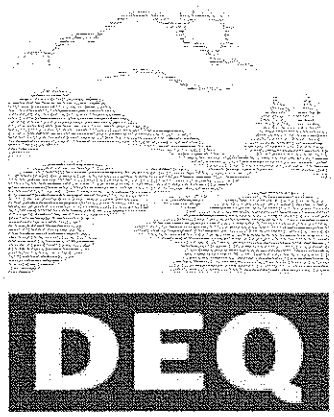
EQCMeeting1of1DOC19851121

11/21/1985

OREGON
ENVIRONMENTAL QUALITY
COMMISSION MEETING
MATERIALS



State of Oregon
Department of Environmental Quality

VICTOR ATIYEH
GOVERNOR

Environmental Quality Commission

Mailing Address: BOX 1760, PORTLAND, OR 97207
522 SOUTHWEST 5th AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

NOTICE

OF

WORK SESSION AND SPECIAL MEETING

November 21, 1985

South Harris Hall
Lane County Courthouse
125 E. Eighth
Eugene

WORK SESSION
2:00 pm-4:00 pm

Hazardous Waste Enforcement Guidelines.

SPECIAL MEETING
4:00 pm-6:00 pm

Analysis of issues raised by the City of Klamath Falls in their petitions for declaratory ruling and rulemaking.

The Commission may take action on this item at this time, or may postpone action until their regular meeting on November 22, 1985.

THESE MINUTES ARE NOT FINAL UNTIL APPROVED BY THE EQC

MINUTES OF THE WORK SESSION AND SPECIAL MEETING

OF THE

OREGON ENVIRONMENTAL QUALITY COMMISSION

November 21, 1985

On Thursday, November 21, 1985, the Oregon Environmental Quality Commission conducted a work session and special meeting in the Lane County Courthouse, 125 E. Eighth, Eugene, Oregon. Present were Commission Chairman James Petersen and Commissioners Mary Bishop and Sonia Buist. Commissioners Wallace Brill and Arno Denecke were absent. Present on behalf of the Department were its Director, Fred Hansen, and several members of the Department staff.

WORK SESSION

The purpose of this work session was for the Department to review with the Commission the Department's proposed Enforcement Guidelines and Procedures for the Hazardous Waste Program.

Al Goodman of the Department's Hazardous and Solid Waste Division reviewed for the Commission the background and history of this matter. In addition, Mr. Goodman said the consequences of mismanagement in the hazardous waste program are greater than in the air and water programs. In those programs the problems stop when the facility closes, however that is not the case in hazardous waste. These Enforcement Guidelines are meant to provide guidance for Department staff to aid in consistent enforcement statewide. They are also meant to help staff prioritize efforts and resolve violations at the lowest possible level.

Mr. Goodman then walked through the proposed Guidelines with the Commission. The Guidelines contain general principles; definitions of Class I, II and III violations; enforcement options for each class of violation; definitions of enforcement actions; and a matrix of civil penalty amounts.

Chairman Petersen asked how these Guidelines would enhance hazardous waste management. Mr. Goodman replied that the Guidelines set the Department's top priorities for field staff, helping them to act consistently statewide.

Tom Donaca, Associated Oregon Industries, said the Guidelines were acceptable in the way the Department was proposing to use them. They had testified at the public hearings on whether or not these guidelines should really be rules. He said the regulated community was willing to see whether these guidelines would be cited or relied upon in enforcement actions. He said the same sort of policy need not be applied to the air and water programs as their circumstances were different.

Frank Deaver, Tektronix, commented the the Department had been fair so far in enforcement actions. He also said he considered that some of the Class II violations should really be Class I. At Chairman Petersen's request, Mr. Deaver said he would provide a list.

James Brown, Tektronix, said closure cost estimates were unrealistic. Closure may be far in the future therefore accurate costs estimates are only educated guesses. Also, a well managed facility would have different costs than others. Mr. Deaver said the while he agreed the closure costs were probably unrealistic, the purpose was to be sure the money was available for cleanup in case something should happen to the company. Mr. Deaver also said recyclers should be more heavily regulated. Chairman Petersen commented that perhaps the closure costs should be reviewed to be sure they are relevant.

Dick Bach, Stoel, Rives, Boley, Fraser & Wise, said the Guildelines were necessary. His clients want to know what type of enforcement actions to expect for violations. In regard to the issue of whether or not these Guidelines should be made rules, Mr. Bach said they would not be inclined to use the rules versus guideline issue in a civil penalty situation unless absolutely necessary. Mr. Bach asked for clarification of "unauthorized disposal of hazardous waste" under Class I violations. He asked if this would include an inadvertent spill. Mr. Hansen replied that if the company used good management practices and notified the Department promptly of the spill, no penalty would likely be assessed. Mr. Goodman said that unauthorized disposal was not a spill.

Commissioner Bishop asked if the Department would anticipate changes to these proposed Guidelines. Mr. Goodman replied that they were likely to change over time, but the Department would return to the Commission with any major changes and be sure to go back to the regulated community with those changes. Commissioner Bishop and Chairman Petersen emphasized remembering to work with the regulated community.

The Commission indicated agreement with the proposed Guidelines.

SPECIAL MEETING

Analysis of Issues Raised by the City of Klamath Falls in Their Petitions for Declaratory Rulings and Rulemaking

On September 20, 1985, the City of Klamath Falls submitted a Petition for Declaratory Ruling as to nonapplicability of laws, regulations and standards to Section 401 Certification of Salt Caves Project; Petition for Rulemaking; Request for Hearing; Request for Stay; and a Demand for Hearing. On October 18, 1985 the Consolidated Conservation Parties submitted a response to the City of Klamath Falls.

At the Commission's October 18, 1985 meeting, it denied petitions from the City of Klamath Falls and requested the Department to prepare an analysis of the points raised in the petitions and make appropriate recommendations for consideration at the November meeting.

On October 28, 1985, the City of Klamath Falls withdrew their application for 401 Certification for the Salt Caves Project. They indicated their intent to file a new application in early 1986. They also indicated withdrawal of their application for a Federal Energy Regulatory Commission (FERC) license.

Peter Glaser, attorney with the firm Duncan, Weinberg & Miller in Washington, D.C., appeared on behalf of the City of Klamath Falls, proponent of the Salt Caves Hydroelectric Project and of the two petitions before the Commission. He said the first petition asked the Commission to declare that its water quality standards for the Klamath River between Keno Dam and the Oregon-California border not be applied to the City's application for Certification of the Salt Caves Project under Section 401 of the Federal Clean Water Act. The petition also asked the Commission to declare that no land use requirements or other "related requirements" be considered in judging the City's Section 401 application and to declare whether the Commission or the Department is the agency that will take final action on the City's application. The second petition asked the Commission to institute rulemaking proceedings to establish rules to be applied to the City's 401 application.

At this meeting, Mr. Glaser said, they would comment on the Department's staff report and the water quality issues raised in the City's petitions. At the Commission's regular meeting the next day, Mr. Glaser intended to address what the Department characterized as "procedural" issues.

Mr. Glaser said they agreed the Commission's water quality standards should be designed to protect the wild trout population in the Klamath River. However, they disagreed with the Department on whether those standards are unnecessarily overbroad in achieving the goal of protecting that trout population.

The petitions argue, Mr. Glaser said, that Section 401 did not give the Commission the authority to outright ban significant dams and reservoirs on the Klamath River. In fact, he said, the City does not concede that Section 401 gives the Commission any authority to regulate the construction of dams that create reservoirs. The language of Section only gives authority to regulate activities causing "discharges."

Mr. Glaser said they did not believe it was necessary to have standards that preclude construction of thermally stratifying reservoirs in order to protect the wild trout population in the Klamath River. He said it should not be assumed that such reservoirs will cause harm to fish. They emphasized that standards can and should be promulgated that would allow the proponent of a reservoir to demonstrate that the reservoir would help and not hinder fish.

Regarding the concerns raised by the Consolidated Conservation parties, Mr. Glaser said that he believed the parties misread the extent of authority that Section 401 gives to the Commission. He said they did not believe Congress intended to vest plenary authority over such dams in state agencies without mentioning such intent in the Act or its legislative history. Also, Mr. Glaser believed the Conservation Parties make a number of inaccurate statements as to why the use of the Klamath River for fish and the use of the River for hydropower dam and reservoir are mutually exclusive.

Mr. Glaser said the the Commission's water quality standards were clearly developed for running water, and the effect on fish of running water and of reservoirs is different. He said it was inappropriate to have one standard applied in the same way to both situations. He urged the Commission to recognize this fact and adopt regulations that would allow a proponent of a reservoir to demonstrate the project will not harm fish.

Mr. Glaser concluded by asking the Commission to grant their petition.

Chairman Petersen asked how the temporary withdrawal of the FERC application would affect the Commission's proceedings. Mr. Glaser replied it should not have any impact as the City has stated that the withdrawal of the FERC application is temporary and the City intends to reapply for a license and to the Department for 401 Certification.

Chairman Petersen asked what the reason was for withdrawing the application. Mr. Glaser replied it was decided it would be necessary to do further studies both in the area of water quality (including monitoring) and in the area of archeology.

Chairman Petersen asked for an explanation of how the Commission rules would ban reservoirs. Mr. Glaser said they were contending that the rules in effect ban reservoirs principally because there would be no way a reservoir could be built to meet the standards for dissolved oxygen and temperature.

Mary Holt, Sierra Club, testified they did not think there was any question that Section 401 clearly gives the state the authority to implement it's water quality standards with respect to hydropower projects.

Chairman Petersen said it had been the Commission's decision that the Department had been delegated the authority to grant 401 Certification. Any appeal of the granting or denying of that Certification would come to the Commission for resolution. He said the Commission was not presently of a mind to change that process. Chairman Petersen also said the Department should not delegate that responsibility to any other agency in the state. The issue was not whether the Department had the authority, he continued, but what should be considered in the process.

Jack Smith, Northwest Environmental Defense Center, said it seemed to him that the City of Klamath Falls was arguing that their project would not affect the uses of the water. He said he could not agree with this position.

Chairman Petersen was not sure the Director's Recommendation was appropriate. The Commission had already denied the petition, he said, so no further formal action was needed unless they were to reverse themselves. In addition, the rulemaking process the Commission would go through at its formal meeting the next day would deal with issues of authority. Chairman Petersen also asked why it would be necessary to reaffirm the water quality standards for the Klamath River.

Director Hansen said that during the last Commission meeting the Department asked the Commission to reject the petitions both for substantative reasons and because of the time constraints. He said there would be no reason to reaffirm if, after hearing the substantative reasons, the Commission stood on their previous decision.

Director Hansen said the Department was standing by the standards as they are. He said there was no questions that the intent of the Commission and the Department at the time of the adoption of the standards was that they apply to reservoirs. And yet, upon review by Counsel, there is some clarification that would help make that intent clearer, he continued. The Department does not believe there is any question about the intent or the desires of the Commission at the time the rules were adopted.

Chairman Petersen said the Department had standards that are designed to protect fish. The Department is claiming that if this project is built, fish are going to die. The applicant is saying they do not think that would happen and want an opportunity to show that fish were not going to die if their project is built.

Glen Carter, of the Department's Water Quality Division explained that at the time standards were developed for the Lower Klamath River the Department was taking advantage of the natural and manmade conditions in the area. The upper river above Keno was in bad condition because of the natural decomposing organics. Once the river got below John Boyle Dam and into the area of the proposed Salt Caves Project, there was the advantage of a tremendous groundwater influx that improved the quality of the water and kept it suitable for the last of the native rainbow trout fishery. Mr. Carter said there were not the beneficial uses identified then that there are now, such as rafting. The area's beneficial uses were largely for recreational fishery and wildlife. He said the standards were set to protect those uses at that time.

Mr. Carter said the applicant believes they can build their project without injuring the fish. However, the experience of the fishery people with the three other reservoirs in the area has shown that in those reservoirs the fish stocks have not reproduced in the fashion

they do in the open river channel, and there is no reason to believe they can do so if the Salt Caves Project was built. Chairman Petersen asked if that was because of water quality. Mr. Carter said water quality would be a significant factor, but it would also be a major habitat change from a running stream to a reservoir-type habitat.

Mr. Carter said most of the fish were planted in those reservoirs, and occasionally a big trout would be found, but high-quality fish production has not been sustained in those reservoirs. The Department has done extensive electroshocking for fish in the John Boyle reservoir and have not turned up any trout.

Chairman Petersen said he was inclined in this matter to take no action regarding changing denial of the Petition for Rulemaking and Petition for Declaratory Ruling and proceed to rulemaking at the Commission's regular meeting; and to have the applicant, when they are ready, continue the 401 Certification process with the Department, and depending on the results of that process, exercise whatever appeal rights they want to bring before the Commission. He felt that any clarification of the rules at this time would be in effect changing goal posts on the applicant. He thought the applicant was entitled to continue under the rules in effect when they first applied. Commissioner Buist commented she was satisfied with the Director's recommendation. Commissioner Bishop said she was uncomfortable taking action at this time for the same reasons Chairman Petersen mentioned.

Director Hansen stressed the Department did not feel the suggested changes they would have proposed had the Commission authorized rulemaking would in any way have changed what the intent or purpose of the existing rules are. Rather, they would have removed two items that may have been litigated. The only changes would have been to clarify existing rules.

The Commission took no action of this item.

There being no further business, the meeting was adjourned.

Respectfully submitted,

Carol Splettstaszer

Carol Splettstaszer
EQC Assistant

VICTOR ATIYEH
GOVERNOR

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: Hazardous Waste Enforcement Guidelines

A work session with the Commission is scheduled for 2:00 p.m. on Thursday, November 21, 1985 in Eugene to discuss the Department of Environmental Quality (DEQ) proposed Enforcement Guidelines and Procedures for the Hazardous Waste Program.

The following materials are being forwarded to the Commission for review prior to the work session:

1. Final Draft of Enforcement Guidelines and Procedures

2. Comments Received by DEQ from:

   - EPA - Region 10
   - Associated Oregon Industry
   - American Electronics Association (Oregon Council)
   - Stoel, Rives, Boley, Fraser and Wyse

3. DEQ Response to Comments

4. Reference Documents

   - EPA letter to DEQ, dated October 17, 1985
   - National Criteria for a Quality Hazardous Waste Program - excerpts pertaining to compliance and enforcement.

These documents are intended to serve as briefing materials to assist the Commission in framing its discussion in the work session. We expect representatives of commenters will attend the work session to respond to any questions of the Commission.

In recent discussions, industry representatives have acknowledged that their concerns with the enforcement guidelines may in fact be more apparent, than real. Therefore, they do not intend to contest the guidelines at this time, but rather will wait to see how the guidelines

are actually put to use by the Department. Nonetheless, we are forwarding their comments and our response to the Commission with the hope that they can assist in developing an accurate understanding and clarify any misconceptions of the guidelines.

I look forward to a productive discussion on November 21.

Fred Hansen
Director

Attachments

Alan Goodman:b
229-5254
November 5, 1985
ZB5207

DEQ Response to Industry Comments

on Proposed Hazardous Waste Enforcement Guidelines

Comments Received

Written comments were received by DEQ from the following:

1. Associated Oregon Industry (AOI)
2. American Electronics Association (AEA), Oregon Council
3. Stoel, Rives, Boley, Fraser & Wyse

Additionally, AOI presented verbal testimony at the EQC's September 27, 1985 meeting.

Issues raised by these commenters involve legal, policy and technical questions. For ease of discussion, our response is organized accordingly.

(Region 10 of EPA also submitted comments on the proposed guidelines. DEQ has prepared a separate response to EPA's comments.)

Legal Issues

Comment: Commenters believe the enforcement guidelines meet the statutory definition of a rule in ORS 183.310(8) and therefore should be promulgated as a rule and in accordance with the Administrative Procedures Act.

Response: The Department believes the guidelines do not fall within the scope of a rule. Pursuant to ORS 183.310(8)(a), a rule does not include ". . . internal management directives, regulations or statements which do not substantially affect the interests of the public." Our view is that the enforcement guidelines qualify for this exclusion. A recent letter (attached) from the Department of Justice explains the basis for our conclusion.

Policy Issues

Comment: Commenters have expressed concern that the proposed enforcement guidelines signal a major departure from DEQ's current "regulatory" program toward a formal "enforcement" program. Additionally, concern exists that DEQ will provide less technical assistance to and become less cooperative with the regulated community in its handling of violations.

Response: The enforcement guidelines are not intended to reflect a major shift in DEQ's enforcement posture for the hazardous waste program. The Department is not planning to depart from its

existing enforcement philosophy. In fact, to reaffirm this, we included the following statement in Section 2 - General Principles - of the guidelines:

> "DEQ will endeavor, by conference, conciliation, and persuasion, to solicit compliance prior to and following issuance of an enforcement action."

Nonetheless, DEQ is concerned with commenters' perceptions of the guidelines. We believe there are two aspects of the guidelines which apparently are viewed as indicating a change in enforcement policy. These are: (1) DEQ's issuance of a civil penalty, without prior written notice, in response to Class I violations, and; (2) the inclusion of a "penalty matrix" to assist in determining the component of a civil penalty attributable to the "gravity and magnitude" of a violation.

It should be noted that issuance of civil penalties without prior written notice currently occurs in limited circumstances. These situations are limited by current rule OAR 340-120-40 to the unauthorized disposal of hazardous waste and situations where the violation is intentional. The proposed enforcement guidelines (in conjunction with the proposed amendment of 340-12-040) would expand this set of circumstances to include additional hazardous waste violations which the Department believes have a significant potential to cause public health hazards or environmental damage. These violations, denoted Class I, include:

- failure to ensure groundwater is protected;
- failure to ensure proper closure and post-closure activities will be undertaken;
- failure to establish and maintain financial assurance mechanisms; and
- Violations which create actual harm or a likelihood for harm.

The Department believes that compliance with the closure, post-closure, financial assurance and groundwater protection requirements is crucial to ensuring that handling of hazardous waste does not result in environmental or public health impacts. The focus of the hazardous waste management program and in particular these high-priority requirements is to <u>prevent</u> problems from occurring. The presence or absence of actual harm in a noncompliance situation is something over which a violator may have no control. Therefore, the potential for harm becomes a significant consideration. The violations

identified as Class I have the potential to result in significant adverse impacts. If damage or contamination does occur, correction may not necessarily be feasible, but if so, may be extremely expensive, time-consuming and even entail expenditure of public funds. For these reasons, DEQ believes the Class I violations generally should be responded to with a civil penalty.

We do want to point out that these key program requirements are applicable only to a limited group of hazardous waste handlers, i.e., treatment, storage, or disposal (TSD) facilities. Since the number of existing TSD facilities is small, the number of handlers who potentially could have Class I violations of the closure, post-closure, financial assurance and groundwater protection requirements is likewise small. In addition, the vast majority of violations now being detected would be classified as Class II or III. As such, the routine enforcement response would be a Notice of Violation, not a penalty. Therefore, we do not believe there will be a significant increase in the issuance of civil penalties as a result of use of the guidelines.

Additionally, existing TSD facilities have been on notice for several years that these requirements would become applicable to them. Since April 1984, these requirements have been part of DEQ's rules. In some cases, these requirements have been incorporated in permits issued in 1981. We believe there has been adequate notice to the regulated community, and that issuance of a penalty without further notice, for Class I violations, is not unfair or inappropriate.

The commenters apparently are troubled also by the penalty matrix. As indicated in the guidelines, the penalty matrix is intended to assist the Director in evaluating the gravity and magnitude of violation. The penalty matrix is nothing more than a way to visualize the range in severity of a violation and in the extent of deviation from the requirement. The penalty matrix includes these aspects of a violation as the two axes of the matrix and suggests a commensurate penalty range. Consideration of a violation's gravity and magnitude is provided for in OAR 340-12-045. The penalty matrix is simply a guide to help the Director consider what amount of civil penalty may be appropriate due to the gravity and magnitude of a violation. The enforcement guidelines also reaffirm the Director's ability to consider other relevant factors, as identified in OAR 340-12-045, in determining the amount of a civil penalty.

Finally, we note that the penalty matrix does not have the effect of law and therefore would not serve as a basis to assess a penalty. The Director will continue to rely upon the existing rules and statutes governing penalty assessments.

Technical Issues

Several of the comments questioned specific provisions of the enforcement guidelines.

Comment: The guidelines state that they do not create any rights for any party contesting a DEQ action. This statement conflicts with the concept of an administrative rule and, therefore, should be deleted.

Response: As indicated earlier in this response, DEQ does not believe the enforcement guidelines constitute a rule. Accordingly, they cannot be relied upon as law. The statement in question is both correct and appropriate for inclusion as a reminder.

Comment: Violations of closure and post-closure plan requirements should not be classified as Class I violations, because such plans are planning documents subject to revision before being actually implemented.

Response: DEQ strongly disagrees with commenter's contention. The closure requirements are critical preventative measures to ensure sufficient funds will be available in the future to conduct a proper facility closure. Failure to meet these requirements now or at any time prior to the date of closure presents a serious risk of facility abandonment or improper closure, regardless of any apparent good intentions of the facility owner/operator. DEQ believes that failure to ensure closure or post-closure activities will be undertaken should be classified as Class I violations.

We note that the rules provide for amending closure plans at any time during the facility's operation prior to closure, to account for changes in waste handling practices. However, the adequacy of closure plans and related financial assurance instruments must be maintained at all times prior to closure, to ensure the availability of sufficient funds.

Comment: The discussion of enforcement response for Class I violations is unclear. Will a civil penalty be assessed whether or not the violation is resolved?

Response: DEQ generally intends to assess a civil penalty for Class I violations. A "Notice of Intent to Assess Civil Penalty" would also be issued as a companion action to establish a compliance schedule leading to resolution of the violation. If compliance is not achieved, an additional penalty could be assessed.

Comment: DEQ's illustrative example of "adverse effect noncompliance has on the statutory and regulatory purposes or procedures for implementing the hazardous waste program" is inappropriate to describe the "potential for harm."

Response: DEQ agrees that the questioned phrase does not clearly relate to the potential for harm from a violation. Accordingly, the phrase and subsequent related discussion have been deleted.

Comment: The criteria to be used in implementing the penalty matrix include terms such as "significant," "substantial," "relatively low," etc., which are undefined. These terms should be fully defined.

Response: The penalty matrix is intended to assist the Director in evaluating the "potential for harm" and "extent of deviation from a requirement" posed by a violation. The degree to which each of these two aspects of a violation occurs can vary over a wide range, depending upon the actual circumstances of a violation. Therefore, we believe the evaluation is benefited by classifying both the potential for harm and the extent of deviation as either major, moderate or minor.

In the final draft of the enforcement guidelines, we have attempted to more clearly distinguish between major, moderate and minor. We have deleted using the terms "substantial," "significant" and relatively low" as synonymous for major, moderate and minor potential for harm. We have also revised the definitions of major, moderate and minor extent of deviation from the requirement.

However, it should be noted that our purpose in using the terms "major," "moderate" and "minor" is to be able to visualize a range in a relative and general manner. We purposefully avoided attaching absolute or precise meanings to these terms beyond their common dictionary meanings. Such precision is not necessary when one considers our objective -- to characterize in a general sense the gravity and magnitude of any violation.

DAVE FROHNMAYER
ATTORNEY GENERAL

WILLIAM F. GARY
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

PORTLAND OFFICE
500 Pacific Building
520 S.W. Yamhill
Portland, Oregon 97204
Telephone: (503) 229-5725

November 8, 1985

Mike Downs, Administrator
Hazardous and Solid Waste Division
Department of Environmental Quality
522 S.W. Fifth Avenue
Portland, OR 97204

Re: Hazardous Waste Enforcement Guidelines

Dear Mr. Downs:

You have asked me to advise you whether the Proposed Enforcement Guidelines and Procedures for the Hazardous Waste Program, a document currently under consideration by the Department of Environmental Quality (DEQ), must be adopted as an administrative rule.

Background

DEQ has broad statutory authority to enforce the state's hazardous waste laws. ORS 459.650-.690, 459.992-.995, 468.130-.140. The statutory enforcement tools include compliance orders, emergency shutdown orders, court injunctive proceedings, criminal prosecutions, and civil penalties.

The use of some of the statutory tools, particular civil penalties, has been delineated further in the agency's administrative rules. For example, OAR 340-12-068 includes a hazardous waste management schedule of civil penalties. OAR 340-12-045 identifies factors, such as the "gravity and magnitude of the violation," which the Director may consider in establishing the amount of a civil penalty.

I am advised that the DEQ has formulated its proposed enforcement guidelines for two primary purposes. First, as part of the DEQ's application to the Environmental Protection Agency for authorization of the state's hazardous waste program, DEQ must provide a comprehensive description of the state's enforcement program. Second, the guidelines are intended to help improve the consistency, appropriateness, and timeliness of the agency's enforcement activities. The proposed guidelines contain several

sections, including a statement of the agency's enforcement principles or objectives, a categorization of violations, identification of appropriate enforcement actions for the various violation categories, establishment of time frames for enforcement actions, and a description of the considerations involved in determining the amount of a civil penalty.

