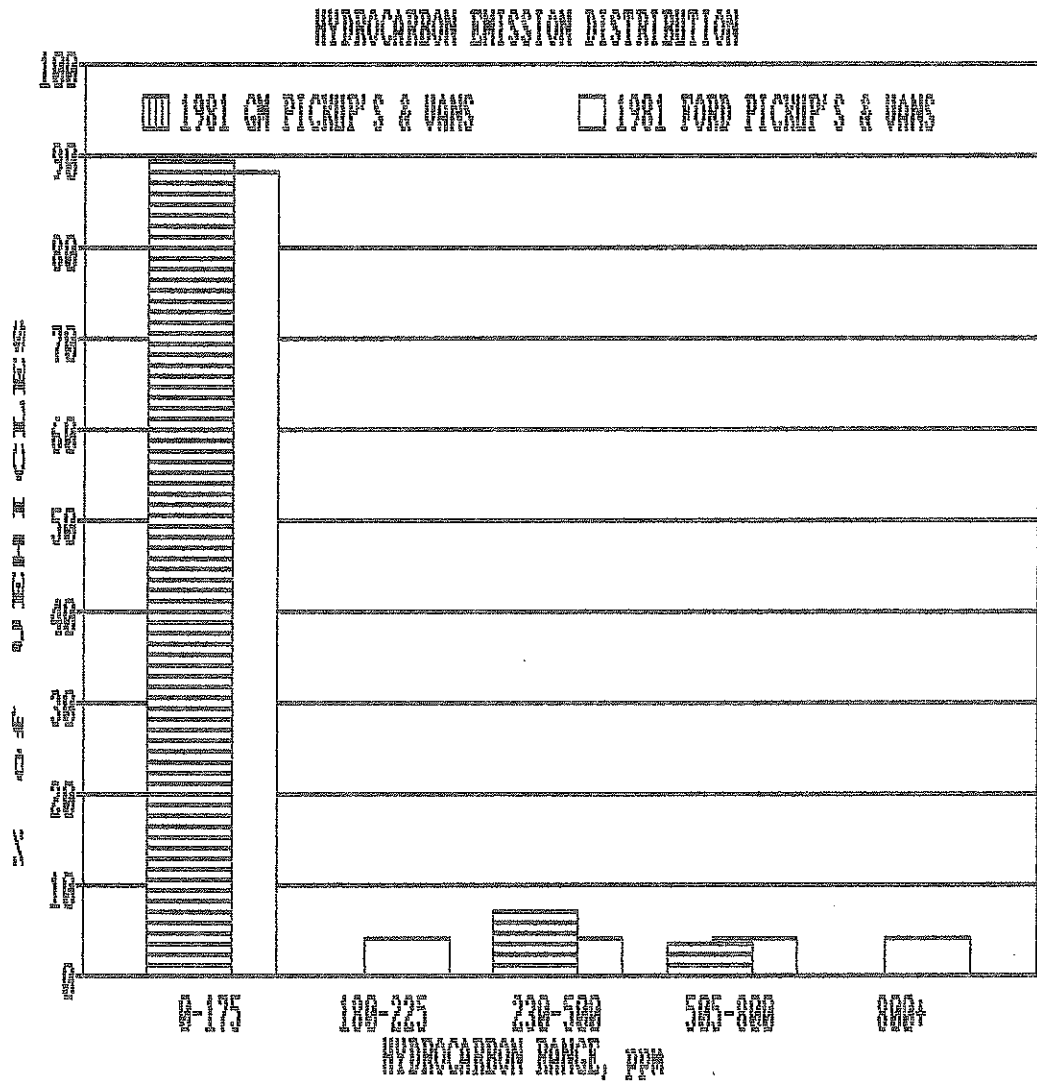


Figure C-5

CARBON MONOXIDE EMISSION DISTRIBUTION

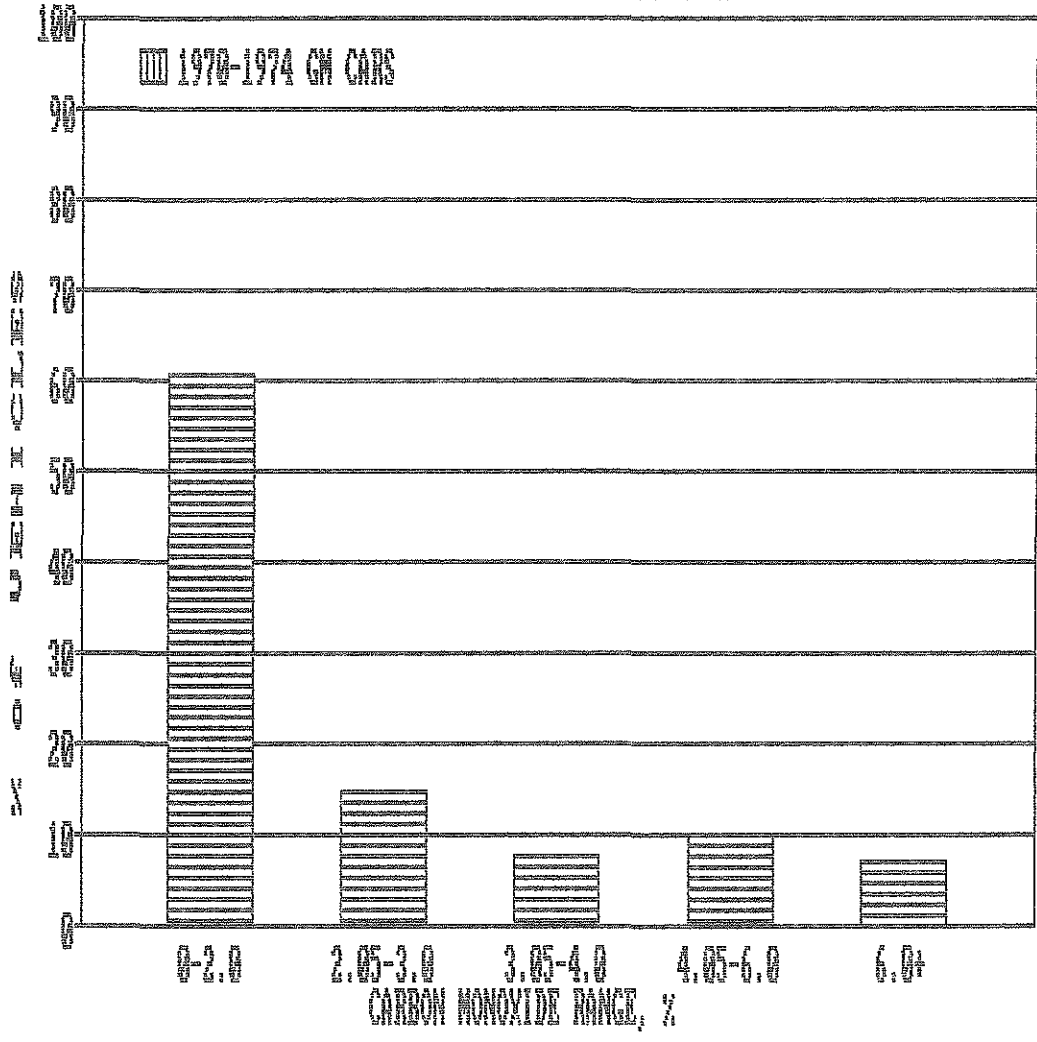


Figure C-6

HYDROCARBON EMISSION DISTRIBUTION

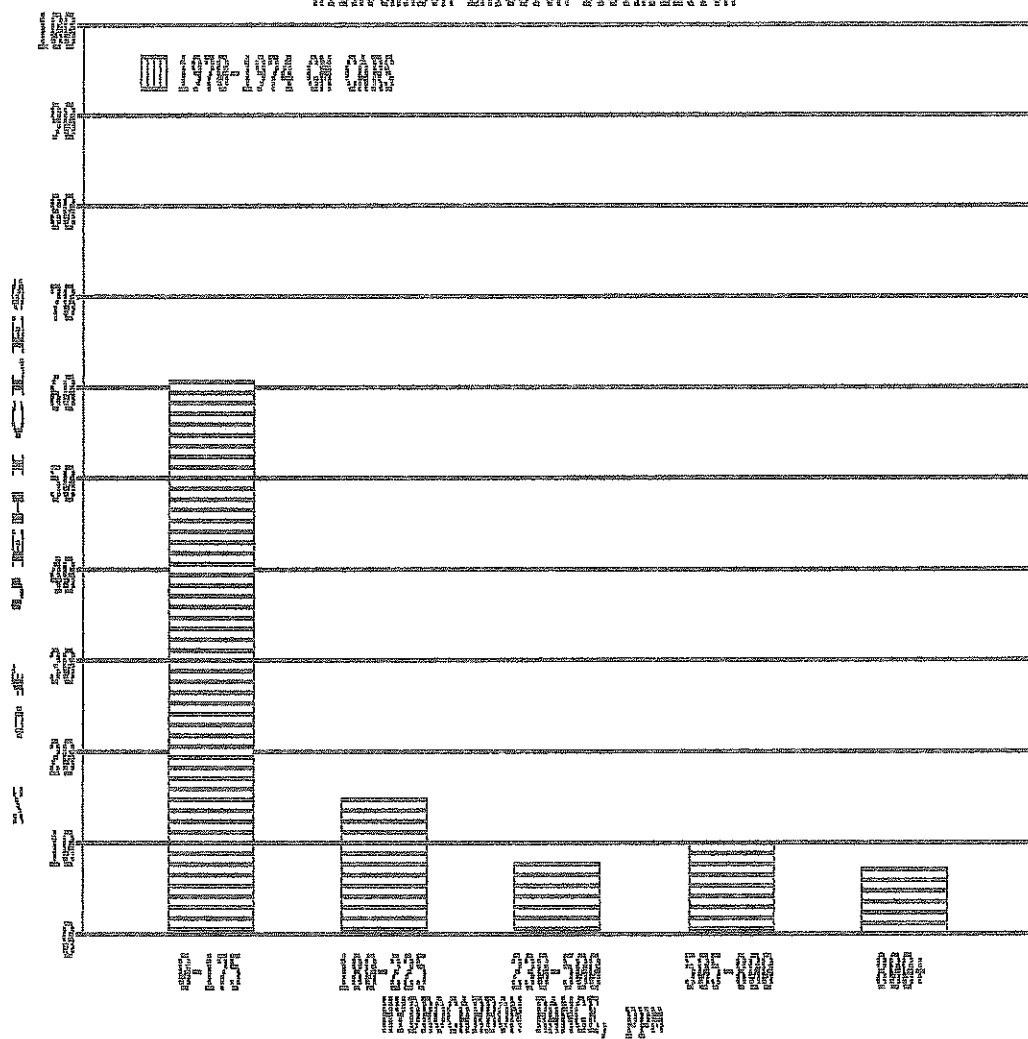
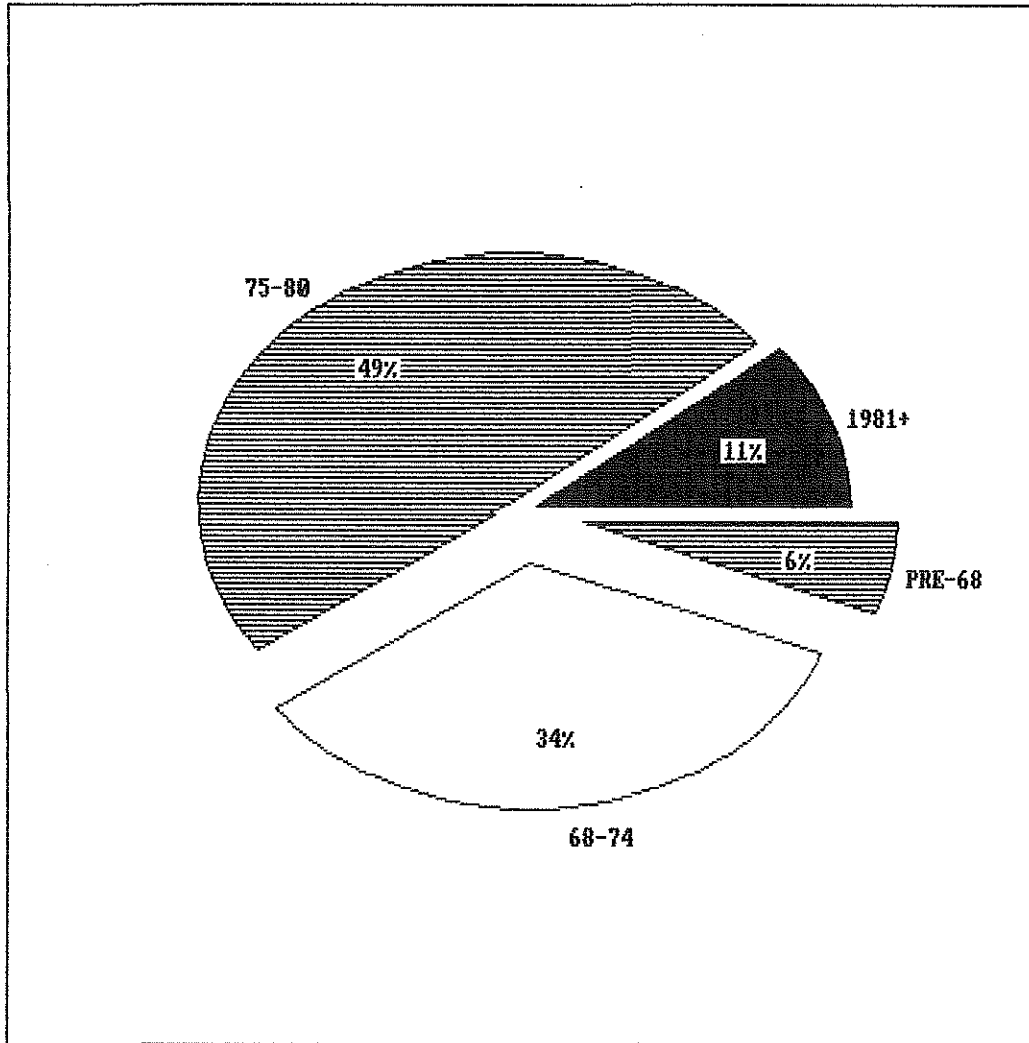


Figure C-7

VEHICLE AGE DISTRIBUTION



**Age Distribution of Vehicles in DEQ I/M Program
Sectors By Model Year Grouping**

Figure C-8

MOBILE 3 PROJECTIONS OF CO VEHICLE EMISSIONS

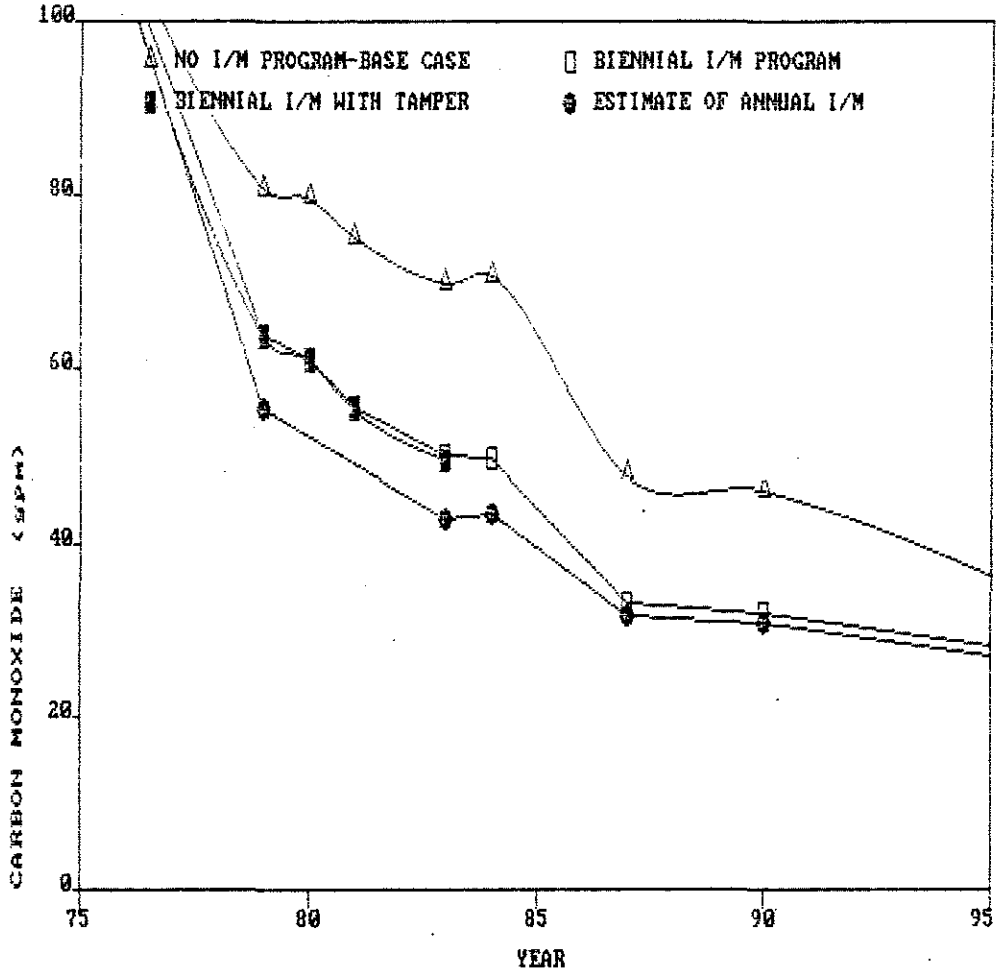


Figure C-9

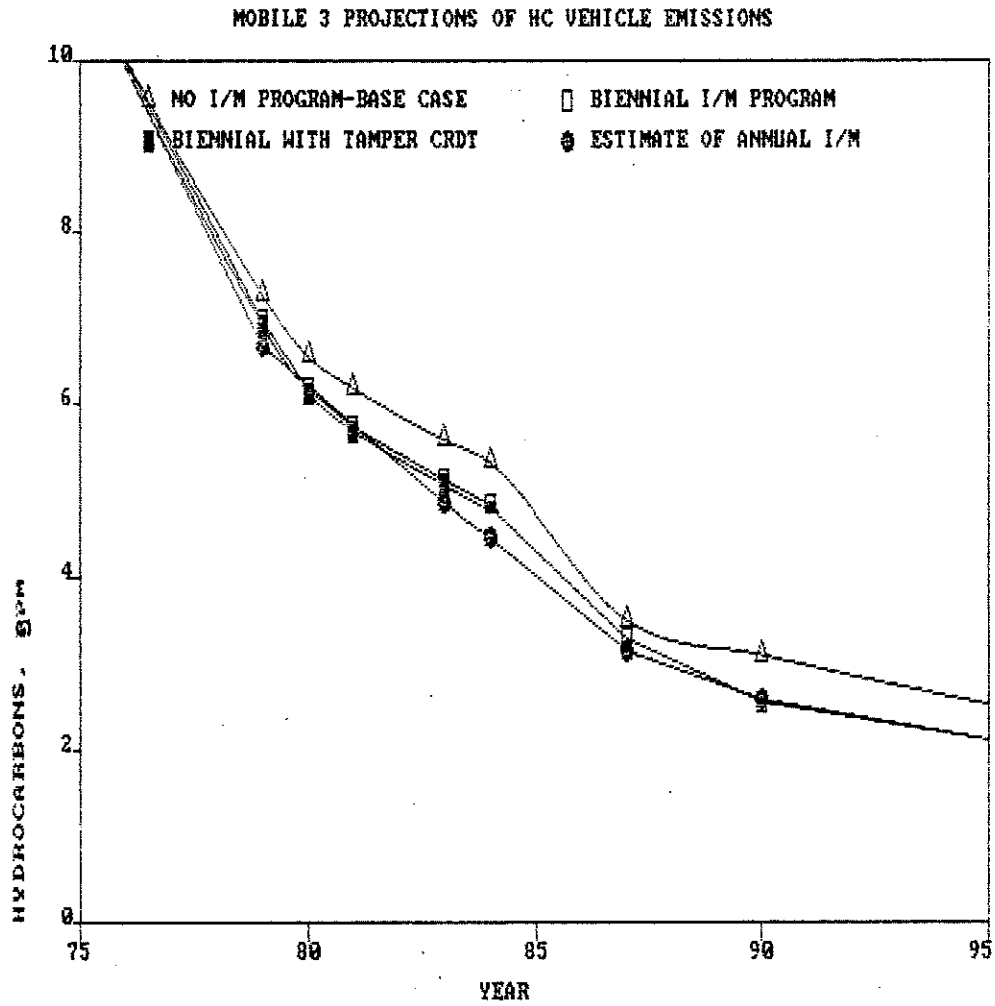


Figure C-10

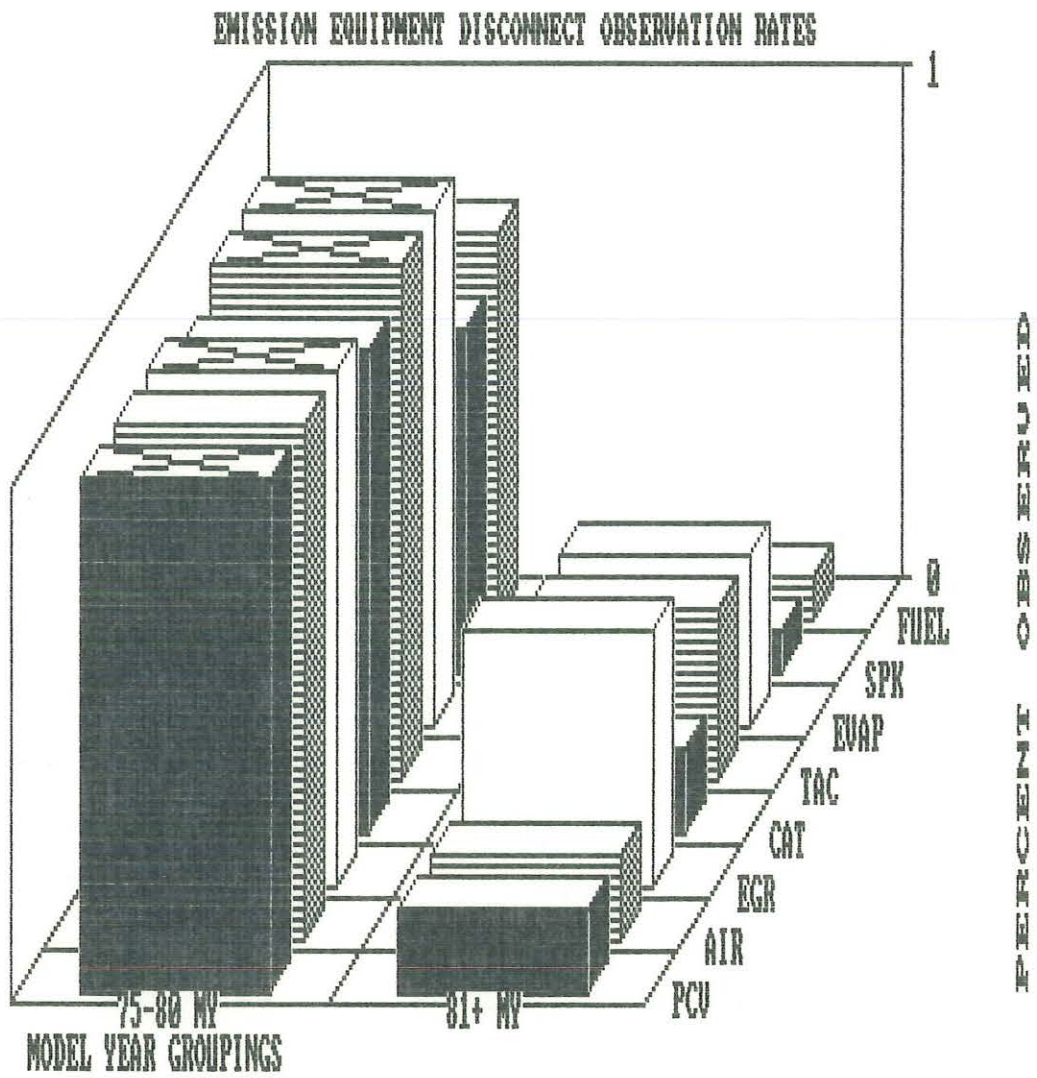
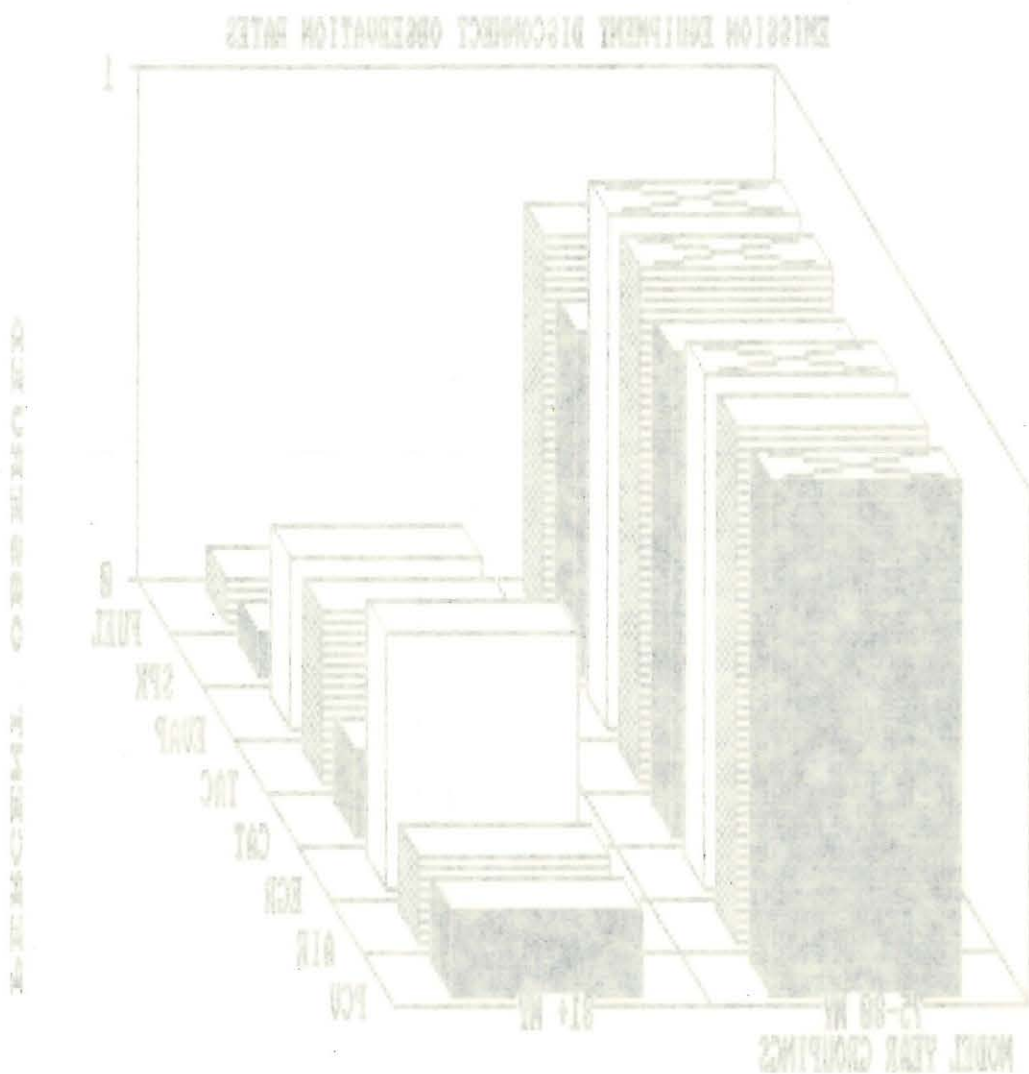


Figure C-1b



Vehicle Inspection and Air Quality

The Portland Air Quality Maintenance Area (AQMA) is classified as a nonattainment area for federal ambient health standards for two major motor vehicle related pollutants--carbon monoxide and ozone. Motor vehicles remain the predominant source of carbon monoxide emissions, contributing about 85 percent of the total carbon monoxide in the Portland metropolitan area.

