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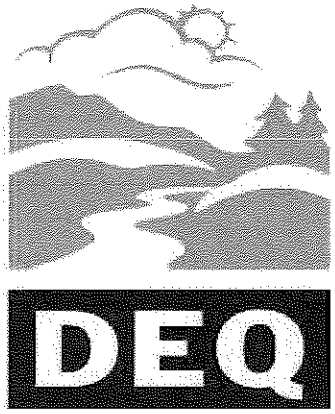
Part 1 of 2

OREGON

ENVIRONMENTAL QUALITY

COMMISSION MEETING

MATERIALS 12/01/1989



State of Oregon
Department of Environmental Quality

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State of Oregon
ENVIRONMENTAL QUALITY COMMISSION

A G E N D A

WORK SESSION -- November 30, 1989

Department of Environmental Quality
Executive Building
811 S. W. 6th Avenue
Portland, Oregon
Room 4A

1:00 p.m. - 1. Stage II Vapor Recovery: Portland Area

2:00 p.m. - 2. Water Quality Rule Amendments: Discussion of Options

NOTE: The Commission may choose to continue discussion of this item at the Regular Meeting on Friday, December 1, 1989, for purposes of authorizing a public hearing on rule amendments.

3:00 p.m. - 3. Strategic Plan: Review of Revisions and Discussion of Next Steps

NOTE: The purpose of the work session is to provide an opportunity for informal discussion of the above items. The Commission will not be making decisions at the work session.

REGULAR MEETING -- December 1, 1989

Department of Environmental Quality
Executive Building
811 S. W. 6th Avenue
Portland, Oregon
Room 4A
8:30 a.m.

Consent Items -- 8:30 a.m.

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

A. Minutes of the October 19-20, 1989, EQC work session and regular meeting.

B. Civil Penalties Settlements

C. Approval of Tax Credit Applications

D. Commission Member Reports:

- Pacific Northwest Hazardous Waste Advisory Council (Hutchison)
- Governor's Watershed Enhancement Board (Sage)
- Strategic Planning (Wessinger)

Public Forum

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

Action Items

E. Financial Assurance for Solid Waste Sites: Proposed Temporary Rule

F. City of Mt. Angel: Request for Waiver of Dilution Requirement [OAR 340-41-455 (1)(f)]

G. State Revolving Loan Fund: Proposed Adoption of Temporary Rules to Address 1989 Legislative Amendments and Problems Encountered in Initial Program Implementation

H. Plastics Tax Credits: Adoption of Temporary Rules to Implement 1989 Legislative Changes, and Authorization for Hearing on Permanent Rule Amendments

I. City of Milwaukie: Appeal from Hearings Officer's Order

Rule Adoptions

NOTE: Hearings have already been held on these Rule Adoption items; therefore any testimony received will be limited to comments on changes proposed by the Department in response to hearing testimony. The Commission also may choose to question interested parties present at the meeting.

J. Kraft Mill Regulations: Modifications to Correct Deficiencies, Add Opacity Standard for Recovery Boilers, Clarify Monitoring Requirements

K. Storm Water Control: Proposed Adoption of Rules Requiring Permanent Water Quality Control Facilities for New Development in the Tualatin and Lake Oswego Subbasins (OAR 340-41-455 and 340-41-006)

L. Hazardous Waste Fee Rules: Revision of Compliance Fees for Generators and Treatment Storage Disposal Facilities (TSDFs)

M. Underground Storage Tank Program: Adoption of Annual Permit Fee

N. Assessment Deferral Loan Program: Adoption of Interest Rate for 1989-91 Biennium

Hearing Authorizations

NOTE: Upon approval of these items, public rule making hearings will be held in each case to receive public comments. Following the hearings, the item will be returned to the Commission for consideration and final adoption of rules.

O. Pollution Control Tax Credits: Proposed Rule Amendments

P. Woodstove Certification Program: Proposed Rule Modifications to Conform to New Environmental Protection Agency (EPA) Requirements

Q. Solid Waste Fees: Proposed Amendment of Fee Rules

R. Enforcement Rules: Proposed Amendments to Clarify Rules

Informational Items

S. Periodic Report on Compliance with Air Pollution Control Requirements

T. Pulp and Paper Mill Regulatory Issues:

- Status of Individual Control Strategies (ICS's) and permit modifications for existing pulp and paper mills.
- Review of options for securing current information on world-wide developments pertaining to pulp and paper mill processes and regulation.
- Consideration of modification of water quality standards to include sediment standards and standards for chlorinated organic compounds related to chlorine based pulp and paper mills.

U. Status of Interstate Estuary Study for the Columbia River.

Because of the uncertain length of time needed, the Commission may deal with any item at any time in the meeting except those set for a specific time. Anyone wishing to be heard on any item not having a set time should arrive at 8:30 a.m. to avoid missing any item of interest.

The next Commission meeting will be Friday, January 12, 1990. There will be a short work session prior to this meeting on the afternoon of Thursday, January 11, 1990.

Copies of the staff reports on the agenda items are available by contacting the Director's Office of the Department of Environmental Quality, 811 S. W. Sixth Avenue, Portland, Oregon 97204, telephone 229-5395, or toll-free 1-800-452-4011. Please specify the agenda item letter when requesting.

State of Oregon
Department of Environmental Quality Memorandum

Date: November 22, 1989

To: Environmental Quality Commission

From: Fred Hansen

Subject: Strategic Planning

Attached are two documents for your review in preparation for the Work Session discussion on Strategic Planning on Thursday, November 30, 1989:

Strategic Plan & Planning Process (11/20/89 Draft)
This document incorporates revisions suggested at the October Retreat into the Fundamental Assumptions, Mission, and Goal Statements that are part of the Strategic Plan.

Discussion Topics (11/22/89 Draft)
This document presents Department ideas on potential high priority issues that need to be discussed in light of potential incorporation into the Strategic Plan.

We need your review of the revisions made by staff in the Strategic Plan & Planning Process draft to be sure that we have captured the intended changes.

Division Administrators will be prepared to supplement the brief information in the Discussion Topics draft during the work session.

FH:l

11/20/89 Draft

Environmental Quality Commission
Department of Environmental Quality

Strategic Plan & Planning Process

INTRODUCTION

On October 18, 1989, the Environmental Quality Commission and the senior managers of the Department of Environmental Quality met to further develop a Strategic Plan for the Agency. This document is intended to reflect the portions of the Strategic Plan for the Agency that have been agreed upon to date. (As used in this document, the term "Agency" refers to both the Commission and the Department.)

The goal of strategic planning (strategic thinking) is to make critical decisions wisely, not to produce plans. Strategic planning focuses on big issues, on areas where key results are essential. The process is not concerned with "nuts and bolts", routine allocation of resources, or with details of the agency's day-to-day operations; rather it channels the thinking of all top-echelon managers. Strategic Planning focuses on a short and medium range time span. It is as much a process as a product; it is dynamic. Strategic Planning is fundamentally an art rather than a science. Strategic Planning is the art of being extremely sensitive to the environment surrounding the Agency, and reacting swiftly to changing conditions and new information by making a stream of day-to-day decisions that maintain diligent pursuit of the defined strategic goals (directions) of the Agency.

The Strategic Plan is a document which sets forth the Mission and Strategic Goals of the Agency. The document is <u>short</u>, and provides an effective means to communicate the "framework" which will help to guide day-to-day decisions, evaluation of progress, and "budgeting and planning" for the near term operation of the operating units of the Agency. The Strategic Plan becomes a primary yardstick for measuring and evaluating Legislative Concepts and the Agency Budget Proposal for the 1991-93 Biennium (development of concepts and budgets begins during the late fall of 1989). The Strategic Plan should be reviewed and updated annually.

ASSUMPTIONS

The following assumptions about the future of Oregon and the nature of future environmental issues, and the strategic planning process will have a bearing on the strategic goals and directions for the Agency:

FUNDAMENTAL ASSUMPTIONS

Note: Modifications made in response to discussion at the October Retreat are noted with new text <u>underlined</u> and deleted text ~~lined through~~.

- The population of Oregon will continue to grow <u>at increasing rates</u> (unless the state takes

deliberate effort to discourage or prevent such growth).

- Industrial and economic development will continue to occur at increasing rates (and be encouraged) to provide jobs for Oregon's citizens.

- A change in the nature and mix of industries in Oregon will occur to provide continued employment for existing residents in response to the predictable decline in timber harvest.

- A net migration of citizens ~~from the rural areas of the state~~ to the state and particularly to the urban and suburban centers will continue, placing a growing strain on infrastructure and quality of life in the urban and suburban centers.

- The quality of the ~~outdoor~~ environment in Oregon is the State's most valuable asset. It is cherished by existing residents, and a highly valued feature for attracting productive future citizens to the state.

- The Environment's assimilative capacity is finite.

- Fiscal constraints will continue to limit available funding for new or expanded environmental quality control efforts.

- Environmental regulatory programs will progressively focus more and more upon the **individual** rather than solely upon cities and industries. (***We have met the enemy and it is us!***)

- The demand by the public for more information and more involvement in the deliberations on environmental quality will continue to grow.

- Federal Requirements will continue to have a heavy bearing on the activities of the Agency.

- Technology and information will continue to improve and enhance the capability to monitor and control the quality of the environment.

- The Environmental Quality Commission is a unique form of Government and is able to accomplish some things the Department cannot.

STARTING POINT

The 1989 Legislatively Approved Budget for the Agency, new legislation to be implemented, and the agreements reflected in the State/EPA agreement (grant agreements) have already established major priorities for the Department for the period from July 1, 1989 through June 30, 1991. There is some ability to adjust priorities and reallocate resources, but significant shifts may be difficult if not impossible.

As a result, the major impact of the Strategic Plan for the Agency will be in providing direction for the budgeting and legislative concept development processes for the 1991-93

biennium.

This does not mean, however, that the Strategic Plan will have no impact on the current biennium. A significant part of preparation for the 1991-93 biennium is an evaluation of current activities and priorities and the development of proposals for adjustments that would be reflected in basic operations. The Strategic Plan will guide this evaluation process.

The Strategic Plan will also begin immediately to guide a wide variety of day to day decisions made by agency managers and employees.

WHAT COMES NEXT

Following are suggested next steps which need to be discussed and modified as necessary to reflect a manageable program:

1. EQC/Department agreement on Draft Strategic Goals and Sub Goals, as well as Priority Objectives. (Next review scheduled for November 30, 1989)

2. Opportunity for Review and Input by the Public and Agency Staff. (Where, When, (How yet to be determined.)

3. Revise as appropriate based on further input.

4. Develop individual Operating Plans for each Division. The Senior Managers of the Department will then review operating plan priorities, prepare preliminary proposals for any reallocation of resources, and report to the Commission.

   Note: Operating Plans are internal management documents developed by individual divisions within the Department to guide day to day actions and facilitate achievement of the expectations reflected in the Budget, Federal Grant Agreements, and the Goals of the Strategic Plan. Operating Plans are the subject of discussion and review by Department managers on a frequent basis.

5. Develop Performance Indicators and a system for periodic reporting to the Commission.

   Note: Performance Indicators are measures of accomplishment that are developed, tracked and routinely reported to the Commission and Department managers to provide a clear indication of progress toward meeting the Goals reflected in the Strategic Plan.

6. Develop preliminary legislative concept proposals and budget decision packages for early presentation and discussion with the Commission.

MISSION

Note: Modifications made in response to discussion at the October Retreat are noted with new text underlined and deleted text ~~lined through~~.

The Mission statement is a short, concise statement which indicates the purpose or reason for existence of the agency in very global terms.

~~To~~ The Mission of the Agency is to be a proactive force in the restoration, enhancement, and maintenance of ~~restore, enhance and maintain~~ the quality of Oregon's air, water and land.

STRATEGIC GOALS AND SUB-GOALS

Note: Modifications made in response to discussion at the October Retreat are noted with new text underlined and deleted text ~~lined through~~.

Strategic Goals or Goals identify the direction the Agency seeks to go or identify general results the Agency desires to accomplish over the course of the next few years. The Goal is not specific as to how the desired results are to be accomplished. The Goal statement provides a "sense of direction" which guides the development of major projects or activities as well as the numerous decisions made by Department managers each day.

Sub-Goals are more definitive statements of direction which help to elaborate on what is intended by the Goal itself. Sub-Goals are not intended to limit the scope of the Goal. Sub Goals are not Division or Program specific; they reflect additional detail on agency wide direction.

1. Address environmental issues on the basis of a **comprehensive cross-media** (air, water, land) approach.

- Develop and implement systematic procedures for coordinated, comprehensive permit application evaluation and permit issuance to assure that requirements in one media (air, water, solid waste, hazardous waste) complement the efforts in other media and do not create new problems.

- Develop and implement a process for review of engineering plans, proposals, and actions to assure that "highest and best control technology" is utilized and that planned solutions to environmental problems in one media complement and do not create problems in another media.

- Assure that agency actions and standards are fully protective of health and the environment, are based on uniform acceptable risk factors, appropriately consider cumulative effects of pollutant exposure through various pathways, and provide an

adequate margin of safety.

- Establish a data management system in which ambient environmental data, source emission data, and compliance information from each environmental media are accessible and useful to other media.

- Take the lead in developing inter-agency solutions and approaches to environmental problems.

2. Aggressively **identify** threats to public health or the environment and take aggressive steps to **prevent** problems which may be created.

   - Enhance and expand environmental monitoring to provide essential data for description of current environmental quality, evaluation of identified problems, modeling of environmental impacts of proposed actions, and evaluation of trends in environmental quality.

   - Secure routinely scheduled monitoring of the environment around significant population and industry centers and of emissions from sources which are large enough to have a significant effect on the environment.

   - Track regional/national/international scale technical/social/economic events and trends that may have significant relationships to Oregon environmental trends, programs, and opportunities for preventive actions.

   - Develop enhanced and new capability to perform environmental trends analysis and evaluate varied sources of information to anticipate problems and develop problem-preventive strategies.

   - Train staff to provide technical assistance that is prevention-oriented to sources, consultants, local government planners, and others.

3. Ensure that unallocated assimilative capacity exists through application of **"highest and best" technology** in conjunction with **new and creative tools** and methods for pollution prevention and control.

   - Develop new and improved capability to determine the environmental assimilative capacity in areas/media of concern.

   - Require highest and best pollution control technology.

   - Seek creative ways to minimize emissions beyond levels achieved by use of highest and best pollution control technology.

- Establish a process for determining appropriate use of currently unused assimilative capacity.

4. Minimize the extent and duration of excess releases to the environment through a technically sound compliance program which is **timely**, serves as a **deterrent**, and **prevents** non-compliance from resulting in an **economic advantage.**

    - Review existing permits and revise as necessary to assure that permits are achievable and clearly understood by permittees, and that conflicting or unessential permit conditions are eliminated.

    - Expand the use of continuous emission monitoring and reporting as a means to make more effective use of existing field staff.

    - Improve technical training of agency staff on compliance determination.

    - Enhance the capacity and range of laboratory analytical capability to support field compliance determination.

    - Evaluate the existing allocation of agency resources, and establish priorities that reflect the desired emphasis on compliance.

    - Assess the agency enforcement program on a periodic basis.

5. Promote ~~Create an atmosphere which fosters~~, on the part of the public, an increased awareness of the environment and ~~promotes~~ a personal sense of value and responsibility for a healthy environment.

    - Secure assistance from experts in understanding options for changing attitudes of the public regarding their actions and environmental quality.

    - Develop a broad-based strategy for informing the public of the relationship between their actions and environmental quality, and integrate implementation of this strategy into all agency actions.

    - Explore options for product labeling as a means of fostering awareness of environmental effects of marketplace products.

    - Enhance public involvement.

- Educate the public about the consequences of pollution and what they can do to prevent it.

6. Employ the **highest professional and ethical standards** in dealing with everyone including the public, regulated community, and co-workers.

   - Develop a clear statement of Department values to guide agency actions and attitudes. In part, this statement should reflect respect and appreciation for the views of others, and decisions that are unbiased, objective, equitable, and based upon sound facts.

   - Provide training of all staff to ensure that a consistent approach reflecting established department values is followed in dealing with the public, regulated community, and co-workers.

7. Foster a workplace atmosphere which emphasizes safety; encourages affirmative action; promotes **creativity, pride, enthusiasm, productivity,** active **participation** in the issues; and allows staff members to apply their **fullest capabilities.**

   - Provide adequate time and opportunity for staff to perform quality work.

   - Systematically acknowledge quality work.

   - Promptly address deficient performance.

   - Provide an environment which fosters participation and creativity.

   - Assure a safe work-place through training and effective implementation of safety programs.

   - Continuously strive to meet affirmative action goals.

8. **Streamline** agency programs and activities by identifying and implementing **more efficient** ways to accomplish essential actions and by **eliminating low priority** tasks.

   - Systematically evaluate rules, permits, procedures, policies, and activities to find ways to streamline and find more efficient ways to accomplish the desired results.

   - Identify programs or activities that can more effectively and efficiently be

accomplished by other government agencies and seek to transfer such activities to those agencies.

- Identify and eliminate work tasks which contribute little to environmental quality protection (accomplishing the goals of this plan) so as to free up resource for higher priority tasks.

9. Maximize the effectiveness of the Environmental Quality Commission in achieving Oregon's Environmental goals.

- Be a Proactive force in the development of environmental policy.
- Involve the Commission in environmental policy issues at the earliest opportunity.
- Reduce the number of issues on the Commission Agenda by eliminating items where statute or rule do not require action.

PRIORITY OBJECTIVES

Priority Objectives (Objectives) are specific short-ranged accomplishments that the Agency seeks to achieve. At any time, the various Divisions of the Department are pursuing many objectives outlined in their operating plan. On an Agency-wide basis, however, a small number of high priority objectives are highlighted to assure a focus of attention and success in accomplishment.

The current priority objectives for the Agency are as follows:

1. .....

(To be developed based on further Commission/Department discussions)

2. .....

etc.

Revised 11/20/89

11/22/89 Draft

DRAFT

Department of Environmental Quality

Discussion Topics

Potential Priority Issues for the Strategic Plan

INTRODUCTION

The purpose of this document is to elicit Commission discussion on potential high priority issues for the Agency, and obtain guidance on priorities for the Strategic Plan.

Division Administrators have discussed program needs and concerns with Division Managers and have identified potential priority issues. Each Division has assumed that on-going work (development and update of standards, pollution control strategy development, permit issuance, pollution control facility plan review, compliance inspections, enforcement, complaint investigation, environmental quality monitoring, etc.) will continue at approximately present levels unless identified as a potential target for modification as part of the issues on these lists.

Division Administrators have also identified items that, although important, are candidates for deferral, modification or elimination in order to be able to assign resources to pursue higher priority issues.

For discussion purposes, the issues are presented below on a program by program basis. It is anticipated that further explanation of the issues will be provided by the responsible Division Administrator at the November 30, 1989, work session discussion.

WATER QUALITY PROGRAM

<u>High Priority Issues</u>

1. Maintain an on-going monitoring system to provide current and comprehensive information on the status of the quality of water throughout Oregon; continue existing monitoring efforts and expand where necessary to provide essential base information for water quality management purposes. (Goal 2)

2. Establish criteria for prioritizing waters of concern, develop a priority list of waters to be dealt with on that basis, approach permitting programs on that basis, and focus enforcement efforts on high-priority waters. (Goals 2 & 4)

3. Assure an awareness of international environmental issues, improve ability to anticipate activities which have the potential to cause environmental problems. Create a technical

advisory group to address the cross media implications of environmental issues. (Goals 1, 2, & 6)

4. Develop volunteer programs for information gathering, education in schools, speakers forums and international information digest, to reduce pollution through public awareness and participation. (Goal 5)

5. Aggressively explore and encourage use of alternatives to in-water disposal of wastes with due consideration for impact on air, land and groundwater quality. (Goal 3)

Candidates for Deferral, Modification, or Elimination

- Establish a wetlands program with water quality assessments and strategies for protection.
- Develop a long-term lake monitoring program.
- Develop a statewide long term estuaries/ocean program.
- Provide major technical assistance to regulated community.

HAZARDOUS AND SOLID WASTE PROGRAM

High Priority Issues

1. Develop consistent cleanup standards at solid waste landfills and facilities regulated by the Resource Conservation and Recovery Act (RCRA) and then identify and have a department approved strategy for cleanup of each problem site under HSW jurisdiction. (Goals 1 & 3)

2. Significantly reduce the disposal of domestic solid waste in the state through an expanded bottle bill, adoption and implementation of recycling goals and standards and improved markets for recyclables. (Goal 2)

3. Significantly increase the percent of domestic solid waste being disposed in landfills with state-of-the art technologies such as double liners and leachate collection through development and enforcement of new solid waste disposal standards. (Goal 3)

4. Significantly reduce the amount of hazardous waste generated in the state through comprehensive implementation of the 1989 Toxic Use Reduction and Hazardous Waste Reduction law and enhanced technical assistance to ensure proper waste management. (Goals 3 & 4)

5. Develop and implement comprehensive strategies to reduce the generation of special wastes and manage the special wastes that are generated. (Special wastes include household

hazardous waste, waste from conditionally exempt hazardous waste generators, incinerator ash, batteries, infectious waste, oil contaminated wastes, etc.) (Goal 2)

Candidates for Deferral, Modification, or Elimination

- Solid waste compliance inspections except during permitting and plan review.
- Department monitoring of groundwater at solid waste disposal sites (require self monitoring instead).
- Wood waste disposal permitting and plan review.
- Compliance and enforcement of recycling laws.
- Work on used oil recycling.
- Hazardous waste compliance and enforcement work which exceeds requirements to maintain delegated program.

ENVIRONMENTAL CLEANUP PROGRAM

High Priority Issues

1. Enhance the cleanup process to include a non-complex cleanup program (with an appropriate regional component) that will promote voluntary responsible party audits and cleanups with limited DEQ oversight. (Goal 8)

2. Aggressively pursue responsible parties to ensure the use of their resources wherever possible to achieve timely cleanups and attain a goal of recovering at least 75% of DEQ expenditures for oversight of these cleanups. (Goal 4)

3. Complete rulemaking on criteria and procedures for the Confirmed Release List, the Site Inventory, Preliminary Assessments and the Hazard Ranking System and implement on an agency-wide basis. (Goals 1 & 2)

4. Secure funding for orphan site cleanups by receiving E-Board approval to sell Pollution Control Bonds to clean up one or more specific sites. (Goals 1 & 2)

5. Ensure implementation of Health & Safety Plan throughout ECD, Regions and Laboratory to provide proper protection of employees that may come in contact with hazardous substances. (Goal 7)

6. Implement the Business Planning Project for ECD to provide basic data management support for the program. (Goals 1 & 8)

Candidates for Deferral, Modification, or Elimination

- Natural resource damage assessments.
- Financial assistance in the form of loans and loan guarantees to needy responsible parties.
- Remedial action at solid waste disposal sites.
- Assistance or oversight for most responsible parties requesting such assistance.
- Will not define an "unwilling" responsible party under HB 3515 and will not use the "non-binding review" provision of HB 3515.

AIR QUALITY PROGRAM

High Priority Issues

1. Ensure revenues are sufficient to achieve air quality goals through the establishment of fees proportional to the impact upon the environment (industrial emission fee, increase to vehicle registration, fees on retail sale of cordwood and woodstoves, etc.). (All Goals)

2. Achieve healthful air quality levels in all pre-1989 nonattainment areas and maintain healthful levels in all attainment areas while, at the same time, accommodating increased emissions from economic development. (Goals 2, 3, &4)

3. Establish a system to periodically assess the ambient air quality within population centers of 5,000 or more residents within the state of Oregon. (Goal 2)

4. Establish an air toxics program which, through the permit process, addresses both new and existing sources and provides a level of protection equal to that of other environmental media. (Goals 1 & 2)

5. Develop improved methods to achieve reductions in area source emissions such as: public education, consumer product labeling, emphasis on pellet vs cordwood heating systems, etc. (Goals 3 & 5)

Candidates for Deferral, Modification, or Elimination

- Responses to issues which are solely nuisance in nature.
- Woodstove certification program; defer to the national certification program.

- The visibility protection program or the noise program.

DEPARTMENT-WIDE ISSUES

High Priority Issues

1. Restructure Compliance Inspection Program to base the inspection frequency and level of effort on the perceived environmental threat posed by the source (implement the Priority Matrix). (Goal 4)

2. Develop a comprehensive data management system that supports management decision making and facilitates exchange of information between Department programs and other agencies. (Goals 1 & 2)

3. Streamline the permit issuance process and eliminate the backlog of pending permit applications. (Goals 1 & 8)

4. Develop and implement new initiatives for informing the public about actions they can take to reduce pollution. (Goal 5)

5. Provide training and development opportunities for agency staff to assure a highly qualified and knowledgeable staff and to facilitate response to the public. (Goals 6 & 7)

6. Develop options for stable long term funding for the management and regulatory efforts that are necessary to achieve state environmental protection goals. (All Goals)

11/22/89

Approved ____
Approved with corrections ____
Corrections made ____

MINUTES ARE NOT FINAL UNTIL APPROVED BY THE EQC

ENVIRONMENTAL QUALITY COMMISSION

Minutes of the One Hundred and Ninety-Ninth Meeting,
October 18-20, 1989

Strategic Planning Retreat

October 18-19, 1989

The Commission and senior managers of the Department of Environmental Quality met on October 18, 1989, beginning at 11:30 a.m. in Room C-106, Commons Building, Marylhurst College, for the purposes of working on a strategic plan for the agency. The planning session recessed at about 4:30 and reconvened on October 19, 1989, at about 9:30 a.m. and adjourned shortly before 2:30 p.m.

Work Session

Thursday, October 19, 1989

The Work Session was convened at 2:45 p.m. in Room C-106, Commons Building, Marylhurst College. Environmental Quality Commission members present were Chairman Bill Hutchison, Vice Chairman Emery Castle and Commissioners Bill Wessinger, Genevieve Sage and Henry Lorenzen. Also present were Larry Edelman of the Attorney General's Office, Director Fred Hansen of the Department of Environmental Quality and Program Staff.

Item 1. Enforcement Rules - Discussion of Implementation Experience

The purpose of this discussion was to provide the Environmental Quality Commission with a summary of the Department of Environmental Quality's experience in implementation of the revised enforcement rules adopted in March 1989, and to advise the Commission of future actions.

Tom Bispham, Regional Operations Administrator, introduced Yone McNally and Van Kollias of the Department's enforcement staff. Mr. Bispham noted that the purpose of the March rule amendments was to improve statewide consistency and predictability in enforcement actions. Major additions were the Notice of Noncompliance and the Civil Penalty Matrix. Training sessions were held in each regional office to acquaint staff with the modified rules. Guidance on standardized wording for Notices of Noncompliance as well as a new enforcement referral form was provided. A computerized enforcement tracking system is being implemented to enhance followup capabilities.

Mr. Bispham also advised that the Department is working on a standardized Notice of Investigation

form that can be left with the source at the time of an inspection. This form would notify of any needed immediate corrective action and the potential for further enforcement.

Mr. Bispham stated that the Department has identified further changes that need to occur in the rules (within the body of the staff report). These changes include the addition of new classes of violations, the incorporation of field burning violations in the classification of air quality violations and the inclusion of some volatile organic compound violations into the system, and the underground storage tank program in that class. The Department would also like to incorporate settlement criteria into the rule so as to make clear to the regulated community what the Department's settlements are based on. Mr. Bispham noted that this item would be brought back to the Commission for hearing authorization, and concluded by expressing his view that the implementation experience has been a positive one. He stated that the direction the Department will be taking is much clearer, and that he felt the "bugs" related to increased workload and need for more help would be worked out in time.

Chairman Hutchison asked for comment from **Tom Donaca** of Associated Oregon Industries (AOI) on the program and its effectiveness. Mr. Donaca responded that the program is fair and consistent, and that it has come as a shock to some people. He stated that he didn't feel that the program has been overly abrupt or stringent.

Commissioner Sage asked if the increase in civil penalty assessments has resulted in a proportional increase in contested cases. Van Kollias responded that the number of contested cases has increased. He explained that all of the notices that go out give the opportunity for the violator to have an informal discussion with the department. These informal discussions often pave the way for settlement or mitigation of the penalty before significant resources are expended on the contested case.

Item 2. Oregon's Municipal Sludge Management Program

The purpose of this discussion was to describe DEQ's existing sludge management program and program needs and to summarize existing and proposed federal sludge regulations. The proposed federal regulations will affect future program delegation of the sludge management program from the Environmental Protection Agency (EPA).

Water Quality Division staff provided an informational report on the Department's domestic sewage sludge management program and program needs. **Mark Ronayne**, Sludge Management Coordinator, delivered a slide presentation as part of the report.

The Department intends to request authorization from the EQC in the winter of 1990 to hold hearings to modify rules to increase source permit fees to recover the costs of increased assistance and oversight of sludge management activities.

Regular Meeting

October 20, 1989

Marylhurst College
Administration Building, Room 200
Marylhurst, Oregon

The Environmental Quality Commission meeting was convened shortly after 8:30 a.m. In attendance were Chairman Bill Hutchison, Vice Chairman Emery Castle, and Commissioners Wessinger, Sage and Lorenzen. Also in attendance, from the Department of Environmental Quality were Director Fred Hansen, Assistant Attorney General Michael Huston and DEQ Program Staff.

NOTE: Staff reports presented at this meeting, which contain the Department's recommendations, are on file in the Office of the Director, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204. Written material submitted at this meeting is made a part of this record and is on file at the above address.

CONSENT ITEMS

Agenda Item A: Minutes of the September 8, 1989 EQC meeting

It was MOVED by Commissioner Wessinger that the minutes be approved as written. The motion was seconded by Commissioner Sage and passed unanimously.

Agenda Item B: Civil Penalty Settlements

The following proposed civil penalty settlement agreements were presented for the Commission's consideration and approval:

a. WQ-CR-89-51, Holland Dairy, Inc.
b. AQOB-WVR-89-49, Dennis Bevins
c. AQOB-SWR-89-61, John H. and Sylvione A. Kohansby, dba/Rogue Villa Trailer Park

Director Hansen, in opening comment, stated that the proposed civil penalties were self-explanatory, but that the one for Holland Dairy required some comment. The Department believed when the facts were being gathered that an intentional violation had occurred. Upon further review and discussion with the Attorney General's office, issues were pointed out that made it difficult to prove the intentional nature of the violation as opposed to being a case of negligence.

As a result, the settlement was consistent with the strongest case the Department believed it could sustain.

It was MOVED by Commissioner Wessinger that the Department's recommendation be approved. The motion was seconded by Commissioner Castle and passed unanimously. The settlement agreements were signed by the Commission.

Agenda Item C: Tax Credits for Approval

The Department presented recommendations that four applications for tax credit be approved as follows:

T-2828	Larry M. Neher, Inc., for a Straw Storage Building
T-2860	Lloyd Kropf, for a Straw Storage Building
T-2914	McLagan Farms, Inc., for a Straw Storage Building
T-2969	Far West Fibers, for a Clark Industrial Forklift

Director Hansen noted that these tax credit applications were all routine in nature, and no different from other past tax credit applications.

It was MOVED by Commissioner Sage that the Department's recommendation be approved. The motion was seconded by Commissioner Castle and passed unanimously.

Agenda Item D: Commission Member Reports

Chairman Hutchison noted that in the interest of time, agenda item D would be dispensed with. He explained that DEQ staff and the Commission were currently involved in a strategic planning process and draft results would be available for public comment in the near future.

PUBLIC FORUM

Linda Williams, Attorney representing Local 290, stated that it is the responsibility of the EQC and the Department to ensure that all of its permits are issued in compliance with comprehensive land use plans acknowledged by the Land Conservation and Development Commission. She reported that Columbia County's comprehensive land use plan is out of date with respect to earthquake hazards under statewide goal number seven, and does not address storage of toxics in a hazard zone. Ms. Williams urged the Commission to review its duties for land use compatibility under OAR 660-31-025(d) as it relates to expansion and siting of pulp mills in Columbia County.

Ronald Knight, representing Local 290, Plumbers and Steamfitters Union, stated that Boise Cascade Corporation is expanding paper production at the St. Helens Pulp and Paper Mill, and

this expansion will result in increased discharges to the air and sewer. Mr. Knight expressed concern that the expansion was being undertaken without appropriate permits and without public input.

David Cupp, also of Local 290, offered further testimony in regard to the St. Helens Boise Cascade pulp and paper mill, and urged DEQ to review Boise Cascade's plans with the view of issuing an air contaminant discharge permit. He also voiced concerns about Continental Lime discharging into Boise Cascade's effluent to the St. Helens sewer system.

Chairman Hutchison asked that the Commission be brought up to date with what has been taking place in regard to permits for Boise Cascade. **Nick Nikkila**, Air Quality Administrator, reported that Boise Cascade is installing a more efficient electrostatic precipitator, and that no increase in emissions will occur. **Peter Wong**, Industrial Waste Engineer, reported that Boise Cascade does not have a wastewater discharge permit from DEQ, as they discharge into the City of St. Helens system, which is permitted by DEQ.

Matt Walters, business manager of Local 290, offered comments to the Commission in regard to the proposed permit for WTD Industries, Inc. (WTD). He urged that existing mills be required to limit their pollution to the Columbia River before authorizing a permit for the discharge of new pollutants into the river by any new source. He also stated opposition to the building of a new pulp mill by WTD on the basis that WTD's owner uses non union workers.

Agenda Item E: New Source Approval - Proposed WTD Pulp Mill on the Lower Columbia River

This agenda item was being brought before the Commission for the third time. The Commission had requested at the September 8, 1989 EQC meeting that the Department return to the Commission at its following meeting with further staff analysis on rule interpretations and other issues to assist in its deliberations on WTD Industries, Inc. proposed new Port Westward Mill wastewater discharge permit. This staff report was a result of the Commission's request.

The Department recommended that the Commission authorize a new discharge from a bleached kraft pulp mill to the Columbia River subject to the following conditions:

a. State of the art production and pollution control technology will be installed to minimize the production of 2,3,7,8 tetrachloro-dibenzo-p-dioxin (TCDD) and other chlorinated organic compounds to the greatest degree practicable.

b. Chlorine dioxide must be substituted 100 percent for chlorine in the bleaching operation unless the applicant can demonstrate to the Department that a lesser substitution amount is the highest possible.

c. The applicant will agree to install such further equipment or make such further modifications as may be necessary to meet its wasteload allocation within three years after the Environmental Protection Agency (EPA) has established a Total Maximum Daily Load (TMDL) for TCDD for the Columbia River and allocated the load to the individual sources. The timetable for compliance may be subject to modification if the EQC determines that the three year time frame is not achievable.

d. The applicant agrees to implement, or join in implementation, of a research and development program to develop additional means for reducing TCDD in the mill effluent.

e. An approach is developed to require existing bleached kraft pulp mills in Oregon to proceed to install state-of-the-art production and pollution control technology to reduce present discharges of TCDD to the greatest extent practicable and eventually, to a level to meet water quality standards.

f. EPA approves this overall approach for Oregon--both for the existing mills and for a new mill.

Lydia Taylor, Water Quality Administrator, updated the Commission with a summary of information and actions since the last meeting as follows:

(1) The Department did not list the Columbia River at the point of the proposed WTD discharge as being water quality limiting for TCDD (this was not clear in the July staff report); therefore, the Department believes the Commission is not precluded from making a decision under existing rules;

(2) The Columbia River is an interstate stream; it would be possible for Oregon to deny a discharge based on water quality concerns while Washington could proceed to approve a similar discharge; the Department is unable to conclude that there is a basis for a moratorium on approval of new or expanded pulp mills based either on the quality of the water column or the sediment; the Department is also unable to conclude that it is appropriate to defer a decision pending action by EPA;

(3) Pope & Talbot is proposing a program to comply with the proposed Individual Control Strategy (ICS) by 1992;

(4) James River has a study underway to determine the approach for compliance with their ICS; compliance is expected by 1992;

(5) The Department will meet soon with Boise Cascade to discuss actions necessary to come into compliance with the ICS;

(6) The Oregon mills do not agree with Oregon's TCDD standard; the Department has advised all that implementation must proceed;

(7) The State of Washington agrees with the approach of requiring that TCDD be not detectable in the bleach plant effluent;

(8) Washington mills will be required to comply with ICS's by June 4, 1993;

(9) Boise Cascade in Wallula, Wn. has changed defoamers which will reduce TCDD production by about 40% and has requested a wasteload increase from Washington Department of Ecology; it will have to come into compliance on TCDD in order to receive a waste load increase;

(10) Longview Fiber in Longview, Wn. has requested a minor permit wasteload increase, and will have to compliance by June 4, 1993 to receive the increase;

(11) Weyerhaeuser in Longview is expected to request a wasteload increase for a proposed newsprint recycling facility with the effluent to be combined with the existing bleached kraft facility; Washington DOE considers this expansion to be a separate issue from TCDD issues; DEQ has asked DOE to reconsider since effluents would be combined;

(12) Washington DOE has not yet had any discussions with the James River in Camas, Wn. facility regarding compliance with TCDD requirements;

(13) The Potlatch facility in Idaho is permitted by EPA; DEQ has been unable to determine current compliance plans for this facility.

In response to a question from Commissioner Lorenzen, Ms. Taylor noted that 85% of the 43-44 milligrams per day of TCDD currently discharged to the Columbia River comes from mills outside Oregon. When compliance with ICS's is achieved in 1993, the level would drop to about 3.6 milligrams per day of TCDD. The 3.6 milligrams would be about 54% of the level the river could accommodate without violating the 0.013 parts per quadrillion standard. These numbers assume no attenuation of TCDD in the river (all remains in the water column) and that pulp and paper mills are the only significant source of TCDD discharged.

Commissioner Lorenzen asked for additional information on the issue of sediment standards. Ms. Taylor indicated that EPA was working toward sediment standards, but their timelines were unknown. She also noted that DEQ is working with the Corps of Engineers on sediment standards for heavy metals (as it relates to disposal of dredge spoils). She also noted that EPA is collecting sediment samples for TCDD analysis from the Columbia River, and that data will not be available for several months.

Commissioner Castle asked for some elaboration on desirable rule amendments mentioned in the staff report. Ms. Taylor indicated that experience in this case and initial indication of concerns in

other situations coming before the Department suggest the need for possible rulemaking in at least three areas:

a. There is currently no rule language to define the term "water quality limited" or to specify the process used to classify a stream segment as "water quality limited". The Department has assumed that listing in the "305(b)" report, which federal law requires the department to file with EPA every 2 years, is the process for designation.

b. There is currently no rule to define how an interstate stream will be handled, particularly if the adjacent state's determinations or decisions are different from Oregon's.

c. The recently adopted rule establishing criteria for approving new or increased loads may be a barrier to approving actions that would improve water quality in a logical and cost effective way. For example, a small community has been urged to remove their discharge from a stream during the summer months when water quality standards are currently violated (i.e. the stream is water quality limiting). The community proposes a facility that would store effluent during the summer and discharge it during the winter when stream flows are high, and water quality problems would not be created. This would require approval of an increase in the allowable discharge load during the winter months. If the stream is designated water quality limiting, the current rule would appear to prevent approval of the winter time load increase required to implement the proposal to improve water quality.

Commissioner Castle asked for elaboration on the Department's conclusion that the Commission can make a final determination on the WTD request. Ms. Taylor noted that if the Columbia River was designated water quality limiting at the point of discharge, the existing rule would not allow the Commission to approve a load allocation for a new source. However, the Department has not classified the Columbia as water quality limiting at the point of the proposed WTD discharge, therefore the Commission is not prevented from approving the proposal.

Chairman Hutchison asked how the Department would propose to pursue the potential rule changes mentioned. Ms. Taylor indicated the department would follow the normal process of developing draft rule language, bringing the matter to the Commission for discussion and hearing authorization, and proceeding to hearing and final consideration by the Commission.

Chairman Hutchison noted that EPA considers the entire lower Columbia River to be water quality limited and questioned if an approval could be granted, particularly if the Department was relying on EPA for assistance. He requested comment on 3 potential options for action as follows:

1. Grant approval conditioned upon the river being removed form the water quality limited list (programs implemented to reduce TCDD levels sufficiently to remove from the list).

2. Deny approval and revisit the issue when conditions change.

3. Grant approval conditioned on the river either being not water quality limited or, if it is still water quality limited, that final load allocations have been made, and the reason the river is not in compliance is that other sources are not in compliance with their load allocations.

Ms. Taylor noted that the Department normally would issue a permit to construct and operate a facility consistent with the load allocation approval of the Commission. If approval were granted under the conditions noted, the Department could prepare an appropriately conditioned permit. A question remains, however, on who would make the decision that the river is no longer water quality limited. Director Hansen noted that EPA's role is to approve a state decision to designate a stream as water quality limited, and that EPA does not technically have to make the decision.

The Chairman then began to call persons who had signed up to testify.

Joe Schultz, representing the Port of St. Helens and the St. Helens Chamber of Commerce, testified that they are on record for approving the construction of a WTD mill. They advocate economic development, but not environmental pollution, and feel it is not fair to deny WTD a permit because of the polluting discharges from currently operating pulp mills on the Columbia River. He felt the permit conditions were realistic and that the Commission should separate the issue of enforcement of limits on existing mills from the approval of a new mill.

Patrick Simpson urged the Commission not to finesse the rule to make a decision. If necessary, the rule should be modified or repealed.

Nina Bell, Northwest Environmental Advocates, testified that the Columbia is water quality limited and that under the rules, the Commission should deny the request. **Karl Anuta**, representing Northwest Environmental Defense Center, suggested that the burden of proof that the proposal will comply with all standards should rest on WTD.

Michael Axline, representing Western Natural Resources Law Clinic, stated that substantial evidence does not exist in the record to support a conclusion that water quality standards will be met with the WTD proposal. Further, evidence in the record suggests that wildlife beneficial uses may be adversely affected. Thus, the record does not support the findings required by Commission rule. Commissioner Lorenzen stated that he believed a finding that beneficial uses would not be adversely affected by the WTD discharge could be made. He noted that the amount of dioxin in WTD's proposed discharge would be less than one percent of the amount currently discharged by existing mills, and would not have a significant or measurable affect on beneficial uses. Director Hansen noted that beneficial uses are considered protected if standards are met; you get to the beneficial use question if there is no standard for a pollutant parameter, or if new evidence suggests the standard is inadequate.

David Walseth, representing WTD, stated that the Commission had a policy choice to make. The Columbia River clearly has a water quality problem. The proposed WTD mill is part of the solution, not part of the problem. The company has agreed to permit reopeners to enable addition

of any new requirements that may later be determined necessary to protect water quality. However, they can't agree to an open ended permit. They will agree to delay startup of the mill to June 1993, however. He further noted that the EQC rule is ambiguous, and that is not an uncommon problem. It requires best analysis of available information and wise discretion to reach a fair decision.

Commissioner Lorenzen commended WTD for embracing new technology and for their cooperation. He expressed concern, however, for the wording of the Commission rule and the Department's statement that the Columbia was not declared water quality limiting at the point of the proposed WTD discharge. He felt the data suggests that the dioxin level may be above 0.013 parts per quadrillion, and asked if WTD had a comment. **Patrick Parenteau**, Attorney representing WTD, responded that, as a matter of law, the stream at the point of the proposed WTD discharge is not water quality limiting. DEQ did not classify it as water quality limiting, and EPA has approved DEQ's action.

Chairman Hutchison stated that he was leaning toward a decision that was conditioned on the river not being water quality limited. Mr. Parenteau responded that such a condition was too open ended and would make it impossible for the company to obtain financing for their project without a firm allowable operating date. That is why they have agreed to defer their proposed startup date to June 1993 which is the federal deadline for all existing mills to be in compliance with their Individual Control Strategies.

Doug Morrison, Northwest Pulp & Paper Association, reviewed dioxin reduction activities of other currently operating mills and stated that the industry has been cooperative.

Chairman Hutchison closed the public testimony, and noted for the record that the Commission had received a request from the Joint Interim Committee on Environment and Hazardous Materials to defer a decision on the WTD proposal until the Committee had a chance to hold a public hearing. In response, Chairman Hutchison stated that he had encouraged the committee to go ahead with their process, but it was appropriate for the Commission to move to a decision as soon as possible.

Chairman Hutchison asked Michael Huston to comment on the state of the record with respect to the substantial evidence test and the findings required by the Commission rule. Michael Huston responded that there is a plausible, reasonable legal argument with the present record that the river is not listed as water quality limiting. However, the Commission is not bound to reach that conclusion and could conclude the opposite. Mr. Huston also stated that the Commission must conclude compliance with standards and beneficial uses. He noted that the record does not look impressive to lawyers because it is not a trial or contested case record, but that there is nothing to compel that this proceeding be a contested case. Mr. Huston also noted that the Commission is legally compelled to do the following:

1) Interpret the law correctly. (The courts will typically show deference to the Commission's interpretation.)

2) Support factual conclusions with substantial evidence. (This is typically done in the form "We make this 'factual conclusion' because we find 'these facts'.)

Commissioner Sage reminded the Commission that there are other sections of the rule that must be addressed in addition to the findings that are being discussed. She noted that the total rule deals with apportioning unused assimilative capacity if it exists; that the rule does not create capacity. Chairman Hutchison asked Michael Huston to comment on the appropriateness of an approval that was conditioned to be effective at a point in the future when unused assimilative capacity became available. Mr. Huston indicated he was not troubled by such a condition. Commissioner Sage stated that there is no unused assimilative capacity and will not be any. Director Hansen noted that the purpose of the rule is to deal with allocation of unused assimilative capacity whenever it may exist and that implementation of the Individual Control Strategies by 1993 will restore unused assimilative capacity for TCDD in the Columbia River.

Chairman Hutchison asked if there is a chance of adding the entire lower Columbia to the list of water quality limited segments in the April 1990, 303(b) report. Lydia Taylor responded that the Department cannot tell at this point. All available information will be reviewed including new data, and information on the potential for attenuation in the river.

Chairman Hutchison then asked the Department to outline the basis for a conclusion that water quality standards would not be violated by the proposed WTD discharge. Lydia Taylor noted that part of the basis would be that no information is available to support a conclusion that standards are or will be violated. Director Hansen added that processes underway by EPA to develop the TMDL and waste load allocations will bring loads into compliance, that the new discharge will not occur until the river is in compliance in 1993, that a process is in place to assure implementation of the waste load allocations, and that if the river was not in compliance by 1993, it would be because existing sources had not complied with their waste load allocation, not because of the new load allocation.

Chairman Hutchison then asked the Department to outline the basis for a conclusion that beneficial uses will not be threatened. Lydia Taylor responded that the Department has reviewed available information and has found no specific studies that present information that would support a conclusion that the added discharge would adversely impact beneficial uses. Director Hansen added that the purpose of standards is to protect beneficial uses, and that standards adopted by the Commission were based on guidance information provided by EPA.

Commissioner Wessinger asked if EPA took the objections of the U.S. Fish and Wildlife Service (USFWS) relative to potential dioxin impacts on wildlife into account in their guidance. Director Hansen stated that EPA guidance was developed prior to the USFWS comments. Lydia Taylor indicated that the 0.013 parts per quadrillion TCDD standard is based on protection of human health.

Chairman Hutchison noted that evidence in the record suggests that the wildlife beneficial use

would not be protected. Lydia Taylor stated that those comments were on a permit proposal, that the comments requested review and more stringent provisions, and that the proposed permit has since been modified to contain more stringent provisions.

Chairman Hutchison then asked the Department to outline the basis for the conclusion that the third factor in the rule could be met. Lydia Taylor noted that the Department did not classify the Columbia at the point of the proposed discharge as water quality limiting. Director Hansen added that proposed conditions of approval would not allow discharge until compliance was achieved in 1993, thus there would be no discharge if the river was classified.

Chairman Hutchison asked Michael Huston if a negative statement met the requirements for substantial evidence. Mr. Huston stated that it would be legally insufficient.

Pat Parenteau, then commented on the USFWS letter in the record. These comments were made on the Dredge/Fill permit application to the Corps of Engineers. They are presently in a consultation process to resolve issues regarding protection of the Bald Eagle and other wildlife. USFWS can veto the issuance of the Corps Fill and Removal permit if there is any threat from the project to the Bald Eagle under the endangered species act. Michael Axline expressed concern about other organo-chlorine compounds and stated the view that the record compels the finding that standards would be violated. Karl Anuta also stated the view that the required findings cannot be made.

Chairman Hutchison expressed the view that he would like to approve the proposal but was not sure how it could be done. Commissioner Castle noted that reasonable people can disagree on application of the rules. If the Commission takes a static point of view, it can and should deny the request. But, if the Commission views the situation as dynamic and recognizes the other sources, the interstate stream, the improvement that may result from approval of the new source and the new technology subject to the conditions outlined, and does not abdicate its responsibilities to others, a different conclusion can be reached. Commissioner Sage noted that the rule lists conditions, and it is not appropriate to place conditions upon the conditions.

Chairman Hutchison asked if WTD would be permanently eliminated by a decision not to approve the discharge. Director Hansen noted that WTD could reapply at any time. However, to be a player in the waste load allocation process, they need some form of approval.

Commissioner Lorenzen stated that he believes the necessary beneficial use protection finding can be made. He noted that the wording of the rule would require the finding that the new source would not cause the beneficial use to be threatened. He explained that the present 43-44 milligrams per day of TCDD from existing mills is substantial; that the proposed new source would add less than one percent to that and that would not be a significant addition. However, he was troubled by the wording of the current rule which apparently prevents the approval of a proposed new source who is willing to agree to stringent controls, live up to the highest standards, and do the right thing. He indicated he would like to send a strong message of approval, but would have to condition that approval to allow no discharge until the river is not water quality limiting to

comply with the rule. He also stressed the need to revisit the rule.

Commissioner Sage asked Michael Huston if it is possible to place further conditions upon existing rule conditions. Michael Huston replied that he was not troubled by that if the conditions accomplish the result that the requirements are met.

It was then MOVED by Commissioner Wessinger that approval be denied for the proposed new wastewater discharge for WTD Industries. Commissioner Wessinger stated that the motion was based on the view that approval is not possible under existing Commission rules. The motion was seconded by Commissioner Sage. Chairman Hutchison asked Director Hansen to call the role. Commissioners Wessinger and Sage voted "Yes", Commissioners Castle and Lorenzen voted "No." Chairman Hutchison broke the tie with a "Yes" vote, thus denying approval of the proposed new discharge.

Chairman Hutchison urged DEQ to get on with the business of bringing the Columbia River into compliance with water quality standards, and WTD to help move that process along and to participate in the process of taking a second look at the rule via public hearings and continued interest. He stated that although he was of the same school of thought as Commissioners Castle and Lorenzen, he could not see that the EQC had a good enough record on the beneficial use issue to make a decision to approve at this time.

Chairman Hutchison called for a 30-minute lunch break, at which time **Commissioner Castle** announced that due to pressing personal business, it was necessary for him to leave.

When the meeting reconvened, Chairman Hutchison asked for comment from Director Hansen about other situations in which new or increased load approval rule will come into play. Director Hansen responded that the Department is anticipating others situations like that of WTD, and that previous discussions led the Department to believe that some rule changes should be considered. Commissioner Wessinger proposed that this issue would be a good one to consider in the work session setting. Chairman Hutchison asked Lydia Taylor if she could have some ideas in writing for proposed draft rules by November 30, 1989, and some options that the Commission could consider. Ms. Taylor responded that the Water Quality Division would be happy to have an informational discussion at that time.

In response to a question by Chairman Hutchison, Director Hansen stated that the rulemaking process generally takes about six months from start to finish, depending on how complicated it is.

Agenda Item F: Site Inventory Listings - Proposed EQC Order Dismissing Contested Case Proceedings

Director Hansen presented background historical information about the 1988 Proposed Inventory of Hazardous Substance Release Sites and the amendments enacted by the 1989 legislature in response to proposals by DEQ, Oregon State Public Research Interest Group (OSPIRG) and

Associated Oregon Industries (AOI). The amendments created a new process for preparing an Inventory. In response to the amendments, the Department was proposing to dismiss all contested cases associated with the site inventory.

Commissioner Lorenzen expressed concern over the wording of the proposed order. He stated that he believed the wording proposed in the supplemental staff report should be changed to include "without prejudice to any party". **Kurt Burkholder** of the Attorney General's Office confirmed that such wording would be appropriate.

It was MOVED by Commissioner Lorenzen that the revised order as presented in the supplement to the staff report, and as amended to include "without prejudice to any party" be approved. Commissioner Wessinger seconded the motion and it was unanimously approved.

Agenda Item G: Site Inventory Listings - Proposed Hearings Officer's Order Regarding the City of Milwaukie

Director Hansen opened discussion of this item by explaining that of the 210 contested cases on the site inventory listing, this item was the only one not to be settled by the Commission's decision on the previous agenda item (F). He stated that the City of Milwaukie believed this item to be a final order, when in truth it was only a proposed order, awaiting decision from the EQC whether or not to concur with the hearing's officer's proposed order.

Michael Huston, legal counsel, advised that the EQC should allow the involved parties to present oral argument as in a contested case.

Kurt Burkholder, DEQ counsel, and Phillip Grillo, City of Milwaukie counsel, agreed that the action before the EQC was the City's motion to stay the hearings officer's September 27, 1989, order. There is no intent to get to the merits of the City's appeal. Mr. Grillo told the EQC that the forum and process for appeal were unclear. The City had therefore filed appeals with Clackamas Circuit Court, the Court of Appeals, and the EQC. Granting the stay would permit the court to address jurisdictional and procedural questions. Mr. Burkholder opposed the stay, asserting that despite these questions, the City was required to exhaust its administrative remedy by obtaining a final order from the EQC.

Chairman Hutchison asked Mr. Grillo what the City stood to gain if it were to "win" its appeal. MR. Grillo responded that the City's appeal was not frivolous and reflected its view that any decision affects the City's liability and that it had a continuing right to contested case review.

It was MOVED by Commissioner Lorenzen that the Commission deny the motion for stay, and directed the parties to develop a briefing schedule to enable the EQC to reach the merits of the appeal at its December 1, 1989, meeting. The motion was seconded by Commissioner Wessinger and passed unanimously.

There was uncertainty expressed about the applicable rules of procedure currently in effect. It was MOVED by Commissioner Wessinger, seconded by Commissioner Lorenzen, and passed unanimously that the parties be directed to follow the Attorney General's Model Rules of Procedure.

Agenda Item H: General Groundwater Protection Policy - Adoption of Proposed Amendments

The purpose of this agenda item was to consider adoption of amended and renumbered groundwater rules that were taken to public hearings in July, 1989. The rules had been developed using a consensus approach through involvement of departmental personnel, the regulated community and interested citizens. The Commission was assured that agricultural groundwater quality issues had been fully covered. This had been accomplished through the development of new legislation in response to overwhelming public response received in the public hearings process.

One person testified in opposition to the proposed rule amendments. **Brett Fisher**, representing the Northwest Coalition for Alternatives to Pesticides (NCAP) expressed opposition to the inclusion of the Numerical Groundwater Quality Reference Levels in Tables 1 and 2 of the proposed rules. NCAP objects to the use of these Reference Levels because they are developed by the U.S. Environmental Protection Agency for use as treated public drinking water standards, taking into account treatability and feasibility. NCAP believes these Reference Levels are not health-based because some of them exceed the one in one million cancer risk factor. NCAP recommended the Commission adopt the proposed Reference Levels as interim levels, with provisions for the development of permanent levels using methods and criteria proposed by NCAP. The Commission was urged to make the revision of Reference Levels a mandatory process in the rules.

Neil Mullane, Interim Manager of the Groundwater Section, responded that the proposed Reference Levels are intended to be used to indicate how contaminated groundwater is, and will not be used as standards per se. The issue of which numerical values would be used as reference and guidance levels in the proposed rules was thoroughly discussed by staff and interested parties, including NCAP, at both the public hearings and work group sessions that took place following the public hearings. Provisions for the periodic revision of these levels have been included in the rules. As mandated by the Groundwater Protection Act of 1989, methods and criteria for the development of maximum levels of contaminants in groundwater to be used in the designation of a groundwater management area will be developed and proposed to the Commission by a specially designated technical advisory committee. The Department assured the Commission that it will consider applying these same methods and criteria to the Reference Levels contained in the Groundwater Quality Protection rules.

It was MOVED by Commissioner Wessinger that the proposed rule amendments be adopted as recommended by the Department. The motion was seconded by Commissioner Sage and passed unanimously.