Analysis

The Administrative Procedures Act defines "rule" as "any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency." ORS 183.310(8). Exceptions from the term "rule" include "internal management directives, regulations or statements which do not substantially affect the interests of the public" (ORS 183.310(8)(a)) and "[a]ctions by agencies directed to other agencies . . . which do not substantially affect the interests of the public" (ORS 183.310(8)(b)). As is evident from this language, the definition of rule is broad, and the exceptions are narrow.

Case law applying the statutory language provides some practical guidance on the question of when a document should be adopted through rulemaking. The cases suggest that the question at hand depends more upon the desired use of the document than its abstract terms. On the one hand, it is clear that if an agency intends a policy or procedure to be legally binding on members of the general public, the policy or procedure should be adopted as a rule. See, e.g., Fitzgerald v. Board of Optometry, ___ Or App ___ (filed Sept. 25, 1985). If, on the other hand, the policy or procedure is directed to the agency staff rather than the general public and is not self-executing, i.e., some additional step must be taken before public or private interests are affected, the policy or procedure need not be adopted as a rule. Rogue Flyfishers v. Water Policy Review Board, 62 Or App 412 (1983).

Thus, the ultimate question is what use DEQ intends to make of the proposed guidelines in its enforcement program. If DEQ intends to cite and rely upon the guidelines in enforcement proceedings, they should be adopted as administrative rules. If, by contrast, DEQ is prepared to defend its enforcement actions based upon existing statutes and rules and desires to use the guidelines only as internal directives in the application of those statutes and rules, there is no legal reason the guidelines must be adopted as rules.

One related consideration should be noted. It may well be advisable for DEQ to review current administrative rules in light of its enforcement objectives. The Oregon courts have stressed the need for adequate rulemaking prior to the exercise of delegated authority. Springfield Education Ass'n v. School Dist. No. 19, 290 Or 217 (1980); Megdahl v. Board of Dental Examiners, 288 Or 293 (1980). Furthermore, recent court holdings from other contexts may be extended to require that the agency's rules include criteria for exercise of enforcement discretion. See, e.g., State v. Freeland, 295 Or 367 (1983). DEQ's current administrative rules would appear to provide a better legal framework than many agencies have, but the ongoing discussions related to the enforcement guidelines may provide ideas for improvement.

Conclusion

Enforcement guidelines should be adopted as administrative rules if they are to be legally binding on members of the general public. If, however, the purpose of the guidelines is simply to describe enforcement activities and provide direction to agency staff in such activities, they need not be adopted as administrative rules.

Sincerely,

Michael B. Huston

Michael B. Huston
Assistant Attorney General

MBH:bc

F I N A L D R A F T

ENFORCEMENT GUIDELINES AND PROCEDURES

HAZARDOUS WASTE PROGRAM

DEPARTMENT OF ENVIRONMENTAL QUALITY

NOVEMBER 1985

TABLE OF CONTENTS

SECTION 1

INTRODUCTION

Purpose and Scope

The Enforcement Guidelines and Procedures (hereafter "enforcement guidelines") presents a framework for enforcement of the Oregon Department of Environmental Quality's (DEQ) Hazardous Waste Program. This document sets forth DEQ's approach to responding to documented instances of noncompliance. Requirements pertaining to hazardous waste handlers are contained in: (1) Oregon Revised Statutes (ORS) 459.410 to 459.450 and 459.460 to 459.690; (2) Oregon Administrative Rules (OAR), Chapter 340, Divisions 100-106; (3) permits (licenses) issued pursuant to applicable OAR and ORS; and, (4) orders of the Department and Commission.

The goal of enforcement is to obtain correction of environmental or public health impacts resulting from noncompliance and expeditious resolution of hazardous waste program violations.

The purpose of this document is to provide guidelines to Department staff to ensure effective state enforcement of hazardous waste requirements. The enforcement guidelines identify the state's enforcement authorities and contain procedures for determining categories of violations and associated timely and appropriate enforcement responses.

Priorities are established to ensure that those violations which cause or have the potential to cause serious environmental harm or public health hazards are addressed by the Department with higher priority than

violations of an administrative nature. Timelines are also established for initial and subsequent escalated enforcement responses to provide for resolution of noncompliance in the shortest practicable time period.

When administrative civil penalties are assessed by the DEQ Director, the guidelines in this document may be consulted in conjunction with OAR 340-12-045 to ensure that: (1) penalties are assessed fairly and consistently; (2) penalties are appropriate to the gravity of the violation; and (3) economic incentives for noncompliance are reduced as much as possible.

Use

The enforcement guidelines are intended for use only by Department personnel involved with administering DEQ's Hazardous Waste Program. The guidelines are based upon existing authorities granted by and procedures and considerations contained in Oregon Revised Statutes and Oregon Administrative Rules. This document is not intended to limit in any way the state's enforcement authorities or practices. The Department may initiate any action or seek any relief, as provided for in Oregon statutes and rules, that is deemed appropriate or necessary.

These guidelines are not intended and should not be relied upon to create rights, substantive or procedural, which are enforceable by any party contesting or appealing a Department action.

The enforcement guidelines will be used by the Department beginning January 1, 1986. In general, enforcement actions initiated by DEQ after January 1, 1986, in response to hazardous waste violations detected after

this date, are intended to be guided by this document. Except as noted below, violations which are detected prior to January 1, 1986, and for which an enforcement action is taken after January 1, 1986, may, but are not necessarily required to, be addressed by these guidelines.

The provisions of this document pertaining to escalation of enforcement responses (Part B of Section 4) apply to all enforcement actions taken after January 31, 1986, regardless of when the violation was detected.

SECTION 2

GENERAL PRINCIPLES

Enforcement of the Department's hazardous waste program will be guided by the following general principles:

1. The objective of enforcement is to attain and maintain compliance with hazardous waste statutes and rules administered by DEQ.

2. Responsibility for compliance rests with those persons conducting activities covered by these statutes and rules and with permits and orders issued pursuant thereto.

3. DEQ enforcement actions will be appropriate to the gravity of the violation, pursued to resolution in a timely manner, and applied consistently statewide.

4. Enforcement actions will be escalated to an appropriate level when violators fail to comply with established compliance schedules.

5. DEQ will endeavor, by conference, conciliation and persuasion, to solicit compliance prior to and following issuance of enforcement action.

6. All enforcement actions will clearly identify each and every documented violation, establish compliance schedules if appropriate and require the violator's certification that compliance is achieved.

7. Compliance schedules established will be for the shortest practicable time and may include interim mitigating measures to minimize adverse effects of noncompliance.

8. Resolution of violations shall be documented through an appropriate means.

SECTION 3

VIOLATION CATEGORIES

Each documented violation of a statutory requirement, rule, or condition of an order or permit will be categorized according to the seriousness of the violation and other relevant factors identified in this section. Each

instance of noncompliance is considered a separate violation and should be classified separately. Using the guidelines in Section 4, a single enforcement response, which addresses all of the violations, should be selected.

Violations will be classified into one of three categories as described more fully below:

Class I Violation - A violation which:

- creates a likelihood for harm or for significant environmental damage, or has caused actual harm or environmental damage;

- involves the unauthorized disposal of hazardous waste;

- results in the failure to assure that groundwater will be protected or that proper closure and post-closure activities will be undertaken; or

- involves the failure to establish and maintain financial assurance mechanisms

Class II Violation - A violation which:

- results in a release or creates a threat of release of hazardous waste to the environment but does not create a likelihood for harm or environmental damage; or,

- involves the failure to ensure hazardous wastes are destined for and delivered to a permitted, interim status or designated facility.

Class III Violation - Any other violation of hazardous waste rules, permits or orders.

Examples of Class I, II, and III violations, using this classification scheme, are included in Appendix II.

While there are some hazardous waste requirements whose violation would, in almost all situations regardless of the circumstances, clearly meet the Class I criteria, cases may arise in which a particular violation's "likelihood for harm" is superficially unclear. Therefore, potential Class I violations should be evaluated in consideration with other relevant factors in order to determine the likelihood for harm. These additional factors may include, but are not limited to, the following:

- the type and duration of the violation;

- the degree of deviation from the requirement;

- precautions, actions or measures taken by the violator which would mitigate potential adverse impacts of the handler's operation;

- the hazard characteristics and quantity of the hazardous waste; and

- specific characteristics of the site where the violation occurred;

SECTION 4

TIMELY AND APPROPRIATE ENFORCEMENT RESPONSE

This section identifies the options for appropriate enforcement actions in response to violations. A more detailed discussion of these actions is contained in Section 5.

Timeframes for DEQ enforcement actions are also included. The timeframes described herein are considered the maximum allowable -- enforcement actions should proceed more quickly if possible. Where timeframes begin with the date of violation discovery, this shall be interpreted as the date that the Department inspector determines through review of the inspection report and/or data (e.g., laboratory reports) that a violation has occurred.

In general, initial DEQ enforcement actions for Class II and III violations will be at the lowest appropriate level and subsequently escalated if violators fail to achieve compliance or meet established compliance schedules. There are exceptions, however, as noted below.

A. INITIAL ENFORCEMENT RESPONSES

CLASS I VIOLATIONS

Appropriate Enforcement Response: The Department generally intends to assess civil penalties for Class I violations through issuance of a Civil Penalty Assessment.

DEQ will also establish compliance schedules to return violators to full compliance, through issuance of either a Notice of Intent to Assess Civil Penalty (hereinafter "Notice of Intent") or an Order. If correction of the Class I violations will require an extended period of time and substantial effort (e.g., development of Part B application, installation of surface impoundment liner, etc.), DEQ may issue an Order in lieu of the Notice of Intent.

If Department staff have reason to believe that either of these DEQ administrative actions will be ineffective in obtaining the violator's full compliance, direct court action may be recommended.

Timeliness of Enforcement Response: The times indicated below pertain to the state's enforcement response options. They include the writing, processing and issuance of the enforcement action.

Enforcement Action	Time
a. Civil Penalty Assessment	45 days after violation discovery.
b. Notice of Intent	45 days after violation discovery.
c. DEQ order	45 days after violation discovery.

d.	Referral to Department of Justice for court action	45 days after violation discovery.

CLASS II VIOLATIONS

Appropriate Enforcement Response: In general, the initial DEQ enforcement response to Class II violations will be a Notice of Violation (NOV) issued by the Regional Manager.

Alternately, a Notice of Intent should be issued if: (1) correction of the violations will take longer than 90 days; (2) the violator has a large number of Class II violations; or (3) the Department has reason to believe the NOV will be ineffective.

In cases where correction of Class II violations will require an extended period of time and substantial effort, issuance of an Order may be recommended.

Timeliness of Enforcement Response: The times indicated below include the writing, processing and issuance of the respective enforcement responses.

	Enforcement Action	Time
a.	Notice of Violation	30 days after violation discovery.

b.	Notice of Intent	60 days after violation discovery.
c.	DEQ order	90 days after violation discovery

CLASS III VIOLATIONS

Appropriate Enforcement Response: A violator with only Class III violations will normally be issued a Notice of Violation as the initial enforcement response.

If there are a large number of Class III violations or if the violations will require more than 90 days to correct, a Notice of Intent should be issued initially.

Issuance of an Order or Civil Penalty Assessment as an initial enforcement response generally will not occur unless there are significant aggravating circumstances.

Timeliness of Enforcement Response:

	Enforcement Action	Time
a.	Notice of Violation	30 days after violation discovery.
b.	Notice of Intent	60 days after violation discovery.

B. ESCALATION OF ENFORCEMENT RESPONSES

While the Department expects the majority of violations to be resolved with an initial enforcement response, DEQ will closely monitor compliance schedule dates and expeditiously take subsequent actions if such dates are not met or if full compliance is not achieved.

Appropriate Enforcement Response: Subsequent enforcement actions taken in response to a violator's failure to comply with an initial enforcement action normally will be escalated as indicated below:

Initial Enforcement Response	Subsequent Enforcement Response
a. Notice of Violation	Notice of Intent.
b. Notice of Intent	Assessment of Civil Penalty.
c. Assessment of Civil Penalty	Additional Assessment of Civil Penalty or Department order.
d. DEQ order	Assessment of Civil Penalty or referral to Department of Justice for court action.

However, these guidelines should not be interpreted to preclude DEQ from taking a subsequent enforcement action which may be more than one level higher than the intitial action. For example, if

a Notice of Violation is issued as the initial response to Class II violations, and compliance is not achieved with 90 days, DEQ may assess a civil penalty without first issuing a Notice of Intent.

Timeliness of Enforcement Response: Subsequent enforcement actions taken in response to a violator's failure to comply with the initial enforcement action will proceed according to the following timeframes.

Enforcement Action	Time[1]
a. Notice of Intent	30 days
b. Assessment of Civil Penalty	45 days
c. DEQ order	60 days
d. Referral to Department of Justice for Court Action	90 days

[1]Begins on the first day after a compliance schedule date is not met.

C. CHRONIC OR REPEATED VIOLATIONS

If the Department finds that a person is a chronic violator of hazardous waste program requirements, or repeatedly violates the same requirements, this is an indication that the past enforcement actions were not successful in deterring the violator. In such cases, it may be appropriate for DEQ to escalate the initial enforcement actions for the newly documented violations above the level normally indicated for an initial response.

For example, if a violator has repeated Class III violations, DEQ may issue a Notice of Intent or a Civil Penalty Assessment for the new violations, rather than begin with a Notice of Violation.

D. COMBINATIONS OF CLASS I, II AND III VIOLATIONS

When a violator has violations of more than one classification, it is desireable to issue one consolidated enforcement response which covers all of the violations.

For example, if a person has several Class I and Class II violations, a single Notice of Intent should be issued, citing all of the Class I and Class II violations. (The Civil Penalty Assessment, which is the appropriate enforcement response for Class I violations, would only cite and cover the Class I violations.)

Although dual enforcement actions should be minimized, they may be appropriate in some cases. For example, a person with both Class II and Class III violations could receive a penalty assessment for the Class II violations and a separate NOV or Notice of Intent for the Class III violations. This might occur when the circumstances surrounding the Class II violations justified a penalty, but the Class III violations did not.

SECTION 5

TYPES AND DESCRIPTIONS OF ENFORCEMENT RESPONSES

Notice of Violation is a written notice that identifies the violations and specifies a date when the violator must return to full compliance. Interim compliance dates may be included if appropriate.

Notices of Violation are used when there are Class II or III violations which can be corrected within 60 days of the notice. A Notice of Violation should not be considered a prerequisite to issuance of a Notice of Intent or a civil penalty if it is thought that either of those actions will eventually be needed to obtain compliance by the violator.

Notices of Violation are issued by the Regional Managers. The notice shall require a written response from the violator noting how and when the violations were corrected. The Department may conduct a followup inspection to verify compliance.

Notice of Intent to Assess Civil Penalty is a written document which warns a violator that civil penalties may be assessed for violations cited

therein without further notice from the Department. The Notice of Intent cites the particular violations and describes the factual findings upon which the violations are based.

The letter accompanying the Notice of Intent shall either specify a schedule, if appropriate, for the violator to return to compliance or require the violator to submit a compliance schedule by a specified date for Department approval. A compliance schedule should contain interim requirements and dates for their achievement if final compliance will exceed 120 days. A compliance schedule should require that progress reports be submitted to the Department within 14 days following each scheduled date.

Notices of Intent are issued for all Class I violations and for Class II or Class III violations which require more than 60 days after the notice to correct. Notices of Intent are issued by the Administrator of the Regional Operations Division, based upon a referral to the Enforcement Section. The Hazardous Waste Section Manager and the appropriate Regional Manager shall be consulted for concurrence prior to issuance of Notices of Intent.

Failure to comply with the compliance schedule in a Notice of Intent should result in an escalated action such as civil penalty, Department order or referral to Department of Justice for court action.

Civil Penalty Assessment means the administrative levying of a monetary penalty by the Director of the Department. A hazardous waste management schedule of civil penalties is contained in OAR 340-12-068 and varies from not less than $100 to not more than $10,000 for each violation. Each day the violation continues may constitute a separate offense.

In determining the amount of a civil penalty, the Director may consider the criteria in OAR 340-12-045. (Section 7 of these guidelines restates OAR 340-12-045 and provides guidance for determining the amount of a penalty.)

Pursuant to ORS 468.125, the Department is not required to provide advance notice prior to assessing a civil penalty for a violation of hazardous waste program requirements (ORS 459.410 to 459.450 and 459.460 to 459.690).

As indicated in Section 4 of these guidelines, civil penalties normally will be assessed against persons with Class I violations and may be assessed against persons who fail to comply with a Notice of Intent or Department order.

Assessments of civil penalty grant the violator the right to request a contested case hearing before the Environmental Quality Commission or its hearings officer. Under certain circumstances, the civil penalty may be mitigated in whole or in part by the Commission. Contested case decisions may be appealed to the Commission and are subject to judicial review.

Failure to comply following an assessment of civil penalty should result in the assessment of an additional penalty, Department order, site operation shutdown order or referral to Department of Justice for court action.

Department Order means an order issued by the Department pursuant to ORS 459.660. Whenever the Department believes a violation has occurred, it may investigate and issue an order requiring changes or compliance without notice or hearing. The Order takes effect 20 days after the date of its issuance, unless a hearing is requested before the 20-day period has expired.

If the Order is appealed, a contested case hearing is held by the Environmental Quality Commission or its hearing officer and is subject to judicial review. Failure to comply with the Order is enforceable through the assessment of civil penalties or criminal action.

Department orders may be used to respond to persons with Class I violations which require an extended period of time and substantial effort to correct or persons who do not adequately respond to initial enforcement actions. Compliance schedules may be included in Orders if appropriate. (See discussion of Notice of Intent in this section for guidance on compliance schedules.) In general, the Department's desire in issuing an Order is to obtain the respondent's consent to the terms of the Order. Therefore, if it appears likely that an order would be contested, use of a Notice of Intent to establish compliance requirements may be preferred.

Department orders shall be prepared by the Enforcement Section of Regional Operations based upon an enforcement referral from the Regional Manager. Department orders will require the concurrence of the Manager of the Hazardous Waste Section and the Administrator of the Hazardous and Solid Waste Division before being issued by the Director.

Commission Order means an order issued by the Environmental Quality Commission pursuant to ORS 459.650. Upon receipt of a complaint made to it by any person, the Department shall make an investigation to determine if the operation of any generator, transporter or hazardous waste management facility is unsafe or is in violation of a statute or regulation. Following the investigation, if the Department is satisfied that sufficient grounds exist to justify a hearing, it shall give 10 days' written notice of the time and place of the hearing. Within 30 days of the hearing, the

Commission shall make a specific order as it considers necessary. Any Order is subject to judicial review. Failure to follow the order, once final, may subject the violator to a Notice of Intent, assessment of a civil penalty, site operation shutdown order, injunctive relief or criminal action.

Commission orders are issued by the EQC or its hearing officer following a hearing. The results of the inspector's investigation will be reviewed by the Administrator of the Hazardous and Solid Waste Division, the Director and the Attorney General's Office before a hearing is scheduled for Commission action. The Department will not ordinarily use this authority unless initiated by a complaint, since ultimate enforcement of the Order would revert to an assessment of a civil penalty, site operation shutdown order, injunctive relief or criminal action.

Site Operation Shutdown Order means an order issued by the Department pursuant to ORS 459.680 without prior notice or hearings. The Department must establish reasonable cause that a clear and immediate danger to public health, welfare, safety or the environment exists from the continued operation of the activity or site. The Order shall be served on the site superintendent. Within 24 hours, the Department must appear in circuit court to petition for the equitable relief required to protect public health, welfare, safety or the environment.

Injunctive Relief means actions or proceedings pursuant to ORS 459.690 for equitable remedies to enforce compliance or restrain further violations whenever it appears to the Department that any person is engaged or about

to engage in any acts or practices that cause or threaten to cause a substantial violation or threat to public health, safety, welfare or the environment. No prior administrative hearing is required.

Criminal Action means proceedings under ORS 459.992(4). Criminal actions are handled by the local District Attorney for the county in which the violations occur. Referrals to the local District Attorney by inspectors shall not occur without the approval of the Director of the Department. The Administrators of the Hazardous and Solid Waste Division and Regional Operations Division shall confer with the Director on the merits of proceeding with criminal action in lieu of the other administrative remedies described in this policy. The Attorney General's Office may also be consulted. The Department may also consider referral of potential criminal actions to EPA for investigation.

The following types of cases or situations may warrant criminal action: (1) a hazardous waste handler violates the terms of a Notice of Intent, Commission order or Department order and does not respond to the assessment of a civil penalty; (2) a hazardous waste handler is a frequent and recalcitrant violator; (3) long-term specific conduct by a violator is to be compelled; (4) deterrence of others situated similarly to the violator is a main goal; and (5) intentional disposal of hazardous waste at an unauthorized disposal site.

Occasionally, local agencies (i.e., city police or fire, county sheriff) may be involved in investigating hazardous waste violations along with the state. Local government has the right and opportunity to seek a criminal action with or without DEQ concurrence and/or knowledge.

SECTION 6

PRIORITIES

All violations documented will be addressed with an appropriate enforcement response. In general, the Department's priority targets will be, first, Class I Violations, then Class II Violations, and then Class III Violations.

Within each category of violations, enforcement priorities may need to be set. In doing so, Department staff should consider the following factors:

- o The magnitude and imminence of the actual or potential public health or environmental threat.

- o The duration of the handlers noncompliance -- if two similar noncompliance scenarios exist, the one which has existed longer should generally be addressed first.

- o Length of time needed to achieve compliance -- violators requiring long-term remedies should be addressed first, except for imminent threat situations.

- o Strength of case -- when all other considerations are equal, the stronger case should receive higher priority.

- o Expression of uncooperativeness or willingness by violator to correct violations.

o Potential for the enforcement action to set an important precedent.

SECTION 7

ASSESSMENT OF ADMINISTRATIVE CIVIL PENALTIES

As indicated in previous sections of these enforcement guidelines, assessment of civil penalties by the DEQ Director is one enforcement tool available to DEQ. A civil penalty may be an appropriate enforcement response depending upon the nature of a violation and its surrounding circumstances.

This section focuses on considerations which may be relevant when determining the proper amount of a civil penalty once a decision has been made that a civil penalty is the appropriate enforcement remedy to pursue.

Relationship to Statutory and Regulatory Provisions

These guidelines do not substitute for consideration of existing provisions in Oregon Revised Statutes (ORS) and Oregon Administrative Rules (OAR) pertaining to assessment of civil penalties. This document does not establish any new authorities or require any action be taken which conflicts with provisions of existing state law. The guidelines are intended solely to help staff understand the applicable ORS and OAR provisions.

ORS 459.995 establishes the liability of hazardous waste violators for civil penalties. In particular, ORS 459.995(2) states that:

> "(2) In addition to any other penalty provided by law, any person who violates ORS 459.410 to 459.450 and 459.460 to 459.690, a license condition or any commission rule or order pertaining to the generation, treatment, storage, disposal or transportation by air or water of hazardous waste, as defined by ORS 459.410, shall incur a civil penalty not to exceed $10,000 for each day of the violation."

Additionally, ORS 459.995(3) states that:

> "(3) The civil penalty authorized by subsections (1) and (2) of this section shall be established, imposed, collected and appealed in the same manner as civil penalties are established, imposed and collected under ORS 448.305, 454.010 to 454.040, 454.205 to 454.255, 454.405 454.425, 454.505 to 454.535, 454.605 to 454.745 and ORS chapter 468."

Due to the references in ORS 459.995(3), Chapter 459 does not stand alone. The principal reference for consideration is ORS Chapter 468 which, in part, authorizes establishment of civil penalty schedules, and specifies considerations for imposing penalties (see ORS 468.130, 468.135, and 468.140). These statutory provisions have been codified by the Commission and comprise Division 12 of OAR Chapter 340. OAR 340-12-068 includes a hazardous waste management schedule of civil penalties. OAR 340-12-045 identifies factors which the Director may consider in establishing the amount of a civil penalty.

Summary of Penalty Determination

When a penalty is to be assessed by the Director, penalty determination can be thought of as proceeding along a component approach. First, a "gravity-based" penalty component is determined. Next, the economic benefit of noncompliance may be calculated if it is expected to be significant. Finally, other relevant factors of OAR 340-12-045, if any, may be considered, where such information is available, to adjust the penalty.

The gravity-based component of a penalty considers "The gravity and magnitude of the violation" factor of OAR 340-12-045. This factor can be displayed as a matrix (discussed later).

Where a violator has derived significant savings by its failure to comply with hazardous waste requirements, the Director may calculate the amount of economic benefit from noncompliance gained by the violator and add this amount to the gravity-based penalty. Consideration of the economic benefit of noncompliance is provided for in OAR 340-12-045(1)(j), i.e., "any other relevant factor."