The federal and state carbon monoxide standard of 10 mg/m³ per an 8-hour average was exceeded 120 days in 1972 at the Burnside continuous air monitoring station (CAMS) in downtown Portland. The worst day recorded that year had an 8-hour average reading of 28.9 mg/m³. In 1983, the 8-hour average was exceeded only 3 times, and during 1984, was not exceeded. Figure D-1 shows the number of violation days for the last 10 years at the CAMS station. Also shown is the number of carbon monoxide violation days at the Hollywood District and 4th and Alder stations in Portland. Figure D-2 shows the annual geometric mean CO concentrations at these stations.

In contrast to carbon monoxide, which usually shows health standard violations close to high emission areas, oxidants measured as ozone are more of a regional problem. The ozone health standard is 235 ug/m³. Health standard violations for ozone usually cover larger geographic areas and often occur away from the main emission sources. In 1975, a monitoring station was placed south of Oregon City at Carus. This station documented the extent of the ozone problem in the region. During these past two years, the site was moved approximately 100 yards to resolve a property dispute, and the site name was changed to Spangler Road. During 1984, the highest measurement of ozone occurred on August 8. The ozone level on that date was measured at 280 ug/m³ compared to the standard of 235 ug/m³. Figure D-3 shows the numbers of violation days and the annual arithmetic mean for that site.

Carbon Monoxide

Carbon monoxide is a colorless, odorless gas that is highly toxic. It is formed by incomplete combustion of fossil fuels. It offsets the blood's ability to carry oxygen, causing health difficulties for those with heart and other chronic diseases. It will reduce lung capacity and can impair mental abilities, and in extremely high concentrations, it can cause death.

The state of Oregon's revised implementation plan and carbon monoxide control strategy, adopted in 1982, aims to reduce carbon monoxide and achieve compliance with federal carbon monoxide 8-hour standard by December 31, 1985, in downtown Portland. Federal requirements stipulate

that areas achieve compliance for all pollutants by December 31, 1987. During these past two years, no changes were made in the revised implementation plan. The key elements of that plan are:

1. Continue the biennial auto inspection/maintenance program.
2. Operate the downtown transit mall, and purchase 77 new articulated and 75 standard coaches. This has been accomplished.
3. Restore fareless square to all hours of the day. This has been accomplished.
4. Expand bus service on I-5 freeway corridor. This has been accomplished.
5. Operate ride-share programs; continue city carpool permit program for six-hour parking meters; implement McLoughlin corridor ride-share program; pursue state legislation that would remove institutional barriers to ride-sharing. All of these items have been maintained.
6. Maintain and manage downtown parking inventory of 40,855 spaces, implemented through the services of a full-time parking manager. This is on-going.

These elements have contributed to significant reductions in the number of carbon monoxide health standard violation days and will be necessary to achieve compliance by the deadline date.

This plan replaces the original Portland area transportation control strategy. The original plan adopted in 1973 included the following elements:

1. New motor vehicle program - federal responsibility.
2. The inspection maintenance program - state responsibility.
3. Mass transit improvements - Tri-Met responsibility.
4. Traffic plan and circulation improvements - local government responsibility.

The sources of carbon monoxide within the Oregon portion of the AQMA are shown in Table D-1. The major source has been motor vehicles. Recently, with the reductions achieved by motor vehicle pollutant control and increased use of woodstoves, the overall relative contribution by motor vehicles has been reduced from 95 percent to 85 percent and is projected to go to 78 percent by 1987. Even so, motor vehicles remain the most significant source of carbon monoxide in the area. Industrial sources accounted for only 2 1/2 percent of the total carbon monoxide emissions. Obtaining additional reductions from industrial sources would have little impact on reaching standard compliance.

The effectiveness of controlling ambient carbon monoxide is studied in several ways. Currently, the entire strategy and compliance schedule is under review. A consultant was hired by the city of Portland and a draft report has been received. In part because of that report, an extensive carbon monoxide monitoring study is being conducted. Small samples of ambient air are being collected on a daily basis from 28 points within the downtown core area. This data will be used to validate the computer modeling and the consultant's report, and give a better picture of existing carbon monoxide air quality in the downtown than is afforded by the present computer modeling analysis. The data will also be used to assess future compliance with the federal standard.

Compliance is defined as not having more than one violation day of the CO standard per calendar year. While it appears that technical compliance with carbon monoxide standards was met at the CAMS station in 1984, other monitoring locations within the Portland area were not in compliance. Also, the fall of 1984 was characterized by better than average ventilation. During periods of air stagnation, carbon monoxide emissions often build to violation levels. Also, the maintenance of compliance with the ambient health standards may prove as difficult as achieving compliance.

The maintenance of compliance below the required standards would require new strategies of and by itself. Continual decreases in vehicle emissions should maintain compliance for the foreseeable future. The prospects for meeting the carbon monoxide standard will be affected by future levels of regional population and employment. During the past two years, there has been a decrease in population of 0.3 percent and a decrease in vehicle population of about 0.6 percent. Economic forecasts indicate that this geographic area should again start to grow as the economic recovery impacts Oregon.

Ambient carbon monoxide emission reductions have been achieved over the past several years. However, the trend lines in Figure D-2 suggest that there may be an increase in ambient CO as measured by the geometric mean. This may be a temporary trend similar to that observed in 1977-78, or it may be a permanent increase in the base carbon monoxide levels due to the increased use of residential wood heating, or it may be due to some other factor altogether. Further monitoring over time will be necessary to determine what are all of the factors affecting this observed increase.

Ozone (oxidants)

Ozone is the chemical that is measured to track all photochemical oxidants. Ozone is a colorless gas with a pungent metallic odor in high concentrations. It causes damage to the lungs and also to plants. Ozone affects the durability of materials, such as rubber and nylon. It is formed during the photochemical reactions between oxides of nitrogen (NO_x) and hydrocarbons. Nitrogen dioxide, a major component of NO_x , is a toxic reddish-brown gas. It is formed during combustion processes, such as in the

automobile engine, boilers, and from various industrial sources. Hydrocarbons are compounds resulting from unburned fuel, evaporative fuel losses, and industrial and commercial applications.

The ozone control strategy adopted for the state's Clean Air Act implementation plan revision contains the following elements:

1. Maintain the emission inspection program.
2. Improve traffic flow via ramp metering.
3. Improve public transit service.
4. Priority parking for carpools.
5. Improve attitude acceptability for carpooling and alternative forms of travel.
6. Reduce the volatile organic compounds from stationary sources.

The purpose of this strategy is to limit the hydrocarbon ozone precursors. While motor vehicles are responsible for a large percentage of these reactive hydrocarbons, significant reductions in the other industrial sources of these pollutants are being pursued. Significant resources continue to be expended on the control of volatile organic compounds from stationary sources. These controls include primary vapor recovery from fuel storage tanks for fleet and retail gas storage. Controls on shipment of fuel and other petroleum products have also been incorporated. Transportation improvements, such as speeding traffic flow, have continued to be added. The completion of the Banfield Light Rail project and the associated I-84 improvements will also accrue emission reductions of the chemicals which mix to form ozone.

Table D-2 lists the relative contribution for hydrocarbon emissions between mobile and industrial sources for the Portland metropolitan area. Table D-3 lists the relative contributions for hydrocarbons among vehicle categories. Approximately 90 percent of the motor vehicle hydrocarbon emissions are from the vehicle classes subject to the emission inspection program. The ozone control strategy projects that the I/M program and other control methods will result in a 7 percent reduction by 1987 from the baseline year of 1980. Compliance with the national health standard is projected by December 31, 1987.

Technical compliance was achieved during this past three-year period with only three measurements above the standard over the three-year period. This just fits the definition of compliance with the ambient standard. However, in reviewing the meteorological data for 1984, there is a strong indication that the technical compliance cannot be maintained without continued strong enforcement of the elements of the control strategy.

Favorable meteorology and less than expected economic growth have combined to accelerate progress toward meeting the ambient standards. The ozone

standard is, however, more industrial sensitive due to the fact that motor vehicles, while being a major source, are not the source of the majority of the emissions. The issues of growth cushion, industrial trade-offs, and improving emission reduction from the inspection program are extremely important. As this area of the country continues to rebound from the economic lull of the past several years, the elements of the growth cushion and the emission control program will become more important in order to continue achieving compliance with the national ambient air quality standard.

Table D-1

Summary of Carbon Monoxide Emissions (tons/year)
 Within the Oregon Portion of the
 Portland-Vancouver Interstate AQMA*

<u>Source</u>	<u>1980</u>	<u>1983</u>	<u>1987 **</u>
Industrial and Other Area Sources	14,260	10,235	14,857
Motor Vehicles	415,738	338,787	342,361
Woodstoves	47,260	55,630	79,000
Total	477,258	404,652	436,218

* Source - Reasonable Further Progress Report to EPA, October 1984.

** Projected in 1982 and not revised in 1984

Table D-2

Summary of Hydrocarbon Emissions (Kg/day)
 Within the Oregon Portion of the
 Portland-Vancouver Interstate AQMA*

<u>Emission Source</u>	<u>1980</u>	<u>1983</u>	<u>1987 **</u>
Industrial and Area Stationary Sources	87,316	60,613	75,548
Mobile Sources	78,992	64,842	46,539
Total	166,308	125,455	122,087

* Source - Reasonable Further Progress Report to EPA - October 1984.

** Projected in 1982 and not revised in 1984.

Table D-3

Summary of Relative Hydrocarbon
 Contributions Among Vehicle Categories
 Portland Metropolitan Area
 (Tons/Year)*

	<u>Hydrocarbons (organics)</u>
Automobiles	15,436
Light Duty Gas Trucks	5,013
Heavy Duty Diesel Trucks	1,002
Heavy Duty Gasoline Trucks	1,074
Off Road Mobile*	943
TOTAL All Mobile Sources	23,648
INDUSTRIAL SOURCES (for reference)	21,572

*Oregon Emission Inventory, 1983.

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Figure D-1

CARBON MONOXIDE NUMBER OF VIOLATION DAYS

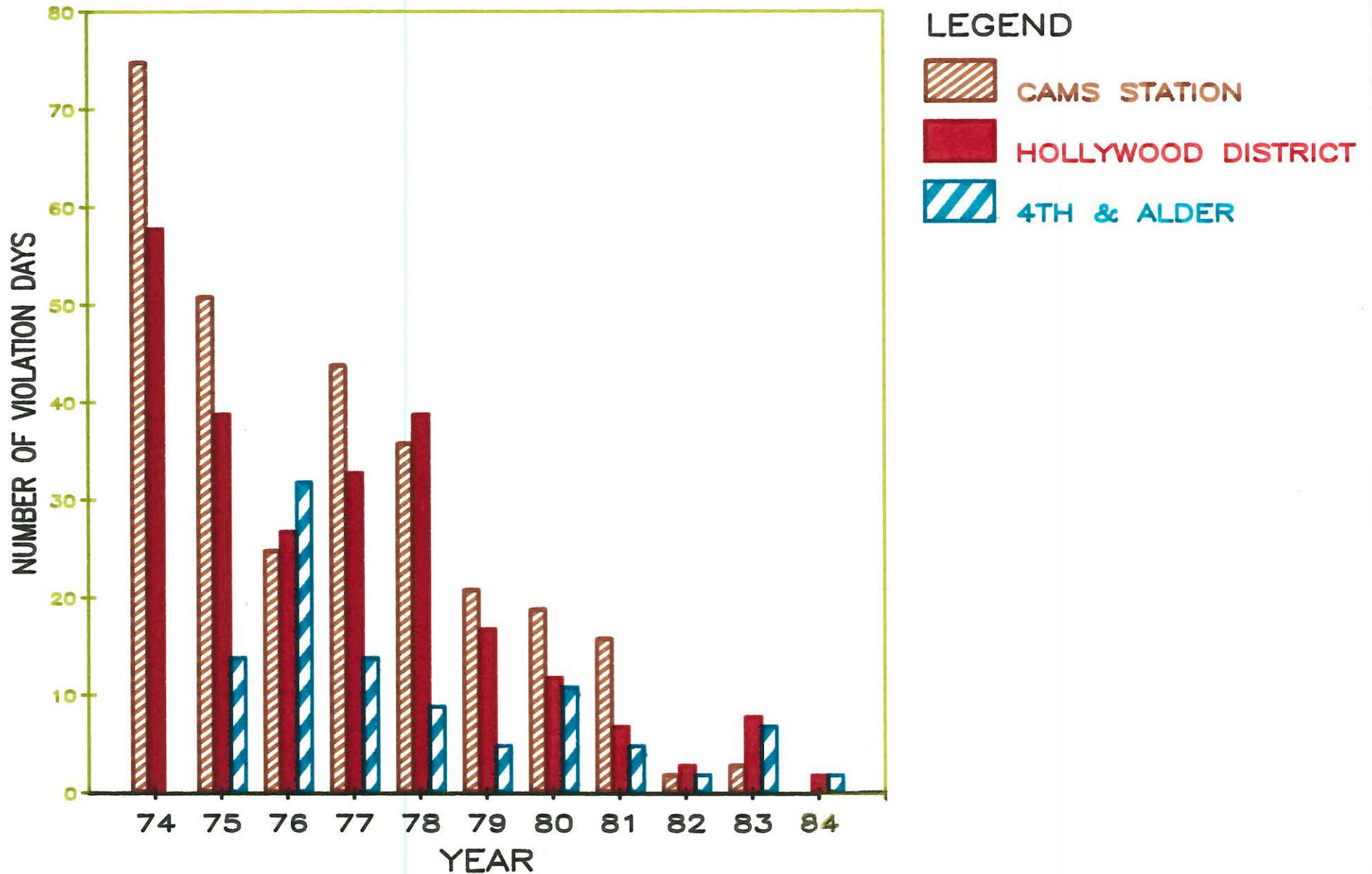


Figure D-2

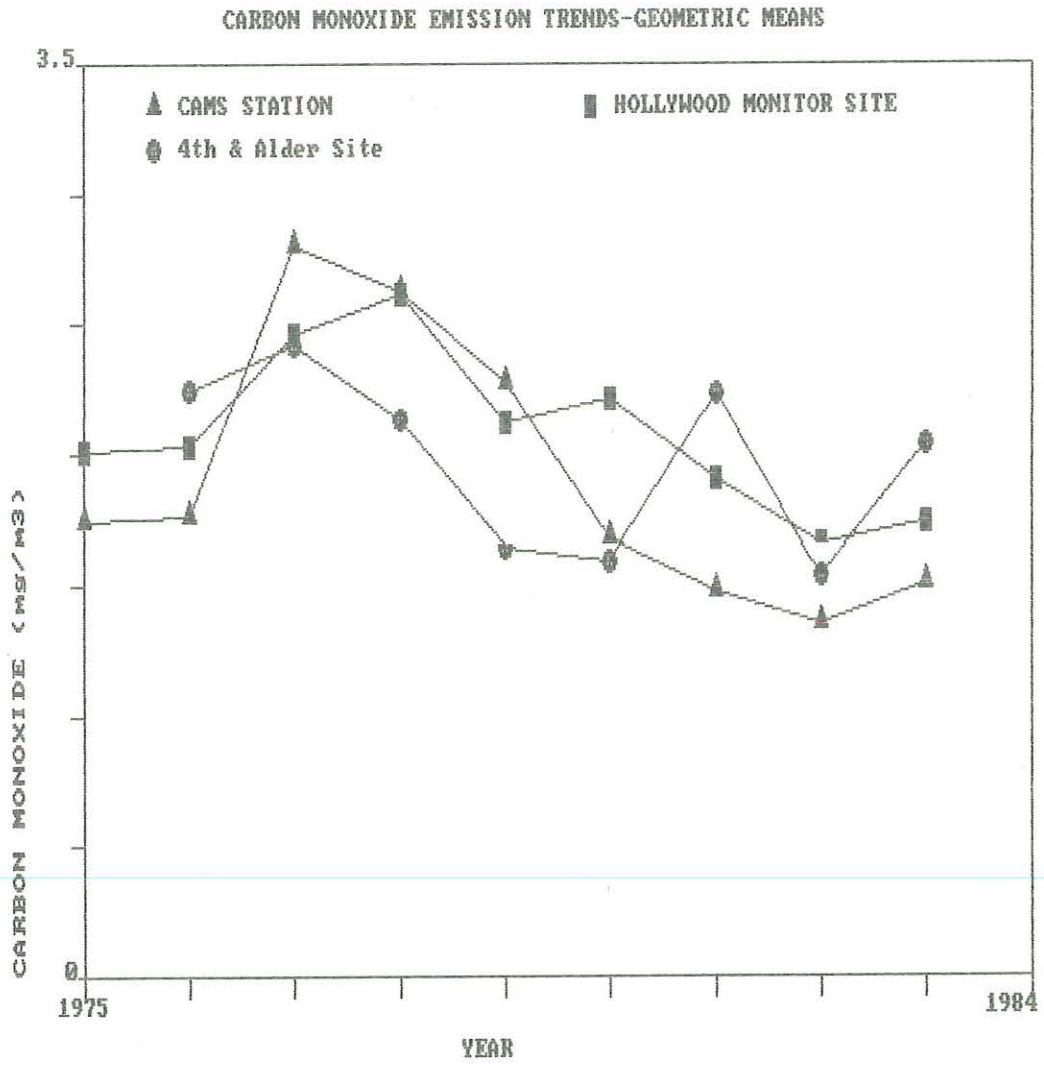
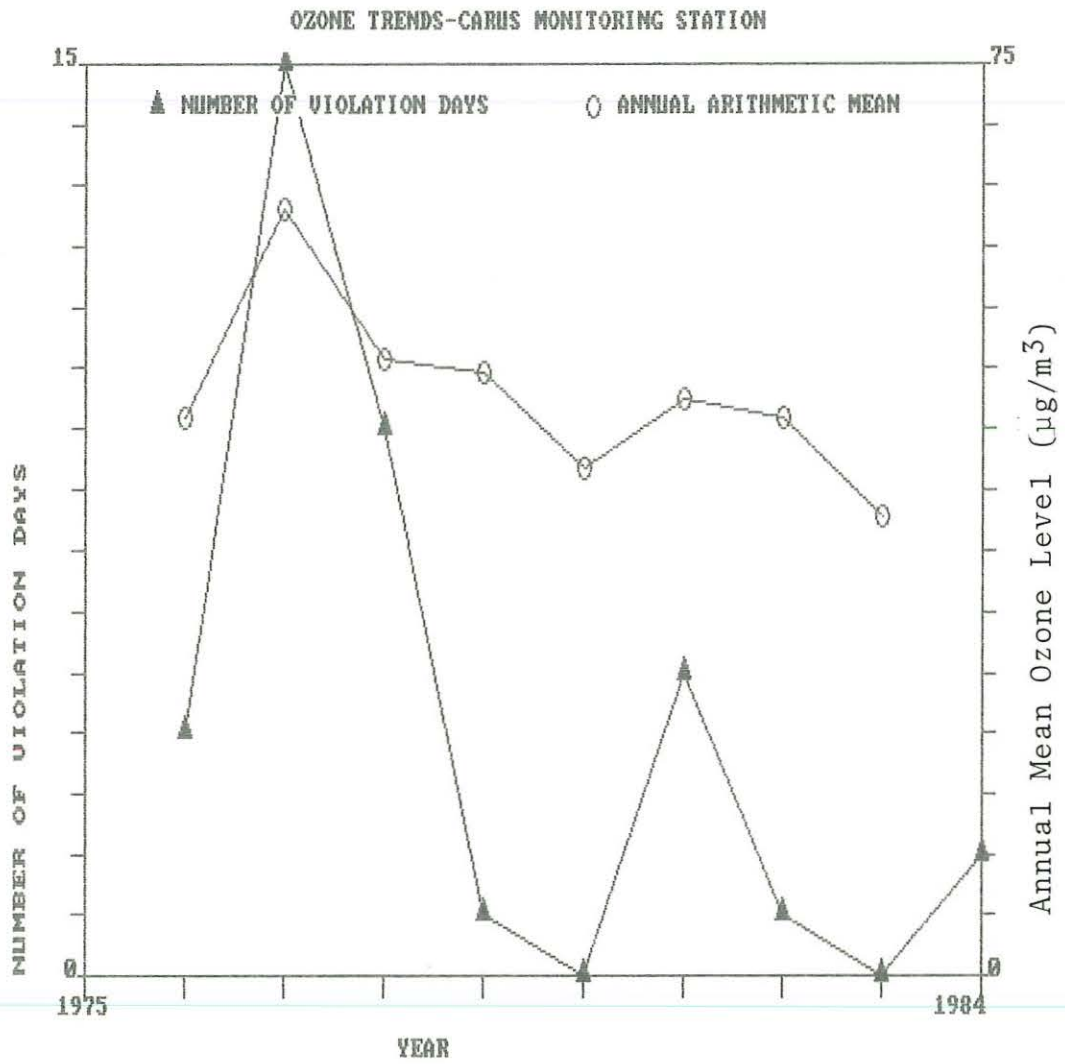


Figure D-3



Population Growth and Traffic Pattern Trends

In 1974, the Oregon Legislature established the boundaries for the Vehicle Inspection Program as being identical to the existing Metropolitan Service District (MSD) boundaries, covering portions of Multnomah, Clackamas and Washington Counties. Vehicles registered within the MSD are required to pass the inspection prior to vehicle registration. Following a vote during the May 1978 primary election, the MSD was reorganized to include a smaller segment of Washington County and a larger part of Clackamas County. The Legislature adopted the current MSD boundaries as the boundaries for the Vehicle Inspection Program, effective January 1, 1980. This section reviews trends in population and traffic patterns associated with the program's geographic area.

Population

The MSD covers portions of Multnomah, Washington and Clackamas Counties. The Metropolitan Service District estimates its population in 1983 at 935,000. Since the MSD boundary was altered on January 1, 1979, only a few years of comparable population data is available (Table E-1). Growth is seen between 1978-81, but a population loss occurred between 1981-83.

Table E-1

MSD Population Since 1979

<u>Year</u>	<u>Population</u>	<u>Growth</u>
1979	906,800	----
1980	938,571	31,771
1981	947,890	9,319
1983	935,000	-12,890

To get a more complete view of MSD population trends, the tri-county (Multnomah, Clackamas and Washington) population can be examined. Table E-2 provides a good estimate of the MSD population growth rate since approximately 88 percent of the tri-county residents live within the MSD.

Table E-2

Population Distribution*
in the Portland Metropolitan Area

<u>Year</u>	<u>Multnomah</u>	<u>Washington</u>	<u>Clackamas</u>	<u>Clark Co., WA</u>	<u>Total of 3 Oregon Counties</u>	<u>Grand Total</u>
1970	554,668(55%)	157,920(15%)	166,088(16%)	128,454(13%)	878,676	1,007,130
1971	559,700(54%)	169,660(16%)	174,900(17%)	130,100(12%)	904,260	1,034,360
1972	560,000(53%)	178,300(16%)	178,400(17%)	132,800(13%)	916,700	1,049,500
1973	556,000(52%)	182,500(17%)	185,600(17%)	135,200(13%)	924,100	1,059,300
1974	544,900(51%)	189,400(18%)	196,900(18%)	140,300(13%)	931,200	1,071,500
1975	547,900(51%)	190,900(18%)	202,900(19%)	149,000(14%)	941,700	1,090,700
1976	553,000(50%)	196,000(18%)	205,800(19%)	154,300(14%)	954,800	1,109,100
1977	556,400(49%)	200,800(18%)	211,000(19%)	164,000(14%)	968,200	1,132,200
1978	549,000(48%)	217,000(19%)	220,000(19%)	169,400(15%)	986,000	1,155,900
1979	556,600(47%)	225,100(19%)	231,000(19%)	178,900(15%)	1,012,700	1,191,600
1980	562,300(45%)	247,800(20%)	243,000(19%)	192,227(15%)	1,053,100	1,245,327
1981	561,400(45%)	253,800(20%)	246,100(19%)	195,800(15%)	1,061,300	1,257,100
1982	564,500(45%)	259,700(20%)	245,100(19%)	198,600(16%)	1,069,300	1,267,900
1983	557,500(44%)	257,400(20%)	243,600(19%)	200,000(16%)	1,058,500	1,258,500
Average Growth/Year (1970-79)	0.03%	4.7%	4.3%	4.3%	1.6%	2.0%
Growth/Year (1979-81)	0.4%	6.3%	3.2%	4.7%	2.4%	2.7%
Growth/Year (1981-83)	-0.3%	0.7%	-0.5%	1.1%	-0.1%	0.05%
Average Growth/Year (1970-1983)	0.04%	4.8%	3.6%	4.3%	1.6%	1.9%

* Data from Portland State University Center for Population Research and Census

The Multnomah County population has remained essentially the same since 1970, while Clackamas and Washington Counties have had population increases of 46 percent and 63 percent, respectively. Clark County, Washington, has also shown a substantial growth of 56 percent since 1970. As compared to the greater Portland metropolitan area, the Multnomah County portion of population has decreased from 55 percent in 1970 to the current portion of 44 percent. Thus, the population of the metropolitan area is increasing, but not evenly throughout the area. The fastest growth is occurring in the suburbs.

Overall, population growth in the tri-counties since 1970 has been at an average rate of 1.6 percent per year. The growth rate was much higher between 1977-80, averaging 2.9 percent per year. Growth continued at a slower rate in 1981 and 1982, but then actually took a drop in 1983. This likely represents a temporary population loss due to extended economic hard times.

A look at working population will give some insight into traffic trends during week day rush hours. Probably the best indicator of working population is income tax filings by county, from the Oregon Department of Revenue. This is summarized in Table E-3 for the metropolitan area. The numbers in parentheses show the fraction of total population that is paying Oregon income tax.

Table E-3

Oregon State Income Tax Filings

<u>County</u>	<u>1970 Returns</u>	<u>1979 Returns</u>	<u>1980 Returns</u>	<u>1981 Returns</u>	<u>1982 Returns</u>	<u>(1970-82) Growth/Yr</u>
Multnomah	204,500(37%)	250,546(45%)	249,414(44%)	246,450(44%)	238,028(42%)	1.4%
Washington	61,987(39%)	101,599(45%)	105,431(42%)	106,364(42%)	102,223(39%)	5.4%
Clackamas	53,150(32%)	95,180(41%)	97,881(40%)	97,787(40%)	94,530(39%)	6.5%
Clark Co., WA	12,700(10%)	25,270(14%)	25,306(13%)	24,692(13%)	23,161(12%)	6.8%
Total of 3 Oregon Counties	319,637(36%)	447,325(44%)	452,726(43%)	450,601(42%)	434,781(41%)	3.0%
Grand Total	332,337	472,595	478,032	475,293	457,942	3.1%

Overall, the growth in working population (Table E-3) in the MSD is almost double the growth of the total population (Table E-2) between 1970-82. However, in the last four years 1979-82, this trend was reversed, probably as a result of high Portland area unemployment. Table E-4 shows the annual average unemployment rates for the Portland metropolitan area for the last thirteen years. If unemployment rate is a forecaster of percent of population employed, the working population for 1983-84 should show significant increases when that data becomes available.

Table E-4

Unemployment Rates
Portland Metropolitan Area

<u>Period</u>	<u>Rate</u>
1970	6.3
1971	7.1
1972	6.1
1973	5.4
1974	6.2
1975	9.5
1976	8.7
1977	6.8
1978	5.2
1979	5.4
1980	6.3
1981	8.0
1982	10.1
1983	10.1
1984	8.2

Vehicle Registration

Table E-5 shows passenger car registration and population figures for the ten Oregon counties with the largest number of passenger vehicle registrations. Overall, since 1970, increases have occurred in both vehicle registrations and in population. The data shows that vehicle registration in almost all counties has been growing at a rate of over twice that of the population. The highest growth rates both in population and in vehicle registrations are occurring in Deschutes, Clackamas and Washington Counties. Multnomah County, the state's most populous, had a minimal population increase but still shows significant growth in vehicle registration.