Agenda Item I: Interim Standards for Maximum Measurable Levels of Contaminants in Groundwater - Adoption of Temporary Rules

Director Hansen explained that under House Bill 3515, which was adopted in the 1989 legislative session, the adoption of Interim Standards for Maximum Measurable Levels of Contaminants in Groundwater was required within 90 days of the effective date of the bill. This item proposes to adopt such interim standards as temporary rules in order to meet the deadline. The Director also requested that the Commission authorize the Department to conduct public hearings for permanent adoption of the Interim Standards.

It was MOVED by Commissioner Sage that the proposed temporary rules and findings of need be adopted. The motion was seconded by Commissioner Lorenzen and passed unanimously. It was MOVED by Commissioner Sage that the Department be authorized to proceed with public hearings for adoption of the interim rules as permanent rules. The motion was seconded by Commissioner Lorenzen and passed unanimously.

Agenda Item J: Request by Northwest Environmental Defense Center (NEDC) for EQC to Initiate Rulemaking to Codify Internal Department Procedures Regarding Content of Permit Evaluations and Public Notices

The purpose of this agenda item was to explore whether NEDC's proposal would result in public notices which are more meaningful to the public; would result in the public being able to better respond with useful testimony; would result in better permits being issued; would improve or better protect the water quality in Oregon; and whether including the water quality public notice provisions in the Oregon Administrative Rules is the best means to assure implementation of such public notice requirements.

The Department recommended that the Commission authorize the Department to go to rulemaking after requesting and receiving detailed suggestions from the affected public about what information should be included and which permits should require public notice for wastewater discharge, air contaminant discharge and solid waste disposal permit applications. This would provide a uniform approach by the Department on public notice for permits and would provide appropriate accountability by placing the requirements in rule form.

Karen Russell, representing the Northwest Environmental Defense Center, supported the Department recommendation.

By consensus, the Commission concurred with the Department's recommendations, and urged DEQ to proceed.

Agenda Item K: Petition for Declaratory Ruling - Salt Caves Hydroelectric Project 401 Certification

The purpose of this agenda item was to determine whether to issue a Declaratory Ruling pursuant to a petition filed by Save Our Klamath River, the Northwest Environmental Defense Center, the Sierra Club, Oregon Trout, Oregon Natural Resources Council and the Oregon Rivers Council. The petitioners requested a ruling on whether a new design for the Salt Caves project, the designation of the Klamath River as a State Scenic Waterway, and new water quality impact analysis (FERC Draft EIS) constitute changed conditions such that the Department should revoke the 401 certification granted for the project. Further, the petition requested a ruling on whether failure to complete studies required by certification conditions constitutes violation sufficient to revoke certification.

The Department recommended that the Commission decline to issue a Declaratory Ruling for the reasons that the matter is presently before the Circuit Court in Multnomah County, the City might elect to withdraw the certified project proposal in the near future, and the Department retains the ability under OAR 340-48-040 to initiate revocation or suspension proceedings if appropriate.

Karl Anuta, representing the petitioners, said the issues raised need clarification and urged the Commission to grant the request for a Declaratory Ruling. **Richard Glick**, representing the City of Klamath Falls, expressed support for the recommendation made by the Department.

It was MOVED by Commissioner Lorenzen that the Commission approve the Department's recommendation and decline to issue a Declaratory Ruling. The motion was seconded by Commissioner Wessinger and passed unanimously.

Agenda Item L: Assessment Deferral Loan Program - Approval of Applications for Funding for 1989-91 Biennium

The Department recommended EQC approval of the applications for sewer safety net funding submitted by the cities of Portland, Gresham and Eugene. Director Hansen noted that this item is an example of the sort of decision making that currently belongs to the EQC, but should probably be delegated to the Department.

It was MOVED by Commissioner Wessinger that the applications be approved as recommended by the Department. Commissioner Sage seconded the motion, and the motion was unanimously approved.

Agenda Item M: Underground Storage Tanks - Adoption of Temporary Rules to Implement Loan Guarantee Program Enacted in House Bill 3080

The purpose of this agenda item was to provide assistance in the form of guaranteed loans to

property owners, tank owners, or permittees for upgrading or replacing underground storage tank (UST) facilities that contain motor fuel, and to provide interest rate subsidies to commercial lending institutions. The 1989 legislature passed House Bill 3080 which establishes the loan guarantee and interest rate subsidy program. The Department has developed rules to implement the new legislation. The Department proposed that the rules be adopted as temporary rules, and that a hearing be authorized to make the temporary rules permanent.

Richard Reiter, of the Department's Hazardous and Solid Waste Division, advised the Commission that the Department has met with the banking community since the proposed rule was circulated. As a result, an addendum to the staff report was presented which contains modifications to the proposed rules.

It was MOVED by Commissioner Wessinger that the rules as proposed in the staff report and as modified by the addendum be adopted as temporary rules, together with the necessary findings presented in the staff report. Commissioner Sage seconded the motion, and it was passed unanimously. It was MOVED by Commissioner Lorenzen that a hearing be authorized to make the rules permanent. The motion was seconded by Commissioner Sage, and unanimously approved.

Agenda Item N-1: Waste Tire Storage Site Cleanup - Approval of Funding Assistance for DuBois Auto Recycling

The purpose of this report was to request the EQC to allow use of funds from the Waste Tire Recycling Account to expedite cleanup of approximately 50,000 waste tires at a permitted site.

The Department recommended proceeding immediately with financial assistance for the DuBois site for the following reasons:

1. The site is located close to populated areas (St. Helens); a tire fire would negatively impact the air quality for this community, and resulting pyrolytic oils could also enter surface and groundwater.

2. The statute gives DEQ the legal authority to provide the assistance.

3. The permittee's financial situation meets the statutory requirement, as interpreted by Department guidelines, that strict compliance with the Department's cleanup schedule would cause substantial curtailment or closing of the permittee's business or the bankruptcy of the permittee.

4. The Waste Tire Advisory Committee has recommended guidelines for use of the funds by corporations.

5. Budget is not an issue; the Waste Tire Recycling Account has an adequate fund balance. Use of funds now would fulfill a legislative intent to clean up tire piles as quickly as possible.

It was MOVED by Commissioner Wessinger that the request for funds from the Waste Tire Recycling Account on behalf of DuBois Auto Recycling be approved. The motion was seconded by Commissioner Sage and passed unanimously.

Agenda Item N-2: Waste Tire Storage Site Cleanup - Approval of Funding Assistance for Ed Flater

This item was deleted from the agenda at the request of the Department. The Attorney General's office advised the Department that financial assistance for the cleanup of a waste tire site can only be offered to a party holding a waste tire storage site permit, and Mr. Flater does not qualify for such a permit because he has no legal interest in the site.

Agenda Item U: Waste Tire Rules - Proposed Amendments to Remove Ocean Reefs from Reimbursement Eligibility; Adding Beneficial Use permit; Change Rate of Reimbursement for Demonstration Projects; Additional Criteria for Financial Assistance in Removing Tires and Other Housekeeping Amendments

The purpose of this agenda item was to comply with legislation passed during the 1989 session in regard to the deletion of ocean reefs made of waste tires from reimbursement eligibility; to regulate storage of tires which are used for a beneficial purpose, such as tire fences; to establish criteria for financial assistance to waste tire storage permittees in order to incorporate Department guidelines into rule clarifying circumstances under which permittees may be assisted in removing waste tires; and to allow use of reimbursement funds in excess of the one cent per pound for waste tire recycling Demonstration Projects in order to give such projects an additional incentive and to show that recycling uses are feasible.

The Department recommended that the Commission authorize public hearings to take testimony on the draft rules.

It was MOVED by Commissioner Sage that the Department's recommendation be approved. The motion was seconded by Commissioner Lorenzen, and unanimously approved.

Agenda Item P: Waste Tire Rules - Addition of Provisions Relating to Denial of Waste Tire Carrier Permits

The purpose of this agenda item was to establish criteria to be applied by the Department when denying an application for a waste tire carrier permit; establish criteria for suspension, revocation

or refusal to renew a waste tire storage site permit or waste tire carrier permit; and to add criteria for denial of waste tire storage site permits.

The Department recommended that the Commission adopt rule revisions proposed by DEQ.

It was MOVED by Commissioner Wessinger that the Department's recommendation be approved. The motion was seconded by Commissioner Lorenzen and was unanimously passed.

Agenda Item O-1: Request for Variance from Solid Waste Composting Rules for Riedel Environmental Technologies Compost Facility

The purpose of this agenda item was to allow storage of finished solid waste compost product for up to five years during the first five years of compost facility operation, enabling Riedel Environmental Technologies to demonstrate product quality and establish permanent markets for the finished compost product.

The Department recommended granting a variance from the current composting rule. The variance would require the removal of all compost product from storage areas within one year, conditioned upon the acceptable demonstration of financial assurance for removal of excess compost at the end of year five. Financial assurance would be triggered at any point that the amount of stored compost exceeded one year's accumulation, and would be adjusted annually.

The Commission heard testimony from **Bob Martin** of Metro and **Alex Cross** of Riedel Environmental Technologies, Inc., who discussed the positive role the compost facility will have on the Metro waste reduction program.

It was MOVED by Commissioner Sage that the variance be approved as recommended by the Department in the staff report. The motion was seconded by Commissioner Lorenzen, and passed unanimously.

Agenda Item O-2: Adoption of New Federal Rules - New Source Performance Standards (NSPS) and New National Emission Standards for Hazardous Air Pollutants (NESHAPS)

The purpose of this agenda item was to adopt, by reference, new and pertinent federal air regulations regarding NSPS and NESHAPS in order to maintain delegation of authority to administer these rules in Oregon.

Director Hansen summarized the procedure whereby the Department annually reviews new federal rules related to NSPS and NESHAPS, and how these rules become adopted as state rules. He indicated that this was a straightforward updating of administrative rules.

The Department recommended that the Commission adopt only those standards which apply to existing sources in Oregon, or to sources which could likely locate in Oregon in the future., which would follow past practices and, additionally, be acceptable to EPA.

It was MOVED by Commissioner Lorenzen that the new federal rules be adopted as recommended by the Department. The motion was seconded by Commissioner Wessinger and passed unanimously.

Agenda Item Q: Asbestos Abatement Program - Rule Amendments

The purpose of this agenda item was to proceed with efforts to fine tune the asbestos rules after almost two years of experience under the present rules. The revision of these rules was requested by the EQC at their June 2, 1989, meeting.

The Department also reported on the June 2, 1989, Variance for Workers Who Disturb or Remove Asbestos in Residential Facilities, as well as the impact of the temporary rule authorized at the same meeting allowing certain additional experience requirements to qualify for supervisor's training.

The Commission heard a short report about the Asbestos Advisory Committee's progress with problems surrounding the residential asbestos abatement industry.

The Department, with support of the Asbestos Advisory Board (and Residential Subcommittee) recommended the EQC authorize public hearings to be conducted on rule amendments as presented in the staff report.

It was MOVED by Commissioner Sage that public hearings be authorized as recommended by the Department. The motion was seconded by Commissioner Wessinger and passed unanimously.

Agenda Item R: Emission Exceedances - Rule Revisions on Reporting Requirements and Actions for Sources which Experience Excess Emissions due to Startup, Shutdown, Scheduled Maintenance and Breakdowns

The purpose of this agenda item was to request authorization for public hearing on proposed rule revisions on reporting requirements and actions for sources of excessive air pollution.

These proposed rules were developed following the September 7, 1989, EQC meeting, in which this topic was discussed as a work session item, and the Commission indicated that amendments to the Department's Upset Rules should be pursued. Director Hansen summarized the proposed upset or excess emission rules for the Commission. He also pointed out two corrections to the staff report: a typographical error on page A-9, paragraph (4), line 4, which should read "99.95" rather than "99.5"; and in Attachment C, an additional public hearing to be held on December 18, 1989, in Bend, Oregon.

The Department, in its recommendation to the Commission, was in agreement with EPA that the current provision which automatically excuses excess emissions should be changed to read that all excess emissions are subject to possible enforcement action, unless the source can demonstrate to the Department's satisfaction that the emissions were unavoidable. Additionally, the Department recommended adding criteria in the rules which would guide sources when reporting these events to the Department. Such criteria would indicate to sources information the Department would consider in determining when to issue a Notice of Noncompliance or take other enforcement action. The Department also supported the submittal of written documentation by the source for all excess emissions, with reports on minor exceedances submitted in a manner and time frame specified by regional staff.

It was MOVED by Commissioner Wessinger that the EQC authorize the proposed rules as corrected for public hearing. The motion was seconded by Commissioner Lorenzen and was unanimously approved.

Agenda Item S: Incinerator Rule - Amendments to Better Address Municipal and Hospital Units

The purpose of this agenda item was to request the Commission to adopt new rules for incinerators that will serve to better protect the public from particulates, acid gases and toxics, by providing a uniform basis for evaluating proposed installations and comparative risks, and providing uniform performance standards for both incineration equipment and monitoring systems.

John Vance, representing Citizens for Clean Water, Inc. and **Mona Elkins** from Silverton presented testimony regarding emissions from medical waste incinerators. They indicated that incineration of waste produces toxic pollutants, and every effort must be made to protect the public from these pollutants, particularly dioxins. They stated their opposition to permitting a medical waste incinerator in Silverton, and that the Department should not allow the Marion County Solid Waste Facility located north of Salem in Brooks to import waste from outside the county for incineration at this facility. They also stated their support for improving the state's incinerator rules, providing the proposed standards are stringent enough to protect public health.

The Department recommended that the Commission authorize a hearing on more stringent rules and uniform limits and controls for existing and future incinerator facilities in Oregon.

It was MOVED by Commissioner Wessinger that a hearing be authorized on rule amendments as recommended by the Department. The motion was seconded by Commissioner Lorenzen and passed unanimously.

Agenda Item T: Special Waste - Proposed Rules

This agenda item seeks authorization to hold a public hearing on proposed rules to establish standards for permitting of landfills to receive cleanup materials contaminated by hazardous substances (special wastes), and establishes a permit fee to fund DEQ efforts to implement the new permitting requirements.

Steve Greenwood, Solid Waste Manager for the Department, stated that the proposed rules included only one type of special waste at this time, and that the Department expected to return to the Commission in the future to add other wastes to the list of 'special wastes'.

The Department recommended that draft regulations proposing to establish minimum criteria for permitting the land disposal of cleanup materials contaminated by hazardous substances, and to create permit fees to fund Department permit actions to implement the new standards as presented in Attachment A be authorized for hearing.

It was MOVED by Commissioner Sage that the Commission authorize public hearings, as requested by the Department. The motion was seconded by Commissioner Wessinger, and passed unanimously.

Agenda Item V: Container Nurseries - Update on Current Status

The purpose of this agenda item was to inform the Commission of Department strategy for controlling the pollutant discharges from container nurseries, and to take a look at the permit or other look-alike vehicle which would be used for implementing necessary controls.

There was some discussion between the Commission, Department staff and members of the container nursery industry in regard to the use of a stipulated order in lieu of a permit.

There appeared to be general acceptance of the program as outlined. No Commission action was required on this item.

There was no further business before the Commission, and the meeting was adjourned at about 4:00 p.m.

Approved with corrections 12/1/89.
Corrections made 12/7/89

ENVIRONMENTAL QUALITY COMMISSION

Minutes of the One Hundred and Ninety-Ninth Meeting,
October 18-20, 1989

Strategic Planning Retreat

October 18-19, 1989

The Commission and senior managers of the Department of Environmental Quality met on October 18, 1989, beginning at 11:30 a.m. in Room C-106, Commons Building, Marylhurst College, for the purposes of working on a strategic plan for the agency. The planning session recessed at about 4:30 and reconvened on October 19, 1989, at about 9:30 a.m. and adjourned shortly before 2:30 p.m.

Work Session

Thursday, October 19, 1989

The Work Session was convened at 2:45 p.m. in Room C-106, Commons Building, Marylhurst College. Environmental Quality Commission members present were Chairman Bill Hutchison, Vice Chairman Emery Castle and Commissioners Bill Wessinger, Genevieve Sage and Henry Lorenzen. Also present were Larry Edelman of the Attorney General's Office, Director Fred Hansen of the Department of Environmental Quality and Program Staff.

Item 1. Enforcement Rules - Discussion of Implementation Experience

The purpose of this discussion was to provide the Environmental Quality Commission with a summary of the Department of Environmental Quality's experience in implementation of the revised enforcement rules adopted in March 1989, and to advise the Commission of future actions.

Tom Bispham, Regional Operations Administrator, introduced Yone McNally and Van Kollias of the Department's enforcement staff. Mr. Bispham noted that the purpose of the March rule amendments was to improve statewide consistency and predictability in enforcement actions. Major additions were the Notice of Noncompliance and the Civil Penalty Matrix. Training sessions were held in each regional office to acquaint staff with the modified rules. Guidance on standardized wording for Notices of Noncompliance as well as a new enforcement referral form was provided. A computerized enforcement tracking system is being implemented to enhance followup capabilities.

Mr. Bispham also advised that the Department is working on a standardized Notice of Investigation form that can be left with the source at the time of an inspection. This form would notify of any needed immediate corrective action and the potential for further enforcement.

Mr. Bispham stated that the Department has identified further changes that need to occur in the rules (within the body of the staff report). These changes include the addition of new classes of violations, the incorporation of field burning violations in the classification of air quality violations and the inclusion of some volatile organic compound violations into the system, and the underground storage tank program in that class. The Department would also like to incorporate settlement criteria into the rule so as to make clear to the regulated community what the Department's settlements are based on. Mr. Bispham noted that this item would be brought back to the Commission for hearing authorization, and concluded by expressing his view that the implementation experience has been a positive one. He stated that the direction the Department will be taking is much clearer, and that he felt the "bugs" related to increased workload and need for more help would be worked out in time.

Chairman Hutchison asked for comment from **Tom Donaca** of Associated Oregon Industries (AOI) on the program and its effectiveness. Mr. Donaca responded that the program is fair and consistent, and that it has come as a shock to some people. He stated that he didn't feel that the program has been overly abrupt or stringent.

Commissioner Sage asked if the increase in civil penalty assessments has resulted in a proportional increase in contested cases. Van Kollias responded that the number of contested cases has increased. He explained that all of the notices that go out give the opportunity for the violator to have an informal discussion with the department. These informal discussions often pave the way for settlement or mitigation of the penalty before significant resources are expended on the contested case.

Item 2. Oregon's Municipal Sludge Management Program

The purpose of this discussion was to describe DEQ's existing sludge management program and program needs and to summarize existing and proposed federal sludge regulations. The proposed federal regulations will affect future program delegation of the sludge management program from the Environmental Protection Agency (EPA).

Water Quality Division staff provided an informational report on the Department's domestic sewage sludge management program and program needs. **Mark Ronayne**, Sludge Management Coordinator, delivered a slide presentation as part of the report.

The Department intends to request authorization from the EQC in the winter of 1990 to hold hearings to modify rules to increase source permit fees to recover the costs of increased assistance and oversight of sludge management activities.

Regular Meeting

October 20, 1989

Marylhurst College
Administration Building, Room 200
Marylhurst, Oregon

The Environmental Quality Commission meeting was convened shortly after 8:30 a.m. In attendance were Chairman Bill Hutchison, Vice Chairman Emery Castle, and Commissioners Wessinger, Sage and Lorenzen. Also in attendance, from the Department of Environmental Quality were Director Fred Hansen, Assistant Attorney General Michael Huston and DEQ Program Staff.

NOTE: Staff reports presented at this meeting, which contain the Department's recommendations, are on file in the Office of the Director, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204. Written material submitted at this meeting is made a part of this record and is on file at the above address.

CONSENT ITEMS

Agenda Item A: Minutes of the September 8, 1989 EQC meeting

It was MOVED by Commissioner Wessinger that the minutes be approved as written. The motion was seconded by Commissioner Sage and passed unanimously.

Agenda Item B: Civil Penalty Settlements

The following proposed civil penalty settlement agreements were presented for the Commission's consideration and approval:

a. WQ-CR-89-51, Holland Dairy, Inc.
b. AQOB-WVR-89-49, Dennis Bevins
c. AQOB-SWR-89-61, John H. and Sylvione A. Kohansby, dba/Rogue Villa Trailer Park

Director Hansen, in opening comment, stated that the proposed civil penalties were self-explanatory, but that the one for Holland Dairy required some comment. The Department believed when the facts were being gathered that an intentional violation had occurred. Upon further review and discussion with the Attorney General's office, issues were pointed out that made it difficult to prove the intentional nature of the violation as opposed to being a case of negligence.

As a result, the settlement was consistent with the strongest case the Department believed it could sustain.

It was MOVED by Commissioner Wessinger that the Department's recommendation be approved. The motion was seconded by Commissioner Castle and passed unanimously. The settlement agreements were signed by the Commission.

Agenda Item C: Tax Credits for Approval

The Department presented recommendations that four applications for tax credit be approved as follows:

T-2828	Larry M. Neher, Inc., for a Straw Storage Building
T-2860	Lloyd Kropf, for a Straw Storage Building
T-2914	McLagan Farms, Inc., for a Straw Storage Building
T-2969	Far West Fibers, for a Clark Industrial Forklift

Director Hansen noted that these tax credit applications were all routine in nature, and no different from other past tax credit applications.

It was MOVED by Commissioner Sage that the Department's recommendation be approved. The motion was seconded by Commissioner Castle and passed unanimously.

Agenda Item D: Commission Member Reports

Chairman Hutchison noted that in the interest of time, agenda item D would be dispensed with. He explained that DEQ staff and the Commission were currently involved in a strategic planning process and draft results would be available for public comment in the near future.

PUBLIC FORUM

Linda Williams, Attorney representing Local 290, stated that it is the responsibility of the EQC and the Department to ensure that all of its permits are issued in compliance with comprehensive land use plans acknowledged by the Land Conservation and Development Commission. She reported that Columbia County's comprehensive land use plan is out of date with respect to earthquake hazards under statewide goal number seven, and does not address storage of toxics in a hazard zone. Ms. Williams urged the Commission to review its duties for land use compatibility under OAR 660-31-025(d) as it relates to expansion and siting of pulp mills in Columbia County.

Ronald Knight, representing Local 290, Plumbers and Steamfitters Union, stated that Boise Cascade Corporation is expanding paper production at the St. Helens Pulp and Paper Mill, and

this expansion will result in increased discharges to the air and sewer. Mr. Knight expressed concern that the expansion was being undertaken without appropriate permits and without public input.

David Cupp, also of Local 290, offered further testimony in regard to the St. Helens Boise Cascade pulp and paper mill, and urged DEQ to review Boise Cascade's plans with the view of issuing an air contaminant discharge permit. He also voiced concerns about Continental Lime discharging into Boise Cascade's effluent to the St. Helens sewer system.

Chairman Hutchison asked that the Commission be brought up to date with what has been taking place in regard to permits for Boise Cascade. **Nick Nikkila**, Air Quality Administrator, reported that Boise Cascade is installing a more efficient electrostatic precipitator, and that no increase in emissions will occur. **Peter Wong**, Industrial Waste Engineer, reported that Boise Cascade does not have a wastewater discharge permit from DEQ, as they discharge into the City of St. Helens system, which is permitted by DEQ.

Matt Walters, business manager of Local 290, offered comments to the Commission in regard to the proposed permit for WTD Industries, Inc. (WTD). He urged that existing mills be required to limit their pollution to the Columbia River before authorizing a permit for the discharge of new pollutants into the river by any new source. He also stated opposition to the building of a new pulp mill by WTD on the basis that WTD's owner uses non union workers.

Agenda Item E: New Source Approval - Proposed WTD Pulp Mill on the Lower Columbia River

This agenda item was being brought before the Commission for the third time. The Commission had requested at the September 8, 1989 EQC meeting that the Department return to the Commission at its following meeting with further staff analysis on rule interpretations and other issues to assist in its deliberations on WTD Industries, Inc. proposed new Port Westward Mill wastewater discharge permit. This staff report was a result of the Commission's request.

The Department recommended that the Commission authorize a new discharge from a bleached kraft pulp mill to the Columbia River subject to the following conditions:

a. State of the art production and pollution control technology will be installed to minimize the production of 2,3,7,8 tetrachloro-dibenzo-p-dioxin (TCDD) and other chlorinated organic compounds to the greatest degree practicable.

b. Chlorine dioxide must be substituted 100 percent for chlorine in the bleaching operation unless the applicant can demonstrate to the Department that a lesser substitution amount is the highest possible.

c. The applicant will agree to install such further equipment or make such further modifications as may be necessary to meet its wasteload allocation within three years after the Environmental Protection Agency (EPA) has established a Total Maximum Daily Load (TMDL) for TCDD for the Columbia River and allocated the load to the individual sources. The timetable for compliance may be subject to modification if the EQC determines that the three year time frame is not achievable.

d. The applicant agrees to implement, or join in implementation, of a research and development program to develop additional means for reducing TCDD in the mill effluent.

e. An approach is developed to require existing bleached kraft pulp mills in Oregon to proceed to install state-of-the-art production and pollution control technology to reduce present discharges of TCDD to the greatest extent practicable and eventually, to a level to meet water quality standards.

f. EPA approves this overall approach for Oregon--both for the existing mills and for a new mill.

Lydia Taylor, Water Quality Administrator, updated the Commission with a summary of information and actions since the last meeting as follows:

(1) The Department did not list the Columbia River at the point of the proposed WTD discharge as being water quality limiting for TCDD (this was not clear in the July staff report); therefore, the Department believes the Commission is not precluded from making a decision under existing rules;

(2) The Columbia River is an interstate stream; it would be possible for Oregon to deny a discharge based on water quality concerns while Washington could proceed to approve a similar discharge; the Department is unable to conclude that there is a basis for a moratorium on approval of new or expanded pulp mills based either on the quality of the water column or the sediment; the Department is also unable to conclude that it is appropriate to defer a decision pending action by EPA;

(3) Pope & Talbot is proposing a program to comply with the proposed Individual Control Strategy (ICS) by 1992;

(4) James River has a study underway to determine the approach for compliance with their ICS; compliance is expected by 1992;

(5) The Department will meet soon with Boise Cascade to discuss actions necessary to come into compliance with the ICS;

(6) The Oregon mills do not agree with Oregon's TCDD standard; the Department has advised all that implementation must proceed;

(7) The State of Washington agrees with the approach of requiring that TCDD be not detectable in the bleach plant effluent;

(8) Washington mills will be required to comply with ICS's by June 4, 1993;

(9) Boise Cascade in Wallula, Wn. has changed defoamers which will reduce TCDD production by about 40% and has requested a wasteload increase from Washington Department of Ecology; it will have to come into compliance on TCDD in order to receive a waste load increase;

(10) Longview Fiber in Longview, Wn. has requested a minor permit wasteload increase, and will have to compliance by June 4, 1993 to receive the increase;

(11) Weyerhaeuser in Longview is expected to request a wasteload increase for a proposed newsprint recycling facility with the effluent to be combined with the existing bleached kraft facility; Washington DOE considers this expansion to be a separate issue from TCDD issues; DEQ has asked DOE to reconsider since effluents would be combined;

(12) Washington DOE has not yet had any discussions with the James River in Camas, Wn. facility regarding compliance with TCDD requirements;

(13) The Potlatch facility in Idaho is permitted by EPA; DEQ has been unable to determine current compliance plans for this facility.

In response to a question from Commissioner Lorenzen, Ms. Taylor noted that 85% of the 43-44 milligrams per day of TCDD currently discharged to the Columbia River comes from mills outside Oregon. When compliance with ICS's is achieved in 1993, the level would drop to about 3.6 milligrams per day of TCDD. The 3.6 milligrams would be about 54% of the level the river could accommodate without violating the 0.013 parts per quadrillion standard. These numbers assume no attenuation of TCDD in the river (all remains in the water column) and that pulp and paper mills are the only significant source of TCDD discharged.

Commissioner Lorenzen asked for additional information on the issue of sediment standards. Ms. Taylor indicated that EPA was working toward sediment standards, but their timelines were unknown. She also noted that DEQ is working with the Corps of Engineers on sediment standards for heavy metals (as it relates to disposal of dredge spoils). She also noted that EPA is collecting sediment samples for TCDD analysis from the Columbia River, and that data will not be available for several months.

Commissioner Castle asked for some elaboration on desirable rule amendments mentioned in the staff report. Ms. Taylor indicated that experience in this case and initial indication of concerns in

other situations coming before the Department suggest the need for possible rulemaking in at least three areas:

a. There is currently no rule language to define the term "water quality limited" or to specify the process used to classify a stream segment as "water quality limited". The Department has assumed that listing in the "305(b)" report, which federal law requires the department to file with EPA every 2 years, is the process for designation.

b. There is currently no rule to define how an interstate stream will be handled, particularly if the adjacent state's determinations or decisions are different from Oregon's.

c. The recently adopted rule establishing criteria for approving new or increased loads may be a barrier to approving actions that would improve water quality in a logical and cost effective way. For example, a small community has been urged to remove their discharge from a stream during the summer months when water quality standards are currently violated (i.e. the stream is water quality limiting). The community proposes a facility that would store effluent during the summer and discharge it during the winter when stream flows are high, and water quality problems would not be created. This would require approval of an increase in the allowable discharge load during the winter months. If the stream is designated water quality limiting, the current rule would appear to prevent approval of the winter time load increase required to implement the proposal to improve water quality.

Commissioner Castle asked for elaboration on the Department's conclusion that the Commission can make a final determination on the WTD request. Ms. Taylor noted that if the Columbia River was designated water quality limiting at the point of discharge, the existing rule would not allow the Commission to approve a load allocation for a new source. However, the Department has not classified the Columbia as water quality limiting at the point of the proposed WTD discharge, therefore the Commission is not prevented from approving the proposal.

Chairman Hutchison asked how the Department would propose to pursue the potential rule changes mentioned. Ms. Taylor indicated the department would follow the normal process of developing draft rule language, bringing the matter to the Commission for discussion and hearing authorization, and proceeding to hearing and final consideration by the Commission.

Chairman Hutchison noted that EPA considers the entire lower Columbia River to be water quality limited and questioned if an approval could be granted, particularly if the Department was relying on EPA for assistance. He requested comment on 3 potential options for action as follows:

1. Grant approval conditioned upon the river being removed form the water quality limited list (programs implemented to reduce TCDD levels sufficiently to remove from the list).

2. Deny approval and revisit the issue when conditions change.

3. Grant approval conditioned on the river either being not water quality limited or, if it is still water quality limited, that final load allocations have been made, and the reason the river is not in compliance is that other sources are not in compliance with their load allocations.

Ms. Taylor noted that the Department normally would issue a permit to construct and operate a facility consistent with the load allocation approval of the Commission. If approval were granted under the conditions noted, the Department could prepare an appropriately conditioned permit. A question remains, however, on who would make the decision that the river is no longer water quality limited. Director Hansen noted that EPA's role is to approve a state decision to designate a stream as water quality limited, and that EPA does not technically have to make the decision.

The Chairman then began to call persons who had signed up to testify.

Joe Schultz, representing the Port of St. Helens and the St. Helens Chamber of Commerce, testified that they are on record for approving the construction of a WTD mill. They advocate economic development, but not environmental pollution, and feel it is not fair to deny WTD a permit because of the polluting discharges from currently operating pulp mills on the Columbia River. He felt the permit conditions were realistic and that the Commission should separate the issue of enforcement of limits on existing mills from the approval of a new mill.

Patrick Simpson urged the Commission not to finesse the rule to make a decision. If necessary, the rule should be modified or repealed.

Nina Bell, Northwest Environmental Advocates, testified that the Columbia is water quality limited and that under the rules, the Commission should deny the request. **Karl Anuta**, representing Northwest Environmental Defense Center, suggested that the burden of proof that the proposal will comply with all standards should rest on WTD.

Michael Axline, representing Western Natural Resources Law Clinic, stated that substantial evidence does not exist in the record to support a conclusion that water quality standards will be met with the WTD proposal. Further, evidence in the record suggests that wildlife beneficial uses may be adversely affected. Thus, the record does not support the findings required by Commission rule. Commissioner Lorenzen stated that he believed a finding that beneficial uses would not be adversely affected by the WTD discharge could be made. He noted that the amount of dioxin in WTD's proposed discharge would be less than one percent of the amount currently discharged by existing mills, and would not have a significant or measurable affect on beneficial uses. Director Hansen noted that beneficial uses are considered protected if standards are met; you get to the beneficial use question if there is no standard for a pollutant parameter, or if new evidence suggests the standard is inadequate.

David Walseth, representing WTD, stated that the Commission had a policy choice to make. The Columbia River clearly has a water quality problem. The proposed WTD mill is part of the solution, not part of the problem. The company has agreed to permit reopeners to enable addition

of any new requirements that may later be determined necessary to protect water quality. However, they can't agree to an open ended permit. They will agree to delay startup of the mill to June 1993, however. He further noted that the EQC rule is ambiguous, and that is not an uncommon problem. It requires best analysis of available information and wise discretion to reach a fair decision.

Commissioner Lorenzen commended WTD for embracing new technology and for their cooperation. He expressed concern, however, for the wording of the Commission rule and the Department's statement that the Columbia was not declared water quality limiting at the point of the proposed WTD discharge. He felt the data suggests that the dioxin level may be above 0.013 parts per quadrillion, and asked if WTD had a comment. **Patrick Parenteau**, Attorney representing WTD, responded that, as a matter of law, the stream at the point of the proposed WTD discharge is not water quality limiting. DEQ did not classify it as water quality limiting, and EPA has approved DEQ's action.

Chairman Hutchison stated that he was leaning toward a decision that was conditioned on the river not being water quality limited. Mr. Parenteau responded that such a condition was too open ended and would make it impossible for the company to obtain financing for their project without a firm allowable operating date. That is why they have agreed to defer their proposed startup date to June 1993 which is the federal deadline for all existing mills to be in compliance with their Individual Control Strategies.

Doug Morrison, Northwest Pulp & Paper Association, reviewed dioxin reduction activities of other currently operating mills and stated that the industry has been cooperative.

Chairman Hutchison closed the public testimony, and noted for the record that the Commission had received a request from the Joint Interim Committee on Environment and Hazardous Materials to defer a decision on the WTD proposal until the Committee had a chance to hold a public hearing. In response, Chairman Hutchison stated that he had encouraged the committee to go ahead with their process, but it was appropriate for the Commission to move to a decision as soon as possible.

Chairman Hutchison asked Michael Huston to comment on the state of the record with respect to the substantial evidence test and the findings required by the Commission rule. Michael Huston responded that there is a plausible, reasonable legal argument with the present record that the river is not listed as water quality limiting. However, the Commission is not bound to reach that conclusion and could conclude the opposite. Mr. Huston also stated that the Commission must conclude compliance with standards and beneficial uses. He noted that the record does not look impressive to lawyers because it is not a trial or contested case record, but that there is nothing to compel that this proceeding be a contested case. Mr. Huston also noted that the Commission is legally compelled to do the following:

1) Interpret the law correctly. (The courts will typically show deference to the Commission's interpretation.)

2) Support factual conclusions with substantial evidence. (This is typically done in the form "We make this 'factual conclusion' because we find 'these facts'.)

Commissioner Sage reminded the Commission that there are other sections of the rule that must be addressed in addition to the findings that are being discussed. She noted that the total rule deals with apportioning unused assimilative capacity if it exists; that the rule does not create capacity. Chairman Hutchison asked Michael Huston to comment on the appropriateness of an approval that was conditioned to be effective at a point in the future when unused assimilative capacity became available. Mr. Huston indicated he was not troubled by such a condition. Commissioner Sage stated that there is no unused assimilative capacity and will not be any in 1993 if WTD is holding a permit and discharging at that time. Director Hansen noted that the purpose of the rule is to deal with allocation of unused assimilative capacity whenever it may exist and that implementation of the Individual Control Strategies by 1993 will restore unused assimilative capacity for TCDD in the Columbia River.

Chairman Hutchison asked if there is a chance of adding the entire lower Columbia to the list of water quality limited segments in the April 1990, 303(b) report. Lydia Taylor responded that the Department cannot tell at this point. All available information will be reviewed including new data, and information on the potential for attenuation in the river.

Chairman Hutchison then asked the Department to outline the basis for a conclusion that water quality standards would not be violated by the proposed WTD discharge. Lydia Taylor noted that part of the basis would be that no information is available to support a conclusion that standards are or will be violated. Director Hansen added that processes underway by EPA to develop the TMDL and waste load allocations will bring loads into compliance, that the new discharge will not occur until the river is in compliance in 1993, that a process is in place to assure implementation of the waste load allocations, and that if the river was not in compliance by 1993, it would be because existing sources had not complied with their waste load allocation, not because of the new load allocation.

Chairman Hutchison then asked the Department to outline the basis for a conclusion that beneficial uses will not be threatened. Lydia Taylor responded that the Department has reviewed available information and has found no specific studies that present information that would support a conclusion that the added discharge would adversely impact beneficial uses. Director Hansen added that the purpose of standards is to protect beneficial uses, and that standards adopted by the Commission were based on guidance information provided by EPA.

Commissioner Wessinger asked if EPA took the objections of the U.S. Fish and Wildlife Service (USFWS) relative to potential dioxin impacts on wildlife into account in their guidance. Director Hansen stated that EPA guidance was developed prior to the USFWS comments. Lydia Taylor indicated that the 0.013 parts per quadrillion TCDD standard is based on protection of human health.

Chairman Hutchison noted that evidence in the record suggests that the wildlife beneficial use would not be protected. Lydia Taylor stated that those comments were on a permit proposal, that the comments requested review and more stringent provisions, and that the proposed permit has since been modified to contain more stringent provisions.

Chairman Hutchison then asked the Department to outline the basis for the conclusion that the third factor in the rule could be met. Lydia Taylor noted that the Department did not classify the Columbia at the point of the proposed discharge as water quality limiting. Director Hansen added that proposed conditions of approval would not allow discharge until compliance was achieved in 1993, thus there would be no discharge if the river was classified.

Chairman Hutchison asked Michael Huston if a negative statement met the requirements for substantial evidence. Mr. Huston stated that it would be legally insufficient.

Commissioner Sage asked legal counsel if it was correct that the rule had to be considered in it's entirety, and Michael Huston responded yes.

Pat Parenteau, then commented on the USFWS letter in the record. These comments were made on the Dredge/Fill permit application to the Corps of Engineers. They are presently in a consultation process to resolve issues regarding protection of the Bald Eagle and other wildlife. USFWS can veto the issuance of the Corps Fill and Removal permit if there is any threat from the project to the Bald Eagle under the endangered species act. Michael Axline expressed concern about other organo-chlorine compounds and stated the view that the record compels the finding that standards would be violated. Karl Anuta also stated the view that the required findings cannot be made.

Chairman Hutchison expressed the view that he would like to approve the proposal but was not sure how it could be done. Commissioner Castle noted that reasonable people can disagree on application of the rules. If the Commission takes a static point of view, it can and should deny the request. But, if the Commission views the situation as dynamic and recognizes the other sources, the interstate stream, the improvement that may result from approval of the new source and the new technology subject to the conditions outlined, and does not abdicate its responsibilities to others, a different conclusion can be reached. Commissioner Sage noted that the rule lists conditions, and it is not appropriate to place conditions upon the conditions.

Chairman Hutchison asked if WTD would be permanently eliminated by a decision not to approve the discharge. Director Hansen noted that WTD could reapply at any time. However, to be a player in the waste load allocation process, they need some form of approval.

Commissioner Lorenzen stated that he believes the necessary beneficial use protection finding can be made. He noted that the wording of the rule would require the finding that the new source would not cause the beneficial use to be threatened. He explained that the present 43-44 milligrams per day of TCDD from existing mills is substantial; that the proposed new source would add less than one percent to that and that would not be a significant addition. However, he was

troubled by the wording of the current rule which apparently prevents the approval of a proposed new source who is willing to agree to stringent controls, live up to the highest standards, and do the right thing. He indicated he would like to send a strong message of approval, but would have to condition that approval to allow no discharge until the river is not water quality limiting to comply with the rule. He also stressed the need to revisit the rule.

Commissioner Sage asked Michael Huston if it is possible to place further conditions upon existing rule conditions. Michael Huston replied that he was not troubled by that if the conditions accomplish the result that the requirements are met.

It was then MOVED by Commissioner Wessinger that approval be denied for the proposed new wastewater discharge for WTD Industries. Commissioner Wessinger stated that the motion was based on the view that approval is not possible under existing Commission rules. The motion was seconded by Commissioner Sage. Chairman Hutchison asked Director Hansen to call the role. Commissioners Wessinger and Sage voted "Yes", Commissioners Castle and Lorenzen voted "No." Chairman Hutchison broke the tie with a "Yes" vote, thus denying approval of the proposed new discharge.

Chairman Hutchison urged DEQ to get on with the business of bringing the Columbia River into compliance with water quality standards, and WTD to help move that process along and to participate in the process of taking a second look at the rule via public hearings and continued interest. He stated that although he was of the same school of thought as Commissioners Castle and Lorenzen, he could not see that the EQC had a good enough record on the beneficial use issue to make a decision to approve at this time.

Chairman Hutchison called for a 30-minute lunch break, at which time **Commissioner Castle** announced that due to pressing personal business, it was necessary for him to leave.

When the meeting reconvened, Chairman Hutchison asked for comment from Director Hansen about other situations in which new or increased load approval rule will come into play. Director Hansen responded that the Department is anticipating others situations like that of WTD, and that previous discussions led the Department to believe that some rule changes should be considered. Commissioner Wessinger proposed that this issue would be a good one to consider in the work session setting. Chairman Hutchison asked Lydia Taylor if she could have some ideas in writing for proposed draft rules by November 30, 1989, and some options that the Commission could consider. Ms. Taylor responded that the Water Quality Division would be happy to have an informational discussion at that time.

In response to a question by Chairman Hutchison, Director Hansen stated that the rulemaking process generally takes about six months from start to finish, depending on how complicated it is.

Agenda Item F: Site Inventory Listings - Proposed EQC Order Dismissing Contested Case Proceedings

Director Hansen presented background historical information about the 1988 Proposed Inventory of Hazardous Substance Release Sites and the amendments enacted by the 1989 legislature in response to proposals by DEQ, Oregon State Public Research Interest Group (OSPIRG) and Associated Oregon Industries (AOI). The amendments created a new process for preparing an Inventory. In response to the amendments, the Department was proposing to dismiss all contested cases associated with the site inventory.

Commissioner Lorenzen expressed concern over the wording of the proposed order. He stated that he believed the wording proposed in the supplemental staff report should be changed to include "without prejudice to any party". **Kurt Burkholder** of the Attorney General's Office confirmed that such wording would be appropriate.

It was MOVED by Commissioner Lorenzen that the revised order as presented in the supplement to the staff report, and as amended to include "without prejudice to any party" be approved. Commissioner Wessinger seconded the motion and it was unanimously approved.

Agenda Item G: Site Inventory Listings - Proposed Hearings Officer's Order Regarding the City of Milwaukie

Director Hansen opened discussion of this item by explaining that of the 210 contested cases on the site inventory listing, this item was the only one not to be settled by the Commission's decision on the previous agenda item (F). He stated that the City of Milwaukie believed this item to be a final order, when in truth it was only a proposed order, awaiting decision from the EQC whether or not to concur with the hearing's officer's proposed order.

Michael Huston, legal counsel, advised that the EQC should allow the involved parties to present oral argument as in a contested case.

Kurt Burkholder, DEQ counsel, and Phillip Grillo, City of Milwaukie counsel, agreed that the action before the EQC was the City's motion to stay the hearings officer's September 27, 1989, order. There is no intent to get to the merits of the City's appeal. Mr. Grillo told the EQC that the forum and process for appeal were unclear. The City had therefore filed appeals with Clackamas Circuit Court, the Court of Appeals, and the EQC. Granting the stay would permit the court to address jurisdictional and procedural questions. Mr. Burkholder opposed the stay, asserting that despite these questions, the City was required to exhaust its administrative remedy by obtaining a final order from the EQC.

Chairman Hutchison asked Mr. Grillo what the City stood to gain if it were to "win" its appeal. MR. Grillo responded that the City's appeal was not frivolous and reflected its view that any decision affects the City's liability and that it had a continuing right to contested case review.

It was MOVED by Commissioner Lorenzen that the Commission deny the motion for stay, and

directed the parties to develop a briefing schedule to enable the EQC to reach the merits of the appeal at its December 1, 1989, meeting. The motion was seconded by Commissioner Wessinger and passed unanimously.

There was uncertainty expressed about the applicable rules of procedure currently in effect. It was MOVED by Commissioner Wessinger, seconded by Commissioner Lorenzen, and passed unanimously that the parties be directed to follow the Attorney General's Model Rules of Procedure.

Agenda Item H: General Groundwater Protection Policy - Adoption of Proposed Amendments

The purpose of this agenda item was to consider adoption of amended and renumbered groundwater rules that were taken to public hearings in July, 1989. The rules had been developed using a consensus approach through involvement of departmental personnel, the regulated community and interested citizens. The Commission was assured that agricultural groundwater quality issues had been fully covered. This had been accomplished through the development of new legislation in response to overwhelming public response received in the public hearings process.

One person testified in opposition to the proposed rule amendments. **Brett Fisher**, representing the Northwest Coalition for Alternatives to Pesticides (NCAP) expressed opposition to the inclusion of the Numerical Groundwater Quality Reference Levels in Tables 1 and 2 of the proposed rules. NCAP objects to the use of these Reference Levels because they are developed by the U.S. Environmental Protection Agency for use as treated public drinking water standards, taking into account treatability and feasibility. NCAP believes these Reference Levels are not health-based because some of them exceed the one in one million cancer risk factor. NCAP recommended the Commission adopt the proposed Reference Levels as interim levels, with provisions for the development of permanent levels using methods and criteria proposed by NCAP. The Commission was urged to make the revision of Reference Levels a mandatory process in the rules.

Neil Mullane, Interim Manager of the Groundwater Section, responded that the proposed Reference Levels are intended to be used to indicate how contaminated groundwater is, and will not be used as standards per se. The issue of which numerical values would be used as reference and guidance levels in the proposed rules was thoroughly discussed by staff and interested parties, including NCAP, at both the public hearings and work group sessions that took place following the public hearings. Provisions for the periodic revision of these levels have been included in the rules. As mandated by the Groundwater Protection Act of 1989, methods and criteria for the development of maximum levels of contaminants in groundwater to be used in the designation of a groundwater management area will be developed and proposed to the Commission by a specially designated technical advisory committee. The Department assured the Commission that it will consider applying these same methods and criteria to the Reference Levels contained in the Groundwater Quality Protection rules.

It was MOVED by Commissioner Wessinger that the proposed rule amendments be adopted as

recommended by the Department. The motion was seconded by Commissioner Sage and passed unanimously.

Agenda Item I: Interim Standards for Maximum Measurable Levels of Contaminants in Groundwater - Adoption of Temporary Rules

Director Hansen explained that under House Bill 3515, which was adopted in the 1989 legislative session, the adoption of Interim Standards for Maximum Measurable Levels of Contaminants in Groundwater was required within 90 days of the effective date of the bill. This item proposes to adopt such interim standards as temporary rules in order to meet the deadline. The Director also requested that the Commission authorize the Department to conduct public hearings for permanent adoption of the Interim Standards.

It was MOVED by Commissioner Sage that the proposed temporary rules and findings of need be adopted. The motion was seconded by Commissioner Lorenzen and passed unanimously. It was MOVED by Commissioner Sage that the Department be authorized to proceed with public hearings for adoption of the interim rules as permanent rules. The motion was seconded by Commissioner Lorenzen and passed unanimously.

Agenda Item J: Request by Northwest Environmental Defense Center (NEDC) for EQC to Initiate Rulemaking to Codify Internal Department Procedures Regarding Content of Permit Evaluations and Public Notices

The purpose of this agenda item was to explore whether NEDC's proposal would result in public notices which are more meaningful to the public; would result in the public being able to better respond with useful testimony; would result in better permits being issued; would improve or better protect the water quality in Oregon; and whether including the water quality public notice provisions in the Oregon Administrative Rules is the best means to assure implementation of such public notice requirements.

The Department recommended that the Commission authorize the Department to go to rulemaking after requesting and receiving detailed suggestions from the affected public about what information should be included and which permits should require public notice for wastewater discharge, air contaminant discharge and solid waste disposal permit applications. This would provide a uniform approach by the Department on public notice for permits and would provide appropriate accountability by placing the requirements in rule form.

Karen Russell, representing the Northwest Environmental Defense Center, supported the Department recommendation.

By consensus, the Commission concurred with the Department's recommendations, and urged DEQ to proceed.

Agenda Item K: Petition for Declaratory Ruling - Salt Caves Hydroelectric Project 401 Certification

The purpose of this agenda item was to determine whether to issue a Declaratory Ruling pursuant to a petition filed by Save Our Klamath River, the Northwest Environmental Defense Center, the Sierra Club, Oregon Trout, Oregon Natural Resources Council and the Oregon Rivers Council. The petitioners requested a ruling on whether a new design for the Salt Caves project, the designation of the Klamath River as a State Scenic Waterway, and new water quality impact analysis (FERC Draft EIS) constitute changed conditions such that the Department should revoke the 401 certification granted for the project. Further, the petition requested a ruling on whether failure to complete studies required by certification conditions constitutes violation sufficient to revoke certification.

The Department recommended that the Commission decline to issue a Declaratory Ruling for the reasons that the matter is presently before the Circuit Court in Multnomah County, the City might elect to withdraw the certified project proposal in the near future, and the Department retains the ability under OAR 340-48-040 to initiate revocation or suspension proceedings if appropriate.

Karl Anuta, representing the petitioners, said the issues raised need clarification and urged the Commission to grant the request for a Declaratory Ruling. **Richard Glick**, representing the City of Klamath Falls, expressed support for the recommendation made by the Department.

It was MOVED by Commissioner Lorenzen that the Commission approve the Department's recommendation and decline to issue a Declaratory Ruling. The motion was seconded by Commissioner Wessinger and passed unanimously.

Agenda Item L: Assessment Deferral Loan Program - Approval of Applications for Funding for 1989-91 Biennium

The Department recommended EQC approval of the applications for sewer safety net funding submitted by the cities of Portland, Gresham and Eugene. Director Hansen noted that this item is an example of the sort of decision making that currently belongs to the EQC, but should probably be delegated to the Department.

It was MOVED by Commissioner Wessinger that the applications be approved as recommended by the Department. Commissioner Sage seconded the motion, and the motion was unanimously approved.

Agenda Item M: Underground Storage Tanks - Adoption of Temporary Rules to Implement Loan Guarantee Program Enacted in House Bill 3080

The purpose of this agenda item was to provide assistance in the form of guaranteed loans to property owners, tank owners, or permittees for upgrading or replacing underground storage tank (UST) facilities that contain motor fuel, and to provide interest rate subsidies to commercial lending institutions. The 1989 legislature passed House Bill 3080 which establishes the loan guarantee and interest rate subsidy program. The Department has developed rules to implement the new legislation. The Department proposed that the rules be adopted as temporary rules, and that a hearing be authorized to make the temporary rules permanent.

Richard Reiter, of the Department's Hazardous and Solid Waste Division, advised the Commission that the Department has met with the banking community since the proposed rule was circulated. As a result, an addendum to the staff report was presented which contains modifications to the proposed rules.

It was MOVED by Commissioner Wessinger that the rules as proposed in the staff report and as modified by the addendum be adopted as temporary rules, together with the necessary findings presented in the staff report. Commissioner Sage seconded the motion, and it was passed unanimously. It was MOVED by Commissioner Lorenzen that a hearing be authorized to make the rules permanent. The motion was seconded by Commissioner Sage, and unanimously approved.

Agenda Item N-1: Waste Tire Storage Site Cleanup - Approval of Funding Assistance for DuBois Auto Recycling

The purpose of this report was to request the EQC to allow use of funds from the Waste Tire Recycling Account to expedite cleanup of approximately 50,000 waste tires at a permitted site.

The Department recommended proceeding immediately with financial assistance for the DuBois site for the following reasons:

1. The site is located close to populated areas (St. Helens); a tire fire would negatively impact the air quality for this community, and resulting pyrolytic oils could also enter surface and groundwater.

2. The statute gives DEQ the legal authority to provide the assistance.

3. The permittee's financial situation meets the statutory requirement, as interpreted by Department guidelines, that strict compliance with the Department's cleanup schedule would cause substantial curtailment or closing of the permittee's business or the bankruptcy of the permittee.

4. The Waste Tire Advisory Committee has recommended guidelines for use of the funds by

corporations.

5. Budget is not an issue; the Waste Tire Recycling Account has an adequate fund balance. Use of funds now would fulfill a legislative intent to clean up tire piles as quickly as possible.

It was MOVED by Commissioner Wessinger that the request for funds from the Waste Tire Recycling Account on behalf of DuBois Auto Recycling be approved. The motion was seconded by Commissioner Sage and passed unanimously.

Agenda Item N-2: Waste Tire Storage Site Cleanup - Approval of Funding Assistance for Ed Flater

This item was deleted from the agenda at the request of the Department. The Attorney General's office advised the Department that financial assistance for the cleanup of a waste tire site can only be offered to a party holding a waste tire storage site permit, and Mr. Flater does not qualify for such a permit because he has no legal interest in the site.

Agenda Item U: Waste Tire Rules - Proposed Amendments to Remove Ocean Reefs from Reimbursement Eligibility; Adding Beneficial Use permit; Change Rate of Reimbursement for Demonstration Projects; Additional Criteria for Financial Assistance in Removing Tires and Other Housekeeping Amendments

The purpose of this agenda item was to comply with legislation passed during the 1989 session in regard to the deletion of ocean reefs made of waste tires from reimbursement eligibility; to regulate storage of tires which are used for a beneficial purpose, such as tire fences; to establish criteria for financial assistance to waste tire storage permittees in order to incorporate Department guidelines into rule clarifying circumstances under which permittees may be assisted in removing waste tires; and to allow use of reimbursement funds in excess of the one cent per pound for waste tire recycling Demonstration Projects in order to give such projects an additional incentive and to show that recycling uses are feasible.

The Department recommended that the Commission authorize public hearings to take testimony on the draft rules.

It was MOVED by Commissioner Sage that the Department's recommendation be approved. The motion was seconded by Commissioner Lorenzen, and unanimously approved.

Agenda Item P: Waste Tire Rules - Addition of Provisions Relating to Denial of Waste Tire

Carrier Permits

The purpose of this agenda item was to establish criteria to be applied by the Department when denying an application for a waste tire carrier permit; establish criteria for suspension, revocation or refusal to renew a waste tire storage site permit or waste tire carrier permit; and to add criteria for denial of waste tire storage site permits.

The Department recommended that the Commission adopt rule revisions proposed by DEQ.

It was MOVED by Commissioner Wessinger that the Department's recommendation be approved. The motion was seconded by Commissioner Lorenzen and was unanimously passed.

Agenda Item O-1: Request for Variance from Solid Waste Composting Rules for Riedel Environmental Technologies Compost Facility

The purpose of this agenda item was to allow storage of finished solid waste compost product for up to five years during the first five years of compost facility operation, enabling Riedel Environmental Technologies to demonstrate product quality and establish permanent markets for the finished compost product.

The Department recommended granting a variance from the current composting rule. The variance would require the removal of all compost product from storage areas within one year, conditioned upon the acceptable demonstration of financial assurance for removal of excess compost at the end of year five. Financial assurance would be triggered at any point that the amount of stored compost exceeded one year's accumulation, and would be adjusted annually.

The Commission heard testimony from **Bob Martin** of Metro and **Alex Cross** of Riedel Environmental Technologies, Inc., who discussed the positive role the compost facility will have on the Metro waste reduction program.

It was MOVED by Commissioner Sage that the variance be approved as recommended by the Department in the staff report. The motion was seconded by Commissioner Lorenzen, and passed unanimously.

Agenda Item O-2: Adoption of New Federal Rules - New Source Performance Standards (NSPS) and New National Emission Standards for Hazardous Air Pollutants (NESHAPS)

The purpose of this agenda item was to adopt, by reference, new and pertinent federal air regulations regarding NSPS and NESHAPS in order to maintain delegation of authority to administer these rules in Oregon.

Director Hansen summarized the procedure whereby the Department annually reviews new federal rules related to NSPS and NESHAPS, and how these rules become adopted as state rules. He indicated that this was a straightforward updating of administrative rules.

The Department recommended that the Commission adopt only those standards which apply to existing sources in Oregon, or to sources which could likely locate in Oregon in the future., which would follow past practices and, additionally, be acceptable to EPA.

It was MOVED by Commissioner Lorenzen that the new federal rules be adopted as recommended by the Department. The motion was seconded by Commissioner Wessinger and passed unanimously.