The Director may adjust the gravity-based penalty upwards or downwards to reflect consideration of other factors as provided for in OAR 340-12-045, if sufficient information is available. These factors include:

(a) Whether the respondent has committed any prior violation, regardless of whether or not any administrative, civil, or criminal proceeding was commenced therefore;

(b) The history of the respondent in taking all feasible steps or procedures necessary or appropriate to correct any violation;

(c) The economic and financial conditions of the respondent;

(d) Whether the violation was repeated or continuous;

(e) Whether a cause of the violation was an unavoidable accident, or negligence, or an intentional act of the respondent;

(f) The opportunity and degree of difficulty to correct the violation;

(g) The respondent's cooperativeness and efforts to correct the violation for which the penalty is to be assessed;

(h) The cost to the Department of investigation and correction of the cited violation prior to the time the Department receives respondent's answer to the written notice of assessment of civil penalty; or

(i) Any other relevant factor.

A penalty may be calculated for each separate and independent violation documented by the Department. In no case can the total penalty for any single violation exceed the statutory maximum of $10,000 per day.

Determination of the Gravity-Based Penalty

In determining the gravity-based component of a civil penalty, the following aspects of a violation are considered:

- Potential for harm; and

- Extent of deviation from a statutory or regulatory requirement.

Potential for Harm

The Department's requirements for hazardous waste handlers were promulgated in order to prevent harm to human health and the environment. Thus, noncompliance could create actual harm or a potential for harm.

The potential for harm in a particular situation can be classified as major, moderate, or minor. The degree of potential harm represented by each category is defined as:

- MAJOR - Violation poses a major adverse effect on public health or the environment.

- MODERATE - The violation poses a moderate adverse effect on public health or the environment.

- MINOR - The violation poses a minor adverse effect on public health or the environment.

Extent of Deviation from Requirement

The "extent of deviation" from the Department's statutes or regulatory requirements (i.e., magnitude of violation) is an important factor in determining the amount of a civil penalty. Violators may be substantially in compliance with the provisions of the requirement or they may have totally disregarded the requirement (or a point in between). As with potential for harm, extent of deviation may be either major, moderate, or minor. In determining the extent of deviation, the following definitions should be used:

- o MAJOR - the violator deviates significantly from the requirements of the regulation or statute to such an extent that almost none of the requirements are met.

- o MODERATE - the violator deviates from the requirements of the regulation or statute, but some of the requirements are implemented as intended.

- o MINOR - the violator deviates somewhat from the regulatory or statutory requirements but most of the requirements are met.

Gravity-Based Penalty Matrix

Consideration of a violation's "gravity and magnitude" may be facilitated by referring to a matrix whose two axes are; 1) the potential for harm, and 2) the extent of deviation from a requirement. The matrix has nine cells, each containing a penalty range. The specific cell is chosen after

determining which category (major, moderate or minor) is appropriate for the potential for harm factor, and which category is appropriate for the extent of deviation factor. The complete matrix is illustrated below:

Extent of Deviation from Requirement

Potential for Harm	MAJOR	MODERATE	MINOR
MAJOR	$10,000 to 8,000	$ 7,999 to 6,000	$ 5,999 to 4,400
MODERATE	$ 4,399 to 3,200	$ 3,199 to 2,000	$1,999 to 1,200
MINOR	1,199 to 600	599 to 200	199 to 100

The highest cell (major potential for harm/major extent of deviation) is limited by the maximum statutory penalty allowance of $10,000 per day of violation.

Assessing Multiple Penalties

In certain situations, a particular violator may have violated several DEQ hazardous waste rules. A separate penalty may be calculated for each violation that results from an independent act (or failure to act) by the violator and is substantially distinguishable from any other violation for which a penalty is to be assessed. A given violation is independent of, and substantially distinguishable from, any other violation when it requires an element of proof not needed by the others. In many cases, violations of different rules constitute independent and substantially distinguishable violations.

For example, failure to implement a groundwater monitoring program and failure to have a written closure plan are violations which result from different sets of circumstances and which pose separate risks. In the case of a firm which has violated both of these rules, a separate count would be charged for each violation. For penalty purposes, each of the violations would be evaluated separately and the amounts totalled.

It is also possible that different violations of the same rule could constitute independent and substantially distinguishable violations. For example, there are two separate violations in the case of a firm which has open containers of hazardous waste in its storage area and which also ruptured different hazardous waste containers while moving them on site. The violations result from two sets of circumstances (improper storage and improper handling) and pose separate and distinct risks. In this situation, two violations with two separate penalties would be appropriate. For penalty purposes, each of the violations would be assessed separately and the amounts totalled.

Multiple penalties also may be assessed where a person has violated the same requirement in substantially different locations. An example of this type of violation is failure to clean up hazardous waste discharged during transportation. A transporter who did not clean up waste discharged in two separate locations during the same trip should be charged with two violations. In these situations, the separate locations present separate and distinct risks to public health and the environment. Thus, separate penalty assessments are justified.

In general, multiple penalties would not be appropriate where the violations are not independent or substantially distinguishable. Where a violation derives from or merely restates another violation, a separate penalty is not warranted. For example, if an owner/operator of a storage facility failed to specify in the waste analysis plan the parameters for which each hazardous waste will be analyzed and failed to specify the frequency with which the initial analysis of the waste will be repeated, the owner/operator has violated the requirement that they develop an adequate waste analysis plan. The violations result from the same factual event (failure to develop an adequate plan), and pose one risk (storing waste improperly due to inadequate analysis). In this situation, both requirements violated would be cited in the complaint, but one penalty, rather than two, would be assessed. The fact that two requirements were violated may be taken into account in choosing higher "potential for harm" and "extent of deviation" categories on the penalty matrix.

Assessing Multi-Day Violations

The Director has authority to assess civil penalties of up to $10,000 per violation per day, with the potential of assessing each day of noncompliance as a separate violation. Multi-day penalties would generally be calculated in the case of continuing flagrant violations. However, per day assessment may be appropriate in other cases.

In the case of continuing violations, the Director has the authority to calculate penalties based on the number of days of documented violation since the effective date of the requirement and up to the date of coming into compliance. The gravity-based penalty derived from the penalty matrix may be multiplied by the number of days of documented violation, when a decision has been made to assess for multi-day violations.

Economic Benefit from Noncompliance

The Director may consider the economic benefit of noncompliance to a violator when assessing penalties. An "economic benefit component" may be calculated and added to the gravity-based component of a penalty when a violator acquires a significant economic benefit from violating state hazardous waste program requirements. (The total penalty cannot exceed $10,000 per violation per day.)

The following regulatory areas are candidates for an economic benefit analysis:

- Groundwater monitoring
- Financial requirements

- o Closure/post-closure
- o Waste determination
- o Waste analysis
- o Clean-up of discharge
- o Part B application submittal
- o Disposal at unauthorized location

Two types of economic benefits from noncompliance may occur:

- o Benefit from delayed costs; and
- o Benefit from avoided costs.

Delayed costs are expenditures which have been deferred by the violator's failure to comply with the requirements. The violator eventually will have to spend the money in order to achieve compliance. Delayed costs are the equivalent of capital costs. Examples of violations which result in savings from delayed costs are:

- o Failure to install a groundwater monitoring program;
- o Failure to submit a Part B permit application; and
- o Failure to develop a waste analysis plan.

Avoided costs are expenditures which are nullified by the violator's failure to comply. These costs will never be incurred. Avoided costs are

the equivalent of operating and maintenance costs. Examples of violations which result in savings from avoided costs are:

- Failure to perform annual and semi-annual groundwater monitoring sampling and analysis;

- Failure to follow the approved closure plan in removing waste from a facility, where removal is not now possible; and

- Failure to perform waste analysis before adding waste to tanks, waste piles, incinerators, etc.

Because the savings that are derived from delayed costs differ from those derived from avoided costs, the economic benefit from delayed and avoided costs are calculated in a different manner. Guidance on calculating delayed and avoided costs is presented in Appendix I.

Adjustment Factors

As mentioned earlier, the gravity and magnitude of the violation is considered in determining the gravity-based component of a penalty. The reasons the violation was committed, the intent of the violator, and other potentially relevant factors are not considered in choosing the appropriate penalty from the matrix. However, OAR 340-12-045(1) identifies relevant factors which the Director may consider in establishing the amount of a civil penalty.

The adjustment factors can increase, decrease or have no effect on the penalty amount to be assessed to the violator. However, no upward adjustment can result in a penalty greater than the statutory maximum of $10,000 per day of violation. Adjustment of a penalty may take place after determining the gravity-based component of the penalty but prior to issuing the penalty assessment, if the necessary information is available to the Director.

In general, these adjustment factors are applied to the gravity-based penalty component derived from the matrix, and not to the economic benefit component (if calculated).

Application of the adjustment factors is cumulative, i.e., more than one factor may apply in a case.

(1) Cooperativeness and efforts to correct the violation.

Cooperativeness can be demonstrated by a violator promptly reporting its noncompliance. Assuming such self-reporting is not required by law, regulation, or permit, this behavior may result in adjustment of the penalty. Prompt correction of environmental problems also can indicate a violator's cooperativeness. Lack of cooperativeness, on the other hand, can result in an upward adjustment of the penalty. No downward adjustment would be made if the efforts to comply primarily consist of coming into compliance without demonstrated promptness.

(2) Degree of willfulness, negligence, and/or nonavoidability

There may be instances of culpability for "knowing" violations which do not meet the criteria for criminal action. In cases where administrative civil penalties are sought for actions of this type, the penalty may be adjusted upward for willfulness and/or negligence. Conversely, there may be instances where penalty adjustment downward may be justified based on the lack of willfulness or negligence, or the presence of unavoidable circumstances.

In assessing the degree of willfulness and/or negligence, the following factors may be considered, as well as any others deemed appropriate:

- How much control the violator had over the events constituting the violation;
- The foreseeability of the events constituting the violation;
- Whether the violator took reasonable precautions against the events constituting the violation;
- Whether the violator knew or should have known of the hazards associated with the conduct;
- Whether the violator knew of the legal requirement which was violated.

The amount of control which the violator had over how quickly the violation was remedied also is relevant in certain circumstances. Specifically, if correction of the environmental problem was delayed by factors which the violator can clearly show were not reasonably forseeable and out of their control, the penalty may be reduced.

(3) Past Compliance History

Where a party previously has violated hazardous waste requirements at the same or a different site, this is usually evidence that the party was not deterred by the previous enforcement response. Unless the previous violation was caused by factors entirely out of the control of the violator, this is an indication that the penalty should be adjusted upwards. If a violator otherwise has a record of substantial compliance, the penalty may be adjusted downward.

Some of the factors to be considered are the following:

- How similar the previous violation was;
- How recent the previous violation was;
- The number of previous violations;
- The violator's response to previous violation(s) in regard to correction of problem.

A violation generally should be considered "similar" if the Department's previous enforcement response should have alerted the party to a particular type of compliance problem.

(4) Economic and financial conditions of the violator.

The Director generally does not intend to assess penalties that are clearly beyond the ability of the violator to pay. Therefore, the Director may consider the economic and financial conditions of a violator.

When it is determined that a violator cannot afford the penalty prescribed by these guidelines, or that payment of all or a portion of the penalty will preclude the violator from achieving compliance or from carrying out remedial measures which DEQ deems to be more important than the deterrence effect of the penalty (e.g., payment of penalty would preclude proper closure/post-closure), the following options may be considered:

- Consider a delayed payment schedule. Such a schedule might even be contingent upon an increase in sales or some other indicator of improved business.

- Consider an installment payment plan with interest.

- Consider straight penalty reductions as a last recourse.

The amount of any downward adjustment of the penalty is dependent on the individual financial facts of the case.

(5) Other relevant factors

These guidelines allow an adjustment for other relevant factors which may arise on a case-by-case basis. The Director may make adjustments to the gravity-based penalty for such reasons.

APPENDIX I

CALCULATING ECONOMIC BENEFIT FROM NONCOMPLIANCE

The following formula is provided to help calculate the economic benefit component:

Economic

Benefit = Avoided Costs x (1-T) + (Delayed Costs x Interest Rate)

In the above formula, T represents the firm's marginal state tax rate. Interest is calculated by using the interest rate charged by the State Department of Revenue for delinquent accounts.

The economic benefit formula provides a reasonable estimate of the economic benefit of noncompliance. If a violator believes that the economic benefit derived from noncompliance differs from the estimated amount, it may present information documenting its actual savings to the Director at the settlement stage or to the Environmental Quality Commission at the hearing stage.

For avoided costs, the economic benefit equals the cost of complying with the requirement, adjusted to reflect income tax effects on the violator.

The economic benefit for delayed costs consists of the amount of interest on the unspent money that reasonably could have been earned by the violator during noncompliance.

APPENDIX II

EXAMPLES OF CLASSIFICATION OF HAZARDOUS WASTE VIOLATIONS

The classifications listed below are examples of the types of violations which may be classified as either Class I, II or III. This list is illustrative, not exhaustive.

Example	Violation Class
Disposing of hazardous waste at a location other than at a permitted hazardous waste management facility.	I
Failure to report a discharge of hazardous waste and take immediate action to protect human health and the environment.	I
Construction and operation of a new treatment, storage or disposal facility without a permit.	I

Installation of grossly inadequate groundwater monitoring wells such that groundwater samples are not representative of background quality in the uppermost aquifer near the facility.	I
Failure to install any groundwater monitoring wells.	I
Installation of grossly inadequate groundwater monitoring wells such that they do not immediately detect any statistically significant amounts of hazardous waste or hazardous waste constituents that migrate from the waste management area to the uppermost aquifer.	I
Failure to develop and follow a groundwater sampling and analysis plan.	I
Failure to develop a complete and written closure plan.	I
Failure of a closure plan to describe the steps needed to decontaminate facility equipment during closure.	I

Failure of a tank closure plan to provide for the removal of all hazardous waste and hazardous waste residues from tanks, discharge control equipment and discharge confinement structures.	I
Failure of a disposal facility owner/operator to have a written post-closure plan.	I
Failure of a post-closure plan to identify planned groundwater monitoring activities or activities to ensure the integrity of the cap and final cover, during the post-closure period.	I
Failure to prepare a written estimate of the cost of closing a facility in accordance with the facility's closure plan.	I
Failure to establish and maintain a financial assurance mechanism for closure of the facility.	I
Failure of a disposal facility owner/operator to prepare a written estimate of the cost of post-closure monitoring and maintenance of the facility in accordance with the facility's post-closure plan.	I
Failure to establish and maintain a financial assurance mechanism for post-closure care of the facility.	I

Note: The following examples of Class II violations are not absolutely Class II in all cases. Depending on individual circumstances, these violations could be classified as Class I if they create a likelihood for harm or otherwise meet the Class I criteria identified in Section 3.

Failure to determine if a solid waste is a hazardous waste.	II
Failure to use a manifest for off-site shipments of hazardous waste.	II
Failure to designate on the manifest an authorized storage, treatment, disposal or reclamation facility.	II
Exceeding the designated time limit for on-site accumulation of hazardous wastes without receiving a permit, qualifying for interim status, or receiving an emergency extension.	II
Failure to mark each container with the words "Hazardous Waste" or with the accumulation date.	II
Failure to comply with the preparedness and prevention requirements of Subpart C of 40 CFR Part 265.	II
Storage of wastes in containers that are not in good condition or have begun to leak.	II

Failure to submit a manifest exception report.	II
Failure to develop and follow a written inspection schedule.	II
Failure to remedy equipment deterioration or malfunction revealed by an inspection.	II
Failure to retain a copy of the manifest.	II
Failure to take precautions to prevent accidental ignition or reaction of ignitable or reactive hazardous waste.	II
Failure of owner/operator to submit a timely and complete Part B permit application.	III
Failure to completely fill out a manifest.	III
Failure to submit a quarterly report of all off-site shipments of hazardous waste.	III
Failure to maintain personnel training documents and records.	III
Failure to maintain a copy of the closure plan at the facility.	III
Failure to provide required notice to DEQ of foreign shipments of waste.	III

Oregon Council
American Electronics Association

Casey Powell
Chairman, Oregon Council AEA
Sequent Computer Systems
14360 N.W. Science Park Drive
Portland, Oregon 97229
(503) 626-5700

October 14, 1985

Mr. Alan Goodman
P.O. Box 1760
Portland, OR 97007

RE: DEQ Enforcement Guidelines and Procedures

Dear Mr. Goodman:

The American Electronic Association/Oregon Council (Oregon AEA) represents some 80+ firms headquartered or having significant operations within the state of Oregon. These firms employ approximately 40,000 Oregonians. As a Council, the Charter is two-fold. It represents the interest of Oregon firms in formulating national association policy and specifically federal lobbying positions. But of a more immediate concern to Oregon firms, the Oregon AEA represents the electronics industry in working for a legislative and regulatory climate that fosters a general business climate and specifically a high technology investment climate.

The Oregon AEA appreciates this opportunity to comment on the DEQ's Draft Enforcement Guidelines and Procedures ("Guidelines"), and is concerned with numerous aspects of the Administrative Rulemaking process as they pertain to these Guidelines.

Prior to listing specific concerns with the actual Guidelines, AEA is concerned with the inadequate notice by the DEQ to the regulated community and also the DEQ's failure to provide a Public Hearing on the provisions of this important document.

The Comment Announcement was mailed after the 9/27/85 EQC meeting, probably on or about 9/30/85, and the Announcement provided approximately 14 days for comments to be submitted. The Announcement was stapled to another Comment Announcement on proposed changes to OAR 340-12-040, which provided a 10/16/85 public hearing. Many members of the regulated community saw the 10/16/85 public hearing date for the latter document and thought that it also applied to the Draft Enforcement Guidelines.

Secondly, the Comment Announcement describes very briefly and inadequately the 43 page document; since a copy of the document was not provided the ability of affected parties to make meaningful comments was significantly limited. The DEQ's offer to provide a copy of the document, upon request, does not mitigate the problems caused by the inadequate notice and short response times.

Gary Conkling
Chairman, Government Affairs Committee
Tektronix
P.O. Box 500, Del. Sta. Y3-439
Beaverton, Oregon 97005
(503) 643-8148

Pat McCormick
Legislative Representative
707 13th Street S.E.
Salem, Oregon 97301
(503) 362-7611

Although the DEQ describes the Guidelines as being a Departmental policy or guideline which does not "create rights, substantive or procedural,...(for) any party contesting or appealing a Department action", it is AEA's contention that the Guidelines are in fact administrative rules within the statutory definition of that term, ORS 183.310(8).

The Oregon Administrative Procedures Act (APA) defines a "rule" to mean "any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency" (emphasis added). These Guidelines clearly fall within the scope of this definition, regardless of DEQ's intent or statements to the contrary.

The Oregon AEA requests the DEQ to extend the comment period on the Guidelines until November 8, 1985 and also provide a public hearing on this document.

In addition to the aforenoted procedural problems, the AEA would like to further comment on the following aspects of the actual document:

1) Page 4 of the document states that the Guidelines do not create any rights, substantive or procedural, for any party affected by the DEQ's decisions. AEA contends that this statement conflicts with the concept of an administrative rule and requests that it be struck from the document.

2) Page 7 discusses Class I violations and includes proper closure and post-closure activities within that category. As a general rule, closure and post-closure proposals are planning documents subject to amendment and revision to account for business, regulatory and/or technological developments, before they are actually implemented. Furthermore, the CFR's require a regulated facility to notify the Agency 180 days prior to implementing closure activities. Therefore, AEA contends that inadequacies in preparation of these documents can and should be alleviated in the regulatory process. Closure and post-closure deficiencies do not call for enforcement action until implementation of the plans are imminent. AEA requests this provision be stricken from the Category I violations.

3) AEA requests the DEQ to cite the Oregon statutory or administrative authority for promulgating these rules, as well as Federal statutory provisions or administrative rules which require the DEQ to adopt Guidelines. Citation to Federal policy or guidance documents is an insufficient basis for these rules.

4) Page 9 discusses "Appropriate Enforcement Response" for Class I violations. From the text, it is unclear if a civil penalty will

be assessed whether or not the violation is resolved after the issuance of the "Notice of Intent to Assess Civil Penalty". We question whether this section is still accurate considering DEQ's current proposal to eliminate Notice of Violation letters under OAR 340-12-040(3)(b)(F) for hazardous waste violations.

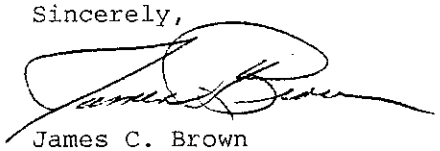
5) Page 28 discusses "Potential for Harm", and notes this section was promulgated to prevent harm to human health and the environment. The DEQ's illustrative example of "adverse effect non-compliance has on the statutory or regulatory purposes or procedures for implementing the hazardous waste program", seems self-serving and inappropriate to this section, as does the 3rd full paragraph which attempts to explain this point. AEA believes these items may be appropriate in other sections of the document but should be deleted under "Potential for Harm".

6) Pages 29-31 establish several criteria to be utilized in implementing the civil penalty matrix. These criteria include such terms as "Major", "Moderate", "Minor", "Substantial", "Significant", "Relatively Low" and "Deviates Somewhat". None of these terms are defined; yet, dependent upon which of the terms is used, a potential civil penalty can vary from $200 to $7,999.

   AEA contends that these terms must be defined in order for them to be used by the DEQ in decisions which will affect members of the regulated community. Failure to do so would open the DEQ's decisions to a court challenge similar to those faced by the Oregon Board of Dental Examiners when that body revoked a dentist's license for "unprofessional conduct", an undefined term, see Megdal v. Board of Dental Examiners, 288 Or 293, 605 P2d 273 (1980) and subsequent cases. Furthermore, the use of these undefined terms violates the Rulemaking procedures set forth at page 3-4 of the Attorney General's Administrative Law Manual and Model Rules of Procedure, effective 9/26/83. We request that these terms be fully defined in the document.

The Oregon AEA thanks the DEQ for this opportunity to comment on the Guidelines and looks forward to explaining its position more fully at the requested public hearing on these rules.

Sincerely,



James C. Brown
Vice Chairman, Environmental
and Occupational Health Committee

JB/mb

cc: AEA EOH Committee Members
Gary Conkling, Tektronix
Miriam Feder, Tektronix
Tom Donaca, AOI

STOEL, RIVES, BOLEY, FRASER & WYSE
ATTORNEYS AT LAW

WASHINGTON COUNTY OFFICE
ONE LINCOLN CENTER, SUITE 400
10300 S W GREENBURG ROAD
TIGARD, OREGON 97223-5407
(503) 220-1441

900 S W FIFTH AVENUE, SUITE 2300
PORTLAND, OREGON 97204-1268

TELEPHONE (503) 224-3380
TELECOPIER (503) 220-2480
CABLE LAWPORT
TELEX 703455

DISTRICT OF COLUMBIA OFFICE
1730 M STREET, N W, SUITE 900
WASHINGTON, D.C. 20036-4505
(202) 955-4555

October 14, 1985

HAND DELIVERED

Oregon Department of
Environmental Quality
Hazardous and Solid Waste Division
522 SW Fifth Avenue
Portland, OR 97204

Attention Mr. Alan Goodman

Re: Proposed Department of Environmental Quality Hazardous Waste Enforcement Guidelines and Procedures

On behalf of this firm and a number of our clients who are generators and transporters of hazardous waste, and owners and operators of TSD facilities, we respectfully offer the following comments in connection with the captioned matter.

I. THE PROPOSED GUIDELINES AND PROCEDURES ARE A RULE.

First, the proposed Hazardous Waste Enforcement Guidelines and Procedures are clearly a "rule" under ORS 183.310(8), and as such must be adopted in strict compliance with the Oregon Administrative Procedures Act. Such compliance requires "reasonable opportunity to submit data or views," and an oral hearing if requested by a specified number of persons or organizations. ORS 183.335(3). It is our understanding that Associated Oregon Industries has, through its attorney Mr. Tom Donaca, already requested an oral hearing, and we reiterate that request on behalf of five clients of this firm. In addition, at least one of those clients authorizes us to advise you that it is prepared to take whatever legal steps may be necessary to challenge adoption of the captioned Guidelines and Procedures if they are adopted other than in full compliance with the Administrative Procedures Act.

In support of our assertion that the proposed Guidelines and Procedures would constitute a rule, we respectfully commend your attention to the plain meaning of ORS 183.310(8):

> "(8) 'Rule' means any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency."

Exception clauses (d), (e) and (f) are clearly not applicable, and exception clauses (a) and (b) could be considered only if the proposed Guidelines and Procedures would not "substantially affect the the interests of the public"--a criterion which is self-evidently not present in the instant case. Accordingly, because the proposed Guidelines and Procedures is a "statement of general applicability that *** prescribes **** policy" of an agency, it most certainly must be a "rule." Moreover, because the proposed new DEQ enforcement policy represents a significant departure from existing policies, it falls squarely within the rulemaking dictates of Fulgham v. SAIF Corporation, 63 Or App 731 (1983).