However, between 1981-83, the population and vehicle registrations generally began to fall. Washington County was the only one of the top ten counties that avoided declines in both population and registration, while Deschutes showed loss of population but a growth of vehicle registration. All other top ten counties had drops in both categories.

Morning Traffic Trends

Morning traffic trends can provide a feel for the business development throughout the tri-county area. Vehicles travelling between 6-11 a.m. generally represent morning business traffic.

Figure E-1 gives the average morning week day traffic into and out of downtown Portland for June, 1982. Besides displaying the total vehicle counts, the figure shows the growth in traffic count which has occurred since 1970, and the growth in this count in the last two years.

Morning traffic counts have substantially increased over the past fourteen years. The largest increase by far occurred at the Vista Ridge Tunnel (Highway 26), reflecting the population and business activity increases in Washington County. Data for 1982-84 show this traffic volume continuing to increase even under the 1982-84 economic recession.

Of some concern to Oregonians is the influx of vehicles from Vancouver, Washington, where cars are not required to pass an air pollution emissions test. The morning southbound traffic counts at the two Interstate bridges provides an indication of the number of people residing in Washington that work in Oregon. This traffic count data compares very well with the Oregon income tax filings for Clark County residents shown in Table E-3.

Figure E-1 shows that a great share of the morning traffic entering Oregon from Washington stops in Portland. Each morning, about 24,000 vehicles enter Oregon over the I-5 and I-205 Bridges, while only about 5,000 vehicles are found going south on I-5 at Wilsonville. The shopping centers and industrial areas along the Columbia River are expected to attract a large portion of these vehicles.

A major change in traffic routing in the metropolitan area has resulted from two recent events. First, the I-205 Glen Jackson Bridge across the Columbia River was opened on December 15, 1982, diverting a large share of morning traffic from I-5. This reduced morning I-5 bridge traffic by about 20 percent. However, the total morning traffic crossing the Columbia River from both bridges has increased about 20 percent in the last two years, with a slightly greater increase in north compared to southbound traffic.

The second traffic pattern change resulted from Banfield Freeway construction which began in June 1982 and disrupted east-west traffic flow on the east side of Portland. As a result, the Oregon State Highway Division removed the Banfield Traffic counter, resulting in a loss of continuity in east side traffic data and an inability to make a reasonable estimate of east side business trends.

Interstate bridge traffic counts show approximately a 67 percent increase in southbound traffic over the past fourteen years. This growth in bridge traffic is of the same magnitude as the growth rate in vehicle registration in the Portland tri-county area (46 percent). This indicates that bridge traffic has not inordinately increased in the last fourteen years. The actual out-of-state influx of approximately 24,000 vehicles each morning is only about 3 percent of the vehicle population in the Portland tri-county area. This does not represent a major impact in terms of pollution or traffic to the Portland area. The 24,000 vehicles represent 14 percent of the registered vehicles in Clark County Washington.*

* Data from Department of Licensing, Olympia, Washington.

Table E-5

Vehicle Registration and Population by County

County	Estimated 1981 Passenger Car Registrations	Estimated 1983 Passenger Car Registrations	Registration Growth Rate/Year 1970-1981	Registration Growth Rate/Year 1981-1983	Estimated 1981 Population	Estimated 1983 Population	Population Growth Rate/Year 1970-81	Population Growth Rate/Year 1981-83
1. Multnomah	377,304	364,687	1.3%	-1.7%	561,400	557,500	0.1%	-0.3%
2. Lane (Eugene)	210,496	207,613	5.8%	-0.7%	275,000	267,900	2.6%	-1.3%
3. Clackamas (Portland/ Oregon City)	189,013	191,886	10.1%	0.7%	246,100	243,600	4.3%	-0.5%
4. Washington (Portland/ Beaverton)	180,969	185,973	9.6%	1.4%	253,800	257,400	5.5%	0.7%
5. Marion (Salem)	157,861	160,456	6.8%	0.8%	209,730	205,900	3.4%	-0.9%
6. Jackson (Medford)	112,544	112,968	8.1%	0.2%	133,700	133,350	3.8%	-0.1%
7. Douglas (Roseburg)	76,253	76,159	6.5%	-0.1%	92,300	90,400	2.6%	-1.0%
8. Linn (Albany)	71,367	71,217	5.8%	-0.1%	90,500	89,350	2.4%	-0.6%
9. Coos (Coos Bay)	49,387	48,897	4.2%	-0.5%	63,300	61,450	1.1%	-1.5%
10. Deschutes (Bend)	54,989	57,450	15.6%	2.2%	63,650	63,300	9.9%	-0.3%

Vehicles From Outside the Vehicle Inspection Boundaries

The vehicle inspection boundaries have been legislatively established as the Metropolitan Service District (MSD) boundaries. This area is shown in Figure E-2, along with the average daily traffic (ADT) across those boundaries for major thoroughfares. During 1981, there was a total of 254,600 ADT on these main roads. Assuming a worst case, that all of the traffic on these roads is registered outside the MSD, then 19 percent of the passenger vehicles operating within the MSD would not have been tested. This does not take into account through-traffic.

The Department did an additional study of Oregon license plates observed in parking lots within the Portland area to gauge out-of-area impact. This study shows that about 12 percent of those Oregon licensed vehicles were from outside the MSD area.

Vehicle Usage

Pollution emitted into the Portland airshed from vehicles is a function of the amount of pollution emitted per mile and the total miles travelled. Table E-6 shows the trend of vehicle usage in the Portland area in the last nine years. The table gives the estimated miles travelled per year on the primary and secondary streets in the tri-county area. There has been an overall increase of 30 percent in traffic in the last eight years. Note in the years 1979-80 there was little change in traffic volume, but in 1981 volumes again began to show substantial increases. Many factors, including economic outlook could have caused such a reaction. One of the stronger factors may have been the increased fuel prices in 1979-80 with the subsequent leveling off of prices in 1981.

Table E-6

Annual Vehicle Miles Portland Metropolitan Area

<u>Year</u>	<u>Multnomah</u>	<u>Clackamas</u>	<u>Washington</u>	<u>Total</u>	<u>Change in Total Miles</u>
1975	1,518,000,000	597,000,000	686,000,000	2,801,000,000	- - - - -
1976	1,619,000,000	659,000,000	751,000,000	3,029,000,000	+228,000,000
1977	1,682,000,000	708,000,000	796,000,000	3,186,000,000	+157,000,000
1978	1,724,000,000	782,000,000	870,000,000	3,376,000,000	+190,000,000
1979	1,713,000,000	792,000,000	855,000,000	3,362,000,000	- 14,000,000
1980	1,678,000,000	776,000,000	911,000,000	3,365,000,000	3,000,000
1981	1,731,000,000	806,000,000	941,000,000	3,478,000,000	113,000,000
1982	1,732,000,000	826,000,000	966,000,000	3,524,000,000	+ 86,000,000
1983	1,726,000,000	907,000,000	1,010,000,000	3,643,000,000	+119,000,000

Another of the factors affecting vehicle usage in the Portland metropolitan area is bus ridership. Table E-7 shows the number of boarding passengers in each of the last fourteen fiscal years.

Table E-7

Tri-Met Bus Ridership

<u>Fiscal Year</u>	<u>Number of Boarding Passengers</u>	<u>Increase in Number of Passengers</u>
1970-71	20,730,000	-----
1971-72	21,350,000	620,000
1972-73	22,170,000	820,000
1973-74	25,480,000	3,310,000
1974-75	28,360,000	2,880,000
1975-76	35,210,000	6,850,000
1976-77	38,080,000	2,870,000
1977-78	41,570,000	3,490,000
1978-79	42,250,000	680,000
1979-80	50,670,000	8,420,000
1980-81	48,090,000	-2,580,000
1981-82	47,090,000	-1,000,000
1982-83	49,320,000	2,230,000
1983-84	49,320,000	- 0 -

Between 1982-84 ridership again increased.

Bus ridership increased every year between 1970-80, however, between 1980-82 a drop in ridership was shown. Phil Colombo of Tri-Met suggested a couple reasons for such fluctuations: 1) fluctuations in fuel prices; 2) fluctuations in employment.

Summary

The population of the MSD (also the Vehicle Inspection Program boundaries) is estimated at 935,000. The annual growth rate over the last thirteen years was 1.6 percent per year. In the last few years the population growth has slowed and for the first time in thirteen years the population declined between 1982-83. The past growth was mainly occurring in the suburban areas. Multnomah County has shown no significant net population gain in the last eleven years.

Between 1970-80 working population in the metropolitan area had grown at a rate of 3.4 percent per year. However, in both 1981 and 1982 working population dropped. Unemployment rates peaked in 1982, leveled off in 1983 and appear to be dropping in 1984.

The number of registered vehicles in the metropolitan area has fluctuated with population, increasing between 1970-81 and showing a drop between 1981-83.

Morning traffic (6 a.m. - 11 a.m.) on major roads in the metropolitan area over the last 13 years has increased. There continues to be a trend of greater growth in the suburbs relative to downtown. There is no clear

indication of reduction in morning traffic during the 1982-83 recession years. Every week day morning approximately 24,000 (about 3% of the total ADT) vehicles enter Oregon across the two interstate bridges (I-5 and I-205). Morning traffic across the bridges has increased at the rate of 5 percent per year over the past fourteen years.

Currently it is estimated about 12 percent of Oregon registered vehicles operating within the MSD come from outside the area. This ratio has not changed significantly in the past few years.

Overall, the vehicle usage (vehicle miles travelled) in the metropolitan area has increased by an average of 4 percent per year in the last eight years. Between 1979-80 there was little change in traffic volume, but between 1981-83 a significant increase was again seen.

AVERAGE WEEKDAY FLOW OF VEHICLES ON
PORTLAND FREEWAY SYSTEM
6 AM - 11 AM

JUNE, 1984

Interstate Bridge (I-5)

<u>North</u>	<u>South</u>
2,489	4,832
3,692	7,165
8,588	16,666
(Up 26% since 1970, down 22% since 1982)	(Up 17% since 1970, down 17% since 1982)

Minnesota Freeway (I-5)

<u>North</u>	<u>South</u>
7,489	9,550
2,500	3,189
13,519	17,241
(Up 60% since 1970, down 5% since 1982)	(Up 59% since 1970, down 4% since 1982)

Fremont Bridge

<u>North</u>	<u>South</u>
(est) 11,180	15,097
(Up 16% since 1980)	(Up 16% since 1980)

Glen Jackson Bridge (I-205)

<u>North</u>	<u>South</u>
4,877	6,995

Banfield Freeway

Freeway construction vehicle counters removed

Vista Ridge Tunnel

<u>West</u>	<u>East</u>
11,160	19,835
(Up 171% since 1970, up 5% since 1982)	(Up 151% since 1970, up 4% since 1982)

Baldock Freeway (I-5)

<u>North</u>	<u>South</u>
3,105	2,674
547	472
6,088	5,244
(Up 17% since 1982)	(Up 12% since 1982)

I-205 at Stafford Road

<u>West</u>	<u>East</u>
5,349	7,557
(Up 93% since 1982)	(Up 76% since 1982)

KEY

Numbers at points represent:

1. Oregon passenger cars
2. Out-of-state passenger cars
3. Total Vehicle Count-6 am to 11 am (Numbers in parenthesis show growth in traffic count)

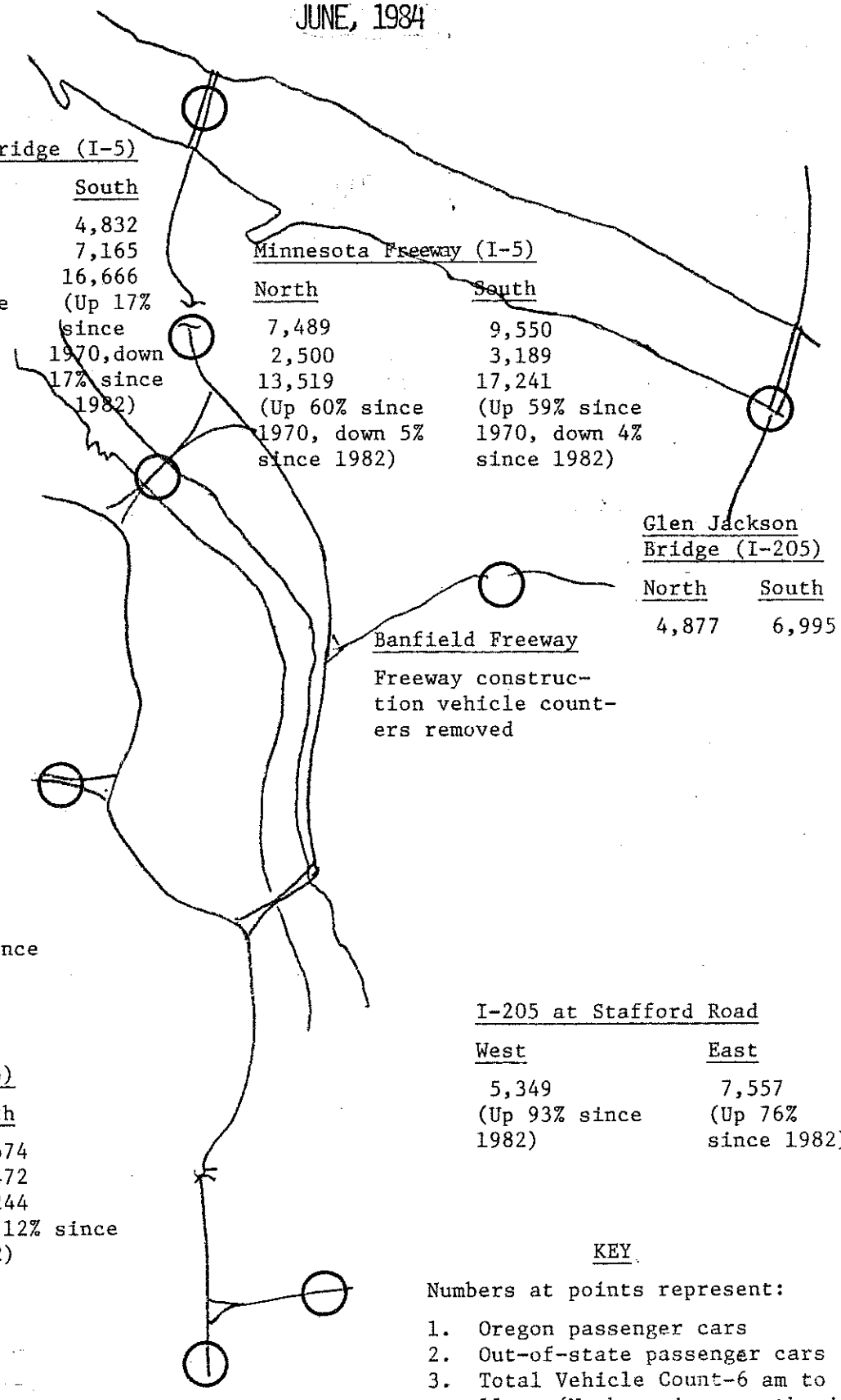
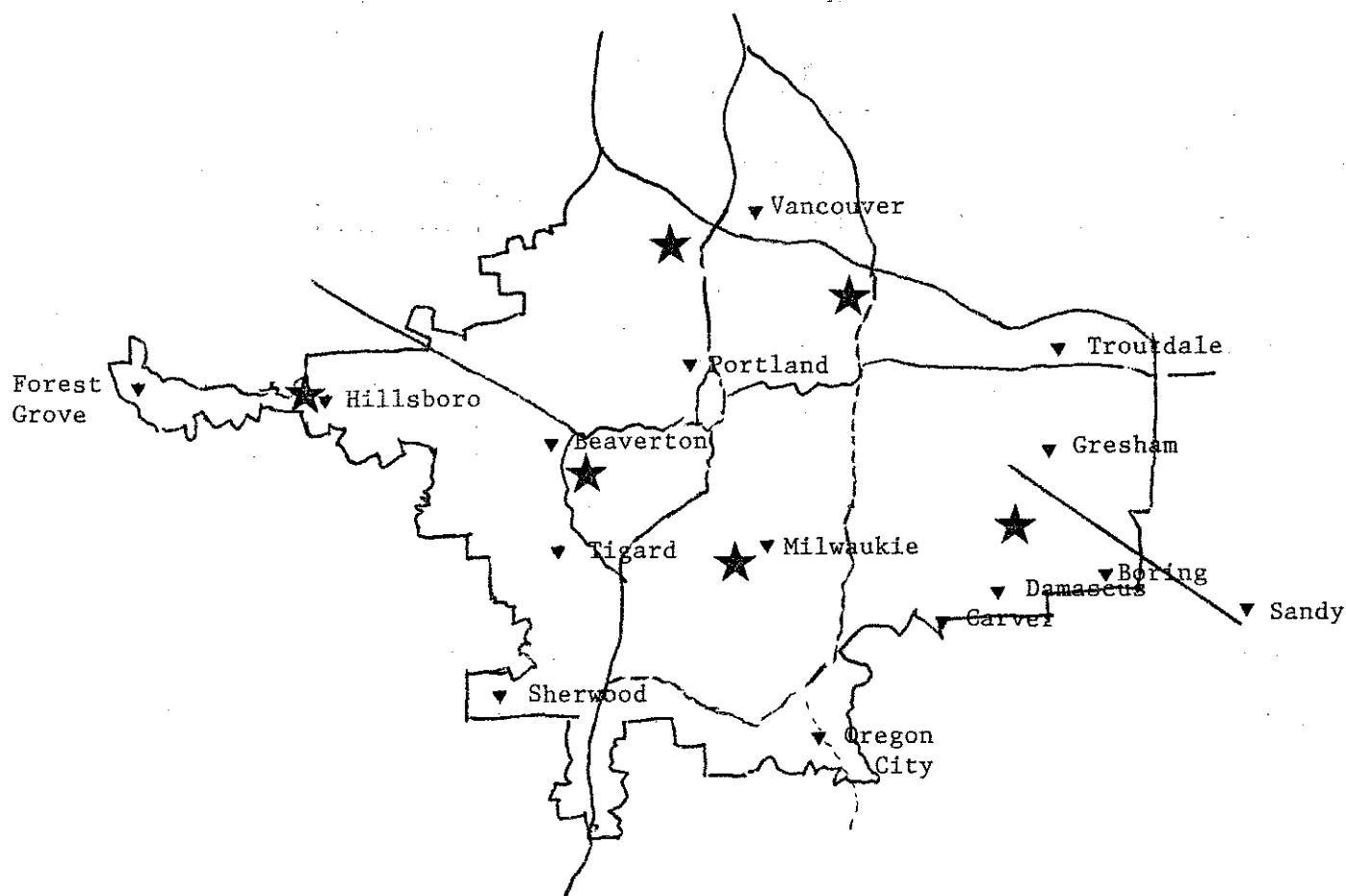


Figure E-2

AVERAGE DAILY TRAFFIC (ADT)
ACROSS CURRENT VEHICLE INSPECTION BOUNDARIES



AVERAGE DAILY TRAFFIC AT MSD BOUNDARIES

	1977	1979	1981	1983
I-5/Interstate Bridge (north boundary)	97,300	100,800	103,400	82,800
I-84N/Jordan Interchange (east bound.)	13,300	13,700	13,700	14,000
US 26/Kelso Road (east boundary)	12,500	13,100	13,700	13,900
US 99E/South End Rd. (south boundary)	9,200	9,300	9,000	8,800
I-5/Wilsonville Interchange (south b.)	43,400	48,100	48,500	51,700
US 99W/Kruger Road (south boundary)	14,200	14,700	14,600	17,200
US 26/Cornelius Pass Rd. (west bound.)	11,600	12,300	14,000	13,800
US 30/Portland city limits (north b.)	14,200	14,800	14,700	14,900
I-205/Interstate Bridge (north bound.)	-0-	-0-	-0-	37,500
TOTALS	215,700	226,800	231,600	254,600

Inspection/Maintenance Programs by Geographic Area

The following are brief, thumbnail descriptions of inspection/maintenance programs operating or scheduled to begin operation in the United States. Figure F-1 is a U.S. map showing which states and locales have programs. Cost figures reported are based upon charges to the motorist, and do not include program costs funded by the individual State general fund unless specifically cited.

The West.Alaska

Alaska has a decentralized inspection/maintenance program scheduled to start in July 1985. It will be operated in the Anchorage and Fairbanks areas. No vehicle registration is to be issued unless a vehicle has been inspected. All vehicles are included in the inspection program.

Arizona

Arizona has a centralized private contractor inspection/maintenance program. Mandatory operation of the Arizona program began in January 1976. The program operates in the Phoenix/Tuscon metropolitan area. The system is enforced via the registration process. The inspection fee to the motorist is \$5.44 and is paid to the contractor. The current contract is under renegotiation. Overview of the contractor is funded from the State general fund. All vehicles through 13 years of age, except for diesel vehicles, are included in the inspection program.

California

California has a decentralized inspection/maintenance program. The program began operation in March 1984. The program operates in the Sacramento, San Francisco Bay, Fresno, Ventura, South Coast Basin (Los Angeles) and San Diego areas. The program is biennial in nature. Testing fees are set by the individual inspection stations and range from \$19 to \$35. Gasoline-powered passenger vehicles and trucks up to 20 years of age and up to 8,500 pounds gross vehicle weight rating are included.

Colorado

Colorado operates an annual decentralized inspection/maintenance program in the Front Range (Denver, Colorado Springs and Fort Collins) areas. The program operation began in 1982. Test fee is \$10. The inspection program covers vehicles 1968 and newer, up to 10,000 pounds gross vehicle weight rating.

Idaho

Idaho operates an annual decentralized inspection/maintenance program in the Boise (Ada County) area. The program started in August 1984. The test fee ranges between \$3 and \$10 and averages \$9.73. Three dollars goes to the County to cover administrative costs. Inspection is required for all light duty vehicles that are 1970 and newer.

Nevada

Nevada has an annual decentralized inspection program in the Las Vegas, Reno and Carson City areas. Test fee is set by market competition and averages about \$10. The inspection program covers about 1965 and newer vehicles, up through 8,500 pounds gross vehicle weight rating.

New Mexico

New Mexico was operating an annual centralized contractor operation, which started in January 1983 in the Albuquerque area. The funding mechanism was ruled invalid by the New Mexico courts. This action effectively canceled the program. Currently, alternative funding mechanisms are under study.

Oregon

Oregon operates a biennial centralized program in the greater Portland metropolitan area. The program started operation in July 1975. All gasoline-powered motor vehicles, regardless of weight rating, are inspected. Light duty diesel vehicles are inspected. The inspection fee is \$7.00. Voters in the Medford area rejected in 1984 a county ordinance establishing a similar program.

Utah

Utah operates an annual centralized program in the Salt Lake and Davis County areas. The program began operation in April 1984. The inspection fee is \$9.00. All 1968 and newer vehicles are included in the inspection program.

Washington

Washington has an annual centralized contractor operated inspection/maintenance program operating in the greater Seattle area. The program started operation in January 1982. The test fee is \$10. For the Seattle area, \$9.99 goes to the contractor. Overview of the contractor is funded by the State general fund. The program covers all vehicles that are up to 14 years of age. Extension of the I/M program to the Spokane area is scheduled for July 1985.

The Midwest

Illinois

Illinois adopted legislation to implement an annual centralized contractor operated inspection/maintenance program in the Chicago and St. Louis areas. Projected startup date is January 1, 1986.

Indiana

Indiana has contracted the biennial inspection to the Indiana Vocational Technical College. The program started in June of 1984. There is no test fee associated with the inspection. The program is biennial in nature and requires vehicle model years through the last 12 years up to 10,000 pounds gross vehicle weight rating to be inspected. The program area is limited to the Chicago and Louisville suburban areas.

Michigan

Michigan has authorized a decentralized annual inspection program for the greater Detroit area. The program is scheduled to begin operation during the last part of the summer of 1985. The inspection fee is set at \$10.

Missouri

Missouri has an annual decentralized inspection/maintenance program which began operation in January 1984. The test used is an idle test. There is an inspection for pollution control equipment. The test fee is \$4.50. The program covers 1968 and newer vehicles, up to 6,000 pounds gross vehicle weight rating.

Ohio

Ohio has designated Cincinnati and Cleveland as nonattainment areas. There is a scheduled program starting date of 1987. Program details and enabling legislation are not yet in place.

Wisconsin

Wisconsin has a central contractor-operated inspection/maintenance program operating in the greater Milwaukee area. There is no test fee. They use a loaded mode and idle test with the loaded portion of the test being used for vehicle preconditioning. All vehicles less than 15 years of age and under 8,000 gross vehicle weight rating are required to go through the inspection.

The South

Alabama

There is currently no program in Alabama. The Birmingham area is in

nonattainment of federal air quality standards, and an inspection program may be required. The current status of such a requirement is under study.

Georgia

Georgia has an annual decentralized inspection/maintenance program operating in the Atlanta area. In this program the idle test is used. Test fee is \$3.00. Vehicles 10 years of age and newer and under 6,000 pounds gross weight rating are required to be inspected.

Kentucky

Kentucky has a centralized contractor inspection/maintenance program operating in the Louisville area. The test fee is \$6.00. All vehicles up to 10,000 pounds gross vehicle weight rating are required to be inspected. The Kentucky suburban area of Cincinnati, Ohio, is also in nonattainment, but does not now have an operating program.

Louisiana

Louisiana does not have an inspection/maintenance program. The Baton Rouge area is in nonattainment and is likely to have an I/M program mandated.

North Carolina

North Carolina has incorporated an inspection/maintenance program in its annual decentralized safety inspection. The program is limited to the Charlotte area. The inspection fee is \$12. The program covers all vehicles 12 years old and newer.

Oklahoma

Oklahoma does not have an inspection/maintenance program. The Tulsa area is in nonattainment and may be required to implement a program.

Tennessee

Tennessee has two different operating inspection/maintenance programs. In the Nashville area, there is an annual centralized contractor operated program. The program began operation in 1984. A \$7.00 fee is charged. It covers vehicles 12 years of age or newer and under 8,500 pounds gross vehicle weight rating. An annual centralized locally-run program is operating in the Memphis area. This program began operation in August 1983. No fee is charged, but the program covers all model year vehicles.

Texas

Texas is operating an annual emission control (tampering only) inspection in the Harris County (Houston) area. The program began operation in July

1984. Mandatory repairs will not be required until July 1985. The El Paso and Dallas/Fort Worth areas are under nonattainment. No inspection/maintenance program is yet proposed for those areas.

The East

Connecticut

Connecticut has an annual statewide contractor operated inspection/maintenance program. The program began operation in January 1983. The program is enforced via window stickers, as opposed to using the state's registration system. The test fee is \$10. Vehicles covered include 1968 and newer vehicles, up to 10,000 pounds gross vehicle weight rating.

Delaware

Delaware operates a state operated annual centralized inspection/maintenance program in the New Castle County (Wilmington) area. There is no test fee. The idle test is used. The inspection requirement covers vehicles with model years 1966 and newer and rated under 8,500 pounds.

Maryland

Maryland has an annual centralized contractor-operated program. The program began operation in February of 1984. The program is limited to the greater Baltimore/Washington, D.C. area. The test fee is \$9.00. All vehicles within the last 12 model years, up to 10,000 pounds gross vehicle weight rating are required to be inspected.

Massachusetts

Massachusetts has an annual decentralized program operating statewide. The program began operation in April of 1983. The system uses a window sticker enforcement system. The test fee is \$10. Vehicles up to 15 years of age and under 8,000 pounds gross vehicle weight rating are included.