Agenda Item Q: Asbestos Abatement Program - Rule Amendments

The purpose of this agenda item was to proceed with efforts to fine tune the asbestos rules after almost two years of experience under the present rules. The revision of these rules was requested by the EQC at their June 2, 1989, meeting.

The Department also reported on the June 2, 1989, Variance for Workers Who Disturb or Remove Asbestos in Residential Facilities, as well as the impact of the temporary rule authorized at the same meeting allowing certain additional experience requirements to qualify for supervisor's training.

The Commission heard a short report about the Asbestos Advisory Committee's progress with problems surrounding the residential asbestos abatement industry.

The Department, with support of the Asbestos Advisory Board (and Residential Subcommittee) recommended the EQC authorize public hearings to be conducted on rule amendments as presented in the staff report.

It was MOVED by Commissioner Sage that public hearings be authorized as recommended by the Department. The motion was seconded by Commissioner Wessinger and passed unanimously.

Agenda Item R: Emission Exceedances - Rule Revisions on Reporting Requirements and Actions for Sources which Experience Excess Emissions due to Startup, Shutdown, Scheduled Maintenance and Breakdowns

The purpose of this agenda item was to request authorization for public hearing on proposed rule revisions on reporting requirements and actions for sources of excessive air pollution.

These proposed rules were developed following the September 7, 1989, EQC meeting, in which this topic was discussed as a work session item, and the Commission indicated that amendments to the Department's Upset Rules should be pursued. Director Hansen summarized the proposed

upset or excess emission rules for the Commission. He also pointed out two corrections to the staff report: a typographical error on page A-9, paragraph (4), line 4, which should read "99.95" rather than "99.5"; and in Attachment C, an additional public hearing to be held on December 18, 1989, in Bend, Oregon.

The Department, in its recommendation to the Commission, was in agreement with EPA that the current provision which automatically excuses excess emissions should be changed to read that all excess emissions are subject to possible enforcement action, unless the source can demonstrate to the Department's satisfaction that the emissions were unavoidable. Additionally, the Department recommended adding criteria in the rules which would guide sources when reporting these events to the Department. Such criteria would indicate to sources information the Department would consider in determining when to issue a Notice of Noncompliance or take other enforcement action. The Department also supported the submittal of written documentation by the source for all excess emissions, with reports on minor exceedances submitted in a manner and time frame specified by regional staff.

It was MOVED by Commissioner Wessinger that the EQC authorize the proposed rules as corrected for public hearing. The motion was seconded by Commissioner Lorenzen and was unanimously approved.

Agenda Item S: Incinerator Rule - Amendments to Better Address Municipal and Hospital Units

The purpose of this agenda item was to request the Commission to adopt new rules for incinerators that will serve to better protect the public from particulates, acid gases and toxics, by providing a uniform basis for evaluating proposed installations and comparative risks, and providing uniform performance standards for both incineration equipment and monitoring systems.

John Vance, representing Citizens for Clean Water, Inc. and **Mona Elkins** from Silverton presented testimony regarding emissions from medical waste incinerators. They indicated that incineration of waste produces toxic pollutants, and every effort must be made to protect the public from these pollutants, particularly dioxins. They stated their opposition to permitting a medical waste incinerator in Silverton, and that the Department should not allow the Marion County Solid Waste Facility located north of Salem in Brooks to import waste from outside the county for incineration at this facility. They also stated their support for improving the state's incinerator rules, providing the proposed standards are stringent enough to protect public health.

The Department recommended that the Commission authorize a hearing on more stringent rules and uniform limits and controls for existing and future incinerator facilities in Oregon.

It was MOVED by Commissioner Wessinger that a hearing be authorized on rule amendments as recommended by the Department. The motion was seconded by Commissioner Lorenzen and passed unanimously.

Agenda Item T: Special Waste - Proposed Rules

This agenda item seeks authorization to hold a public hearing on proposed rules to establish standards for permitting of landfills to receive cleanup materials contaminated by hazardous substances (special wastes), and establishes a permit fee to fund DEQ efforts to implement the new permitting requirements.

Steve Greenwood, Solid Waste Manager for the Department, stated that the proposed rules included only one type of special waste at this time, and that the Department expected to return to the Commission in the future to add other wastes to the list of 'special wastes'.

The Department recommended that draft regulations proposing to establish minimum criteria for permitting the land disposal of cleanup materials contaminated by hazardous substances, and to create permit fees to fund Department permit actions to implement the new standards as presented in Attachment A be authorized for hearing.

It was MOVED by Commissioner Sage that the Commission authorize public hearings, as requested by the Department. The motion was seconded by Commissioner Wessinger, and passed unanimously.

Agenda Item V: Container Nurseries - Update on Current Status

The purpose of this agenda item was to inform the Commission of Department strategy for controlling the pollutant discharges from container nurseries, and to take a look at the permit or other look-alike vehicle which would be used for implementing necessary controls.

There was some discussion between the Commission, Department staff and members of the container nursery industry in regard to the use of a stipulated order in lieu of a permit.

There appeared to be general acceptance of the program as outlined. No Commission action was required on this item.

There was no further business before the Commission, and the meeting was adjourned at about 4:00 p.m.

NEIL GOLDSCHMIDT
GOVERNOR

Environmental Quality Commission

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WORK SESSION
REQUEST FOR EQC DISCUSSION

Meeting Date: November 30, 1989
Agenda Item: 1
Division: Air Quality
Section: Vehicle Inspection

ISSUE:

The issue for discussion is whether or not the Department of Environmental Quality (DEQ, Department) should pursue the development and implementation of a Stage II Vapor Recovery program and, if so, the area of applicability and method of implementation.

Before further discussion on the subject, a brief description of Stage I and Stage II Vapor Recovery might be helpful.

Stage One Vapor Recovery (Stage I) is a system that ensures gasoline vapors from the storage tanks at service stations, which would normally be emitted into the atmosphere, are collected and ultimately routed to the terminal where they are either recovered or destroyed. This means that gasoline tank trucks must be equipped with a vapor return line and be vapor tight. All points in the transport system where the tanker truck is either filled or emptied, must be equipped with a compatible vapor return system.

As the gasoline flows from the tanker truck into the service station's storage tank, the liquid volume in the storage tank increases, resulting in a pressure which forces the vapors through the vapor return line into the tanker truck. The tanker truck then transports the vapors back to the terminal or bulk plant where they are collected, in a like manner, when the truck is refilled. The collected vapors are then either recovered through refrigerated condensation or destroyed through incineration.

Stage Two Vapor Recovery (Stage II) is a system that closes the vapor recovery loop by ensuring that the vapors in individual vehicle gas tanks are collected and routed into the service station's gasoline storage tank. Thus, with the combination of both Stage I and Stage II, vapors from the gas tank of motor vehicles are collected and ultimately end up being either recovered or destroyed at the bulk plant or

terminal. Stage I can provide environmental benefit on its own, but Stage II cannot provide a meaningful reduction in gasoline vapor emissions without Stage I.

The reduction of gasoline vapors which would otherwise be emitted provides at least a twofold benefit. First, since gasoline vapors are one of the components (precursors) which react in the atmosphere to create ground level (tropospheric) ozone, ambient concentrations of ozone are reduced. Second, because gasoline vapors also contain benzene, xylene, and toluene, which are known or suspected carcinogens, the amounts of these "air toxics" emitted into the environment will be reduced.

HISTORY:

The Portland metropolitan area has experienced violations of the health standard for ambient levels of ozone. After a number of years of effort to combat this problem, the area, as of the 1989 ozone season, is balanced on the edge of attainment of the health standard. The Environmental Quality Commission's (EQC, Commission) choice to adopt a 10.5 psi limit on the vapor pressure prior to the 1989 ozone season may have provided the reductions needed to avoid exceedances under the meteorological conditions of the 1989 ozone season. Certainly, the mild meteorological conditions during 1989 were helpful in that effort.

From the staff's point of view, however, DEQ's efforts should not stop the moment it appears that a healthful air quality has been achieved. It would seem prudent to pursue further reductions of these ozone precursor emissions for at least two reasons. First, it is not certain that the level of precursor emissions during future ozone seasons will be sufficient to avoid violations of the health standard under less than favorable meteorological conditions, such as those experienced in 1985 and 1988. A buffer, or margin of safety, is prudent to insure continued attainment.

Second, in order to provide the opportunity for a healthful economic environment, as well as a healthful natural environment, a portion of the assimilative capacity of the airshed that is currently in use needs to become available for reuse. Thus, an additional buffer, or margin of growth, is needed to accommodate and promote further economic development.

In addition, the potential for energy savings and reducing the contribution of toxic compounds, add further emphasis for consideration.

With this view in mind, the staff reviewed available reduction measures that were identified by the Portland Ozone Task Force but not yet implemented in the Portland metro area. Stage II would be an attractive control strategy based upon the magnitude of the reduction potential and the cost effectiveness in terms of dollars per ton of pollutant emissions reduced.

Subsequently, a group of individuals outside the Department were asked earlier this year to serve as a technical advisory committee on Stage II Vapor Recovery. Members of the group were selected in an attempt to ensure a committee of interested or affected entities which did not begin with a majority bias for or against the subject. At the initial meeting of the advisory committee, the mission of the committee was articulated to be twofold: to make a recommendation on whether or not to pursue Stage II Vapor Recovery as a control measure and, regardless of the outcome of the recommendation, to recommend an approach for implementation of a Stage II Vapor Recovery program.

A more in-depth discussion on the committee's deliberations and findings is attached (Attachment A). Some of the significant information which influenced the committee's recommendation are as follows:

* Stage II Vapor Recovery in the Portland metro area is anticipated to provide a reduction of 3000 tons of gasoline vapors per year. Cost estimates associated with Stage II Vapor Recovery range from $200 to $1000 per ton of pollutant reduced. In comparison, industrial controls established by the EQC in the current state implementation plan are calculated to provide a reduction of 5,295 tons per year (13,910 kg/day) of volatile organic vapors. Under these reasonable available control technology (RACT) strategies, costs of $2000 per ton of pollutant reduced have been considered attractive.

* Stage II Vapor Recovery cost effectiveness is significantly reduced for low throughput service stations, such as those with less than 10,000 gallons per month in gasoline sales.

* The impact of Stage II Vapor Recovery construction costs to the gasoline marketing industry can be reduced to the extent that installation of below ground piping can occur in conjunction with underground storage tank (UST) compliance efforts.

* Stage II Vapor Recovery provides a beneficial reduction in ambient concentrations of toxic/carcinogenic constituents of gasoline.

* Stage II Vapor Recovery has the potential to provide an energy conservation benefit through gasoline recovery of 0.5 to 2.0%.

* Stage II Vapor Recovery could result in gasoline costs increases of 0.2 - 1.1 cents per gallon. Areas with existing Stage II Vapor Recovery requirements have not been able to document gasoline price increases directly attributable to Stage II Vapor Recovery.

* One major metropolitan area (St. Louis, MO) recently was able to fully implement a Stage II Vapor Recovery program involving some 1200 service stations within 27 months. There are approximately 630 service stations within the Portland metro area and some 2500 service stations statewide.

* Clean Air Act re-authorization proposals would require Stage II Vapor Recovery for most ozone nonattainment areas. Those nonattainment areas which completely implement Stage II Vapor Recovery requirements during, or prior to, the 1990 base year might not be able to credit Stage II Vapor Recovery reductions towards annual percentage reduction requirements that are proposed.

* The benefits of Stage II Vapor Recovery would be lost without Stage I Vapor Recovery in place during service station fueling.

* U S Environmental Protection Agency (EPA) has recently proposed a nationwide requirement for Stage I Vapor Recovery on the basis of reduction of ambient benzene concentrations.

ALTERNATIVES CONSIDERED:

Besides background information on Stage II and the miscellaneous issues contained in the committee's report, the following alternatives were considered:

1. Require both Stage I and Stage II Vapor Recovery in the Portland metro area.

2. Require both Stage I and Stage II Vapor Recovery statewide.

3. Require both Stage I and Stage II Vapor Recovery on an expedited basis within the Portland metro area and on an extended schedule, in conjunction with UST schedules, for the remainder of the state.

4. Use county boundaries for any vapor recovery program proposed.

5. Exempt gasoline refueling stations with an average monthly throughput of 10,000 gallons of gasoline or less from Stage II Vapor Recovery requirements.

6. Exempt gasoline refueling stations with an average monthly throughput of 40,000 gallons of gasoline or less from Stage II Vapor Recovery requirements.

7. Do not implement Stage II Vapor Recovery unless, and until, required by EPA to do so.

RECOMMENDATIONS

The committee believes that Stage II Vapor Recovery can provide a significant reduction in ozone precursors and toxic air pollutants. The greatest need for ozone precursor reduction exists within the Portland metro area. While the overall reduction strategy is cost effective, the committee is sensitive to the issue that these costs must, in many cases, be borne by small independent service station owners. As a result, to the extent practicable, efforts should be made to minimize these costs through coordination of this control measure with other requirements currently imposed upon the gasoline marketing industry. As a result of the above, the committee recommends the following:

* The underground piping for Stage II Vapor Recovery be required to be constructed and set in place at the time of UST compliance or sooner, as determined through the rulemaking process - but not less than 24 months, at all gasoline refueling stations with an average monthly throughput of greater than 10,000 gallons of gasoline located within the county boundaries of Multnomah, Washington, and Clackamas counties.

* That Stage I Vapor Recovery be fully implemented at all gasoline refueling stations within the above named counties on the above described schedule.

* That the requirement for installation of the above ground components of the Stage II Vapor Recovery system and full operation of the system not be adopted until re-authorization of the Clean Air Act and base year considerations have been completed.

* That the installation of, at least, the underground piping for Stage II Vapor Recovery be strongly recommended as a prudent investment within the rest of the state for refueling stations with an average monthly throughput of greater than 10,000 gallons of gasoline.

The Department concurs with the recommendations of the committee as outlined above.

CONSIDERATIONS FOR JANUARY EQC WORK SESSION

An in-house work group has been assigned the task to determine the implementation costs associated with the above recommendations and to recommend approach(es) to implement a Stage II Vapor Recovery program in the most cost effective manner and to fund those costs. The report prepared by this work group will be provided to the commission for discussion during the January work session.

Approved:

Section:

Division:

Director:

Report Prepared By: William P. Jasper

Phone: 229-5081

Date Prepared: November 14, 1989

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(11/14/89)

ATTACHMENT A

Report to the
Oregon Environmental Quality Commission
by the
Technical Advisory Committee on Stage I/II Vapor Recovery

November 8, 1989

This report summarizes material presented to the DEQ Advisory Committee on Stage II Vapor Recovery. The committee reviewed various issues associated with consideration of Stage I/II vapor recovery as an air pollution control measure. While all members of the committee are in favor of clean air, the economic and political issues associated with consideration of this subject made an unanimous, or even majority recommendation impossible. All committee members agreed in principle that enhancement of Oregon's current Stage I efforts was required and that Stage II vapor recovery can achieve a reduction in volatile organic compounds (VOC) -- hydrocarbons. The disagreements are based upon the degree of need for this type of control strategy and the impacts of the costs associated with implementation.

Committee Recommendation

The Committee reached the following unanimous recommendation of those present and voting:

> The underground piping for Stage II Vapor Recovery be required to be constructed and set in place at the time of UST compliance or sooner, as determined through the rulemaking process - but not less than 24 months, at all gasoline refueling stations with an average monthly throughput of greater than 10,000 gallons of gasoline located within the county boundaries of Multnomah, Washington, and Clackamas counties.
>
> That Stage I Vapor Recovery be fully implemented at all gasoline refueling stations within the above named counties on the above described schedule.
>
> That the requirement for installation of the above ground components of the Stage II Vapor Recovery system and full operation of the system not be adopted until re-authorization of the Clean Air Act and base year considerations have been completed.
>
> That the installation of, at least, the underground piping for Stage II Vapor Recovery be strongly recommended as a prudent investment within the rest of the state for refueling stations with an average monthly throughput of greater than 10,000 gallons of gasoline.

CONSIDERATION ON STAGE II VAPOR RECOVERY

This Advisory Committee was formed in the late spring of 1989. Its charter is to review the concept of implementing a Stage II vapor recovery program in Oregon. Committee membership information is contained at the end of this

report. For purposes of definition, Stage I and Stage II are the names of methods used to control gasoline vapors during the filling of service stations underground tanks by tanker trucks, Stage I -- Figure 1, and the capture of the gasoline vapors when individual automobiles are filled, Stage II -- Figure 2.

During a series of monthly meetings, there was a review of the status of Oregon's Stage I program, an update on the status of the Underground Storage Tank (UST) program, and presentations by vendors of Stage II vapor control equipment. The benefits of this control strategy were discussed, as well as, the cost implications on both the petroleum marketing industry and the general retail gasoline purchaser.

This report will summarize the issues: the benefits in terms of air pollution and toxic control, and the costs and impacts associated with Stage II implementation. The following issues were explored in this review: the benefit to Air Pollution Control, Economic Development "Growth Cushion", Air Toxic Control, Energy Conservation, and the impact on Petroleum Marketing.

AIR POLLUTION CONTROL

Oregon's emission inventory lists gasoline marketing as one of the major sources of volatile organic compounds (VOC) emissions. In the Portland metropolitan area, these emissions account for 8.8% of the total VOCs (Figure 3). Also shown in that chart, is the comparison of VOCs from all sources except motor vehicle emissions.

VOCs associated with gasoline marketing, are generated when the lighter components of gasoline evaporate and are displaced to the atmosphere during vehicle fueling. VOC emissions are part of the air pollution chemistry involved in the formation of photochemical oxidants, measured as ozone; generically referred to as "smog." Portland is currently listed by EPA, as a "moderate" area for ozone noncompliance, and is the only so listed area in Oregon. Carbon monoxide is the other major non-compliant gas of concern in the Portland and Medford areas. Control of carbon monoxide emissions would be unaffected by Stage II type controls.

Some of gasoline marketing's emission impacts are currently regulated. Stage I vapor recovery systems were implemented in urban airsheds of Portland (AQMA), Salem (City limits), and Medford in the early 1970s. These efforts have achieved reductions in VOC emissions for those areas. Enhanced Stage I efforts are necessary in all areas where Stage II is being considered for implementation. The EPA recently announced a proposed rule, related to air toxics, that would require Stage I level control throughout the United States.

In the Portland metropolitan area, over 8% of the total hydrocarbon emissions are from petroleum marketing. Table 1, extracted for Oregon's emission inventory, lists the hydrocarbon emission estimates for all counties in the state. For the Portland metropolitan area, a reduction of approximately 3,000 tons per year of hydrocarbon emissions is estimated to be achieved with Stage II controls.

The following lists contains the cost/benefit estimates for a variety of control strategies. These figures are expressed in terms of dollars of cost per ton of VOC reduced.

On Board Controls -- New Cars	$ 190- 390

Note: Under President Bush's Clean Air Plan, on board controls will not be implemented by EPA. These controls have been discussed by some Senators during Clean Air Act debate, but issues again raised by NHTSA appear to doom further development of this control strategy, at this time.

1 psi RVP gasoline reduction (to 10.5 psi)	$ 320- 500
2.5 psi RVP gasoline reduction (to 9 psi)	$ 400- 600
Stage II Vapor Recovery (EPA est)	$ 620-1,940
Stage II Vapor Recovery (CARB), avg volume	$ 600
Stage II Vapor Recovery (CARB), low volume	$6,000
Stage II Vapor Recovery (CARB), high volume	$ 200
Stage II Vapor Recovery (EPA 1989)	$1,000

From these figures, Stage II Vapor Recovery is estimated to be more cost-effective than new controls on industrial sources, which generally average about $5,300-6,600 per ton of VOC reduced.

ECONOMIC DEVELOPMENT "GROWTH CUSHION"

When air quality standards are met, our community achieves several benefits. Healthful air is assured for area residents and the quality of life is improved. From a business perspective, achieving compliance with air quality standards by more than absolutely necessary, provides a reserve of air emissions available for business and industrial expansion, as well as, the population expansion and other emission increases, such as those due to traffic, associated with any increased growth. If no growth occurs, then potentially even more healthful air is achieved for the community.

To comply with the National Ambient Air Quality Standards (NAAQS) for ozone, an airshed must demonstrate 3 years of ozone attainment and have an approved 10 year plan for maintenance of the ozone standard. While which three years might best be chosen to demonstrate compliance was discussed, it was not the role of this committee to make recommendations on that subject.

The sizable emission reduction potential that Stage II is projected to achieve in the Portland metropolitan area, serves several functions. It can provide for added assurance that the maintenance plan will succeed. Part of the emission reduction potential can be used to offset new industries emissions. This extra offset provides for a "growth cushion." Thus the extra emissions reduction can accommodate economic expansion that is sure to come with continued population growth. Or the extra emissions reduction can be used simply to assure cleaner air for the community.

As an example for the Portland metro area, the potential 3,000 ton per year of VOC represents the equivalent of 10 top existing major heavy industrial plants in the area. From an economic perspective then, this control strategy could allow for robust economic growth to occur. That growth could encompass new well controlled industrial or electronics operations and still allow this metropolitan area to maintain compliance with the current ozone standard. And yet, since Portland is part of an interstate airshed, action on the Oregon side without a similar action on the Washington side, is felt by some individuals as saddling the Oregon portion of the interstate airshed with an additional economic handicap.

AIR TOXIC CONTROL

Motor gasoline contains a variety of chemical compounds. Among these compounds, benzene, toluene and xylene are some that present health concerns. Definition sheets on these compounds are attached. Currently, benzene is the only one of these compounds that there is fairly universal agreement as to carcinogenicity among the major listings. Not all of the accepted lists include toluene and xylene. Typical gasoline contains about 3% benzene, 12% toluene, and 12% xylene. These percentages may vary depending upon the particular gasoline blend.

While benzene makes up a somewhat small percent of all the different chemicals in gasoline, the cancer risk assessment from exposure to the benzene component in gasoline vapors, even to people living in rural areas near service stations, is above the levels of risk that are generally considered appropriate. In this context, the acceptable level of risk for cancer exposure is 1 cancer case from a pollutant per 1,000,000 population.

California Air Resources Board (CARB) has developed the most extensive information on risk exposure to benzene. Based upon this work, the levels of exposure to benzene are between 3 and 24 cancer cases per 1,000,000 population. The risk assessment ranges from the risk associated with living in a rural area near a service station, to the higher urban area risk. Air toxic considerations have lead to programs that are now being implemented, on a statewide basis in at least two states, California and New York. Oregon service station attendants, by extension to these risk estimates, would be at a higher level of risk, since there are currently no self service gasoline in the state.

EPA's proposed rule, mandating Stage I on a national basis, was issued as a benzene control strategy. Based upon the information in Table 1, about 2,000 tons per year of VOC would be captured due to Stage I throughout Oregon. If Stage II were implemented on a statewide basis, an additional 5,000 tons per year could be captured.

ENERGY CONSERVATION

A fourth issue involving Stage II, is that of energy conservation. Under the terms of SB 576, passed by the 1989 Oregon Legislature, the state is to demonstrate a 20% reduction in specific greenhouse and greenhouse-related gases. Some of these gases are present in gasoline vapors. Though there is

some controversy over the magnitude of energy recovery available from vapor recovery. In general, however, emission factors indicate that in excess of 11 pounds of gasoline vapor per 1,000 gallons of gasoline pumped are displaced to the atmosphere. The overall energy conservation from gasoline vapor recovery, depends on how the vapors are handled between the service station and the bulk loading terminal and how the collected vapors are processed in the terminal vapor recovery unit.

SUMMARY OF BENEFITS

Briefly summarizing what are considered the benefits:

There is a significant air pollution benefit, both in terms of achieving compliance and assuring maintenance of the federal ozone standard.

There is the potential to enhance economic growth and development, and to allow for the associated population expansion. Since Portland AQMA is in an interstate area, any proposal shown necessary to attain or maintain the ozone standard, should be considered for implementation throughout the interstate airshed.

There is a significant cancer risk associated with exposure from compounds found in gasoline vapors. Stage II vapor recovery provides one method to achieve that control.

There is the potential for energy conservation. Such efforts, are consistent with Legislative policy.

PETROLEUM MARKETING

Consumer Perception People who buy gasoline have seen the number of service stations in Oregon closed over the past ten years. Because of continuing market pressures and the UST requirements, there is predicted to be a continued decrease in the number of service stations to less than half the stations that were doing business in 1980. Implementation of Stage II will add one more pressure on petroleum marketing, possibly causing some additional operations to shut down. On the other hand, price increases attributable to Stage II systems, estimated to range from between 0.2¢ per gallon for large (200,000 gal/month) volume stations, to 1.1¢ per gallon for small (10,000 gal/month) operations, may not be noticeable. Current evidence of this is the wide range in retail gasoline prices in any given area.

Petroleum Marketing Industry This proposal directly impacts those in the petroleum marketing industry. This impact will be felt in installations and operating costs. The gasoline marketing industry is two years into the ten year period of transition to regulated underground storage tanks (UST). The UST program comes on the heels of a massive change in marketing emphasis, so that as a result, today over half of the retail service stations, have closed. This change in the marketing structure and the effect it has had on this industry was a major stumbling block in reaching a consensus.

Table 2 summarizes the costs estimates associated with Stage II implementation. These costs come from a variety of sources. Depending upon the assumptions, the cost of implementation of Stage II is estimated at about $800-1500 per nozzle for hardware at the pump. Underground excavation and plumbing costs will vary, and may be dependent upon UST compliance.

Costs that were discussed ranged, from $6,800 for the incremental addition of the plumbing for a 23 nozzle station necessary to support Stage II when modifications are made to comply with UST requirements, to a figure of $27,000 for new excavation and total installation of plumbing and hardware for a 12 nozzle facility. Many major oil companies are anticipating future requirements and are realizing cost savings by installing Stage II underground piping during the UST compliance work at company owned stations, especially in urban areas. Thus total capital cost to the owner/operator of a service station can range from about $800-1,500 per nozzle, but may be higher than that range depending upon individual circumstance. These cost do not include extra maintenance expenses, which is estimated at about $100-150 per nozzle per year. When the "cost of money" is considered, real out-of-pocket expense could double.

SUMMARY OF IMPACTS

Briefly summarizing what are considered the major impact on petroleum marketing:

There will be cost increases to the consumer in the price of gasoline. These costs have been estimated to be between 1.1¢ and 0.2¢ per gallon depending upon station size.

There are significant costs that will be borne by the petroleum marketing industry, both large corporation and small independent businesses, during implementation. These costs are estimated at between $800-1,500 per nozzle. In Oregon, for the average 9 nozzle station, the average high range cost is $13,500 for Stage II implementation.

Pollution control tax credits of up to 50% and loan guaranties under the UST program may be available to help with the installation costs.

MISCELLANEOUS ISSUES

During these past months of meetings and review, the Committee did make the following recommendations on issues associated with Stage II:

Enforcement efforts for Oregon's current Stage I program need to be enhanced.

Boundary designations for Stage I and II, if necessary, should be clear and made on a county by county basis.

The issue of tax credits and loan guarantees for Stage II during UST work needs to be clarified.

There should be some level of exemption for small volume service station from Stage II requirements.

If Stage II is to be implemented, there should be a phase in period to allow the industry an orderly transition.

Even handed enforcement and audit, at installation and on at least an annual basis of Stage II facilities would be necessary if the program is to succeed.

Non major service station owners, prior to UST compliance work, should be made aware of Stage I and Stage II requirements and how future rulemaking could affect them.

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FIGURE 1

Two Point Stage I Vapor Recovery

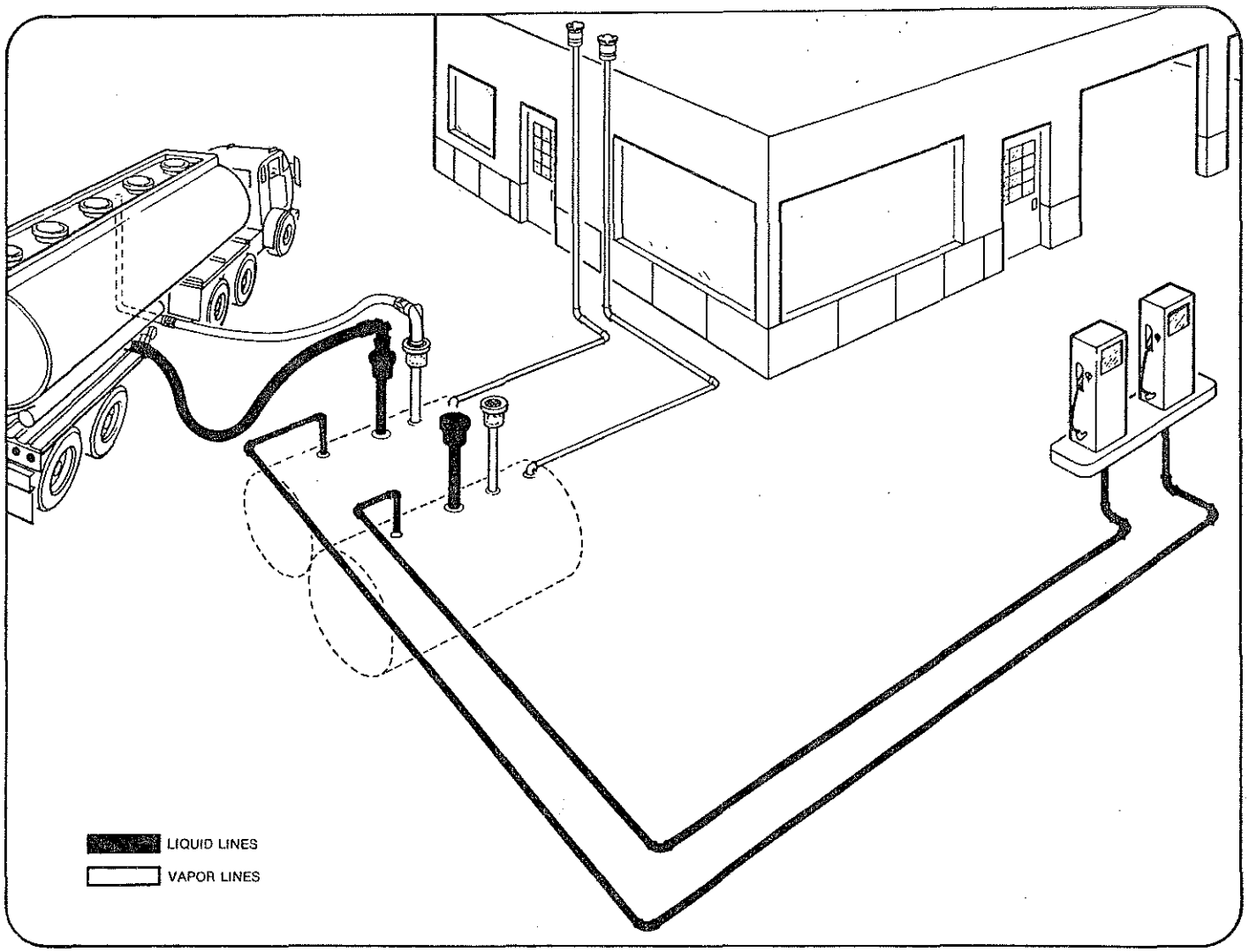


FIGURE 2

Two Point Stage I and Stage II Vapor Recovery

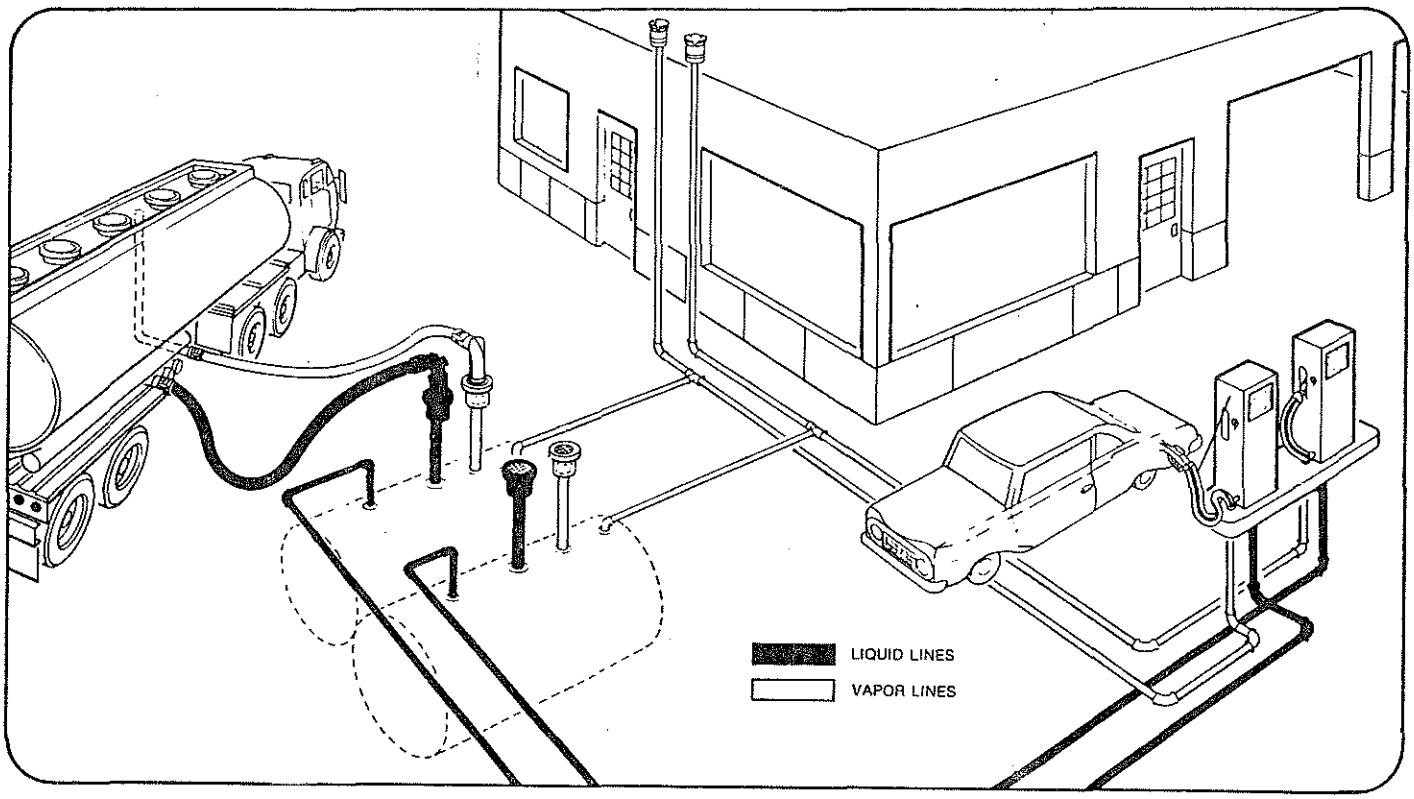
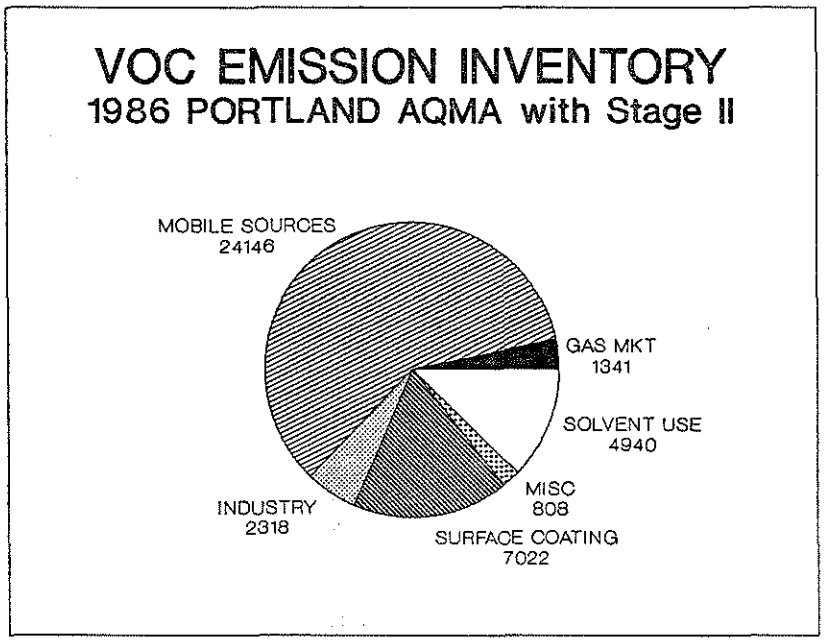
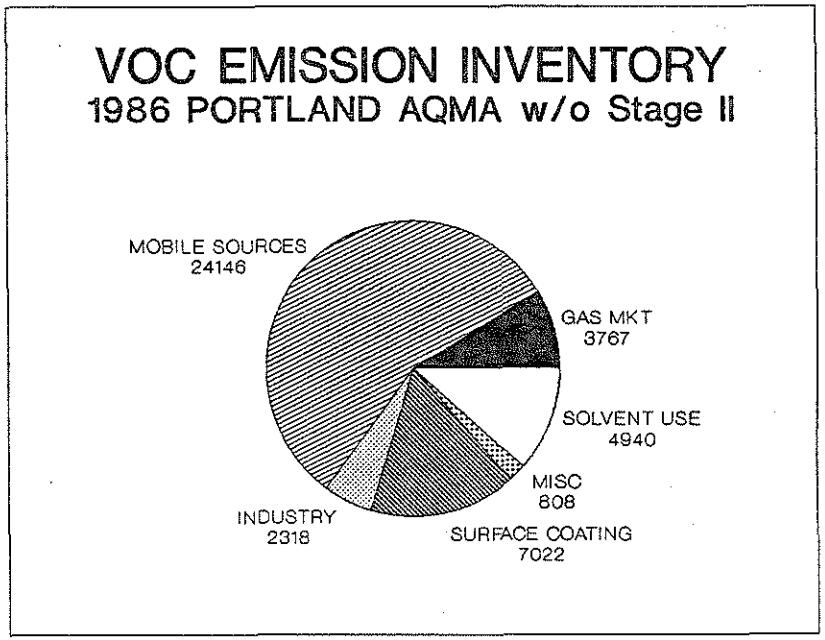


FIGURE 3


VOC EMISSION INVENTORY
1986 PORTLAND AQMA with Stage II
MOBILE SOURCES
24146
GAS MKT
1341
SOLVENT USE
4940
MISC
808
INDUSTRY
2318
SURFACE COATING
7022


VOC EMISSION INVENTORY
1986 PORTLAND AQMA w/o Stage II
MOBILE SOURCES
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GAS MKT
3767
SOLVENT USE
4940
MISC
808
INDUSTRY
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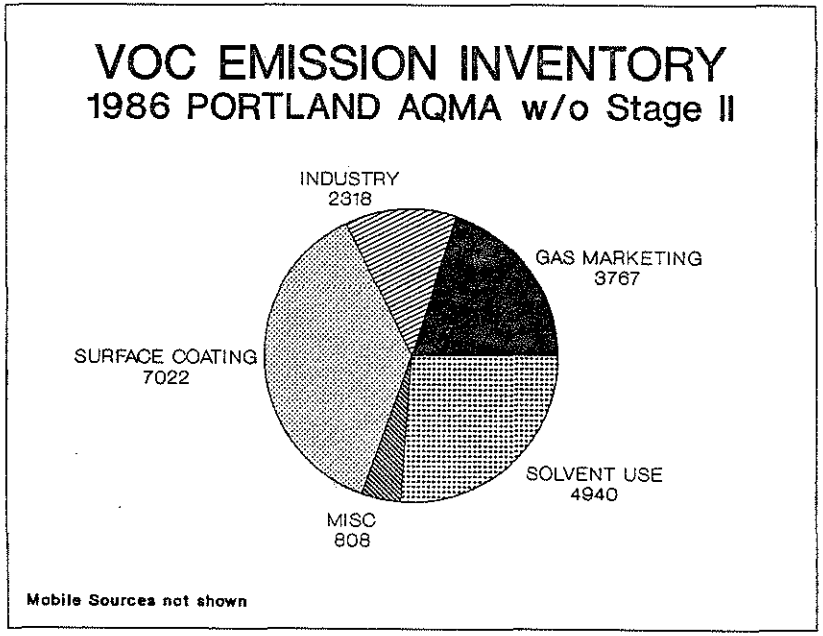
SURFACE COATING
7022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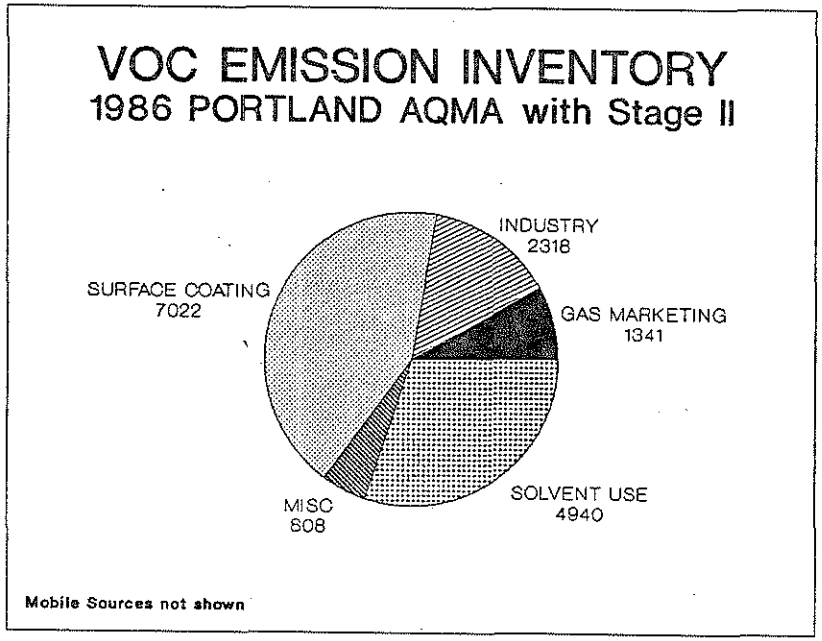
Mobile Sources not shown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SOLVENT USE
4940
Mobile Sources not shown

TABLE 1

GASOLINE MARKETING (Evaporative Emissions From Gasoline Service Station Operations)

Filename: EIGMT87D

YEAR: 1987 - Projection 3

Assumptions:

95% of service stations have stage 1 controls (balanced submerged filling)

95% of service stations have stage II controls

MOTOR VEHICLE GASOLINE SALES

Multnomah County	246525861	Gallons
Washington County	129536310	Gallons
Other Counties	932322577	Gallons
Total State	1308384748	Gallons

AIRCRAFT GASOLINE SALES

Total State	101885866	Gallons

POPULATION

Multnomah County	562000
Washington County	280000
Other Counties	1848000
Total State	2690000

EMISSION FACTORS (Table 4.4-7, AP-42)

					Current Emission Factors Being Used: CONTROLS	NO CONTROLS
Stage I	Filling Underground Storage Tanks: Submerged Filling	7.30	#/1000 Gal			7.30
	Splash Filling	11.50	#/1000 Gal			
	Balanced Submerged Filling	0.30	#/1000 Gal		0.30	
	Underground Tank Breathing & Emptying	1.00	#/1000 Gal		1.00	1.00
				Total Stage I --->	1.30	8.30
Stage II	Vehicle Refueling Operations: Displacement Losses (Uncontrolled)	11.00	#/1000 Gal			11.00
	Displacement Losses (Controlled)	1.10	#/1000 Gal		1.10	
	Spillage	0.70	#/1000 Gal		0.70	0.70
				Total Stage II -->	1.80	11.70

GASOLINE MARKETING (Evaporative Emissions From Gasoline Service Station Operations)

Filename: EIGMT87D

STAGE I EMISSIONS

XX	COUNTY	POPULATION	% OF OTHER COUNTIES POPULATION	% OF STATE POPULATION	EST GAS SALES (M GALLONS)	% OF SERVICE STATIONS WITH CONTROLS	EST SALES STATIONS WITH CONTROLS (M GALLONS)	EST SALES STATIONS WITHOUT CONTROLS (M GALLONS)	VOC FROM STATIONS WITH CONTROLS (TONS/YR)	VOC FROM STATIONS WITHOUT CONTROLS (TONS/YR)	TOTAL VOC (TONS/YR)	1987 VOC (TONS/YR)	CHANGE
1	BAKER	15300	0.83	0.57	8298.4	95.00	7883.5	414.9	5.12	1.72	6.85	34.44	-27.59
2	BENTON	69200	3.74	2.57	37532.7	95.00	35656.0	1876.6	23.18	7.79	30.96	155.76	-124.80
3	CLACKAMAS	255100	13.80	9.48	138361.0	95.00	131442.9	6918.0	85.44	28.71	114.15	201.32	-87.17
4	CLATSOP	33100	1.79	1.23	17952.8	95.00	17055.1	897.6	11.09	3.73	14.81	74.50	-59.69
5	COLUMBIA	36100	1.95	1.34	19579.9	95.00	18600.9	979.0	12.09	4.06	16.15	81.26	-65.10
6	COOS	57500	3.11	2.14	31186.8	95.00	29627.5	1559.3	19.26	6.47	25.73	129.43	-103.70
7	CROOK	13500	0.73	0.50	7322.1	95.00	6956.0	366.1	4.52	1.52	6.04	30.39	-24.35
8	CURRY	17200	0.93	0.64	9328.9	95.00	8862.5	466.4	5.76	1.94	7.70	38.72	-31.02
9	DESCHUTES	65600	3.55	2.44	35580.1	95.00	33801.1	1779.0	21.97	7.38	29.35	147.66	-118.30
10	DOUGLAS	93000	5.03	3.46	50441.3	95.00	47919.2	2522.1	31.15	10.47	41.61	209.33	-167.72
11	GILLIAM	1850	0.10	0.07	1003.4	95.00	953.2	50.2	0.62	0.21	0.83	4.16	-3.34
12	GRANT	8500	0.46	0.32	4610.2	95.00	4379.7	230.5	2.85	0.96	3.80	19.13	-15.33
13	HARNEY	7200	0.39	0.27	3905.1	95.00	3709.9	195.3	2.41	0.81	3.22	16.21	-12.98
14	HOOD RIVER	16500	0.89	0.61	8949.3	95.00	8501.8	447.5	5.53	1.86	7.38	37.14	-29.76
15	JACKSON	141700	7.67	5.27	76855.2	95.00	73012.4	3842.8	47.46	15.95	63.41	90.30	-26.90
16	JEFFERSON	11800	0.64	0.44	6400.1	95.00	6080.1	320.0	3.95	1.33	5.28	26.56	-21.28
17	JOSEPHINE	61700	3.34	2.29	33464.8	95.00	31791.6	1673.2	20.66	6.94	27.61	138.88	-111.27
18	KLAMATH	56900	3.08	2.12	30861.4	95.00	29318.3	1543.1	19.06	6.40	25.46	128.07	-102.61
19	LAKE	7300	0.40	0.27	3959.4	95.00	3761.4	198.0	2.44	0.82	3.27	16.43	-13.16
20	LANE	267700	14.49	9.95	145195.0	95.00	137935.2	7259.7	89.66	30.13	119.79	244.29	-124.50
21	LINCOLN	37600	2.03	1.40	20393.5	95.00	19373.8	1019.7	12.59	4.23	16.82	84.63	-67.81
22	LINN	87000	4.71	3.23	47187.0	95.00	44827.7	2359.4	29.14	9.79	38.93	195.83	-156.90
23	MALHEUR	26500	1.43	0.99	14373.1	95.00	13654.4	718.7	8.88	2.98	11.86	59.65	-47.79
24	MARION	214500	11.61	7.97	116340.4	95.00	110523.4	5817.0	71.84	24.14	95.98	262.11	-166.13
25	MORROW	8000	0.43	0.30	4339.0	95.00	4122.1	217.0	2.68	0.90	3.58	18.01	-14.43
26	MULTNOMAH	562000		20.89	267812.1	95.00	254421.5	13390.6	165.37	55.57	220.94	183.45	37.49
27	POLK	45800	2.48	1.70	24841.0	95.00	23598.9	1242.0	15.34	5.15	20.49	74.49	-53.99
28	SHERMAN	2100	0.11	0.08	1139.0	95.00	1082.0	56.9	0.70	0.24	0.94	4.73	-3.79
29	TILLAMOOK	21000	1.14	0.78	11390.0	95.00	10820.5	569.5	7.03	2.36	9.40	47.27	-37.87
30	UMATILLA	58100	3.14	2.16	31512.2	95.00	29936.6	1575.6	19.46	6.54	26.00	130.78	-104.78
31	UNION	23300	1.26	0.87	12637.4	95.00	12005.6	631.9	7.80	2.62	10.43	52.45	-42.02
32	WALLOWA	7150	0.39	0.27	3878.0	95.00	3684.1	193.9	2.39	0.80	3.20	16.09	-12.89
33	WASCO	20400	1.10	0.76	11064.5	95.00	10511.3	553.2	6.83	2.30	9.13	45.92	-36.79
34	WASHINGTON	280000		10.41	140141.5	95.00	133134.5	7007.1	86.54	29.08	115.62	110.71	4.90
35	WHEELER	1400	0.08	0.05	759.3	95.00	721.4	38.0	0.47	0.16	0.63	3.15	-2.52
36	YAMHILL	58400	3.16	2.17	31675.0	95.00	30091.2	1583.7	19.56	6.57	26.13	131.45	-105.32
	TOTAL	2690000	100	100	1410270.61		1339757.08	70513.53	870.84	292.63	1163.47	3244.68	-2081.21

GASOLINE MARKETING (Evaporative Emissions From Gasoline Service Station Operations)

Filename: EIGMT87D

STAGE II EMISSIONS

XX	COUNTY	POPULATION	% OF OTHER COUNTIES POPULATION	% OF STATE POPULATION	EST GAS SALES (M GALLONS)	% OF SERVICE STATIONS WITH CONTROLS	EST SALES STATIONS WITH CONTROLS (M GALLONS)	EST SALES STATIONS WITHOUT CONTROLS (M GALLONS)	VOC FROM STATIONS WITH CONTROLS (TONS/YR)	VOC FROM STATIONS WITHOUT CONTROLS (TONS/YR)	TOTAL VOC (TONS/YR)	1987 VOC (TONS/YR)	CHANGE
1	BAKER	15300	0.83	0.57	8298.4	95.00	7883.5	414.9	7.10	2.43	9.52	48.55	-39.02
2	BENTON	69200	3.74	2.57	37532.7	95.00	35656.0	1876.6	32.09	10.98	43.07	219.57	-176.50
3	CLACKAMAS	255100	13.80	9.48	138361.0	95.00	131442.9	6918.0	118.30	40.47	158.77	809.41	-650.64
4	CLATSOP	33100	1.79	1.23	17952.8	95.00	17055.1	897.6	15.35	5.25	20.60	105.02	-84.42
5	COLUMBIA	36100	1.95	1.34	19579.9	95.00	18600.9	979.0	16.74	5.73	22.47	114.54	-92.07
6	COOS	57500	3.11	2.14	31186.8	95.00	29627.5	1559.3	26.66	9.12	35.79	182.44	-146.66
7	CROOK	13500	0.73	0.50	7322.1	95.00	6956.0	366.1	6.26	2.14	8.40	42.83	-34.43
8	CURRY	17200	0.93	0.64	9328.9	95.00	8862.5	466.4	7.98	2.73	10.70	54.57	-43.87
9	DESCHUTES	65600	3.55	2.44	35580.1	95.00	33801.1	1779.0	30.42	10.41	40.83	208.14	-167.32
10	DOUGLAS	93000	5.03	3.46	50441.3	95.00	47919.2	2522.1	43.13	14.75	57.88	295.08	-237.20
11	GILLIAM	1850	0.10	0.07	1003.4	95.00	953.2	50.2	0.86	0.29	1.15	5.87	-4.72
12	GRANT	8500	0.46	0.32	4610.2	95.00	4379.7	230.5	3.94	1.35	5.29	26.97	-21.68
13	HARNEY	7200	0.39	0.27	3905.1	95.00	3709.9	195.3	3.34	1.14	4.48	22.85	-18.36
14	HOOD RIVER	16500	0.89	0.61	8949.3	95.00	8501.8	447.5	7.65	2.62	10.27	52.35	-42.08
15	JACKSON	141700	7.67	5.27	76855.2	95.00	73012.4	3842.8	65.71	22.48	88.19	449.60	-361.41
16	JEFFERSON	11800	0.64	0.44	6400.1	95.00	6080.1	320.0	5.47	1.87	7.34	37.44	-30.10
17	JOSEPHINE	61700	3.34	2.29	33464.8	95.00	31791.6	1673.2	28.61	9.79	38.40	195.77	-157.37
18	KLAMATH	56900	3.08	2.12	30861.4	95.00	29318.3	1543.1	26.39	9.03	35.41	180.54	-145.13
19	LAKE	7300	0.40	0.27	3959.4	95.00	3761.4	198.0	3.39	1.16	4.54	23.16	-18.62
20	LANE	267700	14.49	9.95	145195.0	95.00	137935.2	7259.7	124.14	42.47	166.61	849.39	-682.78
21	LINCOLN	37600	2.03	1.40	20393.5	95.00	19373.8	1019.7	17.44	5.97	23.40	119.30	-95.90
22	LINN	87000	4.71	3.23	47187.0	95.00	44827.7	2359.4	40.34	13.80	54.15	276.04	-221.90
23	MALHEUR	26500	1.43	0.99	14373.1	95.00	13654.4	718.7	12.29	4.20	16.49	84.08	-67.59
24	MARION	214500	11.61	7.97	116340.4	95.00	110523.4	5817.0	99.47	34.03	133.50	680.59	-547.09
25	MORROW	8000	0.43	0.30	4339.0	95.00	4122.1	217.0	3.71	1.27	4.98	25.38	-20.40
26	MULTNOMAH	562000		20.89	267812.1	95.00	254421.5	13390.6	228.98	78.34	307.31	1566.70	-1259.39
27	POLK	45800	2.48	1.70	24841.0	95.00	23598.9	1242.0	21.24	7.27	28.51	145.32	-116.81
28	SHERMAN	2100	0.11	0.08	1139.0	95.00	1082.0	56.9	0.97	0.33	1.31	6.66	-5.36
29	TILLAMOOK	21000	1.14	0.78	11390.0	95.00	10820.5	569.5	9.74	3.33	13.07	66.63	-53.56
30	UMATILLA	58100	3.14	2.16	31512.2	95.00	29936.6	1575.6	26.94	9.22	36.16	184.35	-148.19
31	UNION	23300	1.26	0.87	12637.4	95.00	12005.6	631.9	10.81	3.70	14.50	73.93	-59.43
32	WALLOWA	7150	0.39	0.27	3878.0	95.00	3684.1	193.9	3.32	1.13	4.45	22.69	-18.24
33	WASCO	20400	1.10	0.76	11064.5	95.00	10511.3	553.2	9.46	3.24	12.70	64.73	-52.03
34	WASHINGTON	280000		10.41	140141.5	95.00	133134.5	7007.1	119.82	40.99	160.81	819.83	-659.02
35	WHEELER	1400	0.08	0.05	759.3	95.00	721.4	38.0	0.65	0.22	0.87	4.44	-3.57
36	YAMHILL	58400	3.16	2.17	31675.0	95.00	30091.2	1583.7	27.08	9.26	36.35	185.30	-148.95
	TOTAL	2690000	100	100	1410270.61		1339757.08	70513.53	1205.78	412.50	1618.29	8250.08	-6631.80

GASOLINE MARKETING (Evaporative Emissions From Gasoline Service Station Operations)

Filename: EIGMT87D

XX	COUNTY	TOTAL VOC EMISSIONS (TONS/YR)	1987 VOC (TONS/YR)	CHANGE
1	BAKER	16.37	82.98	-66.62
2	BENTON	74.03	375.33	-301.29
3	CLACKAMAS	272.92	1010.73	-737.81
4	CLATSOP	35.41	179.53	-144.12
5	COLUMBIA	38.62	195.80	-157.18
6	COOS	61.52	311.87	-250.35
7	CROOK	14.44	73.22	-58.78
8	CURRY	18.40	93.29	-74.89
9	DESCHUTES	70.18	355.80	-285.62
10	DOUGLAS	99.50	504.41	-404.92
11	GILLIAM	1.98	10.03	-8.05
12	GRANT	9.09	46.10	-37.01
13	HARNEY	7.70	39.05	-31.35
14	HOOD RIVER	17.65	89.49	-71.84
15	JACKSON	151.60	539.91	-388.31
16	JEFFERSON	12.62	64.00	-51.38
17	JOSEPHINE	66.01	334.65	-268.64
18	KLAMATH	60.87	308.61	-247.74
19	LAKE	7.81	39.59	-31.78
20	LANE	286.40	1093.68	-807.28
21	LINCOLN	40.23	203.93	-163.71
22	LINN	93.08	471.87	-378.79
23	MALHEUR	28.35	143.73	-115.38
24	MARION	229.48	942.71	-713.22
25	MORROW	8.56	43.39	-34.83
26	MULTNOMAH	528.26	1750.15	-1221.89
27	POLK	49.00	219.81	-170.81
28	SHERMAN	2.25	11.39	-9.14
29	TILLAMOOK	22.47	113.90	-91.43
30	UMATILLA	62.16	315.12	-252.96
31	UNION	24.93	126.37	-101.45
32	WALLOWA	7.65	38.78	-31.13
33	WASCO	21.82	110.65	-88.82
34	WASHINGTON	276.43	930.54	-654.11
35	WHEELER	1.50	7.59	-6.10
36	YAMHILL	62.48	316.75	-254.27
	TOTAL	2781.76	11494.76	-8713.01

Table 2

Summary of Stage II Costs

	Oregon Estimates	API/St. Louis
Cost per pump hardware	$400-600 [1]	--
Maintenance per year	$100	--
Excavation only with UST (23 pumps)	$6800	--
Licence/permits	NA	$100-200
Total Cost estimate	$16000-27000	--
Average cost per nozzle	$800-1500 [2]	$1660

1 -- Based upon new Emco-Wheaton valve nozzle soon to be introduced at a cost of approximately $200 each.