II. THE TIME ALLOWED FOR COMMENTS IS NOT REASONABLE.

The public notice in connection with the proposed Guidelines and Procedures was published in the October 1, 1985 Oregon Administrative Rules Bulletin--without the full text of the proposal. Because of this, interested persons had only about 7 or 8 working days within which to review the proposed Guidelines and Procedures and prepare written comments. We respectfully submit that this is not a reasonable period of time, and we request an extension of time, until November 15, 1985, within which to submit further comments.

This extension should not be prejudicial to the interests of full and fair consideration by the Environmental Quality Council, because--even if no public hearing is held--the Environmental Quality Council would still have a week to consider these comments before its meeting on November 22.

III. THE PROPOSAL IS ILL-ADVISED.

Although we have not had time to review the proposed Guidelines and Procedures in detail and prepare extensive com-

ments, we cannot help but notice that this proposal appears to be an abject surrender to the federal Environmental Protection Agency. The proposed policy would adopt--for use in Oregon--an approach which has been an abysmal failure at the federal level and which could not possibly lead to a cleaner environment in this state.

It is clear from the "Director's Recommendations" that the Department is not totally enamored of this proposal--and for that we applaud the DEQ staff and its recognition that environmental quality in Oregon has been and will be more readily achieved through persuasion and cooperation than through adversary confrontation and reflexive punishment.

We would find it difficult to believe that this state must adopt an unsuitable policy under pressure from the federal government. We urge the Department of Environmental Quality and the Environmental Quality Council to examine the particular needs of this state and to formulate an enforcement policy which will meet both those needs and the requirements of federal law.

We look forward to the opportunity to present specific point by point comments to the proposed Guidelines and Procedures--both in writing and at a public hearing.

Very truly yours,

Richard D. Bach

RDB:twa
cc: Hon. Arno Denecke
Arnold Silver, Esq.
Thomas Donaca, Esq.

ASSOCIATED OREGON INDUSTRIES

P.O. Box 1006 • Tualatin, Oregon 97062 • (503) 620-4407

Ivan Congleton, president

14 October 1984

Mr. Alan Goodman
DEPT OF ENVIRONMENTAL QUALITY
PO Box 1760
Portland OR 97207

Re: **DEQ Enforcement Guidelines and Procedures**

Dear Mr. Goodman,

The Associated Oregon Industries (AOI) Hazardous Materials Committee has reviewed comments submitted to you in Mr. James C. Brown's 10-14-85 letter on behalf of the American Electronics Association/Oregon Council Environment and Occupational Health Committee regarding the draft enforcement Guidelines and Procedures. Be advised that AOI fully supports these comments and requests that its name be appended to the letter as supporting that position.

We apologize for not being able to draft more lengthy comments, however, due to scheduling conflicts and shortened comment periods, this was not feasible. Thank you for this opportunity to comment.

Sincerely,

Thomas C. Donaca mj

Thomas C. Donaca, General Counsel

cc: Frank Deaver

U.S. ENVIRONMENTAL PROTECTION AGENCY

REGION X

1200 SIXTH AVENUE

SEATTLE, WASHINGTON 98101

REPLY TO ATTN OF: M/S 530

OCT 03 1985

Michael J. Downs, Director
Hazardous and Solid Waste Division
Department of Environmental Quality
P.O. Box 1760
Portland, Oregon 97207

Dear Mr. Downs:

Enclosed are EPA's comments on DEQ's draft "Enforcement Guidelines and Procedures for the Hazardous Waste Program" (September 1985).

Our general reaction is that adherence to the policy would greatly strengthen the state's enforcement program, and we commend DEQ for what is clearly a serious effort to address the national criteria for enforcement response. We do note, however, several issues which we believe remain to be addressed before the guidelines are consistent with national policy. Of particular importance is the need for a detailed set of examples of violations for each of the three classes proposed by the guidelines.

We wish to emphasize that the national criteria for enforcement response are minimum criteria which should be met by a state hazardous waste program. This position is reflected in the Letter of Intent signed by our respective agencies in February. Thus, the enclosed comments identify issues whose resolution will be a major consideration in EPA's action on the state's final authorization application.

Sincerely,

Charles E. Findley, Director
Hazardous Waste Division

Enclosure

EPA Comments on DEQ
Draft "Enforcement Guidelines and Procedures"
September 1985

1. The principal deficiency of the proposed guidelines is the absence of examples of how specific violations will be classified under the proposed classification scheme. Such a set of examples is necessary to ensure that DEQ's intended classifications are consistent with the various EPA classifications. Furthermore, and just as important, we believe that the document's usefulness would be greatly reduced without such examples.

Examples of classifications which parallel those found in the national guidance should be included. We request that DEQ review the national guidance, and either incorporate the specific examples into the state's guidelines, or discuss with us as soon as possible any different approaches the state may believe appropriate.

2. EPA has established two classes of violations, and has singled out a certain class of violators ("high priority violators"). DEQ has chosen to establish three classes of violations. The proposed response to the state's Class I violation is consistent with EPA's for a high priority violator, the state's Class II response consistent with EPA's for a Class I violator, and the Class III response with EPA's Class II violator.

Because of the way the state defines Class I violations, certain high priority violators (as defined by EPA) would not necessarily be appropriately dealt with under the state's approach. Specifically, a violator that has realized a substantial economic benefit as a result of noncompliance, or is a recalcitrant or chronic violator, would not necessarily be handled according to the proposed Class I enforcement response.

One criterion which EPA uses to determine high priority violators is that the violator has one or more Class I violations of the groundwater, closure/post-closure, and financial responsibility requirements. One criterion for the state's proposed Class I violation is the failure to assure that groundwater will be protected or that proper closure and post-closure activities will be undertaken. In general, these two categories correspond. However, this correspondence cannot be clearly ascertained without specific examples of Class I violations. In addition, the state's criterion does not appear to encompass violations of financial responsibility requirements, in particular insurance requirements.

Also, it is difficult to compare the state's criterion for Class I violations of "likelihood for harm or significant environmental damage, or has caused actual harm or environmental damage" with EPA's criterion for

high priority violators of "substantial likelihood of exposure to hazardous waste or has caused actual exposure." We request that the DEQ provide us with clarification on any perceived differences between the two criteria as soon as possible.

Finally, the state defines a Class III violation as "any other violation of hazardous waste rules, permits or orders." Without specific examples of how various violations would be classified, the guidelines appear to conflict with EPA's policy of classifying "failure of a handler to meet a compliance schedule in an Order, decree, agreement or permit" as a Class I violation.

3. In the discussion of the state's proposed response to Class I violations, we find the language somewhat confusing. Discussions with DEQ staff have indicated that the intent of the guidelines is to provide for two separate enforcement actions in every case, one of which is an assessment of a civil penalty. (Such a response would be consistent with EPA's for a high priority violator.) In particular, we believe the guidelines should more clearly distinguish between the civil penalty assessment and the notice of intent to assess a civil penalty.

4. At the end of Section 3 there is a list of several factors which would be taken into account when violations are classified. These factors are appropriate to consider when establishing actual penalities. However, they should not be taken into account when determining the level and timing of enforcement actions, and therefore how violations are classified.

5. Regarding the applicability date of January 1, 1986, we believe that the provisions for escalations of enforcement actions contained in the guidelines should be followed in all enforcement actions, regardless of when a violation was detected.

6. In Section 1 of the guidelines, there are two statements which may benefit from clarification: "The goal of enforcement is to obtain expeditious resolution of hazardous waste program violations..." and "Timelines are established...to provide for resolution of noncompliance in the shortest practicable time period." We are of course in full agreement that responses to violations should be swift, and that a program objective should be to achieve compliance as soon as possible. The problem with these statements is that they do not acknowledge the dependence of resolutions of violations on administrative procedures and due process. They therefore seem to suggest that quick settlement of enforcement actions is an end in itself.

DEQ RESPONSE TO EPA COMMENTS
ON PROPOSED
HAZARDOUS WASTE ENFORCEMENT GUIDELINES AND PROCEDURES

Comment No. 1: DEQ's enforcement guidelines should include examples of how specific violations will be classified under the proposed classification scheme:

Response: DEQ agrees that including examples of violation classification would be helpful to users of the guidelines. The final guidelines will include a list of examples. The examples parallel the types of violations exemplified in EPA's Enforcement Response Policy and demonstrate that the state's classification scheme is consistent with that of EPA. The list of examples in the state's guidelines is meant to be illustrative, not exhaustive.

Comment No. 2: DEQ's violation classification scheme does not classify "violators reaping substantial economic benefit," "financial responsibility requirements violations," "failure of a handler to meet a compliance schedule in an order, decree, permit or agreement" and "chronic or recalcitrant violators" as Class I violations (for which a penalty assessment would be the appropriate enforcement response). DEQ's terminology "likelihood for harm" for Class I criteria appears different from EPA's term "likelihood for exposure."

Response: The omission of "violations of financial responsibility requirements" from the state's Class I category was an oversight. The final guidelines (Section 3) will classify such violations as Class I. The list of examples will also indicate that failure to provide financial assurance for closure and post-closure are Class I violations.

The Department does not believe that "violators reaping a substantial economic benefit from noncompliance" should necessarily be responded to with a penalty assessment. Therefore, this is not a Class I criterion. DEQ's enforcement guidelines are based upon the premise that the level and type of an enforcement action should be related to the violation's potential for human harm or environmental damage, since the state's hazardous waste requirements were promulgated to protect public health and the environment.

We believe that substantial economic benefit from noncompliance would generally result from Class I violations which due to their potential for harm would be addressed with a Class I enforcement response. We direct your attention to EPA's list of examples (page 13 of EPA's Enforcement Response Policy) of violations which could result in significant economic benefit. Most of the ten examples listed by EPA would be classified by the state's classification scheme as Class I on their own merits, irrespective of the occurrence of economic benefit. Furthermore, the state's guidelines on penalty assessment (Section 7) provide for consideration of the economic benefit from noncompliance in the determination of a penalty amount. DEQ's guidelines, therefore, should achieve the same effect as EPA's policy.

Likewise, it is not appropriate to classify all "recalcitrant or chronic violators" as Class I. To do so would eliminate the vital consideration of a violation's potential for harm in determining an appropriate enforcement response. This is not to imply that a handler's past (non)compliance history should be disregarded. The state's enforcement guidelines (Part C of Section 4) do provide for escalation of enforcement actions in response to repeated violations. Although penalties for repeated violators are not required by our guidelines (for the reason given above), neither are they precluded. The bottom line is that each violation will be evaluated on its potential for harm and other relevant factors.

The Department similarly believes that a handler's failure to meet a compliance schedule should not necessarily be a Class I violation and hence automatically result in a penalty assessment. Rather, a more appropriate approach and the one which DEQ will follow (see Part B of Section 4) is to closely monitor compliance schedule dates and expeditiously take subsequent and escalated action if such dates are not met. (We do note that our guidelines specify that failure to comply with a DEQ order could result in either a civil penalty or referral for judicial action.)

To summarize our position, state enforcement responses will be determined at a minimum upon consideration of a violation's potential for harm. The level of enforcement response may be influenced by other relevant factors, such as past compliance history, economic benefit, etc., but would not be dictated solely by them.

Finally, we do not perceive any actual differences between our use of the term "likelihood for harm" and EPA's use of "likelihood for exposure" for the Class I category. The two terms are used interchangeably by EPA in its Enforcement Response Policy (see third paragraph on page 12) and Civil Penalty Policy (see page 6). Also, the questions listed by EPA on page 12 to help determine a violation's likelihood for exposure really pertain to "harm." We believe that the term "harm" more accurately reflects EPA's (and the state's) intent in specifying the Class I criteria. Use of the term "harm" (in Section 3) to classify violations also achieves consistency with the use of "harm" (in Section 7) to determine penalty amounts.

Comment No. 3: The discussion of DEQ's proposed enforcement response to Class I violations is confusing. The state's guidelines should more clearly distinguish between the civil penalty assessment and the Notice of Intent to Assess Civil Penalty.

Response: The Department will attempt to clarify the discussion of Class I enforcement responses in the final enforcement guidelines.

Comment No. 4: The state's guidelines identify factors, in addition to the Class I, II, and III criteria, which would be taken into account when classifying violations. These factors are appropriate to consider when establishing actual penalties, but should not be taken into account when determining the level of enforcement action, and therefore how violations are classified.

Response: The Department's proposed enforcement guidelines are founded on the premise that the environmental and public health significance of hazardous waste violations should be a primary consideration in determining the level of regulatory response. We believe this is also the basis for EPA's enforcement policy, and in fact is reflected by the consistent state and EPA violation classification schemes.

Since the Class I criterion "likelihood for harm" is a subjective standard, DEQ's intent was to identify relevant factors and use them to assist in determining the "likelihood for harm" for potential Class I violations. In many cases, we believe the likelihood for harm from a violation will not be superficially evident, without evaluating the case-specific circumstances." Therefore, other considerations are specifically listed in the guidelines to enable staff to determine if the "likelihood for harm" exists.

Furthermore, EPA recognizes the relevancy of these factors as indicated by the discussion on page 12 of EPA's Enforcement Response Policy.

The final guidelines will clarify that these other relevant factors are applicable only when considering a violation's "likelihood for harm."

Finally, we want to point out that it is not DEQ's intent to use these factors to "declassify" specific Class I violations. For example, failure to assure groundwater is protected would not be reclassified from a Class I violation simply because the groundwater was not being used as a drinking water supply.

Comment No. 5: The provisions for escalating enforcement actions should be followed in all enforcement actions, regardless of when a violation was detected.

Response: The Department's intent is to escalate enforcement actions when violators fail to comply with established compliance schedules (see Section 2). We did not mean to imply in the discussion at the end of Section 1 that for violations detected prior to January 1, 1986, subsequent enforcement actions would not be escalated. Therefore, Section 1 will be revised to state that the principle of enforcement escalation would be followed for all actions taken after January 1, 1986, regardless of when the violations occurred.

Comment No. 6: Statements in Section 1 of the guidelines could suggest that quick settlement of enforcement actions is an end in itself.

Response: The Department does not believe the statements questioned by EPA have the meaning suggested by EPA, especially since this was not the Department's intent. We believe no clarification is warranted.

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 SIXTH AVENUE
SEATTLE, WASHINGTON 98101

OCT 17 1985

REPLY TO
ATTN OF: M/S 530

Michael Downs, Administrator
Hazardous and Solid Waste Division
Department of Environmental Quality
P.O. Box 1760
Portland, Oregon 97207

Dear Mr. Downs:

In your letter of September 24, 1985, you requested clarification for one of your constituents on the statutory or regulatory basis for EPA's requirement that a state's hazardous waste enforcement response and civil penalty policies be identical to EPA's in order for the state's program to receive final authorization.

The requirements for a state's enforcement authority are found in 40 CFR 271.16. Furthermore, in RCRA Section 3006(b) it is stated that a program may not be authorized if it does not provide adequate enforcement of compliance with hazardous waste requirements.

As you are aware, neither of the above specifically requires that a state's enforcement response and civil penalty policies be identical to EPA's. In order to determine, however, that a state program provides for adequate enforcement, we have concluded that a state must have adequate, operative enforcement response and civil penalty policies.

In our national guidance on enforcement response, we have indicated that classification schemes for violations and timelines for enforcement response are minimum criteria. Thus EPA's enforcement response policy is implicitly more stringent than that spelled out in the criteria. Our insistence that these minimum criteria be met is not a requirement that an identical policy be developed.

Regarding the civil penalty policy, EPA has authority to assess a civil penalty of $25,000 per day. As we require a state to have authority to assess a penalty of only $10,000 per day, an identical civil penalty policy is not required. Rather, we are insisting that in its policy, a state demonstrate that the full range of available penalty authority is taken into consideration, and that penalties are established according to the severity of violations.

Should your constituent wish to contact us, we will be glad to discuss these issues in greater detail.

Sincerely,

Randall F. Smith

for Charles E. Findley, Director
Hazardous Waste Division

cc: Oregon Operations Office

United States
Environmental Protection
Agency

Office of
Solid Waste &
Emergency Response

May 1984

EPA

Solid Waste

Interim National Criteria for a Quality Hazardous Waste Management Program under RCRA

(EXCERPTS PERTAINING TO COMPLIANCE AND ENFORCEMENT)

PREFACE

Implementation of the RCRA program is without precedent among environmental programs in technical and management complexity. The program cannot succeed without close cooperation between EPA and the States. The foundation for this cooperation must be a common understanding of what is necessary to build and sustain a quality RCRA program.

This document provides for the first time the basic goals and performance expectations to be followed by the States and EPA in managing the RCRA implementation effort. It is a critical first step in developing the management system necessary to move toward full implementation over the next several years.

The criteria are interim only. Their incorporation into our existing activities will require close interaction among Headquarters, Region, and State offices during the next several months. We plan to use the criteria both to develop our joint Region/State agreement to build program capability (negotiated during the final authorization process) and to develop State grant work programs for the FY 1985 program planning cycle. The criteria will provide a common point of departure for Region and State discussions on all aspects of RCRA management.

Because the criteria are interim, they should be applied realistically, recognizing that individual situations may require adjustments to the national benchmarks. Oversight will continue to be based on the individual grant work programs and the memoranda of agreements negotiated between the Regions and States. Where not specifically referenced in these documents, however, the national criteria will be expected to be followed.

Development of the RCRA program quality criteria involved active participation by RCRA managers at Headquarters, Regions, and the States. It was built around the Task Force on RCRA Program Quality, which held numerous meetings over the last five months and distributed two earlier drafts for comment. It is as close to a consensus document as possible. The Task Force Policy Group overseeing the effort included senior RCRA managers from both EPA and the States.

John H. Skinner	Office of Solid Waste
Gene Lucero	Office of Waste Programs Enforcement
Robert Wayland	Policy & Program Management Staff/OSWER
Lewis Crampton	Office of Management Systems & Evaluation/OPPE
Kirk Sniff	Associate Enforcement Counsel for Waste/OECM
Mel Hohman	Region I, Waste Management Division

Allyn Davis	Region VI, Air and Waste Management Division
Bill Constantelos	Region V, Waste Management Division
Ron Nelson	Maryland Waste Management Administration
Wladimir Gulevich	Virginia Bureau of Hazardous Waste Management
Robert Kuykendall	Illinois Division of Land/Noise Pollution Control
Jon Grand	Council on State Governments

The Task Force was directed by Carl Reeverts from the Office of Solid Waste and Emergency Response. Core working group members supporting the Task Force included Sue Moreland from the Association of State and Territorial Solid Waste Management Officials (ASTSWMO), Laura Yoshii from EPA Region IX, and Robert Knox, Elaine Fitzback, Elizabeth Cotsworth, Susan Absher, Amy Schaffer, Katherine McMillan, and Cheryl Wasserman from EPA Headquarters.

I encourage all RCRA managers to review this document and discuss it with your colleagues in the Regions and States. We plan to revise the criteria to reflect major policy changes and as we gain experience in program implementation. Initially, we will review the criteria annually as part of the program planning process leading to the issuance of the Agency operating guidance. Comments on the criteria are welcome at any time.

Lee M. Thomas
Assistant Administrator
Solid Waste & Emergency Response
Environmental Protection Agency

Date 5-14-84

Donald Lazarchik
President
Association of State and Territorial Solid Waste Management Officials

Date May 15, 1984

INTERIM NATIONAL CRITERIA FOR A QUALITY RCRA PROGRAM

TABLE OF CONTENTS

PART I

INTRODUCTION: PURPOSE, SCOPE, AND USE OF THE CRITERIA

Purpose & Scope

This document establishes interim national criteria for planning and overseeing a quality hazardous waste management program under the Resource Conservation and Recovery Act (RCRA). The same criteria are to be used for evaluating both State performance under interim and final authorization and Regional performance in non-authorized States. The purpose of the document is:

- to clarify program goals and performance expectations to ensure that EPA and the States have a common understanding of what must be done to effectively implement RCRA; and

- to outline general principles to describe how EPA and the States should respond when the criteria are either not met or are exceeded.

The development of useful and relevant performance criteria for RCRA is an evolving process, reflecting our growing experience in program implementation. As the program matures, the criteria will stabilize and shift away from the "process-oriented" measures contained in this version towards "performance-oriented" measures. We plan to review the criteria annually as part of the program planning cycle leading to the Agency operating guidance. The criteria will be revised, as appropriate, to incorporate major policy changes and new program emphases.

This document and related followup guidance materials implement for RCRA the Agency's policy on delegation and oversight.

Use of The Criteria

The criteria will influence a wide range of current management and evaluation activities in Headquarters, the Regions, and the States. Use of the criteria as the common framework for a variety of related activities will provide better coordination and greater consistency in the overall RCRA management system. The criteria will be used:

- to provide the multiyear criteria and performance expectations for defining annual commitments contained in the Agency Operating Guidance and the RCRA Implementation Plan;

- to define consistent planning and evaluation protocols (including standard reports) for developing State grant work programs and overseeing the program on an on-going basis;

- to provide a systematic approach which the Regions and States may use during the final authorization process to support the assessment of program capability and to reach agreement on the steps necessary to build and sustain a quality program over time;

- to set the national criteria for determining when direct EPA actions (e.g., Federal enforcement, adding Federal permit conditions) are appropriate;

- to identify areas where assistance and training are needed to build and sustain a quality program; and

- to assist in determining future State and EPA resource needs.

Supplemental guidance to incorporate the criteria into these related management and evaluation activities will be provided over the next several months. Initial implementation will take place during the FY 1985 program planning process.

PART II
CRITERIA FOR A QUALITY RCRA PROGRAM

Characteristics of a Quality RCRA Program

Subtitle C of the Resource Conservation and Recovery Act (RCRA) provides the statutory authority for the hazardous waste management program. Implementation of Subtitle C is in its early stages, with full implementation of a quality program still several years away in most States. In general, a fully implemented quality program is one which:

- knows the status of its regulated community, communicates program progress effectively to the public, and has taken steps to ensure that all handlers covered by the regulations are identified and brought into the RCRA system;
- has made final determinations (issued or denied pemits, approved closures) for all existing treatment, storage, and disposal (TSD) facilities and has procedures to promptly address new facilities and permit revisions; and
- demonstrates improving compliance rates for all handlers, with all violators returned to compliance as quickly and effectively as possible through a vigorous enforcement program.

The criteria presented below are designed to bring the program closer to achieving each of these characteristics. The criteria define the benchmarks and expectations of the EPA Regions and States to get the program fully implemented. Their focus is on the intermediate milestones (i.e., compliance with interim status requirements, initial permit issuance, getting management systems in place). The following two assumptions underlie the definition and use of the RCRA program quality criteria.

- The criteria apply to the full authorized State program, including the more stringent provisions that are authorized. Individual State performance expectations are those delineated in the State/EPA Memorandum of Agreement and the State grant work program.
- The performance expectations in the criteria are not explicitly constrained by existing resources. They reflect the needs for a quality RCRA program. The annual operating guidance sets priorities among the national criteria within the resource levels available to the program in any given year.

Description of the Performance Criteria

The performance criteria are organized to address three of the major performance areas of the RCRA program: enforcement, permitting, and management. The management criteria have been split into two groups to separately identify (1) those criteria related to activities of the authorized State (or Region, in non-authorized States), and (2) those criteria related to the oversight Agency. In this way, the management criteria capture the mutual dependence of EPA and the authorized States for ensuring a quality program.

The performance criteria do not include national expectations for certain measures (e.g., the compliance rate). This is for one of two reasons: the specific levels are dependent on annual priorities; or our experience to date provides no clear, quantifiable preference. For some of these measures, annual targets may be included in the annual Agency operating guidance. For others, the performance expectation will evolve over time as the RCRA program matures and more performance information becomes available.

The criteria provide three levels of information for each RCRA goal.

- Key Questions. The questions represent the key areas to describe a quality RCRA program for permitting, enforcement, and management.

- Performance Expectations. The performance expectations (where precisely defined) provide the national benchmarks to assess performance of the program for each of the key questions. Note that when the performance expectation is in terms of days, it refers to calendar days, not work days.

- Oversight Tools. The oversight tools are the principal source of program information used to track progress against the criteria. The oversight tools available to the program include program reviews (i.e., HQ program reviews of Regions, quarterly, mid- and end-of-year reviews of States), monthly monitoring (including use of reporting information), file reviews, and review of individual State actions (i.e., oversight inspections, permit reviews).