New Jersey

New Jersey has the oldest inspection/maintenance program in the United States. It is a statewide annual state-operated centralized program which began operation in February of 1974. The program uses an idle test and has been incorporated into the state's safety inspection system. Test fee is included in the registration charge.

New York

New York has an annual decentralized inspection program operating in the New York City metropolitan area. The program began operation in January 1981. Tampering inspection was included for 1984 for newer vehicles on July 1984. The inspection fee is \$6.50. The program includes all vehicles up to 8,500 pounds gross vehicle weight rating.

Pennsylvania

Pennsylvania has an annual decentralized inspection/maintenance program. The program began operation in June 1984. The program is limited to the Philadelphia/Pittsburgh/Harrisburg areas. The Scranton/Wilkes Barre area is in nonattainment and may need to implement an I/M program. The test fee is \$5.00. The program covers all vehicles up to 25 years of age and under 11,000 pounds gross vehicle weight rating.

Rhode Island

Rhode Island has an annual statewide decentralized inspection/maintenance program. Their program began operation in 1977. The test fee is \$4.00. The idle test was added to the existing safety inspection. No SIP credit is claimed by Rhode Island for this I/M program.

Virginia

Virginia has an annual decentralized inspection/maintenance program. The program is limited to the Washington, D.C. suburban area. The inspection fee is \$5.00. It covers the last eight years of vehicles, up to 8,000 pounds gross weight rating. Data is collected manually.

Washington, D.C.

Washington, D.C. has an annual centralized district government operated inspection/maintenance program. The program was added to an existing safety inspection program. The program started operation in January 1983. The inspection fee is \$5.00. It covers vehicles up to 15 years of age and under 8,000 pounds gross vehicle weight rating.

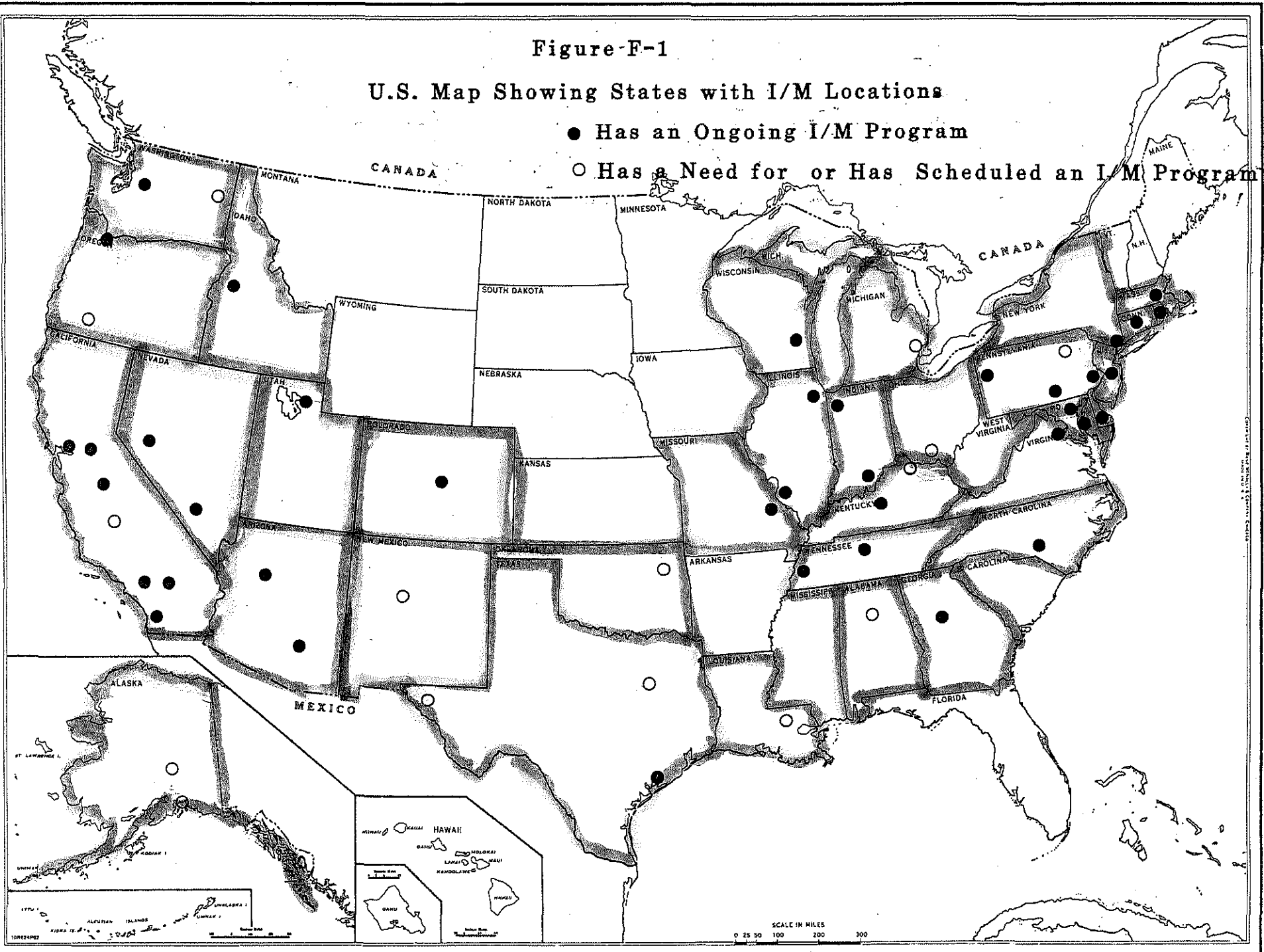
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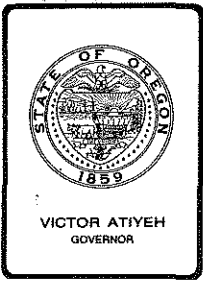
Figure-F-1

U.S. Map Showing States with I/M Locations

● Has an Ongoing I/M Program

○ Has a Need for or Has Scheduled an I/M Program





Environmental Quality Commission

Mailing Address: BOX 1760, PORTLAND, OR 97207

522 SOUTHWEST 5th AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

MEMORANDUM

To: Environmental Quality Commission
From: Director
Subject: Agenda Item No. H, March 8, 1985, EQC Meeting

Status Report - Development of Noise Emission Inspection
Agreement for Tri-Met Diesel Bus Fleet

Background

On April 16, 1984, a petition for rulemaking was received from the Livable Streets Coalition, asking that Portland area motor vehicles be inspected for excessive noise as part of the current air emission inspection program. The petition requested that all major motor vehicle categories, including Tri-Met's diesel transit buses, be included in a noise inspection program.

After Commission acceptance of the petition, public hearings were held and on November 2, 1984 rules were adopted for noise emission inspection of light duty vehicles (autos and light trucks) and motorcycles. The Commission also directed the Department to develop, prior to April 1, 1985, an agreement that would ensure that all of Tri-Met's buses are maintained to appropriate noise emission limits. As a proposed agreement is not yet ready for Commission consideration, this report provides a status of the development of the inspection agreement. This review also provides the Commission the opportunity to provide comment or guidance on the development of the agreement. It is anticipated that this issue will be back for formal consideration at the June, 1985 Commission meeting.

Discussion

The Tri-County Metropolitan Transportation District of Oregon (Tri-Met) owns and operates a fleet of approximately 700 diesel powered transit buses providing public transportation to portions of Multnomah, Clackamas, and Washington Counties. As these buses operate within noise sensitive neighborhoods and the Portland Transit Mall, significant noise impacts will occur from any bus with a defective exhaust system. Initial studies conducted in July, 1984 indicated that as many as 18 percent of the Tri-Met bus fleet would exceed current standards. Thus, it was concluded that

these vehicles should be included within a program that ensured noise emissions were reduced and maintained to appropriate limits established for each sub-fleet of Tri-Met buses.

Tri-Met, in its comments dated August 20, 1984 regarding proposed noise inspection rules, suggested that noise testing should be added to its regular fleet inspection program, if noise requirements are mandated. Thus, Tri-Met would perform testing under inspection procedures and standards approved by the Commission (Attachment 1).

In order to develop an acceptable test program, Tri-Met initiated an engineering study in August, 1984. The primary purpose of this study was to develop an appropriate test procedure that properly identifies buses that have defective or ineffective exhaust systems and establish appropriate noise limits under this test procedure. A secondary part of the study was to develop replacement exhaust system components that would provide an adequate service lifetime.

At this time, Tri-Met has developed a new testing procedure that it believes provides a better identification of defective exhaust system components than the current procedure contained in the Department's rules. Note that the proposed Tri-Met procedure is primarily aimed to identify exhaust noise, whereas the Department's procedure was developed to also identify other engine related noise sources. Due to the nature of Tri-Met bus noise problems, the Department supports the testing procedure developed and proposed by Tri-Met. Attachment 2 of this report provides Tri-Met's results of the test procedure study and Attachment 3 provides Tri-Met's proposed test procedure.

Appropriate noise emission standards under the proposed Tri-Met test procedure have not yet been determined. Tri-Met's bus fleet is comprised of approximately 18 sub-fleets of different models that may have different engines and exhaust system configurations. As the goal of this program is to maintain each bus below a noise emission level that does not allow defective or deteriorated components that increase noise, differing limits may be needed for each sub-fleet. Tri-Met is currently conducting a study of each sub-fleet to establish reasonable standards. This study is expected to be concluded by May 1, 1985 at which time standards can be proposed.

Tri-Met has begun to develop some of the necessary replacement exhaust system components that are needed to ensure that corrective measures will have a reasonable lifetime. A most important item is a newly designed section of flexible exhaust pipe that allows relative movement between the engine and muffler without premature pipe failure. This new design reduces the likelihood of stress failures that often occur in the current design exhaust pipe.

Attachment 3 is a draft agreement, prepared by Tri-Met, to attain and maintain bus noise emissions within appropriate limits. This draft agreement is not ready for formal Commission consideration at this time as a number of issues must be resolved. It is believed that these issues will be resolved in order for the Commission to consider this agreement at its June, 1985 meeting.

It appears that Tri-Met is fully agreeable to conduct noise emission tests on its diesel bus fleet using the Tri-Met maintenance organization. Thus, the Department would not need to provide diesel bus testing capability at the DEQ inspection stations. The vehicle inspection program provides in its rules for self-testing and certification by large vehicle fleet owners. Certificate fees under this process are \$3.00 per vehicle versus \$7.00 when the vehicle is inspected and certified at a DEQ test station. If the current \$3.00 fee were assessed Tri-Met for each diesel bus noise emission certificate, the annual cost would be approximately \$2,000. Tri-Met's draft agreement does not contemplate that the bus fleet would be issued certificates of compliance or assessed fees. However, the Department is concerned that a control mechanism is included in the agreement to insure Tri-Met's buses are inspected and compliance is attained on a specified schedule with adequate records keeping and audit provisions. The existing fleet testing and certification program provides this assurance. These issues will be investigated and hopefully resolved with Tri-Met prior to the June, 1985 EQC meeting.

The following items are believed by staff as needing identification or resolution prior to submitting a proposed agreement:

1. Proposed standards for each bus sub-fleet should be established based upon test data of representative buses of each sub-fleet. Tri-Met believes this task will be completed by May 1, 1985.
2. An inspection schedule must be established. Tri-Met proposes to test all buses within a 90-day period beginning April, 1985. A schedule of periodic testing must be established to ensure buses are maintained within standards. The Department believes each bus must, at a minimum, be tested annually after the initial test and compliance schedule.
3. A compliance policy must be established. Tri-Met proposes that "generally", non-compliant buses will be repaired within a 60-day period following initial noise testing. The Department believes any bus found in excess of standards during the annual inspection should not be operated until compliance work is completed.
4. Certificate of compliance requirements and fees, if any, must be determined. Tri-Met proposes that this program be of a voluntary nature and neither certificates nor fees are necessary.

5. An audit policy must be established that adequately ensures buses are tested and quieted within the provisions of the agreement.

Director's Recommendation

It is recommended that the Commission concur with the above outline of remaining issues that must be resolved before a final Tri-Met bus noise inspection agreement is proposed. It is anticipated that a proposed agreement will be available for formal Commission consideration at the meeting scheduled for June 7, 1985.



Fred Hansen

- Attachments:
1. Tri-Met comments dated August 20, 1984
 2. Test procedure development report
 3. Proposed test procedure
 4. Draft proposed compliance agreement

JOHN HECTOR:a
229-5989
February 21, 1985
NA4808



TRI-MET

4012 SE 17th AVENUE
PORTLAND, OREGON 97202

COMMENTS OF THE TRI-COUNTY METROPOLITAN
TRANSPORTATION DISTRICT ON PROPOSED
RULE AMENDMENTS ESTABLISHING NOISE
EMISSION STANDARDS FOR MOTOR VEHICLES
AUGUST 20, 1984

On May 18, 1984, the Environmental Quality Commission accepted a petition for rulemaking from the Coalition for Liveable Streets and directed the Department of Environmental Quality (DEQ) to initiate rulemaking proceedings.

The Coalition has proposed that all categories of motor vehicles including automobiles, light and heavy trucks, motorcycles and buses undergo noise inspection as part of the Department's Vehicle Inspection Program (VIP).

Tri-Met concurs with the findings of the Department and the Coalition that motor vehicle noise in Portland is a significant problem given the high density of persons and motor vehicles living within the Portland vehicle inspection area boundary. We also concur that all reasonable and effective efforts should be made to monitor motor vehicle compliance with the noise standards established in ORS 467.030.

In response to DEQ's request for comment on methods of conducting noise emission inspection on Tri-Met buses, Tri-Met offers the following:

1. Tri-Met and the DEQ are currently cooperating in an effort to test Tri-Met buses for noise emission and estimate the number of non-compliant vehicles.
2. Tri-Met recommends annual noise emission fleet testing as a workable method of noise inspection.
3. Tri-Met would be willing to participate with the DEQ in securing capital funding for the construction of noise and exhaust emission testing cells which would insure frequent and reproduceable noise emission inspection and diagnosis.
4. Tri-Met has led the transit industry in its motorbus noise control engineering.

RECENT TESTING DATA

In mid-July of this year, Tri-Met and the DEQ staff began conducting preliminary noise emission tests on Tri-Met buses as part of Tri-Met's regular fleet inspection program. While an exact testing procedure is still being worked out, the preliminary findings indicate that the problem is manageable.

Of the 170 Tri-Met buses tested (26% of the Tri-Met fleet), 32 or 18%, exceeded the 91 dba level. The average dba level for all Tri-Met buses tested was 88.4. We are confident that due to the disproportionately high number of AM General series 1000 buses found in the group tested, the total fleet percentage of non-compliant buses is actually between 10 and 15%.

With these figures as a basis, Tri-Met believes that the vast majority of Tri-Met buses are currently meeting DEQ noise standards, that diagnosis and repair of non-compliant vehicles is manageable and that effective noise testing procedures could be helpful in identifying non-compliant vehicles.

ANNUAL NOISE EMISSION TESTING OF TRI-MET BUSES

Tri-Met recommends that if noise emission testing for Tri-Met buses is mandated, an annual noise emission testing procedure should be added to its regular fleet inspection program.

Under such a testing program, Tri-Met and the DEQ staff would concur on acceptable inspection procedures and standards that would be applied to the entire fleet over a one year period. Results of the testing and re-testing program would be presented to the DEQ for its review.

Annual inspection of Tri-Met buses is a more frequent testing program than the 2-year inspection cycle for automobiles, but would give Tri-Met adequate leeway to allow for adverse weather and noise interference conditions.

TESTING CELL

While Tri-Met recommends annual inspection for noise emission control within its existing facilities and resources, it must be recognized that a real solution to the noise problem requires frequent, convenient and reproduceable testing.

Currently, noise testing procedures require nearly perfect weather conditions and the absence of any other noise interference. In a city setting and given the Oregon climate, this is difficult to achieve with any regularity.

For this reason, Tri-Met is willing to work with the DEQ and other state and local authorities to secure grant funding for several noise and exhaust emission testing cells. The cost for each testing device is estimated at \$1 to \$1.5 million, including instrumentation and facilities. The local match requirement for most available federal grants is 15-20%.

Clearly an investment of this size is only warranted if the testing cells can be used full time by Tri-Met and other large public or commercial fleet owners. Given the demonstrated concern over noise pollution, however, an investment of federal, state, local and even private dollars might be considered.

TRI-MET IS A LEADER IN NOISE
EMISSION CONTROL ENGINEERING

Because of the Transit Mall and the expectation that it should remain a "people place", more all around transit motorbus noise control engineering has been done in Portland than anywhere else in the country.

As early as 1975 when Mall construction began, Tri-Met, the DEQ and the City Noise Control Office aggressively pursued a project to establish a voluntary noise control standard. Impetus was added to the project when the Housing and Urban Development office notified the City that future housing renovation projects would be placed in jeopardy if noise levels on the Mall exceeded HUD standards.

Subsequent investigations revealed that Tri-Met buses were not relatively noisy compared to newly manufactured buses, compared to buses operated by other transit districts or compared to modern intercity trucks. In fact, they were on the quiet side. Moreover, there were no known easily applied field fixes to the problem.

As a result of these early findings, Tri-Met applied for and received a \$.5 million grant from the Urban Mass Transportation Administration and the U.S. Environmental Protection Agency to study noise control of transit motorbuses. Tri-Met hired its own acoustical engineering expert, Michael C. Kaye, and has retained his services periodically since that time. The result of Mr. Kaye's efforts has been numerous small breakthroughs and innovations in noise engineering and several articles and pamphlets on motorbus retrofitting.

The problem remains, however, that little can be done to retrofit a motorbus vehicle for noise control that is not excessively expensive. The answer apparently lies in federal standards at the manufacturer's level. Oregon has been progressive in its approach to vehicular noise, but without the help and pressure of other states and transit properties, it is unlikely that our efforts alone can force movement in this arena.

RATIONALE FOR TRI-MET'S
PROPOSED BUS SOUND LEVEL RATING METHOD

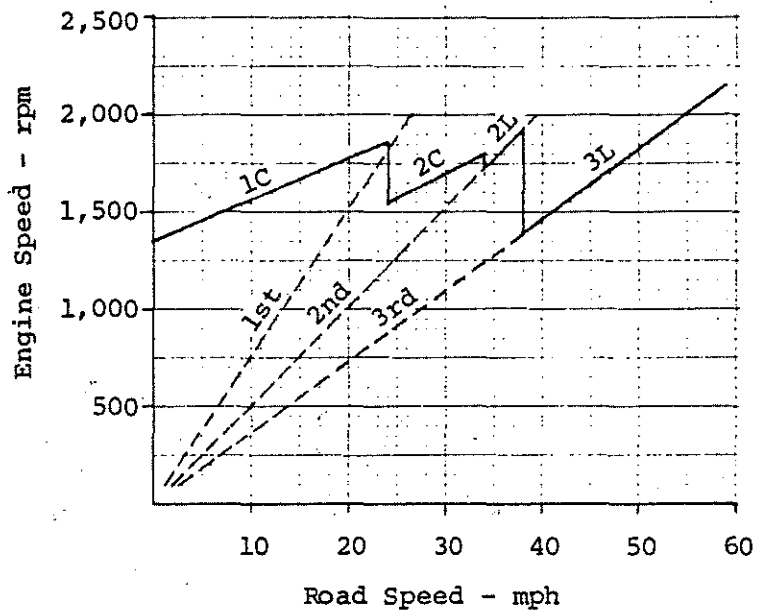
The most commonly accepted method for determining the sound level of heavy trucks and buses is the Society of Automotive Engineer's Standard J366b. This method moves the vehicle past a 50-foot distant microphone under full throttle acceleration on a test track. While SAE J366b may be suitable for engineering purposes, it is unduly time-taking and restrictive of location for noise regulation of large numbers of vehicles by personnel with minimal training.

Accordingly, the Oregon Department of Environmental Quality has adopted a simpler method similar to another SAE procedure. The vehicle is held stationary with the transmission in neutral. The engine is abruptly accelerated to governed speed and the peak meter reading observed is used in rating the sound level. The DEQ method differs from SAE J1096 in that the microphone is positioned 25 feet from the side or rear of the vehicle instead of 50 feet to one side of the vehicle's centerline.

Most vehicle sound level rating methods contemplate heavy diesel trucks with manually-shifted transmissions and dry friction clutches. Tri-Met has tried all these methods of obtaining sound level ratings for their transit motorbuses and has evolved another procedure especially suitable for their kind of vehicles. The contemporary transit motorbus is a special case because its diesel engine drives an automatic transmission through a torque converter. The objective of the Tri-Met method is to cull out for repair or maintenance a bus that has something *wrong* with it that can and needs to be fixed, without at the same time failing a bus that is no noisier than it was when delivered new from the factory. The ambition should be to do away with *unnecessary* noise. With the Tri-Met method, the braking system holds the bus stationary while the engine is operated at full throttle, stalled against the resistance of the torque converter.

The stall method is preferred over a no-load governed speed test for several reasons. First, it more nearly resembles real-world conditions. The instant a bus begins to pull away from a curbside stop with a load of passengers in a congested urban setting, it is under the same full throttle engine stall conditions. Many people are commonly exposed to the sound. Operating the bus engine at governed speed while obtaining its noise rating is not as realistic. The overspeed governors on automotive diesel engines are commonly set for 2,150 rpm no-load speed or higher. Because of their automatically-shifted transmissions, transit bus engines do not reach this speed until they attain high road speeds. At this point, tire noise tends to dominate the other bus sounds coming mainly from the engine-transmission structure and radiator fan. (The exhaust outlet is normally not a significant source of sound under any condition.) Figure 1 shows a typical case. The engine in this bus does not exceed 1,900 rpm until the bus reaches 51 mph and cannot approach 2,150 rpm until nearly 60 mph.

Engine: Detroit Diesel 8V-71N
Transmission: Allison V-730
Torque Converter: Allison TC-470
Tire Size: 12.5 x 22.5 (487 revs. per mile)
Axle Ratio: 5 1/7 : 1
Transmission Ratios:
1st = 1.81:1
2nd = 1.22:1
3rd = .875:1



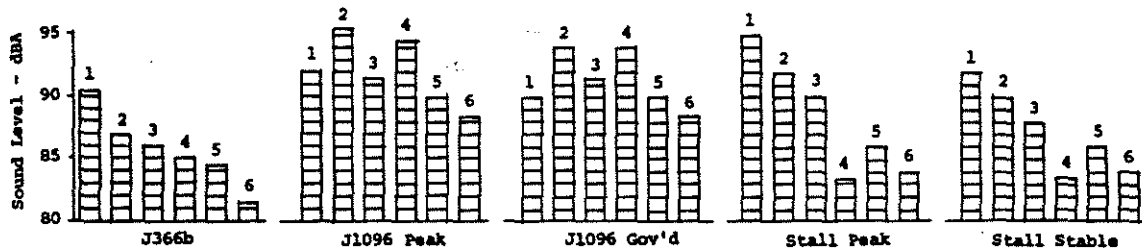
SPEED CHART FOR TRI-MET AMG BUS

Figure 1.

Figure 2.

RANKING COMPARISONS OF VARIOUS TESTS
PIR 8-21-84

J366b at 50', left side
J1096 at 25', left side
Stall at 25', left side



Rank	¹ Bus	Stall rpm	² Accel Dist
1	1073	1,450	138'
2	1095	1,400	173'
3	1090	1,350	155'
4	1080	1,250	185'
5	1088	1,350	160'
6	1086	1,450	153'

¹1976 American General Model 10240B-8
Engine: Detroit Diesel 8V-71N with 71C5 injectors.
Transmission: Allison V-730.
Torque Converter: Allison TC-470

²Acceleration distance. The distance to the point of first automatic upshift from a standing start. Occurs at 21 to 25 mph.

Second, the stall method more nearly correlates with SAE J366b test results, and thus has more value in comparing results with the tests of others, than does the no-load governed speed test. Consider Figure 2. Here are 6 buses sampled from a subfleet of 99 and tested all three ways. Bus 1080 is the only one tested by the stall method that does not have the same ranking as given by SAE J366b. This is probably because its engine is in need of a tuneup. Observe that Bus 1080 had the least engine stall speed and the longest acceleration distance.

Table 1.

SOUND LEVEL RATINGS

¹PIR 10-24-84

Left Side dBA - Fast

Bus 1080

1976 AMG Model 10240B-8

Schwitzer 30" fan and viscous drive, no shroud

As-built exhaust

	J366b	J1096		Stall	
		Peak	Stable	² Peak	Stable
Exhaust OK	83	86	83	-	84
³ Exhaust Leak	94	98	88	-	94

¹Portland International Raceway drag strip.

²No peak, just rose to stable.

³Opened LH manifold joist. Approximately 3 in² leak.

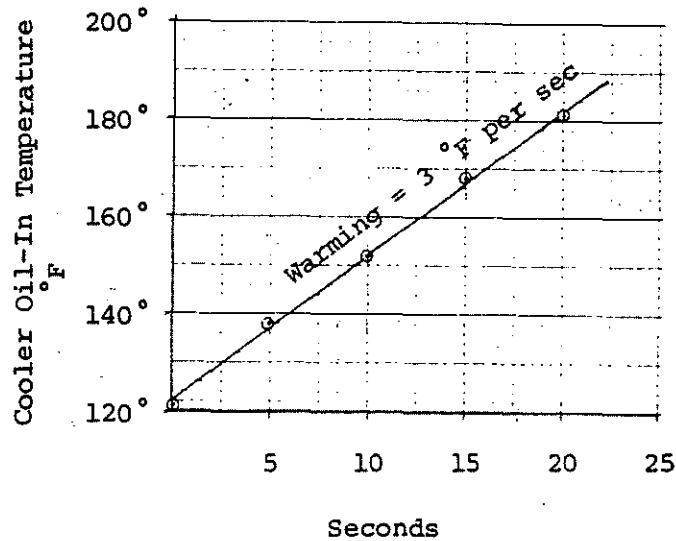
Third, the stall method emphasizes an exhaust leak more than does the no-load governed speed test. This is important because an exhaust leak somewhere between the engine and the muffler, usually at a joint, is the chief reason why a particular bus will be perceived to be louder than others of its subfleet in proper condition. As Table 1 shows, a bus with an artificially induced exhaust leak increased its sound level rating by 11 dBA when tested by the SAE J366b method, by 5 DBA (stabilized level) when tested by the SAE J1096 method, and by 10 dBA when tested by Tri-Met's stall method. Analysis found that the source contribution from the leak rose from 86½ dBA during the governed speed test to 93½ dBA for the stall test.

Finally, the results of the no-load governed speed test are highly sensitive to the setting of the overspeed governor, a variable that has nothing to do with the sound actually heard by the community from a bus during its normal operation. A misadjustment of the governor, not enough to affect the bus's performance, can sway the test results by 3 dBA or more one way or the other.

One possible hazard of the stall test is the overheating of the transmission fluid. Although the transmission warms up rapidly at the rate of about 3 °F per second, as shown by Figure 3, a 10-second test would not be harmful.

Bus 1088
1-17-85

1976 AMG Model 10240-8B
Engine: Detroit Diesel 8V-71N
Injectors: 71C5 (50 mm)
Transmission: Allison V-730
Torque Converter: Allison TC-470



TRANSMISSION HEATING
Full Throttle Stall

Figure 3.

That 10 seconds is long enough to yield a stabilized stall test sound level measurement is indicated by Figure 4. Sometimes the engine comes up to speed somewhat slowly and sometimes its speed rises rapidly, overshoots, and settles back down. A test of 10 seconds is ample time for these transients to disappear.