2 -- Lower cost estimated based upon attributing all excavation costs to UST installation.

HAZARDOUS SUBSTANCE FACT SHEET

Contents prepared by the
New Jersey Department of Health
Right to Know Program

Distributed by the United States
Environmental Protection Agency
Office of Toxic Substances

COMMON NAME: BENZENE

CAS NUMBER: 71-43-2 **DOT NUMBER:** UN 1114

HAZARD SUMMARY

* Benzene can affect you when breathed in and by passing through your skin.
* Benzene is a CARCINOGEN--HANDLE WITH EXTREME CAUTION. It also may be a teratogen.
* Exposure can cause you to become dizzy and lightheaded. Higher levels can cause convulsions and death.
* Exposure can irritate the nose and throat and may cause an upset stomach and vomiting.
* Benzene can cause an irregular heart beat that can lead to death.
* Prolonged exposure can cause fatal damage to the blood (aplastic anemia).
* Benzene is a FLAMMABLE LIQUID.

IDENTIFICATION

Benzene is a colorless liquid with a pleasant odor. It is used mainly in making other chemicals, as a solvent, and is found in gasoline.

REASON FOR CITATION

* Benzene is on the Workplace Hazardous Substance List because it is regulated by OSHA.
* This chemical is also on the Special Health Hazard Substance List because it is a CANCER-CAUSING AGENT, a MUTAGEN and is FLAMMABLE.
* Definitions are provided on page 5.

WORKPLACE EXPOSURE LIMITS

OSHA: The legal airborne permissible exposure limit (PEL) is 10 ppm averaged over an 8-hour workshift and 25 ppm as a ceiling limit, and 50 ppm which should not be exceeded in any 10 minute period.

NIOSH: The recommended airborne exposure limit is 10 ppm averaged over an 8-hour workshift and 25 ppm, not to be exceeded during any 10 minute work period.

* Benzene is a CANCER-CAUSING AGENT in humans. There may be no safe level of exposure to a carcinogen, so all contact should be reduced to the lowest possible level.
* The above exposure limits are for air levels only. Skin contact may also cause overexposure.

HOW TO DETERMINE IF YOU ARE BEING EXPOSED

* Exposure to hazardous substances should be routinely evaluated. This may include collecting air samples. Under OSHA 1910.20, you have a legal right to obtain copies of sampling results from you employer. If you think you are experiencing any work-related health problems, see a doctor trained to recognize occupational diseases. Take this Fact Sheet with you.
* ODOR THRESHOLD = 12.0 ppm.
* The odor threshold only serves as a warning of exposure. Not smelling it does not mean you are not being exposed.

WAYS OF REDUCING EXPOSURE

* A regulated, marked area should be established where Benzene is handled, used, or stored.
* Wear protective work clothing.
* Wash thoroughly immediately after exposure to Benzene and at the end of the workshift.
* Post hazard and warning information in the work area. In addition, as part of an ongoing education and training effort, communicate all information on the health and safety hazards of Benzene to potentially exposed workers.

This Fact Sheet is a summary source of information for workers, employers, and community residents. Health professionals may also find it useful. If this substance is part of a mixture, this Fact Sheet should be used along with the manufacturer-supplied Material Safety Data Sheet (MSDS).

HEALTH HAZARD INFORMATION

Acute Health Effects

The following acute (short-term) health effects may occur immediately or shortly after exposure to Benzene:

* Exposure can cause symptoms of dizziness, lightheadedness, headache, and vomiting. Convulsions and coma, or sudden death from irregular heart beat, may follow high exposures.
* Exposure can also irritate the eyes, nose, and throat.

Chronic Health Effects

The following chronic (long-term) health effects can occur at some time after exposure to Benzene and can last for months or years:

Cancer Hazard

* Benzene is a CANCER-CAUSING AGENT in humans. It has been shown to cause leukemia.
* Many scientists believe there is no safe level of exposure to a cancer-causing agent.

Reproductive Hazard

* There is limited evidence that Benzene is a teratogen in animals. Until further testing has been done, it should be treated as a possible teratogen in humans.

Other Long-Term Effects

* Repeated exposure can damage the blood-forming organs (aplastic anemia) enough to cause death.
* Long-term exposure may cause drying and scaling of the skin.

MEDICAL

Medical Testing

Before beginning employment and at regular times after that, the following are recommended:

* Complete blood count
* Urinary phenol (a test to see if Benzene is in the body).

These should be repeated if symptoms develop or overexposure is suspected.

Any evaluation should include a careful history of past and present symptoms with an exam. Medical tests that look for damage already done are <u>not</u> a substitute for controlling exposure.

Request copies of your medical testing. You have a legal right to this information under OSHA 1910.20.

WORKPLACE CONTROLS AND PRACTICES

Unless a less toxic chemical can be substituted for a hazardous substance, ENGINEERING CONTROLS are the most effective way of reducing exposure. The best protection is enclosing operations and/or providing local exhaust ventilation at the site of chemical release. Isolating operations can also reduce exposure. Using respirators or protective equipment is less effective than the controls mentioned above, but is sometimes necessary.

In evaluating the controls present in your workplace, consider: (1) how hazardous the substance is; (2) how much of the substance is released into the workplace, and (3) whether harmful skin or eye contact could occur. Better controls should be in place for highly toxic chemicals or when significant skin, eye, or breathing exposures are possible.

In addition, the following controls are recommended:

* Where possible, automatically pump liquid Benzene from drums or other storage containers to process containers.
* Specific engineering controls are recommended for this chemical by NIOSH. Refer to the NIOSH criteria documents

on *Benzene # 74-137 and "Refined Petroleum Solvents" # 77-192.*

Good WORK PRACTICES can help to reduce hazardous exposures. The following work practices are recommended:

* Workers whose clothing has been contaminated by Benzene should change into clean clothing promptly.
* Do not take contaminated work clothes home. Family members could be exposed.
* Contaminated work clothes should be laundered by individuals who have been informed of the hazards of exposure to Benzene.
* On skin contact with Benzene, immediately wash or shower to remove the chemical.
* Wash any areas of the body that may have contacted Benzene at the end of each work day, whether or not known skin contact has occurred.
* Do not eat, smoke, or drink where Benzene is handled, processed, or stored, since the chemical can be swallowed. Wash hands carefully before eating or smoking.

PERSONAL PROTECTIVE EQUIPMENT

WORKPLACE CONTROLS ARE BETTER THAN PERSONAL PROTECTIVE EQUIPMENT. However, for some jobs (such as outside work, confined space entry, jobs done only once in a while, or jobs done while workplace controls are being installed), personal protective equipment may be appropriate.

The following recommendations are only guidelines and may not apply to every situation.

Clothing

* Avoid skin contact with Benzene. Wear solvent-resistant gloves and clothing. Safety equipment suppliers/ manufacturers can provide recommendations on the most protective glove/clothing material for your operation.
* All protective clothing (suits, gloves, footwear, headgear) should be clean, available each day, and put on before work.
* ACGIH recommends *VITON* gloves for short periods of protection.

Eye Protection

* Eye protection is included in the recommended respiratory protection.

Respiratory Protection

IMPROPER USE OF RESPIRATORS IS DANGEROUS. Such equipment should only be used if the employer has a written program that takes into account workplace conditions, requirements for worker training, respirator fit testing, and medical exams, as described in OSHA 1910.134.

* At <u>any</u> exposure level, use an MSHA/ NIOSH approved supplied-air respirator with a full facepiece operated in the positive pressure mode or with a full facepiece, hood, or helmet in the continuous flow mode, or use an MSHA/NIOSH approved self-contained breathing apparatus with a full facepiece operated in pressure-demand or other positive pressure mode.

HANDLING AND STORAGE

* Prior to working with Benzene you should be trained on its proper handling and storage.
* Benzene must be stored to avoid contact with OXIDIZERS (such as PERMANGANATES, NITRATES, PEROXIDES, CHLORATES, and PERCHLORATES), since violent reactions occur.
* Store in tightly closed containers in a cool well-ventilated area away from HEAT, STRONG OXIDIZERS (such as CHLORINE and BROMINE) and IRON.
* Sources of ignition such as smoking and open flames are prohibited where Benzene is handled, used, or stored.
* Metal containers involving the transfer of 5 gallons or more of Benzene should be grounded and bonded. Drums must be equipped with self-closing valves, pressure vacuum bungs, and flame arresters.
* Wherever Benzene is used, handled, manufactured, or stored, use explosion-proof electrical equipment and fittings.

QUESTIONS AND ANSWERS

Q: If I have acute health effects, will I later get chronic health effects?

A: Not always. Most chronic (long-term) effects result from repeated exposures to a chemical.

Q: Can I get long-term effects without ever having short-term effects?
A: Yes, because long-term effects can occur from repeated exposures to a chemical at levels not high enough to make you immediately sick.

Q: What are my chances of getting sick when I have been exposed to chemicals?
A: The likelihood of becoming sick from chemicals is increased as the amount of exposure increases. This is determined by the length of time someone is exposed and the amount of material they are exposed to.

Q: Is the risk of getting sick higher for workers than for community residents?
A: Yes. Exposures in the community, except possibly in cases of fires or spills, are usually much lower than those found in the workplace. However, people in the community may be exposed to contaminated water as well as to chemicals in the air over long periods. Because of this, and because of exposure of children or people who are already ill, community exposures may cause health problems.

Q: Don't all chemicals cause cancer?
A: No. Most chemicals tested by scientists are not cancer-causing.

Q: Aren't pregnant women at the greatest risk from reproductive hazards?
A: Not necessarily. Pregnant women are at greatest risk from chemicals which harm the developing fetus. However, chemicals may affect the <u>ability</u> to have children, so both men and women of child-bearing age are at high risk.

Q: Should I be concerned if a chemical is a teratogen in animals?
A: Yes. Although some chemicals may affect humans differently than they affect animals, damage to animals suggests that similar damage can occur in humans.

HAZARDOUS SUBSTANCE FACT SHEET

Contents prepared by the
New Jersey Department of Health
Right to Know Program

Distributed by the United States
Environmental Protection Agency
Office of Toxic Substances

Common Name: TOLUENE

CAS Number: 108-88-3
DOT Number: UN 1294

RTK Substance number: 1866
Date: 11/3/86

HAZARD SUMMARY

* Toluene can affect you when breathed in and by passing through your skin.
* Toluene may cause mutations. Handle with extreme caution.
* It may damage the developing fetus.
* Toluene is a FLAMMABLE LIQUID and a FIRE HAZARD.
* Exposure can irritate the nose, throat, and eyes. Higher levels can cause you to feel dizzy, lightheaded, and to pass out. Death can occur.
* Repeated exposures can damage bone marrow causing low blood cell count. It can also damage the liver and kidneys.
* Toluene can cause slowed reflexes, trouble concentrating, and headaches.
* Prolonged contact can cause a skin rash.

IDENTIFICATION

Toluene is a colorless liquid with a sweet pungent odor. It is used as a solvent and in aviation gasoline, making other chemicals, perfumes, medicines, dyes, explosives, and detergents.

REASON FOR CITATION

* Toluene is on the Workplace Substance List because it is regulated by OSHA and cited by ACGIH, DOT, NIOSH, NFPA and other authorities.
* This chemical is on the Special Health Hazard Substance List because it is FLAMMABLE.
* Definitions are attached.

HOW TO DETERMINE IF YOU ARE BEING EXPOSED

* Exposure to hazardous substances should be routinely evaluated. This may include collecting air samples. Under OSHA 1910.20, you have a legal right to obtain copies of sampling results from your employer. If you think you are experiencing any work-related health problems, see a doctor trained to recognize occupational diseases. Take this Fact Sheet with you.
* ODOR THRESHOLD = 2.9 ppm.
* The odor threshold only serves as a warning of exposure. Not smelling it does not mean you are not being exposed.

WORKPLACE EXPOSURE LIMITS

OSHA: The legal airborne permissible exposure limit (PEL) is 200 ppm averaged over an 8-hour workshift and 300 ppm, not to be exceeded during any 15 minute work period and a maximum peak concentration of 500 ppm.

NIOSH: The recommended airborne exposure limit is 100 ppm averaged over an 8-hour workshift and 200 ppm, not to be exceeded during any 10 minute work period.

* The above exposure limits are for air levels only.
* Toluene may cause mutations. All contact with this chemical should be reduced to the lowest possible level.

WAYS OF REDUCING EXPOSURE

* Where possible, enclose operations and use local exhaust ventilation at the site of chemical release. If local exhaust ventilation or enclosure is not used, respirators should be worn.
* Wear protective work clothing.
* Wash thoroughly immediately after exposure to Toluene and at the end of the workshift.
* Post hazard and warning information in the work area. In addition, as part of an ongoing education and training effort, communicate all information on the health and safety hazards of Toluene to potentially exposed workers.

This Fact Sheet is a summary source of information of all potential and most severe health hazards that may result from exposure. Duration of exposure, concentration of the substance and other factors will affect your susceptibility to any of the potential effects described below.

HEALTH HAZARD INFORMATION

Acute Health Effects

The following acute (short-term) health effects may occur immediately or shortly after exposure to **Toluene**:

* Exposure can irritate the nose, throat, and eyes. Higher levels can cause you to feel dizzy, lightheaded, and to pass out. Death can occur.
* Lower levels may cause trouble concentrating, headaches, and slowed reflexes.

Chronic Health Effects

The following chronic (long-term) health effects can occur at some time after exposure to **Toluene** and can last for months or years:

Cancer Hazard

* **Toluene** may cause mutations (genetic changes) in living cells. Whether or not it poses a cancer hazard needs further study.

Reproductive Hazard

* **Toluene** may damage the developing fetus.

Other Long-Term Effects

* Repeated exposure may damage bone marrow, causing low blood cell count.
* Prolonged contact can cause drying and cracking of the skin, and a rash.
* Repeated **Toluene** exposure can cause headaches, loss of appetite, nausea, and liver and kidney damage, and may cause brain damage.

MEDICAL TESTING

For those with frequent or potentially high exposure (half the TLV or greater, or significant skin contact), the following is recommended before beginning work and at regular times after that:

* Urinary Hippuric acid excretion (at the end of shift) as an index of overexposure.

If symptoms develop or overexposure is suspected, the following may be useful:

* Exam of the nervous system.
* Liver and kidney function tests, and evaluation for renal tubular acidosis.
* Complete blood count.

Any evaluation should include a careful history of past and present symptoms with an exam. Medical tests that look for damage already done are not a substitute for controlling exposure.

Request copies of your medical testing. You have a legal right to this information under OSHA 1910.20.

WORKPLACE CONTROLS AND PRACTICES

Unless a less toxic chemical can be substituted for a hazardous substance, **ENGINEERING CONTROLS** are the most effective way of reducing exposure. The best protection is to enclose operations and provide local exhaust ventilation at the site of chemical release. Isolating operations can also reduce exposure. Using respirators or protective equipment is less effective than the controls mentioned above, but is sometimes necessary.

In evaluating the controls present in your workplace, consider: (1) how hazardous the substance is, (2) how much of the substance is released into the workplace and (3) whether harmful skin or eye contact could occur. Special controls should be in place for highly toxic chemicals or when significant skin, eye, or breathing exposures are possible.

In addition, the following controls are recommended:

* Where possible, automatically pump liquid **Toluene** from drums or other storage containers to process containers.
* Specific engineering controls are recommended for this chemical by NIOS
* Refer to the NIOSH criteria document: Occupational Exposure to *Toluene #73-11023*.

Good WORK PRACTICES can help to reduce hazardous exposures. The following work practices are recommended:

* Workers whose clothing has been contaminated by **Toluene** should change into clean clothing promptly.
* Contaminated work clothes should be laundered by individuals who have been informed of the hazards of exposure to Toluene.
* On skin contact with **Toluene**, immediately wash or shower to remove the chemical. At the end of the workshift, wash any areas of the body that may have contacted **Toluene**, whether or not known skin contact has occurred.
* Do not eat, smoke, or drink where Toluene is handled, processed, or stored, since the chemical can be swallowed. Wash hands carefully before eating or smoking.

PERSONAL PROTECTIVE EQUIPMENT

WORKPLACE CONTROLS ARE BETTER THAN PERSONAL PROTECTIVE EQUIPMENT. However, for some jobs (such as outside work, confined space entry, jobs done only once in a while, or jobs done while workplace controls are being installed), personal protective equipment may be appropriate.

The following recommendations are only guidelines and may not apply to every situation.

Clothing

* Avoid skin contact with **Toluene**. Wear solvent-resistant gloves and clothing. Safety equipment suppliers/manufacturers can provide recommendations on the most protective glove/clothing material for your operation.
* All protective clothing (suits, gloves, footwear, headgear) should be clean, available each day, and put on before work.
* ACGIH recommends *VITON* and *Fluorene/Chloroprene* as protective materials.

Eye Protection

* Wear splash-proof chemical goggles and face shield when working with liquid, unless full facepiece respiratory protection is worn.

Respiratory Protection

IMPROPER USE OF RESPIRATORS IS DANGEROUS. Such equipment should only be used if the employer has a written program that takes into account workplace conditions, requirements for worker training, respirator fit testing and medical exams, as described in OSHA 1910.134.

* Where the potential exists for exposures over 100 ppm, use an MSHA/NIOSH approved full facepiece respirator with an organic vapor cartridge/canister. Increased protection is obtained from full facepiece powered air purifying respirators.
* If while wearing a filter, cartridge or canister respirator, you can smell, taste, or otherwise detect Toluene, or in the case of a full facepiece respirator you experience eye irritation, leave the area immediately. Check to make sure the respirator-to-face seal is still good. If it is, replace the filter, cartridge, or canister. If the seal is no longer good, you may need a new respirator.
* Be sure to consider all potential exposures in your workplace. You may need a combination of filters, prefilters, cartridges, or canisters to protect against different forms of a chemical (such as vapor and mist) or against a mixture of chemicals.
* Exposure to 2,000 ppm is immediately dangerous to life and health. If the possibility of exposures above 2,000 ppm exists, use a MSHA/NIOSH approved self-contained breathing apparatus with a full facepiece operated in continuous flow or other positive pressure mode.

HANDLING AND STORAGE

* Prior to working with **Toluene** you should be trained on its proper handling and storage.
* **Toluene** must be stored to avoid contact with STRONG OXIDIZERS (such as CHLORINE, BROMINE and FLUORINE) since violent reactions occur.

* Protect storage containers from physical damage.
* Sources of ignition, such as smoking and open flames, are prohibited where Toluene is used, handled, or stored in a manner that could create a potential fire or explosion hazard.
* Metal containers involving the transfer of 5 gallons or more of Toluene should be grounded and bonded. Drums must be equipped with self-closing valves, pressure vacuum bungs, and flame arresters.
* Use only non-sparking tools and equipment, especially when opening and closing containers of Toluene.

QUESTIONS AND ANSWERS

Q: If I have acute health effects, will I later get chronic health effects?
A: Not always. Most chronic (long-term) effects result from repeated exposures to a chemical.

Q: Can I get long-term effects without ever having short-term effects?
A: Yes, because long-term effects can occur from repeated exposures to a chemical at levels not high enough to make you immediately sick.

Q: What are my chances of getting sick when I have been exposed to chemicals?
A: The likelihood of becoming sick from chemicals is increased as the amount of exposure increases. This is determined by the length of time and the amount of material to which someone is exposed.

Q: When are higher exposures more likely?
A: Conditions which increase risk of exposure include <u>dust releasing operations</u> (grinding, mixing, blasting, dumping, etc.), <u>other physical and mechanical processes</u> (heating, pouring, spraying, spills and evaporation from large surface areas such as open containers), and <u>"confined space" exposures</u> (working inside vats, reactors, boilers, small rooms, etc.).

Q: Is the risk of getting sick higher for workers than for community residents?
A: Yes. Exposures in the community, except possibly in cases of fires or spills, are usually much lower than those found in the workplace. However, people in the community may be exposed to contaminated water as well as to chemicals in the air over long periods. Because of this, and because of exposure of children or people who are already ill, community exposures may cause health problems.

Q: Don't all chemicals cause cancer?
A: No. Most chemicals tested by scientists are not cancer-causing.

Q: Who is at the greatest risk from reproductive hazards?
A: Pregnant women are at greatest risk from chemicals that harm the developing fetus. However, chemicals may affect the <u>ability</u> to have children, so both men and women of childbearing age are at high risk.

HAZARDOUS SUBSTANCE FACT SHEET

Contents prepared by the
New Jersey Department of Health
Right to Know Program

Distributed by the United States
Environmental Protection Agency
Office of Toxic Substances

Common Name: XYLENES

CAS Number: 1330-20-7
DOT Number: UN 1307

RTK Substance number: 2014
Date: 11/3/86

HAZARD SUMMARY

* Xylenes can affect you when breathed in and by passing through your skin.
* Xylenes may damage the developing fetus.
* They can irritate the eyes, nose and throat. High levels can cause dizziness, passing out and death.
* Repeated exposure may damage bone marrow causing low blood cell count. They may also damage the eyes, and cause stomach problems.
* Xylenes may cause problems with memory and concentration.
* Xylenes are FLAMMABLE LIQUIDS and FIRE HAZARDS.

IDENTIFICATION

Xylenes are all similar chemicals forming a clear liquid with a strong odor. They are used as solvents and in making drugs, dyes, insecticides and gasoline.

REASON FOR CITATION

* Xylenes are on the Hazardous Substance List because they are regulated by OSHA and cited by ACGIH, DOT, NIOSH, NFPA and other authorities.
* These chemicals are on the Special Health Hazard Substance List because they are **FLAMMABLE**.
* Definitions are attached.

HOW TO DETERMINE IF YOU ARE BEING EXPOSED

* Exposure to hazardous substances should be routinely evaluated. This may include collecting air samples. Under OSHA 1910.20, you have a legal right to obtain copies of sampling results from your employer. If you think you are experiencing any work-related health problems, see a doctor trained to recognize occupational diseases. Take this Fact Sheet with you.
* ODOR THRESHOLD = 1.1 ppm.
* The odor threshold only serves as a warning of exposure. Not smelling it does not mean you are not being exposed.

WORKPLACE EXPOSURE LIMITS

OSHA: The legal airborne permissible exposure limit (PEL) is 100 ppm averaged over an 8-hour workshift.

NIOSH: The recommended airborne exposure limit is 100 ppm averaged over a 10-hour workshift and 200 ppm, not to be exceeded during any 10 minute work period.

ACGIH: The recommended airborne exposure limit is 100 ppm averaged over an 8-hour workshift and 150 ppm as a STEL (short term exposure limit).

* The above exposure limits are for air levels only. When skin contact also occurs, you may be overexposed, even though air levels are less than the limits listed above.

WAYS OF REDUCING EXPOSURE

* Where possible, enclose operations and use local exhaust ventilation at the site of chemical release. If local exhaust ventilation or enclosure is not used, respirators should be worn.
* Wear protective work clothing.
* Wash thoroughly immediately after exposure to Xylenes and at the end of the workshift.
* Post hazard and warning information in the work area. In addition, as part of an ongoing education and training effort, communicate all information on the health and safety hazards of Xylenes to potentially exposed workers.

This Fact Sheet is a summary source of information of all potential and most severe health hazards that may result from exposure. Duration of exposure, concentration of the substance and other factors will affect your susceptibility to any of the potential effects described below.

HEALTH HAZARD INFORMATION

Acute Health Effects

The following acute (short-term) health effects may occur immediately or shortly after exposure to Xylenes:

* Exposure can irritate the eyes, nose and throat. It can also cause headaches, nausea and vomiting, tiredness and stomach upset. High levels can cause you to feel dizzy and lightheaded, and to pass out. Very high levels can cause death.

Chronic Health Effects

The following chronic (long-term) health effects can occur at some time after exposure to Xylenes and can last for months or years:

Cancer Hazard

* According to the information presently available to the New Jersey Department of Health, Xylenes have not been tested for their ability to cause cancer in animals.

Reproductive Hazard

* Xylenes may damage the developing fetus.

Other Long-Term Effects

* Repeated exposure can damage bone marrow, causing low blood cell count.
* Xylenes can damage the liver and kidneys.
* Prolonged contact can cause drying and cracking of the skin.
* Repeated exposure to Xylenes can cause poor memory, concentration and other brain effects. It can also cause damage to the surface of the eye.

MEDICAL

Medical Testing

For those with frequent or potential high exposure (half the TLV or greater, significant skin contact), the following is recommended before beginning work and at regular times after that:

* Exam of the eyes by slit lamp.

If symptoms develop or overexposure is suspected, the following may be useful:

* Liver and kidney function tests.
* Complete blood count.
* Urine concentration of m-Methylhippuric Acid (at the end of shift) as an index of overexposure.

Any evaluation should include a careful history of past and present symptoms with an exam. Medical tests that look for damage already done are not a substitute for controlling exposure.

Request copies of your medical testing. You have a legal right to this information under OSHA 1910.20.

Mixed Exposures

Because more than light alcohol consumption can cause liver damage, drinking alcohol can increase the liver damage caused by Xylenes.

WORKPLACE CONTROLS AND PRACTICES

Unless a less toxic chemical can be substituted for a hazardous substance, ENGINEERING CONTROLS are the most effective way of reducing exposure. The best protection is to enclose operations and/or provide local exhaust ventilation at the site of chemical release. Isolating operations can also reduce exposure. Using respirators or protective equipment is less effective than the controls mentioned above, but is sometimes necessary.

In evaluating the controls present in your workplace, consider: (1) how hazardous the substance is, (2) how much of the substance is released into the workplace (3) whether harmful skin or eye contact could occur. Special controls should be in place for highly toxic chemicals or

when significant skin, eye, or breathing exposures are possible.

In addition, the following controls are recommended:

* Where possible, automatically pump liquid Xylenes from drums or other storage containers to process containers.
* Specific engineering controls are recommended for these chemicals by NIOSH. Refer to the NIOSH criteria document: Occupational Exposure to *Xylenes #75-168*.

Good WORK PRACTICES can help to reduce hazardous exposures. The following work practices are recommended:

* Workers whose clothing has been contaminated by Xylenes should change into clean clothing promptly.
* Contaminated work clothes should be laundered by individuals who have been informed of the hazards of exposure to Xylenes.
* On skin contact with Xylenes, immediately wash or shower to remove the chemicals. At the end of the workshift, wash any areas of the body that may have contacted Xylenes, whether or not known skin contact has occurred.
* Do not eat, smoke, or drink where Xylenes are handled, processed, or stored, since the chemicals can be swallowed. Wash hands carefully before eating or smoking.

PERSONAL PROTECTIVE EQUIPMENT

WORKPLACE CONTROLS ARE BETTER THAN PERSONAL PROTECTIVE EQUIPMENT. However, for some jobs (such as outside work, confined space entry, jobs done only once in a while, or jobs done while workplace controls are being installed), personal protective equipment may be appropriate.

The following recommendations are only guidelines and may not apply to every situation.

Clothing

* Avoid skin contact with Xylenes. Wear protective gloves and clothing. Safety equipment suppliers/manufacturers can provide recommendations on the most protective glove/clothing material for your operation.
* All protective clothing (suits, gloves, footwear, headgear) should be clean, available each day, and put on before work.
* ACGIH recommends the use of *Polyvinyl Alcohol* for protective material.

Eye Protection

* Wear splash-proof chemical goggles and face shield when working with liquid, unless full facepiece respiratory protection is worn

Respiratory Protection

IMPROPER USE OF RESPIRATORS IS DANGEROUS. Such equipment should only be used if the employer has a written program that takes into account workplace conditions, requirements for worker training, respirator fit testing and medical exams, as described in OSHA 1910.134.

* Where the potential exists for exposures over 100 ppm, use a MSHA/NIOSH approved full facepiece respirator with an organic vapor cartridge/canister. Increased protection is obtained from full facepiece powered-air purifying respirators.
* If while wearing a filter, cartridge or canister respirator, you can smell, taste, or otherwise detect Xylenes, or in the case of a full facepiece respirator you experience eye irritation, leave the area immediately. Check to make sure the respirator-to-face seal is still good. If it is, replace the filter, cartridge, or canister. If the seal is no longer good, you may need a new respirator.
* Be sure to consider all potential exposures in your workplace. You may need a combination of filters, prefilters, cartridges, or canisters to protect against different forms of a chemical (such as vapor and mist) or against a mixture of chemicals.
* Where the potential for high exposures exists, use a MSHA/NIOSH approved supplied-air respirator with a full facepiece operated in the positive pressure mode or with a full facepiece, hood, or helmet in the continuous flow mode.

* Exposure to 10,000 ppm is immediately dangerous to life and health. If the possibility of exposures above 10,000 ppm exists use a MSHA/NIOSH approved self contained breathing apparatus with a full facepiece operated in continuous flow or other positive pressure mode.

HANDLING AND STORAGE

* Prior to working with Xylenes you should be trained on its proper handling and storage.
* Xylenes must be stored to avoid contact with STRONG OXIDIZERS (such as CHLORINE, BROMINE and FLUORINE) since violent reactions occur.
* Sources of ignition, such as smoking and open flames, are prohibited where Xylenes are used, handled, or stored in a manner that could create a potential fire or explosion hazard.
* Use only non-sparking tools and equipment, especially when opening and closing containers of Xylenes.
* Protect storage containers from physical damage.

QUESTIONS AND ANSWERS

Q: If I have acute health effects, will I later get chronic health effects?
A: Not always. Most chronic (long-term) effects result from repeated exposures to a chemical.

Q: Can I get long-term effects without ever having short-term effects?
A: Yes, because long-term effects can occur from repeated exposures to a chemical at levels not high enough to make you immediately sick.

Q: What are my chances of getting sick when I have been exposed to chemicals?
A: The likelihood of becoming sick from chemicals is increased as the amount of exposure increases. This is determined by the length of time and the amount of material to which someone is exposed.

Q: When are higher exposures more likely?
A: Conditions which increase risk of exposure include dust releasing operations (grinding, mixing, blasting, dumping, etc.), other physical and mechanical processes (heating, pouring, spraying, spills and evaporation from large surface areas such as open containers), and "confined space" exposures (working inside vats, reactors, boilers, small rooms, etc.).

Q: Is the risk of getting sick higher for workers than for community residents?
A: Yes. Exposures in the community, except possibly in cases of fires or spills, are usually much lower than those found in the workplace. However, people in the community may be exposed to contaminated water as well as to chemicals in the air over long periods. Because of this, and because of exposure of children or people who are already ill, community exposures may cause health problems.

Q: Who is at the greatest risk from reproductive hazards?
A: Pregnant women are at greatest risk from chemicals that harm the developing fetus. However, chemicals may affect the ability to have children, so both men and women of childbearing are at high risk.

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ENVIRONMENTAL QUALITY COMMISSION

WORK SESSION - - NOVEMBER 30, 1989

Agenda Item: #2
Division: Water Quality
Section: Standards and Assessments

SUBJECT:

Water Quality Rule Amendments: Discussion of Options

INTRODUCTION:

The Commission has requested staff review of the language in OAR 340-41-026(3) and specifically the term "water quality limited" contained in subsection (c). The following memo examines this language.

OAR 340-41-026(3) was modified by the Commission on June 4, 1989. The expressed purpose of this modification was to provide the Commission and Department with specific criteria for the review and approval of pollutant load discharge increases for new discharges, expanding discharges at existing facilities, and discharges to lakes.

The rule was modified because the Commission had frequently been asked by several permittees to grant increased pollutant loadings to different waterbodies including the Columbia and Willamette Rivers. In reviewing these requests, the Commission felt it important to establish a set of criteria that would be useful in making these determinations. Information could then be provided by the permittee that would assist the Commission in making effective decisions. The information submitted would help to describe the effect of the increased loads on beneficial uses and the character of the receiving water.

Consequently, the Commission directed the Department to explore and recommend specific criteria to assist the Commission in evaluating waste load increase requests. The Commission would then review the proposed language and consider it for potential inclusion into Oregon Administrative Rules.

Proposed rule language was developed and taken to public hearing in the spring of 1989. The hearing process focused attention on the specific criteria. A review of the hearing record shows that there was no oral or written comment to indicate if there was any concern with or understanding of the water quality limited language used in the proposed rule.

Recently, the Commission and public have asked several questions regarding the water quality limited language contained in the increase loading rule. These questions indicate that there was not complete understanding of what the term "water quality limited" used in the rule means. These question also indicate that there is considerable misunderstanding as to how this designation is made, when it applies to a specific waterbody, and when it no longer applies to a specific waterbody.

This recent discussion makes it imperative that some time be taken to further explain the term "water quality limited" if the increase loading rule and the water quality limited program are to work together effectively to prevent, control and solve water quality problems in the state of Oregon.

The remainder of the report will examine the term water quality limited. Its distinctive definitions in federal statue and regulation and the ensuing requirements for waterbodies that fall into these definitions. It will conclude with a review of three rule options for clarifying the water quality limited program and when increased waste load may be approved for discharge to currently designated water quality limited waterbodies and how the current increasing load rule should be modified.

BACKGROUND:

In the spring of 1989 the Commission considered the specific criteria for load increase requests. Concurrently, the Department was completing an extensive and exhaustive process to define and identify water quality limited waterbodies in accordance with federal law and regulation. This information was being assembled to meet the requirements of Section 305(b) of the Water Quality Act (WQA) wherein each state must submit a report on a two year cycle to the US Environmental Protection Agency (EPA) which describes the water quality status of the states waters. This report is to identify where the state is meeting or not meeting water quality standards, and consequently where the state is or not protecting beneficial uses. The Department has prepared this report every two years for over a decade. It has served to evaluate the effectiveness of the state's water pollution control program and help set future program direction.

The Department had been particularly deliberate in preparing the 1988 305(b) report and had reviewed the steps being taken to identify water quality problems and to classify waterbodies as water quality limited with the Commission. This included a review of the criteria being used by the Department to determine the water quality status of a waterbody. Considerable attention was given to this evaluation because of the ensuing implications for a waterbody designated as water quality limited and the potential effects that such a designation might have on the sources discharging to those waterbodies.

This approach highlighted the importance of the 1988 report. This would be the first report produced that would specifically identify water quality limited waterbodies throughout the state. This designation would have considerable effect on how the Department implemented the state's water pollution control program.

The water quality management program in Oregon underwent considerable change from 1986 to 1988. The agency had shifted from a technology based permit program to a water quality based permit program. The emphasis shifted from the treatment technology used to the actual quality of the receiving water. Moving away from treatment engineering processes to the receiving water's chemical, physical, and biological health. This change also shifted emphasis away from the traditional pollutants, such as Biological Oxygen Demand (BOD), to an emphasis on a wider range of pollutants including nutrients, metals, and toxics. The key influence on this change had been the need to establish total maximum daily loads (TMDLs) for waterbodies identified as water quality limited.

Historically, the Department had implemented water quality control activities in accordance with a general management plan. This plan set forth an overall program to preserve and enhance water quality statewide and to provide for the beneficial uses of the water resource. The plan was intended to fulfill the policy of the State of Oregon regarding water pollution control as expressed in the Oregon statutes. This management plan was also designed to satisfy water quality planning and management activities identified in the Federal Clean Water Act (CWA) of 1972 which was amended in 1987 and is now referred to as the Water Quality Act (WQA).

Oregon's traditional water quality control program approach was challenged on December 12, 1986 when the Northwest Environmental Defense Center (NEDC) filed suit in the Federal District Court in Oregon against Lee Thomas, Administrator of EPA, to require him to ensure that TMDLs were established and implemented for waters within Oregon identified as being water quality limited. The suit was based on the information provided in the 1986 305(b) report wherein the Department had identified waterbodies that were not meeting standards and protecting beneficial uses.

As a result of the law suit and the ensuing court settlement the Department must develop total maximum daily loads (TMDLs), waste load allocations (WLAs), and load allocations (LAs) for waterbodies designated as being water quality limited. A detailed description of this suit is contained in Attachment E.

WATER QUALITY LIMITED:

Federal Law and Regulation

Section 303 of the WQA contains the basic federal requirements for water quality management planning. This section deals specifically with water quality standards and implementation plans. It also contains the basic introduction to the review of water quality information and introduces the concept of designating a waterbody water quality limited.

303(D)(1) - Confirmed as not meeting water quality standards

Section 303(d) of the WQA describes the water quality limited (WQL) requirements. The statue language reads:

> "(d)(1)(A) Each state shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any water quality standards applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters."

Therefore, under this section of the Act, the State is required to identify where water quality standards are not being met even after the application of effluent limitations. Waterbodies so identified are termed "water quality limited" Water quality limited stream segments are reaches that do not meet standards, in either numerical or narrative form, even after technology based limitations have been applied.

According to section 303(d)(1)(D) of the WQA, total maximum daily loads (TMDLs) are to be developed on those waters identified under section 303(d)(1) as not meeting standards even after the application of effluent limitations.

> "303(d)(1)(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality."

A TMDL has several components. These components are defined in federal regulations as follows:

Loading Capacity (LC): The greatest amount of loading that a water can receive without violating water quality standards.

Load Allocation (LA): The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources.

Wasteload Allocation (WLA): The portion of a receiving waters loading capacity that is allocated to one of its existing or future point sources of pollution. WLA constitute a water quality-based effluent limitation.

Total Maximum Daily Load (TMDL): The sum of the individual WLAs for point sources and LAs for nonpoint sources and background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure.

A TMDL is basically equivalent to the loading capacity of a waterbody. The loading capacity is the greatest amount of pollutant loading that a waterbody can receive without violating water quality standards.

The loading capacity (LC) is equal to the assimilative capacity of a stream for a particular parameter. Assimilation is the process of self purification. This process is dependent on the physical and biological nature of the stream. As assimilation occurs, the ability of a stream to accept pollutant loadings is regenerated. For example, dissolved oxygen is added to a stream by reaeration. The decay of ammonia removes oxygen from a stream. When the ammonia demand for oxygen exceeds the oxygen supplied by reaeration, instream oxygen is depleted. When decay and reaeration rates are equal, the instream oxygen concentration remains stable. After the ammonia has decayed, reaeration replaces the lost oxygen. The capacity of the stream to receive ammonia loads has been regenerated and assimilation has occurred.

Some parameters will not be assimilated by a stream. These parameters, such as dissolved solids, are termed conservative. For conservative parameters, the mass loadings to a stream can simply be added to show the cumulative load. Other parameters, such as ammonia and phosphorus, may be assimilated by a stream and are termed non-conservative. For non-conservation parameters, the loading capacity of a stream may be regenerated due to instream assimilation. This dynamic process needs to be accounted for in establishing the TMDL. And in considering increased waste loads.

In summary a waterbody is termed WQL under section 303(D)(1) when it fails to meet water quality standards even after the application of technology based controls. Waterbodies identified as WQL are required to have total maximum daily loads, waste load allocations and load allocations developed and implemented.

303(d)(3) - Suspected of not meeting water quality standards

Section 303 in addition to requiring the identification of waterbodies needing TMDLs contains under (d)(3) additional language for identifying water quality limited waterbodies. Section 303(d)(3) states:

> "For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (2)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation and for thermal discharges, at the level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife."

Therefore, the state must also identify waterbodies that may not be meeting water quality standards but for which the state lacks a complete data record or for which it has yet to conclude whether effluent limitations are being fully implemented. For these waterbodies the state shall estimate TMDL and/or collect the needed information to determine if the waterbody should be designated a 303(d)(1) WQL waterbody.

Federal regulation further describes 303(d)(3) waterbodies as waterbodies were the decision has yet been made as to whether control technologies (effluent limitations) would solve the problem if they were implemented. Therefore, on some of these waterbodies there may exist inadequately or not fully implemented technologies, that if adequately or fully implemented, the waterbody may achieve standards. An example of this is the Tillamook River basin, where a management plan exist for nonpoint source problems, however the plan has not been fully implemented at this time. Water quality standards are still being violated but there has been a steady improvement in water quality while it has been implement and the expectation is that with full plan implementation the river will be in compliance.

In summary a waterbody is termed WQL under section 303(d)(3) when: 1) it is suspected of water quality standards violation but there is insufficient data to make a definitive determination; and/or 2) there is insufficient information to determine whether available control technologies or management programs when in place and functioning will address the problem; and/or

3) the waterbody is expected to be in compliance with the implementation of a management plan.

In relationship to the increase load rule (OAR 340-41-026(3)) it is very important that it be fully understood that the Department did not intent to include waterbodies identified under the 303(d)(3) provisions of the Act into the coverage of the increase load rule. 303(d)(3) waterbodies are waters where the Department does not have sufficient information to conclude one way or another whether the waterbody needs TMDLs. At the very least the

language of OAR 340-41-026(3) needs to be changed to identify the two different WQL definitions. Later in this report proposed options will be described requirements for the two WQL definitions.

It is also important to note that even from the very beginning of the TMDL program there has been a division of waterbodies into categories based on sufficient information to make informed decisions. As the Department learned more about the WQL/TMDL program and federal regulations it became very apparent that these regulations also anticipated that there would be a wide range in the availability of information on specific waterbodies. Consequently two different definitions of water quality limited and two different program elements 303(d)(1) and 303(d)(3) were established to develop and maintain pollution control activities.

INTERSTATE WATERBODIES:

The federal regulations give the initial responsibility to the states to identify WQL status and develop TMDLs for the waters **within their boundaries**. This is true for interstate waterbodies as well. However, if the states can not agree to the TMDLs and the resulting WLAs and LAs the EPA has the responsibility to resolve the issues.

HOW HAVE WATERBODIES BEEN EVALUATED IN OREGON:

Conventional Pollutants

The 1988 305(b) report contains in Appendix B a detailed description of how the Department evaluated its ambient water quality data to determine water quality limited status. Briefly,the approach was to first identify specific beneficial uses, then identify the physical, chemical and biological parameters and criteria that would have the greatest effect in protecting these uses. Next the seasonality and data coverage were identified. This identifies the most sensitive time of year that particular beneficial use needed to be protected. This was usually the critical flow period. It also identifies the level of data needed to make a use protection determination. Finally, the actual criteria for whether a use was supported or not supported were identified.

The results of this evaluation are contained in Appendix A of the report where the waterbodies are divided into 303(d)(1) and 303(d)(3) water quality limited status.

Toxic Pollutants

In addition to examining its ambient water quality data, the Department, as a requirement of section 304(l) of the WQA, conducted and included in the 1988 305(b) report an evaluation of waterbodies affected by toxic discharges. The detailed description of this evaluation is contained in Appendix C of the report. The results of this evaluation are contained in column 8 of Appendix A. Waterbodies identified as having confirmed discharges of toxics that impacted beneficial uses were identified as water

quality limited (303(d)(1)) and those with suspected discharges and problems were identified as water quality limited (303(d)(3)).

WHAT IS THE DESIGNATION PROCESS?

The current designation process begins with the evaluation of available data and ends with the submittal of the biennial status assessment report (305 (b)) to EPA. The water quality limited waterbodies are identified in the table contained in Appendix A of the 305(b) report. The 305(b) report was taken to hearing for review by those who could potentially be affected by the various designations in the report.

RAMIFICATION OF BEING DESIGNATED WQL:

If a waterbody is designated as WQL under section 303(d)(1), the Department must prioritize this waterbody and schedule the development of TMDLs. The Department places facilities who may discharge to these waterbodies on notice that TMDLs will be developed and that the Department will open their permit and modify it to include the appropriate TMDL and WLA. The modified permit will be a water quality based permit.

If a waterbody is designated as WQL under section 303(d)(3) the Department will prioritize these waterbodies for: 1) collection of data needed to provide information to make a determination on whether TMDLs are needed, and/or 2) development of estimated TMDLs, and/or 3) development and implementation of management programs.

PROBLEMS INHERENT IN THE LANGUAGE OF OAR 304-41-026(3)(c)

OAR 340-41-026(3)(c) prohibits approvals for increased waste load discharges to WQL waterbodies. However, it does not define WQL nor is there a definition elsewhere in Oregon Administrative Rule. There is also considerable disagreement as to what waterbodies the WQL designation should apply to, when it should apply, and when it should no longer apply. Finally, the current rules do not address the question as to whether the Commission or department cam approve increasing waste loads that would not be discharged until the waterbody was it compliance with waste load allocations.

Water Quality Limited Definition

The first issue is whether this rule was intended to apply to all WQLs waterbodies or only those identified under 303(d)(1). As previously discussed, federal law and regulation has two distinctive definitions for water quality limited. OAR 340-41-026(3)(c) does not distinguish between the two or indicate whether both types of waterbodies were included in this rule. The 303(d)(1) definition would appear to the intent of the rule. This would address those streams the Department has identified under the NEDC law suit and through the extensive evaluation conducted under the 305(b) process. These waterbodies have been determined not to be meeting standards even after the application of technology based controls. Any waste load

increases to these waterbodies should only be granted if the TMDL process has established the stream's assimilative capacity, waste load and load allocation have been set, and reserve capacity exist, or will exist, when the current sources are in compliance with their WLAs or LAs.

If reserve capacity has been set aside, the Commission and Department must then determine under what conditions they will allow the reserve capacity to be allocated. There are three potential approaches: 1) approve no allocations until WLAs and LAs are being fully met; or 2) approve an allocation based on the waterbody being in compliance by the time the discharge will be made to the receiving stream; or 3) approve an allocation after extensive evaluation of the potential added risk to the waterbody's identified beneficial uses. Under approach three it would be imperative that the EQC carefully examined and make specific judgments as to whether it is appropriate to increase loads to that waterbody.

The water quality limited language in OAR 340-41-026(3) would not logically include 303(d)(3) waterbodies because in these situations there is less than adequate data on which to make a decision as to whether in fact there is a problem, or what its severity may be, or whether control technologies have been implemented or when implemented will there be standards violations. **This lack of knowledge would not warrant the strict discharge prohibition but a more deliberate evaluation approach.** For 303(d)(3) waterbodies it would be more appropriate to require detailed information be provide by the applicants and permittee at the specific locations of the discharge. This information would then be used to help answer the questions as to the health of the waterbody. This then would provide the basis for Commission or Departmental action. Any permit issued in this situation would also contain a reopener which would give the Department express authority to open the permit to include TMDLs/WLAs if they prove to be necessary to protect water quality.

In addressing the issue of applicability to 303(d)(1) or (d)(3) the rule needs to identify the official process by which a stream is designated WQL.

Water Quality Limited Period

The second issue is that the current increasing load rule does not recognize the same seasonality the Department took into consideration when it evaluated the water quality data to determine a waterbodies WQL status. The fact that a water quality problem associated with a specific waterbody may only occur during specific period of the year and that its WQL status is directly linked to this period is not reflected in the current increase load rule language. The rule as currently written assumes that a waterbody designated WQL is WQL the entire year. Consequently, it can not accept additional waste at any time and therefore the rule prohibits increase loads. This in fact is not the case and it runs counter to the water quality based permitting concept inherent in the TMDL/WLA process.

Under this concept a waterbody's assimilative capacity would be determined and specific waste loads would be allocated to individual sources. The loads allocated would reflect the season of the year the load could be discharged. The Department would also reserve a portion of this capacity in a WQL waterbody for allocation to future loads increase request. This approach addresses the water quality problem at the specific time of the year when standards are being violated.

The current rule language does not in fact reflect what the Department and Commission have been doing in establishing and managing TMDLs. This can be seen in the program to achieve compliance with the TMDLs in the Tualatin basin. In this situation the Commission and Department have tied the TMDLs to specific periods of the year and stream flows. This describes the timing as to when the specific water quality problem is a concern in the waterbody and the ability of the waterbody to assimilate more waste with increased flow.

The Department is currently considering waste load increases for minor sources on WQL waterbodies but during the seasonal period when the standards violations do not occur and for which the waterbody was designated WQL. These increases can be generally characterized as winter time increases when there is sufficient flow to assimilate the additional load. In making a decision on these request the Department is considering: effect on beneficial uses, technologies available, cost, antidegradation policy, etc.

Removing the Water Quality Limited Status

The third issue is that the increasing load rule does not contain language that would describe when a WQL waterbody is no longer WQL and could potentially receive additional waste loads.

Approving Increasing Loads Discharged When WQL in Compliance

The fourth issue is whether the Commission or Department may approve additional load increases for a water quality limited waterbody.

NEED FOR RULE CLARIFICATION:

The current increasing load rule needs to be clarified to address each of the issues described above. The best approach for accomplishing this may be to adopt rules that describe the water quality limited program. These rules could then be referenced throughout the water program including OAR 340-41-026(3) the increasing load rules. The rules would define water quality limited, how a waterbody is designated WQL, when a waterbody is no longer water quality limited, and when and under what conditions may the Commission and Department approve increase waste loads for water quality limited waterbodies.

The following alternative options describe the basic approaches that could be reflected in rules to address the issues.

ALTERNATIVE OPTIONS

Below are described three separate options for providing agency policy direction and clarification in this situation.

OPTION # 1

Under option 1, the Department would use the 305(b) report as the controlling document to identify waterbodies as water quality limited. The criteria for this designation would be those described in Appendix B and C of the 305(b) report. A waterbody would remain water quality limited until identified sources were in full compliance with their assigned waste load allocations.

Only those waterbodies qualifying for WQL status under section 303(d)(1) of the WQA would be affected by the increase load rule. No increases would be allowed in these waterbodies until waste load allocation had been made, there was reserve capacity sufficient to handle the requested increase load, and the sources were in full compliance with the waste load allocations.

Advantage - This would establish a very strict regulatory program approach for waterbodies not achieving water quality standards. This would considerably reduce the work loads of Commission and Department because they would not have to consider load increase requests until a waterbody was in compliance. It would tend to focus attention on the resources and timeframe for TMDL development and achievement of WLAs. The water quality limited designation would address the seasonality issue.

Disadvantage - This option would not allow the Commission or Department to approve load increases that would be discharged after the WQL waterbody is in compliance until after the waterbody is in compliance. This approach would also not effectively address 303(d)(3) waterbodies.

OPTION # 2

Under option 2 the Department would use the 305(b) report as the controlling document to identify waterbodies as water quality limited. The criteria for this selection would be those described in Appendix B and C of the 305(b) report. A waterbody would remain water quality limited until all identified sources were in full compliance with their assigned waste load allocations.

Only those waterbodies qualifying for WQL status under section 303(d)(1) of the WQA would be affected by the increase load rule. No increases would be allowed in these waterbodies during the time period the standards were not being met.

However, the Commission and Department could consider load increases as long as reserve assimilative capacity sufficient to handle the requested increase would exist in the waterbody when WLAs were achieved; the sources were in full compliance with the schedule for meeting the WQL; and increase would not cause a threat to beneficial uses at the time it discharged.

Load increases could be granted before if water quality standards violation still existed only if extraordinary circumstances existed that warranted immediate action to solve an environmental problem. This action could be taken if the existing sources had been allocated waste loads, the sources were in compliance with the schedule for meeting the waste load allocations, the Department had established a reserve assimilative capacity that could be allocated to new or existing sources, the proposed temporary increase load increment did not pose a significant increased threat to beneficial uses from the time it discharged until the waterbody was in full compliance with the TMDL.

Advantage - The Department and Commission would have the ability to approve load increase requests on WQL waterbodies if sufficient reserve assimilative capacity would be available when the existing sources were in full compliance with assigned WLAs, and existing sources were on schedule to be in compliance with their allocated waste load.

The time of year that the problem actually exist would be taken into consideration when making the designation of the water quality limited status.

Disadvantage - This would not address the 303(d)(3) waterbodies.

OPTION # 3

Under option 3 the Department would use the 305(b) report as the controlling document to identify waterbodies as water quality limited. The criteria for this selection would be those described in Appendix B and C of the 305(b) report.

All waterbodies qualifying for WQL status under section 303(d)(1) and section 303(d)(3) of the WQA would be included in the increase load rule.

Waterbodies qualifying for WQL status under section 303(d)(1) of the WQA would be affected by the increase load rule. No increases would be allowed in these waterbodies during the time period the standards were not being met until the sources were allocated waste loads and in full compliance with compliance schedules to meet identified WLAs. If WLAs had been made and the sources were in full compliance with the schedule for meeting the WQL the Commission and Department could consider load increases as long as there existed reserve assimilative capacity in the waterbody to accommodate the increase load and the increase would not cause a significant threat to beneficial uses during the time it discharged.

Waterbodies qualifying for WQL status under section 303(d)(3) of the WQA would also be included in the increase load rule however the rule language would be modified to specifically show that these waterbodies do not have the same significant as 303(d)(1) waterbodies.

A waterbody designated under Section 303(d)(1) would remain on the table in Appendix A of the 305(b) report until identified sources were in compliance with their assigned waste load allocations.

A waterbody designated under Section 303(d)(3) would remain on the Appendix A table until data showed it should be on the 303(d)(1) list or that it was in compliance with standards.

Advantage - In addition to all the advantages identified for option # 2 this option would allow the department to identify and set priorities for both levels of water quality limited waterbodies.

This would allow the Department to maintain emphasis on both wql designated waterbody types but at a level appropriate for each.

This would expand the water quality based permitting program to several addition areas.

Disadvantage - Considerably increase the Departments work load to develop water quality based permits.

STAFF RECOMMENDATION:

Option # 3 provides the professional approach outlined in option two while also maintaining emphasis on the 303(d)(3) waterbodies it set sound overall program direction.

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OPTION # 1 ATTACHMENT A

OAR 340-41-ABC

(1) (a) A waterbody shall be designated as water quality limited through the biennial water quality status assessment report prepared to meet the requirements of Section 305(b) of the Water Quality Act. Appendix A of the 305(b) report shall identify: what waterbodies are water quality limited, the time of year they are limited, the segment of stream or area of waterbody limited, the parameter(s) of concern, whether it is water quality limited under Section 303(d)(1) of the Water Quality Act, and whether it is limited as a result of an evaluation conducted under Section 304(l) of the Act. Appendix B and C of the status assessment report shall identify the specific evaluation process for designating waterbodies limited.

(b) The WQL list contained in Appendix A of the 305(b) report shall be placed on public notice and reviewed through the public hearing process. At the conclusion of the hearing process Appendix A will become the official water quality limited list. The Department may add a waterbody to the water quality limited list between 305(b) reports after placing that action out on public notice and conducting a public hearing.

(c) Total maximum daily loads (TMDLs), waste load allocations (WLAs), load allocations (LAs), and the reserve capacity shall be established for waterbodies designated WQL under subsection (a).

(d) For interstate waterbodies the state shall be responsible for completing the requirements of subsections (c) for that portion of the interstate waterbody within the boundary of the state.

(e) For waterbodies designated WQL under subsection (a) the Commission or Department may consider wasteload increases for new and existing sources based on the following conditions:

(A) That TMDLs, WLAs and LAs have been set;

(B) That compliance plans under which enforcement action can be taken are fully implemented; and

(C) That a reserve capacity sufficient to handle the increase load exist.

(f) Waterbodies designated under subsection (a) shall be removed from the water quality limited list when all WLAs and LAs have been achieved, unless water quality standards are still being violated.