KEY QUESTIONS	PERFORMANCE EXPECTATIONS	OVERSIGHT TOOLS
4. Are enforcement actions timely and appropriate? (See timeframe in Appendix A.) *	A. For high priority violators: ** 1) If the State has administrative penalty authority, an administrative order with penalty will be issued within 90 days after violation discovery.*** Steps 4, 5, and 6 outlined under Part B below will then be followed if escalated actions are necessary. 2) If the State lacks administrative penalty authority, the case should be referred to the appropriate judicial authority, e.g., State Attorney General, District Attorney, etc., within 90 days from the discovery of violation. Steps 5 and 6 outlined under Part B below will then be followed if escalated actions are necessary.	° Monthly Compliance and Enforcement Log (HWDMS) ° Program reviews

---

* The timeliness criteria are national performance expectations. They may be more stringent to reflect individual Regional/State requirements or they may be adjusted to incorporate unique State processes and authorities. The specific criteria used in each State must be included in the annual State grant work program or the MOA. Note that emergencies (such as imminent and substantial endangerment situations) should be acted on immediately and not be limited by these criteria.

** A high priority violator is a handler who has one or more Class I violations of the groundwater, closure/post-closure, and financial responsibility requirements, or who poses a substantial likelihood of exposure to hazardous waste or has caused actual exposure, has realized a substantial economic benefit as a result of non-compliance, or is a chronic or recalcitrant violator (including a handler who is violating schedules in an order or decree). The Enforcement Response Policy issued December 21, 1984, provides an operational definition for Region and State use.

*** The violation discovery date is the date when the case development staff determines a violation has occurred through review of the inspection report and/or other data (e.g., laboratory reports). (For purposes of tracking progress against the criteria, the violation discovery date will be fixed at 45 days after the inspection. It should, however, be a much shorter time.)

KEY QUESTIONS	PERFORMANCE EXPECTATIONS	OVERSIGHT TOOLS

B. For Other Violators with Class I Violations: *

1) An initial enforcement action (e.g., warning letter, notice of violation, or equivalent action) is taken within 30 days of violation discovery.

2) Decision is made to escalate action (e.g., administrative order, civil referral) within 90 days of the initial enforcement action for handlers not returned to compliance or on an agreed upon compliance schedule.** (More than one action, such as a warning letter, NOV or equivalent, may be taken within this time period.)

3) If a decision is made to issue an administrative order (AO), it should be issued within 60 days after the decision to escalate. (Note that pre-hearing negotiations should not generally continue beyond 90 days from issuance of the initial AO.)

4) Decision is made to refer case to appropriate judicial authority after the administrative process is exhausted for handlers not in compliance, not on an agreed upon schedule or for which no administrative hearing has been scheduled.**

5) Case is referred to judicial authority within 90 days after decision to refer case.

6) Judicial authority files the case within 60 days of referral.

---

* At its option an EPA Region or State may choose to bypass less formal enforcement actions and go immediately to an AO or civil referral. The criteria in Part A above should be followed in such cases. (See page 7.)

** Handlers on a compliance schedule will be monitored to ensure conformance with the schedule. Escalated enforcement actions will be taken if the handler is not in compliance within 30 days of the compliance schedule.

KEY QUESTIONS	PERFORMANCE EXPECTATIONS	OVERSIGHT TOOLS
	C. Appropriate enforcement actions: 1) An enforcement response is expected for every instance of known non-compliance. 2) Penalties must be issued to all high priority violators and for other Class I violations where necessary. 3) All penalties are commensurate with the violation, based on a consistent penalty policy. 4) All actions cite authority, list violations, require a date for compliance, and require the handler to certify compliance. (Civil and criminal actions are considered appropriate actions.)	
5. Are enforcement actions reported to the public or the regulated community to promote compliance?	A. Compliance strategy includes procedures for publicizing precedent-setting or other important actions/violations. B. Actions/violations are publicized in accordance with the enforcement strategy.	° Program reviews
6. What is the Class I noncompliance rate at inspected handlers? (See description and examples of the compliance formulas in Appendix B.)	A. Percent of handlers having Class I violations at the beginning of the fiscal year brought into compliance or on a compliance schedule each quarter. B. Percent of handlers with Class I violations at a point in time that have been inspected or had record reviews (measured on a semiannual basis).	° Monthly Compliance and Enforcement Log (HWDMS)

VICTOR ATIYEH
GOVERNOR

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, November 21, 1985, EQC Meeting

Analysis of Issues Raised by the City of Klamath Falls in Their Petitions for Declaratory Rulings and Rulemaking

Background

On September 20, 1985, the City of Klamath Falls submitted the following documents related to the pending 401 certification of the Salt Caves Project (see Attachment A):

1. Petition for Declaratory Ruling as to Non-Applicability of Laws, Regulations and Standards to Section 401 Certification of Salt Caves Project; Petition for Rulemaking; Request for Hearing; Request for Stay; and

2. Demand for Hearing.

On October 18, 1985, Consolidated Conservation Parties submitted a response to the City of Klamath Falls Petitions (see Attachment B).

At the meeting of the Environmental Quality Commission on October 18, 1985, the Commission denied the petitions from the City of Klamath Falls and requested the Department to prepare an analysis of the points raised in the petitions and make appropriate recommendations for consideration at the November 22, 1985 meeting. The order denying the petitions is included as Attachment C.

On October 28, 1985, the City of Klamath Falls withdrew their application for 401 certification for the Salt Caves Project (see Attachment D). They indicated their intent to file a new application in early 1986. They also indicated withdrawal of their application for a Federal Energy Regulatory Commission license. Their letter suggests continued interest in pursuing revised water quality standards as proposed in their petition, however.

The City of Klamath Falls' petition for a declaratory ruling requested ruling on four issues, three of which relate to 401 certification. These

three issues are discussed in a separate agenda item regarding 401 certification procedural rules (Agenda Item M).

The remaining declaratory ruling issue and the petition for rule-making related to water quality standards and are discussed below.

Petitioners' Arguments

The petitioners contend that existing water quality standards for dissolved oxygen, temperature, pH, dissolved gases, algal production, and general degradation in the Klamath Basin are stream standards and were not written to cover deep, stratified reservoirs. To apply these standards to the Salt Caves Project, which will produce a deep, stratified reservoir, is considered by the petitioner to be arbitrary and unreasonable. They contend that application of the standards would virtually ban any hydroelectric development on the Klamath River between the Keno Dam and the California border. Such a ban is considered invalid because it violates the Klamath River Compact, which establishes hydroelectric power as a beneficial use of the Klamath River. The petitioners also contend that the ban is invalid because it contradicts state statutes under which the regulations were adopted, and it is not reasonably related to the purpose of the rules.

The petitioners also proposed adoption of special water quality standards for reservoirs on the Klamath River between Keno Dam and the Oregon-California border. The proposed standards would be less restrictive than current standards.

Consolidated Conservation Parties Response

The Conservation Parties pointed out, in their rebuttal to the petition, that the EQC water quality standards are within the EQC's statutory authority and mandate. They also pointed out that the state standards have been approved by EPA and are therefore federal standards. The standards must be written to "protect, maintain and improve" water quality. The standards do not ban hydroelectric generation because there are several types of hydroelectric projects which could be constructed without the requirement of a high dam with its associated water quality problems. They maintain that application of the standards is not a violation of the Klamath River Compact. They pointed out that hydroelectric power generation is of lower priority than recreation, fish and wildlife on the Klamath River Compact's list of prioritized beneficial uses. They further note that the petitioner's proposed reservoir standards do not benefit trout, recreation, wildlife, or other non-hydropower beneficial uses. They also note that proposed criteria would not be consistent with EPA recommended minimum criteria.

Department Analysis

The Department has evaluated the arguments presented in the petitions and would summarize the issues raised as follows:

1. Do present water quality standards apply to reservoirs?

2. Are present standards more stringent than necessary to protect identified beneficial uses?

3. Do present standards ban hydroelectric projects on the Klamath River between Keno Dam and the California border?

4. Is the present temperature standard properly applied to the construction of a reservoir or the operation of a hydroelectric project?

5. Should the EQC promulgate different standards for reservoirs?

The discussion which follows focuses on each of these issues.

Issue -- Do present water quality standards apply to reservoirs?

The City of Klamath Falls argues that present water quality standards for the Klamath River between Keno Dam and the California border were written for rivers or streams only and should not be applied to reservoirs. Therefore, special standards appropriate for reservoirs should be adopted.

The Department notes that for purposes of water quality control, ORS 468.700(8) defines "water" or "waters of the state" to include impounding reservoirs, rivers, streams, creeks, marshes, etc. The same definition is recited in OAR 340-41-006(14) as it relates to water quality standards. Further, the operable prefacing language for Klamath Basin water quality standards is contained in OAR 340-41-965(2) and reads as follows:

> " ...
> "(2) No wastes shall be discharged and no activities shall be conducted which either alone or in combination with other wastes or activities will cause violation of the following standards in the waters of the Klamath Basin:
>
> "(a) Dissolved oxygen (DO):
> " ...
> "(b) Temperatures:
> " ...
> "(c) Turbidity:
> " ... "

It is clear that these standards were intended to apply to all of the waters of the state within the Klamath Basin. The standards are reasonably applicable to the waters of the state within the Klamath River channel between the Keno Dam and the Oregon-California border. Any proposal to discharge wastes, construct facilities, or conduct an activity which may impact water quality or the existing beneficial uses of these waters must be evaluated in light of the existing standards.

Issue -- Are present standards more stringent than necessary to protect identified beneficial uses?

The City of Klamath Falls argues generally that present standards are more stringent than necessary to protect the identified salmonid (trout) fishery beneficial uses within a reservoir. They suggest that zones of poor water quality will exist within a stratified reservoir but will not harm fish because fish will avoid unacceptable water quality and find strata with acceptable, non-stressful quality. They suggest that a stratified reservoir will enhance the trout fishery by reducing stressful natural temperature fluctuations in the stream and by providing more trout living space than the flowing stream. They further suggest that dissolved oxygen (DO) concentrations as low as 3 mg/l are accepted standards for trout in reservoirs as long as temperature is 70°F or less.

The Department does not agree with the city. The presence of a wild trout fishery in the Klamath River between Keno Dam and the California border is clear indication that physical habitat and water quality have been and are adequate to promote trout spawning, rearing, and maintenance of this highly valued fishery. The present water quality standards for this section of stream were initially adopted in 1967 and were updated in 1977. These standards were designed to assure quality adequate to sustain the existing fishery. The standards for dissolved oxygen, temperature, pH, turbidity, and other parameters were established taking into consideration existing conditions as well as the available technical literature. Standards were designed to protect all designated uses -- values for individual parameters were set to protect the use with the most stringent quality demand. For most parameters, fish and aquatic life needs were the controlling requirements.

The most recent update of EPA criteria for dissolved oxygen was published in the April 19, 1985 Federal Register. This document reflects the latest scientific knowledge on dissolved oxygen. For salmonid waters, the following were suggested:

* No production impairment = 8 mg/l
* Slight production impairment = 6 mg/l
* Moderate production impairment = 5 mg/l
* Severe production impairment = 4 mg/l
* Acute mortality limit = 3 mg/l

The Department concludes that the existing standard of 7 mg/l in the Klamath River between Keno Dam and the California border is backed by the latest scientific information.

It is also noted that as temperature increases, fish production is adversely impacted. Less oxygen is dissolved in water as temperature increases. At reduced dissolved oxygen concentrations, the swimming ability and growth of trout are adversely affected. Disease incidence also increases with increased temperature. The present temperature standard was based on fishery agency recommendations.

Turbidity and pH standards were also based on available technical data to support fish and aquatic life and recreational uses.

In order to support fish, water quality must also support a balanced population of aquatic life. Trout typically feed on aquatic insects and zooplankton found on stream bottoms or in the shallow areas of lakes and reservoirs. If water quality were to restrict trout to a narrow strata in the middle of a reservoir, it is highly questionable whether natural food supplies would be adequate to support an extensive fishery.

The Department generally agrees that some thermally stratified lakes or reservoirs demonstrate water quality in the bottom strata that can be stressful to cold water species of fish (salmonids) and that such fish will try to avoid water conditions that produce stress. However, a review of available data in Oregon suggest that dissolved oxygen levels in the bottom strata is above 5 mg/l in most lakes and reservoirs. Lower DO levels are observed in lakes or reservoirs where significant organic loading enters from the lake bottom or contributing watershed.

A question arises as to how standards are applied to existing lakes and reservoirs where water quality does not meet existing standards in the lower strata. OAR 340-41-965(3) provides "Where the natural quality parameters of waters of the Klamath basin are outside the numerical limits of the above assigned water quality standards, the natural water quality shall be the standard". The Department has interpreted this paragraph to apply to those lakes or reservoirs that were in existence when the standards were adopted and are unable to meet the use protecting standards due to natural causes. The combination of the standards and this paragraph serve to preclude further degradation of quality and indicate the desired water quality in the event improvement can be achieved in the future.

The Department concludes that present standards are necessary to support the trout fishery and other beneficial uses of the Klamath River and that such standards should be maintained. The Department further concludes that such standards should continue to be applied to reservoirs.

Issue -- Do present standards ban hydroelectric projects on the Klamath River between Keno Dam and the California border?

The City of Klamath Falls argues that the net effect of the Klamath Basin water quality standards, as interpreted and applied by the Department, is to ban hydroelectric energy development on the Klamath River between Keno Dam and the California border.

The Department does not agree with the city. The intent of water quality standards is to protect water quality, prevent degradation of water quality, and generally assure that water quality supports identified beneficial uses. Activities or discharges which would cause standards to be violated are intended to be prohibited. Water quality standards violations can often be prevented or eliminated by modifying the design of

facilities, or modifying the way an activity is conducted, or reducing the magnitude of the activity or discharge.

In the case of hydroelectric generating facilities, the Department has found that most proposed projects can be designed to comply with water quality requirements. Many projects without large storage reservoirs have been certified to comply with water quality standards. The Department has been provided no information to suggest that the petitioner's particular project design is the only possible way to generate hydroelectric power in that reach of the Klamath River. A project to divert water to a generator without construction of a large, deep, stratified reservoir may have less adverse impact on water quality and be an appropriate alternative for consideration. The Department recognizes that such a project may not be as desireable from an electric generating standpoint because lack of water storage would limit ability to produce more energy during peak demand periods of the day.

Issue -- Is the present temperature standard properly applied to the construction of a reservoir or the operation of a hydroelectric project?

The City of Klamath Falls notes that the wording of the Klamath Basin temperature standard refers to measurable increases of temperature outside a mixing zone as measured relative to a control point upstream from a discharge. They believe the Department has inappropriately applied this standard to the construction of a reservoir. They also question the Department's application of this standard to the conditions below the powerhouse in their proposed project.

The temperature standard reads in part as follows:

> "(2) No wastes shall be discharged and no activities shall be conducted which either alone or in combination with other wastes or activities will cause violation of the following standards in the waters of the Klamath Basin:
> "(b) Temperature:
> "(A) Salmonid fish (trout) producing waters: No measurable increases shall be allowed outside of the assigned mixing zone, as measured realative 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 when receiving water temperatures are 57.5°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 ...."

The intent of this standard is clearly to prevent discharges or activities from causing temperature increases that would adversely impact the

salmonid (trout) fishery. The specific wording was written at time when the Department was focusing on issuance of waste discharge permits. The Department would agree that wording could be revised to clarify the intended application to activities that may cause increases in temperature that are detrimental to beneficial uses.

Issue -- Should the EQC promulgate different standards for reservoirs?

The City of Klamath Falls proposed adoption of special standards for reservoirs on the Klamath River between Keno Dam and the California border. The proposed standards were less restrictive than present standards. Their proposes Salt Caves Hydroelectric project would comply with their proposed standards and thus would qualify for certification pursuant to Section 401 of the Federal Clean Water Act.

The Department does not believe it appropriate to adopt special standards for reservoirs. As noted previously, the existing standards describe the quality necessary to protect the designated beneficial uses and should be maintained. It may be desireable, however, to amend the wording of the present standards to better reflect their intent and application.

Concluding Note

The preceding discussion has focused on the major issues contained in the petitions submitted by the City of Klamath Falls. The Department has not addressed many of the detailed comments which relate to specifics of the proposed Salt Caves project since the 401 certification application has been withdrawn and further studies by the applicant are underway. Such issues may be considered in the future when they file a new application for 401 certification.

Summation

1. On September 20, 1985, the City of Klamath Falls filed petitions with the EQC seeking a declaratory ruling regarding the applicability of present water quality standards in the Klamath Basin and requesting adoption of special water quality standards for reservoirs on the Klamath River between Keno Dam and the California border.

2. On October 18, 1985, the EQC issued an order denying the petitions and requested the Department to prepare an analysis of the points raised and make appropriate recommendations for consideration at the next regular Commission meeting.

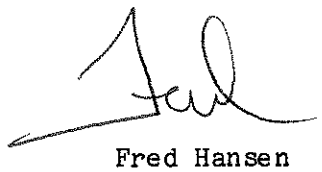
3. Issues raised in the petitions relating to 401 certification procedures are addressed in a separate agenda item (Agenda Item M).

4. The Department has presented an analysis of the major water quality standards issues raised in the petitions.

5. The Department concludes that the present water quality standards for the Klamath River between Keno Dam and the California border continue to be appropriate to protect the designated beneficial uses. However, it may be appropriate to amend the wording of the present standards to better reflect the intent.

Director's Recommendation

It is recommended that the commission (1) reaffirm the intent, interpretation, and application of the water quality standards for the Klamath River between Keno Dam and the California border, and (2) instruct the Department to immediately develop proposed amendments to the standards to better reflect the intent. Proposed rule amendments should be presented to the Commission as soon as possible for hearing authorization by telephone conference so that adoption can be competed at the March meeting of the Commission if possible.



Fred Hansen

Attachments:

A Petitions filed by City of Klamath Falls
B Response to Petitions filed by Consolidated Conservation Parties
C Order of EQC denying petitions
D Letter withdrawing 401 certification application of the City of Klamath Falls

Charles K. Ashbaker:h
WH470
229-5325
November 13, 1985

ATTACHMENT A

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
AND THE
DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF THE REQUEST OF THE CITY OF KLAMATH FALLS FOR CERTIFICATION UNDER SECTION 401 OF THE FEDERAL WATER POLLUTION CONTROL ACT OF COMPLIANCE WITH WATER QUALITY STANDARDS AND REQUIREMENTS	)	DEMAND FOR HEARING

Pursuant to the 14th Amendment to the United States Constitution, the Oregon Constitution and applicable Oregon law, the City of Klamath Falls hereby demands a full contested case hearing on its application for certification under Section 401 of the Federal Water Pollution Control Act, 33 U.S.C. § 1341, for its proposed Salt Caves Hydroelectric Project. As stated more fully in the City's "Petition for Declaratory Ruling as to Non-Applicability of Laws, Regulations, and Standards to Section 401 Certification of Salt Caves Project," filed with the Environmental Quality Commission ("EQC") and the Department of Environmental Quality ("DEQ") concurrently with this pleading, the City does not know whether DEQ or EQC believes it has the authority to grant or deny a Section 401 certification. The City demands a hearing prior to the issuance by either body of any

decision which purports to grant or deny, on an interim or final basis, the City's application for certification.

Dated: September 20, 1985

Respectfully submitted,

Diarmuid F. O'Scannlain
Richard M. Glick
Ragen, Roberts, Tremaine,
Krieger, Schmeer, O'Scannlain
& Neill
1600 Orbanco Building
1001 SW Fifth Avenue
Portland, Oregon 79204
Telephone: (503) 224-1600

Of Counsel:

Edward Weinberg
Peter Glaser
Duncan, Weinberg & Miller, P.C.
1775 Pennsylvania Avenue, N.W.
Suite 1200
Washington, D.C. 20006
(202) 467-6370

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
AND THE
DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF THE REQUEST OF THE CITY OF KLAMATH FALLS FOR CERTIFICATION UNDER SECTION 401 OF THE FEDERAL WATER POLLUTION CONTROL ACT OF COMPLIANCE WITH WATER QUALITY STANDARDS AND REQUIREMENTS	)

PETITION FOR DECLARATORY RULING AS TO NON-APPLICABILITY OF LAWS, REGULATIONS AND STANDARDS TO SECTION 401 CERTIFICATION OF SALT CAVES PROJECT; PETITION FOR RULEMAKING; REQUEST FOR HEARING; REQUEST FOR STAY

The City of Klamath Falls ("Petitioner") hereby petitions the Environmental Quality Council ("EQC") and the Department of Environmental Quality ("DEQ") for (1) a declaration, pursuant to ORS 183.410, OAR 340-11-062 and OAR 137-02-000 et seq., of the non-applicability of certain laws, regulations and standards with respect to EQC's and DEQ's consideration of Petitioner's application for certification of the proposed Salt Caves Project pursuant to Section 401 of the Federal Water Pollution Control Act, 33 U.S.C. 1341 ("Section 401"), and (2) a rulemaking, pursuant to ORS 183.390, OAR 340-11-047 and OAR 137-01-070, for the purpose of determining regulations which would be applicable to EQC's and DEQ's certification under Section 401 of the Salt Caves Project. In addition, Petitioner requests a hearing on its two petitions, as provided for in the authorities cited above, and a stay of consideration of Petitioner's application for Section 401 certification pending action on its Petitions.

I

INTRODUCTORY STATEMENT

On January 30, 1985, Petitioner filed with the Federal Energy Regulatory Commission ("FERC") an application for license to construct and operate its proposed Salt Caves Hydroelectric Project. Under FERC's regulations purportedly applicable to the Project, Petitioner must obtain a Section 401 certification from the designated state agency for the Project. On information and belief, EQC and DEQ have been designated in Oregon to issue Section 401 certifications for hydroelectric projects, including the Salt Caves Project. On January 25, 1985, Petitioner filed with EQC and DEQ an application for Section 401 certification for the Project.

In addition, Petitioner has applied to the Oregon Energy Facility Siting Council ("EFSC") for a site certificate and to the Oregon Water Policy Review Board ("WPRB") for a water right for the Project. Such agencies scheduled joint contested case hearings on such applications.

On June 3, 1985, DEQ issued public notice (attached hereto as Exhibit A) that it was considering Petitioner's Section 401 certification application, that its final decision would not be issued until "after the EFSC/WPRB joint hearing record is complete and can be reviewed " and that its determination would be based on a "review of the record" from these hearings. However, the Notice did not state which portion of such record would be reviewed. In addition, the Notice stated that DEQ's consideration would be based on "applicable water quality

standards," "related requirements" and "consisten[cy] with the local comprehensive land use plan or the statewide planning goals." The Notice further stated that DEQ's decision would be based on "an analysis of the Project's compliance with state and federal requirements and receipt of a land use compatibility statement." Other than such Notice, petitioner has received no formal notification of the bases on which its Section 401 application will be reviewed.

On August 6, 1985, Mr. Glen Carter, Principal Environmental Analyst in the Oregon Department of Environmental Quality, Water Quality Control Division, filed testimony on behalf of DEQ in the EFSC and WPRB proceedings. Such testimony, attached hereto as Exhibit B, recited that Mr. Carter is the primary person at DEQ charged with reviewing Petitioner's Section 401 certification application. It also recited certain "[r]ules adopted by the [EQC] applicable to the Klamath River in the vicinity of the Salt Caves Project" (Exhibit B at 6) and stated that the Project violated a number of these rules. While Mr. Carter's language on this point was not specific, it appears from the context of his statements that DEQ has determined that the rules listed on page 6 of his testimony are, at least in part, the rules which DEQ believes are applicable to consideration of Petitioner's Section 401 certification application. It also appears that DEQ has determined that the Project violates those rules in certain material respects. However, Mr. Carter's testimony did not address the "related requirements," land use consistency and aspects of the EFSC/WPRB hearing record that DEQ

and EQC might, as stated in the June 3, 1985 Notice, also apply to Petitioner's Section 401 certification application.

II

PETITION FOR DECLARATORY RULING

Petitioner seeks a declaratory ruling from EQC and DEQ on the non-applicability of laws, regulations and standards to its Section 401 certification application in four respects:

A. That certain of the EQC regulations, as interpreted and applied to the Salt Caves Project in Mr. Carter's testimony are not, in fact, applicable to such Project;

B. That no land use matters will be considered in judging Petitioner's Section 401 application;

C. That no "related requirements" or matters in the joint EFSC/WPRB hearing record will be applied to the Section 401 certification application.

D. A statement as to whether DEQ, EQC or EFSC is the designated agency to issue the Section 401 certification and as to the procedures that will be used in judging Petitioner's application.

A. <u>DEQ and EQC Should Declare That Certain of EQC's Regulations Are Not Applicable to Section 401 Certification of the Salt Caves Project</u>.