STATIONARY TESTS - TRI-MET CENTER STREET YARD

8-17-84

25 Feet from Bus Centerline

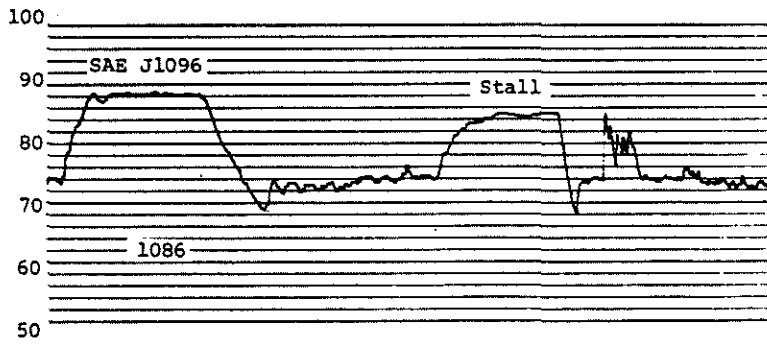
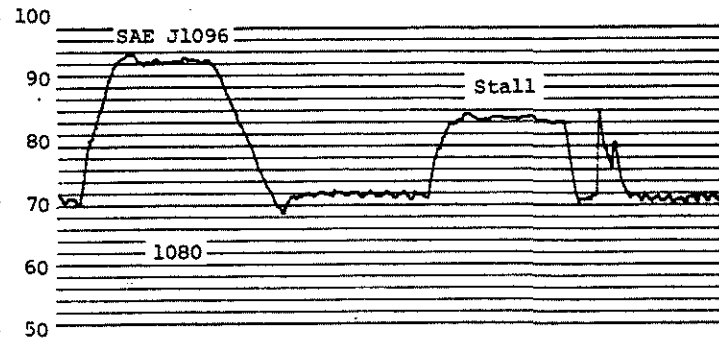
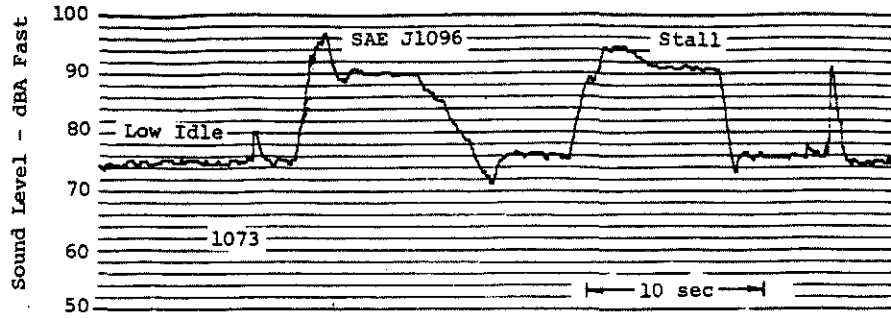


Figure 4.

STATIONARY TESTS - TRI-MET CENTER STREET YARD

8-17-84

25 Feet from Bus Centerline

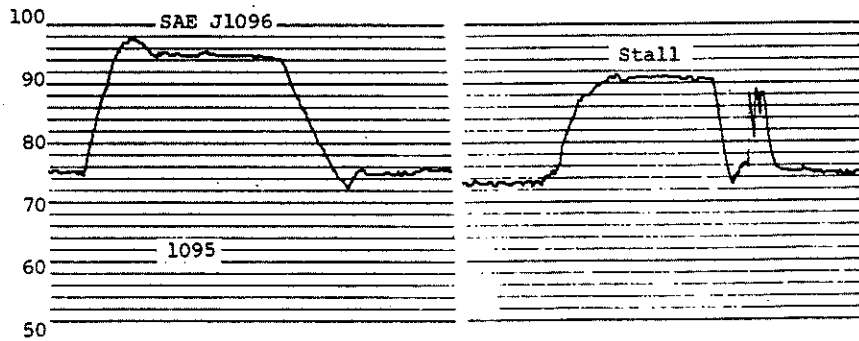
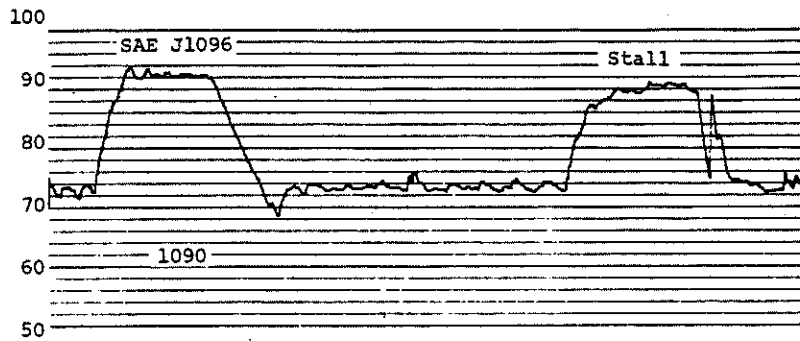
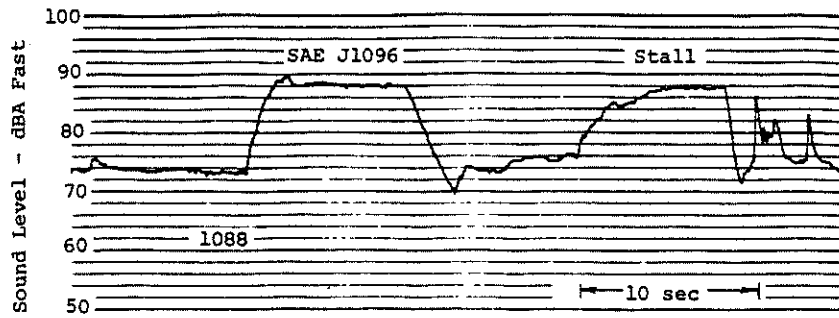


Figure 4.
Continued

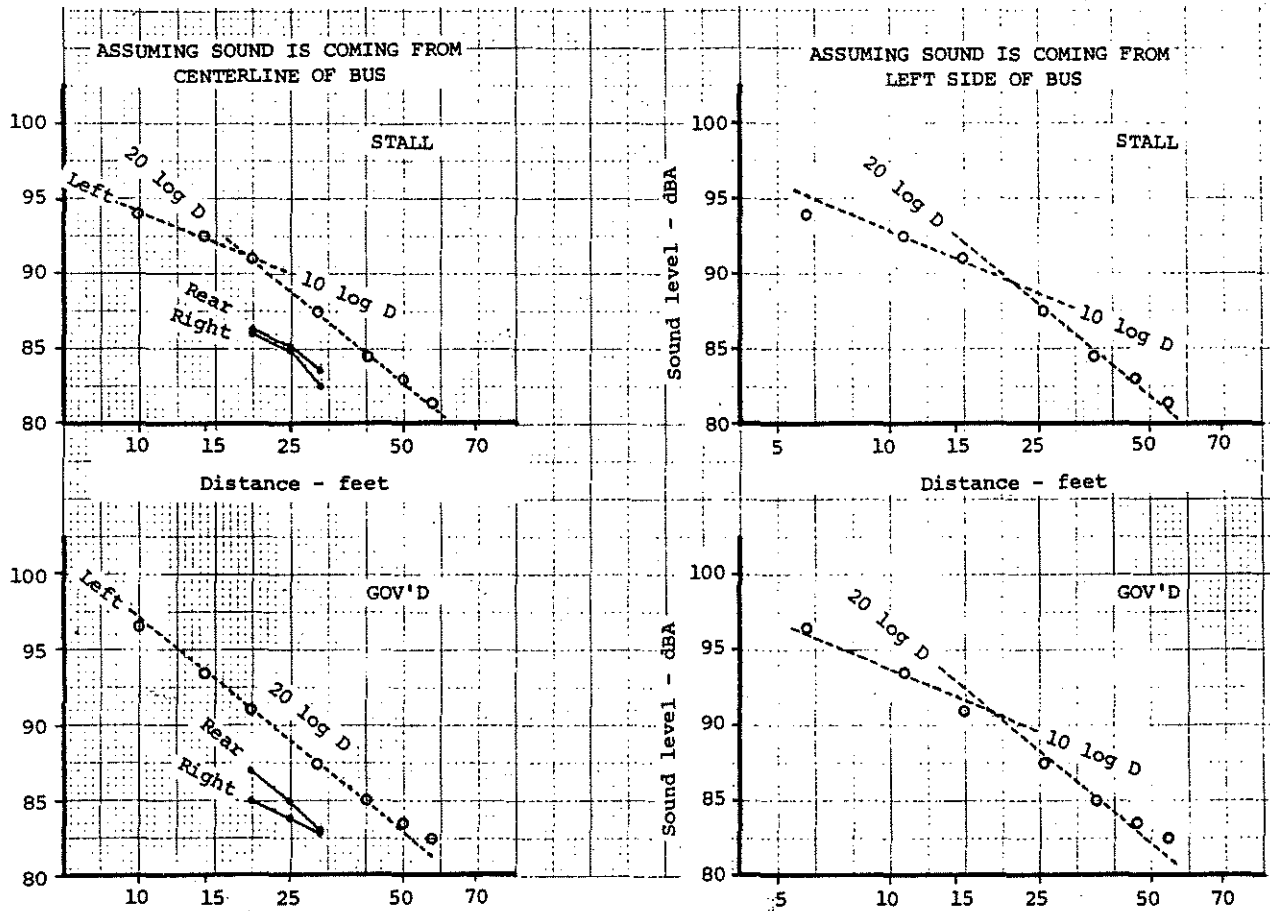
Figure 4 illustrates another of Tri-Met's concerns: The stabilized level should be used for ratings, not the peak. It is more important to use a test method that will be easy to do rather than one that yields the highest possible sound level value. Reading a meter with the needle holding steady is easier than trying to read one with the needle moving up to a peak and down again. It tends to waste time and undermine confidence when two technicians test the same bus and decide on different ratings for it. The easier the method, the more likely they will agree. The difference between peak and stable levels can be compensated for by adjusting the standard that goes with the method.

Because radiator fan sound is so steeply sensitive to engine speed, it might be questioned whether this important noise source would escape regulation if a stall test is used instead of a governed speed test. At the speeds of issue, this is not a great problem. The worst case in the Tri-Met fleet is the large group of AMG buses with unusually fast fan speeds and fixed drives. Tri-Met was forced to modify these buses because of unacceptable failures of the thermally automatic on-off fan drives included with the original equipment. A belt-and-pulley drive was substituted. Due to cramped quarters and limited choice of parts, the fans turn at all times at speeds 20% faster than the engine. These buses probably spend almost all their time at engine speeds of 1,800 rpm or less. At 1,800 rpm, the fan makes no more sound than the rest of the bus's sources under full throttle, rendering it barely perceptible.

Should the microphone distance be measured from the side or centerline of the bus? And, should the distance be 25 feet, 50 feet, or some other distance? Both SAE J366b and SAE J1096 call for a distance of 50 feet to be measured from the centerline of the vehicle. The stationary test defined by DEQ's Sound Measurement Procedures Manual instructs that the highest sound level found at a distance of 25 feet from the sides or rear of the vehicle is to be recorded. Figure 5 presents results of directivity and divergence sound tests from a stationary bus. The left side is louder than the rear or right side. The engine compartment sound beams freely out through the radiator grille on the left side. There is no obvious advantage to marking off the microphone distance from the side or from the centerline. The SAE practice of measuring from the centerline might as well be followed since it is more universal. When sound is measured from a distance of 20 feet or closer to the centerline during a stall test, it appears to behave as if coming from a very broad source because the sound level falls off at the rate of 3 dBA for every doubling of distance. Beyond 20 feet, it seems to behave as if coming from a point source because it falls off at the rate of 6 dBA for every doubling of distance. It would seem that a test distance of 25 feet is as good as any other since it conforms to SAE and to International Standards Organization practices, it avoids tricky near-field effects, and it doesn't require an exorbitant test area.

Where is the line between unavoidable variation in sound level ratings from identical buses and ratings indicating the need for maintenance and repair? Everything under the sun has an explanation, provided one has enough time and resources to discover it. However, despite an overall satisfying consistency, all those who have diligently tried to measure truck and bus sound know that small differences occur between repeat tests that seem to defy explanation. A practical test standard makes an allowance for this reality. Both DEQ's Procedure and SAE J366b allow an extra 2 dBA before a standard is applied to a rating for "variations in test sites, temperature gradients, test equipment, and inherent differences in nominally identical vehicles". Until more experience argues otherwise, a 2 dBA allowance seems fair.

Bus 1088
 Center Street 8-17-84
 Governed speed - 2,100 rpm.
 Stall speed - 1,350 rpm



DISTANCE EFFECT
 ON STATIONARY BUS SOUND

Figure 5.

DETERMINATION OF TRANSIT MOTORBUS EXTERIOR SOUND LEVEL RATING

1. Introduction.

The contemporary transit motorbus, with its diesel engine driving an automatic transmission through a torque converter, presents a special case of obtaining sound level ratings for the purpose of noise regulation. The most commonly accepted method for sound level rating of heavy trucks and buses is the Society of Automotive Engineers Standard J366b. This method moves the test vehicle past a 50-foot distant microphone under full throttle acceleration on a test track. While this may be appropriate for engineering purposes, it is unduly time-taking and restrictive of location for rating large numbers of buses by personnel having a minimum of training. The method prescribed by this instruction rates the sound from a stationary bus while under power. Its results duplicate common operational conditions and are much easier to obtain than, but still correlate well with, those from SAE J366b.

2. Instrumentation.

- 2.1 The sound level meter shall satisfy the Type 1 requirement of American National Standard Specification for Sound Level Meters.
- 2.2 The windscreen shall not affect the microphone response more than ± 1 dB for frequencies of 20 to 4,000 Hz or $\pm 1\frac{1}{2}$ dB for frequencies of 4,000 to 10,000 Hz.
- 2.3 The external sound level calibrator shall be accurate to ± 0.5 dB.
- 2.4 The sound level meter shall be set for fast response and the A-weighting network.
- 2.5 Field calibration with the external calibrator shall be made immediately before each test sequence.
- 2.6 The microphone shall be covered by the windscreen during all rating tests.
- 2.7 The instrument manufacturer's operating instructions shall be followed, including making sure batteries have an adequate state of charge, positioning the microphone to obtain its flattest frequency response, and making such corrections for ambient conditions as are necessary.
- 2.8 The sound level meter and external calibrator shall have been properly calibrated within one year of use.

3. Test Site and Instrument Setup.

- 3.1 The site shall be a flat open space free of large reflecting surfaces such as vehicles, buildings, walls, or signboards within 50 feet of either the bus or the microphone.

- 3.2 The area between the bus and the microphone shall have a surface of concrete, asphalt, or similar hard non-porous material. It may be wet or dry, but it shall not be covered with snow or some other sound-absorbing substance.
- 3.3 Measurements shall not be made during falling precipitation or if there is a wind speed more than 10 mph.
- 3.4 Measurements shall not be made unless the ambient sound level is at least 10 dBA lower than the level of the bus.
- 3.5 The microphone shall be mounted on a tripod and positioned 25 feet from the centerline of the bus, 4 feet above the ground opposite the louder side of the bus.
- 3.6 If the engine compartment is in the rear of the bus, the microphone shall be positioned in line with the rear bumper. For any other location of the engine compartment, the microphone shall be positioned in line with the center of the engine compartment.
- 3.7 Only two people may be within 10 feet of the microphone during rating tests.

4. Procedure.

- 4.1 The bus shall be tested in a stationary position with the brakes set and the transmission selector in forward drive.
- 4.2 The throttle pedal shall be fully and quickly depressed for approximately 10 seconds, causing the engine to stall against the resistance of the torque converter.
- 4.3 The stabilized measurement occurring at the end of the 10-second test period shall be used to report the sound level rating of the bus.
- 4.4 One measurement is normally sufficient, but if more than one measurement is obtained in a test sequence, then the tests shall be continued until the results stabilize. The stabilized result shall be reported as the sound level rating.
- 4.5 The sound level rating shall be the whole number nearest the measured number and fraction. If the fraction is one-half, the measurement shall be rounded up to the nearest whole number to obtain the sound level rating.
- 4.6 While it is unavoidable to find small variations among results due to differences in sites, instrumentation, and bus condition, the allowance for this variation shall be incorporated into the applicable bus sound level standard rather than applied to the sound level rating based on measurement.

Oregon Environmental Quality Commission
522 S. W. Fifth Avenue
Portland, Oregon 97204

IN THE MATTER OF
Tri-County Metropolitan
Transportation District
of Oregon

JOINT AGREEMENT

The TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON (TRI-MET), the OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, and the OREGON ENVIRONMENTAL QUALITY COMMISSION jointly recognize the benefits of limiting motor vehicle noise emissions. To this end Tri-Met and the Environmental Quality Commission, through the Department of Environmental Quality, agree to establish a demonstration program to attain and to maintain transit bus noise emissions within reasonable limits.

1. The Tri-County Metropolitan Transportation District of Oregon owns and operates a fleet of transit buses providing public transportation to portions of Multnomah, Clackamas, and Washington Counties in the State of Oregon.
2. Motor vehicle noise including noise generated by transit buses is a significant problem given the high density of persons and motor vehicles in the service area of Tri-Met.
3. Studies conducted by Tri-Met and the Department of environmental Quality have determined that a number of Tri-Met's transit buses exceed the maximum allowable noise levels set forth in Oregon Administrative Rules 340-35-030(1)(a), Table 2, as adopted by the Environmental Quality Commission.

IN RECOGNITION of this fact and to evaluate the affect of a compliance effort on over-all noise emissions, Tri-Met and the Environmental Quality

Commission hereby agree to establish a compliance program outlined as follows:

- A. Tri-Met will continue to study the characteristics of each of its individual sub-fleets of buses so as to establish reasonable noise level standards for each sub-fleet or group of sub-fleets. These noise level standards will be identified by May 1, 1985.
- B. Beginning in April 1985 and continuing annually thereafter, Tri-Met will conduct noise testing on each of the buses currently in use in transit operations. Due to the need for favorable weather conditions to conduct such testing, and the substantial numbers of buses to be tested, a 90-day period will be necessary to complete the noise testing. The testing, itself, will be conducted at each of Tri-met's three existing and any future operating facilities.
- C. Noise testing will be conducted consistent with the following procedure:
 - C.1 Test Site and Instrument Setup.
 - 1.a The site shall be a flat, open space free of large, reflecting surfaces such as vehicles, buildings, walls, or signboards within 50 feet of either the bus or the microphone.
 - 1.b The area between the bus and the microphone shall have a surface of concrete, asphalt, or similar hard, non-porous material. It may be wet or dry but it shall not be covered with snow or some other sound-absorbing substance.
 - 1.c Measurements shall not be made during falling precipitation or if there is a wind speed more than 10 mph.
 - 1.d Measurements shall not be made unless the ambient sound level is at least 10 dBA lower than the level of the bus.

- 1.e The microphone shall be mounted on a tripod and positioned 25 feet from the centerline of the bus, 4 feet above the ground opposite the louder side of the bus.
- 1.f If the engine compartment is in the rear of the bus, the microphone shall be positioned in line with the rear bumper. For any other location of the engine compartment, the microphone shall be positioned in line with the center of the engine compartment.
- 1.g Only two people may be within 10 feet of the microphone during rating tests.

C.2 Procedure.

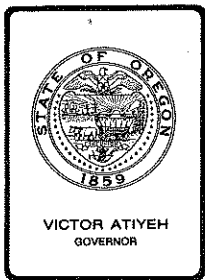
- 2.a The bus shall be tested in a stationary position with the brakes set and the transmission selector in the forward drive position.
- 2.b The throttle pedal shall be fully and quickly depressed for approximately 10 seconds, causing the engine to stall against the resistance of the torque converter.
- 2.c The stabilized measurement occurring at the end of the 10-second test period shall be used to report the sound level rating of the bus.
- 2.d One measurement is normally sufficient, but if more than one measurement is obtained in a test sequence, then the tests shall be continued until the results stabilize. The stabilized result shall be reported as the sound level rating.
- 2.e The sound level rating shall be the whole number nearest the measured number and fraction. If the fraction is one-

half, the measurement shall be rounded up to the nearest whole number to obtain the sound level rating.

2.f While it is unavoidable to find small variations among results due to differences in sites, instrumentation, and bus condition, the allowance for this variation shall be incorporated into the applicable bus sound level standard rather than applied to the sound level rating based on measurement.

- D. Following the completion of noise testing at each of Tri-Met's operating facilities, those buses whose noise emissions are in excess of specified standards will be identified. Once identified, those buses will be scheduled for repairs to correct such deficiencies as exhaust leaks which are known to adversely impact noise emissions. Generally, these repairs will be completed in a 60-day period following initial noise testing at each of the operating facilities. After remedial repairs have been made to each bus originally determined to be noncompliant with noise standards, supplementary testing will be conducted to insure ultimate compliance with those standards.
- E. Tri-Met will supply noise testing records related to all diesel buses operated in transit service to the DEQ annually. These records will contain all information concerning initial noise testing, necessary repairs to noncompliant buses, supplementary noise testing, dates of all activities, and any other relevant information. These records shall serve as satisfactory proof of voluntary compliance with noise standards. No other form of compliance documents shall be necessary or required.

- F. The Department of Environmental Quality may audit Tri-Met's compliance with noise standards by conducting noise testing of a representative sample of Tri-Met's buses. The Department will provide Tri-Met notice of any intent to audit compliance at least fourteen (14) days in advance of any testing.
- G. Tri-Met will modify preventive maintenance schedules and practices where applicable to more closely monitor potential noise-related problems such as exhaust leaks.



Environmental Quality Commission

Mailing Address: BOX 1760, PORTLAND, OR 97207

522 SOUTHWEST 5th AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

January 30, 1985

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Arno H. Denecke
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Re: Appeal of Permit Issuance
or Denial

At the January 25, 1985 Environmental Quality Commission meeting, John Charles of the Oregon Environmental Council raised again the question whether DEQ's decision to issue a permit should be reviewed by the Commission on request from a member of the public. Currently, administrative review is available only to a dissatisfied permit applicant who challenges either the terms of a permit or DEQ's decision not to issue one.

The Commission last considered the permit review process when an environmental group asked the Commission to amend agency rules to expand the right to administrative review to "any person." The Commission chose not to initiate rulemaking on that specific proposal, but studied whether some greater access to administrative review was desirable. The enclosed staff reports were prepared in connection with the Commission's study. Ultimately the Commission chose to leave agency review procedure unchanged. Consequently, only dissatisfied applicants are entitled to Commission review. Others must take their challenges to the courts. ?

I hope this information is helpful.

Sincerely,

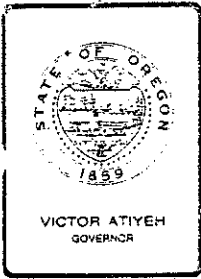

Linda K. Zucker
Hearings Officer

163.480 - "Any person
already affected or
aggrieved by an order
in my party to one agency
process" entitled
to judicial review

LKZ:d
HD1499

Enclosures

cc: Fred Hansen, Director, DEQ
Michael Huston, Assistant Attorney General, DOJ
Tom Bispham, DEQ
Mike Downs, DEQ
Harold Sawyer, DEQ
Lydia Taylor, DEQ



Environmental Quality Commission

Mailing Address: BOX 1760, PORTLAND, OR 97207

522 SOUTHWEST 5th AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

MEMORANDUM

To: Environmental Quality Commission

From: Director

Subject: Agenda Item No. M, October 15, 1982, EQC Meeting
Petition to Amend OAR 340-14-025(5)

Background

Friends of the Earth/Oregon Branch (FOE/O), a citizen group, has petitioned the Commission to amend its rules to expand the scope of administrative review to allow any person dissatisfied with the conditions or limitations of a permit issued by the Department to obtain a contested case hearing before the Commission. A copy of the petition is attached.

Under the current rule, only a permit applicant may obtain Commission review. The rule provides:

OAR 340-14-025(5)

(5) If the applicant is dissatisfied with the conditions or limitations of any permit issued by the Department, he may request a hearing before the Commission or its authorized representative. Such a request for hearing shall be made in writing to the Director within 20 days of the date of mailing of the notification of issuance of the permit. Any hearing held shall be conducted pursuant to the regulations of the Department.

FOE/O would substitute "any person" in place of "the applicant" in the rule. *

At its October 15, 1982 meeting the Commission must either deny the petition or initiate rulemaking proceedings.

* This memorandum addresses only the specific rule proposal before the Commission for consideration.

Considerations

In analyzing the need for this rule change, the fundamental question is whether a proper balance is reached between the sometimes conflicting goals of assuring access to the system in order to protect the public interest, and the need for expeditious processing of the variety of permits issued by the agency in the regular course of its operations. The nature of the permitting process, the availability of alternate methods of gaining access to the Commission, the availability of judicial review, and the need for timely permit issuance, all suggest that the proposed rule would inhibit rather than achieve a reasonable balance.

The permit process involves the application of predetermined rules to a specific facility. The Department's authority to impose permit terms is fairly circumscribed by the rules and standards established by the Commission. Adoption of rules is always preceded by a public participation process in which citizen comment is elicited and addressed. The rules establish the parameters of each permit. In that sense, the drafting of a permit is a mechanical or ministerial process because the content of the permit is defined by preexisting standards. Policy decisions as to, for example, safe and allowable emission quantities, have already been made. And while not mandated by law, it is the practice of the Department to conduct informational hearings prior to issuing permits in which public interest has been expressed. At these hearings, interested persons have the opportunity to point out any perceived misapplication of the agency's rules and standards to the facility being regulated. These hearings are informational rather than "adversarial." They do not require sworn testimony, cross examination is not undertaken, and neither refined rules of pleading nor the rules of evidence are applied.

The rule change proponent would like to be able to enter the review process at the administrative level rather than employing the judicial review process. FOE/O "asserts that the present rule does not equally provide for the rights of all" and "is prejudicial to the interests of the public in that (it) does not provide an equal opportunity to both applicant and affected parties to challenge conditions and limitations of a permit for which (sic) the public or applicant may be dissatisfied."

While a member of the public cannot compel a trial-type proceeding at the administrative level, the public position does have its advocate. The agency's mission, as reflected in ORS 468.035, is to restore and preserve the quality and purity of the air and the waters of the state in accordance with the rules and standards established by the Commission. In developing and issuing permits, as in its other functions, the agency is the proponent and protector of the public interest. It is this public interest that the agency serves in applying statutes and regulations in development of a permit. The permit applicant stands in a different position than the public. In recognition of the particular interests of permit applicants,

the legislature granted dissatisfied applicants the right to advocate their position in a contested case before the agency. ORS 468.070(3); 183.310(2)(C). The legislature has not accorded this right to the public at large.

It is established law that in the absence of a particular statute or rule requiring it (and neither exists in this case) an agency need not offer a contested case (trial-type) hearing before issuing a permit. N. W. Envr. Def. v. Air Poll. Auth., 16 Or App 638, 519 P2d 1271, Sup. Ct. review denied (1974). However the public is not left without a remedy to correct any purported failure of the agency to apply correct standards or procedure in issuing a permit. Under ORS 183.480 "any individual adversely affected or aggrieved by an order" is entitled to judicial review. A permit is an order contemplated in this grant of access to the courts. ORS 183.310(5)(a). Thus, citizens favoring or opposing the issuance or terms of a permit have the right to test the agency's action by judicial review. ORS 183.484 confers jurisdiction for such review on the circuit court.

There are also other means of directing the Commission's attention to issues of public concern about permit conditions. The agency's interpretation of a rule or statute may be challenged by a petition for declaratory ruling. ORS 183.410. Just as the applicant in this case did, any interested person may petition the Commission to promulgate, amend or repeal a rule. ORS 183.390. With a minimum of formality, any member of the public may claim the Commission's attention with a presentation of concerns at the public forum which precedes Commission action on the scheduled agenda at each Commission meeting.

Adding administrative review to the review procedure already available could increase the cost and time needed to issue legitimate permits. House Bill 3305 (Oregon Laws 1982, First Special Session, Ch. 3), enacted this year, enjoins state agencies to act without undue delay in completing review of permit applications. It provides:

SECTION 1. (1) It is the policy of the State of Oregon that every state agency authorized or required to approve or to issue permits shall accomplish its review and make its decision expeditiously and without undue delay.