ATTACHMENT B

OPTION # 2

OAR 340-41-ABC

(1) (a) A waterbody shall be designated as water quality limited through the biennial water quality status assessment report prepared to meet the requirements of Section 305(b) of the Water Quality Act. Appendix A of the 305(b) report shall identify: what waterbodies are water quality limited, the time of year they are limited, the segment of stream or area of waterbody limited, the parameter(s) of concern, whether it is water quality limited under Section 303(d)(1) of the Water Quality Act, and whether it is limited as a result of an evaluation conducted under Section 304(l) of the Act. Appendix B and C of the status assessment report shall identify the specific evaluation process for designating waterbodies limited.

(b) The WQL list contained in Appendix A of the 305(b) report shall be placed on public notice and reviewed through the public hearing process. At the conclusion of the hearing process Appendix A will become the official water quality limited list. The Department may add a waterbody to the water quality limited list between 305(b) reports after placing that action out on public notice and conducting a public hearing.

(c) Total maximum daily loads (TMDLs), waste load allocations (WLAs), load allocations (LAs), and the reserve capacity shall be established for waterbodies designated WQL under subsection (a).

(d) For interstate waterbodies the state shall be responsible for completing the requirements of subsections (c) for that portion of the interstate waterbody within the boundary of the state.

(f) For waterbodies designated WQL under subsection (a) the Commission and Department may consider wasteload increases for new and existing sources based on the following conditions:

(A) That TMLDs, WLAs and LAs have been set;

(B) That a reserve capacity sufficient to handle the requested increase load exist;

(C) That a compliance plan under which enforcement actions can be taken has been established; and

(D) That a determination has been made that at the time of discharge the compliance plan will have been achieved and the increase load to the waterbody will meet water quality standards at the boundary of the established mixing zone for the discharge.

(g) Under extraordinary circumstances to solve an immediate environmental problem that the Commission or Department may consider a waste load increase for an existing source on a waterbody designated water quality limited under Section 303(d)(1) based on the following conditions:

(A) That TMLDs, WLAs and LAs have been set;

(B) That a compliance plan under which enforcement actions can be taken has been established; and

(C) That an evaluation of the requested temporary increased load shows that this increment of load will not have a significant adverse effect on beneficial uses.

(h) Waterbodies designated under subsection (a) shall be removed from the water quality limited list when the WLAs and LAs have been achieved, unless water quality standards are still being violated.

ATTACHMENT C

OPTION # 3

OAR 340-41-ABC

(1) (a) A waterbody shall be designated as water quality limited through the biennial water quality status assessment report prepared to meet the requirements of Section 305(b) of the Water Quality Act. Appendix A of the 305(b) report shall identify: what waterbodies are water quality limited, the time of year they are limited, the segment of stream or area of waterbody limited, the parameter(s) of concern, whether it is water quality limited under Section 303(d)(1) or 303(d)(3) of the Water Quality Act, and whether it is limited as a result of an evaluation conducted under Section 304(l) of the Act. Appendix B and C of the status assessment report shall identify the specific evaluation process for designating waterbodies limited.

(b) The WQL list contained in Appendix A of the 305(b) report shall be placed on public notice and reviewed through the public hearing process. At the conclusion of the hearing process Appendix A will become the official water quality limited list. The Department may add a waterbody to the water quality limited list between 305(b) reports after placing that action out on public notice and conducting a public hearing.

(c) Total maximum daily loads (TMDLs), waste load allocations (WLAs), load allocations (LAs), and the reserve capacity shall be established for waterbodies designated WQL under Section 303(d)(1) of the Water Quality Act.

(d) For waterbodies designated WQL under Section 303(d)(3) the Department shall establish a priority list for future water quality monitoring activities to determine: if the waterbody should be placed on the Section 303(d)(1) list, if estimated TMDLs need to be prepared, and if an implementation plan needs to be developed and implemented.

(e) For interstate waterbodies the state shall be responsible for completing the requirements of subsections (c) and (d) for that portion of the interstate waterbody within the boundary of the state.

(f) For waterbodies designated WQL under Section 303(d)(1) the Commission and Department may consider wasteload increases for new and existing sources based on the following conditions:

(A) That TMDLs, WLAs and LAs have been set;

(B) That a reserve capacity sufficient to handle the requested increase load exist;

(C) That a compliance plan under which enforcement actions can be taken has been established; and

(D) That a determination has been made that at the time of discharge the compliance plan will have been achieved and the increase load to the waterbody will meet water quality standards at the boundary of the established mixing zone for the discharge.

(g) Under extraordinary circumstances to solve an immediate environmental problem that the Commission or Department may consider a waste load increase for an existing source on a waterbody designated water quality limited under Section 303(d)(1) based on the following conditions:

(A) That TMLDs, WLAs and LAs have been set;

(B) That a compliance plan under which enforcement actions can be taken has been established; and

(C) That an evaluation of the requested temporary increased load shows that this increment of load will not have a significant adverse effect on beneficial uses.

(h) For waterbodies designated under Section 303(d)(3) the Commission or Department may approve increased waste loads if it has been determined that the receiving water has adequate assimilative capacity to receive the waste discharged.

(h) Waterbodies designated under Section 303(d)(1) shall be removed from the water quality limited list when the WLAs and LAs have been achieved, unless, the waterbody is still violating water quality standards.

(i) Waterbodies designated under Section 303(d)(3) shall be removed from the water quality limited list when:

(A) Monitoring data shows that the waterbody should be placed on the 303(d)(1) list, or

(B) Monitoring data shows that the waterbody is in compliance with water quality standards.

(3) The Commission or Department may grant exceptions to sections (2) and (5) and approvals to section (4) for major dischargers and other dischargers, respectively. Major dischargers include those industrial and domestic sources that are classified as major sources for permit fee purposes in OAR 340-45-075(2).

(a) In allowing new or increased discharged loads, the Commission or Department shall **[make the following findings]** **determine that;**

(A) The new or increased discharged load [would not] **is not expected to** cause water quality standards to be violated;

(B) The new or increased discharged load [would not] **is not expected to** threaten or impair any recognized beneficial uses; **(In making this determination the Commission or Department may rely upon the presumption that if standards are met the beneficial uses they were designed to protect are protected. In making this determination the Commission or Department may also evaluate other state and federal agency data that would provide information on potential impacts to beneficial uses for which standards have not been set.)**

(C) The new or increased discharged load [shall not be granted if the] **to a** receiving stream [is] classified as being water quality limited **is made in accordance with OAR 340-41-ABC** unless the pollutant parameters associated with the proposed discharge are unrelated either directly or indirectly to the parameter(s) causing the receiving stream to be water quality limited; and

(D) The activity, expansion, or growth necessitating a new or increased discharged load is consistent with the acknowledged local land use plans as evidenced by a statement of land use compatibility from the appropriate local planning agency.

ATTACHMENT E

NORTHWEST ENVIRONMENTAL DEFENCE CENTER VS THE U.S. EPA

Oregon's traditional water quality control program approach was challenged on December 12, 1986 when the Northwest Environmental Defense Center (NEDC) filed suit in the Federal District Court in Oregon against Lee Thomas, Administrator of EPA, to require him to ensure that TMDLs were established and implemented for waters within Oregon identified as being water quality limited. The suit was based on the information provided in the 1986 305(b) report wherein the Department had identified waterbodies that were not meeting standards and protecting beneficial uses.

The suit specifically identified the Tualatin River and generally other streams in Oregon that were water quality limited. Subsequently, NEDC filed a Notice of Intent to sue, naming 27 additional water quality limited waterbodies. The lawsuit contended that Section 303 of the WQA requires EPA to establish TMDLs on ``water quality limited'' stream segments and that this is a non-discretionary function. Therefore, EPA was obligated by statute to establish TMDLs.

The Department reviewed the suit with the State Attorney General's office to establish a legal position. In reviewing the suit the Department decided that the development of TMDLs and the supporting waste load allocations (WLAs) and load allocations (LAs) should be directed by the state. The Department believed that establishing TMDLs and, particularly, WLAs, would be quite controversial. There would be discussion over the loads given to different sources and there would be a number of different alternatives for achieving the WLAs including flow augmentation, modified treatment method, no discharge, land application, or a combination of these or other alternatives. Because of this, a process had to be developed that would involve as much public participation as practicable, so that all potential alternative WLAs/LAs and potential implementation strategies would be given appropriate evaluation.

If EPA were responsible for developing the TMDL their approach, as established by federal regulation, would not allow for more than minimal public participation.

The Department felt that it would be more consistent with the overall approach of the state's environmental control program that the Department take the lead in establishing TMDLs/WLAs/LAs. Therefore, it actively participated in the negotiations between EPA and NEDC to develop an acceptable approach to settle the suit.

On February 10, 1987, the Department met with the U.S. Justice Department and EPA to finalize a settlement proposal. The Justice Department and EPA presented the proposal developed to NEDC on February 11, 1987. The proposed approach consisted of the following key elements:

Identify the water quality limited stream segments on which TMDLs/WLAs/LAs would be developed and describe how other waterbodies will be assessed and additional ``water quality limited'' segments would be identified, ranked, and addressed in the future.

Describe how TMDLs/WLAs/LAs would be developed.

Establish a generic process to be used by the Department to develop and adopt the TMDLs/WLAs/LAs for each ``water quality limited'' segment.

Describe how the Department would address applications for discharge permits during the period from the time a water quality limited segment is identified and the time TMDLs/WLAs/LAs are adopted.

Describe the basic procedure for developing strategies which would be used to implement the TMDLs/WLAs/LAs through the NPDES permit process.

As negotiation continued between EPA/NEDC/U.S. Justice Department, the Department proceeded to implement this approach. Department staff evaluated the 1986 305(b) report, the NEDC suit, and the NEDC "Notice of Intent" to file suit to determine the "water quality limited" segments due to point source discharges. The segments identified as the most appropriate waterbodies for the initial TMDL efforts are listed below:

Tualatin River
Yamhill River
Bear Creek
South Umpqua River
Coquille River
Pudding River
Garrison Lake
Klamath River
Umatilla River
Calapooia River
Grande Ronde River

Inaddition to these eleven waterbodies the Department stated that there was insufficent information to make a definative determination on 17 other waterbodies listed in the notice of intent to sue. These seventeen (17) waterbodies include:

Neacoxie Creek
Necanicum River
Nestucca River and Nestucca Bay
Schooner Creek and Siletz Bay
Yaquina River and Yaquina Bay
North Florence Groundwater Aquifer
Calapooya Creek
Coast Fork Willamette River
Mary's River
Columbia Slough
Deschutes River
Crooked River
John Day River
Powder River
Malheur River
Owyhee River
Willamette River

NEIL GOLDSCHMIDT
GOVERNOR

Environmental Quality Commission

811 SW SIXTH AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

REQUEST FOR EQC ACTION

Meeting Date: December 1, 1989
Agenda Item: C
Division: MSD
Section: Administration

SUBJECT:

Pollution Control Tax Credits.

PURPOSE:

Approve Pollution Control Tax Credit Applications.

ACTION REQUESTED:

__ Work Session Discussion
- __ General Program Background
- __ Potential Strategy, Policy, or Rules
- __ Agenda Item __ for Current Meeting
- __ Other: (specify)

__ Authorize Rulemaking Hearing
__ Adopt Rules
- Proposed Rules — Attachment ___
- Rulemaking Statements — Attachment ___
- Fiscal and Economic Impact Statement — Attachment ___
- Public Notice — Attachment ___

__ Issue a Contested Case Order
__ Approve a Stipulated Order
__ Enter an Order
- Proposed Order — Attachment ___

X Approve Department Recommendation
- __ Variance Request — Attachment ___
- __ Exception to Rule — Attachment ___
- __ Informational Report — Attachment ___
- X Other: (specify) — Attachment A

Tax Credit Application Review Report
(See list on next page)

Tax Credit Application Review Reports:

T-2002	Willamette Industries, Inc.	- Three baghouses, one modified baghouse, four modified scrubbers, two silos, blowers, conveyers.
T-2097	Whittier Wood Products Co.	- Two baghouses, fans, ductwork.
T-2147	Teledyne Ind., Inc.	- Fugitive Emission Connecting, Sealing Devices.
T-2212	Road and Driveway Co.	- Venturi scrubber, recirculation ponds, sound attenuation system, yard paving and haul roads.
T-2232	Roseburg Forest Products Co.	- Burley Wet Scrubber.
T-2275	Teledyne Ind., Inc.	- Venturi Scrubber System.
T-2286	Newood Products, Inc.	- Cyclone/baghouse dust control system.
T-2407	Willamette Industries, Inc.	- CFM EFB Electrostatic Precipitator, steel floor.
T-2409	Timber Products Co.	- Primary Collector System
T-2424	Timber Products Co.	- Raw material storage building, bins, hopper and conveying system.
T-2515	Willamette Industries, Inc.	- Pneumafil primary baghouse and auxiliary equipment.
T-2537	Teledyne Ind., Inc.	- Demisters for Scrubber System.
T-2625	South Coast Lumber Co.	- Scrubber and clarifier.
T-2668	Timber Products	- Two Pneu-Aire baghouses.
T-2815	Kenneth Roth	- Straw Storage Shed
T-2859	Looney Farms, Inc.	- Straw Storage Shed
T-3034	Knaupp Seed Farm, Inc.	- Rears 30 Foot Propane Flamer

DESCRIPTION OF REQUESTED ACTION:

Issue Tax Credit Certificate for Pollution Control Facilities.

AUTHORITY/NEED FOR ACTION:

X	Required by Statute: ORS 468.150-468.190	Attachment ___
	Enactment Date: _____	
___	Statutory Authority: _____	Attachment ___
___	Pursuant to Rule: _____	Attachment ___
___	Pursuant to Federal Law/Rule: _____	Attachment ___
___	Other:	Attachment ___
___	Time Constraints: (explain)	

DEVELOPMENTAL BACKGROUND:

___	Advisory Committee Report/Recommendation	Attachment ___
___	Hearing Officer's Report/Recommendations	Attachment ___
___	Response to Testimony/Comments	Attachment ___
___	Prior EQC Agenda Items: (list)	Attachment ___
___	Other Related Reports/Rules/Statutes:	Attachment ___
___	Supplemental Background Information	Attachment ___

REGULATED/AFFECTED COMMUNITY CONSTRAINTS/CONSIDERATIONS:

None.

PROGRAM CONSIDERATIONS:

None.

ALTERNATIVES CONSIDERED BY THE DEPARTMENT:

None.

DEPARTMENT RECOMMENDATION FOR ACTION, WITH RATIONALE:

The Department recommends the Environmental Quality Commission approve T-2002, T-2097, T-2147, T-2212, T-2232, T-2275, T-2286, T-2407, T-2409, T-2424, T-2515, T-2537, T-2625, T-2668, T-2815, T-2859, and T-3034 in that they comply with the Pollution Control Tax Credit Program requirements and regulations.

CONSISTENCY WITH STRATEGIC PLAN, AGENCY POLICY, LEGISLATIVE POLICY:

Yes.

Note - Pollution Tax Credit Totals:

Proposed December 1, 1989 Totals

Air Quality	$3,868,433
Water Quality	- 0 -
Hazardous/Solid Waste	- 0 -
Noise	- 0 -
	$3,868,433

1989 Calendar Year Totals Through October 20, 1989

Air Quality	$ 1,981,204
Water Quality	7,029,552
Hazardous/Solid Waste	5,881,431
Noise	62,320
	$14,954,507

ISSUES FOR COMMISSION TO RESOLVE:

None

INTENDED FOLLOWUP ACTIONS:

Notify applicants of Environmental Quality Commission actions.

Approved:

Section: _____

Division: John H. Loey

Director: Fred Hansen

Report Prepared By: Roberta Young

Phone: 229-6408

Date Prepared: October 26, 1989

RY:y
MY9052
November 13, 1989

Application No. T-2002

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Willamette Industries, Inc.
Duraflake Division
3800 First Interstate Tower
Portland, OR 97201

The applicant owns a particleboard manufacturing facility in Albany, Oregon.

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

2. Description of Facility

Claimed facility consists of the installation of three new baghouses, one modified baghouse, four modified scrubbers, two silos, associated blowers, conveyors and other equipment.

Claimed Facility Cost: $1,047,642.20
(Accountant's Certification was provided).

3. Procedural Requirements

The facility is governed by ORS 468.150 through 468.190, and by OAR Chapter 340, Division 16.

The facility met all statutory deadlines in that:

a. The request for preliminary certification was filed 10-2-85 30 days before construction commenced on 11-1-85.

b. The request for preliminary certification was approved before application for final certification was made.

c. Construction of the facility was substantially completed on 9-30-86 and the application for final certification was found to be complete on 2-14-89. On November 9, 1988 the Environmental Quality Commission approved a 6 month extension of time for filing final certification.

4. Evaluation of Application

a. The facility is eligible because the principal purpose of the facility is to comply with a requirement imposed by the Department to reduce air pollution. The requirement is to comply with OAR 340-25-320(1) covered raw material storage and OAR 340-21-060 buildings and equipment to be closed and ventilated to control fugitive emissions.

Willamette Industries, Duraflake Division has produced particleboard at its Millersburg location for more than 25 years. For several years the plant has been a major contributor of fugitive emissions and particulate fall-out onto adjacent and nearby properties.

On February 14, 1985 fire destroyed the plytrim handling/storage building and its components. No previous tax credit components were destroyed.

The mere replacement of the destroyed facilities would have returned to the prior existing air pollution problems. A corporate decision was made to change the scope and concept of the rebuilding project. The basic philosophy/strategy behind the air pollution aspects of the proposal was to maintain continuously enclosed storage, transporting and processing of dry shavings and ply trim after their introduction into the existing dry raw material building. Rebuilding of the destroyed ply trim building would not be necessary.

To accomplish this, the company chose pneumatic and enclosed belt/drag conveyors and new additional intermediate storage, i.e. 40 and 60 unit silos. Also required were three new baghouses, one modified baghouse, four modified scrubbers and associated equipment.

Of the approximately $2.5 million dollar project, 42% was assigned to air pollution controls. Although not yet substantiated, projected emission reductions are estimated at 30% or 63 tons of particulate per year.

b. Eligible Cost Findings

In determining the percent of the pollution control facility cost allocable to pollution control, the following factors from ORS 468.190 have been considered and analyzed as indicated:

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

The facility does not recover or convert waste products into a saleable or usable commodity.

2) The estimated annual percent return on the investment in the facility.

There is no return on investment because there are no economic benefits from these installations.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

Open conveyors and low pressure conveying systems would have been considerably less expensive: however, the scope of this project is to reduce fugitive emissions and these methods would not have achieved the desired results.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There is no savings from the facility. The cost of maintaining and operating the facility is $40,000 annually.

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

A breakdown of costs for claimed pollution control is as follows:

Description	Cost
Mechanical Equipment	318,523.55
Mechanical Installation	8,154.33
Pneumatic Equipment	481,235.84
Electrical Equipment	138,146.92
Electrical Installation	68,607.26
Foundations	26,111.57
Siding	1,676.63
Firetek System Inside Conveying Equipment	5,186.10
	1,047,642.20

The actual cost of the facility properly allocable to pollution control as determined by using these factors is 100%.

5. Summation

a. The facility was constructed in accordance with all regulatory deadlines.

b. The facility is eligible for final tax credit certification in that the principal purpose of the facility is to reduce a substantial quantity of air pollution and accomplishes this purpose by the redesign to eliminate air pollution as defined in ORS 468.250.

c. The facility complies with DEQ statutes and rules and permit conditions.

d. The portion of the facility cost that is properly allocable to pollution control is 100%.

6. Director's Recommendation

Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $ 1,047,642.20 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. T-2002.

Robert Harris:r
PO\AR1780
(503) 229-5259
November 2, 1989

Application No. T-2097

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Whittier Wood Products Co.
3787 West 1st Ave.
PO Box 2827
Eugene, OR 97402

The applicant owns an unfinished furniture manufacturing facility in Eugene, Oregon.

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

2. Description of Facility

Claimed facility is for the installation of two baghouses, fans and associated ductwork.

Claimed Facility Cost: $97,881.71
(Accountant's Certification was provided).

3. Procedural Requirements

The facility is governed by ORS 468.150 through 468.190, and by OAR Chapter 340, Division 16.

The facility met all statutory deadlines in that:

a. The request for preliminary certification was filed 5-14-86 less than 30 days before construction commenced on 6-4-86. However, according to the process provided in OAR 340-16-015(1)(b), the application was reviewed by staff and the applicant was notified that the application was complete and that construction could commence.

b. The request for preliminary certification was approved before application for final certification was made.

c. Construction of the facility was substantially completed on 4-30-87 and the application for final certification was found to be complete on 6-6-88 within 2 years of substantial completion of the facility.

A-5

4. Evaluation of Application

a. The facility is eligible because the principal purpose of the facility is to comply with a requirement imposed by Lane Regional Air Pollution Authority to reduce air pollution.

This reduction is accomplished by elimination of air contaminants as defined in ORS 468.275.

The company manufactures unassembled, unfinished furniture. An increase in business required them to install new manufacturing machinery and the utilization of an additional building. The existing air pollution control equipment proved inadequate and was in need of additional capacity. This was accomplished by the installation of two Carter Day bagfilters, fans and associated ductwork. These bagfilters now collect all sawdust and fine sanderdust which subsequently is landfilled.

These installations satisfy the requirements of the Lane Regional Air Pollution Authority.

b. Eligible Cost Findings

In determining the percent of the pollution control facility cost allocable to pollution control, the following factors from ORS 468.190 have been considered and analyzed as indicated:

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

The facility does not recover or convert waste products into a salable or usable commodity.

2) The estimated annual percent return on the investment in the facility.

There is no return on investment because the air pollution equipment does not collect a saleable product.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant has not identified any known alternative. The method selected is acceptable for achieving the pollution control objective.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There is no savings from the facility. The cost of maintaining and operating the facility is $23,622.77 annually.

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

There are no other factors to consider in establishing the actual cost of the facility properly allocable to prevention, control or reduction of pollution.

The actual cost of the facility properly allocable to pollution control as determined by using these factors is 100%.

5. Summation

a. The facility was constructed in accordance with all regulatory deadlines.

b. The facility is eligible for final tax credit certification in that the sole purpose of the facility is to reduce a substantial quantity of air pollution and accomplishes this purpose by the elimination of air pollution as defined in ORS 468.250.

c. The facility complies with DEQ statutes, rules, and permit conditions.

d. The portion of the facility cost that is properly allocable to pollution control is 100%.

6. Director's Recommendation

Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $97,881.71 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. T-2097.

Robert Harris:r
PO\AR1784
(503) 229-5259
November 2, 1989

Application No. T2147

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Teledyne Industries, Inc.
Teledyne Wah Chang Albany
PO Box 460
Albany, OR 97321

The applicant owns and operates a zirconium, hafnium, tantalum, titanium, and niobium production plant at 1600 Old Salem Road, Albany, Oregon.

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

2. Description of Facility

Six connecting devices for transfer of zirconium tetrachloride ($ZrCl_4$) from the secondary condensers to the collection cans in the sand chlorination process.

Claimed Facility Cost: $86,521
(Accountant's Certification was provided).

3. Procedural Requirements

The facility is governed by ORS 468.150 through 468.190, and by OAR Chapter 340, Division 16.

The facility met all statutory deadlines in that:

a. The request for preliminary certification was filed July 7, 1986 more than 30 days before construction, commenced on October 9, 1986.

b. The request for preliminary certification was approved before application for final certification was made.

c. Construction of the facility was substantially completed on September 1, 1988 and the application for final certification was found to be complete on August 18, 1989 within 2 years of substantial completion of the facility.

4. Evaluation of Application

a. The facility is eligible because the sole purpose of the facility is to prevent a substantial quantity of air pollution.

This prevention is accomplished by elimination of air pollution resulting from fugitive emissions, as defined in ORS 468.275. The fugitive emissions consisting of carbon monoxide (CO), chlorine (Cl_2), hydrogen chloride (HCl), and particulate have essentially been eliminated by the connecting devices. The six (6) connecting devices provide a leak free connection between the secondary condensers and collection cans during transfer of zirconium tetrachloride ($ZrCl_4$) to the collection cans. Prior to installation of the 6 connecting devices, a tight fit was obtained between the $ZrCl_4$ collection cans and the secondary condensers by shimming the gap between with wooden shims. Any fit less than perfect resulted in the release of fugitive emissions.

The claimed facility has been inspected by Department personnel and has been found to be operating in compliance with Department regulations and permit conditions, having eliminated the fugitive problem.

b. Eligible Cost Findings

In determining the percent of the pollution control facility cost allocable to pollution control, the following factors from ORS 468.190 have been considered and analyzed as indicated:

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

   The facility does not recover or convert waste products into a salable or usable commodity.

2) The estimated annual percent return on the investment in the facility.

   There is no return on the investment in the facility because the expense of operating the facility is greater than income (see 4).

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

   There is no known alternative.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

   There is $6,099 gross income realized annually from reduced operating labor. However, this is offset by an annual operating expense of $17,196 ($15,552 additional maintenance expense and $1664 additional property tax).

5) Any other factors which are relevant in establishing the portion of the actual cost of the facility properly

recycling or properly disposing of used oil.

There are no other factors to consider in establishing the actual cost of the facility properly allocable to prevention, control or reduction of pollution.

The actual cost of the facility properly allocable to pollution control as determined by using this factor or these factors is 100%.

5. Summation

a. The facility was constructed in accordance with all regulatory deadlines.

b. The facility is eligible for final tax credit certification in that the sole purpose of the facility is to prevent a substantial quantity of air pollution and it accomplishes this purpose by the elimination of fugitive emissions as defined in ORS 468.275.

c. The facility complies with DEQ statutes and rules, and permit conditions.

d. The portion of the facility cost that is properly allocable to pollution control is 100%.

6. Director's Recommendation

Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $86,521 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. T-2147.

WF:r
PO\AR1309
(503) 229-5749
9/15/89

Application No. T2212

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Road & Driveway Co.
PO Box 730
Newport, OR 97365

The applicant owns an asphaltic concrete paving plant in Newport, Oregon.

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

2. Description of Facility

Pollution controls include a variable throat venturri scrubber and accessories, scrubber water recirculation ponds, sound attenuation system, and paving of yard and haul roads.

Claimed Facility Cost: $137,691.00
(Accountant's Certification was provided).

3. Procedural Requirements

The facility is governed by ORS 468.150 through 468.190, and by OAR Chapter 340, Division 16.

The facility met all statutory deadlines in that:

a. The request for preliminary certification was filed 11-28-86 more than 30 days before construction commenced on 1-1-87.

b. The request for preliminary certification was approved before application for final certification was made.

c. Construction of the facility was substantially completed on 5-7-87 and the application for final certification was found to be complete on 4-28-89 within 2 years of substantial completion of the facility.

4. Evaluation of Application

a. The facility is eligible because the principal purpose of the facility is to prevent a substantial quantity of air pollution.

This prevention is accomplished by the elimination of air contaminants as defined in ORS 468.275.

A-11

During 1985 and 1986 many complaints were received pertaining to excessive dust and noise from this facility. The Newport area was experiencing rapid development near the asphalt plant. Rather than relocate the facility, the company chose to install a new asphalt plant with the best available controls for the prevention of air and noise pollution. Since startup of the new facility, complaints have been eliminated and inspections have shown compliance with permit conditions.

b. Eligible Cost Findings

In determining the percent of the pollution control facility cost allocable to pollution control, the following factors from ORS 468.190 have been considered and analyzed as indicated:

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

   The facility does not recover or convert waste products into a salable or usable commodity.

2) The estimated annual percent return on the investment in the facility.

   There is no return of investment from the facility because there are no economic benefits.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

   Alternative methods for controlling emissions from asphaltic concrete plants are baghouse installations. This alternative was not chosen because of higher cost for the same collection efficiency.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

   There is no savings or increase in costs as a result of the facility modification.

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

   There are no other factors to consider in establishing the actual cost of the facility properly allocable to prevention, control or reduction of pollution.

The actual cost of the facility properly allocable to pollution control as determined by using these factors is 100%

5. Summation

a.. The facility was constructed in accordance with all regulatory deadlines.

b. The facility is eligible for final tax credit certification in that the principal purpose of the facility is to prevent a substantial quantity of air pollution and accomplishes this purpose by the elimination of air contaminants as defined in ORS 468.275:

c. The facility complies with DEQ statutes, and rules, and permit conditions.

d. The portion of the facility cost that is properly allocable to pollution control is 100%.

6. Director's Recommendation

Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $137,691.00 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. T2212.

Robert Harris:r
PO\AR1692
(503) 229-5259
November 2, 1989

Application No. T2232

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Roseburg Forest Products Co.
Dixonville Veneer Facility
PO Box 1088
Roseburg, OR 97470

The applicant owns a veneer drying facility at Dixonville, Oregon.

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

2. Description of Facility

Claimed facility is a Model D5-NF Burley wet scrubber to control emissions from a new veneer dryer.

Claimed Facility Cost: $96,528.16
(Accountant's Certification was provided).

3. Procedural Requirements

The facility is governed by ORS 468.150 through 468.190, and by OAR Chapter 340, Division 16.

The facility met all statutory deadlines in that:

a. The request for preliminary certification was filed 7-2-86 more than 30 days before construction commenced on 9-1-86.

b. The request for preliminary certification was approved before application for final certification was made.

c. Construction of the facility was substantially completed on 6-6-88 and the application for final certification was found to be complete on 3-14-89 within 2 years of substantial completion of the facility.

4. Evaluation of Application

a. The facility is eligible because the principal purpose of the facility is to control a substantial quantity of air pollution.

This control is accomplished by elimination of air contaminants as defined in ORS 468.275.

A-14

The Company's need for additional veneer drying capacity required the purchase and installation of a new veneer dryer. Air Contaminant Discharge Permit conditions require the addition of air pollution control devices.

Department inspections have shown compliance with the installation of this scrubber.

b. Eligible Cost Findings

In determining the percent of the pollution control facility cost allocable to pollution control, the following factors from ORS 468.190 have been considered and analyzed as indicated:

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

The facility does not recover or convert waste products into a salable or usable commodity.

2) The estimated annual percent return on the investment in the facility.

There is no return on investment because there are no economic benefits from these installations.

3). The alternative methods, equipment and costs for achieving the same pollution control objective.

There is no known alternative. The scrubber design selected is the accepted method for emission control of veneer dryers.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There is no savings or increase in costs as a result of the facility modification.

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

There are no other factors to consider in establishing the actual cost of the facility properly allocable to prevention, control or reduction of pollution.

The actual cost of the facility properly allocable to pollution control as determined by using these factors is 100%.

5. Summation

   a. The facility was constructed in accordance with all regulatory deadlines.

   b. The facility is eligible for final tax credit certification in that the principal purpose of the facility is to control a substantial quantity of air pollution and accomplishes this purpose by the elimination of air contaminants as defined in ORS 468.275.

   c. The facility complies with DEQ statutes and rules, and permit conditions.

   d. The portion of the facility cost that is properly allocable to pollution control is 100%.

6. Director's Recommendation

   Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $96,528.16 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. T-2232.

Robert Harris:r
PO\AR1698
(503) 229-5259
November 2, 1989

Application No. T2275

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Teledyne Industries, Inc.
Teledyne Wah Chang Albany
PO Box 460
Albany, OR 97321

The applicant owns and operates a zirconium, hafnium, tantalum, titanium, and niobium production plant at 1600 Old Salem Road, Albany, Oregon.

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

2. Description of Facility

Venturi Scrubber system to eliminate fugitive emissions

Claimed Facility Cost: $60,307
(Accountant's Certification was provided).

3. Procedural Requirements

The facility is governed by ORS 468.150 through 468.190, and by OAR Chapter 340, Division 16.

The facility met all statutory deadlines in that:

a. The request for preliminary certification was filed April 21, 1987 more than 30 days before construction commenced on June 1987.

b. The request for preliminary certification was approved before application for final certification was made.

c. Construction of the facility was substantially completed on August 18, 1987 and the application for final certification was found to be complete on August 18, 1989 within 2 years of substantial completion of the facility.

4. Evaluation of Application

a. The facility is eligible because the sole purpose of the facility is to control a substantial quantity of air pollution consisting of fugitive particulate and niobium chloride emissions and for excessive opacity.

Upon installation of the niobium tentachloride hydrolysis and the niobium precipitation processes an attempt was made to use the existing niobium calcining control system to also control these processes. This resulted in the release of fugitive emissions from demister plugging and increased emissions from the overloaded niobium calcining system scrubber. To eliminate the fugitive emissions, a new separate control system was required for the recently installed niobium tentachloride hydrolysis and the niobium precipitation processes.

The facility has been inspected by Department personnel and has been found to be operating in compliance with Department regulations and permit conditions having eliminated the fugitive emissions and the opacity problem.

b. Eligible Cost Findings

In determining the percent of the pollution control facility cost allocable to pollution control, the following factors from ORS 468.190 have been considered and analyzed as indicated:

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

The facility does not recover or convert waste products into a salable or usable commodity.

2) The estimated annual percent return on the investment in the facility.

There is no annual percent return on the investment in the facility.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

An attempt was made to use an existing scrubber system which was not successful. This required a new high efficiency scrubber system with additional capacity.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There are no savings from the facility. The cost of maintaining and operating the facility was not quantified by the applicant as it did not affect the percent allocable.

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

There are no other factors to consider in establishing the actual cost of the facility properly allocable to prevention, control or reduction of pollution.

The actual cost of the facility properly allocable to pollution control as determined by using these factors is 100%.

5. Summation

a. The facility was constructed in accordance with all regulatory deadlines.

b. The facility is eligible for final tax credit certification in that the sole purpose of the facility is to prevent a substantial quantity of air pollution and it accomplishes this purpose by the elimination of fugitive emissions resulting in an air pollution problem as defined in ORS 468.275.

c. The facility complies with DEQ statutes and rules, and permit conditions.

d. The portion of the facility cost that is properly allocable to pollution control is 100%.

6. Director's Recommendation

Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $60,307 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. T-2275.

WF:r
PO\AR1394
(503) 2 9-5749
9/26/89

Application No. T-2286

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Newood Products of Oregon, Inc.
P O BOX 21808
Eugene, OR 97402

The applicant manufactures wooden store fixturing and furniture in Eugene, Oregon.

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

2. Description of Facility

Claimed facility consists of the installation of a cyclone/baghouse dust control system.

Claimed Facility Cost: $43,918.23 (Accountant's Certification was provided).

3. Procedural Requirements

The facility is governed by ORS 468.150 through 468.190, and by OAR Chapter 340, Division 16.

The facility met all statutory deadlines in that:

a. The request for preliminary certification was filed 12-16-86 more than 30 days before construction commenced on 06-18-87.

b. The request for preliminary certification was approved before application for final certification was made.

c. Construction of the facility was substantially completed on 03-11-88 and the application for final certification was found to be complete on 05-11-89 within 2 years of substantial completion of the facility.

4. Evaluation of Application

a. The facility is eligible because the principal purpose of the facility is to control a substantial quantity of air pollution. This control is accomplished by the redesign to eliminate air contaminants as defined in ORS 468.275.

In 1986, Newood acquired the manufacturing site it has been leasing. As the company's business expanded, the increased manufacturing volume resulted in a considerably larger quantity of wood waste, particularly in the form of fine, dry sanderdust. The company initiated an extensive plant upgrade and remodel project, which included a new dust collection system. The Lane Regional Air Pollution Authority required that this include "Best Available Control Technology" for the dust collection system. The system as installed complies with this requirement.

Because of the high concentration of extremely fine dry sander dust, this waste by-product has no market value and is disposed of on a give-away basis.

b. Eligible Cost Findings

In determining the percent of the pollution control facility cost allocable to pollution control, the following factors from ORS 468.190 have been considered and analyzed as indicated:

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

The facility does not recover or convert waste products into a salable or usable commodity.

2) The estimated annual percent return on the investment in the facility.

There is no return on investment in the facility because there are no economic benefits from these installations.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

There is no known alternative for collection of fine wood dust. The method selected is acceptable for achieving the pollution control objective.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There is no savings or increase in costs as a result of the facility modification.

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

There are no other factors to consider in establishing the actual cost of the facility properly allocable to prevention, control or reduction of pollution.

The actual cost of the facility properly allocable to pollution control as determined by using these factors is 100%.

5. Summation

a. The facility was constructed in accordance with all regulatory deadlines.

b. The facility is eligible for final tax credit certification in that the principal purpose of the facility is to control a substantial quantity of air pollution and accomplishes this purpose by the elimination of air pollution as defined in ORS 468.250.

c. The facility complies with DEQ statutes and rules, and permit conditions.

d. The portion of the facility cost that is properly allocable to pollution control is 100%.

6. Director's Recommendation

Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $43,918.23 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. T-2286.

Robert Harris:r
PO\AR1827
(503) 229-5259
November 1, 1989

Application No. T2407

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Willamette Industries Inc.
Foster Plywood
3800-3825 First Interstate Tower
1300 SW Fifth Ave
Portland, OR 97201

The applicant owns a plywood manufacturing facility in Sweet Home, Oregon.

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

2. Description of Facility

Installation of a 40,000 CFM EFB electrostatic precipitator to control emissions from two existing veneer dryers plus capacity for a third dryer which was added. A steel floor was also added to the third dryer to prevent fugitive emissions from the base of the dryer.

Claimed Facility Cost: $384,209.83
(Accountant's Certification was provided).

3. Procedural Requirements

The facility is governed by ORS 468.150 through 468.190, and by OAR Chapter 340, Division 16.

The facility met all statutory deadlines in that:

a. The request for preliminary certification was filed 12-23-87 more than 30 days before construction commenced on 1-25-88.

b. The request for preliminary certification was approved before application for final certification was made.

c. Construction of the facility was substantially completed on 12-8-88 and the application for final certification was found to be complete on 8-1-89 within 2 years of substantial completion of the facility.

4. Evaluation of Application

a. The facility is eligible because the principal purpose of the facility is to reduce a substantial quantity of air pollution. This reduction is accomplished by elimination of air pollution.

Fugitive emissions from the two existing dryers have been a constant problem and were considered to be out of compliance while existing scrubber emissions had deteriorated to the point of marginal compliance. To address these problems and add additional dryer capacity, the company decided to add a new scrubbing system large enough to treat emissions from three veneer dryers. They subsequently added a third dryer complete with a steel flooring which provided dryer sealing to prevent fugitive emission leakage.

The dryers are currently considered to be in compliance with veneer dryer regulations.

b. Eligible Cost Findings

In determining the percent of the pollution control facility cost allocable to pollution control, the following factors from ORS 468.190 have been considered and analyzed as indicated:

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

The facility does not recover or convert waste products into a salable or usable commodity.

2) The estimated annual percent return on the investment in the facility.

There is no return on the investment because there are no economic benefits from these installations.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

Six proposals were considered. The proposal selected was for its capacity to treat a larger gas stream with a higher efficiency at a competitive cost.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There is no savings or increase in costs as a result of the facility modification.

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

There are no other factors to consider in establishing the actual cost of the facility properly allocable to prevention, control or reduction of pollution.

The actual cost of the facility properly allocable to pollution control as determined by using these factors is 100%.

5. Summation

a. The facility was constructed in accordance with all regulatory deadlines.

b. The facility is eligible for final tax credit certification in that the principal purpose of the facility is to reduce a substantial quantity of air pollution and accomplishes this purpose by the elimination of air pollution as defined in ORS 468.250.

c. The facility complies with DEQ statutes, rules, and permit conditions.

d. The portion of the facility cost that is properly allocable to pollution control is 100%.

6. Director's Recommendation

Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $384,209,83 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. T-2407.

Robert Harris:r
PO\AR1715
(503) 229-5259
November 2, 1989

Application No. T-2409

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Timber Products Co.
W. R. Atwood/L. N. Moore/Rockwood & Co., Inc.
PO Box 1669
Medford, OR 97501

The applicant owns and operates a particleboard manufacturing plant in Medford.

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

2. Description of Facility

The claimed facility is a primary collector consisting of a cyclone, motor/fan and connecting ducts to reduce wood dust emissions from the particleboard cooler exhaust.

Claimed Facility Cost: $25,331.00 as adjusted for eligible pollution control costs (Accountant's Certification was provided).

3. Procedural Requirements

The facility is governed by ORS 468.150 through 468.190, and by OAR Chapter 340, Division 16.

The facility met all statutory deadlines in that:

a. The request for preliminary certification was filed on January 15, 1987 more than 30 days before installation commenced on November 11, 1988.

b. The request for preliminary certification was approved before application for final certification was made.

c. Installation of the facility was substantially completed on June 1, 1989 and the application for final certification was found to be complete on October 25, 1989 within 2 years of substantial completion of the facility.

4. Evaluation of Application

a. The facility is eligible because the principal purpose of the facility is to comply with a requirement imposed by the Department to reduce air pollution. The requirement is to comply with ORS 340-25-320(2).

This reduction is accomplished by controlling air contamination sources as defined in ORS 468.275.

The collected wood dust, estimated at 30 tons per year, is disposed of in the company's boilers.

b. Eligible Cost Findings

In determining the percent of the pollution control facility cost allocable to pollution control, the following factors from ORS 468.190 have been considered and analyzed as indicated:

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

The facility does not recover or convert waste products into a salable or usable commodity.

2) The estimated annual percent return on the investment in the facility.

There is no return on investment from this facility because there are no economic benefits from these installations.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

A bagfilter was considered. The cost of such a control system without a primary cyclone would have been 5 or 6 times the cost of the cyclone. (A bagfilter was later added, tax credit application T-2668, using this cyclone as a primary dust collector).

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There is no savings from the facility. The cost of maintaining and operating the facility is $2,500 annually.

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

A cyclone usually functions as a piece of process equipment and is not therefore eligible for certification as a pollution control facility. However, in this installation it has a principal purpose for pollution control.

A claim was made for two cyclone collection systems. However, one system was considered ineligible for pollution control tax credit because it was installed to replace four existing cyclones which functioned in the handling of wood residue as elements of the manufacturing process. The two cyclone systems were essentially identical; the initial claimed cost was therefore reduced by one-half.

The actual cost of the facility properly allocable to pollution control as determined by using these factors is 100%.

5. Summation

a. The facility was constructed in accordance with all regulatory deadlines.

b. The facility is eligible for final tax credit certification in that the principal purpose of the facility is to comply with a requirement imposed by the Department to reduce air pollution.

c. The facility complies with DEQ statutes and rules.

d. The portion of the adjusted facility cost that is properly allocable to pollution control is 100%.

6. Director's Recommendation

Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $ 25,331.00 with 100 % allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. T-2409.

D. Neff:r
PO\AR1761
(503) 229-6480
November 2, 1989

Application No. T2424

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Timber Products Co.
Medford Particleboard
PO Box 269
Springfield, OR 97477

The applicant owns a particleboard manufacturing facility in Medford, Oregon.

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

2. Description of Facility

Claimed facility is a new raw material storage building, bins, hoppers and conveying systems to replace similar facilities destroyed by fire.

Claimed Facility Cost: $1,775,831.08 adjusted to $1,327,651.31 as explained in text. (Accountant's Certification was provided).

3. Procedural Requirements

The facility is governed by ORS 468.150 through 468.190, and by OAR Chapter 340, Division 16.

The facility met all statutory deadlines in that:

a. The request for preliminary certification was filed 2-4-88 less than 30 days before construction, commenced on 2-25-88. However, according to the process provided in OAR 340-16-015(1)(b), the application was reviewed by DEQ staff and the applicant was notified that the application was complete and that construction could commence.

b. The request for preliminary certification was approved before application for final certification was made.

c. Construction of the facility was substantially completed on 4-17-89 and the application for final certification was found to be complete on 6-12-89 within 2 years of substantial completion of the facility.

4. Evaluation of Application

a. The facility is eligible because the principal purpose of the facility is to comply with a requirement imposed by the Department to reduce air pollution. The requirement is to comply with OAR 340-25-320(1).

This reduction is accomplished by redesign to eliminate air contaminants, as defined in ORS 468.275.

Raw materials utilized in the manufacture of particleboard consist of sawdust, wood shavings, wood chips, hogged plywood and particleboard trim. These materials are delivered by chip trucks and trailers. The materials are dumped into a bin, and carried by conveyors into a storage building where it is separated by type and species for storage.

The existing wood frame storage structure was destroyed by fire on August 5, 1987.

Much of the raw material is dry, light in weight and small in size and becomes airborne in the lightest breeze. Defined as fugitive emissions, it can easily drift beyond the confines of the plant. The raw material must be stored in such a manner as to protect it from wind to keep these fugitive emissions from being carried to nearby commercial and residential properties.

The replacement building is completely covered with only a small opening on the north end for access of front end loaders, effectively eliminating the problem of drifting particulates.

> OAR 340-25-320 (1) Truck Dump and Storage Areas:
> (a) Every person operating or intending to operate a particleboard manufacturing plant shall cause all truck dump and storage areas holding or intending to hold raw materials to be enclosed to prevent windblown particle emissions from those areas from being deposited upon property not under the ownership of said person.

b. Eligible Cost Findings

In determining the percent of the pollution control facility cost allocable to pollution control, the following factors from ORS 468.190 have been considered and analyzed as indicated:

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

The facility does not recover or convert waste products into a salable or usable commodity.

2) The estimated annual percent return on the investment in the facility.

There is no return on investment in the facility because there are no economic benefits from these installations.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant has not identified any known alternatives. The method selected is acceptable for achieving the pollution control objective.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There is no savings or increase in costs as a result of the facility modification.

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

The following is a breakdown of cost for the claimed facility:

Raw Material storage building	$1,272,193.16
Truck Dump hopper	153,420.62
Material conveying system	302,759.15
Truck Dump hood	47,458.15
Total Claimed cost	$1,775,831.08

A portion of these costs are disallowed by the Department for tax credit purposes and are listed here:

Truck Dump hopper	$ 153,420.62
Material conveying system (except for cost of conveyer belt enclosures, i.e. $8,000.00)	294,759.15
Portion of claim disallowed	$ 448,179.77
Total of allowed claim	$1,327,651.31

The company has been advised of the Department's action and does not necessarily agree.

The actual cost of the facility properly allocable to pollution control as determined by using these factors is 100%.

5. Summation

a. The facility was constructed in accordance with all regulatory deadlines.

b. The facility is eligible for final tax credit certification in that the sole purpose of the facility is to prevent a substantial quantity of air pollution and accomplishes this purpose by elimination of air pollution as defined in ORS 468.250.

c. The facility complies with DEQ statutes and rules and permit condition.

d. The portion of the facility cost that is properly allocable to pollution control is 100%.

6. Director's Recommendation

Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $1,327,651.31 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. T-2424.

Robert Harris:r
PO\AR1754
(503) 229-5259
November 2, 1989

Application No. T2515

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Willamette Industries, Inc.
Korpine Division
3800-3825 First Interstate Tower
1300 SW Fifth Ave
Portland, OR 97201

The applicant owns a particle board manufacturing plant in Bend, Oregon.

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

2. Description of Facility

Facility consists of the installation of a pneumafil primary baghouse (Model 8-5-162-12) and ancillary equipment to control fine dust from the No. 2 Press Line Former.

Claimed Facility Cost: $95,368.40
(Accountant's Certification was provided).

3. Procedural Requirements

The facility is governed by ORS 468.150 through 468.190, and by OAR Chapter 340, Division 16.

The facility met all statutory deadlines in that:

a. The request for preliminary certification was filed 6-1-88 more than 30 days before construction commenced on 7-10-88.

b. The request for preliminary certification was approved before application for final certification was made.

c. Construction of the facility was substantially completed on 8-26-88 and the application for final certification was found to be complete on 9-1-89 within 2 years of substantial completion of the facility.

4. Evaluation of Application

a. The facility is eligible because the sole purpose of the facility is to reduce a substantial quantity of air pollution.

This reduction is accomplished by elimination of air contaminants as defined in ORS 468.275.

Korpine Division of Willamette Industries has had a fugitive emission problem from their particleboard plant for several years. The company has an ongoing effort to identify and address these problem areas.

The addition of fan and bagfilter on the No. 2 press line places negative air pressure at the former to capture these emissions.

The collected wood dust is disposed of in the company's boilers.

b. Eligible Cost Findings

In determining the percent of the pollution control facility cost allocable to pollution control, the following factors from ORS 468.190 have been considered and analyzed as indicated:

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

   The facility does not recover or convert waste products into a salable or usable commodity.

2) The estimated annual percent return on the investment in the facility.

   There is no return on investment because there are no economic benefits from these installations.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

   The applicant has not identified any known alternatives. The method selected is acceptable for achieving the pollution control objective.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

   There is no savings or increase in costs as a result of the facility modification.

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

There are no other factors to consider in establishing the actual cost of the facility properly allocable to prevention, control or reduction of pollution.

The actual cost of the facility properly allocable to pollution control as determined by using these factors is 100%.

5. Summation

a. The facility was constructed in accordance with all regulatory deadlines.

b. The facility is eligible for final tax credit certification in that

The sole purpose of the facility is to reduce a substantial quantity of air pollution and accomplishes this purpose by the elimination of air pollution as defined in ORS 468.250.

c. The facility complies with DEQ statutes and rules and permit conditions.

d. The portion of the facility cost that is properly allocable to pollution control is 100%.

6. Director's Recommendation

Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $95,368.40 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. T-2515.

Robert Harris:r
PO\AR1720
(503) 229-5259
November 2, 1989

Application No. T2537

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Teledyne Industries, Inc.
Teledyne Wah Chang Albany
PO Box 460
Albany, OR 97321

The applicant owns and operates a zirconium, hafnium, tantalum, titanium, and niobium production plant at 1600 Old Salem Road, Albany, Oregon.

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

2. Description of Facility

Two additional demisters for the niobium calciner venturi scrubber system to eliminate demister plugging causing fugitive emissions.

Claimed Facility Cost: $10,890
(Accountant's Certification was provided).

3. Procedural Requirements

The facility is governed by ORS 468.150 through 468.190, and by OAR Chapter 340, Division 16.

The facility met all statutory deadlines in that:

a. The request for preliminary certification was filed July 19, 1988 more than 30 days before construction commenced on August 22, 1988.

b. The request for preliminary certification was approved before application for final certification was made.

c. Construction of the facility was substantially completed on September 9, 1988 and the application for final certification was found to be complete on August 18, 1989 within 2 years of substantial completion of the facility.

4. Evaluation of Application

a. The facility is eligible because the sole purpose of the facility is to control a substantial quantity of air pollution.

This control is accomplished by the facility which consists of two (2) demisters added to the existing scrubber system consisting of

a venturi scrubber and two (2) other demisters. The two additional demisters provided for a more efficient operation by reducing the existing demister plugging thereby increasing collection efficiency and eliminating fugitive emissions consisting of niobium oxide particulate and ammonium chloride.

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

b. Eligible Cost Findings

In determining the percent of the pollution control facility cost allocable to pollution control, the following factors from ORS 468.190 have been considered and analyzed as indicated:

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

The facility does not recover or convert waste products into a salable or usable commodity.

2) The estimated annual percent return on the investment in the facility.

There is no annual percent return on the investment in the facility or gross income resulting from installation of the claimed facility.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant states and the Department concurs that there is no known alternative.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There is no savings or increase in costs as a result of the facility modification.

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

There are no other factors to consider in establishing the actual cost of the facility properly allocable to prevention, control or reduction of pollution.

The actual cost of the facility properly allocable to pollution control as determined by using these factors is 100%.

5. Summation

   a. The facility was constructed in accordance with all regulatory deadlines.

   b. The facility is eligible for final tax credit certification in that the sole purpose of the facility is to prevent a substantial quantity of air pollution and it accomplishes this purpose by the elimination of fugitive emissions.

   c. The facility complies with DEQ statutes and rules, and permit conditions.

   d. The portion of the facility cost that is properly allocable to pollution control is 100%.

6. Director's Recommendation

   Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $10,980 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. T-2537.

WJF:1
PO\AR1337
(503) 229-5749
11/09/89

Application No. T-2625

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

South Coast Lumber Co.
Plywood Division
PO Box 670
Brookings, OR 97415

The applicant owns a plywood manufacturing facility in Brookings, Oregon.

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

2. Description of Facility

Installation of an American Kiln scrubber and clarifier on a new wood fired boiler.

Claimed Facility Cost: $114,174.00
(Accountant's Certification was provided).

3. Procedural Requirements

The facility is governed by ORS 468.150 through 468.190, and by OAR Chapter 340, Division 16.

The facility met all statutory deadlines in that:

a. The request for preliminary certification was filed 10-1-87 more than 30 days before construction commenced on 1-22-88.

b. The request for preliminary certification was approved before application for final certification was made.

c. Construction of the facility was substantially completed on 5-31-88 and the application for final certification was found to be complete on 8-30-88 within 2 years of substantial completion of the facility.

4. Evaluation of Application

a. The facility is eligible because the sole purpose of the facility is to reduce a substantial quantity of air pollution.

This reduction is accomplished by elimination of air contaminants, as defined in ORS 468.275.

The company replaced an existing wood fired boiler with a new 50,000 lb/hr Riley wood fired boiler. This allowed the elimination of a boiler that could not consistently comply with Department regulations.

Emissions from the Riley boiler and associated American Kiln/scrubber and clarifier have been tested and are within permit limits and regulations of the Department.

b. Eligible Cost Findings

In determining the percent of the pollution control facility cost allocable to pollution control, the following factors from ORS 468.190 have been considered and analyzed as indicated:

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

The facility does not recover or convert waste products into a salable or usable commodity.

2) The estimated annual percent return on the investment in the facility.

There is no return on investment because there are no economic benefits from these installations.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

No other methods were seriously considered because this scrubber system was the most cost efficient for this type of boiler.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There is no savings from the facility. The cost of maintaining and operating the facility is $74,519 annually.

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

There are no other factors to consider in establishing the actual cost of the facility properly allocable to prevention, control or reduction of pollution.

The actual cost of the facility properly allocable to pollution control as determined by using these factors is 100%

5. Summation

   a. The facility was constructed in accordance with all regulatory deadlines.

   b. The facility is eligible for final tax credit certification in that the sole purpose of the facility is to reduce a substantial quantity of air pollution and accomplishes this purpose by the elimination of, air pollution as defined in ORS 468.275.

   c. The facility complies with DEQ statutes and rules, and permit conditions.

   d. The portion of the facility cost that is properly allocable to pollution control is 100%.

6. Director's Recommendation

   Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $114,174.00 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. T-2625.

Robert Harris:r
PO\AR1789
(503) 229-5259
November 2, 1989

Application No. T2668

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Timber Products Co.
PO Box 269
Springfield, OR 97477

The applicant owns and operates a particleboard and plywood manufacturing facility in Medford, Oregon.

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

2. Description of Facility

Two Clarke Model 60-20 Pneu-Aire baghouses.

Claimed Facility Cost: $246,706.00
(Accountant's Certification was provided).

3. Procedural Requirements

The facility is governed by ORS 468.150 through 468.190, and by OAR Chapter 340, Division 16.

The facility met all statutory deadlines in that:

a. The request for preliminary certification was filed on 10-31-88 more than 30 days before construction commenced on 1-10-89.

b. The request for preliminary certification was approved before application for final certification was made.

c. Construction of the facility was substantially completed on 6-1-89 and the application for final certification was found to be complete on 8-25-89 within 2 years of substantial completion of the facility.

4. Evaluation of Application

a. The facility is eligible because the sole purpose of the facility is to prevent a substantial quantity of air pollution.

This prevention is accomplished by the elimination of air contaminants defined in ORS 468.275.

1) Two Clarke Model 60-20 Pneu-Aire baghouses were installed to zero out the emissions from two cyclones serving the particle board cooling wheel roof vent, resizer and skinner saws and hog. One baghouse has an air to cloth ratio of 7:1 and the other a ratio of 6.73:1. A 5 zone GRE-CON fire detection and control system was also installed.

2) Timber Products Co. had previously installed the cyclones as a particulate control measure. This mill is located on the north city limits of Medford with a variety of light industrial and residential buildings in the immediate vicinity. The cyclones were effective in controlling TSP, but emitted very fine particulate matter that impacted neighboring business operations, one of which was an automotive body and paint shop. It became evident that further control measures were necessary. Baghouses were the obvious solution.

3) Currently there are no emissions and there are no complaints.

b. Eligible Cost Findings

In determining the percent of the pollution control facility cost allocable to pollution control, the following factors from ORS 468.190 have been considered and analyzed as indicated:

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

The facility does not recover or convert waste products into a salable or usable commodity.

2) The estimated annual percent return on the investment in the facility.

There is no return of investment from the installation of these facilities because there are no economic benefits.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

Baghouses are considered to be almost 100% effective and are accepted methods for control of fine particulate emissions in the wood industry.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility. There is no savings or increase in costs as a result of the facility modification.