Mr. Carter's testimony identified the following six purported violations of what he referred to as "applicable" water quality regulations:

1. Insufficient dissolved oxygen during certain summer days in the bottom waters of the Salt Caves Reservoir, assertedly in violation of OAR 340-41-965(2)(a)(B);

2. Temperature "increases" during certain summer days in bottom waters of the proposed Salt Caves reservoir and downstream of the

proposed Salt Caves powerhouse, assertedly in violation of OAR 340-41-965(2)(b);

3. pH values above 9 in the upper layer of the reservoir and below 7 in the bottom layer of the reservoir, assertedly in violation of OAR 340-41-965(2)(d);

4. The potential for dissolved gases in the bottom of the reservoir, assertedly in violation of OAR 340-41-965(2)(g);

5. Algal production in the reservoir, assertedly in violation of OAR 340-41-965(2)(h) and OAR 340-41-965(2)(j).

6. General degradation in waters, assertedly in violation of OAR 340-41-026(1)(a).

These regulations as interpreted and applied to the Salt Caves Project by Mr. Carter are arbitrary and unreasonable. The discussion following will show that, as interpreted by Mr. Carter, each of these regulations is improperly transformed into an administrative ban on virtually any hydroelectric development on the Klamath River between Keno Dam and the California-Oregon border, the stretch of the River covered by the regulations. Such discussion will then show that such an administrative ban is in violation of law and cannot be justified by any proper purpose of EQC's water quality regulations. EQC and DEQ should, therefore, declare that the EQC regulations interpreted and applied to the Salt Caves Project by Mr. Carter are not, in fact, applicable to such Project, and EQC should promulgate regulations which are.

1. Dissolved Oxygen

Mr. Carter's testimony to EFSC and WPRB stated that Petitioner has predicted that anoxic conditions will exist in the bottom levels of the Salt Caves reservoir in July and August

during low flow years and during July in average flow years. Ex. B at 12. Mr. Carter concludes, on this basis, that "these situations are clear violations" of OAR 340-41-965(2)(a)(B), which states that on the "Main Stem Klamath River from Keno Dam to Oregon-California Border . . . DO concentrations shall not be less than 7 mg/l." Id.

In applicant's view, this regulation as interpreted and applied to the Salt Caves Project by Mr. Carter is totally unreasonable. The regulation, on its face, refers to DO conditions in the river, not in a reservoir on the river. In fact, it would be virtually impossible for any reservoir on that stretch of the river to meet the DO regulation as interpreted by Mr. Carter. As described in the affidavit of Kenneth Carlson, Water Quality Specialist/Hydrologist for Beak Consultants, attached hereto as Ex. C, almost any reservoir constructed in temperate climates will tend to stratify in summer months. This means that during those months the upper waters will tend to be warm and will contain relatively high concentrations of DO, while the bottom waters will be cooler and may become anoxic. As Mr. Carlson testifies, this phenomenon will occur in the proposed Salt Caves reservoir. The upper waters will at nearly all times of the year retain DO in concentrations above 7 mg/l, while the bottom layers will become anoxic during portions of the summer. There is no feasible mitigation program that could prevent such stratification. Ex. C at 6-7. Thus, by claiming that the DO standard is applicable to reservoirs, and to all levels of reservoirs, even when they stratify, Mr. Carter transforms that standard into a

virtual ban on reservoirs, and, therefore, on hydroelectric projects in that stretch of the river.

Such application of the DO regulation to all levels of reservoirs is completely unnecessary and is, in fact, totally arbitrary in light of the purpose of the regulation. Such purpose, according to Mr. Carter, is protection of the rainbow trout population in that part of the river. Ex. B at 8, 9, 11. Rainbow trout cannot sustain anoxic conditions and, therefore, in a flowing river it is necessary to assure that certain minimum DO conditions are maintained.

However, as Dr. Robert Ellis, Senior Aquatic Biologist for Beak Consultants, states in his affidavit, attached hereto as Exhibit D, the presence of anoxic conditions in the bottom of the Salt Caves or any reservoir during summer stratification will not in any way be harmful to trout populations. During periods of summer stratification, trout will seek the middle and upper levels of the reservoir where sufficient DO will exist. Ex. D at 4-10.

Even during the critical period of summer stratification, in August, when trout will be restricted to the middle levels of the reservoir because of high surface temperatures, and when DO in such middle levels may be as low as 3 mg/l, the Salt Caves reservoir will provide more than ample trout habitat. As Dr. Ellis states in his affidavit, generally accepted standards for trout habitat in reservoirs provide for DO levels as low as 3 mg/l, so long as water temperature is 70° F. or less. Ex. D at 3-6. During the critical August period, the middle levels of the

Salt Caves reservoir that will have DO concentrations of at least 3 mg/l and that will be 70° F. or below will be approximately several meters in depth. This volume of water represents nearly an order of magnitude (ten times) more living space for trout than is presently provided for in the reservoir reach of the river. Ex. D at 7.

Thus, even during August, the proposed reservoir will provide far more trout habitat than the present river. In months other than August, when trout can also seek the upper and bottom levels of the reservoir, this difference will be even greater. Id. In short, while the 7 mg/l standard may be reasonable as applied to a river, it is completely unreasonable as applied to a reservoir.

The fact that the DO standard, as Mr. Carter applies it to reservoirs, is not reasonably related to its intended purpose of preserving trout populations is further illustrated by the existence of a thriving trophy trout fishery in the Iron Gate reservoir downstream of the Salt Caves site. As Mr. Carter recognizes, that reservoir stratifies strongly during summer months, resulting in the creation of anoxic conditions in its bottom waters. Ex. B at 14. This condition does not prevent trout from thriving in the reservoir. Ex. C at 9. Mr. Carter also points out that the Lost Creek Reservoir in the Rogue Basin stratifies strongly in the summer. Ex. B at 12. But he neglects to point out that such reservoir also maintains a healthy trout population. Ex. C at 10-12.

Thus, Mr. Carter's interpretation and application of the DO regulations to reservoirs not only turns that regulation into an administrative ban on virtually any hydroelectric projects between Keno Dam and the California-Oregon border, it does so for reasons that are completely unrelated to the purpose of that regulation. Such regulation, as interpreted by Mr. Carter, must be declared not applicable to the Project and a new regulation must be devised for application to reservoirs.

2. Temperature Standard

The temperature standard applied by Mr. Carter to the project is contained in OAR 340-41-965(2)(b), which reads as follows:

> (A) Salmonid fish (trout) producing waters: No measureable 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 57.5°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 and which are necessary to accommmodate legitimate uses or activities where temperatures in excess of this standard are unavoidable and all practical preventive techniques have been applied to minimize temperature rises. The Director shall hold a public hearing when a reqeust for an exception to the temperature standard for a planned activity or discharge will in all probability adversely affect the beneficial uses.

In applying this standard to the project, Mr. Carter's testimony compared expected temperatures in the reservoir with

temperatures in the stretch of the river which the reservoir will replace. Currently, because of periodic releases of warm water from the upstream J.C. Boyle reservoir and powerhouse, and because of the seepage of cool spring water into the river below J.C. Boyle dam, temperatures in the reservoir reach of the river fluctuate dramatically by as much as 7° C. daily. The proposed reservoir, because its surface waters would tend to retain heat, would have a relatively constant temperature. Since the relatively constant reservoir surface temperature would be greater than the temperature in the river at the late night and early morning low points of the fluctuating temperature cycle, Mr. Carter concluded that a violation of the temperature standard will occur. Ex. B at 15-18.

As with Mr. Carter's application of the DO standard, his application of the temperature standard to the Salt Caves reservoir amounts to an administrative ban on any such reservoirs between Keno Dam and the Oregon-California border. Any reservoir on that stretch of the river will have relatively constant temperatures as compared with the present temperature fluctuations. Ex. C at 14. Thus, at the time of day when the low point of such fluctuations occurs, reservoir temperatures will necessarily exceed river temperatures.

But as with Mr. Carter's application of the DO standard, his application of the temperature standard to the proposed reservoir is completely arbitrary and unjustified in light of the purpose of that standard. In the first place, Mr. Carter's analysis completely ignores the requirements set forth

in that standard. Such standard requires that stream temperatures "outside" of an "assigned mixing zone" be compared with temperatures at a point "upstream" of a "discharge." Not only does Mr. Carter fail to undertake this analysis, he does not even attempt to relate the critical terms of the standard--"discharge" and "mixing zone"--to a hydroelectric project.

In fact, as Mr. Carlson states in his affidavit, the analysis made by Mr. Carter cannot logically be applied to a hydroelectric project. Such standard was obviously written for a point source thermal discharge into a running stream. As Mr. Carter interprets it, it was not intended to and should not be applied to conditions created by a hydroelectric project. Ex. C at 13.

In addition, as with his application of the DO standard, Mr. Carter's application of the temperature standard to the Salt Caves Project ignores the purpose of that standard -- to protect the trout population. Ex. B at 16. As Dr. Ellis states in his affidavit, the current dramatic fluctuations in river temperature are stressful to trout. By reducing those fluctuations, the project will actually benefit trout. Ex. D at 11-12. As Mr. Carlson states in his affidavit, any temperature standard applied to the Salt Caves stretch of the river must take into account the existing complex temperature regime. The standard must be designed to allow for improvements in that regime, even if such improvements cause an increase in water temperature during certain points of certain days. Ex. C at 16-18. Mr. Carter's application of the existing temperature standard to the

Salt Caves reservoir, which ignores these factors and which even ignores the language of the standard, is simply arbitrary.

Mr. Carter also finds a violation of the temperature standard downstream of the proposed powerhouse. But his analysis of such alleged violation is completely different from his analysis of temperature in the reservoir. Instead of comparing the temperature of the waters in the powerhouse reach of the river before and after construction of the Project, as he did for the reservoir, Mr. Carter chooses to compare expected water temperatures downstream and upstream of the powerhouse after the project is constructed. Ex. B at 18, Ex. C at 15-16. He gives no reason why one analysis is proper for one section of the river while another analysis is proper for another section. In addition, as with his analysis of reservoir temperatures, his analysis of water temperatures in the powerhouse reach simply fails to apply the terms "mixing zone" and "discharge". Ex. C at 13-14.

Similarly, his analysis of temperatures in the powerhouse reach fails to take into account the purpose of the temperature standard to protect fish. As Mr. Carlson and Dr. Ellis state in their affidavits, temperatures in the powerhouse reach of the river will be more hospitable to fish than currently exists. Ex. C at 14-15, Ex. D at 11-13. And, as Mr. Carlson testifies, Mr. Carter's analysis amounts to a further ban on hydroelectric projects on that stretch of the river. Differing water temperatures upstream and downstream of a powerhouse are necessarily created by hydroelectric projects of the character that could be constructed on that stretch of the river. Ex. C at

16. The important point for the Klamath River is that the temperature regime created by the project will be more suitable to fish than currently exists.

In sum, the temperature standard as interpreted by Mr. Carter cannot reasonably be applied to the Salt Caves Project and a new one must be devised.

3. Dissolved Gases

The dissolved gases standard is contained in OAR 340-41-965(2)(g) and reads as follows:

> (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.

According to Mr. Carter, "[a]ny development of sulfide gases in toxic concentrations at the reservoir bottom, or elsewhere in the project facilities, would be a violation of the standard." Ex. B at 22. Finding that when the bottom waters of the proposed facilities turn anoxic there is a "potential" for the production of sulfide gases in such bottom waters, Mr. Carter concludes that a violation of the dissolved gases standard will occur. Id. at 22, 30.

Mr. Carter's application of this standard is as unreasonable as his application of the DO standard. Anoxic conditions cause the potential for the production of sulfide gases. Thus, the potential for the production of sulfide gases in the bottom levels of reservoirs during periods of summer stratification is as inevitable as the creation of anoxic

conditions. Ex. C at 20-22. Applying the dissolved gases regulation as Mr. Carter does would, therefore, result in banning virtually any hydroelectric projects in that stretch of the river as surely as would his application of the DO standard. But, as with anoxic conditions, the potential for the production of sulfide gases would be confined to the bottom waters during periods of summer stratification where fish would not exist. Therefore, such gases, even if they were actually produced, could not be deleterious to fish or to other aquatic life, navigation, recreation or other reasonable uses, in violation of the standard. Id. Moreover, it is absurd to claim that the "potential" for the liberation of gases violates any reasonable standard. As Mr. Carlson testifies, such potential in the Salt Caves Project is remote. Id. at 21-22.

4. pH Standard

The pH standard is contained within OAR 340-41-965(2)(d), which provides:

> (d) pH (Hydrogen Ion Concentration): pH values shall shall not fall outside the range of 7.0 to 9.0.

Mr. Carter claims that pH levels in excess of 9 may occur in the surface waters of the proposed reservoir and that pH levels below 7 will occur in the bottom of the reservoir during periods of summer stratification. Ex. B at 20.

As to his claim related to the bottom waters, any pH levels below 7 would be confined to periods of summer stratification when fish are not present in such bottom waters. Thus, such levels could not hurt fish, and it would be arbitrary to base a

violation of the pH standard on such occurrences. Ex. C at 19-20. And, as with Mr. Carter's application of the DO and dissolved gases standard, his application of the pH standard to bottom waters would unjustifiably prevent the construction of hydroelectric projects.

As to his claim related to the surface waters, as Mr. Carlson testifies, any pH levels in excess of 9 would be insignificant. Ex. C at 18-19. Mr. Carter's reading of the pH standard as not allowing such insignificant impacts suggests that the standard is unreasonable and should be changed.

5. Algae Standards

Mr. Carter testified that the creation of algae conditions in the Salt Caves Reservoir "may reach nuisance proportions," and that, therefore, will violate OAR 340-41-965(2)(h). Ex. B at 22-23. He also stated that a portion of decayed algal mass may be carried downstream and may settle in downstream reservoirs, which he claims would be a violation of OAR 340-41-965(2)(j). Id. at 10. However, both of these standards require some form of "deleterious" effect on beneficial use of the river. As Mr. Carlson testifies, no such "deleterious" effect will be created. Ex. C at 22. Mr. Carter's assertion that the standard is violated without a showing of such "deleterious" effect suggests that the standard is unreasonable and must be changed or clarified.

6. Anti-Degredation Standards

Mr. Carter testified that there would be a general degredation of water quality assertedly in violation of OAR 340-

41-026(1)(a). Ex. B at 28-29. His application of this standard to a reservoir, however, simply repeats the fundmamental analytical errors in his testimony as to other asserted water quality violations. For the reasons stated above, conditions in the Salt Caves reservoir would not constitute a degredation of water quality. His assertion to the contrary argues for changing the rule.

7. Legal Invalidity of an EQC Ban on Hydroelectric Projects

As stated above, Mr. Carter's interpretation and application of EQC's regulations to the Salt Caves Project amounts to an unjustifiable administrative ban by EQC of virtually any hydroelectric projects on the lower Klamath River. Such ban is legally invalid, for three reasons.

First, it violates the Klamath River Compact (attached hereto as Ex. E), which establishes hydroelectric power as a beneficial use of the Klamath River.

Article III of the Compact establishes the following uses for the river: (a) domestic use; (b) irrigation use; (c) recreational use, including use for fish and wildlife; (d) industrial use; (e) generation of hydroelectric power; and (f) such other uses as are recognized under the laws of the state involved. In addition, Article IV of the Compact specifically recognizes that hydroelectric power would be developed on the lower Klamath River, consistent with other uses. Indeed, the Senate Committee Report that recommended that Congress grant consent to the Compact stated that the river was "well suited for

hydroelectric development" and that the California Oregon Power Company ("COPCO") had specific plans for developing 168,000 kilowatts in addition to the 127,750 kilowatts it had already developed or was in the process of constructing. S. Rep. No. 834, 85th Cong., 1st Sess. (1957) at 2-3. Included in COPCO's plans for this additional 168,000 kilowatts was a hydroelectric development at the Salt Caves location.

Obviously, a blanket ban on hydroelectric projects was not contemplated in the Klamath River Compact. Indeed, the Compact specifically endorsed the use of the river for then existing and further hydroelectric development.

EQC has no authority to adopt a regulation in violation of the Compact. As an interstate compact, consented to by Congress, it has the force of a statute of the United States. Texas v. New Mexico, 462 U.S. 554 (1983). In addition, the Compact was adopted as a statute of the State of Oregon. ORS 542.620. Obviously, EQC's regulations must comply with the statutes of the United States and Oregon. But, as an unjustifiable administrative ban on hydroelectric projects on the lower Klamath River in Oregon, EQC's regulations clearly violate the Compact's designation of hydroelectric power as a beneficial use of the river.

In addition, as Mr. Carter recognzies, in lieu of establishing a water policy program for the lower Klamath River in Oregon, the WPRB relies on the program of uses established in the Compact. Ex. B at 7. Authority for the WPRB to adopt such programs designating river uses is contained in ORS 536.300.

Such authority is pre-eminent over the authority of any other Oregon agency, including EQC and DEQ. Under ORS 468.735(2), any regulation issued by EQC must be consistent with such programs. Under ORS 536.360, state agencies, including EQC and DEQ, may not take any action contrary to such programs, and under ORS 536.370, any such action is ineffective. But by unjustifiably banning hydroelectric projects on the lower Klamath River in Oregon, EQC has, in effect, taken action contrary to WPRB's program of uses--established in the Compact--for such river. Such action is, therefore, invalid.

The second reason why Mr. Carter's interpretation of EQC's regulations is invalid is that it contradicts the state statutes under which those regulations were adopted. Under ORS 468.735, EQC is authorized to issue water quality standards only in accordance with the public policy contained in ORS 468.710. Such policy is that "pollution of waters" "constitues a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life and impairs domestic, agricultural, industial and other legitimate beneficial uses of water. . . " (Emphasis supplied.) ORS 468.710. The phrase "pollution" or "water pollution" as used in ORS 468.710 is defined in ORS 468.700(3) as the alteration of the properties of water so as to ". . . create a public nuisance or which will or tends to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational or other legitimate beneficial uses or to livestock, wildlife, fish or other aquatic

life or the habitat thereof." (Emphasis supplied.) Under these standards, EQC's authority to issue water quality regulations is limited to those necessary to combat conditions or substances that are a "menace" to public health, which constitute a "public nuisance" or which are "harmful," "detrimental" or "injurious" to fish and wildlife or beneficial uses of water.

There is no rational basis, however, to conclude that hydroelectric projects automatically result in "water pollution," as that term is used in the above authorities. Indeed, as noted above, and as stated by Mr. Carlson and Dr. Ellis, reservoirs cannot be presumed to be per se deleterious to fish and, in fact, the Salt Caves reservoir will be beneficial to fish. Yet Mr. Carter reads into EQC's regulations the irrebutable presumption that reservoirs harm fish. Such regulations, as interpreted by Mr. Carter, therefore, exceed their statutory authority and are invalid. Ochoco Construction, Inc. v. Department of Land Conservation and Development, 667 P.2d 499, 505 (Or. 1983); Oregon Newspaper Publishers Ass'n v. Peterson, 415 P.2d 21, 25 (Or. 1966).

The third reason to reject Mr. Carter's interpretation is that, as noted, it is not reasonably related to the purpose of the regulations. It is axiomatic that a regulation not reasonably related to its purpose is invalid. See, e.g., Mourning v. Family Publications Service, Inc., 411 U.S. 356, 371 (1973); Rutledge v. City of Shreveport, 387 F. Supp. 1277, 1281 (W.D. La. 1975). Here, it cannot be shown that a blanket ban on

hydroelectricity is necessary to protect trout in the Klamath River. Such ban, therefore, is invalid.

In sum, Mr. Carter's interpretation of EQC's regulations as being a blanket ban on hydroelectric projects is contrary to law, and EQC and DEQ should declare that the EQC regulations, as applied by Mr. Carter to the Salt Caves Project are, in fact, not applicable.

B. EQC and DEQ Should Declare That No Land Use Requirements Are Applicable to Section 401 Certification.

As noted above, DEQ's June 3, 1985 Notice declared that no Section 401 certification would be issued for the Salt Caves Project unless the Project was consistent with the Klamath County land use plan or statewide planning goals. No authority exists, however, for either DEQ or EQC to require such a finding as a condition to issuance of a Section 401 certification. Section 401 itself nowhere mentions such a requirement. The Federal Water Pollution Control Act was intended to control water pollution and has nothing to do with local land use requirements. EQC and DEQ cannot rely on that Act to create a land use condition on Section 401 certification.

Moreover, there is no valid procedure for EQC or DEQ to determine whether the Salt Caves Project complies with all of the requirements of the Klamath County land use plan. That plan states that the Project area is zoned for forestry and that hydroelectric development is a conditional use in a forest zone. The Salt Caves Project is specifically listed in the plan as a potential use of the project area. The only legally avail-

able method for determining whether a conditional use permit may issue for the Project is for the City to apply for one. As stated in the Klamath County Board of Commissioners' June 26, 1985 letter to DEQ (Ex. F hereto), in the absence of such an application the County cannot determine whether the Project is consistent or inconstistent with the County plan. Similarly, neither EQC nor DEQ has the authority to usurp the conditional use process and make its own determination. Any land use requirements should be declared not applicable to Section 401 certification of the project.

C. EQC and DEQ Should Declare That No "Related Requirements" or Matters in the Joint EFSC/WPRB Hearings Record are Applicable to the Project.

It is axiomatic that a regulatory agency must give notice of any of its regulatory requirements to an affected entity. See, e.g., Sun Ray Drive-In Dairy v. Oregon Liquor Control Comm'n, 517 P.2d 289, 293 (Or. Ap. 1973). DEQ's declaration that it will judge Petitioner's Section 401 certification application according to "related requirements" and unspecified items in the EFSC/WPRB hearing record fails to provide such notice. Any application of these standards to Petitioner's application would be invalid, and DEQ and EQC should declare that such will not be done.

In addition, in a related pleading filed with DEQ and EQC concurrently with the instant pleading, Petitioner is demanding a separate hearing on its Section 401 application before DEQ and EQC. Any reliance on the EFSC/WPRB hearing record, therefore, would be duplicative and unnecessary.

E. EQC and DEQ Should Declare Which Oregon Agency Will Act on Petitioner's Section 401 Certification Application and According to What Procedures.

It is also axiomatic that an entity subject to regulation must be given notice of the identity of the regulatory decisionmaker and the procedures by which the regulatory authority will be exercised. But in the instant case, Petitioner has no such notice. There is considerable doubt as to whether EFSC's adoption of EQC's water quality regulations for the affected portion of the Klamath River has pre-empted EQC's and DEQ's authority with respect to Section 401 certification. Petitioner has no idea whether DEQ's statement in its June 3, 1985 notice that it intends to act after the EFSC/WPRB record closes means that DEQ intends to act on Petitioner's application at that time or simply intends to make a recommendation to EFSC. Petitioner has a right to know whether EQC and DEQ consider that EFSC has the authority to issue or deny a Section 401 certification on the Project

In addition, assuming that DEQ and EQC believe that EFSC does not have such authority, Petitioner has no idea whether DEQ and EQC believe that such authority is lodged in DEQ or EQC. Petitioner is aware that DEQ intends to make some form of initial decision which would be appealable to EQC. However, Petitioner does not know whether such initial decision would constitute a grant or denial of its Section 401 certification. In view of the importance of such matter to the FERC licensing process, it is important that DEQ and EQC clarify which agency holds the power to issue or deny a Section 401 certification.

III

PETITION FOR RULEMAKING

Pursuant to ORS 183.390, OAR 340-11-047 and OAR 137-01-070, Petitioner requests that EQC initiate a rulemaking to establish rules that would be applicable to reservoir construction on the Klamath River between Keno Dam and the Oregon-California border. Ultimate facts sufficient to show the reasons for adopting the proposed rules, the legal basis therefor and sufficient facts to show how Petitioner is affected by the proposed rule are as set forth in the above Petition for Declaratory Ruling and the exhibits attached hereto. The proposed rules would read as follows:

STANDARDS APPLICABLE TO RESERVOIRS
ON THE KLAMATH RIVER BETWEEN KENO
DAM AND THE OREGON-CALIFORNIA BORDER

(1) Dissolved Oxygen (DO) - DO concentrations in the epilimnion shall be not less than 7 mg/l, provided that (a) during summer stratification DO concentrations in waters with temperature of 70°F or less shall not be less than 3 mg/l and (b) during fall turnover DO concentrations shall not be less than 5 mg/l.

(2) Temperature - Temperatures shall at no time be greater than 70°F, provided that during periods of summer stratification surface temperatures may exceed 70°F so long as waters within the epilimnion or metalimnion with not less than 3 mg/l of dissolved oxygen are below 70°F.

(3) pH - pH values shall not consistently fall outside the range of 7.0 to 9.0 in the epilimnion.

(4) Dissolved gases - the liberation of dissolved gases in the epilimnion, 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.

(5) Algae - owners of reservoirs shall be required to undertake all reasonable activities to reduce algae levels and to mitigate the effects of algae.

(6) Other standards - OAR 340-41-965(2)(c), (e), (f), (h) (except as to algae growth), (i) (except as to algae growth), (j) (except as to algae growth), (k) (except as to algae growth), (l) (except as to algae growth), (m), (n), (o) and (p) shall be applicable to the epilimnion and metalimnion of reservoirs.