(2) Every state agency authorized or required to approve or to issue permits shall adopt rules establishing the timetable to be followed by the agency when issuing permits. Whenever possible, the period of time between receipt of the properly completed application and completion of the agency's review shall not exceed 60 days unless other law specifies a longer period of time.

(3) Whenever any person proposes a project and submits a properly completed application to the appropriate state agency for the necessary permit, the state agency shall promptly acknowledge receipt of the application. If the state agency contemplates it will be unable to complete action to approve or disapprove the application within 60 days of receipt of the application, the state agency shall submit to the applicant a procedural timetable for completion of the agency's review at the time it acknowledges receipt of the application.

(4) As used in this section:

- (a) "Permit" means any approval required from a state agency prior to construction or operation of a project.
- (b) "Project" means any public or private construction or expansion or addition that requires as a prerequisite to such construction, expansion or addition the approval of a state agency, excluding activities subject to ORS 469.570, 469.590 to 469.621 and 469.930.
- (c) "State agency" means "agency" as that term is defined in ORS 183.310.

Encumbering the permit application process with an additional hurdle can tie up agency resources in issues which are costly to litigate administratively (probably requiring the use of expert witnesses and undoubtedly requiring the counsel and representation of an attorney), but which do not escape judicial scrutiny. The Department issues 200 permits annually regulating air quality alone. Applicants for these permits for new or planned facilities could be confronted with serious delays. Significant contested cases before the agency typically involve trial to a hearings officer preceded or followed by motions, discovery, exchanges of legal memoranda, delays to accommodate attorney and witness schedules, transcription of a hearing record, and a detailed decision. Repetition of some of these elements occurs in appeals of the hearings officer's decision to the Commission. Unbridled by judicial rules of procedure and evidence, contested case participants have considerable latitude in the presentation of their cases. This lesser degree of formality can be helpful, but it tends to create a more diffuse and extensive proceeding record than is found in court trials. There are attendant costs, not the least of which is the dampener that protracted or cumulative litigation places on planned facility development. A further concern is that the proposed rule change, as drafted, allows anyone, however tenuous his interest in the permit, to become a party.

In short, the opportunity for public participation prior to the issuance of permits, alternate methods of reaching the Commission with concerns, the existence of a judicial review procedure, and the need for an expeditious method of permit processing all make the present system outweigh the advantage of providing contested case hearings on demand to the public.

Recommendation

I recommend that the rule not be changed as proposed.



William H. Young

Attachment (1) Petition to Amend OAR 340-14-025(5)

L. K. Zucker:k
229-5383
September 29, 1982
HR1288



Environmental Quality Commission

Mailing Address: BOX 1760, PORTLAND, OR 97207

522 SOUTHWEST 5th AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

MEMORANDUM

To: Environmental Quality Commission

From: Director

Subject: Agenda Item No. I, August 19, 1983, EQC Meeting

Administrative Review of Agency-Issued Permits

Background

This matter originally came before the Commission when a public interest group petitioned the Environmental Quality Commission to amend its rules to expand access to administrative review of permits issued by the Department. (1) Permit applicants are entitled to a contested case hearing to challenge the terms or conditions of a permit or its denial. (2) The proposed rule extended that right to "any person."

Department opposed the proposal. It argued that the public has adequate protection in (1) the opportunity for public participation prior to the issuance of permits; (2) the existence of alternate methods of reaching the Commission with concerns; and (3) the existence of a judicial review procedure. The need for an efficient method of processing the variety of permits issued by the agency in its normal operations outweighed the value of providing contested case hearings on demand.

The Commission declined to initiate rulemaking procedures on the specific rule change proposal. Instead, it directed staff to study and analyze the extent to which the Commission and non-applicants should be able to participate in the formation and review of permits. The Commission also directed staff to recommend procedures by which such participation might be undertaken effectively.

(1) Attached are the petition, staff report, response, and final order (Attachment 1).

(2) OAR 340-14-025(5). If the applicant is dissatisfied with the conditions or limitations of any permit issued by the Department, he may request a hearing before the Commission or its authorized representative. Such a request for hearing shall be made in writing to the Director within 20 days of the date of mailing of the notification of issuance of the permit. Any hearing held shall be conducted pursuant to the regulations of the Department.

Alternatives

The various options can be grouped under two categories. The first group employs a trial-type (contested case) procedure. The second contemplates a less structured forum for Commission involvement in the permit process. For reasons discussed below the contested case format is deemed unduly burdensome; a variation from the second option category is favored.

Contested Case Review

These alternatives all involve variations of a trial-type hearing at the instigation of a non-applicant to challenge permit terms.

One course of action, at the far end of the option range, is to offer to all comers the ability to request a full administrative hearing with all the formalities and procedures required by law in the conduct of an administrative trial. No one now seems to be advocating allowing non-applicants contested case review on demand, and it is this alternative that the Commission rejected as unwarranted in considering the rulemaking petition which prompted this examination.

The issue then narrows to whether the contested case format can be effectively employed subject to limitations designed to encourage potentially informative and productive examination of issues without unduly burdening the applicant and regulator. Some means are:

1. Limit the persons to whom Commission review is available. Persons to whom review rights are offered in other situations include those who can show they:
 - a. Are "adversely affected or aggrieved." (ORS 183.480 standard for establishing right to judicial review of agency orders.)
 - b. Have an interest in the outcome of the agency's proceeding or represent a public interest in such result (ORS 183.310(6)(c) standard for establishing right of access by intervention in a contested case).
 - c. Have an interest in the matter which is so direct and immediate that they will either gain or lose by the direct legal operation and effect of the decision - (Non-administrative intervention criteria, Union High Dist. No. 2 v. LaClair, 218 Or 493, 344 P2d 769 (1959).)

Or, the Commission can create its own qualification criteria.

2. Limit the types of issues appealable by non-applicants. This might involve limiting Commission review to policy issues, constitutional issues or jurisdictional issues, rather than technical issues requiring technical expertise; e.g. that a rule was misconstrued seems

a better claim on Commission involvement than that effluent measurements are inaccurate.

3. Limit the format, procedure, or circumstances under which review is available by appeal to the Commission:
 - a. Proceed by written presentations rather than by sworn witnesses, cross examination, etc.
 - b. "Certification of issues." Request Commission review by identifying areas of ostensible error and documenting error. EQC may consider whether the requester has made a persuasive case of possible error.
 - c. Make requests for review discretionary and reversible only for abuse of discretion, as in rulemaking and declaratory ruling requests.
4. Broadening access to the hearing process but require the posting of a bond.

There also are possible variations within the listed means.

Proponents of expanded use of the contested case process thoughtfully support their request. Administrative review can be both cheaper and less formal than court review. Typically, court review requires the use of attorneys, while administrative review more flexibly allows participation by informed laymen. The opportunity for court review sometimes becomes illusory if generous funding is not available. They say, too, that opening the process to a broader spectrum of participants enhances the prospect of a more complete and, presumably, better record for decision, possibly decreasing the need for court review. Proponents remind us that the permit process involves considerable discretion and, therefore, the potential for abuse, which is traditionally protected by the availability of administrative review. They argue that relatively few permits are appealed, and therefore the feared delays and costs would be infrequent and usually warranted. Finally, there exist possibilities which would expand public access without seriously interfering with either the business of the Department or permit applicants.

Opponents sensibly counter that delays engendered by contested cases make that option simply impractical. Applicants suffer with the passage of time. Delay provides a per se advantage to permit opponents. Delay is financially costly and deters facility siting. The permittee is made hostage to radical groups. Because permits require assurance of land use compatibility, the issues raised have been thoroughly debated in a land use forum. There is a fear that extensive Commission review would transform the nature of the permit process from technical to political by transferring responsibility from the technical body to the policy body.

Policy is established in the rulemaking process and the development of a permit is essentially ministerial, not requiring direct Commission participation. Finally, an expanded contested case process is simply not necessary. There is no fundamental unfairness in allowing an applicant rights that non-applicants do not have. Due process allows different procedures, depending on the interests of the parties; Oregon law authorizes the present procedure and it is presumed to be intended because the legislature could have expanded administrative review in this agency as it did for such agencies as State Lands, DLCD, and the Energy Facility Siting Council. Finally, reasonable alternatives are currently available: court review, pre-issuance public participation, informal access to the EQC for presentation of concerns and use of declaratory ruling and rulemaking proceedings.

Analysis of Contested Case Options

Use of any of these contested case alternatives exceeds the requirements of law. It is established law that in the absence of a particular statute or rule requiring it an agency need not offer a contested case (trial-type) hearing before issuing a permit.⁽³⁾ While proponents of expanded access to the system cite the need for "fundamental fairness," that fairness is not necessarily achieved by offering all persons perfect parity by congruent rights. The interest of applicants and non-applicants is not of the same nature or magnitude. Delay engendered by the right to command contested case review, whether exercised or not, is the major impediment to such review.

While non-party applicants represent important environmental interests, these interests are sufficiently recognized by providing for participation in setting of the standards (rules and regulations) employed in permits through rulemaking participation and other established public participation processes. Ultimately, the availability of judicial review is the safety net assuring that the considerable discretion exercised by the agency is not abused.

Under any of the alternatives, contested case hearings could be compelled more frequently than they are now. A permit applicant would have little assurance of the certainty of his project until the 30-day appeal deadline had passed uneventfully. Even an unsuccessful request for a hearing could extend the uncertainty weeks beyond the permit issuance date, while permit applicants and hearing applicants argued the issue of hearing entitlement.

⁽³⁾N.W. Env'r. Def. v. Air Poll. Auth., 16 Or App 638, 519 P2d 1271, Sup. Ct. review denied (1974).

Looking at the agency rules for appeals to the Commission, OAR 340-11-132, we see that an appellant has 30 days to file a notice of intent to appeal. Then, presumably, the agency must prepare a transcript. Twenty-one days seems a modest time for this activity. Another 30 days are required for preparation of appellant's brief and exceptions, with an additional 30 days for Respondent's exceptions. Appellant may use 20 days for reply before the matter is even ready for evaluation and decision, 131 days have elapsed. These time estimates are very conservative. There is an often used rule providing for extensions of time. All activity pursuant to a permit is in abeyance during the appeal period.

The costs of delay have been considered by the Southern Oregon Timber Industry Association (SOTIA) (Attachment 3). Noting that availability of a contested case would significantly increase the economic burden to the agency and create economic hardship for applicants, SOTIA believes that adding this burden to the already excessive Oregon permit environment could become a deterrent to businesses seeking to locate or expand in Oregon. Although costs are difficult to quantify, SOTIA developed a partial list of direct and indirect costs:

- (1) Increased salary, travel, and associated costs for agency personnel needed to conduct contested hearings;
- (2) Additional agency overhead costs necessary for management of increased staff workload;
- (3) Costs of personnel to research, rebut, and defend the agency decision;
- (4) Costs of industrial staffing necessary to defend the company's interests;
- (5) Increased costs of equipment and installation resulting from delays in purchase and placement;
- (6) Lost wages of company personnel who could be working much earlier if the process moved expeditiously;
- (7) Loss of tax revenue to the federal government and state from the company and the employes not employed during the delay;
- (8) The loss of business to other states which do not have convoluted permit processes;
- (9) Loss of profits to finance capital development and pay stock holders, with attendant loss of income tax revenues.

The list is not exhaustive.

Public Participation Hearings

These alternatives all involve variations of a hearing in which information is brought to the Commission and exchanged with other interested members of the public orally or in writing but without use of sworn testimony, cross examination, and other various procedures associated with administrative litigation. These types of hearings are commonly referred to as "public" hearings, although the term is broader than the range of the options being discussed.

Below is a selection of methods containing elements which can be combined in a wide range of ways to implement an information exchange between the Commission and the public on permits issued by the Department. The list attempts to display some ways the variables may be used.

- A. No Change. Department holds public hearings on controversial permits. A hearings officer prepares a report summarizing the offered testimony, while the technical person responsible for the facility prepares an analysis of the issues raised. The Director studies the reports before issuing or denying the permit and may or may not be influenced by information gleaned from the hearing. The Commission, having delegated that responsibility to the Director, does not influence his permit decision. However, since the permit applicant has a right to appeal the terms of that permit to the Commission, the Commission (itself or through its hearings officer) may hold a contested case hearing to review the Director's action. An applicant may also challenge the Commission's decision in a court appeal, while a non-applicant may only challenge the Director's action by a court appeal.
- B. Commission Review of Controversial Permits. As soon as the agency identifies a permit in which common sense would tell it there is potential interest of any substantial nature, the agency could publish notice and then hold a public hearing. Staff would then provide the Commission with a summary and analysis of information received and a proposed permit. The Commission could then advise the Director of its satisfaction with the draft permit or direct changes. A variation akin to this alternative is to have the Commission hold the hearing and issue the permit.
- C. Activity Report as a Basis for Commission Attention. Staff develops a list of permit applications which it could send to the Commission as an activity report, highlighting those permits in which significant public interest was expected. The Commission could then decide what increased level of attention those permits would be given, and the appropriate method of accomplishing that.
- D. Director's Report to the Commission.

Informally, perhaps in a general information memo from the Director, the Commission could be informed of significant permit activities and have identified permits likely to produce broad or sustained public interest, so the Commission could particularly monitor those permits and, on its own initiative or in response to public or agency request, guide decisions involving the permit.

Analysis of Public Hearing Options

There are advantages to greater Commission involvement in permit issuance outside the contested case format. Friends of the Earth/Oregon, which

filed the original rule change request, informed the Commission that it had never intended to request a contested case hearing; rather it wanted a chance to address the Commission and so be sure that the Commission knew directly of its objections and concerns.

The public usually finds it easier to deal with the public hearing process of simply submitted written or oral testimony, rather than the more formal contested case process where they may feel "on trial." In the public hearing one is not cut off from the decision-maker by legal formalities and conventions. While a contested case hearing can be more rigorous in examining the issues, agency resources are finite and the advantage is not necessarily worth the cost.

The timing of permits is crucial. A project can be killed solely by delay. Delay can be substantially avoided by using the public hearing process. Even before receipt of a permit application the agency usually knows of major upcoming projects and can predict with an extremely high degree of accuracy which permits will be controversial. These projects tend to be major in every sense, and it takes a long time to develop the information necessary to evaluate the permit applications. This pre-issuance time can be well managed for enriching the public participation process. Information gleaned from outside experts and the non-technical public are easiest to incorporate at an early stage in the permit development and thus are used to the greatest advantage.

While the opportunity for an information-type hearing appears to be the best of the available solutions, it will not satisfy everyone. One disadvantage is the absence of legal controls. The Commission has discretion whether to hold the hearing and whether to follow the information received from the public in formulating the permit terms. The agency's discretion is controlled, of course, first by its good faith, and further by the existence of opportunity for judicial review. Because the Commission is committed to hearing permit appeals, it may not wish to appear biased by comments made and positions taken in the permit development stage.

It is difficult to outline any structured process which will not adversely affect the agency's relatively expeditious processing of the vast portion of the permits it issues. The advantage of the public hearing system, and particularly alternative D, is that it is geared to providing Commission review when warranted by public interest or the controversial nature of the permit, without inappropriately interfering with the applicant's right to timely administrative action.

Director's Recommendation

It is recommended the Commission take note of this report and direct staff to use public hearing alternative "D" described on page 6.

Bill

William H. Young

Attachments (3)

1. Petition, staff report, response, and final order
2. Oregon Environmental Council letter of 6/27/83
3. Southern Oregon Timber Industries Association letter of 7/25/83

HK2113
LKZucker:k
229-5383
August 3, 1983

excerpts from meeting minutes 10/15/82

AGENDA ITEM M: PETITION TO AMEND OAR 340-14-025 (5).

Friends of the Earth has filed a Petition to Amend our Administrative Rules to allow any person dissatisfied with the terms of a permit issued by the Department to obtain a hearing before the Commission.

The Commission must act either by denying the request or by initiating formal rulemaking proceedings.

Director's Recommendation

We recommend that the rule not be changed as proposed.

Steven Karloff, Friends of the Earth/Oregon, spoke to the Commission in favor of the petition.

John Charles, Oregon Environmental Council, requested added language of "affected or aggrieved" parties to be added to the rule change being requested.

Llewellyn Matthews, Northwest Pulp & Paper Association, also spoke to the Commission on the matter.

It was MOVED by Commissioner Burgess, seconded by Commissioner Brill, and passed unanimously that the Director's Recommendation be approved with the added request to staff to research whether any process can be developed which would improve the process without a significant adverse impact on any applicant.

AGENDA ITEM N: PROPOSED ADOPTION OF THE CARBON MONOXIDE CONTROL STRATEGY FOR THE MEDFORD-ASHLAND AQMA AS A REVISION TO THE STATE IMPLEMENTATION PLAN.

This item concerns adoption of the carbon monoxide control strategy for the Medford area. A strategy to bring the Medford area into attainment with the carbon monoxide standard by 1987 has been developed and adopted by Jackson County and the City of Medford. Five persons gave verbal testimony at the DEQ public hearing. Two supported the plan in its proposed form, two recommended changes in the plan, and one was opposed in general to the plan. Adoption of this strategy by the Commission would revise the State Implementation Plan and avoid potential federal economic sanctions.

Director's Recommendation

Based on the Summation, the Director recommends that the EQC adopt the carbon monoxide attainment strategy for the Medford-Ashland AQMA and direct the Department to forward it to EPA as a revision of the State Implementation Plan.

It was MOVED by Commissioner Bishop, seconded by Commissioner Brill, and passed unanimously that the Director's Recommendation be approved.

12/3/82

This agenda item was intended to provide background information and highlight major policy issues for EQC consideration.

Director's Recommendation

It is recommended that the Commission discuss these and related issues during the Work Session at this meeting.

Howard Rankin, Department bond counsel, answered questions from the Commission and talked generally regarding bonds and appropriate security.

The Commission discussed this matter but took no action.

AGENDA ITEM P: FINAL ORDER DENYING PETITION TO AMEND OAR 340-14-025 (5) REGARDING HEARINGS IN PERMIT MATTERS.

At the October 1982 meeting, the Commission rejected a petition proposing amendment of an administrative rule regarding hearings in permit matters.

Department's counsel drafted an order reflecting the Commission's action and the basis for it. The proposed order, and petitioner's response to it, was sent to the Commission.

The Commission is now required to take formal action to memorialize its October decision.

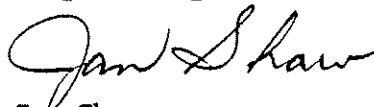
The Commission asked staff to revise the proposed final order to avoid implication of anything petitioners may have intended by their petition and submit the final order to Commissioners for changes or approval.

There being no further business, the meeting was adjourned.

LUNCH MEETING

1. Legislation status: Stan Biles, Assistant to the Director, reported on the status of the Department's legislative proposals. John Charles, OEC, discussed legislation that his organization will be supporting. Tom Donaca, AOI, reported that his board is supporting woodstove legislation.
2. Budget status: Mike Downs, Management Services Administrator, reported on the status of the Department's 83-85 budget request.
3. Woodstove certification program: John Kowalczyk, Air Quality, presented a slide show and written report on a potential woodstove certification program.

Respectfully submitted,



Jan Shaw
EQC Assistant

1
8/19/83

AGENDA ITEM I: Administrative Review of Agency-Issued Permits.

The Commission asked staff to examine the agency permit appeal practices to see if they can be improved and to bring alternatives to the Commission for consideration. This item attempts to do that.

Director's Recommendation

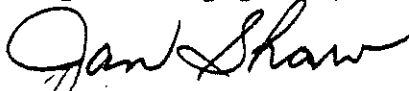
It is recommended the Commission take note of this report and direct staff to use public hearing alternative "D" described on page 6.

Alexander Gordon, attorney representing the Oregon Environmental Council, reiterated OEC's concern that "any aggrieved person" be allowed to request a contested case hearing.

It was MOVED by Commissioner Denecke, seconded by Commissioner Bishop, and passed unanimously that the Director's Recommendation be approved.

There being no further business, the meeting was adjourned.

Respectfully yours,



Jay Shaw
EOC Assistant

TRANSCRIPT - PUBLIC FORUM - March 8, 1985 EQC Meeting

Subject: Lava Diversion Project

Wujack

Good morning. My name is John Wujack, I'm a resident of Bend. I'm a member of the Executive Committee of a group called the Coalition for the Deschutes. We're a natural resource planning group in the Bend area. We charge ourselves with monitoring hydroelectric development in the Deschutes river basin. There is a project which is going to be judged here later on this morning and that project will be judged on its own merits. What I'd like to talk to you about this morning is the need for sound planning from federal agencies, state agencies, city and county governments, so that very specific problems can be eliminated, sound planning can go into effect which will really benefit community interests. What's going to serve one community in the eastern agricultural sections may not be working in a community such as Bend where we have limited agricultural resources but we have a growing tourist industry. And we feel as though the compatibility between all government agencies working on this is the only way we're going to have sound planning in what is really becoming a burden on the state, and that is in the burgeoning hydroelectric industry. I just thank you for your time this morning.

Petersen Thank you. Questions for Mr. Wujack? Thank you. Larry Tuttle, Deschutes County Commissioner.

Tuttle Thank you very much Chairman Petersen. It appears that we see each other more in Portland than we do in Bend. My name is Larry Tuttle, I'm a Deschutes County Commissioner. For the record, my address is Courthouse, Bend, Oregon. The purpose for requesting this time on the public forum section today is to request that I be allowed to make comments in the public hearing at the time that you take up number F on the agenda.

Petersen Why don't you go ahead and make your comments now, Commissioner Tuttle. I think the time span between now and then is very brief and the impact probably the same. I think we as a Commission decided that we want to limit that agenda item to just legal arguments and yet we do want people to feel free to talk with us on this subject.

Tuttle Would you be willing then, because the issue that I particularly want to address in my comments is the party status, may I submit a written memorandum into the record of the hearing?

Petersen Sure.

Tuttle I would like to go ahead and make the comments at this time.

Petersen Fine.

Tuttle I'll basically be reading from a prepared statement, so this statement will be the same as the one to be submitted into the record.

Petersen Okay.

Tuttle Today, of course, I'm speaking about Lava Diversion Project No. FERC 5205 on the Deschutes River. On November 28, 1983, General Energy Development Inc. (GED), through their consultant, Campbell-Craven Environmental Consultants, submitted a letter requesting Water Quality Standards Compliance Certification or waiver for the project I just previously described, pursuant to Section 401 of the Federal Clean Water Act. By letter dated September 7, 1984, the Department of Environmental Quality informed GED that it was circulating public notice of its application and that the application required statement of land use compatibility from Deschutes County, in accordance with the Agency's coordination program adopted pursuant to ORS 197.180.

Deschutes County received the public notice of GED's application from the Department on September 17, 1984. Deschutes County also received a letter from GED on October 2, 1984 requesting, and I quote, "a statement of compatibility with the Deschutes

Tuttle

(continued)

County Comprehensive Plan." Deschutes County responded directly to the Department by letter dated October 10, 1984, saying in part that it was impossible for Deschutes County to find that the proposed hydroelectric project near the Benham Falls on the Deschutes River south of Bend is in conformance with the Comprehensive Plan and implementing ordinances with respect to the requested certification under Section 401 of the Federal Clean Water Act, without reviewing the whole of the project in accordance with the standards and procedures applicable to such a request. And further, that until such time as an application has been made by General Electric Development, Inc., and that application has been found in conformance with the comprehensive plan and implementing ordinances, Deschutes County opposes the issuance of 401 Federal Clean Water Act Certification. End of quote.

GED's application for Water Quality Standards Compliance Certification was denied by the Department by letter dated November 27, 1984. The Department identified eight activities associated with the project construction and operation whose potential for water quality impairment had not been adequately addressed in environmental report, and that GED had failed to obtain a Land Use Compatibility Statement from Deschutes County. Deschutes County learned that the November 27, 1984 denial of GED's application had been appealed to the Environmental Quality

Tuttle Commission on February 27, 1985--that is, we learned it on that
(continued) day.

Questions about the standing of GED. GED was the applicant for the Water Quality Standards Compliance Certification. GED, however, is unable to utilize the waters of the state because the waters of the upper Deschutes River have been withdrawn from appropriation. Therefore, GED is unable to build any project on the upper Deschutes River. Arnold Irrigation District has entered into a joint venture agreement where the District will supply GED the municipal preference for the project for a share in the revenue of the project. Two Attorney General opinions have analyzed the agreement between the District and GED. The opinions conclude that the agreement is insufficient to qualify GED's application before the Water Resources Department as municipal application because the District has retained sufficient beneficial interest and control to make it appear that the proposal is other than, I quote, "a subterfuge to allow a private developer to use the municipal application process." And that's a quote from the Attorney General's Department. This was an opinion of Larry D. Thompson, Assistant Attorney General, dated October 24, 1983. GED is precluded from appropriating water for the project and the District does not have an agreement which will allow GED to utilize your municipal powers. This District is not an applicant in this proceeding. Under these

Tuttle circumstances GED does not have standing to apply for the Water
(continued) Quality Standards Compliance Certification.

Two. On the District's appeal. Deschutes County was not made a party to the proceeding today but was allowed to comment pursuant to the public notice, excuse me, Deschutes County was not made a party to the entire proceeding but was allowed to comment pursuant to the public notice as a member of the public and was a necessary party to the proceeding before the Department. To Deschutes County's knowledge, GED has not participated in this appeal of the Department's decision to the Commission. It appears that the District has received some special status and was allowed to stipulate to a briefing schedule and file a brief with the Commission raising legal arguments. Because of Deschutes County's role in determining compatibility with the Statewide Land Use Goals, the local Comprehensive Plan and implementing ordinances, Deschutes County should be given equal status with the District and be entitled to participate in the Commission's hearing in at least the same capacity as the District--and by the District I mean Arnold Irrigation District. The District was kind enough to supply Deschutes County with copies of the briefs on the afternoon of Tuesday, March 5, 1985--that's Tuesday of this week, about 5 o'clock. Given such a short period of time from the date of receipt of that information and the hearing before the Commission

Tuttle

(continued)

today, March 8, there was insufficient time to respond to the legal issues raised on behalf of GED by the District. Deschutes County does, however, concur with the Department's position set forth in their brief as to the legal issues under consideration.

Three. Evidence outside the record. The Department and the District acknowledge in their briefs that the Department continued to work on eight deficient areas after November 27, 1984, after the November 27, 1984 decision. No additional notice was given to the public that additional information would be considered by the Department after the decision was made. It is of great concern to Deschutes County, who has attempted to participate in the entire process but has not been given party status or considered necessary to the proceedings, that factual issues could be determined after the public hearings process had been closed by the Department. We believe that if the eight issues are to be resolved by subsequent evidence submitted by GED, at a minimum a new notice should be issued with an opportunity for the public to review and participate in the application as amended relating to those eight items. The appeal from the decision to the Commission should not consider new evidence developed outside of the record.

Tuttle

(continued)

Four. New hearing. Evidence was considered by Department outside the scope of the review process. We believe that, if the evidence is to be considered, it should not be considered as an appeal of the November 27, 1984 decision, but should be considered as a refiled or amended application. GED's application should be returned to the Department for new proceedings on the application as supplemented. It is our conclusion that the application of GED for Water Quality Standards Compliance Certification pursuant to Section 401 of the Federal Clean Water Act, should be denied. In the alternative, Deschutes County should be made a party with at least the same status as Arnold Irrigation District, and be entitled to participate in the rehearing of the supplemental application on remand before the Department.

Respectfully submitted, Richard L. Isham, Deschutes County Legal Counsel.

I have copies for each of the Commissioners and staff.

Petersen

Are there questions for Commissioner Tuttle?

Tuttle

So I'm clear. It is my understanding that this will be made a part of the public hearing record.

Petersen Yes.

Tuttle Thank you very much.