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

There are no other factors to consider in establishing the actual cost of the facility properly allocable to prevention, control or reduction of pollution.

The actual cost of the facility properly allocable to pollution control as determined by using these factors is 100%.

5. Summation

a. The facility was constructed in accordance with all regulatory deadlines.

b. The facility is eligible for final tax credit certification in that the sole purpose of the facility is to prevent a substantial quantity of air pollution and accomplishes this purpose by the elimination of air contaminants as defined in ORS 468.275:

c. The facility complies with DEQ statutes, rules, and permit conditions.

d. The portion of the facility cost that is properly allocable to pollution control is 100%.

6. Director's Recommendation

Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $246,706.00 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. T-2668.

Robert Harris:r
PO\AR1695
(503) 229-5259
November 2, 1989

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Kenneth Roth
33803 Seven Mile Lane SE
Albany, Oregon 97321

The applicant owns and operates a grass seed farm operation in Albany, Oregon.

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

2. Description of Claimed Facility

The facility described in this application is a 20 x 70 x 100' pole construction straw storage shed, located at 33803 Seven Mile Lane SE, Albany, Oregon. The land and building are owned by the applicant.

Claimed facility cost: $27,036
(Accountant's Certification was provided.)

3. Procedural Requirements

The facility is governed by ORS 468.150 through 468.190, and by OAR Chapter 340, Division 16.

The facility has met all statutory deadlines in that:

a. The request for preliminary certification was filed March 22, 1989, less than 30 days before construction commenced on April 6, 1989.

However, according to the process provided in OAR 340-16-015(1)-(b), the application was received by DEQ staff and the applicant was notified that the application was complete, and construction could commence.

b. The request for preliminary certification was approved before application for final certification was made.

c. Construction of the facility was substantially completed on July 15, 1989, and the application for final certification was found to be complete on September 21, 1989, within two years of substantial completion of the facility.

4. Evaluation of Application

a. The facility is eligible because the sole purpose of the facility is to reduce a substantial quantity of air pollution.

This reduction is accomplished by reduction of air contaminants, defined in ORS 468.275, and the facility's qualification as a "pollution control facility", defined in OAR 340-16-025(1). The facility also meets the definition provided in OAR 340-16-025 (2)(f)(A): "Equipment, facilities, and land for gathering, densifying, processing, handling, storing, transporting and incorporating grass straw or straw based products which will result in reduction of open field burning."

b. Eligible Cost Findings

In determining the percent of the pollution control facility cost allocable to pollution control, the following factors from ORS 468.190 have been considered and analyzed as indicated:

1. The extent to which the facility is used to recover and convert waste products into a salable or usable commodity.

The facility promotes the conversion of a waste product (straw) into a salable commodity by providing straw storage.

2. The estimated annual percent return on the investment in the facility.

The actual cost of the facility, $27,036, divided by the average annual cash flow, derived from the sale of grass seed straw, of $2,090 produces a return on investment factor of 12.94.

Using Table 1 of OAR 340-16-030 for a life of 20 years, the annual percent return on investment is 4.50%. Using the annual percent return of 4.5% and the reference annual percent return of 18.3%, 75% is allocable to pollution control.

3. The alternative methods, equipment and costs for achieving the same pollution control objective.

The method chosen is an accepted method for reduction of air pollution. The method is one of the least costly, most effective methods of reducing air pollution.

4. Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

   There is no savings or increase in costs as a result of the facility.

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

   There are no other factors to consider in establishing the actual cost of the facility properly allocable to prevention, control or reduction of air pollution.

   The actual cost of the facility properly allocable to pollution control as determined by using these factors is 75%.

5. Summation

   a. The facility was constructed in accordance with all regulatory deadlines.

   b. The facility is eligible for final tax credit certification in that the sole purpose of the facility is to reduce a substantial quantity of air pollution and accomplishes this purpose by the reduction of air contaminants, as defined in ORS 468.275.

   c. The facility complies with DEQ statutes and rules.

   d. The portion of the facility that is properly allocable to pollution control is 75%.

6. Director's Recommendation

   Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $27,036, with 75% allocated to pollution control, be issued for the facility claimed in Tax Credit Application Number TC-2815.

J. Britton:y
(503) 686-7837
November 13, 1989

Application No. TC-2859

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Looney Farms, Inc.
William D. Looney, President
L. Louise Looney, Secretary
627 Ferry Street SW
Albany, Oregon 97321

The applicant owns and operates a grass seed farm operation in Shedd, Oregon.

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

2. Description of Claimed Facility

The facility described in this application is a galvanized, four-sided, metal pole building, 22 x 124 x 144', with a 1,500 ton capacity, located at 31499 Kendall Loop Road, Shedd, Oregon. The land and buildings are owned by the applicants.

Claimed facility cost: $58,738.32
(Accountant's Certification was provided.)

3. Procedural Requirements

The facility is governed by ORS 468.150 through 468.190, and by OAR Chapter 340, Division 16.

The facility has met all statutory deadlines in that:

a. The request for preliminary certification was filed April 10, 1989 less than 30 days before construction commenced on April 10, 1989.

However, according to the process provided in OAR 340-16-015(1)(b), the application was received by DEQ staff and the applicant was notified that the application was complete, and construction could commence.

b. The request for preliminary certification was approved before application for final certification was made.

c. Construction of the facility was substantially completed on May 10, 1989, and the application for final certification was found to be complete on June 22, 1989, within two years of substantial completion of the facility.

4. Evaluation of Application

a. The facility is eligible because the sole purpose of the facility is to reduce a substantial quantity of air pollution.

This reduction is accomplished by reduction of air contaminants, defined in ORS 468.275, and the facility's qualification as a "pollution control facility", defined in OAR 340-16-025(1). The facility also meets the definition provided in OAR 340-16-025 (2)(f)(A): "Equipment, facilities, and land for gathering, densifying, processing, handling, storing, transporting and incorporating grass straw or straw based products which will result in reduction of open field burning."

b. Eligible Cost Findings

In determining the percent of the pollution control facility cost allocable to pollution control, the following factors from ORS 468.190 have been considered and analyzed as indicated:

1. The extent to which the facility is used to recover and convert waste products into a salable or usable commodity.

The facility promotes the conversion of a waste product (straw) into a salable commodity by providing straw storage.

2. The estimated annual percent return on the investment in the facility.

The actual cost of the claimed facility ($58,738.32) divided by the average annual cash flow $1,000) equals a return on investment factor of $58.74. Using Table 1 of OAR 340-16-030 for a life of ten years, the annual percent return on investment is 0.00%.

3. The alternative methods, equipment and costs for achieving the same pollution control objective.

The method chosen is an accepted method for reduction of air pollution. The method is the least costly most effective method of reducing air contaminants.

4. Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There is no savings or increase in costs as a result of the facility.

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

   There are no other factors to consider in establishing the actual cost of the facility properly allocable to prevention, control or reduction of air pollution.

The actual cost of the facility properly allocable to pollution control as determined by using these factors is 100%.

5. Summation

   a. The facility was constructed in accordance with all regulatory deadlines.

   b. The facility is eligible for final tax credit certification in that the sole purpose of the facility is to reduce a substantial quantity of air pollution and accomplishes this purpose by the reduction of air contaminants, as defined in ORS 468.275.

   c. The facility complies with DEQ statutes and rules.

   d. The portion of the facility that is properly allocable to pollution control is 100%.

6. Director's Recommendation

   Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $58,738.32, with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application Number TC-2859.

J. Britton:y
(503) 686-7837
November 9, 1989

Application No. TC-3034

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Mark Knaupp
Knaupp Seed Farm, Inc.
815 Greenwood Road
Independence, OR 97351

The applicant owns and operates a grass seed farm operation in Independence, Oregon.

Application was made for tax credit for air pollution control equipment.

2. Description of Claimed Equipment

The equipment described in this application is a Rears 30-foot propane flamer used to sanitize grass seed fields. The equipment is owned by the applicant.

Claimed equipment cost: $7,749.65

3. Procedural Requirements

The equipment is governed by ORS 468.150 through 468.190, and by OAR Chapter 340, Division 16.

The equipment has met all statutory deadlines in that:

a. The request for preliminary certification was filed June 9, 1989, less than 30 days before purchase on June 26, 1989.

However, according to the process provided in OAR 340-16-015(1)(b), the application was received by DEQ staff and the applicant was notified that the application was complete, and purchase could commence.

b. The request for preliminary certification was approved before application for final certification was made.

c. Purchase of the equipment was substantially completed on June 26, 1989 and the application for final certification was found to be complete on September 19, 1989, within two years of substantial purchase of the equipment.

4. Evaluation of Application

a. The equipment is eligible because the sole purpose of the facility is to reduce a substantial quantity of air pollution. This reduction is accomplished by reduction of air contaminants, defined in ORS 468.275, and the equipment's qualification as a "pollution control facility", defined in OAR 340-16-025(1). The equipment also meets the definition provided in OAR 340-16-025(2)(f)(A): "Equipment, facilities, and land for gathering, densifying, processing, handling, storing, transporting and incorporating grass straw or straw based products which will result in reduction of open field burning."

b. Eligible Cost Findings

In determining the percent of the pollution control equipment cost allocable to pollution control, the following factors from ORS 468.190 have been considered and analyzed as indicated:

1. The extent to which the facility is used to recover and convert waste products into a saleable or usable commodity.

   The equipment promotes the reduction of air pollution by sanitizing fields in a less polluting manner than open field burning.

2. The estimated annual percent return on the investment in the equipment.

   There is no return on investment for this equipment as it produces no gross annual income. Propane flaming is more costly than the open field burning that it replaces.

3. The alternative methods, equipment and costs for achieving the same pollution control objective.

   The method chosen is an accepted method for reduction of air pollution. The method is one of the least costly, most effective methods of reducing air contaminants.

4. Any related savings or increase in costs which occur or may occur as a result of the purchase of the equipment.

   The cost of maintaining and operating the equipment is $6,600 annually.

5. Any other factors which are relevant in establishing the portion of the actual cost of the equipment properly allocable to the prevention, control or reduction of air, water or noise pollution or solid or hazardous waste or to recycling or properly disposing of used oil.

   There are no other factors to consider in establishing the actual cost of the equipment properly allocable to prevention, control or reduction of air pollution.

The actual cost of the equipment properly allocable to pollution control as determined by using these factors is 100%.

5. Summation

a. The equipment was purchased in accordance with all regulatory deadlines.

b. The equipment is eligible for final tax credit certification in that the sole purpose of the equipment is to reduce a substantial quantity of air pollution and accomplishes this purpose by the reduction of air contaminants, as defined in ORS 468.275.

c. The equipment complies with DEQ statutes and rules.

d. The portion of the equipment that is properly allocable to pollution control is 100%.

6. Director's Recommendation

Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $7,749.65, with 100% allocated to pollution control, be issued for the equipment claimed in Tax Credit Application Number TC-3034.

J. Britton:ka
(503) 686-7837
September 20, 1989

NEIL GOLDSCHMIDT
GOVERNOR

Environmental Quality Commission

811 SW SIXTH AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

REQUEST FOR EQC ACTION

Meeting Date: December 1, 1989
Agenda Item: E
Division: H&SW
Section: Solid Waste

SUBJECT:

Financial Assurance for Solid Waste Sites:
Proposed Temporary Rule

PURPOSE:

The proposed temporary rule amends OAR 340-61-029(1)(a) so that a permit applicant for a new regional solid waste disposal facility may commence operation immediately after receiving Department of Environmental Quality approval of the applicant's financial assurance plan. The current rule requires a three-month waiting period.

ACTION REQUESTED:

__ Work Session Discussion
- __ General Program Background
- __ Potential Strategy, Policy, or Rules
- __ Agenda Item __ for Current Meeting
- __ Other: (specify)

__ Authorize Rulemaking Hearing
__ Adopt Rules
- Proposed Rules — Attachment ___
- Rulemaking Statements — Attachment ___
- Fiscal and Economic Impact Statement — Attachment ___
- Public Notice — Attachment ___

__ Issue a Contested Case Order
__ Approve a Stipulated Order
__ Enter an Order
- Proposed Order — Attachment ___

_X_ Approve Department Recommendation

___	Variance Request	Attachment ___
___	Exception to Rule	Attachment ___
___	Informational Report	Attachment ___
_X_	Other: Adopt Temporary Rule	
	Proposed Rule	Attachment A
	Rulemaking Statements	Attachment B
	Fiscal and Economic Impact Statement	Attachment B

DESCRIPTION OF REQUESTED ACTION:

Under ORS 340-61-029(1)(a) an applicant for a solid waste permit for a new regional disposal facility "shall submit to and have approved by the Department a financial assurance plan" at least three months prior to first receiving waste. The purpose of the rule is to ensure that financial resources are available in case of premature closure or environmental problems at the regional landfill, and to provide adequate time for Department review of the financial assurance plan.

Oregon Waste Systems, Inc., (OWS) has submitted a written request to the Department for variance from the rule so they can begin site operations sooner than three months after approval of their financial assurance plan.

Rather than a variance, a temporary rule change is proposed, which will allow a permittee of a new regional disposal facility to begin receiving waste as soon as the Department approves the applicant's financial assurance plan, if all other prerequisites to commencing operation have been satisfied.

OWS' request for waiver of the wait period after completion of approval of this plan caused the staff to reconsider the wording of the rule. Once a financial assurance plan is approved, there does not appear to be any reason for the plan to continue to delay operations. There would be no increased environmental risk associated with changing the rule. The intent of the law would not be violated and no other prerequisites to opening a disposal site would be affected.

The rule was shaped through discussions with the Department's Solid Waste Advisory Committee. The matter was presented to the Committee on October 17, 1989. They could not recall a specific reason for the particular wording of the rule and had no objection to changing it to accommodate all situations similar to that represented by OWS.

AUTHORITY/NEED FOR ACTION:

___	Required by Statute: _____ Enactment Date: _____	Attachment ___
_X_	Statutory Authority: ORS 459.235(3)	Attachment ___
_X_	Pursuant to Rule: OAR 340-61-029	Attachment ___
___	Pursuant to Federal Law/Rule: _____	Attachment ___
_X_	Other: ORS 183.335(5)/183.355(2) OAR 340-11-052 OAR 340-61-080	Attachment ___
_X_	Time Constraints:	

A temporary rule is needed in order to allow OWS to accept waste prior to January 1, 1990.

DEVELOPMENTAL BACKGROUND:

_X_	Advisory Committee Report/Recommendation	Attachment C
___	Hearing Officer's Report/Recommendations	Attachment ___
___	Response to Testimony/Comments	Attachment ___
___	Prior EQC Agenda Items: (list)	Attachment ___
___	Other Related Reports/Rules/Statutes:	Attachment ___
_X_	Supplemental Background Information	
	Variance Request from Oregon Waste Systems, Inc.	Attachment D
	Department Letter Response to Variance Request	Attachment E

REGULATED/AFFECTED COMMUNITY CONSTRAINTS/CONSIDERATIONS:

The OWS financial assurance plan was approved by the Department October 2, 1989. To comply with OAR 340-61-029(1)(a), OWS may not receive waste until January 1, 1990. Before January 1, 1990, Department staff will review and approve all other OWS submittals which are prerequisite to initiating operation. OWS expects to be in a position to receive waste from Metro or other sources prior to January 1, except for satisfying the three-month wait period.

PROGRAM CONSIDERATIONS:

Department staff believes there are no significant program considerations to the proposed temporary rule amendment.

ALTERNATIVES CONSIDERED BY THE DEPARTMENT:

1. Grant a variance to OWS as requested and permanently modify the rule in the future as program priorities allow.

2. Grant a variance to OWS and not change the rule.

3. Adopt a temporary rule modification consistent with OWS' request, with the intention of making the temporary rule permanent within 180 days.

4. Do not grant either a variance or make a rule change and continue to require the three-month delay after Department approval of financial assurance.

DEPARTMENT RECOMMENDATION FOR ACTION, WITH RATIONALE:

The Department recommends that the Commission:

(1) Adopt a temporary rule as set forth in Attachment A (Alternate 3) together with the following findings:

> There does not appear to be any environmental reason to delay opening a disposal site after approval of the financial assurance plan. Therefore, the rule should be changed in accordance with Attachment A. Adequate time for Department review of the plan is preserved by the proposed new rule. Other prerequisites to opening a disposal site will not be affected. Therefore, the rule should be changed permanently for all applicants, rather than provide a variance for one instance. A temporary rule is recommended as best representing the Commission's intentions to make a permanent rule change. If the temporary rule or variance is not granted, it is possible that opening of the Gilliam County Landfill would be unnecessarily delayed. This would result in loss of revenue to OWS and could delay removing wastes from communities, industries or LUST cleanups.

(2) Authorize the Department to conduct public hearing(s) on the proposed rule as set forth in Attachment A with the intent to make the rule permanent within 180 days.

CONSISTENCY WITH STRATEGIC PLAN, AGENCY POLICY, LEGISLATIVE POLICY:

The proposed rule change is consistent with agency and legislative policy to not impose unreasonable or burdensome regulation, while still protecting environmental quality. The rule change preserves adequate time for the Department to review and approve financial assurance plans and financial instruments.

ISSUES FOR COMMISSION TO RESOLVE:

1. Should the operator of a regional solid waste landfill be able to receive and dispose waste as soon as the required financial assurance is in place and approved by the Department (and all other prerequisites are satisfied), or is there reason to continue the three-month delay?

2. If the delay should be eliminated, should a temporary rule be adopted or should a variance be granted to Oregon Waste Systems and the rule amended by the regular rulemaking process?

INTENDED FOLLOWUP ACTIONS:

1. File temporary rule with Secretary of State.

2. Notify interested persons, entities and media specified under ORS 183.335(1) of adoption of the temporary rule.

3. Hold public hearings, and complete promulgation of permanent rule within 180 days.

Approved:

Section: Steve Greenwood

Division: Stephanie Hallock

Director: Fred Hansen

Report Prepared By: Ernie Schmidt

Phone: 229-5157

EAS:k
SW\SK2355

Date Prepared: October 31, 1989

Proposed Temporary Rule Change
OAR 340-61-029

Regional Landfills

340-61-029 (1)(a) [At least three (3) months] prior to first receiving waste, the applicant for a new regional disposal facility shall submit to and have approved by the Department, a financial assurance plan. The applicant shall allow at least 90 days for Department review of the submitted plan. For purposes of this rule, "new regional disposal facility" is a regional disposal facility which has received no waste prior to January 1, 1988.

Rulemaking Statements for Financial Assurance Temporary Rule Amendment

STATEMENT OF NEED FOR RULEMAKING

Pursuant to ORS 183.335(7), this statement provides information on intended action to temporarily amend an administrative rule.

(1) Legal Authority

ORS 459.235(3) requires an applicant for a solid waste permit for a regional disposal facility to file with the Department financial assurance for protection of the environment in a form and amount established by rule by the Commission.

ORS 183.335(5) authorizes the Commission to adopt, amend or suspend a rule for a period of not longer than 180 days without prior notice or hearing.

(2) Need for the Rule

The proposed temporary rule amendment is needed to eliminate unnecessary delay to initiating operation of a regional disposal facility after the financial assurance plan, as well as all other required submittals, have been approved by the Department.

A temporary rule becomes effective immediately upon filing with the Secretary of State, and would enable Oregon Waste Systems, Inc., to commence operation of its Gilliam County Landfill several weeks sooner than if normal rulemaking procedures are observed. Oregon Waste Systems expects to have waste to receive during that earlier time frame.

(3) Principal Documents Relied Upon

ORS 459.235, 183.335 and 183.355

Letter dated October 2, 1989, from Richard A. Daniels, Vice President and General Manager, Oregon Waste Systems, Inc., to Steve Greenwood, Department of Environmental Quality, requesting a waiver of the requirement for financial assurance to be in place three months prior to initiating landfill operations.

LAND USE COMPATIBILITY STATEMENT

Land Use Consistency

The Department has concluded that the proposal conforms with the Statewide Planning Goals and Guidelines.

Goal 6 (Air, Water and Land Resources Quality): The proposed rule is designed to protect surface and groundwater quality in the affected area and is consistent with this Goal.

Goal 11 (Public Facilities and Services): The proposed rule would allow solid waste disposal in an environmentally sound manner and is consistent with this Goal.

The proposed rule does not appear to conflict with other Goals.

FISCAL AND ECONOMIC IMPACT STATEMENT

Solid waste disposal permit applicants for regional disposal facilities are impacted by the proposed temporary rule amendment. At this time there are only two applicants. The rule amendment will enhance their ability to commence business as soon as possible.

To the extent that small businesses, large businesses, local governments, other state agencies and the general public are served by regional solid waste disposal facilities, the proposed rule amendment will assist in their ability to dispose of wastes.

V. Financial Assurance

Ernie Schmidt from DEQ explained that Oregon Waste Systems had requested a variance from the rules adopted by the Commission last year on financial assurance for regional sites. The rule was originally worded so that an applicant for a regional disposal site had to both submit the financial assurance and have it approved by DEQ 90 days prior to receiving waste.

The Department intends to ask the Commission for a temporary rule change, allowing the regional site to accept waste upon approval of the financial assurance plan, but still requiring 90 days for Department review and approval. Ernie stated that the Department feels this change would not conflict with the intent of the previous rule.

Oregon Waste Systems received approval of its financial assurance plan on October 2, and would not be allowed to accept waste prior to January 1, 1990 under the old rule. They would like to receive waste prior to that date. Bob Martin indicated that it was highly unlikely that Metro will be in a position to ship waste to the OWS landfill prior to January 1. Bruce McIntosh from Oregon Waste Systems indicated that OWS would still like to be able to accept waste earlier than January 1.

Steve Schell stated that he would like to see the rule stipulate that if the Department does not act on the submitted financial assurance documents within a certain time frame, then the financial assurance would be automatically approved.

The Committee voted to support the Department's request for a temporary rule.

VI. Woodwaste Policy

Joe Gingerich from DEQ described the woodwaste task force that has been formed to develop a more cohesive policy on disposal of woodwastes. Rick Parrish is the SWAC representative on that task force. The work of the task force will be reviewed by the Solid Waste Advisory Committee before being adopted.

Joe explained that the overall policy will be to encourage reduction and reuse of woodwaste, rather than landfilling. He outlined a number of questions or issues that the task force is trying to address, including: (1) what materials should be included in the definition of woodwaste? (2) What are appropriate disposal options, and (3) what kind of information is needed to evaluate woodwaste sites? Joe explained that the task force will try to dovetail its work with the new permit instructions that are being developed. Using a matrix that identifies what information is needed at what sites, Joe stated that many woodwaste sites are likely to be able to waive many of the feasibility study requirements for landfills.

ATTACHMENT D

Oregon Waste Systems, Inc.
5240 N.E. Skyport Way
Portland, Oregon 97218
(503) 281-2722
Fax (503) 284-6957

A Waste Management Company

October 2, 1989

Steve Greenwood
Department of Environmental Quality
811 SW 6th
Portland, OR 97204

This letter is a request for waiver of the 90 day requirement for financial assurance being in place prior to initiating landfill operations.

As discussed the intent of this requirement in the DEQ Oregon Administrative Rules is to allow adequate time for the agency to review the quality and acceptability of the assurance instrument. OWS has been working with DEQ for over 6 months to develop such assurance which I believe has now been determined by you to be acceptable. In summary, we are providing DEQ with an environmental impairment liability insurance policy for $3m/occurrence and $6m aggregate and a letter of credit for $2.5m to assure our closure/post closure plan cost estimates of $2.5m. In essence DEQ is more than adequately assured.

Submission of that assurance today provides for waste delivery beginning 1/1/90 in accord with the 90 day requirement. However Metro has indicated an interest in early delivery of wastes beginning November 24, 1989 from the Metro South Transfer Station after they install the compactor. We have informed them that we can be prepared from an operational standpoint (people and equipment) to do so. Granting this request allows Metro and OWS to start operations in better weather conditions and at smaller start-up volumes.

This request also allows receipt of special wastes such as fuel contaminated soils from leaking underground storage tanks at this landfill with a state-of-the-art design in the high desert climate.

I understand that this request can be heard by the EQC at their October 20 meeting. Please keep me informed.

OREGON WASTE SYSTEMS, INC.

Rick

Richard A. Daniels
Vice President & General Manager

c: Jim Benedict

RAD:90:ad

ATTACHMENT E

NEIL GOLDSCHMIDT
GOVERNOR

Department of Environmental Quality

811 SW SIXTH AVENUE, PORTLAND, OREGON 97204-1390 PHONE (503) 229-5696

October 16, 1989

Richard A. Daniels
Vice President and General Manager
Oregon Waste Systems
5240 NE Skyport Way
Portland, OR 97218

Re: Financial Assurance
Gilliam County Landfill
SW Permit No. 391
Gilliam County

Dear Mr. Daniels:

We received your request for waiver of the administrative rule which requires financial assurance to be in place (approved) 90 days prior to initiating landfill operation.

The Department approved your financial assurance package for the Gilliam County Landfill on October 2, 1989. Under the current rule you cannot receive waste for disposal before January 1, 1990. You indicate METRO could be in a position to deliver waste as soon as November 24, 1989.

The Department is receptive to a variance in this situation. We believe your receiving waste before January 1 would not constitute an environmental problem. The intent of the law would not be violated by granting a variance.

The Department intends to propose a temporary rule change at the December 1, 1989 Environmental Quality Commission meeting, to clarify the intent of the present rule and allow receipt of waste upon approval of the financial assurance package. If approved, this temporary rule would be effective immediately. Discussions with METRO indicate it is unlikely they would have waste available to you before December. The temporary rule would be subject to public hearings prior to being made permanent. Approval of a variance for financial assurance will not, of course, relieve a permittee from satisfying all other prerequisites to beginning operation.

If you have any questions regarding this matter, please give Ernie Schmidt a call at 229-5157, or me at 229-5782.

Sincerely,

Ernest A. Schmidt

for Steve Greenwood, Manager
Solid Waste Section
Hazardous and Solid Waste Division

SG:ES:k
SW\SK2336
cc: Ernie Schmidt, DEQ
Stephanie Hallock, DEQ

NEIL GOLDSCHMIDT
GOVERNOR

Environmental Quality Commission

811 SW SIXTH AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

REQUEST FOR EQC ACTION

Meeting Date: December 1, 1989
Agenda Item: G
Division: Water Quality
Section: Construction Grants

SUBJECT:

State Revolving Loan Fund (SRF): Proposed Adoption of Temporary Rules to Address 1989 Legislative Amendments and Problems Encountered in Initial Program Implementation

PURPOSE:

Obtain EQC approval of temporary rule needed to respond to emergency created by recent legislative changes and problems in the existing rule that limit program implementation.

ACTION REQUESTED:

___ Work Session Discussion
- ___ General Program Background
- ___ Potential Strategy, Policy, or Rules
- ___ Agenda Item ___ for Current Meeting
- ___ Other: (specify)

___ Authorize Rulemaking Hearing
_x_ Adopt Rules
- Proposed Rules (Temporary) Attachment A
- Rulemaking Statements Attachment ___
- Fiscal and Economic Impact Statement Attachment ___
- Public Notice Attachment ___

___ Issue a Contested Case Order
___ Approve a Stipulated Order
___ Enter an Order
- Proposed Order Attachment ___

___ Approve Department Recommendation
- ___ Variance Request Attachment ___
- ___ Exception to Rule Attachment ___
- ___ Informational Report Attachment ___
- ___ Other: (specify) Attachment ___

DESCRIPTION OF REQUESTED ACTION:

The proposed temporary rule incorporates legislative changes made by the 1989 Oregon Legislature. These amendments allow direct loans to be made to public agencies from the SRF; eliminate the need for a bond counsel opinion for every SRF loan; and allow the Department to waive its right to withhold revenue sharing funds otherwise due to the public agency in the case of agency default.

In addition, the temporary rule allows the Department to make loans to public agencies which provide loan security that is different but substantially equivalent to the security required for other types of loans allowed by the rules. This change would give the Department the ability to make loans to communities which are unable to provide exactly the type of security which the rules currently require but which can provide other types of equivalent security.

AUTHORITY/NEED FOR ACTION:

x	Required by Statute: SB 1097	Attachment C
	Enactment Date: June 30, 1989	
x	Statutory Authority: ORS 468.423 to .440	Attachment B
___	Pursuant to Rule: _____	Attachment ___
___	Pursuant to Federal Law/Rule: _____	Attachment ___
___	Other:	Attachment ___
___	Time Constraints: Several public agencies have indicated that they need to begin receiving SRF loan funds by January, 1990. In order to complete loan agreements with these public agencies, the temporary rule amendments are necessary.	

DEVELOPMENTAL BACKGROUND:

___	Advisory Committee Report/Recommendation	Attachment ___
___	Hearing Officer's Report/Recommendations	Attachment ___
___	Response to Testimony/Comments	Attachment ___
x	Prior EQC Agenda Items:	
	March 3, 1989 - SRF Rule Adoption OAR 340-54-005 to -075	Attachment A
___	Other Related Reports/Rules/Statutes:	
	ORS 183.335 (5)	Attachment E
x	Supplemental Background Information	Attachment D
	Justification for Temporary Rule	

REGULATED/AFFECTED COMMUNITY CONSTRAINTS/CONSIDERATIONS:

Without the temporary rule, some public agencies will not be able to fulfill existing loan requirements. When the existing rules were drafted, a section was included which requires a pledged reserve for revenue secured loans which could be much larger than is necessary or feasible. The pledged reserve is equal to a percentage of "the debt service due in the following year on the SRF loan and all obligations which have an equal or superior lien on the pledged revenues" (OAR 340-54-065(2)(c)). This could mean that a public agency getting a 20 year $4 million SRF loan which already has $16 million outstanding revenue bonds would have to pledge a reserve of between $250,000 and $1 million. The reserve would be required even if the public agency has already established a pledged reserve for the outstanding debt. This result was not intended by the rules and is addressed by the proposed temporary rule.

Also, under the existing rule, the Department would have the authority with all SRF loans to withhold revenue sharing monies in the case of default by an SRF borrower. For some jurisdictions, this authority could have the effect of reducing the bond local rating due to the potential effect on an important source of income for public facilities. The temporary rule reflects new statutory language in SB 1097 which clearly allows the Department to waive this authority.

Affected public agencies indicate support of the proposed temporary rule.

PROGRAM CONSIDERATIONS:

ORS 468.437, adopted in 1987, required an opinion from Oregon bond counsel regarding the applicants legal authority to borrow from the SRF. SB 1097 changed the SRF statute to make this opinion from Oregon bond counsel optional. The temporary rule makes the same change to the SRF rules. Oregon bond counsel has advised the Department that such an opinion is not always necessary, and that the average cost would likely be $2,000-$4,000 per opinion. Under the current rules, this cost would be borne by the Department.

ALTERNATIVES CONSIDERED BY THE DEPARTMENT:

1. Adopt a temporary rule which incorporates all changes made to the SRF statute by SB 1097. This approach was recommended by bond counsel.

2. Do not adopt a temporary rule to amend the existing rules. SB 1097 makes an opinion from Oregon bond counsel optional and allows the Department to waive the right to revenue sharing money. The Department could choose to exercise these options under SB 1097 which supercedes existing rules. The conflict between requirements in the rules and in SB 1097 could, however, lead to confusion for borrowers. Legal counsel recommends adoption of rules to avoid this conflict.

3. Adopt a temporary rule which allows the Department to accept other security than that specifically identified in the existing rules so long as it provides substantially the same amount of security as would be otherwise required. These amendments would provide a broad solution to the loan security problems created by the specificity of the existing SRF rules. This provides additional flexibility which could allow the Department to gear SRF loans to the needs of communities without compromising SRF loan security.

4. Adopt a temporary rule to change the language in the existing rule regarding loan reserves for revenue secured loans. Eliminate the requirement for the loan reserve to cover other debts with an equal or superior lien on the sewer revenues if the borrower has already pledged a reserve for these debts. Also require the reserve to be based on average annual debt service rather than on the next year's debt service since debt service can vary from year to year on some loans.

DEPARTMENT RECOMMENDATION FOR ACTION, WITH RATIONALE:

Adopt Alternatives 1, 3, and 4. These alternatives address known problems with the rules while providing the Department the greatest degree of flexibility in issuing loans without compromising the stability of the loan program. This flexibility is particularly important during the initial stages of program implementation since there will inevitably be circumstances arising which have not been anticipated. With more flexibility in the rules, these circumstances can be addressed without having to frequently return to the Commission for more rule changes. Oregon bond counsel has also recommended this course of action.

CONSISTENCY WITH STRATEGIC PLAN, AGENCY POLICY, LEGISLATIVE POLICY:

The temporary rules are consistent with the legislative intent of SB 1097. They are also consistent with the original intent of the SRF rules to require an adequate amount of loan security to protect SRF monies without unduly burdening the SRF borrowers.

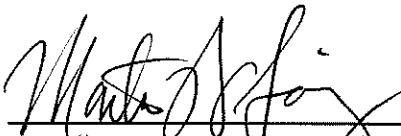
OTHER ISSUES FOR COMMISSION TO RESOLVE:

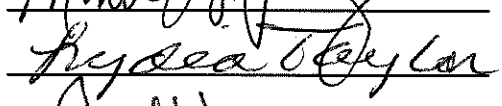
None.

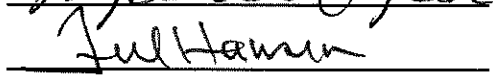
INTENDED FOLLOWUP ACTIONS:

A SRF Task Force is being developed to review these and other issues. The Department will return to the Commission for authorization to hold a public hearing on these rules in January or February of 1990.

Approved:

Section: 

Division: 

Director: 

Report Prepared By: Maggie Conley

Phone: 229-5257

Date Prepared: November 2, 1989

(MG:kjc)
(CG\WJ2371)
(November 9, 1989)

NOTE: *Proposed amendments begin on page 24.*

The underlined portions of text represent proposed additions made to the rules.

The [~~bracketed~~] portions of text represent proposed deletions made to the rules.

DIVISION 54

STATE REVOLVING FUND PROGRAM

PURPOSE

340-54-005

These rules are intended to implement (ORS 468.423 - .440) under which financial assistance is made available to and utilized by Oregon municipalities to plan, design and construct water pollution control facilities.

DEFINITIONS

340-54-010

(1) "Alternative treatment technology" means any proven wastewater treatment process or technique which provides for the reclaiming and reuse of water, productive recycling of wastewater constituents, other elimination of the discharge of pollutants, or the recovery of energy.

(2) "Categorical exclusion" means an exemption from environmental review requirements for a category of actions which do not individually, cumulatively over time, or in conjunction with other actions have a significant effect on the quality of the environment. Environmental impact statements, environmental assessments and environmental information documents are not required for categorical exclusions.

(3) "Change order" means a written order and supporting information from the borrower to the contractor authorizing an addition, deletion, or revision in the work within the scope of the contract documents, including any required adjustment in contract price or time.

(4) "Clean Water Act" means the Federal Water Pollution Control Act, as amended, 33 USC 1251 et. seq.

(5) "Collector sewer" means the portion of the public sewerage system which is primarily installed to receive wastewater directly from individual residences and other individual public or private structures.

(6) "Combined sewer" means a sewer that is designed as both a sanitary and a stormwater sewer.

(7) "Construction" means the erection, installation, expansion or improvement of a water pollution control facility.

(8) "Default" means nonpayment of SRF repayment when due, failure to comply with SRF loan covenants, a formal bankruptcy filing, or other written admission of inability to pay its SRF obligations.

(9) "Department" means the Oregon Department of Environmental Quality.

(10) "Director" means the Director of the Oregon Department of Environmental Quality.

(11) "Documented health hazard" means areawide failure of on-site sewage disposal systems or other sewage disposal practices resulting in discharge of inadequately treated wastes to the environment demonstrated by sanitary surveys or other data collection methods and confirmed by the Department and Health Division as posing a risk to public health.

(12) "Documented water quality problem" means water pollution resulting in violations of water quality statutes, rules or permit conditions demonstrated by data and confirmed by the Department as causing a water quality problem.

(13) "Environmental assessment" means an evaluation prepared by the Department to determine whether a proposed project may have a significant impact on the environment and, therefore, require the preparation of an environmental impact statement (EIS) or a Finding of No Significant Impact (FNSI). The assessment shall include a brief discussion of the need for a proposal, the alternatives, the environmental impacts of the proposed action and alternatives and a listing of persons or agencies consulted.

(14) "Environmental impact statement (EIS)" means a report prepared by the Department analyzing the impacts of the proposed project and discussing project alternatives. An EIS is prepared when the environmental assessment indicates that a significant environmental impact may occur and significant adverse impacts can not be eliminated by making changes in the project.

(15) "Environmental information document" means a written analysis prepared by the applicant describing the environmental impacts of the proposed project. This document is of sufficient scope to enable the Department to prepare an environmental assessment.

(16) "EPA" means the U.S. Environmental Protection Agency.

(17) "Estuary management" means development and implementation of a plan for the management of an estuary of national significance as described in §320 of the Clean Water Act.

(18) "Excessive infiltration/inflow" means the quantities of infiltration/inflow which can be economically eliminated from a sewer system as determined in a cost effective analysis that compares the costs for correcting the infiltration/inflow conditions to the total costs for transportation and treatment of the infiltration/inflow from sanitary sewers.

(19) "Facility plan" means a systematic evaluation of environmental factors and engineering alternatives considering demographic, topographic, hydrologic, and institutional characteristics of a project area that demonstrates that the selected alternative is cost effective and environmentally acceptable.

(20) "Federal Capitalization Grant" means federal dollars allocated to the State of Oregon for a federal fiscal year from funds appropriated by Congress for the State Revolving Fund under Title VI of the Clean Water Act. This does not include state matching monies.

(21) "Infiltration" means the intrusion of groundwater into a sewer system through defective pipes, pipe joints, connections, or manholes in the sanitary sewer system.

(22) "Inflow" means a direct flow of water other than wastewater that enters a sewer system from sources such as, but not limited to, roof gutters, drains, manhole covers, cross connections between storm sewers and sanitary sewers, catch basins, cooling towers, storm-waters, surface runoff, or street wash waters.

(23) "Initiation of operation" means the date on which the facility is substantially complete and ready for the purposes for which it was planned, designed, and built.

(24) "Innovative technology" means developed wastewater treatment processes and techniques which have not been fully proven under the circumstances of their contemplated use and which represent a significant advancement over the state of the art in terms of significant reduction in life cycle cost of the project or environmental benefits when compared to an appropriate conventional technology.

(25) "Intended Use Plan" means a report which must be submitted annually by the Department to EPA identifying proposed uses of the SRF including, but not limited to a list of public agencies ready to enter into a loan agreement for SRF funding within one year and a schedule of grant payments.

(26) "Interceptor sewer" means a sewer which is primarily intended to receive wastewater from a collector sewer, another interceptor sewer, an existing major discharge of raw or inadequately treated wastewater, or a water pollution control facility.

(27) "Highly controversial" means public opposition based on a substantial dispute over the environmental impacts of the project. The disputed impacts must bear a close causal relationship to the proposed project.

(28) "Maintenance" means work performed to make repairs, make minor replacements or prevent or correct failure or malfunctioning of the water pollution control facility in order to preserve the functional integrity and efficiency of the facility, equipment and structures.

(29) "Major sewer replacement and rehabilitation" means the repair and/or replacement of interceptor or collector sewers, including replacement of limited segments.

(30) "Nonpoint source control" means implementation of a plan for managing nonpoint source pollution as described in §319 of the Clean Water Act.

(31) "Operation" means control of the unit processes and equipment which make up the treatment system and process, including financial and personnel management, records, laboratory control, process control, safety, and emergency operation planning.

(32) "Operation and maintenance manual" means a guide used by an operator for operation and maintenance of the water pollution control facility.

(33) "Project" means the activities or tasks identified in the loan agreement for which the borrower may expend, obligate, or commit funds.

(34) "Public agency" means any state agency, incorporated city, county sanitary authority, county service district, sanitary sewer service district, metropolitan service district, or other district authorized or required to construct water pollution control facilities.

(35) "Replacement" means expenditures for obtaining and installing equipment, accessories or appurtenances which are necessary during the design or useful life, whichever is longer, of the water pollution control facility to maintain the facility for the purpose for which it was designed and constructed.

(36) "Reserve capacity" means that portion of the water pollution control facility that is designed and incorporated in the constructed facilities to handle future sewage flows and loadings from existing or future development consistent with local comprehensive land use plans acknowledged by the Land Conservation and Development Commission.

(37) "Sewage collection system" means pipelines or conduits, pumping stations, force mains, and any other related structures, devices, or applications used to convey wastewater to a sewage treatment facility.

(38) "Sewage treatment facility" means any device, structure, or equipment used to treat, neutralize, stabilize, or dispose of wastewater and residuals.

(39) "SRF" means State Revolving Fund and includes funds from state match, federal capitalization grants, SRF loan repayments, interest earnings, or any additional funds provided by the state. The State Revolving Fund is the same as the Water Pollution Control Revolving Fund referred to in ORS 468.423 - .440.

(40) "Significant industrial dischargers" means water pollution control facility users as defined in the Department's Pretreatment Guidance Handbook.

(41) "Small community" means a city, sanitary authority or service district with a population of less than 5,000.

(42) "Wastewater" means water carried wastes from residences, commercial buildings, industrial plants, and institutions together with minor quantities of ground, storm, and surface waters that are not admitted intentionally.

(43) "Water pollution control facility" means a sewage disposal, treatment and/or collection system.

(44) "Value engineering" means a specialized cost control technique which uses a systematic approach to identify cost savings which may be made without sacrificing the reliability or efficiency of the project.

PROJECT ELIGIBILITY

340-54-015

(1) A public agency may apply for a loan for up to 100% of the cost of the following types of projects and project related costs (including financing costs, capitalized interest, and, to the extent permitted by the Clean Water Act, loan reserves).

(a) Facility plans including supplements are limited to one complete facility plan financed by the SRF per project;

(b) Secondary treatment facilities;

(c) Advanced waste treatment facilities if required to comply with Department water quality statutes and rules;

(d) Reserve capacity for a sewage treatment or disposal facility receiving SRF funding which will serve a population not to exceed a twenty year population projection and for a sewage collection system or any portion thereof not to exceed a fifty year population projection;

(e) Sludge disposal and management;

(f) Interceptors and associated force mains and pumping stations;

(g) Infiltration/inflow correction;

(h) Major sewer replacement and rehabilitation if components are a part of an approved infiltration/inflow correction project;

(i) Combined sewer overflow correction if required to protect sensitive estuarine waters, if required to comply with Department water quality statutes and rules, or if required by Department permit;

(j) Collector sewers if required to alleviate documented water quality problems, to serve an area with a documented health hazard, or to serve an area where a mandatory health hazard annexation is required pursuant to ORS 222.850 to 222.915 or ORS 431.705 to 431.760;

(k) Stormwater control if project is a cost effective solution for infiltration/inflow correction to sanitary sewer lines;

(1) Estuary management if needed to protect sensitive estuarine waters and if the project is publicly owned; and

(m) Nonpoint source control if required to comply with Department water quality statutes and rules and if the project is publicly owned.

(2) Funding for projects listed under (1) above may be limited by Section 201(g)(1) of the Clean Water Act.

(3) Loans will not be made to cover the non-federal matching share of an EPA grant.

(4) Plans funded in whole or in part from the SRF must be consistent with plans developed under Sections 208, 303(e), 319, and 320 of the Clean Water Act.

(5) Loans shall be available only for projects on the SRF Priority List, described in OAR 340-54-025.

(6) A project may be phased if the total project cost is in excess of that established in OAR 340-54-075.

USES OF THE FUND

340-54-020

The SRF may only be used for the following project purposes:

(1) To make loans, purchase bonds, or acquire other debt obligations;

(2) To pay SRF program administration costs (not to exceed 4% of the federal capitalization grant or as otherwise allowed by federal law);

(3) To earn interest on fund accounts.

SRF PRIORITY LIST

340-54-025

(1) General. The Department will develop an annual statewide SRF priority list which numerically ranks water quality pollution problems which could be financed through the State Revolving Fund.

(2) Eligibility. Projects necessary to correct water quality problems listed on the SRF priority list must be eligible under OAR 340-54-015(1).

(3) SRF Priority List Ranking Criteria. The numerical ranking of water quality pollution problems will be based on points assigned from the following three (3) criteria:

(a) Water Quality Pollution Problem Points

(A) 100 points will be assigned for:

(i) Environmental Quality Commission order pertaining to water quality problems;

(ii) Stipulated consent orders and agreements pertaining to water quality problems;

(iii) Court orders pertaining to water quality problems; or

(iv) Department orders.

(B) 90 points will be assigned for documented health hazards and mandatory health hazard annexation areas required pursuant to ORS 222.850 to 222.915 or ORS 431.705 to 431.760 with associated demonstrated water quality problems or beneficial use impairments.

(C) 80 points will be assigned for streams where the Environmental Quality Commission has established Total Maximum Daily Loads.

(D) 70 points will be assigned for documented water quality problems or beneficial use impairments.

(E) 60 points will be assigned for:

(i) Notices issued by the Department for permit violations related to inadequate water pollution control facilities (Notice of Violation); or

(ii) Non-compliance with the Department's statutes, rules or permit requirements resulting from inadequate water pollution control facilities.

(F) 40 points will be assigned for documented health hazards or mandatory health hazard annexation areas required pursuant to ORS 222.850 to 222.915 or ORS 431.705 to 431.760 without documented water quality problems.

(G) 20 points will be assigned for existing potential, but undocumented, water quality problems noted by the Department.

(b) Population Points

(A) Points shall be assigned based on the population the project will serve as follows:

Points = $(\text{population served})^{2 \log 10}$

(c) Receiving Waterbody Sensitivity Points

(A) A maximum of 50 points shall be assigned for the sensitivity of the water body as follows:

(i) Stream sensitivity will be based on the following:

(I) The following formula will be used to determine stream sensitivity where an existing water pollution control facility discharges into a stream:

Points = $(Ce * Qe / Qe + Qs)^{2.5}$ where:

Ce = Concentration of effluent as represented by BOD^5 (Bio Chemical analysis)

Qe = Quantity of permitted effluent flow from treatment facility (mgd) or current low flow average if higher than permit limits

Qs = Quantity of minimum receiving stream flow (mgd) from statistical summaries of stream flow data in Oregon (7 day/10 year average low flow) or from Department measurements

(II) 50 points will be assigned to any water quality problem where the Department determines surface waters are being contaminated by areawide on-site system failures or documented nonpoint source pollution problems.

(III) 25 points will be assigned to any potential surface water quality problem, resulting from effluent from on-site systems or from nonpoint sources.

(ii) Groundwater sensitivity points will be assigned based on the following:

(I) 50 points will be assigned to any Department documented groundwater quality pollution problem.

(II) 25 points will be assigned to any potential groundwater quality pollution problem as noted by the Department.

(iii) Lake and Reservoir sensitivity points. 50 points will be assigned any discharge to a lake or reservoir.

(iv) Estuary sensitivity points. 50 points will be assigned any discharge to an estuary.

(v) Ocean sensitivity. 25 points will be assigned for a discharge to the ocean.

(4) SRF Point Tabulation Method. Point scores will be accumulated as follows:

(a) Points will be assigned based on the most significant documented water quality pollution problem within each point category.

(b) The score used in ranking a water quality problem will consist of the sum of the points received in each of the three (3) point categories.

(5) SRF Priority List Contents. The priority list entry for each water quality problem will include, at least, the following:

(a) Problem priority rank based on total points. The water quality problem with the most points will be ranked number one (1) and all other problems will be ranked in descending order based on total points.

(b) Description of project(s) necessary to address the identified problem.

(c) Name of public agency.

(d) The priority point score used in ranking the water quality pollution problem.

(6) Public Notice and Review.

(a) The Department will publish a public notice and distribute the proposed SRF priority list to all interested parties for review. Interested parties include, but are not limited to, the following:

(A) Public agencies with water quality pollution problems on the list;

(B) Interested local, state and federal agencies;

(C) Any other persons or public agencies who have requested to be on the mailing list.

(b) The Department will allow 30 days after issuance of the public notice and proposed list for review and for public comments to be submitted.

(A) During the comment period any public agency can request the Department to include a problem not identified on the proposed list or reevaluate a problem on the proposed priority list.

(B) The Department shall consider all requests submitted during the comment period before establishing the official statewide priority list.

(c) The Department shall distribute the official priority list to all interested parties.

(d) If an interested party does not agree with the Department's determination on a priority list the interested party may within 15 days of mailing of the official list file an appeal to present their case to the Director. The appeal will be informal and will not be subject to contested case hearing procedures.

(7) Priority List Modification.

(a) The Department may modify the official priority list by adding, removing or reranking projects if notice of the proposed action is provided to all lower priority projects.

(b) Any interested party may, within 15 days of mailing of the notice, request a review by the Department.

(c) The Department shall consider all requests submitted during the comment period before establishing the modified statewide priority list.

(d) The Department will distribute the modified priority list to all interested parties.

(e) If an interested party does not agree with the Department's determination on the modified priority list, the party may within 15 days of the mailing of the modified priority list, file an appeal to present their case to the Director. The appeal will be informal and will not be subject to contested case hearing procedures.

PRELIMINARY APPLICATION PROCESS AND PREPARATION OF THE INTENDED USE PROJECT LIST

340-54-030

(1) General.

(a) Each year the Department will prepare and submit an Intended Use Plan to EPA which includes a list of projects for which public agencies have demonstrated the ability to enter into a loan agreement within one year.

(b) No project may be included in the Intended Use Plan Project List unless it will address a problem listed in the SRF Priority List.

(c) The Intended Use Plan Project List will consist of two parts, the Fundable List and the Planning List. The Fundable List includes projects which are ready to receive funding and for which adequate SRF funds are anticipated to be available during the funding year. The Planning List includes projects which are ready to receive funding but for which inadequate funds are anticipated to be available during the funding year.

(2) Development of the Intended Use Plan Project List.

(a) In order to develop the Intended Use Plan Project List, the Department will contact, by certified mail, the public agencies with problems listed in the priority list and ask them to submit a preliminary application for SRF funding.

(b) In order for a project to be considered for inclusion in the Intended Use Plan Project List, the Department must receive a completed preliminary SRF application by certified mail within 30 days of the date the Department mails the preliminary application form.

(c) The preliminary SRF application will include, but not be limited to:

(A) A description of the proposed project;

(B) The proposed project costs and SRF loan amount;

(C) The type of SRF loan which will be requested;

(D) The date when the public agency anticipates filing a final SRF application; and

(E) The date when the public agency anticipates beginning the project.

(d) The Department will review and approve for inclusion in the Intended Use Plan Project List all preliminary applications which demonstrate the ability of the public agency to enter into a loan agreement within one year. Approved projects will be listed in rank order as established in the priority list.

(e) If a public agency does not submit a timely preliminary application, its project(s) shall not be considered for inclusion in the Intended Use Plan Project List and will lose its opportunity for SRF financing in that year, unless the Department determines otherwise.

(f) After completion of the proposed Intended Use Plan Project List, the Department will send a copy to all public agencies with projects listed on the priority list.

(g) Any interested party may within 15 days of mailing of the notice request a review by the Department.

(h) The Department shall consider all requests submitted during the comment period before establishing the Intended Use Plan Project List.

(i) If an interested party does not agree with the Department's determination on the Intended Use Plan Project List, the interested party may within 15 days of the distribution of the Intended Use Plan Project List file an appeal to present their case to the Director. The appeal will be informal and will not be subjected to contested case hearing procedures.

(3) Intended Use Plan Modification.

(a) The Department may remove a project from the Fundable List in the Intended Use Plan project list if the Department determines that a public agency which has a project listed in the Fundable List will not be ready to enter into a loan agreement as required under OAR 340-54-030(2)(d).

(b) When the Department removes a project, it will give written notice to the applicant whose project is proposed for deletion and allow the applicant 30 days after notice to demonstrate to the Department its readiness and ability to immediately complete a loan agreement.

(c) When a project is removed from the Fundable List in the Intended Use Plan, projects from the Planning List of the Intended Use Plan will be moved in rank order to the Fundable List to the extent that there are adequate SRF funds available.

FINAL APPLICATION PROCESS FOR SRF FINANCING FOR FACILITY PLANNING FOR WATER POLLUTION CONTROL FACILITIES, NONPOINT SOURCE CONTROL PROJECTS, ESTUARY MANAGEMENT PROJECTS AND STORMWATER CONTROL PROJECTS.

340-54-035

Applicant(s) for SRF loans for nonpoint source control projects, estuary management projects, stormwater control projects, and facility planning for water pollution control facilities must submit:

(1) A final application on forms provided by the Department;

(2) Evidence that the public agency has authorized development of nonpoint source control project, estuary management project, stormwater control projects or water pollution control facility plan;

(3) A demonstration that applicant complies with the requirements of OAR 340-54-055(2) and 340-54-065(1); and

(4) Any other information requested by the Department.

FINAL APPLICATION PROCESS FOR SRF FINANCING FOR DESIGN AND CONSTRUCTION OF WATER POLLUTION CONTROL FACILITIES

340-54-040

Applicants for SRF loans for design and construction of water pollution control facilities must submit:

(1) A final SRF loan application on forms provided by the Department (See also Section 340-54-055(2), Loan Approval and Review Criteria).

(2) A facilities plan which includes the following:

(a) A demonstration that the project will apply best practicable waste treatment technology as defined in 40 CFR 35.2005(b)(7).

(b) A cost effective analysis of the alternatives available to comply with applicable Department water quality statutes and rules over the design life of the facility and a demonstration that the selected alternative is the most cost effective.

(c) A demonstration that excessive inflow and infiltration (I/I) in the sewer system does not exist or if it does exist, how it will be eliminated.

(d) An analysis of alternative and innovative technologies. This must include:

(A) An evaluation of alternative methods for reuse or ultimate disposal of treated wastewater and sludge material resulting from the treatment process;

(B) An evaluation of improved effluent quality attainable by upgrading the operation and maintenance and efficiency of existing facilities as an alternative or supplement to building new facilities;

(C) A consideration of systems with revenue generating applications; and

(D) An evaluation of the opportunity to reduce the use of energy or to recover energy.

(E) An evaluation of the opportunities to reduce the amount of wastewater by water use conservation measures and programs.

(e) An analysis of the potential open space and recreational opportunities associated with the project.

(f) An evaluation of the environmental impacts of alternatives as discussed in OAR 340-54-050.

(g) Documentation of the existing water quality problems which the facility plan must correct.

(h) Documentation and analysis of public comments and of testimony received at a public hearing held before completion of the facility plan.

(3) Adopted sewer use ordinance(s).

(a) Sewer use ordinances adopted by all municipalities and service districts discharging effluent to the water pollution control facility must be included with the application.

(b) The sewer use ordinance(s) shall prohibit any new connections from inflow sources into the water pollution control facility, without the approval of the Department.

(c) The ordinance(s) shall require that all wastewater introduced into the treatment works not contain toxics or other pollutants in amounts or concentrations that have the potential of endangering public safety and adversely affecting the treatment works or precluding the selection of the most cost-effective alternative for wastewater treatment sludge disposal.

(4) Documentation of pretreatment surveys and commitments:

(a) A survey of nonresidential users must be conducted and submitted to the Department, as part of the final SRF application which identifies significant industrial discharges as defined in the Department's Pretreatment Guidance Handbook. If the Department determines that the need for a pretreatment program exists, the

borrower must develop and adopt a program approved by the Department before initiation of operation of the facility.

(b) The borrower must document to the satisfaction of the Department that necessary pretreatment facilities have been constructed and that a legally binding commitment or permit exists with the borrower and any significant industrial discharger(s), being served by the borrower's proposed sewage treatment facilities. The legally binding commitment or permit must insure that pretreatment discharge limits will be achieved on or before the date of completion of the proposed wastewater treatment facilities or that a Department approved compliance schedule is established.

(5) Adoption of a user charge system.

(a) General. The borrower must develop and obtain the Department's approval of its user charge system. If the borrower has a user charge system in effect, the borrower shall demonstrate that it meets the provisions of this section or amend it as required by these provisions.

(b) Scope of the user charge system.

(A) The user charge system must, at a minimum, be designed to produce adequate revenues to provide for operation and maintenance (including replacement expenses);

(B) Unless SRF debt retirement is reduced by other dedicated sources of revenue discussed in OAR 340-54-065, the user charge system must be designed to produce adequate revenues to provide for SRF debt retirement.

(c) Actual use. A user charge system shall be based on actual use, or estimated use, of sewage treatment and collection services. Each user or user class must pay its proportionate share of the costs incurred in the borrower's service area.