(7) Anti-Degredation - so long as reservoirs meet these reservoir standards, conversion of portions of the river to reservoirs shall not be considered to be a violation of OAR 340-41-026(1)(a).

TEMPERATURE STANDARD APPLICABLE TO HYDROELECTRIC PROJECTS

(1) Notwithstanding the requirements of OAR 340-41-965(2)(b), required stream temperatures downstream of a dam utilized for the production of hydroelectricity shall be established on a case-by-case basis so as to ensure protection of the salmonid fish population.

IV
REQUEST FOR HEARING

Pursuant to OAR 137-02-040 and OAR 340-11-062(7) and (8), Petitioner requests oral argument and submission of briefs on its Petition for a Declaratory Ruling. In addition, Petitioner requests the opportunity to submit additional factual information.

Pursuant to OAR 340-11-047(3)(c) and OAR 137-01-070(3)(c), Petitioner requests to be heard orally on its Petition for Rulemaking. In addition, Petitioner requests the opportunity to submit additional factual and legal information.

V.

REQUEST FOR STAY

Petitioner requests that DEQ and EQC stay consideration of Petitioner's application for Section 401 certification pending decision on the two Petitions contained herein. As demonstrated above, EQC has no regulations which can reasonably be applied to such application. Any attempt to apply existing EQC regulations to such application would violate the authorities cited above, would violate Petitioner's due process rights and would cause Petitioner irreparable injury. In addition, resolving issues as to the applicability of existing EQC rules to the Salt Caves Project before acting on the Section 401 certification application would conserve administrative resources by avoiding a potentailly useless process.

VI

IDENTITY OF PETITIONER AND INTERESTED PARTIES

Petitioner's name and address are the same as stated in Petitioner's application for Section 401 certification. On information and belief, all entities interested in Petitioner's

Petitions are intervenors in the joint EFSC/WPRB hearings, a list of which is in DEQ's possession.

Dated: September 20, 1985

Respectfully submitted,

Diarmuid F. O'Scannlain
Richard M. Glick
Ragen, Roberts, Tremaine,
Krieger, Schmeer, O'Scannlain
& Neill
1600 Orbanco Building
1001 SW Fifth Avenue
Portland, Oregon 79204
Telephone: (503) 224-1600

Of Counsel:

Edward Weinberg
Peter Glaser
Duncan, Weinberg & Miller, P.C.
1775 Pennsylvania Avenue, N.W.
Suite 1200
Washington, D.C. 20006
(202) 467-6370

concern. We continue to urge you to initiate such a rulemaking, the results of which would be available for application to the City's new Section 401 application.

If you should have any questions, please let us know.

Sincerely,

William G. Miller
Project Director

cc: J. Keller, City of Klamath Falls
R. Ellis, Beak Consultants
P. Glaser, Duncan, Weinberg & Miller
R. Glick, Ragen, Roberts

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
AND THE
DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF THE REQUEST OF THE CITY OF KLAMATH FALLS FOR CERTIFICATION UNDER SECTION 401 OF THE FEDERAL WATER POLLUTION CONTROL ACT OF COMPLIANCE WITH WATER QUALITY STANDARDS AND REQUIREMENTS	))))))	CONSOLIDATED CONSERVATION PARTIES' RESPONSE TO THE CITY OF KLAMATH FALLS' PETITIONS FOR RULEMAKING, DECLARATORY JUDGMENT AND REQUESTS FOR HEARING AND STAY OF PROCEEDINGS

On September 20, 1985, the City of Klamath Falls ("the City" or the "City"), filed a petition with the Environmental Quality Commission ("EQC"), and the Department of Environmental Quality ("DEQ"). The petition contains a demand for hearing, a petition for declaratory ruling and for rulemaking, and a request for hearing and stay. The Consolidated Conservation Parties answer the City's petition with the following brief of points and authorities.

INTRODUCTION

The City proposes to build a hydroelectric project on the Klamath River in the Salt Caves vicinity. It currently has an application for project license pending before the Federal Energy Regulatory Commission. On January 25, 1985, the City also filed an application with DEQ for water quality certification pursuant to Section 401 of the Clean Water Act. On June 3, 1985, DEQ issued a public notice and request for public comment on the City's request for Section 401 certification. As of this date, the City's Section 401 application remains incomplete. *See*, Ex. "A."

Concurrent with the above process, the Energy Facility Sitting Council ("EFSC"), and the Water Policy Review Board ("WPRB"), have before them applications by the City to approve its project, pursuant to their respective statutory mandates. Substantial testimony relevant to water quality issues has already been filed in WPRB and EFSC proceeding. In particular, DEQ filed testimony documenting the likelihood that the Salt Caves Dam would violate several water quality standards. Public comments and substantial testimony from party-intervenors, including all of the Consolidated Conservation Parties, have also been submitted in the EFSC/WPRB process. In its public notice dated June 3, 1985, DEQ stated its intention to incorporate the EFSC/WPRB record into its Section 401 certification record.

THE CITY'S POSITION

The City asserts that the EQC and DEQ have wrongfully made a finding that the Salt Caves project violates state water quality criteria. The assertion is based on two points regarding DEQ's applicable water quality standards. OAR 351-41-962 and 340-41-965, *et seq*. First, the City argues that the water quality rules are arbitrary and unreasonable as interpreted by the DEQ. It asserts that while the rules are supposed to protect fish, they will work to ban a project which would provide fully adequate fish habitat. Second, the City argues that the rules are illegal, in that they contravene the Klamath River Compact, ORS 542.620, and contravene ORS 468.710, the statutory authority

for the rules. The City also contends that the rules are illegal because they do not rationally serve their purpose.

The City also claims that the agencies are wrongfully using inapplicable rules, land use plan compliance and other vague requirements, as criteria for water quality certification. It argues that land use planning goals have no relevance to water quality, that the federal law does not contemplate land use as part of the state water quality authority, and that the controlling agencies are not equipped to make the appropriate land use decision. The City argues, moreover, that there are other criteria alluded to by the agencies which are not plain to the City and, therefore, should not be applicable.

As relief, the City wishes to have the rules declared inapplicable to its project or, in the alternative, to have the EQC institute a rulemaking and accept its own proposed rules to allow its project to go forward.

I. THE PETITION FOR DECLARATORY RULING IS WITHOUT MERIT.

A. EQC's Water Quality Standards are within ECQ's Statutory Authority and Mandate.

DEQ and EQC applied science to policy decisions to promulgate the Klamath Basin Water Quality rules. Although judicial review standards do not guide the agencies when making specific decisions, they outline the parameters of reasonableness for agency action. Since the City accuses the state agencies of arbitrary and unreasonable choices,

those choices need only fall within the parameters of allowable discretion, as prescribed by the various enabling statutes. It is clear, here, that the DEQ's interpretations of EQC water quality standards are well within its reasonable discretion.

(1) Federal Statutory Authority

Federal law grants pervasive authority to the states to regulate and control water quality. The basis of that authority is Section 303 of the Clean Water Act, 33 U.S.C., § 1313. The states are to adopt water quality standards, "such as to protect the public health or welfare, enhance the quality of water and serve the purposes [of the Act] . . . taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes . . . ." (§ 1313(c)(2)). EPA sets minimum quality standards, § 1313(b)(2), the state submits its proposed standards, § 1313(c)(3), and if the state standards meet the requirements of the Act, then EPA approves them. *Id.*

States are expressly granted the right, moreover, to either adopt EPA's view or make more restrictive standards. 40 C.F.R., § 131.4. "If the States wish to achieve better water quality, they may . . . ." *U.S. Steel v. Train*, 556 F.2d 882, 838 (7th Cir. 1977); *Mississippi v. Costle*, 625 F.2d 1269 (5th Cir. 1980). On the other hand, EPA has the authority to disapprove state standards which are less

stringent than EPA minimums, unless there is a valid and statutorily-acceptable explanation. *Mississippi v. Costle*, 625 F.2d 1269, 1276 (5th Cir. 1980).

(2) Oregon's Statutory Authority

In Oregon, the Department of Environmental Quality (DEQ), is charged under ORS 468.035 with implementing the regulations promulgated by EQC to comply with the provisions of the Clean Water Act. Pursuant to this authority, DEQ has promulgated the water quality criteria to which the applicant now objects. These standards are set forth in OAR 340-41-965, *et seq.*, and took effect on January 12, 1977, after approval by EPA.

ORS 468.735 states that water quality standards must be promulgated pursuant to ORS 468.710. ORS 468.710(2), cited by the City as authority to protect fish, also mandates that state water quality criteria, "protect, maintain and improve" the water. Fish are to be protected along with wildlife, other equatic life, and, "domestic, agricultural, industrial, municipal, recreational and other legitimate beneficial uses . . . ." *Id.*

ORS 468.710(4) directs that state water quality criteria, "provide for the prevention, abatement and control of new or existing water pollution . . . ." Water pollution, defined at ORS 468.700(3), is, "alteration of the physical, chemical or biological properties of any waters . . . which will or tends to render such waters harmful, detrimental or injurious to commercial, industrial, agricultural, recreational

or other legitimate beneficial uses or to livestock, wildlife, fish or other aquatic life or the habitat thereof."

The state statutes are clearly within the bounds of the federal grant of authority. First, the state laws reiterate the Section 1313(c)(2) requirement to, "enhance the quality of water" with the ORS 468.710 requirement to, "protect, maintain and improve" the water quality. And, second, the substantive interests in Section 1313(c)(2), "public water supplies, propagation of fish and wildlife, recreational purposes, and agriculture, industrial, and other purposes" are similarly mirrored in the state law. For example, ORS 468.710(2) enumerates fish, wildlife, and other uses, such as, "domestic, agricultural, industrial, municipal, recreational and other legitimate beneficial uses" as water quality interests. ORS 468.710(4) requires abatement and control of pollution which would tend to be harmful to essentially the same interests.

At the state statutory level, there is no question that the state legislature has acted within the confines of the Clean Water Act. Therefore, if the agencies have acted within the confines of discretion allowed by the state statutes, the agencies have also acted within the confines of the federal law.

B. EQC's Water Quality Standards are Reasonable and Statutorily Authorized.

1. EQC Water Quality Standards are not a Ban on Hydro Development.

The applicant asserts that DEQ's current water quality standards are arbitrary, unreasonable and beyond agency authority because they constitute an "administrative ban" on hydroelectric development on the Klamath River. The City bases this assertion on its water quality analysts' (Mr. Ellis and Mr. Carlson), interpretation of testimony submitted to EFSC/WPRB by a DEQ water quality analyst (Mr. Carter). While the opinions of these two water quality analysts are useful in determining whether a given project meets or would meet a given scientific standard, they are irrelevant to the City's assertion that the standards are unreasonable.

The applicant asserts that the regulations are a blanket prohibition on hydroelectric development and, therefore, are unreasonable and beyond the agency's statutory authority. The promulgation of standards, designed to assist an agency in deciding whether to permit a hydro project, is not a ban on such hydro projects. Contrary to the applicant's assertions, hydro projects are not banned by EQC's regulations. In fact, many types of hydroelectric projects may well meet the EQC standards. A "run of the river" gravity generation system is unlikely to violate the Klamath River water quality standards. An instream turbine generation facility may also

meet the water quality standards. (*See, e.g.*, run-of-river plants without pondage, base-load hydro plants, Creager & Justin, *Hydroelectric Handbook* 191 (1950), Goodman, Hawkins & Love, *Small Hydroelectric Projects for Rural Development* 6-9, 193-194 (1981) (describing feasibility of the above options); and pumped-storage generation, U.S. Army Corps of Engineers, *Pumped Storage Potential of the Pacific Northwest* 48 (1972) (discussing comparative environmental impacts of reservoir and pumped storage hydroelectric alternatives.)

2. DEQ is Empowered to Apply Water Quality Standards to Reservoirs.

The City objects to the application of DEQ's regulations to its dam project which will result in the creation of a large reservoir where the last free-flowing stretch of Klamath River now runs. The City argues that, (1) OAR 340-41-965(2)(a)(B), requiring that dissolved oxygen concentrations be greater than 7 mb/l should apply to a river, not its reservoir; (2) OAR 340-41-965(2)(b) applies only to point source thermal discharges, not the City's proposed reservoir; (3) OAR 340-41-965(2)(g) and OAR 340-41-965(2)(d) are unjustifiable bans on hydroelectric projects in that stretch of the Klamath River to be impounded by the Salt Caves Reservoir; and, (4) OAR 340-41-065(2)(j) and OAR 340-41-965(1)(a) should not be applied to reservoirs generally. The sum of the City's objections is that DEQ is authorized to apply OAR 340-41-965 to its Salt Caves Reservoir and its reservoir cannot meet the standards.

DEQ and EQC are empowered and required to, "establish standards of quality and purity for the waters of the state." ORS 468.755(1). The "waters of the state" are defined as specifically including "impounding reservoirs." ORS 468.700(8). Thus, in enforcing Oregon's public policy to, "protect, maintain and improve the quality of the waters of the state for public water supplies, the propagation of wildlife, fish and aquatic life," DEQ and EQC are required to apply the water quality standards applicable to "the waters of the state" to "impounding reservoirs."

Nothing in the language of the water quality standards themselves indicates any intent that they be applied solely to free-flowing streams. The introduction to the standards clearly states that the standards are applicable to the conduct of "activities," as well as discharges from point sources. *See*, OAR 340-41-965(2). The City has been unable to point to any explicit language from any of the standards' criteria that would limit the application of such criteria to rivers in their free-flowing state.

The City also argues that the purpose of the water quality standards is to protect trout, and that because one strata of water in its reservoir will permit trout survival, it is unreasonable for EQC to apply the water quality regulations to all water strata in the reservoir. The City's argument ignores the fact that the DEQ and EQC are responsible for *all* "the waters" of the state. The mere fact that, from

time to time, there may remain some water suitable for trout in the reservoir, does not relieve the agencies from the responsibilities to protect the rest of the reservoir. If, in fact, EQC wants all of the reservoir strata to comply with the criteria, then their responsibility for "the waters of the state" means that the EQC can regulate the whole reservoir. Such regulation is not outside the bounds of statutory authority and, thus, is not unreasonable.

3. EQC must Consider all of the Designated Uses for the Klamath Basin.

The City also has erred, in any case, in focusing solely on fish as use protected by the water quality standards and Section 401.

The EQC and DEQ are required by Section 401 of the Clean Water Act to consider all designated uses adopted by Oregon, pursuant to Section 303(c)(2) of the Clean Water Act (33 U.S.C., § 1313(c)(2)), and EPA regulations, 40 C.F.R. § 131.6(a) when issuing a Section 401 certification. The EQC and DEQ promulgated designated beneficial uses for the Klamath River Basin at OAR 340-41-962, Table 19. Not only is hydropower not among the designated beneficial uses for river miles 209 through 221 of the Klamath River (the stretch of river affected by Salt Caves project), the protection of trout (salmonid fish species), is but one of the many designated uses protected by water quality standards. (*See*, Ex. "B") Although protection of domestic irrigation

and industrial water supplies, as well as wildlife, hunting and water contact recreation, are uses designated for the Klamath, the City asserts, implicitly, that fish protection is the only purpose for which the water quality standards were created, and that the EQC should ignore these other beneficial uses. DEQ and EQC *would*, however, be unreasonable if they ignored the recreation and fish and wildlife habitat uses of the Klamath River. These uses are designated beneficial uses, pursuant to the Clean Water Act and Oregon law. DEQ and EQC have acted within their statutory mandate by promulgating rules to achieve protection and maintenance of all the beneficial uses in the Klamath Basin.

4. The Agencies have Acted in the Best Interest of Fish.

If, indeed, the only purpose behind water quality standards is protection of fish and fisheries, and that was the only agency motivation behind the rules, the agencies' actions are still justified. On the one hand, the City has found evidence, as cited above, that there would be adequate habitat for trout in the middle stratum of the reservoir. Thus, the trout would not be jeopardized and the reservoir could provide a fishery.

The City has taken too narrow a view of the water quality standards. Water quality standards protect trout to be sure, but the standards also protect other statutory beneficial uses. Moreover, the standards protect trout

wherever they are found, not just in the reservoir "layers" to which the City would relegate them. Moreover, there is ample evidence to indicate that the project would not be as beneficial as the City asserts. On the contrary, the reservoir would be detrimental to trout and other beneficial uses.

The City has failed to explain the testimony of Oregon Division of Fish and Wildlife biologist Ziller. He stated that unstressed habitat (68 degrees or cooler and 7 mg/l DO or more), would be virtually nonexistent in the reservoir. (Direct Testimony of ODFW, p. 29. Having a choice between unstressed habitat and less desirable habitat, trout would make the predictable choice. They would, "seek areas of higher quality water," *Id.*, at 37, and migrate to lotic (running water) areas and stay there even during non-critical oxygen and temperature months. *Id.*, at 38. If protecting and maintaining habitat in the Klamath River is to benefit fish, but the fish do not use the type of habitat the City proposes to provide, that is compelling evidence that the goal of protecting fish habitat is not met by the City's project.

The marginal habitability of the middle reservoir stratum is not adequate to protect fish habitat, notwithstanding a given individual specimen's ability not to die. Fish -- cited by the City as the only beneficial interest which the agencies may protect -- benefit most by the agencies' interpretation of the regulations, which are, therefore, not unreasonable.

C. The Oregon Regulations in no way Violate the Klamath River Compact.

The applicant argues that DEQ's water quality regulations violate the Klamath River Compact (the "Compact"), (ORS 542.620). The applicant erroneously assumes that the Compact exclusively authorizes hydroelectric development. In reality, the compact provides, (1) a cooperative mechanism for granting primary water quality responsibility to the states; (2) a legislative history that recognizes wildlife and recreation uses; and, (3) specific priorities which place hydro development below that reserved for fish, wildlife and recreation. There is no support for the notion that the Compact preempts Oregon's water quality regulations. In fact, the Compact actually provides the framework for Oregon's present regulatory scheme.

The City's first argument on this issue is premised on the assumption that the current water quality regulations constitute a "virtual ban" on hydro projects on this portion of the Klamath River. The error of this assumption has been thoroughly explained above. The mere fact that the Salt Caves proposal does not meet the water quality standards does not mean all hydro projects have been administratively banned.

(1) Hydropower Development is a Low Priority Use under the Klamath River Compact.

The City's second argument is that the agencies are somehow precluded from limiting the use of the

river to uses other than hydropower development. The City cites Article III and Article IV of the Compact to show that hydropower development was specifically contemplated. Because hydropower development was contemplated, the City argues such development cannot now take the back seat to water quality. This second assumption is also erroneous.

One of the purposes of the Klamath River Basin Compact is to further intergovernmental cooperation by providing, "for prescribed relationships between beneficial uses of water as a practicable means of accomplishing [such] distribution and use." ORS 542.620, Art. I(B)(3).

The Klamath River Compact establishes a prioritization of uses when there is insufficient water to satisfy all applications. ORS 542.620, Art. III(B)(1). The City has failed to note that hydroelectric power is near the bottom of the list of prioritized uses, while recreation, fish and wildlife all rank higher. *Id.* Article III of the Compact plainly states that California and Oregon, "*shall* give preference to applications for a *higher use* over applications for a lower use in accordance with the following order of uses: (a) domestic use, (b) irrigation use, (c) recreational use, including use for fish and wildlife . . . [then], (e) generation of hydroelectric power . . . ." *Id.* (Emphasis added). This clear legislative mandate defeats the City's contention that the regulations enacted by the State of Oregon are in derogation of the Klamath River Compact.

The legislative history of Congressional approval of the Compact plainly recognized the federal interests in wildlife, recreation and fish. *See*, S. Rep. No. 834, 85th Cong., 1st Sess. (1957), at 3. The City again conveniently excludes this portion of the legislative history from their comments. The portion of the history upon which the City relies refers to a "plan" for an additional 168,000 kilowatts of hydroelectric generating capacity which existed at the time of ratification of the Compact. This "plan" was no more than just that -- a plan.

The City has chosen to rest its arguments on a 28-year-old plan which contemplated further hydro development in the Klamath Basin. Reference to the legislative history, which evidently contemplated additional hydropower development, cannot alter the clear statutory priorities of the Compact. The Compact itself does not specify how much hydropower development should take place on the Klamath River and, given the priority listing of uses, surely legislators could not have expected more hydro development than would ultimately be found compatible with the higher uses.

In addition, Article IV does not support the City's position. Article IV directs that, when allocating water resources, the states must, "provide for the most efficient use of power head and its economic integration with the distribution of water for other beneficial uses in order to secure the most economical distribution and use of

water and the lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells." ORS 542.620, Art. IV. The states are to engage in a balancing of interests of providing water for "power head" with "other beneficial uses," including recreation, fish and wildlife. The power head is to provide electricity, "for irrigation and drainage pumping." It is not to provide energy for far away households and returns for a single hydropower investor.

Thus, Article IV is not a singular identification of purpose. It is not a statutory mandate for the Salt Caves project. It is a provision for a balancing of interests that coincides with the Article III provision of irrigation and domestic use (priorities "(a)" and "(b)"), as priorities over hydroelectric generation. The states must balance any hydroelectric development against other uses of the water; if Article IV states any preference for hydropower, it relates only to hydropower development that provides cheap power for other higher priority uses, such as irrigation.

(2) The Compact Plainly Allows State Water Quality Standards.

Congress recognized the importance of pollution control and anticipated the state and federal cooperation that characterizes the Clean Water Act. Article VII of the Compact recognizes that, "[t]he Klamath River Basin requires *cooperative* action of the two states in pollution abatement

and control." While the applicant contends that present regulations contradict the Compact, the Compact itself requires each state, "to take appropriate action under its own laws to abate and control interstate pollution," defined as, "the deterioration of the quality of the waters . . . within the boundaries of such state which materially and adversely affects beneficial uses of waters in the Klamath River Basin in the other state." ORS 542.620, Art. III C. Oregon, the upstream state, has to abate and control deterioration of water quality in its own waters, so that the quality of California's share is not deteriorated. There is no exception for hydropower development. In fact, if a hydropower project caused water quality deterioration in California, the mandatory requirement of the Compact would lead to a ban on that project.

The EQC's water quality standards do not conflict with the water use priorities provided by the Compact. Indeed, DEQ's approach will further the purposes of the Compact.

D. The Agencies may use Land Use Compliance as Criteria for Section 401 Certification.

The City argues that DEQ exceeded its statutory authority in requiring the Salt Caves proposal to comply with land use regulations in Klamath County. The City is wrong.

Section 401, 33 U.S.C., § 1341, does not expressly allow or prohibit use of land use criteria in a certification.

But, so long as the land use planning goals do not exceed the water quality goals of the federal law, then the agencies can use the local land use criteria as part of the Section 401 criteria. The land use criteria closely intermeshes with water quality criteria. Since the land use criteria are simply another basis, as opposed to numerical limits to chemical characteristics of water, for effecting the statutory goals, then they are also within the statutory authority.

(1) Section 401 Authority.

Section 401(a)(1) of the Clean Water Act, 33 U.S.C., § 1341(a)(1), states that a certification must, "comply with the applicable provisions of sections 1311, 1312, 1313, 1316 and 1317 of this title." Under 33 U.S.C., § 1313(c)(2), Oregon is directed to promulgate standards which must, "protect the public health or welfare, enhance the quality of water and serve the purposes of [the Act]." Enhancing water quality is one objective. But, separate from that objective is the federal requirement of protecting "the public health and welfare." The City surely cannot expect Oregon to accept the assertion that land use planning does not help accomplish protection of the public welfare.

The DEQ is given a wide berth by federal laws to formulate appropriate Section 401 criteria. The criteria need not be limited to numerical water quality standards. So long as the criteria are promulgated pursuant to the interest of the public health and welfare, they are within

the discretion outlined by the Clean Water Act. Thus, Section 401 does, by reference to Section 303, provide for land use criteria in certification of projects.

If this plenary grant of authority seems wider than could be intended, federal legislative history specifically supports inclusion of land use criteria in water quality certification. Pub. L. 39-234, 79 Stat. 903 (1965), first reserved water quality implementation to the states. The states were to promulgate water quality standards, "such as to protect the public health or welfare, enhance the quality of water and serve the purposes of [the] Act." 79 Stat. 908. This language, in substantive content, has been preserved in Section 303. The U.S. House of Representatives, Public Works Committee, when accepting the language quoted above, said, "[a]uthorizing the [HEW, to be replaced by the EPA], to promulgate and enforce such standards . . . would place in the hands of a single Federal official the power to establish zoning measures over -- to control the use of -- land . . . . [T]he committee approved a substitute provision which is a vast improvement." H. Rep. No. 215, 89th Cong., 1st Sess., 10 (1969), *reprinted in*, 1965 *U.S. Code Congressional & Admin. News*, 3313, 3322 (1965).

The language is specifically designed to reserve water quality decisions to the states. It is also designed to reserve land use questions to the states. Congress wanted not to provide for *federal* land use requirements.