Petersen Thank you Commissioner Tuttle. I think it might be appropriate for legal counsel for the State and for the applicant to maybe comment on Commissioner Tuttle's remarks during your presentation, if you have one. Further public forum participation--Mr. J. D. Smith wants to talk to the Commission about Section 401.

Smith Thank you Mr. Chairman and members of the Commission. My name is J. D. Smith representing Oregon Shores Conservation Coalition and Northwest Environmental Defense Council, or Northwest Environmental Defense Center, pardon me.

I wanted to comment on the matter of the Lava Diversion Project.

Brill Get a little closer to the mike there.

Smith I and several others testified at the last month's meeting about the 401 certification process. Primarily to the extent that the certification of compliance with Section 303 of the Federal Clean Water Act seemed to us fairly clearly to require a consideration of the impact of projects to be certified under

Smith
(continued) Section 401, that they be consistent with not simply water quality criteria, but also the uses of the water. Amongst the issues to be argued during the formal hearing on this project, that particular consideration does not exist. I simply want to reiterate the same comments that we made last month that the Commission is missing a fairly key tool in making these kind of evaluations by not considering the impact of the Lava Diversion Project on the other uses of the water, primarily fish, recreation, etc.

Petersen Isn't that the land use issue? I mean, isn't that the point that the state is making?

Smith I think the point, Mr. Chairman, is not that it is or is not a land use issue, but what is clearly in the Federal law under Section 303 is the requirement of compliance or consistency with water uses. If that clearly appears under the land use law, that's probably fine, but it seems an unnecessarily circuitous route to make a determination under what is clearly in the Federal law.

Petersen Therein lies one of the problems that we're dealing with is the Federal law versus the State law and how the two may or may not overlap or preempt one another. It's not as clear as it could be.

Smith My point, Mr. Chairman, is that the Federal law, without arguing about whether local, state--without arguing about the relationship between local, state and federal law--the federal law itself allows this Commission, or perhaps better, requires this Commission to consider compatibility with water uses.

Denecke Do I restate it correctly--your contention is that the evidence does not show compliance with 303 of the Federal law?

Smith That is correct.

Petersen Are there other people on the public forum? Then I'll close it at this time.

TRANSCRIPT - MARCH 8, 1985 EQC MEETING - Agenda Item F

Petersen Agenda Item F, which is appeal of DEQ denial of Clean Water Act, Section 401, Certification to the Lava Diversion Project, FERC No. 5205, Deschutes River, Oregon. I think we will ask counsel to both come up to the table. For the record, acknowledge receipt of the briefs--the Department's brief, the applicant's brief, and also receipt of the Deschutes County memorandum that was read by Commissioner Tuttle into the public record of this proceeding. The parties have, in an effort to expedite a decision, have stipulated as to the facts. This is the first time I've read two opposing briefs where the introductory factual statements are identical, so we can get down to the legal merits of the case and call on attorney Neil Bryant.

Bryant Thank you Chairman Petersen. I'm Neil Bryant. I'm the attorney for Arnold Irrigation District which, as Commissioner Tuttle described, has entered into a joint venture agreement with GED to develop a small hydro project on the Deschutes called Lava Diversion. With me today, although he hasn't testified, is Don McCurdy. He is President of GED and lives in Medford, Oregon. It is my understanding, Mr. Chairman, that the record for this matter is the record that the DEQ has, as far as its file, the applications and the documents that have gone into that file. Is that correct?

Petersen Correct. Plus the materials submitted here today.

Bryant

I would like to supplement that record here today with two things. The first is the minutes of the Board of Commissioners, which Mr. Tuttle referred to, stating that GED did make an application for a Certificate of Compatibility and was denied. Those are the minutes of October 10, 1984. And the second thing I'd like to add to the record would be the House and Senate and Conference Committee statements dealing with 401(d) in 1971. This is the Federal legislation. When the amendment was adopted that added language under for 401(d), the Pollution Control Act of 1972. I have copies for all the Commissioners and also for Mr. Huston.

I'd also like to thank the Commission's staff for expediting this hearing. You may or may not be aware of that, but because of our license application is presently pending before FERC, and that's just the acceptance of the application for a license, it doesn't mean they will grant the license. They have given us a time limitation that we must comply with and of course one of the things they are waiting to receive is the 401 Certificate from the state.

Congress has adopted a national energy policy in regards to hydroelectric. The Federal Power Act constitutes a complete and comprehensive plan for development, transmission, and utilization of electric power. It does this through the Commerce

Bryant

(continued)

clause and it covers all navigable and in some cases nonnavigable streams. This, naturally, includes the Deschutes River. Both the cases cited in my brief and Mr. Huston's brief acknowledge this national plan. Today we do have agreement on the facts. The water quality issues have been resolved, and the question is whether or not we should be required to get a Certificate of Compatibility, and secondly, whether or not one should have been issued by Deschutes County. GED has not, or Arnold has not applied with Deschutes County for a Conditional Use Permit at this time. It's premature for us to do so. We think that we comply and should be entitled to the Compatibility Statement from Deschutes County because they have adopted an ordinance that under a conditional use allows for a small hydro development in Deschutes County. To be compatible does not mean we must obtain a Conditional Use Permit. Nothing in the legislation.....
(TAPE ENDS)

(NEW TAPE BEGINS) ... compatibility means you must require a Conditional Use or some permit from the County. And that statute says that DEQ and the other state agencies must carry out their planning duties in a manner compatible with the Comprehensive Plan. If the Legislature wanted that to read that we had to comply and obtain a permit through the normal planning process before the 401 Certificate or before it wouldn't be considered compatible or coordinated, they could have certainly said so.

Bryant

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And I think they left the door open too for when the DEQ or other agencies found that they had to act possibly inconsistent with the Statewide Plan. In ORS 197.640(2)(d), it states that an agency can go ahead and not follow the local jurisdiction's plan if in fact a state or federal statute doesn't allow it.

Turning to the real question though, we're talking about 401(d) and the language that's there. And the staff has interpreted this small section of the statute to allow the state to apply other requirements in hydro licensing. Those words are "and with any other appropriate requirement of state law." This phrase is just a small part of the entire legislation. If you take the plain meaning of this section, you have to read not only that little part that's taken out of context, but all of Section (d). And Section (d) refers only to water standards and water quality issues, effluent limitations, requirements necessary to assure compliance with any effluent limitations. And then it cites the other sections of the Act which all deal with water quality issues. Nothing mentioned but water quality issues. Then, if you just look at the word "appropriate" and how it modifies the word "requirement" in Section (d), you see that "requirements" refers only to water quality issues. There is a doctrine that is used by attorneys and courts in trying to interpret language in statutes, and unfortunately it's in Latin and Commissioner Denecke probably knows this pronunciation

Bryant

(continued)

better than I, but I'll try it--ejusdem generis. The staff's interpretation of 401(d) would permit a state to consider almost any factor and issue a water quality certification, contrary to the doctrine of ejusdem generis. Our own 9th Circuit, this is the Federal court system, says, and I quote, "Under the rule of ejusdem generis, the general words which follow the specific words in the enumeration of prohibited acts must be construed to embrace only acts similar in nature to those acts enumerated by the preceding specific words." Those preceding specific words all deal with water quality standards and issues. That's from the case of Haili v. United States, 260 F2d 744 (1958). The second thing you look at in helping you determine what these words mean is the legislative history. I've introduced today the Senate, House, and Conference Committee reports from the United States Congress. In 1971 the House and Senate passed different bills and they went to a conference committee. This legislation talks about the purpose of the Act and the changes and says its to allow the Certification from the state in which the discharge occurs, that any such discharge will comply with Sections 301 and 302. Again Sections 301, 302--water quality. It goes on to say the Act was amended to assure consistency with the bill's changed emphasis. Water quality standards to effluent limitations based on elimination of any discharge or pollutants. Nothing about land use. They're concerned about water quality. The additional purpose, also, was to allow states to impose more

Bryant

(continued)

stringent water quality standards than the federal act. William Ruckelshaus, and in that there is a letter from him, who was the EPA Administrator at that time, talks about the purpose and again emphasizes the water standards. But finally, when it went to the floor of the Senate, one of its chief sponsors, Senator Muskie from Maine, described the intent of the bill and the change, again this change came out of the conference committee that he was on. He states, "Secondly, the conferees agreed that a state may attach to any federal license or permit such conditions as may be necessary to assure compliance with water quality standards in the state." So when he explains that change that says "appropriate requirements of the state," he is saying to assure compliance with water quality standards, water quality requirements, not other requirements.

In summation on this point. If you allowed it to mean anything else you'd lose your federal energy policy and the power that the Federal Power Act gives to FERC to make the decision on issues that are not delegated specifically to the state. This is called the preemption and it has been recognized by the Supreme Court of the United States in the cases I've cited. The DEQ erroneously contends that Section 401 provides the agency with a veto power over FERC's hydro project licensing authority. I cite that from page 7 of the staff's brief. In fact, the Supreme Court has specifically held that no state shall have

Bryant

(continued)

veto power over federal hydro projects. This is a quote from the Iowa case, from the U.S. Supreme Court, to require the petitioner to secure the actual grant to it of a state permit as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Counsel of Iowa (who was trying to assert you had to get a state license too) a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the state the comprehensive planning that the Act provides and it shall depend on the judgment of the Federal Commission or other representatives of the Federal government to make the decision.

Denecke

Excuse me Mr. Bryant. Doesn't the state have a veto power though in the area--you would argue that the state does have the right to withhold certification based on water quality standards. Isn't that really a form of veto as well, only you're saying it's a limited veto.

Bryant

That's exactly right.

Denecke

And not a broad form veto, but it isn't that the state doesn't have any veto at all.

Bryant No. In the Federal plan, in the Federal Power Act, in the Pollution Control Act as passed in '72, Congress has said, out of the entire pie, let's consider it a pie for hydro development licensing, we will cut out a section where the state will make the determination, and that determination will be made in the area of water quality. They are very specific in just that area. And any attempt of states to attach other restrictions based upon the 401 Section has been denied by other federal courts and state courts. And in fact there is a suggestion in the brief from the staff that maybe the First Iowa case has been weakened. But as late as 1982 in New England Power Company v. New Hampshire, 455 U.S. 331, they have again said that the Federal Power Act gives the federal government that right to control the policy and the licensing.

Denecke Mr. Bryant, is that case cited in the brief--this last one.

Bryant No.

Denecke Would you give me that again.

Bryant Yes, I'd be happy to. New England Power Company v. New Hampshire, 455 U.S. 331 (1982).

Petersen Did that case talk about Section 401?

Bryant No. That case--it talked about--it involves the city in New Hampshire that was attempting to place some restrictions on the development of hydro and requiring them to get a license. And, in particular, they were in part trying to bootstrap an argument from the California case which is cited in the appellant's brief as stating that that is a weakening of the First Iowa case, and that maybe now the states did have more of a say in other areas. And the same Supreme Court that gave the U.S.-California case, said no, that is not the case.

Petersen Has 401(d) been interpreted by any of the federal courts?

Bryant No.

Petersen So this issue is ...

Bryant Only the New York Court of Appeals.

Denecke Was the Campobelleo case, that's not the full name of it, did that interpret 401(d)?

Bryant Yes. The Campobelleo case involved 401. In the Campobelleo case--but the question did not arise whether or not the state could impose additional nonwater quality issues. In that case it affirmed an Administrative Law Judge--said he lacked authority

Bryant

(continued)

to review the conditions imposed by the state in a 401 Certificate. That review could only be obtained in the state court. Again, as Commissioner Petersen has said, if the issue is 401 and the standards, and say we were denied our Certificate because we didn't meet the DEQ's requirement on water quality, FERC takes the position, and the court upheld it, that we could only appeal in the state court on the issue of whether or not we met that standard or whether or not that standard was fair. That's what the Campobelleo case stood for. That case does not hold that a state may impose nonquality concerns in 401. The issue is not addressed. There the state had already issued a Water Quality Certificate and someone didn't like the issuance of it so they challenged it in a nonstate proceeding, and the court said no, the proper way to challenge that is to go to the state court.

The other case that is cited by the staff in their report is California v. U.S. In fact, this did not modify the First Iowa case. In California we have a fight between two federal agencies. FERC who was licensing a small hydro project and the Department of the Interior, as it was on, in fact, an Indian reservation and the Department of the Interior controls the Indian reservations. Justice Renquist in writing the decision found that FERC had to listen to the other federal agencies as it pertained to the Indian reservation. But in that same case,

Bryant

(continued)

they did not allow the Indian reservation to impose restrictions and standards on the grant of the permit. Renquist went on to say, and this is his reasoning for why he found in this manner, "The history of the relationship between the federal government and the state and the reclamation of arid lands of the Western States is both long and involved. But through it runs a consistent thread of purposeful and continued deference to state water law by Congress." Thus the Court's opinion turns on the history of water rights in the arid western states in the Reclamation Act. That's the Act that they were interpreting and discussing in reaching that decision. You asked, Judge Denecke, about a case that might talk about California and First Iowa. There is only one case that I've been able to find that discusses the impact that the California decision might have on First Iowa, and that's the town of Springfield, Vermont v. McClaren. It's at 549 F2d 1134 (1982).

Denecke

549, what was the other number?

Bryant

1134. In this case, the Vermont public service board said, now that California's been decided, we have the right to pose some other standards on the licensing of a hydroelectric project. And they cited California as their basis for doing this--the California decision. The court said, "Notwithstanding some similarity in the wording of the state statute"--excuse me, let

Bryant me start again. "Notwithstanding some similarity in the wording
(continued) of the statutes"--we're talking about the two federal statutes,
the FERC statute and the Arid and Dry Land Reclamation Act
statute--"They serve different objectives, relate to federal
actions fundamentally dissimilar in nature." And the court
found, and this is the federal court in Vermont, "that it does
not overrule First Iowa."

The other case that is cited by the staff is the Escondido case.
To me this has no impact on the federal preemption question.
It involved--you know what--I apologize. When I discussed the
California case I said it involved the Indian rights. That was
not true. You were probably going to correct me. The Escondido
case affected the Indian rights, where the Department and the
Secretary of the Interior and the FERC commission were at odds
as to who could set standards, whether or not the Secretary of
the Interior could set standards on a hydro project on the Indian
lands. And the decision was between the two federal agencies,
where Congress had acted. Apparently there is a little
inconsistent law that the Secretary of Interior could set some
restrictions on the FERC license. Solely a question of division
of authority between the two federal agencies.

The cases directly in point I've cited in my brief and they come
out of New York, I believe they are both 1982 cases, it's very

Bryant

(continued)

analogous to what we're doing here today. The Commissioner of the environment in the State of New York tried to impose some additional restrictions other than water quality issues, and he based his decision on the same language, the same cases, that the staff have stated in their brief. And the New York court stated that they just couldn't do this--that the Federal Power Act has vested the Federal Power Commission with broad responsibility for development of the national policies in the area of electrical power. The Commission's jurisdiction with respect to such projects preempts all state licensing except where specifically allowed to address specific issues, i.e., water quality. The Federal Pollution Control Act, which is the one now that you have the legislative history on adopted in 1962, relinquishes only one element of the otherwise exclusive jurisdiction to the states. And that is that the project will violate applicable water standard quality of the state. I'm quoting, "Congress did not empower the state to consider or reconsider matters unrelated to their quality, water quality standards," like land use planning. "It is equally clear that the Commissioner has neither the authority nor the duty to delve into the many issues which have been investigated and decided by the Federal Power Commission in the course of the extensive proceedings it has conducted." The matter of de Rham case which is also cited gives the legislative history of 401. And they talk about the extensive and the exhaustive proceedings that

Bryant

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are conducted by FERC. Right now, we're dealing with 27 different state and federal agencies in the consultation requirements of FERC.

Finally, I think that the Oregon Attorney General's opinion, which I've cited in my brief, recognizes the preemption of FERC. And the DEQ in the past has recognized that you can only deal with water quality issues on the 401 Certificate because you haven't required Statements of Compatibility in the past from county or local government, simply because you weren't allowed to. You have to follow the federal scheme and the federal government. So I think, in conclusion, that when you review the plain meaning of the language, 401(d), review it by reading the other sections and the full paragraph. Don't take the words out of context. When you review the legislative history, and the ejusdem generis doctrine, you'll see that that language can only mean that the requirements you can add have to deal with water quality. The First Iowa case has not been watered down and weakened, and if you have an opportunity to review the cases that are in the briefs of both parties, and the ones that I have cited today, I think you'll see that you have no recourse but to grant the 401 Certificate if the water quality standards are met.

Thank you.

Petersen Questions?

Denecke Mr. Bryant, I'd like you to comment on Commissioner Tuttle's remarks. As I understand him, he is raising three points. GED has no standing as they can't use any water. That may be a pretty loose general statement. Secondly, that Deschutes County should be a party to this. And thirdly, that evidence was taken between the decision on this case by the Department and now that show that GED had satisfied--I think there were eight things where--on water quality which were absent at the time of the Department's decision, first decision. Would you comment on those.

Bryant Beginning with the last matter first. When the letter from Mr. Hansen, which I think was dated November 27, 1984, in addition to the compatibility question there were eight issues dealing with water quality and the responses to those eight issues were made in December. When the staff of the DEQ reviewed the answers they were satisfied. And so, as stipulated between the parties, the factual matters dealing with water quality have been answered. As far as whether or not that process was appropriate or not, I don't know. To me it seems like it would be. That's kind of the way that things were handled in the past, and if someone had some additional information that they wanted to submit to DEQ they certainly could have done so.

Bryant

(continued)

Concerning the standing of GED. The Attorney General's opinion that he has referred to, first of all, which said that the first two agreements between Arnold Irrigation and GED--by the way these agreements--it's a contract where we're cooperating with GED in allowing them to use our water rights to generate electricity and then we receive compensation for it that we will use to improve our water canals and conserve water, etc. The first two agreements were rejected by the Attorney General saying that according to what is called the Winchester Decision, it didn't give Arnold sufficient rights. This is delightful for Arnold because now we have rewritten the agreement that allows more rights to go to Arnold and more money. That has been submitted to Water Resources and to the Attorney General's office for review. It has not been rejected or accepted. We haven't gotten a decision on that.

Concerning the other matter about our municipal preference and the ability to do this project. Attorney General's opinion was issued approximately a month or so ago, which said that the Deschutes River, for purposes of that section of law allowing municipal preference was not part of our irrigation system. Now, this confused the Irrigation District because, I don't know if you're familiar with the Deschutes, but we have a reservoir up above at Crane Prairie and then we run the water down the river and take it out about 5-6 miles above Bend. If it wasn't

Bryant

(continued)

for the River we couldn't get the water to our canals. So we feel the Deschutes is part of our system. The AG's opinion said it was a very close question. They based it upon the legislative history of the Act, and that's been submitted to Water Resources. Water Resources still has not acted on our joint application-- the joint application between Arnold and GED. They have not turned us down. So formally they haven't rejected it, and I can assure you that if they do it's our intent to appeal that decision because we think it's in error and we would be entitled to the license from the State Water Resources. So that at the moment is up in the air.

Concerning the standing of the county. I don't really understand that. I guess my answer to that would go back to the point that it's not really an issue here because FERC and the Federal Power Act has given you a specific slice of the pie to make a decision on dealing with water standards. The Deschutes County in making that determination really isn't involved. DEQ does that analysis. Unless there is something that gives, under the Federal Law, and the 401 Certificate, gives Deschutes County the right to become a party, it wouldn't appear that they would be a party. But I have not had an opportunity to review what has been submitted by the County, and the first time I heard it was when Commissioner Tuttle testified today.

Petersen I know I've read this but I can't put my hands on it. The eight objections--water quality objections that have been overcome. Could you run through those really quickly for me?

Hansen Mr. Chairman, number 56 almost to the very back of that package. That identifies those issues that have not yet been addressed. Eight items.

Bryant Mr. Chairman, also there is an interoffice memo dated February 13, 1985 to Mr. Hansen from Glen Carter dealing specifically with those eight items. If you'd like to I could run through them very quickly.

Petersen Let me just take a minute and read them. I think I've got them here. The potential water quality impacts not adequately addressed.

Hansen Those are the problems, and then the memorandum is the answer to those problems.

Petersen To what extent did the Department get involved in minimum streamflow? Was that part of the--something the Department had to determine in connection with this also--this certification?

Huston I don't believe that was an issue in this case, Mr. Chairman.

Petersen But was that something that the Department would have to pass on in addition to specific water quality.

Hansen Minimum streamflow, Mr. Chairman, minimum streamflow refers to state law requiring 75 points to be identified for minimum streamflows. This minimum streamflow points being identified by Fish and Wildlife or by DEQ for our respective responsibilities. I don't believe that that relates at all to the particular situation here.

Bryant Mr. Chairman, DEQ did testify at the minimum streamflow hearings in Bend concerning the proposed minimum streamflow and water quality issues. I attended those hearings, and this is just from recollection, but I think the testimony was that they didn't find serious water pollution problems or something like that on the Deschutes in regards to these proposed projects.

Petersen Any more questions for Mr. Bryant at the present time?
Mr. Huston.

Huston Thank you Mr. Chairman.

Denecke Excuse me Mr. Chairman just a moment. Do you have any comment to make on Mr. Smith's statement that 303 was not complied with.

Bryant I couldn't hear him very well when he spoke, but from what I did grasp of it I believe it has been complied with and again the same arguments that are raised in my oral presentation and brief, it is very specific as to what states may do and what the DEQ can do, and those other uses, again, simply wouldn't apply in this forum--if I heard him correctly.

Denecke I think, Mr. Bryant, that you stated that the requirements of 303, which the state has to find are complied with, where there was no evidence that they had been complied with--that's what I understand he was talking about.

Bryant Oh. Okay. That's the first I've heard of that.

Denecke _____ wasn't specific about the _____

Bryant I know know of no deficiencies. It is my understanding they were all complied with.

Bishop Wasn't he speaking about the uses of the water, so it would be the fish and the recreation use--the other uses of water and we should be considering those.

Denecke I'm not sure what 303 refers to--do you recall?

Huston

I think I can help just a little bit Mr. Chairman, members of the Commission. 303--I'm not sure of the specifics of 303 either. There is a general reference in there to the beneficial uses of the water. Mr. Smith's contention, basically, and it's one that you particularly have to grapple with in your rulemaking on 401, although we view this as a precedent-setting case toward that end, Mr. Smith's basic contention is regardless of what 401 specifically says about your ability to go beyond water quality standards, that the water quality standards themselves encompass beneficial use considerations.

Hansen

Rather than the more narrow, limited water quality issues.

Bryant

I guess then if that was his point, my response to that would be if it did get into that then you're defeating the purpose of the Federal Power Act decisions by the court saying that we can't allow any local or state vetos other than the specific areas that are described, otherwise you could have the counties or the cities put requirements there that couldn't be met or simply not allowing hydro to be developed, and that's not the purpose of the Act.

Petersen

Mr. Huston, excuse me, I think the Commission probably would appreciate your remarks a lot more if we could take a brief, five minute recess.

----- BREAK -----

Bryant The cases that we have cited in our briefs and in our oral argument, and he has no objection if the Commission would like I'll give you just Xerox copies of those cases.

Petersen I appreciate that. Since Commissioners Bishop, Buist, and Brill's legal library is rather limited. I don't know, do you have the U.S. Supreme Court reports in your house?

Buist Oh indeed yes.

Petersen This is just one set of all the cases?

Bryant Right.

Bishop That's sufficient.

Petersen These aren't duplicate sets of all the cases?

Bryant No. You'll find in most of them only 10% of the case applies to what we're talking about.

Petersen Okay. Mr. Huston.

Huston

Thank you Mr. Chairman, members of the Commission. I'm Michael Huston, Assistant Attorney General, representing the Department of Environmental Quality.

With respect to some of the procedural issues that have arisen. I understood the county to be in part requesting that they be granted party status in this case and have a formal involvement. The county, as you will see if you haven't already, has an obvious stake in the outcome of this decision. We would like to think that the Department's position is parallel enough to their concerns that we will indirectly represent their concerns today. And we would also like to think that the case can be easily resolved on a narrower issue than many of those that other people would like to have you deal with today. At the same time, the Department has no reluctance at all to suggest to you that if you prefer to have those additional parties involved, and prefer to have those additional issues briefed, we would support that. I think the proper vehicle for doing that would have to be referring the case back to your Hearings Officer to entertain those requests for party status and to establish a new briefing schedule for those additional parties and additional issues.

I would like to discuss all three of the legal issues that Mr. Bryant has raised in his brief. Dealing rather quickly with issue number 1--the land use compatibility issue--the county's

Huston interpretation. Also briefly with the third issue--the alleged
(continued) inconsistency in the agency practices. And saving for last the
most important issue, the breadth of 401.

The first issue, it is the appellant's position, Mr. Bryant's clients' position that the county's plan gives general recognition to the possibility of hydroelectric development in the county, and that is simply all that the land use laws require. The Department respectfully begs to differ. ORS 197.180 says that state agencies have to act compatibly with both local plans and ordinances. The and, the conjunctive and, is in that statute. The number of Oregon court decisions that have reversed state agency and local decisions for failure to comply with ordinances as opposed to plans, are virtually too numerous to cite. In this particular case, the county offered its interpretations to the Department in a pair of letters. What the county said, and those letters are attached as part of the appendices to our brief, what the county said was very simple. It said the county had adopted an ordinance that allowed hydro project development subject to a Conditional Use Permit process. Particularly pending completions of a longer-range study on the cumulative effects of projects being proposed for the Deschutes River. The very purpose of that review is to determine whether any project will indeed comply with the county's ordinances. Until that review is completed, any

Huston

(continued)

determination of compatibility with the ordinance is simply impossible and I think there is no legal question that any project constructed with the absence--in the absence of a permit, would simply and boldly violate the county's land use ordinances. No such review has been completed. Indeed, the appellant has not even sought a conditional use permit from the county to date. That, in our judgment, both for the land use issue as well as a number of the other legal issues we'll be discussing today, simply makes the appellant's position premature. They have not even sought that necessary approval from the county.

Moving then to the appellant's third issue, the issue of consistency. The appellant, I think this is important although Mr. Bryant didn't spend much time on it today, I'm sure it's of some concern to the Commission. The appellant's position is, in effect, because DEQ has not assured compliance with the land use laws in past 401 decisions, it cannot do so in this case. Mr. Bryant bases that legal argument on a provision of the state Administrative Procedures Act which allows state agency decisions to be reversed by a court in some limited circumstances for acting inconsistently with prior agency practice. The Department's response is simple. I think clear. Fortunately, the state Administrative Procedures Act does not bar agencies from ever changing their practices. In particular it does not bar an agency from recognizing the error of their past ways and

Huston

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improving on those errors. What the APA does say is that a court may remand an agency decision if the court finds that the agency decision to be quote, "inconsistent with an agency rule, an officially agency stated position, or a prior agency practice," and I emphasize "if the inconsistency is not explained by the agency." End of quote of the statutory provision from the APA. Thus, the law simply requires that an agency explain in a rational fashion its departure from its prior practice. That is precisely what the Department did so in this case. Precisely what the Department did in this case. In a letter, in the letter denying the 401 certification to the appellant, the Department included the following information. It rather candidly admitted that in the past it had overlooked the requirements of its own land use coordination agreement and of the state's land use laws, which specifically list 401 as a land use decision for which land use compatibility will be assured. It also said that the agency had consulted with its legal counsel, we expressed concerns about the failure to do so in the past, and it also noted several factual distinctions in this case. This is the first case in which the issue had ever arose. It's the first case in which a local government had specifically advised the Department that there was a conflict, or that there was even any potential for the conflict. Of course in this case it actually ended up going one step further with the county to taking a definitive position that its ordinances had not been

Huston

(continued)

satisfied. Legally, we think this is very parallel to the court decision in Oregon, particularly the Roth v. LCDC case. That was a case in which LCDC decided to admit that it had been interpreting the statewide planning goals incorrectly and to change that interpretation. When challenged, the court disposed of the argument by saying, we do not remand a valid determination before us on review for inconsistency with the erroneous position previously taken by the agency. That administrative law principle was confirmed as recently as this week in a second LCDC case, 1000 Friends of Oregon v. LCDC and Benton County. In short, agencies may see the error of their ways and correct them. And even if prior procedures are not necessarily legally erroneous, agencies can decide to change those procedures and improve upon them providing they explain why they are doing so.