(d) Notification. Each user charge system must provide that each user be notified, at least annually, in conjunction with a regular bill or other means acceptable to the Department, of the rate and that portion of the user charge that is attributable to wastewater treatment services.

(e) Financial management. Each borrower must demonstrate compliance with state and federal audit requirements. If the borrower is not subject to state or federal audit requirements, the borrower must provide a report reviewing the account system prepared by a municipal auditor. A systematic method must be provided to resolve material audit findings and recommendations.

(f) Adoption of system. The user charge system must be legislatively enacted before loan approval and implemented before

initiation of operation of the facility. If the project will serve two or more municipalities, the borrower shall submit the executed intermunicipal agreements, contracts or other legally binding instruments necessary for the financing, building and operation of the proposed treatment works.

(6) A financial capability assessment for the proposed project which demonstrates the applicant's ability to repay the loan and to provide for operation and maintenance costs (including replacement) for the wastewater treatment facility.

(7) Land use compatibility statement from the appropriate local government(s) demonstrating compliance with the LCDC acknowledged comprehensive land use plan(s) and statewide land use planning goals.

(8) Any other information requested by the Department.

FINAL APPLICATION PROCESS FOR SRF FINANCING FOR CONSTRUCTION OF WATER POLLUTION CONTROL FACILITIES

340-54-045

Applicants for SRF loans for construction of water pollution control facilities must:

(1) Comply with the application requirements in OAR 340-54-040 for design and construction of water pollution control projects;

(2) Submit Department approved plans and specifications for the project; and

(3) Submit a value engineering study, satisfactory to the Department, if the total project cost will exceed $10 million.

ENVIRONMENTAL REVIEW

340-54-050

(1) General. An environmental review is required prior to approval of a loan for design and construction or construction when:

(a) No environmental review has previously been prepared;

(b) A significant change has occurred in project scope and possible environmental impact since a prior environmental review; or

(c) A prior environmental review determination is more than five years old.

(2) Environmental Review Determinations. The Department will notify the applicant during facility planning of the type of environmental

documentation which will be required. Based upon the Department's determination:

(a) The applicant may apply for a categorical exclusion; or

(b) The applicant will prepare an environmental information document in a format specified by the Department and the Department will:

(A) Prepare an environmental assessment and a Finding of No Significant Impact; or

(B) Issue a Notice of Intent to Prepare an Environmental Impact Statement; prepare an environmental impact statement and prepare a record of decision.

(3) Categorical exclusions. The categorical exclusions may be made by the Department for projects that have been demonstrated to not have significant impacts on the quality of the human environment.

(a) Eligibility.

(A) If an applicant requests a categorical exclusion, the Department shall review the request and based upon project documentation submitted by the applicant, the Department shall:

(i) Notify the applicant of categorical exclusion and publish notice of categorical exclusion in a newspaper of state-wide and community-wide circulation;

(ii) Notify the applicant to prepare an environmental information document, or

(iii) Issue Notice of Intent to Prepare an Environmental Impact Statement.

(B) A project is eligible for a categorical exclusion if it meets the following criteria:

(i) The project is directed solely toward minor rehabilitation of existing facilities, toward replacement of equipment, or toward the construction of related facilities that do not affect the degree of treatment or the capacity of the facility. Examples include infiltration and inflow correction, replacement of existing equipment and structures, and the construction of small structures on existing sites; or

(ii) The project will serve less than 10,000 people and is for minor expansions or upgrading of existing water pollution control facilities.

(C) Categorical exclusions will not be granted for projects that entail any of the following activities:

(i) The construction of new collection lines;

(ii) A new discharge or relocation of an existing discharge;

(iii) A substantial increase in the volume or loading of pollutants;

(iv) Providing capacity for a population 30 percent or greater than the existing population;

(v) Known or expected impacts to cultural resources, historical and archaeological resources, threatened or endangered species, or environmentally sensitive areas; or

(vi) The construction of facilities that are known or expected to not be cost-effective or to be highly controversial.

(b) Documentation. Applicants seeking a categorical exclusion must provide the following documentation to the Department:

(A) A brief, complete description of the proposed project and its costs;

(B) A statement indicating the project is cost-effective and that the applicant is financially capable of constructing, operating, and maintaining the facilities; and

(C) Plan map(s) of the proposed project showing:

(i) Location of all construction areas;

(ii) Planning area boundaries; and

(iii) Any known environmentally sensitive areas.

(D) Evidence that all affected governmental agencies have been contacted and their concerns addressed.

(c) Proceeding with Financial Assistance. Once the issued categorical exclusion becomes effective, financial assistance may be awarded; however, if the Department later determines the project or environmental conditions have changed significantly, further environmental review may be required and the categorical exclusion will be revoked.

(4) Environmental Information Document.

(a) General. If a project is not eligible for a categorical exclusion, the applicant must prepare an environmental information document.

(b) An environmental information document must include:

(A) A description of the proposed project and why it is needed;

(B) The potential environmental impacts of the project as proposed;

(C) The alternatives to the project and their potential environmental impacts;

(D) A description of public participation activities conducted and issues raised; and

(E) Documentation of coordination with affected federal and state government agencies and tribal agencies.

(c) If an environmental information document is required, the Department shall prepare an environmental assessment based upon the applicant's environmental information document and:

(A) Issue a Finding of No Significant Impact documenting any mitigative measures required of the applicant. The Finding of No Significant Impact will include a brief description of the proposed project, its costs, any mitigative measures required of the applicant as a condition of its receipt of financial assistance, and a statement to the effect that comments supporting or disagreeing with the Finding of No Significant Impact may be submitted for consideration by the board; or

(B) Issue a Notice of Intent to Prepare an Environmental Impact Statement.

(d) If the Department issues a Finding of No Significant Impact:

(A) The Department will distribute the Finding of No Significant Impact to those parties, governmental entities, and agencies that may have an interest in the proposed project. No action regarding the provision of financial assistance will be taken by the Department for at least 30 days after the issuance of the Finding of No Significant Impact;

(B) The Department will reassess the project to determine whether the environmental assessment will be supplemented or whether an environmental impact statement will be required if substantive comments are received during the

public comment period that challenge the Finding of No Significant Impact; and

(C) The Finding of No Significant Impact will become effective if no new information is received during the public comment period which would require a reassessment or if after reviewing public comments and reassessing the project, an environmental impact statement was not found to be necessary.

(e) Proceeding with Financial Assistance. Once the issued Finding of No Significant Impact becomes effective, financial assistance may be awarded; however, if the Department later determines the project or environmental conditions have changed significantly, further environmental review may be required and the Finding of No Significant Impact will be revoked.

(5) Environmental Impact Statement.

(a) General. An environmental impact statement will be required when the Department determines that any of the following conditions exist:

(A) The project will significantly affect the pattern and type of land use or growth and distribution of the population;

(B) The effects of the project's construction or operation will conflict with local or state laws or policies;

(C) The project may have significant adverse impacts upon:

(i) Wetlands,

(ii) Floodplains,

(iii) Threatened and endangered species or their habitats,

(iv) Sensitive environmental areas, including parklands, preserves, other public lands or areas of recognized scenic, recreational, agricultural, archeological or historic value;

(D) The project will displace population or significantly alter the characteristics of existing residential areas;

(E) The project may directly or indirectly, through induced development, have significant adverse effect upon local ambient air quality, local noise levels, surface or groundwater quality, fish, shellfish, wildlife or their natural habitats;

(F) The project is highly controversial; or

(G) The treated effluent will be discharged into a body of water where beneficial uses and associated special values of the receiving stream are not adequately protected by water quality standards or the effluent will not be of sufficient quality to meet these standards.

(b) Environmental Impact Statement Contents. At a minimum, the contents of an environmental impact statement will include:

(A) The purpose and need for the project;

(B) The environmental setting of the project and the future of the environment without the project;

(C) The alternatives to the project as proposed and their potential environmental impacts;

(D) A description of the proposed project;

(E) The potential environmental impact of the project as proposed including those which cannot be avoided;

(F) The relationship between the short term uses of the environment and the maintenance and enhancement of long term productivity; and

(G) Any irreversible and irretrievable commitments of resources to the proposed project;

(c) Procedures.

(A) If an environmental impact statement is required, the Department shall publish a Notice of Intent to Prepare an Environmental Impact Statement in newspapers of state-wide and community-wide circulation.

(B) After the notice of intent has been published, the Department will contact all affected local, state and federal agencies, tribes or other interested parties to determine the scope required of the document. Comments shall be requested regarding:

(i) Significance and scope of issues to be analyzed, in depth, in the environmental impact statement;

(ii) Preliminary range of alternatives to be considered;

(iii) Potential cooperating agencies and the information or analyses that may be needed from them;

(iv) Method for environmental impact statement preparation and the public participation strategy;

(v) Consultation requirements of other environmental laws; and

(vi) Relationship between the environmental impact statement and the completion of the facility plan and any necessary arrangements for coordination of preparation of both documents.

(C) Prepare and submit a draft environmental impact statement to all affected agencies or parties for review and comment;

(D) Following publication of a public notice in a newspaper of community-wide and state-wide circulation, allow a 30 day comment period, and conduct a public hearing on the draft environmental impact statement; and

(E) Prepare and submit a final environmental impact statement (FEIS) addressing all agency and public input.

(F) Upon completion of a FEIS, the Department will issue a Record of Decision (ROD) documenting the mitigative measures which will be required of the applicant. The loan agreement will be conditioned upon such mitigative measures. The Department will allow a 30 day comment period for the ROD and FEIS.

(G) Material incorporated into an environmental impact statement by reference will be organized to the extent possible into a supplemental information document and be made available for public review upon request. No material may be incorporated by reference unless it is reasonably available for inspection by interested persons.

(d) Proceeding with Financial Assistance. Once the issued record of decision becomes effective, financial assistance may be awarded; however, if the Department later determines the project or environmental conditions have changed significantly, further environmental review may be required and the record of decision will be revoked.

(6) Previous Environmental Reviews. If a federal environmental review for the project has been conducted, the Department may, at its discretion, adopt all or part of the federal agency's documentation.

(7) Validity of Environmental Review. Environmental determinations under this section are valid for five years. If a financial assistance application is received for a project with an environmental determination which is more than five years old, or if conditions or project scope have changed significantly since the last determination, the Department will reevaluate the project, environmental conditions, and public comments and will either:

(a) Reaffirm the earlier decision;

(b) Require supplemental information to the earlier Environmental Impact Statement, Environmental Information Document, or Request for Categorical Exclusion. Based upon a review of the updated document, the Department will issue and distribute a revised notice of categorical exclusion, Finding of No Significant Impact, or Record of Decision; or

(c) Require a revision to the earlier Environmental Impact Statement, Environmental Information Document, or Request for Categorical Exclusion. If a revision is required, the applicant must repeat all requirements outlined in this section.

(8) Appeal. An affected party may appeal a notice of categorical exclusion, a Finding of No Significant Impact, or a Record of Decision pursuant to procedures in the Oregon Administrative Procedures Act, ORS 183.484.

LOAN APPROVAL AND REVIEW CRITERIA

340-54-055

(1) Loan Approval. The final SRF loan application must be reviewed and approved by the Director.

(2) Loan Review Criteria. In order to get approval of a final SRF loan application, the following criteria must be met:

(a) The applicant must submit a completed final loan application including all information required under OAR 340-54-035, 340-54-040, or 340-54-045 whichever is applicable;

(b) There are adequate funds in the SRF to finance the loan;

(c) The project is eligible for funds under this chapter;

~~[(d) The State of Oregon's bond counsel finds that the applicant has the legal authority to incur the debt;]~~

(d)~~[(e)]~~ The applicant must demonstrate to the Director's satisfaction its ability to repay a loan and, where applicable, its ability to ensure ongoing operation and maintenance (including replacement) of the proposed water pollution control facility. In addition, for revenue secured loans described under OAR 340-54-065(2), at a minimum, unless waived by the Director, the following criteria must be met:

(A) Where applicable, the existing water pollution control facilities are free from operational and maintenance problems which would materially impede the proposed system's function or the public agency's ability to repay the

loan from user fees as demonstrated by the opinion of a registered engineer or other expert acceptable to the Department;

(B) Historical and projected system rates and charges, when considered with any consistently supplied external support must be sufficient to fully fund operation, maintenance, and replacement costs, any existing indebtedness and the debt service expense of the proposed borrowing;

(C) To the extent that projected system income is materially greater than historical system income, the basis for the projected increase must be reasonable and documented as to source;

(D) The public agency's income and budget data must be computationally accurate and must include four years historical and projected statements of consolidated sewer system revenues, cash flows, and expenditures;

(E) The budget of the project including proposed capital costs, site work costs, engineering costs, administrative costs and any other costs which will be supported by the proposed revenue secured loan must be reflected in the public agency's data;

(F) Audits during the last four years are free from adverse opinions or disclosures which cast significant doubt on the borrower's ability to repay the Revenue Secured Loan in a timely manner;

(G) The proposed borrowing's integrity is not at risk from undue dependence upon a limited portion of the system's customer base and a pattern of delinquency on the part of that portion of the customer base;

(H) The public agency must have the ability to bring effective sanctions to bear on non-paying customers; and

(I) The opinion of the pubic agency's legal counsel or a certificate from the public agency which states that no litigation exists or has been threatened which would cast doubt on the enforceability of the borrower's obligations under the loan.

(e) The Department may establish other loan criteria as necessary.

LOAN AGREEMENT AND CONDITIONS

340-54-060

The loan agreement shall contain conditions including, but not limited to, the following, where applicable to the type of project being financed:

(1) Accounting.

(a) Applicant shall use accounting, audit and fiscal procedures which conform to generally accepted government accounting standards.

(b) Project files and records must be retained by the borrower for at least three (3) years after performance certification. Financial files and records must be retained until the loan is fully amortized.

(c) Project accounts must be maintained as separate accounts.

(2) Wage Rates. Applicant shall ensure compliance with federal wage rates established under the Davis-Bacon Act.

(3) Operation and Maintenance Manual. If the SRF loan is for design and construction, the borrower shall submit a facility operation and maintenance manual which meets Department approval before the project is 75% complete.

(4) Value Engineering. A value engineering study satisfactory to the Department must be performed for design and construction projects prior to commencement of construction if the total project cost will exceed $10 million.

(5) Plans and Specifications. Applicant must submit and receive Departmental approval of project plans and specifications prior to commencement of construction, in conformance with OAR Chapter 340, Division 52.

(6) Inspections. During the building of the project, the borrower shall provide inspections in sufficient number to ensure the project complies with approved plans and specifications. These inspections shall be conducted by qualified inspectors under the direction of a registered civil, mechanical or electrical engineer, whichever is appropriate. The Department or its representatives may conduct interim building inspections to determine compliance with approved plans and specifications and with the loan agreement, as appropriate.

(7) Loan amendments.

(a) Changes in the project work that are consistent with the objectives of the project and that are within the scope and funding level of the loan do not require the execution of a formal loan

amendment. However, if additional loan funds are needed, a loan amendment shall be required.

(b) If the total of all loan amendments will not exceed 10% of the total amount approved in the original loan agreement, loan amendments increasing the originally approved loan amount may be requested at any time during the project.

(c) If the total of all loan amendments will exceed 10% of the total amount approved in the original loan agreement, loan amendments increasing the originally approved loan amount must be requested prior to implementation of changes in project work. The Department may approve these loan amendments if the borrower demonstrates the legal authority to borrow and the financial capability to repay the increased loan amount.

(d) Loan amendments decreasing the loan amount may be requested at the end of a project when the final cost of the project is less than the total amount approved in the original loan agreement.

(8) Change orders. Upon execution, the borrower must submit change orders to the Department. The Department shall review the change orders to determine the eligibility of the project change.

(9) Project Performance Certification.

(a) Project performance standards must be submitted by the borrower and approved by the Department before the project is 50 percent complete.

(b) The borrower shall notify the Department within thirty (30) days of the actual date of initiation of operation.

(c) One year after initiation of operation, the borrower shall certify whether the facility meets Department approved project performance standards.

(d) If the project is completed, or is completed except for minor items, and the facility is operable, but the borrower has not sent its notice of initiation of operation, the Department may assign an initiation of operation date.

(e) The borrower shall, pursuant to a Department approved corrective action plan, correct any factor that does not meet the Department approved project performance standards.

(10) Eligible Costs. Payments shall be limited to eligible work that complies with plans and specifications as approved by the Department.

(11) Adjustments. The Department may at any time review and audit requests for payment and make adjustments for, but not limited to, math errors, items not built or bought, and unacceptable construction.

(12) Contract and Bid Documents. The borrower shall submit a copy of the awarded contract and bid documents to the Department.

(13) Audit. An audit consistent with generally accepted accounting procedures of project expenditures will be conducted by the borrower within one year after performance certification. This audit shall be paid for by the borrower and shall be conducted by a financial auditor approved by the Department.

(14) Operation and Maintenance. The borrower shall provide for adequate operation and maintenance (including replacement) of the facility and shall retain sufficient operating personnel to operate the facility.

(15) Default remedies. Upon default by a borrower, the Department shall have the right to pursue any remedy available at law or in equity and may appoint a receiver at the expense of the public agency to operate the utility which produces pledged revenues and collect utility rates and charges. The Department may also withhold any amounts otherwise due to the public agency from the State of Oregon and direct that such funds be applied to the debt service due on the SRF loan [~~indebtedness~~] and deposited in the fund. If the Department finds that the loan to the public agency is otherwise adequately secured, the Department may waive this right to withhold state shared revenue in the loan agreement or other loan documentation.

(16) Release. The borrower shall release and discharge the Department, its officers, agents, and employees from all liabilities, obligations, and claims arising out of the project work or under the loan, subject only to exceptions previously contractually arrived at and specified in writing between the Department and the borrower.

(17) Effect of approval or certification of documents. Review and approval of facilities plans, design drawings and specifications or other documents by or for the Department does not relieve the borrower of its responsibility to properly plan, design, build and effectively operate and maintain the treatment works as required by law, regulations, permits and good management practices. The Department is not responsible for any project costs or any losses or damages resulting from defects in the plans, design drawings and specifications or other subagreement documents.

(18) Reservation of rights.

(a) Nothing in this rule prohibits a borrower from requiring more assurances, guarantees, or indemnity or other contractual requirements from any party performing project work; and

(b) Nothing in the rule affects the Department's right to take remedial action, including, but not limited to, administrative enforcement action and actions for breach of contract against a borrower that fails to carry out its obligations under this chapter.

(19) Other provisions. SRF loans shall contain such other provisions as the Director may reasonably require to meet the goals of the Clean Water Act and ORS 468.423 to 468.440.

LOAN TERMS AND INTEREST RATES

340-54-065

As required by ORS 468.440, the following loan terms and interest rates are established in order to provide loans to projects which enhance or protect water quality; to provide loans to public agencies capable of repaying the loan; to establish an interest rate below market rate so that the loans will be affordable; to provide loans to all sizes of communities which need to finance projects; to provide loans to the types of projects described in these rules which address water pollution control problems; and to provide loans to all public agencies, including those which can and cannot borrow elsewhere.

(1) Types of Loans. An SRF loan must be one of the following types of loans:

(a) The loan must be a general obligation bond, or other full faith and credit obligation of the borrower, which is supported by the public agency's unlimited ad valorem taxing power; or

(b) The loan must be a bond or other obligation of the public agency which is not subject to appropriation, and which has been rated investment grade by Moody's Investor Services, Standard and Poor's Corporation, or another national rating service acceptable to the Director; or

(c) The loan must be a Revenue Secured Loan which complies with subsection (2) of this section; or

(d) The loan must be an Alternative Loan which complies with subsection 3 of this section; or

(e) The loan must be a Discretionary Loan which complies with subsection 4 ~~{(3)}~~ of this section.

(2) Revenue Secured Loans. These loans shall:

(a) Be bonds, loan agreements, or other unconditional obligations to pay from specified revenues which are pledged to pay to the borrowing; the obligation to pay may not be subject to the appropriation of funds;

(b) Contain a rate covenant which requires the borrower to impose and collect each year pledged revenues which are sufficient to pay all expenses of operation and maintenance (including replacement) of the facilities which are financed with the borrowing and the facilities which produce the pledged revenues.

All debt service and other financial obligations (such as contributions to reserve accounts) imposed in connection with prior lien obligations, plus an amount equal to the product of the coverage factor shown in subsection (d) of this section times the debt service due in that year on the SRF loan and all obligations which have an equal or superior lien on the pledged revenues. The coverage factor selected from subsection (d) shall correspond to the reserve percentage selected for the SRF loan;

(c) Require the public agency to maintain in each year the SRF loan is outstanding, a pledged reserve which is dedicated to the payment of the SRF loan. The amount of the reserve shall be at least equal to the product of the reserve percentage shown in subsection (d) of this section times the average annual debt service ~~[due in the following year]~~ on the SRF loan. ~~[and all obligations which have an equal or superior lien on the pledged revenues.]~~ The reserve percentage selected from subsection (d) shall correspond to the coverage factor selected for the SRF loan. Reserves shall be funded with cash, or a letter of credit or other third party commitment to advance funds which is satisfactory to the Director;

(d) Comply with the following coverage factors and reserve percentages:

Coverage Factor	Reserve Percentage
1.05:1	100%
1.15:1	75%
1.25:1	50%
1.50:1	25%

(e) Contain a covenant to review rates periodically, and to adjust rates, if necessary, so that estimated revenues in subsequent years will be sufficient to comply with the rate covenant;

(f) Contain a covenant that, if pledged revenues fail to achieve the level required by the rate covenant, the public agency will promptly adjust rates and charges to assure future compliance with the rate covenant. However, failure to adjust rates shall not constitute a default if the public agency transfers unencumbered ~~[unpledged]~~ resources in an amount equal to the revenue deficiency to the utility system which produces the pledged revenues;

(g) Follow the payment schedule in the loan agreement which shall require monthly SRF loan payments to the Department. If the Department determines that monthly loan payments are not practicable for the borrower, the payment schedule shall require periodic loan payments as frequently as possible, with monthly deposits to a dedicated loan payment account whenever practicable;

(h) Contain a covenant that, if the reserve account is depleted for any reason, the public agency will take prompt action to restore the reserve to the required minimum amount;

(i) Contain a covenant that the public agency will not, except as provided in the SRF loan documentation, incur obligations (except for operating expenses) which have a lien on the pledged revenues which is equal or superior to the lien of the SRF loan, without the prior written consent of the Director. The Director shall withhold consent only if the Director determines that incurring such obligations would materially impair the ability of the public agency to repay the SRF loan or the security for the SRF loan;

(j) Contain a covenant that the borrower will not sell, transfer or encumber any financial or fixed asset of the utility system which produces the pledged revenues, if the public agency is in violation of any SRF loan covenant, or if such sale, transfer or encumbrance would cause a violation of any SRF loan covenant.

(3) Alternative Loan. Alternative Loans are to be used if the public agency would incur unnecessary costs or excessive burdens by entering into a Revenue Secured Loan, and if the public agency can provide the Department with substantially equivalent security. The Director may authorize an Alternative Loan to a public agency, if the public agency demonstrates to the satisfaction of the Director that:

(a) It would be unduly burdensome or costly to the public agency to borrow money from the SRF under subsections (a), (b), or (c) of Section 340-54-065; and,

(b) The Alternative Loan has a credit quality which is substantially equal to, or better than, the credit quality of a Revenue Secured Loan to that public agency.

In determining whether an Alternative Loan meets the requirements of subsection (3)(b) of this section, the Director may consult with the Department's financial advisor, and may charge the public agency applying for an Alternative Loan the reasonable costs of such consultation.

(4)[~~(3)~~] Discretionary Loan. A Discretionary Loan shall be made only to a public agency which has a population of less than 5,000 persons which, in the judgment of the Director, cannot practicably comply with the requirements of OAR 340-54-065(1)(a), (b), [~~or~~] (c), or (d). Discretionary Loans shall comply with OAR 340-54-065(5)[~~(4)~~] of this section, and otherwise be on terms approved by the Director. The total principal amount of Discretionary Loans made in any fiscal year shall not exceed five percent of the money available to be loaned from the SRF in that fiscal year.

(5)[~~(4)~~] Interest Rates.

(a) Zero percent interest rate. SRF loans which are fully amortized within five years shall bear no interest; at least three percent of the original principal amount of the loan shall be repaid each year.

(b) Three percent interest rate.

(A) All SRF loans, other than Discretionary Loans, in which the final principal payment is due more than five years after the loan is made shall bear interest at a rate of three percent per annum, compounded annually; shall have approximately level annual debt service during the period which begins with the first principal repayment and ends with the final principal repayment; and, shall require all principal and interest to be repaid within twenty years.

(B) A Discretionary Loan shall bear the interest rate of three percent per annum, compounded annually; shall schedule principal and interest repayments as rapidly as is consistent with estimated revenues (but no more rapidly than would be required to produce level debt service during the period of principal repayment); and, shall require all principal and interest to be repaid within twenty years.

(c) Review of interest rate. The interest rates on SRF loans described in OAR 340-54-065(5)[~~(4)~~](a) and (b) shall be in effect for loans made by September 30, 1991. Thereafter, interest rates may be adjusted by the EQC, if necessary, to assure compliance with ORS 468.440.

(6)[~~(5)~~] Interest Accrual. Interest accrual begins at the time of each loan disbursement from the SRF to the borrower.

(7)[~~(6)~~] Commencement of Loan Repayment. Except as provided in OAR 340-54-065(5)[~~(4)~~](a), principal and interest repayments on loans shall begin within one year after the date of project completion as estimated in the loan agreement.

(8)[~~(7)~~] Minor Variations in Loan Terms. The Department may permit insubstantial variations in the financial terms of loans described in this section, in order to facilitate administration and repayment of loans.

SPECIAL RESERVES

340-54-070

(1) Facility Planning Reserve. Each fiscal year, 10 percent of the total available SRF will be set aside for loans for facility planning. However, if preliminary applications for facility planning

representing 10 percent of the available SRF are not approved, these funds may be allocated to other projects.

(2) Small Communities Reserve. Each fiscal year, 15 percent of the total available SRF will be set aside for loans to small communities. However, if preliminary applications from small communities representing 15 percent of the available SRF are not received, these funds may be allocated to other public agencies.

MAXIMUM LOAN AMOUNT

340-54-075

In any fiscal year, no public agency on the priority list may receive more than 25 percent of the total available SRF. However, if the SRF funds are not otherwise allocated, a public agency may apply for more than 25 percent of the available SRF, not to exceed the funds available in the SRF.

for each such class. The fee for the issuance of certificates shall be established by the commission in an amount based upon the costs of administering this program established in the current biennial budget. The fee for a certificate shall not exceed $10.

(2) The department shall collect the fees established pursuant to paragraph (b) of subsection (1) of this section at the time of the issuance of certificates of compliance as required by ORS 468.390 (2)(c).

(3) On or before the 15th day of each month, the commission shall pay into the State Treasury all moneys received as fees pursuant to subsections (1) and (2) of this section during the preceding calendar month. The State Treasurer shall credit such money to the Department of Environmental Quality Motor Vehicle Pollution Account, which is hereby created. The moneys in the Department of Environmental Quality Motor Vehicle Pollution Account are continuously appropriated to the department to be used by the department solely or in conjunction with other state agencies and local units of government for:

(a) Any expenses incurred by the department and, if approved by the Governor, any expenses incurred by the Motor Vehicles Division of the Department of Transportation in the certification, examination, inspection or licensing of persons, equipment, apparatus or methods in accordance with the provisions of ORS 468.390 and 815.310.

(b) Such other expenses as are necessary to study traffic patterns and to inspect, regulate and control the emission of pollutants from motor vehicles in this state.

(4) The department may enter into an agreement with the Motor Vehicles Division of the Department of Transportation to collect the licensing and renewal fees described in paragraph (a) of subsection (1) of this section subject to the fees being paid and credited as provided in subsection (3) of this section. [Formerly 449.965; 1974 s.s. c.73 §5; 1975 c.535 §3; 1977 c.704 §10; 1981 c.294 §1; 1983 c.338 §936]

468.410 Authority to limit motor vehicle operation and traffic. The commission and regional air pollution control authorities organized pursuant to 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 this chapter by rule may regulate, limit, control or prohibit motor vehicle operation and traffic as necessary for the control of air pollution which presents an imminent and substantial endangerment to the health of persons. [Formerly 449.747]

468.415 Administration and enforcement of rules adopted under ORS 468.410. Cities, counties, municipal corporations and other agencies, including the Department of State Police and the Highway Division, shall cooperate with the commission and regional air pollution control authorities in the administration and enforcement of the terms of any rule adopted pursuant to ORS 468.410. [Formerly 449.751]

468.420 Police enforcement. The Oregon State Police, the county sheriff and municipal police are authorized to use such reasonable force as is required in the enforcement of any rule adopted pursuant to ORS 468.410 and may take such reasonable steps as are required to assure compliance therewith, including but not limited to:

(1) Locating appropriate signs and signals for detouring, prohibiting and stopping motor vehicle traffic; and

(2) Issuing warnings or citations. [Formerly 449.753]

FINANCING TREATMENT WORKS

468.423 Definitions for ORS 468.423 to 468.440. As used in ORS 468.423 to 468.440:

(1) "Commission" means the Environmental Quality Commission.

(2) "Department" means the Department of Environmental Quality.

(3) "Director" means the Director of the Department of Environmental Quality or the director's designee.

(4) "Fund" means the Water Pollution Control Revolving Fund established under ORS 468.427.

(5) "Public agency" means any state agency, incorporated city, county, sanitary authority, county service district, sanitary district, metropolitan service district or other special district authorized or required to construct water pollution control facilities.

(6) "Treatment works" means:

(a) The devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature, necessary to recycle or reuse water at the most economical cost over the estimated life of the works. "Treatment works" includes:

(A) Intercepting sewers, outfall sewers, sewage collection systems, pumping power and other equipment, and any appurtenance, exten-

sion, improvement, remodeling, addition or alteration to the equipment;

(B) Elements essential to provide a reliable recycled water supply including standby treatment units and clear well facilities; and

(C) Any other acquisitions that will be an integral part of the treatment process or used for ultimate disposal of residues resulting from such treatment, including but not limited to land used to store treated waste water in land treatment systems prior to land application.

(b) Any other method or system for preventing, abating, reducing, storing, treating, separating or disposing of municipal waste, storm water runoff, industrial waste or waste in combined storm water and sanitary sewer systems.

(c) Any other facility that the commission determines a public agency must construct or replace in order to abate or prevent surface or ground water pollution. [1987 c.648 §1]

Note: 468.423 to 468.440 were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 468 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

468.425 Policy. It is declared to be the policy of this state:

(1) To aid and encourage public agencies required to provide treatment works for the control of water pollution in the transition from reliance on federal grants to local self-sufficiency by the use of fees paid by users of the treatment works;

(2) To accept and use any federal grant funds available to capitalize a perpetual revolving loan fund; and

(3) To assist public agencies in meeting treatment works' construction obligations in order to prevent or eliminate pollution of surface and ground water by making loans from a revolving loan fund at interest rates that are less than or equal to market interest rates. [1987 c.648 §2]

Note: See note under 468.423.

468.427 Water Pollution Control Revolving Fund; sources. (1) The Water Pollution Control Revolving Fund is established separate and distinct from the General Fund in the State Treasury. The moneys in the Water Pollution Control Revolving Fund are appropriated continuously to the department to be used for the purposes described in ORS 468.429.

(2) The Water Pollution Control Revolving Fund shall consist of:

(a) All capitalization grants provided by the Federal Government under the federal Water Quality Act of 1986;

(b) All state matching funds appropriated or authorized by the legislature;

(c) Any other revenues derived from gifts, grants or bequests pledged to the state for the purpose of providing financial assistance for water pollution control projects;

(d) All repayments of moneys borrowed from the fund;

(e) All interest payments made by borrowers from the fund; and

(f) Any other fee or charge levied in conjunction with administration of the fund.

(3) The State Treasurer may invest and reinvest moneys in the Water Pollution Control Revolving Fund in the manner provided by law. All earnings from such investment and reinvestment shall be credited to the Water Pollution Control Revolving Fund. [1987 c.648 §3]

Note: See note under 468.423.

468.429 Uses of revolving fund. (1) The Department of Environmental Quality shall use the moneys in the Water Pollution Control Revolving Fund to provide financial assistance:

(a) To public agencies for the construction or replacement of treatment works.

(b) For the implementation of a management program established under section 319 of the federal Water Quality Act of 1986 relating to the management of nonpoint sources of pollution.

(c) For development and implementation of a conservation and management plan under section 320 of the federal Water Quality Act of 1986 relating to the national estuary program.

(2) The department may also use the moneys in the Water Pollution Control Revolving Fund for the following purposes:

(a) To buy or refinance the treatment works' debt obligations of public agencies if such debt was incurred after March 7, 1985.

(b) To guarantee, or purchase insurance for, public agency obligations for treatment works' construction or replacement if the guarantee or insurance would improve credit market access or reduce interest rates, or to provide loans to a public agency for this purpose.

(c) To pay the expenses of the department in administering the Water Pollution Control Revolving Fund. [1987 c.648 §4]

Note: See note under 468.423.

468.430 [1983 c.218 §1; repealed by 1985 c.222 §6]

468.433 Duties of department. In administering the Water Pollution Control Revolving Fund, the department shall:

(1) Allocate funds for loans in accordance with a priority list adopted by rule by the commission.

(2) Use accounting, audit and fiscal procedures that conform to generally accepted government accounting standards.

(3) Prepare any reports required by the Federal Government as a condition to awarding federal capitalization grants. [1987 c.648 §5]

Note: See note under 468.423.

468.435 [1983 c.218 §2; repealed by 1985 c.222 §6]

468.437 Loan applications; eligibility; waiver; default remedy. (1) Any public agency desiring a loan from the Water Pollution Control Revolving Fund shall submit an application to the department on the form provided by the department. Each applicant shall demonstrate to the satisfaction of the State of Oregon bond counsel that the applicant has the legal authority to incur the debt. To the extent that a public agency relies on the authority granted by law or charter to issue revenue bonds pursuant to the Uniform Revenue Bonding Act, the department may waive the requirements for the findings required for a private negotiated sale and for the preliminary official statement.

(2) Any public agency receiving a loan from the Water Pollution Control Revolving Fund shall establish and maintain a dedicated source of revenue or other acceptable source of revenue for the repayment of the loan.

(3) If a public agency defaults on payments due to the Water Pollution Control Revolving Fund, the state may withhold any amounts otherwise due to the public agency and direct that such funds be applied to the indebtedness and deposited into the fund. [1987 c.648 §6]

Note: See note under 468.423.

468.440 Loan terms and interest rates; considerations. (1) The Environmental Quality Commission shall establish by rule policies for establishing loan terms and interest rates for loans made from the Water Pollution Control Revolving Fund that assure that the objectives of ORS 468.423 to 468.440 are met and that adequate funds are maintained in the Water Pollution Control Revolving Fund to meet future needs. In establishing the policy, the commission shall take into consideration at least the following factors:

(a) The capability of the project to enhance or protect water quality.

(b) The ability of a public agency to repay a loan.

(c) Current market rates of interest.

(d) The size of the community or district to be served by the treatment works.

(e) The type of project financed.

(f) The ability of the applicant to borrow elsewhere.

(2) The commission may establish an interest rate ranging from zero to the market rate. The term of a loan may be for any period not to exceed 20 years.

(3) The commission shall adopt by rule any procedures or standards necessary to carry out the provisions of ORS 468.423 to 468.440. [1987 c.648 §7]

Note: See note under 468.423.

Note: Section 8, chapter 648, Oregon Laws 1987, provides:

Sec. 8. Before awarding the first loan from the Water Pollution Control Revolving Fund, the Department of Environmental Quality shall submit an informational report to the Joint Committee on Ways and Means or, if during the interim between sessions of the Legislative Assembly, to the Emergency Board. The report shall describe the Water Pollution Control Revolving Fund program and set forth in detail the operating procedures of the program. [1987 c.648 §8]

FIELD BURNING REGULATION

468.450 Regulation of field burning on marginal days. (1) As used in this section:

(a) "Marginal conditions" means atmospheric conditions such that smoke and particulate matter escape into the upper atmosphere with some difficulty but not such that limited additional smoke and particulate matter would constitute a danger to the public health and safety.

(b) "Marginal day" means a day on which marginal conditions exist.

(2) In exercising its functions under ORS 476.380 and 478.960, the commission shall classify different types or combinations of atmospheric conditions as marginal conditions and shall specify the extent and types of burning that may be allowed under different combinations of atmospheric conditions. A schedule describing the types and extent of burning to be permitted on each type of marginal day shall be prepared and circulated to all public agencies responsible for providing information and issuing permits under ORS 476.380 and 478.960. The schedule shall give first priority to the burning of perennial grass seed crops used for grass seed production, second priority to annual grass seed crops used for grass seed production, third priority to grain crop burning, and fourth priority to all other

65th OREGON LEGISLATIVE ASSEMBLY–1989 Regular Session

Senate Bill 1097

Sponsored by Senator OTTO (at the request of Association of Oregon Sewerage Agencies)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced.**

Allows public agency to borrow directly from Water Pollution Control Revolving Fund. Allows public agency to waive notice of sale, official statement and other procedures if borrowing directly from Department of Environmental Quality.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to pollution control; creating new provisions; amending ORS 468.437; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this Act is added to and made a part of ORS 468.423 to 468.440.

SECTION 2. Notwithstanding any limitation contained in any other provision of law or local charter, a public agency may:

(1) Borrow money from the Water Pollution Control Revolving Fund through the department;

(2) Enter into loan agreements and make related agreements with the department in which the public agency agrees to repay the borrowed money in accordance with the terms of the loan agreement;

(3) Covenant with the department regarding the operation of treatment works and the imposition and collection of rates, fees and charges for the treatment works; and

(4) Pledge all or part of the revenues of the treatment works to pay the amount due under the loan agreement and notes in accordance with ORS 288.594.

SECTION 3. ORS 468.437 is amended to read:

468.437. (1) Any public agency desiring a loan from the Water Pollution Control Revolving Fund shall submit an application to the department on the form provided by the department. [*Each applicant shall demonstrate to the satisfaction of*] **The department may require an opinion from** the State of Oregon bond counsel that the applicant has the legal authority to [*incur the debt*] **borrow from the Water Pollution Control Revolving Fund.** [*To the extent that a public agency relies on the authority granted by law or charter to issue revenue bonds pursuant to the Uniform Revenue Bonding Act, the department may waive the requirements for the findings required for a private negotiated sale and for the preliminary official statement.*] **If a public agency relies on borrowing authority granted by charter or law other than section 2 of this 1989 Act, then with the consent of the department and notwithstanding any limitation or requirement of the charter or law, the public agency may borrow directly from the Water Pollution Control Revolving Fund without publishing a notice of sale, providing an official statement or following any other procedures designed to provide notice or information to potential lenders. The requirements of ORS 288.845 shall not apply to revenue bonds that are sold to the department.**

(2) Any public agency receiving a loan from the Water Pollution Control Revolving Fund shall

NOTE: Matter in **bold face** in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.

establish and maintain a dedicated source of revenue or other acceptable source of revenue for the repayment of the loan.

(3) If a public agency defaults on payments due to the Water Pollution Control Revolving Fund, the state may withhold any amounts otherwise due to the public agency and direct that such funds be applied to [*the indebtedness*] **the payments** and deposited into the fund. **If the department finds that the loan to the public agency is otherwise adequately secured, the department may waive this right in the loan agreement or other loan documentation.**

SECTION 4. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.

Findings Justifying Adoption of a Temporary Rule

The following findings regarding the development of the temporary rule are intended to comply with the requirements of ORS 183.335(5) (see Attachment E).

1. Failure to act promptly will result in serious prejudice to the public interest.

   Several public agencies need to receive SRF loans immediately in order to allow them to proceed with their projects and address serious environmental problems. Unless the rules are adopted, these public agencies will not be able to enter into loan agreements with DEQ because of the undue financial burden of existing rule requirements. These rule requirements are related to reserve accounts for revenue secured loans and the Department's ability to withhold revenue sharing funds in the case of loan default.

   In addition, unless the temporary rule is adopted, the inconsistency between the existing rules, adopted in March 1989, and Senate Bill 1097, enacted June 1989, may create confusion as to what the Department intends to require.

2. Statutory authority.

   The legal authority for the proposed rules is included in ORS 468.440. This statute allows the EQC to establish by rule policies for the loan program.

3. Statement of need for the rule.

   OAR 340-54-005 to 340-54-075 establishes unduly burdensome requirements for SRF borrowers which may prevent them from getting a SRF loan in a timely manner as needed to address environmental problems. The Department, therefore, finds that it is necessary to adopt the temporary rule in order to allow these projects to proceed so that important environmental concerns may be addressed.

   The temporary rule is also needed to incorporate recent statutory changes and avoid confusion created by inconsistencies between existing rules and the new legislation.

(b) The agency shall include with the notice of intended action given under subsection (1) of this section:

(A) A citation of the statutory or other legal authority relied upon and bearing upon the promulgation of the rule;

(B) A statement of the need for the rule and a statement of how the rule is intended to meet the need;

(C) A list of the principal documents, reports or studies, if any, prepared by or relied upon by the agency in considering the need for and in preparing the rule, and a statement of the location at which those documents are available for public inspection. The list may be abbreviated if necessary, and if so abbreviated there shall be identified the location of a complete list; and

(D) A statement of fiscal impact identifying state agencies, units of local government and the public which may be economically affected by the adoption, amendment or repeal of the rule and an estimate of that economic impact on state agencies, units of local government and the public. In considering the economic effect of the proposed action on the public, the agency shall utilize available information to project any significant economic effect of that action on businesses, which shall include a cost of compliance effect on small businesses affected.

(c) The Secretary of State may omit the information submitted under paragraph (b) of this subsection from publication in the bulletin referred to in ORS 183.360.

(3) When any agency proposes to adopt, amend or repeal a rule, it shall give interested persons reasonable opportunity to submit data or views. Opportunity for oral hearing shall be granted upon request received from 10 persons or from an association having not less than 10 members within 15 days after agency notice. An agency holding a hearing upon a request made under this subsection is not required to give additional notice of the hearing in the bulletin referred to in ORS 183.360 if the agency gives notice in compliance with its rules of practice and procedure other than a requirement that notice be given in the bulletin. The agency shall consider fully any written or oral submission.

(4) Upon request of an interested person received within 15 days after agency notice pursuant to subsection (1) of this section, the agency shall postpone the date of its intended action no less than 10 nor more than 90 days in order to allow the requesting person an opportunity to submit data, views or arguments concerning the proposed action. Nothing in this subsection shall preclude an agency from adopting a temporary rule pursuant to subsection (5) of this section.

(5) Notwithstanding subsections (1) to (4) of this section, an agency may adopt, amend or suspend a rule without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, if the agency prepares:

(a) A statement of its findings that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice;

(b) A citation of the statutory or other legal authority relied upon and bearing upon the promulgation of the rule;

(c) A statement of the need for the rule and a statement of how the rule is intended to meet the need; and

(d) A list of the principal documents, reports or studies, if any, prepared by or relied upon by the agency in considering the need for and in preparing the rule, and a statement of the location at which those documents are available for public inspection.

(6)(a) A rule adopted, amended or suspended under subsection (5) of this section is temporary and may be effective for a period of not longer than 180 days. The adoption of a rule under this subsection does not preclude the subsequent adoption of an identical rule under subsections (1) to (4) of this section.

(b) A rule temporarily suspended shall regain effectiveness upon expiration of the temporary period of suspension unless the rule is repealed under subsections (1) to (4) of this section.

(7) Any person may request in writing that an agency mail to the person copies of its notices of intended action given pursuant to subsection (1) of this section. Upon receipt of any request the agency shall acknowledge the request, establish a mailing list and maintain a record of all mailings made pursuant to the request. Agencies may establish procedures for establishing and maintaining the mailing lists current and, by rule, establish fees necessary to defray the costs of mailings and maintenance of the lists.

(8) This section does not apply to rules establishing an effective date for a previously effective rule or establishing a period during which a provision of a previously effective rule will apply.

(9) This section does not apply to ORS 279.025 to 279.031 and 279.310 to 279.990 relating to public contracts and purchasing.

NEIL GOLDSCHMIDT
GOVERNOR

Environmental Quality Commission

811 SW SIXTH AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

REQUEST FOR EQC ACTION

Meeting Date: December 1, 1989
Agenda Item: H
Division: Hazardous & Solid Waste
Section: Waste Reduction

SUBJECT:

Waste Reduction Program - Reclaimed Plastic Tax Credit Rules.

PURPOSE:

Senate Bill 1083, as passed by the 1989 Oregon Legislature, makes changes to the statutory language in ORS 468.925 to 468.965. The accompanying rules, OAR 340-17-010 to 340-17-055, are in conflict with the changes made in the statute. The adoption of temporary rules will allow the Department of Environmental Quality (Department) to eliminate conflicts between existing rules and new statutory language until permanent rules can be adopted.

ACTION REQUESTED:

___ Work Session Discussion
- ___ General Program Background
- ___ Program Strategy
- ___ Proposed Policy
- ___ Potential Rules
- ___ Other: (specify)

_X_ Authorize Rulemaking Hearing
- Proposed Rules (Draft) (same as temporary rules) — Attachment A
- Rulemaking Statements — Attachment C
- Fiscal and Economic Impact Statement — Attachment D
- Draft Public Notice — Attachment E

___ Adopt Rules
Proposed Rules (Final Recommendation) Attachment ___
Rulemaking Statements Attachment ___
Fiscal and Economic Impact Statement Attachment ___
Public Notice Attachment ___

___ Issue Contested Case Decision/Order
Proposed Order Attachment ___

_X_ Other: (specify)
Adopt Temporary Rules
Temporary Rules Attachment A
Statement of Need and Emergency Attachment B

DESCRIPTION OF REQUESTED ACTION:

The Reclaimed Plastic Tax Credit program was originally set up in 1985 to allow tax relief on investments made for the manufacture of a reclaimed plastic product. The changes in the program outlined in Senate Bill 1083 allow more types of investments to be eligible for tax credits and extends the sunset date for the program from December 31, 1988 to July 1, 1995.

Adoption of temporary rules is requested since, based on the existing rules, no tax credit applications submitted after December 31, 1988 will be eligible for tax credit unless the rules are changed. The temporary rules will include the following modifications to the existing rules, resulting from changes to the statute:

- Extending the sunset date for the program to July 1, 1995;

- Expanding eligibility for tax credits to include investments in equipment, personal property, or machinery which is necessary for the collection, transportation or processing of reclaimed plastic or the manufacture of a reclaimed plastic product; and

- Adding a formula for use in calculating the percent allocable.

Other changes include:

- the definition of "qualifying business" in the statute had a typographical error in it. Therefore, the definition

was changed in the rules to be consistent with the remaining statutory language; and

- wording changes and additions were made which ensure that the plastics recycling tax credit program is compatible with the pollution control tax credit program.

A public hearing is requested to receive comment prior to making the rules permanent. Notice of the public hearing will be mailed to known interested parties and will be published in newspapers of general circulation in Oregon.

AUTHORITY/NEED FOR ACTION:

___ Required by Statute: _____ Attachment ___
Enactment Date: _____
___ Statutory Authority: _____ Attachment ___
_X_ Amendment of Existing Rule: OAR 340-17-010 to 340-17-055 Attachment ___
___ Implement Delegated Federal Program: _____ Attachment ___
_X_ Other: Attachment ___

An emergency exists which necessitates the adoption of temporary rules. The Department is requesting authorization for a rulemaking hearing to obtain public input prior to permanent rulemaking.

_X_ Time Constraints: (explain)

One plastics recycling tax credit preliminary application is pending. The rules should be adopted as soon as possible since the Department only has 60 days to approve or deny applications for preliminary certification.

DEVELOPMENTAL BACKGROUND:

___ Advisory Committee Report/Recommendation Attachment ___
___ Hearing Officer's Report/Recommendations Attachment ___
___ Response to Testimony/Comments Attachment ___
___ Prior EQC Agenda Items: (list) Attachment ___
___ Other Related Reports/Rules/Statutes: Attachment ___
___ Supplemental Background Information Attachment ___

REGULATED/AFFECTED COMMUNITY CONSTRAINTS/CONSIDERATIONS:

The temporary rules/proposed rules modify the existing rules to allow more investments to be eligible for tax credit. Under existing rules, only those investments which are made in equipment or machinery used to produce a reclaimed plastic product would be eligible for tax credit. The new statutory language expands the eligibility to investments in equipment, machinery or personal property used to collect, transport or process reclaimed plastic or manufacture a reclaimed plastic product. The affected community did not oppose Senate Bill 1083 when it was being heard in the legislature and so should be supportive of the proposed rule changes.

PROGRAM CONSIDERATIONS:

Senate Bill 1083 took effect on October 3, 1989. There is a conflict between the existing rules for the program and the statutory language in Senate Bill 1083. The language in the existing rules is more restrictive than the language in the new bill which addresses eligibility of investments.

The administration of the tax credit program is estimated to take 0.10 FTE of an existing staff person's time. Fees established in the rules will cover the cost of this administration.

ALTERNATIVES CONSIDERED BY THE DEPARTMENT:

1) Request adoption of proposed rules as temporary rules. This action would give the Department immediate rules with which to work that would not be in conflict with new statutory language.

2) Request adoption of proposed rules as temporary rules and an authorization for a public hearing to consider the proposed rule modifications.
This action would give the Department immediate rules with which to work and allow public comment on the proposed rules prior to adoption as permanent rules.

3) Request authorization for a public hearing to consider

the proposed rule modifications through normal rule making process.
This action would allow the Department to accept public comment on the proposed rule, and then proceed to rule adoption in February 1990. Adoption of this alternative could restrict the way the plastics recycling tax credit program is implemented prior to permanent rule adoption.

DEPARTMENT RECOMMENDATION FOR ACTION, WITH RATIONALE:

The Department recommends approval of Alternative 2, adoption of temporary rules which would modify existing rules to eliminate conflict with new statutory language and authorization for the Department to hold a public hearing on the proposed rules.

The recommendation allows the Department to accept applications for tax credit which are submitted after December 31, 1988 and eliminates conflict with new statutory language. This recommendation also provides the public an opportunity to comment on the proposed rules and allows the Department to analyze public suggestions for incorporation into final rules.

CONSISTENCY WITH STRATEGIC PLAN, AGENCY POLICY, LEGISLATIVE POLICY:

By adopting the temporary rules, the Department is able to carry out the Plastics Recycling Tax Credit Program as passed by the 1989 Legislature in Senate Bill 1083. The temporary rules are consistent with other agency tax credit rules and will assist in developing opportunities for recycling of secondary plastics in keeping with Oregon's solid waste management hierarchy.

ISSUES FOR COMMISSION TO RESOLVE:

None

INTENDED FOLLOWUP ACTIONS:

A) Publication of intent to hold a public hearing in the Secretary of State's Bulletin on December 15, 1989 and publication of notice of public hearing in newspapers.

B) Hold hearing January 9, 1990 in Portland.

C) Receive public comment until January 9, 1990.

D) Prepare a hearing's officer's report for final rule adoption by the Commission at the February 1990 meeting.

Approved:

Section: David Rozell

Division: Stephanie Hallock

Director: Fred Hansen

Report Prepared By: Lissa Wienholt

Phone: 229-6823

Date Prepared: November 15, 1989

(EAW:eaw)
(eqc1083.1)
(11/15/89)

OREGON ADMINISTRATIVE RULES

FOR PLASTICS RECYCLING TAX CREDITS

CHAPTER 340, DIVISION 17

340-17-010 Purpose

The purpose of these rules is to prescribe procedures and criteria to be used by the Department and Commission for issuance of tax credits to Oregon businesses that make ~~[capital]~~investments in order to collect, transport, or process reclaimed plastic or to manufacture a reclaimed plastic product. These rules are to be used in connection with ORS 468.925 to 468.965 and apply only to ~~[capital]~~investments made on or after January 1, 1986 and before ~~[January 1, 1989]~~July 1, 1995, except where otherwise noted herein.

340-17-015 Definitions

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

(2) "Circumstances beyond the control of the applicant" means facts, conditions and circumstances which applicant's due care and diligence would not have avoided.

(3) "Commission" means Environmental Quality Commission.

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

(5) "Personal property" means any investment in property directly related to the operation of the industry or enterprise seeking the tax credit, which make a significant contribution to the collection, transportation or processing of reclaimed plastic or the manufacture of a reclaimed plastic product, excluding land and buildings.

[~~(5)~~] (6) "Qualifying business" means a [~~manufacturing~~]business in Oregon that collects, transports, or processes reclaimed plastic or manufactures a reclaimed plastic product which will achieve compliance with Department statutes and rules or Commission orders or permit conditions before certification of tax credit. [~~in Oregon~~].

[~~(6)~~](7) "Reclaimed plastic" means plastic [~~that originates within Oregon~~]from industrial consumers, commercial users or post-consumer waste. [~~and is intended to be used to manufacture a nonmedical or nonfood plastic product. The reclaimed plastic must not be an industrial waste generated by the person claiming the tax credit, but must be purchased from a plastic recycler other than the person claiming the tax credit.~~] "Reclaimed Plastic" includes shredded plastics, regrind, pellets or any other similar products manufactured from Oregon industrial consumers, commercial users, or post consumer waste that is sold for the purpose of making an end product out of reclaimed plastic and is intended to be used to manufacture a non-medical or non-food plastic product.

[~~(7)~~](8) "Reclaimed plastic product" means a plastic product of real economic value for which more than 50 percent of the plastic used in the product is reclaimed plastic. [~~Shredded plastic, regrind or any similar product which is sold for the purpose of making an end product of reclaimed plastic does not qualify as a reclaimed plastic product.~~]

[~~(8)~~](9) "Special circumstances" means emergencies which call for immediate erection, construction or installation of a facility, cases where applicant has relied on incorrect information provided by Department personnel as demonstrated by letters, records of conversations or other

written evidence, or similar adequately documented circumstances which directly resulted in applicant's failure to file a timely application for preliminary certification. ~~[Special circumstances shall not include cases where applicant was unaware of tax credit certification requirements or applied for preliminary certification in a manner other than that prescribed in 340-17-015(1).]~~

340-17-020 Procedures for Receiving Preliminary Tax Credit Certification

(1) Filing of Application

(a) Any person proposing to apply for final certification of ~~[a capital]~~ an investment made in Oregon to collect, transport or process reclaimed plastic or to manufacture a reclaimed plastic product pursuant to ORS 468.935 shall file an application for preliminary certification with the Department of Environmental Quality. The application shall be made on a form provided by the Department. The preliminary certificate need not be issued prior to construction for compliance with this requirement.

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

(c) The Commission may waive the filing of the application if it finds the filing inappropriate because special circumstances render the filing unreasonable and if it finds such investment would otherwise qualify for tax credit certification pursuant to ORS 468.925 to ~~[to]~~468.965.

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

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

(2) Approval of Preliminary Certification

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

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

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

(3) Denial of Preliminary Certification

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

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

(4) Appeal

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

340-17-025 Procedures for Final Tax Credit Certification

(1) Filing of Application

(a) A written application for final tax credit certification shall be [~~made~~]<u>submitted</u> to the Department on a form provided by the Department.

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

(c) An application shall not be considered filed until all requested information is [~~furnished~~]<u>submitted</u> by the applicant, and the Department

notifies the applicant in writing that the application is complete and ready for processing.

(d) The application must be [~~filed~~]submitted between January 1, 1986 and [~~December 31, 1988~~]June 30, 1995. Failure to file a timely application shall make the [~~capital~~]investment ineligible for tax credit certification.

(e) The Commission may grant an extension of time to file an application if circumstances beyond the control of the applicant would make a timely filing unreasonable.

(f) An extension shall only be considered if applied for between January 1, 1986 and [~~December 31, 1988~~]June 30, 1995. An extension may be granted for no more than one year. Only one extension may be granted.

(g) An application may be withdrawn and resubmitted by applicant at any time between January 1, 1986 and [~~December 31, 1988~~]June 30, 1995 without paying an additional processing fee, unless the amount of the investment has increased. An additional processing fee shall be calculated by subtracting the cost of the [~~capital~~]investment on the original application from the cost of the [~~capital~~]investment on the resubmitted application and multiplying the remainder by one-half of one percent.

(h) If the Department determines the application is incomplete for processing and applicant fails to submit requested information within 180 days of the date when the Department requested the information, the application will be rejected by the Department. If the applicant makes a written request for additional time to submit requested information, the Department may grant additional time so long as applicant is required to submit requested information by [~~December 31, 1988~~]June 30, 1995.