But, it preserved the option for state and local authorities to use land use requirements, if they saw fit.

(2) State Authority

The City also overlooks the critical fact that ORS 197.180(1) expressly *requires* each agency of the state to comply with the state and local land use plans when making decisions affecting land. DEQ, following ORS 197.180(1), informed the City of intent to apply land use criteria. *Public Notice re Comment on Federal Energy Regulatory Commission Preliminary Permit No. 3313, § 401 Certification* (June 3, 1985). DEQ, in granting or denying Section 401 certification, must be, "consistent with the local comprehensive land use plan or the statewide planning goals." *Public Notice, supra.* DEQ would be in violation of ORS 197.180 if it did not consider land use questions.

II THE CITY'S PROPOSED RULES ARE UNREASONABLE AND SHOULD NOT BE ADOPTED.

Along with its petition for declaratory ruling, the City has requested EQC to promulgate new "reservoir" water quality rules aimed, obviously and specifically, at permitting construction of the Salt Caves project.

The proposed rules, however, do not benefit trout, recreation, wildlife, and other non-hydropower beneficial uses. The agencies would ignore their state statutory requirements of protecting those interests if the proposed rules were adopted. Besides ignoring state requirements,

the City proposes further to breach even the minimum criteria of the EPA in at least two areas.

The EPA is to develop minimum criteria for water quality for particular uses. 33 U.S.C., § 1314(a)(1). EPA has done so in what is known as the "Red Book." U.S. Environmental Protection Agency, *Quality Criteria for Water* (1976).

For pH in fishing waters, EPA has promulgated 6.5 to 9.0 as a range that, "appears to provide adequate protection for the life of freshwater fish . . . ." *Id.*, at 341. There is no special provision to exempt reservoirs from the standard. Yet, the City proposes a standard where pH could violate the EPA standard in reservoirs anywhere but in the epilimnion (middle stratum). Applicant's Petition, p. 23.

For dissolved oxygen (DO), EPA has promulgated 5.0 mg/l for a requirement of most fishable waters. *Quality Criteria for Water*, at 224. Again, there is no special provision for reservoirs. The City proposes 3.0 mg/l when the water is 70 degrees F or less. Applicant's Petition, p. 23. Moreover, the City suggests that fish can thrive when the DO level is at 3.0 mg/l, when EPA and the state have found otherwise. There is no basis to accept that position.

By all appearances, the City proposes rules tailored to allow the Salt Caves project to go forward, and for no other reason. But, the project would go forward under the City's own rules in the face of violations of the minimum

standards set by EPA. Unless the City is willing to say that EPA has also acted unreasonably, the Oregon agencies cannot be said to have gone beyond their discretion in promulgating DO and pH standards that are at least as stringent as those of EPA.

CONCLUSION

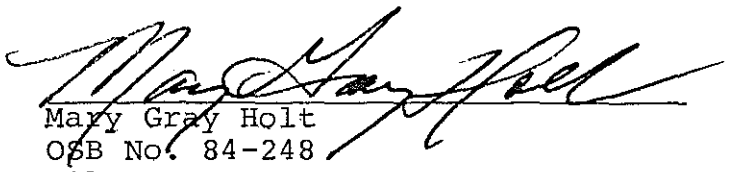
The City requested Section 401 certification for its project in January 1985. The DEQ has already taken public comment on that application, and is moving forward in its analysis of the City's project. Now, however, the City has decided to attack the substance of the EQC regulations and support its position with technical testimony of its water quality experts. Consolidated Conservation Parties have effectively shown that EQC's water quality standards are reasonable and authorized by state and federal law. In addition, they have shown that the City's proposed rules are unreasonable.

The EQC should not interrupt the analysis that is already underway to rule on the petition for declaratory ruling. Rather, it should deny the petition at this time, but take the petition and Consolidated Conservation Parties' Response under advisement as argument in the certification proceeding. The certification decision can then be based

upon a consideration of all relevant legal and technical issues. In doing so, EQC should set a reasonable procedural schedule to meet its decisional deadlines.

Respectfully submitted on behalf of Consolidated Conservation Parties:

Oregon National Resources Council
Oregon Wildlife Federation
Oregon Chapter, Sierra Club
Oregon Trout, Inc.
Save Our Klamath River



Mary Gray Holt
OSB No. 84-248
721 S.W. Oak Street
Portland, OR 97205

Counsel for Oregon Chapter
Sierra Club

Terence L. Thatcher
OSB No. 84-122
708 Dekum Building
519 S.W. Third Avenue
Portland, OR 97204

Counsel for Oregon Wildlife
Federation

Dated: October 18, 1985

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of the Demand for Hearing; Petition for Declaratory Ruling as to Non-applicability of Laws, Regulations and Standards to Section 401 Certification of Sale Caves Project; Petition for Rulemaking: Request for Hearing; Request for Stay Filed by the City of Klamath Falls.	ORDER

A. INTRODUCTION

1. Any person who applies for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities which may result in any discharge into navigable waters is required by Section 401 of the federal Clean Water Act to obtain a water quality compliance certification from the state in which the discharge originates. That certification must state that any such discharge or activity will comply with applicable effluent limitations, water quality standards and implementation plans, national standards of performance for new sources, and toxic and pre-treatment effluent standards adopted pursuant to the Clean Water Act.

Section 401 provides that if the state fails to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request the certification requirement is deemed to be waived.

The federal agency is prohibited from issuing a license unless a certification is granted or waived.

2. DEQ is the agency of the State of Oregon designated to implement the provision of Section 401 of the Federal Clean Water Act.

3. By letter dated January 25, 1985, Resources Management, Inc. (RMI), requested, on behalf of the City of Klamath Falls, certification, pursuant to Section 401 of the Federal Clean Water Act, of the of the city's proposed Salt Caves Hydroelectric Generation Project on the Klamath River near the California border. No supporting information was included with the letter.

4. By letter dated February 7, 1985, the Director of the Department of Environmental Quality notified RMI of the requirements for a completed application and the process intended for action on the application.

5. By letter dated February 22, 1985, RMI transmitted to DEQ a copy of the FERC license application documents for the Salt Caves project. Such documents are a part of the documentation needed for a complete application for 401 certification. Further supplements to the FERC application have been received by the department on August 8, 1985 and October 1, 1985.

6. On December 31, 1984, the Energy Facility Siting Council (EFSC) and the Water Policy Review Board (WPRB) (now Water Resources Commission (WRC)) issued a notice of a joint contested case hearing for the purpose of determining whether a site certificate and surface water appropriation permit should be issued pursuant to state statutory authorities.

7. On February 1, 1985, DEQ petitioned for party status in

the joint EFSC/WPRB contested case hearing for the purpose of representing DEQ's evaluation of water quality standards compliance. Rules of both EFSC and WPRB require such compliance as a condition for issuance of certificate and permits.

8. On June 3, 1985, DEQ issued public notice of the City of Klamath Falls' request for 401 certification. Notice was issued even though the application was incomplete. DEQ elected to coordinate the 401 application review process with the EFSC/WPRB contested case hearing so as to minimize the need for parties and interested persons to submit testimony in two proceedings regarding potential impacts of the project on water quality. DEQ's election to coordinate its process with the EFSC/WPRB contested case process was based on a contested case schedule which would allow a 401 certification decision to be made by DEQ within one year of the date of the applicant's first request for certification (i.e., action by January 25, 1986).

9. On August 6, 1985, the Federal Energy Regulatory Commission (FERC) issued a notice of proposed rulemaking regarding 401 certification. FERC proposes to establish procedures requiring state action on a 401 certification request to be completed either within one year of the applicant's first request or within 90 days from the date FERC issues notice of an application, whichever occurs first. Information accompanying the notice indicated that at least eight months would be available in most cases for state action on a certification request. Failure to act within the allowed time would be interpreted as state

waiver of the certification requirement. Comments on the proposed rules were to be filed by October 8, 1985.

10. By order dated September 27, 1985, the joint EFSC/WPRB hearing process and schedule was delayed at the request of the City of Klamath Falls. Cross-examination of witnesses was delayed from early September 1985 to March 1986. This delay makes it impossible for DEQ to continue its efforts to coordinate the 401 certification review and the EFSC/WPRB process and complete action within the most conservative view of timetable allowed under the federal Clean Water Act.

11. On September 29, 1985, the City of Klamath Falls filed with DEQ and EQC a Demand for Hearing; Petition for Declaratory Ruling as to Non-Applicability of Laws, Regulations and Standards to Section 401 Certification of Salt Caves Project; Petition for Rulemaking; Request for Hearing; and Request for Stay. EQC rules require the commission either to issue an order denying the petitions or to initiate appropriate hearing procedures within 30 days after submission of petitions.

12. On October 3, 1985, copies of the Petition of the City of Klamath Falls were mailed to known parties of interest with indication that the EQC would consider the matter at a special meeting on October 18, 1985.

13. On October 8, 1985, a public hearing was held on proposed administrative rules pertaining to the processing of 401 certification applications. Department recommendations for final adoption of rules will be presented to the EQC at its regularly

scheduled meeting on November 22, 1985.

14. By letter dated October 15, 1985, the department reminded Diarmuid F. O'Scannlain, attorney for the City of Klamath Falls, that their 401 certification application still has not been completed. The letter also advised of the department's intent to terminate efforts to coordinate the department's 401 certification decision with the joint EFSC/WPRB hearing process.

B. FINDINGS, REASONS, CONCLUSIONS

1. Demand for Hearing

The petition cites the 14th Amendment of the United States Constitution, the Oregon Constitution, applicable Oregon law, and lack of knowledge of whether DEQ or EQC believes it has authority to grant or deny a Section 401 certification as grounds for a contested case hearing on its application. Under procedures followed since Section 401 of the Clean Water Act was enacted, the department evaluates applications and the director or the director's designee makes a determination to grant or deny certification. The director's decision is appealable to the EQC as a contested case pursuant to ORS chapter 183 and OAR chapter 340, division 11. Similar procedure is followed for all permit issuance actions except where EQC is directed by statute to issue a permit or license. The 401 certification is similar to a permit action by the department.

The demand for hearing is denied. The department should proceed to a decision and the director's decision will be subject to appeal to the commission as a contested case.

2. Petition for Declaratory Ruling as to Non-applicability of Laws, Regulations and Standards to Section 401 Certification of Salt Caves Project

Petitioner seeks a declaratory ruling from EQC and DEQ on the non-applicability of laws, regulations and standards to its Section 401 certification application in four respects:

a. that certain of the EQC regulations, as interpreted and applied to the Salt Caves Project in Mr. Carter's testimony are not, in fact, applicable to such Project;

b. that no land use matters will be considered in judging Petitioner's Section 401 application;

c. that no "related requirements" or matters in the joint EFSC/WPRB hearing record will be applied to the Section 401 certification application;

d. a statement as to whether DEQ, EQC or EFSC is the designated agency to issue the Section 401 certification and as to the procedures that will be used in judging Petitioner's application.

Items b, c, and d are procedural issues that are part and parcel of the 401 certification rulemaking process currently underway. Petitioner has submitted testimony in that process under letter dated October 9, 1985. Petitioner's testimony incorporates by reference the petitions being considered here.

These and other issues will be addressed by the EQC as part of that ongoing rulemaking process at its regular meeting on November 22, 1985. Further more, even in the absence of additional rulemaking or a declaratory ruling, petitioner will have full opportunity to have its concerns addressed through the existing procedures for Section 401 certification review.

Therefore, petitioner's request for declaratory ruling on points b, c, and d are denied.

Item a requests a ruling to the effect that existing EQC standards and rules pertaining to water quality in the Klamath Basin do not apply to the Salt Caves Project and the section of the Klamath River altered and impacted by the Salt Caves Project. In particular, petitioner argues that existing rules should not apply to a reservoir proposed to be constructed in the area. Further, petitioner argues that application of existing rules would unlawfully prohibit construction of any hydroelectric generating facility on the Klamath River near the Oregon-California border.

The commission notes that for purposes of water quality control, ORS 468.700(8) defines "water" or "waters of the state" to include among other things impounding reservoirs, rivers, streams, creeks, marshes, etc. The same definition is recited in OAR 340-41-006(14) as it relates to water quality standards. Further, the operable prefacing language for Klamath Basin water quality standards is contained in OAR 340-41-965(2) and reads as follows:

" . . .

"(2) No wastes shall be discharged and no activities shall be conducted which either alone or in combination with other wastes or activities will cause violation of the following standards in the waters of the Klamath Basin:

"(a) Dissolved oxygen (DO):

" . . .

"(b) Temperature:

" . . .

"(c) Turbidity:

" . . . "

It is clear that these standards do apply to all of the waters of the state within the Klamath Basin. The standards are reasonably applicable to the Klamath River between the Keno Dam and the Oregon-California border. Any proposal to discharge wastes, construct facilities, or conduct an activity which may impact water quality or the existing beneficial uses of the water must be evaluated in light of the existing standards.

The intent of water quality standards is to protect water quality, prevent degradation of water quality, and generally assure that water quality supports recognized beneficial uses. It is expected that activities or discharges which would cause standards to be violated are intended to be prohibited. Water quality standards violations can often be eliminated by modifying the design of facilities, or modifying the way an activity is

conducted, or reducing the magnitude of the activity or discharge.

In the case of hydroelectric generating facilities, the department has found that most proposed projects can be designed to comply with water quality requirements. The department has been provided no information to suggest that the petitioner's particular project design is the only possible way to generate hydroelectric power in that reach of the Klamath River. A project to divert water to a generator without construction a large, deep, stratified reservoir may have less adverse impact on water quality and be an appropriate alternative for consideration. Despite the above observations it should be noted that no final determination has yet been made on petitioner's request for Section 401 certification. Petitioner has a continuing and full opportunity to present its view of water quality standards as part of the remaining decision-making process.

Therefore, petitioner's request for a declaratory ruling on item a is denied for the reasons noted above.

3. Petition for Rulemaking

Petitioner requests that rulemaking be initiated to establish new standards, which are less restrictive than present standards, for the Klamath River between Keno Dam and the Oregon-California border.

The general reasoning is contained in the Petition for Declaratory Ruling and suggests that existing standards are inappropriate for protecting designated uses and unlawfully prevent construction of a reservoir.

The commission takes notice of the requirements of Section 303 of the Federal Clean Water Act which generally requires states to adopt water quality standards to meet the intent of the Act and submit such standards to EPA for approval. Such standards, once approved by EPA become federally enforceable standards. Modification of standards must similarly be approved. EPA regulations regarding water quality standards are contained in 40 CFR 131. These regulations describe documentation requirements and procedures for modifying standards where existing uses and the quality criteria for protection of those uses would be modified.

The rationale for standards modification presented by the petitioner is not adequate justification for relaxation of standards or securing federal approval of such a change.

The commission also takes notice of the fact that a standards change proposal of this magnitude is a major policy decision and cannot be concluded prior to the time that a decision on petitioner's 401 certification application must be rendered. Uncertainty on how FERC intends to interpret and apply a deadline for action on a 401 certification request dictates that action by the director on the pending request be taken prior to January 25, 1986. In addition, the commission has instructed the department to analyze and respond to issues raised in the petitions at the commission's next regularly scheduled meeting.

Therefore the petition for rulemaking is denied.

/ / /

4. Request for Hearing

Petitioner requests opportunity to present oral testimony and further written briefs on its Petitions for Declaratory Ruling and Rulemaking.

Petitioner's request is denied, for the reason that sufficient grounds for a commission decision on the petitions exist. In addition, petitioner submitted substantial written material in conjunction with the petition and was also provided further opportunity to submit written material prior to the commission's meeting on October 18, 1985. Further, the commission's decision to deny the petitions makes the request moot.

5. Request for Stay

Petitioner requests a stay of any decision on their 401 certification application pending a decision on the petitions. As discussed above, petitioner's concerns can be addressed as part of the continuing Section 401 certification review process, and it would be both unnecessary and inadvisable to stay this process. Furthermore, a stay could jeopardize the state's ability to make a timely Section 401 decision. Since the commission has denied these petitions, this request is moot.

Therefore, the request for a stay is denied.

/ / /

/ / /

/ / /

/ / /

/ / /

C. ORDER

It is hereby ordered that the City of Klamath Falls' Demand for Hearing, Petition for Declaratory Ruling, Petition for Rulemaking, Request for Hearing, and Request for Stay are denied.

DATED: October 21, 1985.

On behalf of the Commission

for Harold L. Sawyer
Fred Hansen, Director

ATTACHMENT D

RESOURCE MANAGEMENT INTERNATIONAL INC.

1010 HURLEY WAY • SUITE 500
SACRAMENTO, CALIFORNIA 95825
(916) 924-1534

October 28, 1985

Mr. Fred Hansen, Director
State of Oregon, Department
of Environmental Quality
P. O. Box 1760
Portland, OR 97207

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY
RECEIVED
OCT 28 1985
OFFICE OF THE DIRECTOR

Re: City of Klamath Falls
Application for Section 401
Certification for Salt Caves
Project (FERC Project No. 3313-001)

Dear Mr. Hansen:

By this letter the City of Klamath Falls withdraws its application dated January 25, 1985 for Section 401 certification for the above-referenced project. We intend to file a new application early in 1986.

We decided to withdraw our application partially because we felt the need to undertake further water quality studies. After completion of such studies, currently expected by the end of this year, the City intends to file a new and complete application with you for Section 401 certification.

The City is also withdrawing its application for license with the Federal Energy Regulatory Commission but expects to file a new license application with FERC in May of 1986.

In your Order dated October 21, 1985, pertaining to the City's Demand for Hearing and related Petition you indicated the DEQ staff is currently studying issues raised in such Petition and that EQC will consider the results of such studies at its November meeting. The issues under review related to whether EQC should promulgate new regulations that would be applicable to the construction of hydroelectric projects on the Klamath River between Keno Dam and the Oregon-California border. Your Order indicated concern that any rulemaking undertaken could not be completed in time to be applicable to the City's former Section 401 application. Our action in withdrawing that application and filing a new one in several months should alleviate that

Rec'd 11/21/85
EQC

COMMENTS OF THE CITY OF KLAMATH FALLS, OREGON
TO WORK SESSION OF ENVIRONMENTAL QUALITY
COMMISSION, NOVEMBER 21, 1985

My name is Peter Glaser. I am an attorney with the Washington, D.C. law firm of Duncan, Weinberg & Miller, P.C., 1775 Pennsylvania Avenue, N.W., Washington, D.C., 20006. I am here today representing the City of Klamath Falls, proponent of the Salt Caves Hydroelectric Project and of two petitions before this Commission. The first petition asks the Commission to declare that its water quality standards for the Klamath River between Keno Dam and the Oregon-California border will not be applied to the City's application for certification of the Salt Caves Project under section 401 of the Federal Water Pollution Control Act. The petition also asks the Commission to declare that no land use requirements or other "related requirements" will be considered in judging the City's section 401 application and to declare whether EQC or DEQ is the agency that will take final action on the City's application. The second petition asks the Commission to institute a rulemaking to establish rules that will be applied to the City's section 401 application.

By order dated October 21, 1985, the Commission denied the City's petitions. However, the Commission directed the Department to prepare an analysis of the water quality issues raised in the City's petitions for the Commission's next meeting. In addition, the Commission characterized the City's concerns with the Commission's land use requirements, "related requirements,"

and uncertainty as to whether DEQ or EQC has the final authority to grant or deny a section 401 application as "procedural" issues that would be addressed by the Commission in its ongoing rulemaking process at its November 22, 1985 meeting.

Last Thursday, the City received a copy of the Department's "Analysis of Issues Raised by the City of Klamath Falls in Their Petitions for Declaratory Ruling and Rulemaking." While indicating that the Department intends to propose some new wording in the existing water quality standards, the Department recommended that no substantive changes be made in those standards. Our comments today are addressed to the Department's report, to certain matters raised in the Commission's October 21, 1985 Order, to a document entitled "Consolidated Conservation Parties' Response to the City of Klamath Falls' Petitions for Rulemaking, Declaratory Judgment and Requests for Hearing and Stay of Proceedings," dated October 18, 1985, and to the water quality issues raised in the City's Petitions. At tomorrow's hearing, the City intends to address what the Department has characterized as the "procedural" issues.

Obviously, the City cannot address today all of its concerns with respect to the water quality issues, and our not mentioning any particular matter today should not be taken as a waiver of such matter.

We should state at the outset that we agree with the thrust of the Department's report, that is, that the Commission's water quality standards should be designed to protect the wild trout

population in the Klamath River. Where we respectfully disagree with the Department is on the question of whether those standards are unnecessarily overbroad in achieving the goal of protecting that population. We think that the standards do not allow construction of any reservoir on the Klamath that stratifies, as any significant reservoir inevitably will, and we believe that such disallowance is wrong as a matter of law and unnecessary as a matter of policy.

We have argued in our petitions that section 401 does not give this Commission authority to ban outright significant dams and reservoirs on the Klamath. Nothing in section 401 hints at such a broad authority. In fact, the City does not concede that section 401 gives this Commission any authority to regulate the construction of dams that create reservoirs. The language of section 401 only gives authority to regulate activities causing "discharges." But even if it does give such authority, it certainly does not authorize this Commission, in effect, to ban significant dams and reservoirs outright.

We believe that in determining the reach of section 401, where a hydroelectric project is concerned, that section must be read together with the Federal Power Act. For six and a half decades that Act has been consistently read as giving the Federal Power Commission (today the Federal Energy Regulatory Commission or "FERC") primacy in the matter of power dams. We think it is simply wrong to read section 401 as, in effect, nullifying the authority of FERC when it comes to power dams,

particularly when Congress nowhere hinted that such nullification was intended.

Beyond our reading of the scope of section 401, we do not believe that it is necessary to have standards that preclude construction of thermally stratifying reservoirs in order to proctect the wild trout population in the Klamath. It cannot and should not reasonably be assumed that such reservoirs will result in harm to fish. Standards can and should be promulgated that recognize this fact and that allow a proponent of a reservoir to demonstrate that the reservoir would help, not hinder, fish. Again, we state that we agree with the policies expressed in the Department's report, but we think that the applicable water quality standards can be modified consistent with those policies.

For instance, the Department's report states that most reservoirs in Oregon have dissolved oxygen in their bottom strata in concentrations of 5 mg/l. The corollary is that some reservoirs, in fact, a significant number, have dissolved oxygen in their bottom strata in concentrations of less than 5 mg/l. And some of these support thriving trout fisheries. Our petitions mentioned the Iron Gate and Lost Creek reservoirs in this regard. There are others. The point is that it can be scientifically shown that low concentrations of dissolved oxygen in bottom strata of reservoirs do not preclude thriving trout populations.

In addition, the Department states that the present temperature standard was based on fishery agency recommendations. But we believe that the evidence clearly shows that the current wide temperature fluctuations in the river, caused by water releases

from Boyle Dam, are actually stressful to fish. We believe that the present thermal regime of the river is highly complex, and that the evidence would show that construction of a reservoir would alter that regime in a way that would help fish. Again, the City is simply asking this Commission to promulgate standards that recognize that all stratifying reservoirs are not harmful to fish and which would allow a proponent of a reservoir to demonstrate that fish would be helped, not hindered, by a particular reservoir.

Moving to concerns raised by the Consolidated Conservation Parties, there is much we disagree with in their pleading. Principally, we believe that they misread the extent of authority that section 401 of the Water Pollution Control Act gives this Commission. We simply cannot believe that Congress intended in that section to reverse a half century of regulation of power dams, by vesting plenary authority over such dams in state agencies, without even mentioning such intent in the Act or in its legislative history. We will touch on some of these concerns in our remarks on the "procedural" issues tomorrow.

We would note today that the conservation parties devote a good deal of their brief to a discussion of how a reservoir would impact use of the Klamath River for fish, recreation and hydropower. We believe that the conservation parties make a number of inaccurate statements as to why, in effect, use of the Klamath River for fish and use of that river for a hydropower dam and reservoir are mutually exclusive. We need not argue the complexities of our position here. We ask only that the EQC tailor its standards to allow us to demonstrate our position

in a section 401 certification proceeding.

In addition, we most emphatically disagree with the conservation parties that hydropower is not a designated use of the Klamath River. Their argument in that regard ignores the Klamath River Compact, and we doubt that either Congress or the Oregon legislature intended that the Compact be ignored.

In sum, a review of documents in DEQ's files pertaining to the genesis of EQC's water quality standards clearly shows that those standards were developed for running water. No one ever suggested when those standards were written that they were intended to ban construction of significant reservoirs. We do not believe it can be shown that reservoirs automatically harm fish. The effect on fish of running water and of reservoirs is different, and it is inappropriate to have one standard applied in the same way to both situations. We urge EQC to adopt regulations that recognize this fact and allow a proponent of a reservoir to demonstate factually that his project will not harm fish. We believe, therefore, that EQC should grant our petitions.

Thank you.