Thirdly, finally, deal with the admittedly more complicated issue in the case--the issue of the breadth of the state's authority under Section 401. This issue, in the Department's judgment merits more attention for at least two reasons. While the Department submits that the law--truly believes that the law favors its position, the law is admittedly less clear on this issue. Secondly, as a matter of policy, and as a representative of the Department's position on this case it is incumbent upon me to convey this, it is your Department's view that this case is of the utmost importance. It touches upon no less than the

Huston

(continued)

basic issues of the integrity of the state's land use laws and this Department's good track record in the past of trying to adhere to those, and perhaps more importantly, it touches upon the basic issue of the State of Oregon's view of its role in hydro development projects within our state borders.

401 presents the only clear, under the current law, state authority--authority for state involvement in hydroelectric development issues. Thus, you have the broad public interest that you've seen not only today during the comment--public comment period, but also in your initial hearing on the 401 rulemaking. Fortunately, you need not resolve all those broader policies in the context of this particular case. This case is much more narrowly attuned, in our judgment, to the minimal question of whether you can enforce requirements that this agency already has on the books, which the State Legislature has required that you have on the books. Those requirements simply being that when you make a water quality decision, that it is in effect in tandem a land use decision and that that decision has to be assured to be compatible with both state and local land use standards.

I think it is important on this last issue to distinguish between what the District is arguing and what they are not arguing.

They are not arguing that the state land use laws do not have

Huston

(continued)

clear application to this case. You have not heard Mr. Bryant make that argument. They do argue, however, that federal law preempts this agency's ability to apply the state land use laws as well as your own adopted rules and agreements on application of those laws. In short, appellant's argument amounts to a contention that federal law requires you to violate or at least ignore state law and your own law. The Department's response can be simply capsulized with three points. We think the appellant is wrong in the reading of the Clean Water Act, because they give no effect to the clear language that allows this body to determine other appropriate requirements of state law beyond water quality considerations. Secondly, and we will contend that to try to separate the land use considerations, both of concern to the county and encompassing state law, from water quality situations is virtually impossible. In this case you are not really confronted with the ultimate question of how far you can go, but rather you face a situation where the State Legislature simply said, in essence, land use is relevant to your water quality determinations. Much as in every water quality permit you issue you assure land use compliance, you should in a 401 Water Quality Certification. The second basic point the Department offers is that we believe the appellant's are wrong in in their statement of preemption law. You need not even get to the question of preemption law if you determine that 401 at least itself allows you room for operation. If

Huston that's the case, there is no preemption question at all. It's
(continued) only if you read 401 and the other appropriate state requirement
language out of 401 that you then have to confront the issue
of whether the Federal Power Act prevents you from operating
in this particular case.

Denecke Mr. Huston, could you reiterate that in perhaps different
language because I'm not quite following you.

Huston I think Commissioner Denecke--I'll sure try. Section 401(d)
says quite literally that in addition to water quality standard
considerations required by the Clean Water Act, that you can
apply and should apply other appropriate requirements of state
law. If that language means what it appears to say, that is
the end of the issue. It's only if that language is read out,
then we confront the general preemption question of whether a
federal law, most relevantly the Federal Power Act, prevents
you from operating in this realm.

Petersen Mr. Huston, what state statute says that this body must consider
the land use considerations.

Huston 197.180(1) says that all state agencies that make land use deci-
sions have to make those decisions in compliance with statewide
planning goals and with local comprehensive plans and ordinances.

----- END OF TAPE -----

Huston (NEW TAPE BEGINS) ... to make those compatible with local plans.
(continued) You have adopted such an agreement required by law. You have submitted it to LCDC for their approval. They have approved it. It is attached in the appendices. What it says, is water quality decisions of this agency including 401 are land use decisions. They clearly impact the use of the land. Therefore, this agency concedes that it has a responsibility to assure land use compatibility. The means you've chosen to do that is that when an applicant submits a request for certification or request for a permit of virtually any form do you--your Department writes the local government or advises the applicant that the local government has to make a determination that its ordinances are complied with. That's precisely what happened in this case.

Petersen That's what I thought. The requirement is not in the statute, it's the statute sets out the general requirements and then the Agreement is what actually adopts the 401 connection with land use. That's what I thought.

Huston Exactly Mr. Chairman. I'm sorry I've misled. The general requirement for state agencies in taking land use decisions in compliance with ordinances is in the statute. Your determination

Huston of what is and is not a land use decision and how you accomplish
(continued) that is in your Agreement.

Petersen That's ours. The Legislature has not said that water quality
decisions are land use decisions.

Huston The third basic point the Department would offer is in large
part a policy argument and in lesser part also a legal argument.
It is the Department's simple position that when confronted with
a case of legal uncertainty that the agency should comply with
the clear requirements of its state law and the own agency's
rules, and simply opt for the broader view of its state
authority. There is little question that federal law is
increasingly pervasive in the environmental field. You will
probably discover that there are few arenas in which you operate
where there is not at least a reasonable contention that Congress
has preempted the field. It is the Department's judgment that
the proper way to respond to those contentions is to analyze
them on a case-by-case basis. Not as a general principle,
certainly, to react with timidity because of possible legal
problem with preemption.

That sort of policy consideration also folds into the legal
calculus, though, for at least two reasons. One, this agency's
opinion carries legal weight on this sort of issue. You are

Huston

(continued)

the agency charged by ORS Chapter 468 by the Legislature with implementation of the Federal Clean Water Act on the state level, as well as charged with meeting your responsibilities under the state land use laws. The Oregon courts have established strong principles of deference to agencies interpretation of the statutes that they are responsible for enforcing. The Court of Appeals has recently established the test that your interpretation is entitled to definitive deference unless it is plainly inconsistent with the purpose and language of the applicable law. There may be room for legal doubt in this case, and we're going to talk a little bit more about exactly how much doubt there may be, but it is the Department's position that certainly their case, or their position in this case is not plainly inconsistent with the applicable law.

Secondly, the Department's preference to opt for a broader rather than a narrower view of their authority is also relevant to the preemption issue. It is a basic tenet to the preemption issue. It is a basic tenet, the preemption doctrine, that state laws are presumed valid until the reverse is clearly shown. The burden, quite frankly, is on Mr. Bryant to establish that your authority is preempted. We submit that while there may be a possibility of preemption in the future, at a minimum that case has not been established yet. Mr. Bryant's client has not even applied for the conditional use permit that the county's

Huston

(continued)

ordinances require. We have no--we don't know that Mr. Bryant wouldn't be successful in that effort or we certainly don't know what grounds the county might use to act upon that decision. In that case, any attempt to conclude preemption would appear to be significantly premature.

With respect to the tricky issue of the breadth of legal authority. It's an occupational hazard of attorneys that they like to talk about cases. Although often the inquiry is not very helpful. I'm going to engage in it out of occupational necessity, if for no other reason. What we have, and I'll try to be as candid as possible. We have two courts in the country that have opined on the meaning of 401 and cases that are very factually and legally different from one that we have in front of us. In short, they are not real helpful, but we'll talk about them. You have the 11th Circuit Court of Appeals, mid-level, second to the highest federal court, the 11th Circuit, the Northeast, that involved an oil refinery case. With all due respect to Mr. Bryant, I think he's got his facts reversed on the two cases. This is indeed a case where the State of Maine chose to take a broad view of its 401 authority. It quite boldly said, we're looking beyond water quality. We're going to condition our 401 approval of this 401 refinery on state siting law. A siting law very parallel in its considerations to Oregon land use law. What happened in that case is that it was EPA's

Huston jurisdiction to issue an NPDES permit. So that's how it got
(continued) in federal court, because EPA refused to give credence to to
the State of Maine's conditions under the siting laws, saying
401 doesn't allow you to go that far. What the federal court
held is that it wasn't going to decide the issue. That it was
not the federal court's business to tell the state how far it
can go. It then proceeded to opine--to offer the unnecessary
opinion that, in the court's judgment 401 would allow the state
to do that by virtue of the specific language that we referred
to--to determine what the other appropriate requirements of state
law.

Denecke That's Campobello.

Huston That's the Roosevelt Campobello case. For the lawyers on the
Commission, that's dictum, for the nonlawyers that means the
court said more than they absolutely had to.

The other court that has addressed the issue is, indeed the New
York Court of Appeals. Most recently in the Power Authority
v. New York case. A case which I think the appellant relies
upon wrongly as being definitive and on point. The facts refute
that. Again, facts that I believe Mr. Bryant had wrong. The
New York agency in that case did not choose to go beyond water
quality considerations. It chose to take the narrow view of

Huston

(continued)

its authority. It was challenged by the power company that wanted to build the dam. The power company contended that the state agency should have considered a broad range of other considerations, particularly energy considerations, and that your counterpart agency in New York should have decided that although water quality standards were violated, that the prevailing energy needs were such that they could verify 401 nonetheless. Thus, there are some very critical distinctions between that New York case and this case. It's a minimum case. All the court was faced there was with issue of whether at a minimum the agency has to meet water quality standards. And there is no serious question about that at all. In the Clean Water Act there is an entirely distinct provision, Section 1309 of the USC cite, that says states can't go below the minimum.

Secondly, energy considerations are, in our judgment, very different from land use considerations. If the Department in this case or in other cases were purporting to directly duplicate the energy considerations that FERC makes the preemption case or issue would become a lot harder. That's not what anyone is purporting to do here. Secondly, the case is, of course, completely different, or I guess exactly parallel in the sense, and the New York court was simply deferring to the judgment of its expert agency's narrow view of their 401 authority. That is in that sense the case precedent would support the principle

Huston

(continued)

that a court is likely to defer to to whatever position you take of your authority in this case. It is, indeed, somewhat ironic that the New York case is argued as one taking a restrictive, definitive restrictive view of the state's 401 authority.

Because I am advised now that the State of New York itself, your counterpart agency, has joined a group of several states--Maine, State of Washington to the north, and others--in taking a broader view of 401. And they do not view that case as dispositive or prohibitive of that issue.

I think, for beginning to wrap up here, that the Commission faces the unfortunate situation where you're going to get a lawsuit regardless of what you decide. And perhaps it's a--be somewhat instructive to walk through exactly how that is going to work and what you will face in that situation. I'm sure if you rule in favor of the Department today that Mr. Bryant will be glad to fulfill my prophecy and give you a lawsuit. If you decide in Mr. Bryant's favor, I don't think the Department appeals Commission's decisions, but we know well that the county or other folks would. What would face, I think, is as follows. The Federal courts have said they won't decide it. They won't substitute their judgment for yours on the breadth of your authority under 401. FERC has held the same. They won't second-guess your authority under 401. So it's very likely that if you send your denial of 401 for this project to FERC that they

Huston

(continued)

will not second-guess that. Thus, the remedy if you rule in the Department's favor for Mr. Bryant will be exclusively on the critical substantive issues in state courts. In state courts, what we think you will face is a very strong state court recognition of our land use laws and a consistent literal enforcement of those land use laws. You will face a Court of Appeals which very recently had ruled in your favor on a very parallel land use case, Schreiner's Gardens v. DEQ, in which the Court of Appeals upheld your water quality permit, your air permit, and your solid waste permit for the garbage disposal north of Salem. That was a case where the Department behaved exactly like it's behaving in this case. It insisted that the applicant obtain a conditional use permit from the county. The applicant went to the county. Obtained it. The Department then in turn relied upon those land use findings. The court said, yup, you're right. Those were land use decisions. You had to do that and the way you did it was perfectly appropriate. Your reliance on the local government's determination was specifically acceptable. The inevitability of a lawsuit I don't think has swayed the Department's posture at all in the case. It has simply, I think, reinforced their judgment that if you are going to be involved in litigation, the proper role of the state is to be advocating in favor of its own authority rather than against it.

Huston

(continued)

There are many ways that this case can get resolved. Mr. Bryant can have his client seek a conditional use permit and perhaps obtain it. No one knows whether that is impossible until he has tried. Congress can, with a stroke of a pen, rewrite the 401(d), the Clean Water Act, and eliminate all this doubt about whether it means what it says. Or they can in any other fashion make a clear preemptive ruling. They have not done so. Finally, a court, some other court or a court in direct ruling of your decision, can give us a definitive judgment that 401 does not allow us to comply with state land use laws. Until any of those things happen, it is simply the Department's belief that at a minimum, you should apply state land use laws and your own rules that are already on the books. And respectfully recommends that you endorse that position by affirming the Department's denial of the 401 certification in this case.

Thank you.

Petersen

Questions for Mr. Huston? Mr. Bryant, would you speak to--we're going to give you a chance to rebut--could you speak to the question of why your clients have not pursued the Conditional Use Permit.

Bryant

Several reasons, some factual and some you would consider political. The way the Conditional Use Permit is written, and

Bryant

(continued)

it's attached, in order to obtain it while the study period is proceeding--by the way the study period will probably conclude in approximately a year--the task force has the right to ask for a continuance for additional six months. And they plan on doing that, as I understand it, in August of this year. So it would be February before they issue their report, theoretically. During that interim you can apply for Conditional Use if you meet certain standards which are set out in Section 3 of the ordinance, which is attached. Those uses we feel are impossible to meet. For instance, maintain the streamflow. Any small hydro development will affect the streamflow. So that's impossible. And it talks about other restrictions are there. It says, rather than using words like "will not significantly impact," that give you some room to determine if it is a reasonable use, it is just a blanket statement that you shall maintain certain things. And of course, during construction--and what these projects are is you take water out of the river, run it through a pipe and back into the river after they go through a penstock and a power house. So, it does take water out of the river for awhile and then put it back in. For that reason we don't think it's possible to get a Conditional Use. Secondly, our time restrictions and what we're doing with the Federal Regulatory Commission would not allow us the time necessary to go through the process with Deschutes County to obtain the Conditional Use. Thirdly, to a large extent the FERC determines the scope and

Bryant the design and the implementation of the actual project from
(continued) construction to how it is going to operate. And until they tell us exactly what they are going to require--you know we make proposals but until they tell us what they are going to require as a condition to granting our application, we wouldn't be able to tell Deschutes County precisely what is going to happen as far as the design and implementation. We can give them a real good idea of what we think it is going to be and what we're proposing, but we don't have the Federal Power Act stamp of approval. So it would be premature for us to go ahead and apply for that permit now, for those reasons.

Petersen So essentially you're arguing it's kind of a "Catch 22."

Bryant That's exactly right.

Petersen You can't learn how to land until you've had a few takeoffs under your belt type thing. Okay, I think I understand that issue.

Denecke Mr. Huston, see if I can phrase the question I have correctly. Suppose that instead of a land use matter, suppose that the Department refused to issue the certification because issuance would violate the state's policy on preservation and protection of wildlife and fish? Would your argument be the same that the laws on the protection and enjoyment of wildlife and fish is

Denecke an appropriate requirement of state law? Do you understand my
(continued) question?

Huston I'm afraid I do Commissioner. I wish I understood my answer. The problem is those are precisely the broader policy issues that you are going to be confronted with in your further rulemaking on 401. And you already know, I believe it was either Fish and Wildlife or an environmental group sharing their interest, that have already been in front of you and said they are likely to contend that precisely those considerations ought to be and can appropriately be made a part of 401. You also are going to face a contention raised by Mr. Smith's suggestions today about how far even the narrow view of 401 goes. And you had Mr. Bryant, I think, taking the position this morning that even considerations apparently expressly incorporated within the water quality standards may be arguably preempted by the federal power legislation. So, I guess an answer is lots of tough issues to come, more appropriately resolved by the Commission in its policy setting function of rulemaking. We think you've got a narrow question here of whether you enforce laws already on the books, both yours and the State Legislature's, and that the significance of the case simply is that if you take the narrow view here you really seem to have resolved the broader policy issues down the road.

Denecke I suppose what irritates me basically is that here Oregon has been a leader in environmental protection, and yet the Federal Government feels that because other states have not been a leader they've got to come in and effect take over and tell the states that they really don't have much to say about this. It appears in this case that, well, I don't think there is any question, it not only appears that federal legislation says the Feds are decide everything except the question of water quality.

Petersen Mr. Huston, is it your position that this Commission can decide what other appropriate requirements of state law are?

Huston Precisely.

Petersen By rulemaking? That's your position?

Huston By rulemaking in the future, Mr. Chairman, it is our contention that you have really already decided that, or the State Legislature has decided that for you with respect to at least land use. You get to decide some other tough ones down the road, but at least with respect to land use, our basic contention is the Legislature said that is an appropriate requirement with respect to water quality decisions really. Basic contention is that it may well be beyond your judgment. At least the Department--

Petersen Well, but really we talked about that. The State Legislature didn't say that. We said that by virtue of our agreement with LCDC. Isn't that true? The State Legislature didn't say that.

Huston The State Legislature didn't say that 401 Certification of the land use decision. What they said is, first of all they did create a general definition of what is a land use decision and the courts have as well. And basically that test is any time it has a significant impact on the present or future land uses. That principle is established by the Supreme Court in the Petersen case. Secondly, I don't think there is any question that that test is not met in this case. I don't believe Mr. Bryant has even attempted to argue that it wouldn't be. Secondly they have also directed each state agency to try to make their own rough cut of what is and is not a land use decision. I'm not sure that you've done that. You have said 401 is. I'm not sure that's binding, but probably is, and even if it isn't I think it meets the generic legal test for land use decision anyway.

Petersen Mr. Bryant, would you like to have some time for rebuttal?

Bryant I'll be very brief. First of all on Justice Denecke's comment and the question to Michael. You're exactly right. If you open the door here on other appropriate requirements to say it

Bryant

(continued)

includes land use, then it can include a whole bunch of other things, not just for the State of Oregon but for every state in the Union. And so you try to have a National Energy Policy with that kind of an open door. I think when you review the cases, especially the Supreme Court cases, you will see that's not what they intended. When you review the legislative report and the testimony of Senator Muskie, a sponsor of the bill, you will see that is not intended. The people that want to tighten up water control and do it for the Country, they didn't intend to change our National Energy Policy or the Federal Power Act in doing it.

One thing that is hard for me to address here is, I've come and my client has come to ask for a different opinion than what your staff is recommending. I'm presuming that when you became Commissioners that you took an oath and that in it there is something about supporting the laws of the United States and the State of Oregon, and that you will not make a decision in this particular case because you have an obligation on behalf of the State of Oregon to stand up to the federal government. That is not the issue. The question is the interpretation of 401(d) and the preemption and whether or not preemption applies. And if you determine after your research in reviewing the file that it in fact does apply, whether or not you are on a state commission should not enter into your decision. To do so would

Bryant

(continued)

be denying us a fair hearing, if that is one of the things you weigh in making a decision. And I just can't believe that is intended. Otherwise, it doesn't really make sense to go through this process. So certainly--Michael used the word timidity--I don't want you to be timid on the other side of the coin either. And so the fact that if you find in our favor, and that makes it more difficult for the state on appeal, well so be it. That is our system, that is our process. That is the way it should work.

On the Schreiner Gardeners decision, I agree with that case. It doesn't have any application here. They weren't talking about 401 or federal preemption. So I would--and you have one other opportunity, which the Chairman has alluded to a couple of times. You can define compatibility. It has never been defined before. And if you define compatibility as stating that the plan allows for small hydro, which it does, then you have technically have met your coordination agreement. That part of your decision. And as I mentioned in my other argument, that section ORS 197.640(d)(2), does permit an out to a state agency when they can't follow the plan. Where it is inconsistent with a state or federal law. It is unfortunate that by what I think you need to do in following the federal legislation and the Constitution, you may be in fact violating a state law. But you do belong to the United States of America and it is a

Bryant National Energy Policy, and I think that is what you are
(continued) obligated to do if you interpret the law the way I have asked
you to. Thank you.

Petersen Thank you. Further questions.

Bryant I don't know, Michael, if 401 has actually been, a copy of it
is in the record.

Denecke It is not.

Bryant I've got a copy of it here, and with permission I'd like to
submit that to the record so you'll know what we've been talking
about.

Petersen Also, it would be handy to have a copy of Section 303, I think
since that has been--some inquiries from the Commission have
come from that.

Hansen Would you like that now?

Petersen Well, maybe we ought to decide as a Commission how we are going
to proceed, before we start making Xerox copies of things. I
think it is clear to me that we have two or three very, very
complex legal issues. I'm not sure this Commission is even

Petersen

(continued)

capable of fully grappling with the technical legal arguments. And therein lies perhaps one of the problems. However, it is our responsibility, and I think we're going to do the best job we can. Not ever having before an opportunity to either be affirmed or reversed on appeal. I want my first shot--I don't want to get reversed. So I think that in view of that and in view of the new material that was submitted today, I think it would be appropriate for us to certainly take this under advisement. As a lawyer, when a judge tells me that, I always kind of cringe and wonder how long that is going to take. Sometimes that is used as an excuse for not being able to bite the bullet and make a decision. But I think that under the circumstances that would be appropriate so that we can do the best job possible for the parties. It is an important decision. It is going to have precedent-setting characteristics to it. It is going to be appealed no matter what we decide. So I think it would be appropriate, and I would entertain a motion to take it under advisement and then make a commitment to parties that we will do that as expeditiously as possible, and decide on the most appropriate way to do that. I suspect it will require some other meeting, work session, where we can talk amongst ourselves, and of course whenever we get together it is a public meeting unless it qualifies for Executive Session, which I don't think this would. So people would be able to be present in that process. As far as scheduling that is concerned, we haven't

Petersen talked about that and I don't know when people would be
(continued) available, how long you would like to consider the record and
digest some of these things. Maybe some of you wouldn't like
to consider it at all. I don't know. I know Arno and I would.
What are the thoughts of the Commission?

Denecke I'll move along the lines which you suggested Mr. Chairman.

Bishop Second.

Petersen Okay. Everybody agreeable with that? Our next meeting, Carol,
is scheduled for when?

Hansen It's in Salem at--

Splettstaszer April 19.

Hansen April 19.

Petersen I'm thinking we probably ought to do it before then. Maybe in
a couple of weeks from now. I will be out of town, or out of
the state the last week in March. But perhaps the week before
that we can set a time. It is the week of the 18th I believe.
Are you going to be around?

Buist I'll be out of town Monday, Tuesday, Wednesday.

Petersen Why don't we do this. Why don't we just get our heads together right after our Commission meeting is adjourned and then we'll make that decision and obviously let everybody know where and when and what the procedures are going to be. Are there any other questions or comments on this particular agenda item before we move on to the next.

Bishop We need to take a vote on that.

Petersen It was kind of a consensus, I think. Everybody agreed--everybody nodded this way, which is--Chair took judicial notice of the up and down--thank you very much gentlemen for excellent presentations.

Petersen Are there any further items? Yes?

John Charles Not having the Commission's rules in front of me regarding (OEC) appeals of Departmental actions--on the 401 issue that you are taking under advisement--what does that mean in terms of the public record? Is the record closed, or is it open, or what. The issues raised today--some of the arguments I would be

Charles interested in commenting on. So I guess my question to you is,
(continued) whether you are going to allow any other comment.

Petersen I'm inclined not to. I think that is consistent with prior
Commission--we've got two parties and we're not going to--I
understand how that bears on the other issue that you've
addressed us on.

Charles That's what I mean--the rulemaking process that is coming up.

Petersen Right. Very appropriate at that point in time. But I think
we have a more confined contested case situation here and I'd
rather not open it up to public comment.

Brill Jim, does that mean at this time or at our future meeting?

Petersen Any--at this time and the future meeting. I'm not going to close
the record because we may request additional information as a
Commission to consider and help us make our decision. So I'm
not going to close the record, but I'm not going to open it for
nonparty participation, unless I'm overruled by the four people
sitting up here with me.

Alright, then I will adjourn the meeting at this time.

ENVIRONMENTAL QUALITY COMMISSION

March 7, 1985

Work Session
Room 1400
522 SW Fifth Avenue
Portland

Agency Questions on Principles and Procedures Used in
Commission Review of Agency Enforcement Actions.

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY

INTEROFFICE MEMO

TO: Environmental Quality Commission

DATE: November 29, 1984

FROM: Linda K. Zucker 

SUBJECT: Principles and Procedures Used in Commission Review of Agency Enforcement Actions

To provide direction to its hearings officer, the Commission is asked to consider and comment on the following questions:

1. In reviewing enforcement actions for the Commission, should the hearings officer give any weight to the fact that the Department has undertaken an enforcement action, or should the burden of proof and case record control case results?

2. In reviewing penalty actions for the Commission, should the hearings officer exercise the Commission's prerogative to mitigate penalties? What test should the hearings officer apply?

- a) Is the penalty appropriate under all the circumstances proved,
- b) Is the penalty within an appropriate "range of discretion",
or
- c) Some other test?

On review:

- a) Is the minimum penalty the amount to be assessed in the absence of aggravating or mitigating factors, or
- b) Is the minimum penalty the base to which aggravating factors are added, or
- c) Is the minimum penalty the base from which mitigating factors are subtracted, or
- d) Is the penalty amount determined in some other way?

3. The Commission reviews Department enforcement actions on the evidentiary record created at hearing and will accept additional evidence only under predetermined limited circumstances. Will the Commission consider only those legal defenses raised at the hearing level, or will it consider new theories for liability and nonliability raised for the first time on review to the Commission?

4. On Commission review of the hearings officer's decision, what weight will the Commission give to the hearings officer's findings of credibility?

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5. The Commission has decided that under ORS 468.300 lack of negligence is not a defense to violation of agency statute or rule. Does the Commission believe a litigant can successfully defend against a Department penalty assessment either under a theory of estoppel or under a theory that the litigant obtained a permit by operation of law?

HM52.2

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY

INTEROFFICE MEMO

TO: Environmental Quality Commission

DATE: November 30, 1984

FROM: Sean O'Connell

SUBJECT: Principles and Procedures Used in Commission Review of Agency Enforcement Actions.

To provide direction to its Hearings Officer, the Commission is asked to consider and comment on the following questions:

1. If the minimum penalty is assessed, should the Hearings Officer have any authority to reduce it even below this minimum amount?
2. Does the Commission expect the Hearings Officer to substitute her judgment for the Department's, even given the same factual situation?
3. If the Hearings Officer elects to reduce a penalty should the basis for the reduction (and degree) be clearly spelled out? Should this justification address the financial benefit the grower could have gained as a result of the infraction?
4. Should the "estoppel" argument be removed from any application to field burning cases (involving grower claims of permit agent transgressions) until a legal opinion on the matter can be obtained?
5. Should the Department consider enforcement action against permit agents for rule violations?

AS834

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY

INTEROFFICE MEMO

TO: Environmental Quality Commission

DATE: November 30, 1984

FROM: Sean O'Connell

SUBJECT: Principles and Procedures Used in Commission Review of Agency Enforcement Actions.

To provide direction to its Hearings Officer, the Commission is asked to consider and comment on the following questions:

1. If the minimum penalty is assessed, should the Hearings Officer have any authority to reduce it even below this minimum amount?

*Does this create a greater appeal
value?*

2. Does the Commission expect the Hearings Officer to substitute her judgment for the Department's, even given the same factual situation?

3. If the Hearings Officer elects to reduce a penalty should the basis for the reduction (and degree) be clearly spelled out? Should this justification address the financial benefit the grower could have gained as a result of the infraction?

*How assessed at below
figure?*

4. Should the "estoppel" argument be removed from any application to field burning cases (involving grower claims of permit agent transgressions) until a legal opinion on the matter can be obtained?

5. Should the Department consider enforcement action against permit agents for rule violations?

AS834