(2) Commission Action

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

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

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

(d) Certification

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

(B) No determination of the proportion of the ~~[capital]~~investment to be certified shall be made until receipt of the application.

(C) A certificate is effective for purposes of tax relief in accordance with ORS 316.103 and 317.106 if investment was made on or after January 1, 1986 and before ~~[January 1, 1989]~~July 1, 1995.

(D) Certification under ORS 468.935 shall be granted for a period of 5 consecutive years. The 5-year period shall begin with the tax year of the person in which the facility is certified under this section.

(e) Rejection

If the Commission rejects an application for certification, or certifies a lesser actual cost of the ~~[capital]~~investment or a lesser portion of the actual cost properly allocable to the collection, transportation or processing of reclaimed plastic or to the manufacture of a reclaimed plastic product than was claimed in the application for certification, the Commission shall cause written notice of its action, and a concise statement of the findings and reasons therefore, to be sent by registered or certified mail to the applicant. ~~[within 120 days after the filing of the application.]~~

(3) Appeal

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

340-17-030 Determination of Percentage of Certified Investment Costs Allocable to Collection, Transportation or Processing of Reclaimed Plastic or Manufacturing a Reclaimed Plastic Product

(1) Definitions:

(a) "Claimed Investment Costs" means the actual cost of the claimed equipment, machinery, or personal property. Certification of the actual cost of the claimed equipment, machinery, or personal property must be

documented by a certified public accountant for claimed investment costs which are over $20,000.

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

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

(2)[(1)] In establishing [T]the percent of costs properly allocable to the investment costs incurred to allow a person to collect, transport or process reclaimed plastic or to manufacture a reclaimed plastic product, the Commission shall consider the following factors and make appropriate findings regarding their applicability: [shall be equal to the estimated percent of time the collection, transportation, processing or manufacturing process will convert reclaimed plastic into a saleable or usable commodity, based on projections for the first year of operation of the manufacturing process.]

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

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

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

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

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

(a) air conditioners;

(b) septic tanks or other facilities for human waste;

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

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

(e) any distinct portion of the investment which makes an insignificant contribution to the collection, transportation or processing of reclaimed plastic or the manufacture of a reclaimed plastic product including the following specific items:

(A) office furnishings;

(B) parking lots and road improvements;

(C) landscaping;

(D) external lighting;

(E) company or related signs; and

(F) automobiles.

OAR 340-17-035 Amount of Tax Credits Available

(1) For purposes of monitoring the Department's tax credit limit the Department will consider the sum of the preliminary certifications issued in each calendar year. When preliminary certification is waived under OAR 340-17-020, the year of final certification will be used. A

preliminary certificate which is granted and then cancelled within the same calendar year shall not be counted as part of the $1.5 million annual certification limit after it has been cancelled.

(2) Not more than $1.5 million in investment costs will be issued preliminary certification in any calendar year. In each calendar year a minimum of $500,000 of the $1.5 million will be reserved for investments costing $100,000 or less. The maximum cost certified for each investment shall not exceed $500,000 except as permitted by OAR 340-17-035(4).

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

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

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

(a) Determine the claimed investment costs.

(b) Determine the salvage value, if any, of any equipment which is being taken out of service.

(c) Determine the net investment cost.

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

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

340-17-040 Procedure to Revoke Certification

(1) Pursuant to the procedures for a contested case under ORS 183.310 to 183.550, the Commission may order the revocation of the final tax credit certification issued under ORS 468.940, if it finds that:

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

(b) The holder of the certificate has failed substantially to operate the qualifying business ~~[to manufacture a reclaimed plastic product]~~as specified in such certificate.

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

(3) If the certification of an ~~[capital]~~investment is ordered revoked pursuant to paragraph (a) of subsection (1) of this section, all prior tax relief provided to the holder of such certificate shall be forfeited and the Department of Revenue or the proper county officers shall proceed to collect those taxes not paid by the certificate holder as a result of the

tax relief provided to the holder under any provision of ORS 316.103 and 317.106.

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

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

340-17-045 Procedures for Transfer of a Tax Credit Certificate

To transfer a tax credit certificate from one holder to another, the Commission shall revoke the certificate and grant a new one to the new holder for the balance of the available tax credit following the procedure set forth in ORS 316.103 and 317.106.

340-17-050 Fees for Final Tax Credit Certification

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

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

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

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

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

340-17-055 Taxpayers Receiving Tax Credit

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

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

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

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

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

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

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

Attachment B

STATEMENT OF NEED AND EMERGENCY

JUSTIFICATION STATEMENT FOR TEMPORARY RULE FILING

State of Oregon
Department of Environmental Quality
811 S.W. Sixth
Portland, Oregon

Statement of Need
Temporary Rules Regarding the Reclaimed Plastic Tax Credit Program

In accordance with ORS 183.335(5), the undersigned Director of the Department of Environmental Quality makes the following findings and declarations in support of the issuance of a temporary rule relating to the Reclaimed Plastic Tax Credit Program:

(a) The 1989 Legislature passed Senate Bill 1083 on July 3, 1989 which made changes to the Reclaimed Plastic Tax Credit Program contained in ORS 468.925 to 468.965.

(b) The existing rules for the Reclaimed Plastic Tax Credit Program are in conflict with the new statutory language. The two major areas of conflict are description of eligible investments and the date by which applications must be filed in order to be considered eligible.

(c) Failure to act promptly in this instance will result in prejudice to the public interest, and particularly to the interests of those engaged in the business of plastics recycling, because no applications submitted after December 31, 1988 would be considered eligible for tax credit until amendments could be made to the existing rules.

(d) The rule is needed to allow the Department to carry out the Reclaimed Plastic Tax Credit Program as passed by the 1989 Oregon Legislature in Senate Bill 1083 during the time the Department is developing permanent rules.

Dated:

_____

Fred Hansen, Director
Oregon Department of Environmental Quality

Attachment C

RULEMAKING STATEMENTS
for
Proposed Revisions to Existing Rule Pertaining to
Plastics Recycling Tax Credit

OAR 340, Division 17

Pursuant to ORS 183.335, these statements provide information on the intended action to adopt a rule.

STATEMENT OF NEED:

Legal Authority

The 1989 Oregon Legislature passed Senate Bill 1083 which made changes to the existing Plastics Recycling Tax Credit Program contained in ORS 468.925 to 468.965. As a result of changes made to the statute, the accompanying rules (OAR 340-17-010 to OAR 340-17-055) need to be modified to be consistent with the statute.

Need for Rule

In order to implement recent statutory changes, amendment of the tax credit rules is necessary.

Principal Documents

1) Existing state statute, ORS 468.925 to 468.965
2) OAR Chapter 340-17-010 to 340-17-055
3) Senate Bill 1083 (1989)

Land Use Consistency

This proposed rule does not affect land use as defined in the Department's coordination program approved by the Land Conservation and Development Commission.

Attachment D

FISCAL AND ECONOMIC IMPACT

The Reclaimed Plastic Tax Credit program was originally set up in 1985 to allow tax relief on investments made for the manufacture of a reclaimed plastic product. The changes in the program outlined in Senate Bill 1083 allow more types of investments to be eligible for tax credits and extends the sunset date for the program from December 31, 1988 to July 1, 1995. The proposed rule revisions establish the criteria for eligibility and the process for application for tax credit.

The net effect of the rule revisions should be to allow more tax credits to be eligible thereby increasing the impact on the general fund. The statute states that the total costs of investments which receive preliminary certification for tax credit from the Commission in any calendar year shall not exceed $1,500,000. The maximum impact on the general fund will vary from year to year depending on the percent of costs properly allocable and what year applicants receive their final certification.

There should be no significant or adverse economic impact on the general public, small businesses, or large businesses as a result of these rule revisions.

Attachment E
Agenda Item H
December 1, 1989
EQC Meeting

Plastics Recycling Tax Credit Rule Amendments Public Hearing

Date Prepared:
Hearing Date: January 9, 1989
Comments Due: January 12, 1989

WHO IS AFFECTED: Amendment of rules will affect people applying for plastics recycling tax credits.

WHAT IS PROPOSED: The DEQ proposes to adopt amendments to the Plastics Recycling Tax Credit Rules (OAR 340-17-010 through 340-17-055) to reflect statutory amendments made by the 1989 Legislature.

WHAT ARE THE HIGHLIGHTS: Proposed amendments would:
- extend the sunset date of the program to July 1, 1995;
- broaden the eligibility requirements for investments to include equipment, machinery, or personal property which is used to collect, transport or process reclaimed plastic or manufacture a reclaimed plastic product;
- clarify the method by which the percent allocable will be determined; and
- ensure that the plastics tax credit program is compatible with the pollution control tax credit program.

HOW TO COMMENT: Copies of the proposed rule amendments can be obtained from:

Claudia Jones
Management Services Division
811 SW Sixth Avenue
Portland, OR 97204
Telephone: 229-6022
Toll-free: 1-800-452-4011

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STATE OF OREGON
ENVIRONMENTAL QUALITY COMMISSION

In the Matter of Site Inventory Listing of Property Located in Clackamas County, Oregon City of Milwaukie, Owner	)	No. SA-891-706 FINAL ORDER

The Commission's hearings officer issued a proposed order, on September 25, 1989, dismissing this contested case proceeding. The City of Milwaukie appealed the hearings officer's proposed order on October 4, 1989. Having considered the written exceptions, memoranda, and oral argument by the parties, the Commission issues the following findings of fact, conclusions of law, and final order.

A. Findings of Fact

1. On November 30, 1988, the Department of Environmental Quality (DEQ) issued Order No. SA-891-706 to the City of Milwaukie (Milwaukie), by which order DEQ proposed to list property owned by Milwaukie on an inventory of facilities where a release of hazardous substances is confirmed.

2. On December 12, 1988, Milwaukie requested a contested case hearing on DEQ's site inventory order. The Site Inventory Law in existence at that time expressly allowed such hearing. ORS 466.557(4) (1987). Pending such hearing request, Milwaukie's property was not listed on the Site Inventory.

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PORTLAND, OR 97201
PHONE (503) 229-5725

3. The Site Inventory Law was substantially amended by the 1989 Legislative Assembly under HB 3235. The amendments essentially replaced a one-step inventory process (i.e., DEQ listing where confirmed release) with a three-step process: (1) EQC rulemaking, to define "confirmed release" and establish exemptions and criteria for delisting, (2) DEQ development of a List of Facilities having confirmed release, and (3) DEQ development of an Inventory of facilities having both a confirmed release and need for further investigation or cleanup. HB 3235, §§ 1, 3 and 7. As with the 1987 law, the purpose of the 1989 Site Inventory Law was to inform the public of the presence and extent of sites in the state contaminated by toxic pollution. The legislature made clear that DEQ's placing a facility on a new List or Inventory would not determine who might be liable for the contamination. HB 3235, § 6.

4. The legislature's objective in amending the Site Inventory Law was two-fold. First, the legislature intended the inventory process developed under the 1987 law to be started over. See Minutes, House Committee on Environment and Energy (HB 3235), Exhibit H at 1 (March 22, 1989). Second, the legislature intended that neither future listing decisions nor the November 30, 1988 listing orders go to contested case hearing. See Minutes, House Committee on Environment and Energy (HB 3235), at 2-6 (March 3, 1989).

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Consistent with these objectives, the legislature repealed the provision of former ORS 466.557(4) that provided for contested case appeals. HB 3235, § 1. The legislature also expressly provided that the decision of the DEQ director to add a facility to the future List or Inventory "is not appealable to the Environmental Quality Commission or subject to judicial review under ORS 183.310 to 183.550." HB 3235, §§ 1 and 3.

5. House Bill 3235 was signed into law on June 28, 1989. On July 14, 1989, DEQ notified Milwaukie by letter that DEQ dismissed Order No. SA-891-706. DEQ's letter also informed Milwaukie that all other sites were being withdrawn from the Site Inventory developed under the 1987 law and that a new List and Inventory would not be developed until after the EQC had adopted rules.

6. Upon Milwaukie's continued request for a contested case hearing, the EQC's hearings officer held a prehearing conference and received briefs from the parties. On September 25, 1989, the hearings officer issued a proposed order dismissing this contested case.

7. On October 4, 1989, Milwaukie appealed the hearings officer's proposed order to this Commission.

B. Conclusions of Law

1. This matter is moot, because DEQ has dismissed its order proposing to list Milwaukie property on a Site Inventory.

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2. Milwaukie has no right to a contested case hearing under existing law. Such right exists only if provided by statute, agency rule or order, or a constitutional provision. ORS 183.310(2); see Linnton Plywood Association v. DEQ, 68 Or App 412, 681 P2d 1180 (1984). No statute, rule, or order provides for a contested case hearing on a DEQ listing action, even if one were pending. See e.g., ORS 466.557 (1989). Constitutional due process does not require a hearing because (a) there is no governmental action pending against Milwaukie, and (b) even if there were pending governmental action in the form of a site inventory order, it would not deprive Milwaukie of a liberty or property interest.

3. Milwaukie has no continued right to a hearing under the former Site Inventory Law. The 1989 legislature repealed the contested case opportunity provided under ORS 466.557(4) (1987). The intent of the legislature was that all pending contested cases be terminated. Even if Milwaukie's contested case right under the former Site Inventory Law survived repeal of the law, there is no pending DEQ action to appeal.

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C. Order

Based upon the above findings of fact and conclusions of law, the EQC dismisses this contested case proceeding.

DATED this first day of December, 1989.

FOR THE ENVIRONMENTAL
QUALITY COMMISSION

WILLIAM P. HUTCHISON, Chair
Environmental Quality Commission

NOTICE OF RIGHT TO APPEAL.

This order may be appealed in accordance with ORS 183.482.

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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

In the matter of:	
SITE INVENTORY LISTING OF PROPERTY LOCATED IN CLACKAMAS COUNTY, OREGON, CITY OF MILWAUKIE, OWNER.	No. SA-891-706 CITY OF MILWAUKIE'S RESPONSE TO THE DEPARTMENT OF ENVIRONMENTAL QUALITY'S EXCEPTIONS TO THE HEARINGS OFFICER'S ORDER

The Department of Environmental Quality ("DEQ") has filed exceptions with the Environmental Quality Commission ("EQC") to the hearings officer's Order of September 25, 1989, dismissing the City of Milwaukie's ("City") request for a contested case hearing. This is a summary of the City's response to DEQ's exceptions:

1. DEQ's First Exception:

"The hearings officer's order should have found that DEQ dismissed its site inventory order against Milwaukie, on July 14, 1989."

City's Response:

DEQ lost jurisdiction of the matter once the City filed and served its appeal with EQC on December 12, 1988. Mr. Hansen's letter of July 14, 1989, had no legal effect on the action while the appeal was pending.

The timely filing and service of a Notice of Appeal is a jurisdictional requirement for the commencement of an appeal to the Commission, OAR 340-11-132(2)(b), and, as such, has jurisdictional consequences. DEQ could take no further action on this matter

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Portland, Oregon 97209
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while it was pending with the EQC. Similarly, EQC no longer has jurisdiction of this matter while judicial review is pending.

2. DEQ's Second Exception:

"The hearings officer's order should have concluded that, as a result of DEQ's dismissal of its site inventory order, this matter is moot."

City's Response:

This matter is not moot. Judicial review of this matter will have a "practical affect" (see Matter of Holland, 290 Or 765 (1981)) by providing the City with an opportunity for a decision on the merits of its Answer, which it may use to defend against the future listing of the City of Milwaukie on the inventory contemplated by HB 3235. If, for some reason, the site is not relisted, a judgment on the merits will provide a basis for other legal action against the state for damages due by wrongfully listing the City on the initial list. Under current law, DEQ's attempt to "moot" this appeal is impermissible.

3. DEQ's Third Exception:

"The hearings officer's order should not have found (on pages 3 and 9 of the hearings officer's order) that Milwaukie has a protected property interest in the repealed contested case provisions of ORS 466.557 (1987). Such an interest does not exist where there is no governmental action pending against Milwaukie."

City's Response:

The City agrees with the hearings officer's finding that it had a protected property interest in ORS 466.557 (1987) and other

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rules and statutes that provide the City with the continued right to a contested case hearing of the agency's listing decision. Governmental action involving the City of Milwaukie was and still is pending. The fact that no enforcement order has been issued by the agency is irrelevant. "Government action" for purposes of due process, need not rise to the level of a Superfund enforcement action in order to trigger due process protections.

4. DEQ's Fourth Exception:

"The hearings officer's order should not have recited harm allegedly suffered by Milwaukie as a result of DEQ's site inventory order (on pages 8-9 of the hearings officer's order) because there is no evidence in the record that Milwaukie has suffered such harm."

City's Response:

The harm recited by the hearings officer in her September 25, 1989, order is supported by evidence in the record and is uncontroverted by any evidence on the part of DEQ. The City will continue to articulate these harms.

5. DEQ's Fifth Exception:

"The hearings officer's order should have included a notice of opportunity to appeal the hearings officer's order to EQC, as a proposed order in EQC's contested case proceeding."

City's Response:

Every final order must include a citation of the statute under which the order may be appealed. ORS 183.470(4). The EQC's September 25, 1989, order is properly before the Oregon Court of

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Appeals, despite the hearings officer's decision not to include the above-mentioned notice.

OAR 137.03.060 does not apply to this proceeding. These rules were not, and still have not been, published in accordance with legally applicable requirements. The published rules for internal agency appeals of this sort are governed by OAR 340-11-132 (published June 1988). The agency has admitted, on the record, that the Secretary of State's office has failed to properly publish the rules set out in OAR 137.03.060, which it now is attempting to apply in this case.

CONCLUSION

The City of Milwaukie objects to DEQ's exceptions and proposed final order. The hearings officer's September 25, 1989, order is final for purposes of judicial review. As such, the EQC no longer has jurisdiction to hear this matter unless the court of appeals directs otherwise.

Respectfully submitted this 17th day of November, 1989.

O'DONNELL, RAMIS, ELLIOTT & CREW

By: _____
Phillip E. Grillo, OSB # 85220
Of Attorneys for the City of Milwaukie

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O'DONNELL, RAMIS, ELLIOTT & CREW
Attorneys at Law
1727 N.W. Hoyt Street
Portland, Oregon 97209
(503) 222-4402
FAX (503) 243-2944

CERTIFICATE OF FILING

I hereby certify that I filed the original of the foregoing CITY OF MILWAUKIE'S RESPONSE TO THE DEPARTMENT OF ENVIRONMENTAL QUALITY'S EXCEPTIONS TO THE HEARINGS OFFICER'S ORDER with the Environmental Quality Commission, 811 S.W. 6th Avenue, Portland, Oregon, 97204, on November 17, 1989, by mailing same to the Environmental Quality Commission contained in a sealed envelope, with first class postage paid, deposited in the post office at Portland, Oregon.

Phillip E. Grillo, OSB # 85220
Of Attorneys for City of
Milwaukie

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing CITY OF MILWAUKIE'S RESPONSE TO THE DEPARTMENT OF ENVIRONMENTAL QUALITY'S EXCEPTIONS TO THE HEARINGS OFFICER'S ORDER on the following person(s) and address(es) on November 17, 1989, by mailing to the said person(s) a true copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to such person(s) as follows, and deposited in the post office at Portland, Oregon, on said day.

Mr. Kurt Burkholder
Assistant Attorney General
Department of Justice
Justice Building
1515 S.W. 5th Ave., Ste. 410
Portland, OR 97201

Fred Hansen, Director
Department of Environmental Quality
811 S.W. 6th Ave.
Portland, OR 97204-1390

Dated: November 17, 1989.

Phillip E. Grillo, OSB # 85220
Of Attorneys for City of
Milwaukie

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1727 N.W. Hoyt Street
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STATE OF OREGON
ENVIRONMENTAL QUALITY COMMISSION

In the Matter of Site Inventory Listing of Property Located in Clackamas County, Oregon City of Milwaukie, Owner	)	No. SA-891-706 DEPARTMENT OF ENVIRONMENTAL QUALITY'S EXCEPTIONS TO HEARINGS OFFICER'S ORDER

The hearings officer of the Environmental Quality Commission (EQC) issued an order dismissing this contested case proceeding, on September 25, 1989. The City of Milwuakie (Milwaukie) appealed the hearings officer's order to the full EQC on October 4, 1989.

While the Department of Environmental Quality (DEQ) supports the hearings officer's dismissal of this contested case proceeding, DEQ files these exceptions to certain findings and conclusions made by the hearings officer in order to clarify the proper grounds for such dismissal.

DEQ's exceptions are supported by the Memorandum in Support of Exceptions and Proposed Final Order, filed herein.

EXCEPTIONS

1. The hearings officer's order should have found that DEQ dismissed its site inventory order against Milwaukie, on July 14, 1989.

2. The hearings officer's order should have concluded that, as a result of DEQ's dismissal of its site inventory order, this matter is moot.

3. The hearings officer's order should not have found (on pps. 3 and 9 of the hearings officer's order) that Milwaukie has a protected property interest in the repealed contested case provisions of ORS 466.557 (1987). Such an interest does not exist where there is no governmental action pending against Milwaukie.

4. The hearings officer's order should not have recited harm allegedly suffered by Milwaukie as a result of DEQ's site inventory order (on pps. 8-9 of the hearings officer's order), because there is no evidence in the record that Milwaukie has suffered such harm.

5. The hearings officer's order should have included a notice of opportunity to appeal the hearings officer's order to EQC, as a proposed order in the EQC's contested case proceeding.

RELIEF REQUESTED

DEQ requests that the EQC affirm the hearings officer's dismissal of this contested case proceeding, by adoption of the order proposed by DEQ and filed herein.

DATED this 3RD day of November, 1989.

KURT BURKHOLDER
Assistant Attorney General
Of Attorneys for Department of
Environmental Quality

STATE OF OREGON
ENVIRONMENTAL QUALITY COMMISSION

In the Matter of Site Inventory Listing of Property Located in Clackamas County, Oregon City of Milwaukie, Owner	)	No. SA-891-706 PROPOSED FINAL ORDER

The Commission's hearings officer issued a proposed order, on September 25, 1989, dismissing this contested case proceeding. The City of Milwaukie appealed the hearings officer's proposed order on October 4, 1989. Having considered the written exceptions, memoranda, and oral argument by the parties, the Commission issues the following findings of fact, conclusions of law, and final order.

A. Findings of Fact

1. On November 30, 1988, the Department of Environmental Quality (DEQ) issued Order No. SA-891-706 to the City of Milwaukie (Milwaukie), by which order DEQ proposed to list property owned by Milwaukie on an inventory of facilities where a release of hazardous substances is confirmed.

2. On December 12, 1988, Milwaukie requested a contested case hearing on DEQ's site inventory order. The Site Inventory Law in existence at that time expressly allowed such hearing. ORS 466.557(4) (1987). Pending such hearing request, Milwaukie's property was not listed on the Site Inventory.

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3. The Site Inventory Law was substantially amended by the 1989 Legislative Assembly under HB 3235. The amendments essentially replaced a one-step inventory process (i.e., DEQ listing where confirmed release) with a three-step process: (1) EQC rulemaking, to define "confirmed release" and establish exemptions and criteria for delisting, (2) DEQ development of a List of Facilities having confirmed release, and (3) DEQ development of an Inventory of facilities having both a confirmed release and need for further investigation or cleanup. HB 3235, §§ 1, 3 and 7. As with the 1987 law, the purpose of the 1989 Site Inventory Law was to inform the public of the presence and extent of sites in the state contaminated by toxic pollution. The legislature made clear that DEQ's placing a facility on a new List or Inventory would not determine who might be liable for the contamination. HB 3235, § 6.

4. The legislature's objective in amending the Site Inventory Law was two-fold. First, the legislature intended the inventory process developed under the 1987 law to be started over. See Minutes, House Committee on Environment and Energy (HB 3235), Exhibit H at 1 (March 22, 1989). Second, the legislature intended that neither future listing decisions nor the November 30, 1988 listing orders go to contested case hearing. See Minutes, House Committee on Environment and Energy (HB 3235), at 2-6 (March 3, 1989).

Consistent with these objectives, the legislature repealed the provision of former ORS 466.557(4) that provided for contested case appeals. HB 3235, § 1. The legislature also expressly provided that the decision of the DEQ director to add a facility to the future List or Inventory "is not appealable to the Environmental Quality Commission or subject to judicial review under ORS 183.310 to 183.550." HB 3235, §§ 1 and 3.

5. House Bill 3235 was signed into law on June 28, 1989. On July 14, 1989, DEQ notified Milwaukie by letter that DEQ dismissed Order No. SA-891-706. DEQ's letter also informed Milwaukie that all other sites were being withdrawn from the Site Inventory developed under the 1987 law and that a new List and Inventory would not be developed until after the EQC had adopted rules.

6. Upon Milwaukie's continued request for a contested case hearing, the EQC's hearings officer held a prehearing conference and received briefs from the parties. On September 25, 1989, the hearings officer issued a proposed order dismissing this contested case.

7. On October 4, 1989, Milwaukie appealed the hearings officer's proposed order to this Commission.

B. Conclusions of Law

1. This matter is moot, because DEQ has dismissed its order proposing to list Milwaukie property on a Site Inventory.

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2. Milwaukie has no right to a contested case hearing under existing law. Such right exists only if provided by statute, agency rule or order, or a constitutional provision. ORS 183.310(2); see Linnton Plywood Association v. DEQ, 68 Or App 412, 681 P2d 1180 (1984). No statute, rule, or order provides for a contested case hearing on a DEQ listing action, even if one were pending. See e.g., ORS 466.557 (1989). Constitutional due process does not require a hearing because (a) there is no governmental action pending against Milwaukie, and (b) even if there were pending governmental action in the form of a site inventory order, it would not deprive Milwaukie of a liberty or property interest.

3. Milwaukie has no continued right to a hearing under the former Site Inventory Law. The 1989 legislature repealed the contested case opportunity provided under ORS 466.557(4) (1987). The intent of the legislature was that all pending contested cases be terminated. Even if Milwaukie's contested case right under the former Site Inventory Law survived repeal of the law, there is no pending DEQ action to appeal.

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C. Order

Based upon the above findings of fact and conclusions of law, the EQC dismisses this contested case proceeding.

DATED this ____ day of _____, 1989.

FOR THE ENVIRONMENTAL
QUALITY COMMISSION

_____
WILLIAM P. HUTCHISON, Chair
Environmental Quality Commission

NOTICE OF RIGHT TO APPEAL.

This order may be appealed in accordance with ORS 183.482.

Submitted By:

Kurt Burkholder
Assistant Attorney General
Of Attorneys for Department
of Environmental Quality

STATE OF OREGON
ENVIRONMENTAL QUALITY COMMISSION

In the Matter of Site Inventory Listing of Property Located in Clackamas County, Oregon City of Milwaukie, Owner	)	No. SA-891-706 DEPARTMENT OF ENVIRONMENTAL QUALITY'S MEMORANDUM IN SUPPORT OF EXCEPTIONS AND PROPOSED ORDER

BACKGROUND

The former Site Inventory Law, 1987 Or Laws ch 735 § 6, required the Department of Environmental Quality (DEQ) to develop an inventory of all facilities where a release of hazardous substances is confirmed. ORS 466.557(1) (1987). The purpose of the inventory was to inform the public of the presence and extent of sites in the state contaminated by toxic pollution. Id. It was not a purpose of the inventory to determine who might be liable for contamination. The 1987 legislature expressly made listing on the inventory independent of and not a prerequisite to DEQ enforcement against persons liable under the state superfund statute. ORS 466.557(6) (1987).

In accordance with the 1987 law, DEQ issued orders on November 30, 1988 proposing to list 325 facilities on a Site Inventory. In response to those orders, 210 requests for contested case hearings were filed with the Environmental Quality Commission

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(EQC), a procedure expressly allowed under former ORS 466.557(4). The City of Milwaukie (Milwaukie) requested a hearing regarding Order SA-891-706, which proposed to list property owned by Milwaukie on the Site Inventory.

The Site Inventory Law was substantially amended by the 1989 Legislative Assembly under House Bill 3235. The amendments essentially replaced a one-step inventory process (i.e., DEQ listing where confirmed release) with a 3-step process: (1) EQC rulemaking, to define "confirmed release" and establish exemptions and criteria for delisting, (2) DEQ development of a List of facilities having a confirmed release, and (3) DEQ development of an Inventory of facilities having both a confirmed release and a need for further investigation or cleanup. HB 3235, §§ 1, 3, and 7. As with the 1987 law, the purpose of the 1989 Site Inventory Law remained public information. HB 3235, §§ 1 and 3. The legislature again made clear that DEQ's placing a facility on a new List or Inventory would not "be a prerequisite to or otherwise affect the authority of the director to undertake, order or authorize a removal or remedial action under [the state superfund law]." HB 3235, § 6.

The legislature's objective in amending the Site Inventory Law was twofold. First, the legislature intended the inventory process developed under the 1987 law to be started over. See Minutes, House Committee on Environment and Energy (HB 3235), Exhibit H at 1 (March 22, 1989). Second, the legislature intended that neither future listing decisions nor the

November 30, 1988 listing orders go to contested case hearing. See Minutes, House Committee on Environment and Energy (HB 3235), at 2-6 (March 3, 1989). The legislative history of HB 3235 shows the concerns shared by the legislature, DEQ, industry, and environmental groups over the costs and delay that had resulted from the pending contested cases. Id. As stated by Bill Hutchison, Chair of EQC:

> "My argument is that we need to protect the DEQ from laying on an administrative nightmare that isn't consistent with the goals and creates such a large number of appeals. The appeal process is an unnecessary process, and it could bleed the limited resources." Id. at 5.

Similarly, Representative Cease, Chair of the House Committee on Environment and Energy, stated:

> "The purpose of this bill is to: keep the agency and the state from going broke, to keep these things from being tied up in court over procedural issues, to make clear who has a right to know what, what right the public has in knowing, and to make this a simple process." Id. at 3-4.

Consistent with these objectives, the legislature repealed the provision of former ORS 466.557(4) that provided for contested case appeals. HB 3235, § 1. The legislature also expressly provided that the decision of the DEQ director to add a facility to the future List or Inventory "is not appealable to the Environmental Quality Commission or subject to judicial review under ORS 183.310 to 183.550." HB 3235, §§ 1, 3.

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House Bill 3235 was signed into law on June 28, 1989. On July 14, 1989, DEQ notified Milwaukie by letter that DEQ dismissed Order SA-891-706 (copy attached as Exhibit A.) DEQ's letter also informed Milwaukie that all other sites were being withdrawn from the Site Inventory developed under the 1987 law and that a new List and Inventory would not be developed until after the EQC had adopted rules.

Although DEQ dismissed the order proposing to list Milwaukie property on the former Site Inventory, Milwaukie asserted in a July 18, 1989 letter to the hearings officer that the dismissed action nonetheless must go to hearing. Milwaukie based its contention on the repealed contested case provision of ORS 466.557(4) and constitutional due process. DEQ appeared at a July 27, 1989 prehearing conference to state its position that this matter is moot, and that Milwaukie has no continued right to a hearing.

On September 25, 1989, the hearings officer issued an order dismissing this contested case proceeding (copy attached as Exhibit B). Milwaukie appealed the hearings officer's order to the EQC on October 4, 1989.

EXCEPTION NO. 1

The hearings officer's order failed to mention that DEQ dismissed its site inventory order proposing to list Milwaukie property, on July 14, 1989. This is a critical finding that should be included in the EQC's final order. DEQ's dismissal of its order left nothing to litigate.

Since it is not clear whether the hearings officer included DEQ's July 14, 1989 dismissal letter in the record, a copy is attached as Exhibit A.

EXCEPTION NO. 2

Since DEQ dismissed its site inventory order, this matter is moot. Milwaukie's property was never placed on the site inventory, because its appeal stayed the proposed listing. Milwaukie's property is not proposed to be listed now. Simply put, DEQ is not attempting to "do something to" Milwaukie. There therefore is no right to (or need for) a contested case hearing.

The EQC's final order should include a conclusion that this matter is moot.

While not the subject of a DEQ exception, DEQ would briefly address other ways Milwaukie might be entitled to a hearing, since these are relevant to the EQC's final order.

There are four ways relevant here that Milwaukie might have a right to a contested case hearing. Such right would exist only if provided by (1) statute, (2) agency rule, (3) agency order, or (4) constitutional provision. ORS 183.310(2); see Linnton Plywood Association v. DEQ, 68 Or App 412, 681 P2d 1180 (1984).

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The Site Inventory Law, as amended by the 1989 legislature, does not provide for a contested case hearing on a DEQ listing action. No other statute provides for a hearing. No DEQ or EQC rule or order provides for a hearing.

Any constitutional right, typically, is based on the Due Process Clause of the 14th Amendment of the U.S. Constitution. That constitutional right is triggered by an agency action depriving a person of a "liberty" or a "property" right. This threshold is not met here for two obvious reasons. First, even if DEQ were placing Milwaukie's property on a list or inventory, that action would not deprive Milwaukie of any liberty or property interest. A listing decision is not an enforcement action or a determination of liability. HB 3235 § 6; see also Minutes, House Committee on Environment and Energy (HB 3235), at 2 and 3). It merely serves the purpose of informing the public that a particular property is contaminated with hazardous substances.

The second reason that the due process threshold is not met here is that there is no pending DEQ action against Milwaukie, let alone one depriving Milwaukie of a liberty or property interest. DEQ has dismissed Order SA-891-706. Without the basic prerequestive of a governmental action, due process rights under the 14th Amendment are irrelevant.

While there is no right to a hearing under existing law, Milwaukie has contended it has a continued right to a hearing

under the repealed contested case provision of the 1987 Site Inventory Law.

There is no continued right to a hearing based on the contested case provision of ORS 466.557(4) that was repealed by HB 3235:

> "The effect of the repeal of a statute having neither a saving clause nor a general saving statute to prescribe the governing rule for the effect of the repeal, is to destroy the effectiveness of the repealed act in futuro and to divest the right to proceed under the statute. Except as to proceedings past and closed, a statute is considered as if it had never existed."
> Sutherland, Statutory Construction § 23.33 (4th ed Sands 1985).

Thus, even if Milwaukie's reliance on the 1987 Site Inventory Law were relevant in the face of no pending DEQ action, that former law provides Milwaukie no relief. The contested case right has disappeared.

Milwaukie has also argued that DEQ is attempting to apply HB 3235 retroactively to deny Milwaukie a contested case hearing, and that HB 3235 cannot be applied retroactively absent express legislative intent. DEQ's dismissal of Order SA-891-706 did not require retroactive application of HB 3235. DEQ's July 14, 1989 letter did not dismiss the contested case requested by Milwaukie; it only dismissed the order initially giving rise to the contested case. While this had the practical effect of mooting the contested case, it nonetheless was not based on HB 3235's repeal of contested case appeals.

Moreover, DEQ could have dismissed Order SA-891-706, for a variety of reasons, whether the legislature had adopted HB 3235 or not. Put another way, DEQ could have dismissed the order even if ORS 466.557 still provided for a contested case hearing. Retroactive application of HB 3235 was not required.

Even assuming that DEQ did apply HB 3235 retroactively, such an action would have been supported by legislative intent that the existing Site Inventory be withdrawn and pending contested cases be terminated. See Minutes of House Committee on Environment and Energy.

EXCEPTION NO. 3

The hearings officer's order concludes that Milwaukie has a protected property interest in the repealed contested case provision of ORS 466.557 (1987), and that this interest entitles Milwaukie to due process protection, i.e., some form of hearing.

This conclusion is wrong, because there is no DEQ action against Milwaukie that might trigger due process protections. The cases cited by the hearings officer share an essential factual premise missing here: a governmental action against the party alleging a liberty or property interest. See e.g., Matthews v. Eldridge, 424 US 310 (1976) [agency's termination of social security benefits]; Parks v. Watson, 716 F 2d 646 (9th Cir 1983) [city's denial of request to vacate streets].

Not only is the hearings officer's conclusion wrong as a matter of law, but it is confusing in the hearings officer's application of it to this case. It is not clear whether the hearings officer finds that Milwaukie has due process protections as to DEQ's original site inventory order, or as to DEQ's July 14, 1989 dismissal of that order. To the extent the hearings officer's order can be read to apply due process protections to DEQ's issuance of the original site inventory order, such application should be rejected by the EQC since the site inventory order is no longer pending against Milwaukie. To the extent the hearings officer's order can be interpreted as holding Milwaukie has a right to a hearing on DEQ's dismissal of the site inventory order, the holding is unnecessary. DEQ does not contest that the hearings officer and EQC have "jurisdiction to determine jurisdiction" through the hearings that have been provided. Moreover, Milwaukie is not demanding a contested case hearing on DEQ's dismissal of the site inventory order, but on the original order itself.

Whatever its intended application, the hearings officer's holding is wrong or unnecessary, and should not be incorporated into EQC's final order.

EXCEPTION NO. 4

On pages 8-9 of the hearings officer's order, Milwaukie is quoted as to various "deprivations" the city has allegedly suffered as a result of DEQ's proposed listing of city

property, i.e., depressed property values, declining property development, potentially spiralling insurance cost, increased municipal water costs, and strict liability for remedial action costs. These alleged impacts would not be caused by DEQ's placing Milwaukie's property in an information base such as a site inventory, but by the fact that the property might be contaminated by toxic waste. This was publicly known before DEQ's November 30, 1988 order and would have been publicly known whether DEQ put Milwaukie's property on the Site Inventory or not. Milwaukie has suffered no harm that it might not already have suffered by virtue of owning contaminated property.

More importantly, the record contains no evidence -- beyond Milwaukie's allegations -- that Milwaukie has suffered any harm on property owned by the city. EQC's final order on the issue of a contested case right therefore should not include findings on harm alleged by Milwaukie.

EXCEPTION NO. 5

The hearings officer's order failed to include notice of the procedures under which the order may be appealed. This was partly due to uncertainty regarding the nature of the hearings officer's prehearing order. Milwaukie has nonetheless exercised its right of appeal to the EQC. Ultimately, the EQC's final order must contain such notice. OAR 137-03070(1)(e).

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The hearings officer's order was an order "issued in connection with a contested case proceeding." ORS 183.310(5)(a). This proceeding was initiated by Milwaukie's request for a contested case hearing. Further, the hearings officer does not have authority to hear matters other than contested cases. The hearings officer's order was not rendered something other than an "order in a contested case" by the fact it was issued before a full evidentiary hearing was conducted.

As an order in a contested case proceeding, the hearings officer's action was subject to ORS 183.464(1) and OAR 137-03-060, and should have been cast as a "proposed" order subject to review by the EQC. The hearings officer's proposed order was not a final agency action for purposes of judicial review. See Land Reclamation, Inc. v. DEQ, 292 Or 104, 636 P2d 933 (1981); ORS 183.310(5)(b)(B). It must first be appealed to the EQC. OAR 137-03-060. The EQC's action on the hearings officer's order will be a final order that, in turn, may be appealed to the Court of Appeals. ORS 183.482. If the hearings officer's order is not appealed to the EQC, that order becomes final but is not subject to judicial review, for failure on Milwaukie's part to exhaust administrative remedies. See Van Gordon v. Oregon State Bd. of Dental Examiners, 34 Or App 607, 614, 579 P2d 306 (1978).

As a final contested case order, the commission's action on the hearings officer's order will be subject to the

requirements of OAR 137-03-070, including the requirement that the EQC's order include a citation of the statutes under which the order may be appealed, i.e., ORS 183.482.

CONCLUSION

The EQC should affirm the hearings officer's dismissal of this contested case proceeding, with clarifications addressing the exceptions discussed above. DEQ respectfully submits that the proposed final order filed by DEQ would be appropriate for this purpose and should be adopted by the EQC.

KURT BURKHOLDER
Assistant Attorney General
Of Attorneys for Department of
Environmental Quality

NEIL GOLDSCHMIDT
GOVERNOR

Department of Environmental Quality.

811 SW SIXTH AVENUE, PORTLAND, OREGON 97204-1390 PHONE (503) 229-5696

July 14, 1989

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

City of Milwaukie
10964 S. E. Oak
Milwaukie, OR 97222

ATTN: Manager of Environmental Affairs

RE: Dismissal Order No. SA-891-706
Milwaukie Public Water Supply
Inventory of Confirmed Releases

This letter is to notify you that the order the Department of Environmental Quality mailed on November 30, 1988 stating that the facility listed above was proposed for listing on the Inventory of Confirmed Releases, established pursuant to ORS 466.557 as that statute was then in effect, is hereby dismissed. If a request for a contested case hearing to appeal the listing was submitted, that appeal is no longer necessary since the law has been changed and the Department has withdrawn all sites from the proposed list.

The Oregon Legislature has amended the Inventory law. The new law, House Bill 3235, requires the Environmental Quality Commission (EQC) to adopt rules regarding the listing process. The Department will solicit the advice of a citizen advisory committee in the development of the rules.

The Department will be operating under a significantly different approach. The new law requires the Department to develop two lists--the List of Confirmed Releases and the Inventory of Facilities Needing Further Action. The new law requires the agency to notify the owner and operator of a facility before the facility is placed on either list. The owner or operator will then have an opportunity to provide comments. Once those comments have been made the Department's decision to add a facility to either list is final. These lists will not, however, be developed until the new rules are adopted.

After the adoption of rules, expected to occur in about nine months, the Department will contact you in writing only if the captioned site is again proposed for listing. If this is the case, you will be given an opportunity to submit information concerning the site. Let me point out, however, that neither this letter nor any future decision to list affects liability, further investigation, remedial action or similar issues at the site.

If you have any questions about this letter, the new law, or the rulemaking process, please contact the Site Assessment Section of the Environmental Cleanup Division at (503) 229-5733.

Sincerely,

Fred Hansen
Director

SL:m
SM2336
cc: Linda Zucker, EQC Hearings Officer
Northwest Regional Office, DEQ

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

In the matter of:	
SITE INVENTORY LISTING OF PROPERTY LOCATED IN CLACKAMAS COUNTY, OREGON, CITY OF MILWAUKIE, OWNER.	No. SA-891-706 CITY OF MILWAUKIE'S EXCEPTIONS

The CITY OF MILWAUKIE ("City") files the following exceptions to the Environmental Quality Commission ("EQC") hearings officer's Order of September 25, 1989, pursuant to the schedule agreed upon by the City and the agency.

The September 25, 1989, Order should be set aside, modified, or reversed because:

1. The hearings officer incorrectly interpreted the law;

2. The hearings officer's decision is inconsistent with the agency's own rules;

3. The hearings officer's decision violates statutory and constitutional provision;

4. The hearings officer's decision is not supported by substantial evidence in the whole record; and

5. The Order does not contain specific findings of fact.

The City objects to EQC's review of this matter at this time. The EQC has no jurisdiction to hear this matter while judicial review is pending.

Attorneys at Law
1727 N.W. Hoyt Street
Portland, Oregon 97209
(503) 222-4402
FAX (503) 243-2944

Furthermore, the City requests that the complete record developed before the hearings officer be prepared and transmitted to the EQC and the parties no later than two weeks before the EQC's December 1, 1989, hearing on this matter. In the event that the complete record is not made available to the EQC by the agency, the City will assemble its previously submitted material and serve it on the EQC in order to preserve the City's portion of the record.

Respectfully submitted this 2nd day of November, 1989.

O'DONNELL, RAMIS, ELLIOTT & CREW

By: _____
Phillip E. Grillo, OSB # 85220
Of Attorneys for the City of Milwaukie

O'DONNELL, RAMIS, ELLIOTT & CREW
Attorneys at Law
1727 N.W. Hoyt Street
Portland, Oregon 97209
(503) 222-4402
FAX (503) 243-2944

PEG\MILWAUKI\EXCEPTNS.EQC/gaj

CERTIFICATE OF FILING

I hereby certify that I filed the original of the foregoing CITY OF MILWAUKIE'S EXCEPTIONS with the Environmental Quality Commission, 811 S.W. 6th Avenue, Portland, Oregon, 97204, on November 2nd, 1989, by mailing same to the Environmental Quality Commission contained in a sealed envelope, with first class postage paid, deposited in the post office at Portland, Oregon.

Phillip E. Grillo, OSB # 85220
Of Attorneys for City of
Milwaukie

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing CITY OF MILWAUKIE'S EXCEPTIONS on the following person(s) and address(es) on November 2nd, 1989, by mailing to the said person(s) a true copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to such person(s) as follows, and deposited in the post office at Portland, Oregon, on said day.

Mr. Kurt Burkholder
Assistant Attorney General
Department of Justice
Justice Building
1515 S.W. 5th Ave., Ste. 410
Portland, OR 97201

Fred Hansen, Director
Department of Environmental Quality
811 S.W. 6th Ave.
Portland, OR 97204-1390

Dated: November 2nd, 1989.

Phillip E. Grillo, OSB # 85220
Of Attorneys for City of
Milwaukie

PEG\MILWAUKI\CERTSERV.EQC/gaj

Attorneys at Law
1727 N.W. Hoyt Street
Portland, Oregon 97209
(503) 222-4402
FAX (503) 243-2944

NEIL GOLDSCHMIDT
GOVERNOR

Environmental Quality Commission

811 SW SIXTH AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

MEMORANDUM

TO: Environmental Quality Commission DATE: October 12, 1989

FROM: Linda K. Zucker, Hearings Officer

SUBJECT: Agenda Item G
Appeal of Site Inventory Listing of Property Located in Clackamas County, City of Milwaukie, Owner

On September 25, 1989, I issued an order in Case SA-891-706 dismissing the City of Milwaukie's request for contested case hearing to pursue its appeal of a November 30, 1988 DEQ order which proposed to include City property on an inventory of sites having confirmed releases of hazardous wastes. In the September 25, 1989 order I also affirmed DEQ's withdrawal of its November 30, 1988 order.

The City has filed an appeal of my decision in the Court of Appeals and has filed a precautionary appeal to the EQC. The City's Notice of Appeal to the EQC contains a request "...that any further action by the EQC be stayed in this case until a court of competent jurisdiction determines either the applicable review procedures or reviews the merits of this appeal."

The action before the EQC on October 20, 1989 is to grant or deny the requested stay.

LKZ:y
HY8986
Attachments: A. Notice of Appeal (EQC)
B. Petition for Judicial Review (w/o Order)
C. Affidavit Supporting Petition for Judicial Review

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

In the matter of:	
SITE INVENTORY LISTING OF PROPERTY LOCATED IN CLACKAMAS COUNTY, OREGON, CITY OF MILWAUKIE, OWNER.	No. SA-891-706 NOTICE OF APPEAL

Pursuant to OAR 340-11-132, petitioner, City of Milwaukie, hereby files this precautionary Notice of Appeal from the Hearings Officer's September 25, 1989, Order (attached).

Petitioner files this precautionary appeal solely to preserve its right of review before the full Environmental Quality Commission ("EQC") in the event a court of competent jurisdiction finds that the review procedures set forth in OAR 340-11-132 apply and are required to be exhausted prior to judicial review. The petitioner maintains that the Hearings Officer's September 25, 1989, Order is final and subject to judicial review under either ORS 183.482 or ORS 183.484.

Petitioner, by filing this Notice of Appeal, requests that any further action by the EQC be stayed in this case until a court of competent jurisdiction determines either the applicable review procedures or reviews the merits of this appeal. Petitioner

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O'DONNELL RAMIS, ELLIOTT & CREW
Attorneys at Law
1727 N.W. Hoyt Street
Portland, Oregon 97209
(503) 402-1200
FAX (503) 243-2944

D-2
Attachment A

hereby moves that the chairman indefinitely extend the briefing schedule in this matter in light of pending judicial review.

Respectfully submitted this 4th day of October, 1989.

O'DONNELL, RAMIS, ELLIOTT & CREW

By: _____
Phillip E. Grillo, OSB #85220
Of Attorneys for the City of Milwaukie

Attorneys at Law
1727 N.W. Hoyt Street
Portland, Oregon 97209
(503) 222-4402
FAX (503) 243-2944

PEG\MILWAUKI\APPEAL.NOT/gaj

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CERTIFICATE OF FILING

I hereby certify that I filed the original of the foregoing NOTICE OF APPEAL with the Environmental Quality Commission, 811 S.W. 6th Avenue, Portland, Oregon, 97204, on October 4th, 1989, by mailing same to the Environmental Quality Commission, contained in a sealed envelope, with first class postage paid, deposited in the post office at Portland, Oregon.

Phillip E. Grillo, OSB # 85220
Of Attorneys for City of
Milwaukie

CERTIFICATE OF SERVICE

I hereby certify I served the foregoing NOTICE OF APPEAL on the following parties on October 4th, 1989, by mailing to each party a correct copy thereof, contained in a sealed envelope, with first class postage paid, deposited in the post office at Portland, Oregon, on said day, and addressed as follows:

Kurt Burkholder
Assistant Attorney General
Department of Justice
1515 S.W. 5th Ave., # 410
Portland, OR 97201

Fred Hansen, Director
Department of Environmental Quality
811 S.W. 6th Ave.
Portland, OR 97204-1390

Dated: October 4th, 1989.

Phillip E. Grillo, OSB # 85220
Of Attorneys for City of
Milwaukie

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~~A-13~~

IN THE COURT OF APPEALS

OF THE STATE OF OREGON

In the Matter of:	PETITION FOR JUDICIAL REVIEW
SITE INVENTORY LISTING OF PROPERTY LOCATED IN CLACKAMAS COUNTY, OREGON, CITY OF MILWAUKIE, Owner,	EQC NO. SA-891-706
	Appellate Court No. _____.

PETITION FOR JUDICIAL REVIEW

Pursuant to authority provided in ORS 183.480 - 183.497, the City of Milwaukie (City), as petitioner, seeks judicial review of the Final Order of the Environmental Quality Commission (EQC) in case No. SA-891-706, dated September 25, 1989, attached as Exhibit A and incorporated by reference herein, and represents as follows:

A. Nature of the Order the Petitioner Desires Reviewed.

The EQC Hearings Officer denied the City's request that the EQC conduct a contested case hearing to allow the City to challenge a November 30, 1988, Department of Environmental Quality (DEQ) order that placed City property, located at 3800 SE Harvey, Milwaukie, Oregon, on the inventory of facilities where a release of a hazardous substance is confirmed.

B. The Nature of Petitioner's Interest.

On November 30, 1988, the Director of DEQ listed the City as the owner of a contaminated Facility under the Oregon Superfund Act pursuant to ORS 466.557 (1987). On December 12, 1988, the City filed a timely Notice of Intent to Appeal that decision to EQC, requesting a full contested case hearing on the merits as provided

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Attachment 2 D-5

by the then applicable law, ORS 466.567 (1987).

The Oregon Superfund Act was amended by the 1989 Legislative through H.B. 3235. Those amendments purport to remove property owners' rights to both a contested case hearing and a judicial review of the Director's decision to list a facility. H.B. 3235 did not expressly provide for retroactive application to Facilities previously listed.

The City maintains that its right to a contested case hearing and judicial review survives H.B. 3235 since the bill does not apply retroactively. The City continued to request a contested case hearing as provided by the statutory scheme effective at the time the City filed its Notice of Intent to Appeal on December 12, 1988. On September 25, 1989, the EQC Hearings Officer issued an Order denying the City a contested case hearing. Unless the Hearing Officer's decision noted above is reversed, petitioner will be denied its statutory and constitutional rights to a contested case hearing on the merits.

Dated this 4th day of October, 1989.

O'DONNELL, RAMIS, ELLIOTT & CREW

By: _____

Phillip E. Grillo, OSB #85220
1727 NW Hoyt
Portland, OR 97209
of Attorneys for Petitioner

O'DONNELL, RAMIS, ELLIOTT & CREW
Attorneys at Law
1727 N.W. Hoyt Street
Portland, Oregon 97209
(503) 222-4402

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CERTIFICATE OF FILING

I hereby certify that I filed the original of the foregoing PETITION FOR JUDICIAL REVIEW, together with 25 copies thereof, with the State Court Administrator, Case Records Division, Supreme Court Building, Salem, Oregon 97310, on October ___, 1989, by mailing same to the State Court Administrator, contained in a sealed envelope, with first class postage paid, deposited in the post office at Portland, Oregon.

Phillip E. Grillo, OSB # 85220
Of Attorneys for City of
Milwaukie

CERTIFICATE OF SERVICE

I hereby certify I served two (2) copies of the foregoing PETITION FOR JUDICIAL REVIEW on the following parties on October ___, 1989, by mailing to each party a correct copy thereof, contained in a sealed envelope, with first class postage paid, deposited in the post office at Portland, Oregon, on said day, and addressed as follows:

Kurt Burkholder
Assistant Attorney General
Department of Justice
1515 S.W. 5th Ave., # 410
Portland, OR 97201

Fred Hansen, Director
Department of Environmental Quality
811 S.W. 6th Ave.
Portland, OR 97204-1390

Dated: October ____, 1989.

Phillip E. Grillo, OSB # 85220
Of Attorneys for City of
Milwaukie

O'DONNELL, RAMIS, ELLIOTT & CREW
Attorneys at Law
1727 N.W. Hoyt Street
Portland, Oregon 97209
(503) 222-4402

D-7

IN THE COURT OF APPEALS

OF THE STATE OF OREGON

In the Matter of:	AFFIDAVIT SUPPORTING PETITION FOR JUDICIAL REVIEW
SITE INVENTORY LISTING OF PROPERTY LOCATED IN CLACKAMAS COUNTY, OREGON, CITY OF MILWAUKIE, Owner,	EQC NO. SA-891-706
	Appellate Court No. _____.

STATE OF OREGON)
) ss.
County of Multnomah)

I, Phillip E. Grillo, being first duly sworn do say:

1. I am one of the attorneys representing the City of Milwaukie (City), the petitioner in the above-entitled action, and make this Affidavit in support of the City's Petition For Judicial Review of the Final Order of the Environmental Quality Commission (EQC) in case No. SA-891-706, dated September 25, 1989. For the following reasons, petitioner is adversely affected and aggrieved by EQC's September 25th order pursuant to ORS 183.482(2).

2. In its September 25, 1989 Order, EQC denied the City's request for a contested case hearing to allow the City to challenging the November 30, 1988, Department of Environmental Quality (DEQ) order that placed the City property, located at 3800 SE Harvey, Milwaukie, Oregon, on the inventory of facilities where a release of a hazardous substance has been confirmed.

3. The City filed a timely Notice of Intent to Appeal the

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Attachment C.

DEQ's November 30, 1988 Order, requesting a full contested case hearing on the merits as provided by ORS 466.567 (1987).

4. The 1989 Legislature later amended ORS 466.567 (1987) with H.B. 3235. Those amendments took effect on June 28, 1989 and purport to remove property owners' rights to both a contested case hearing and a judicial review of DEQ's decision to list a facility.

5. The City maintained that H.B. 3235 does not apply retroactively, and that its right to a contested case hearing and judicial review survived the amendments to ORS 466.567. The City pursued its right to a hearing. On September 25, 1989, EQC issued an Order denying the City a contested case hearing. Unless the EQC's order is reversed or remanded, petitioner will be denied its statutory and constitutional rights to a contested case hearing on the merits.

Attorneys at Law
1727 N.W. Hoyt Street
Portland, Oregon 97209
(503) 222-4402
FAX (503) 243-2944

Phillip E. Grillo

SUBSCRIBED and sworn to before me this 6th day of October, 1989.

Notary Public for Oregon
My commission expires: _____

NEIL GOLDSCHMIDT
GOVERNOR

Environmental Quality Commission

811 SW SIXTH AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

file

October 12, 1989

Phillip E. Grillo
Attorney at Law
1727 N. W. Hoyt Street
Portland, OR 97209

Kurt Burkholder
Assistant Attorney General
1515 S. W. 5th Avenue, Suite 410
Portland, OR 97201

Re: SA-891-706

Before I issued the September 25, 1989 order, we agreed to defer discussing appeal procedure until you had reviewed and considered the order. We have now had two extended discussions about appeal procedure.

In the meantime, the City has filed appeals in the Court of Appeals and with the Environmental Quality Commission and expects to file shortly in circuit court. The applicable review procedure is an issue on appeal.

Under these circumstances, I will not be supplementing the September 25, 1989 order to address review procedure.

Enclosed is a copy of the materials I am providing to the Environmental Quality Commission in connection with its October 20, 1989 meeting. As agreed, the scope of requested EQC action is to review the City's request for a stay of further EQC action.

Sincerely,

Linda K. Zucker
Hearings Officer

LKZ:y
HY8985
Enclosures
cc: Environmental Quality Commission
Fred Hansen, Director, DEQ
Environmental Cleanup Division, DEQ

NEIL GOLDSCHMIDT
GOVERNOR

Environmental Quality Commission

811 SW SIXTH AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

September 25, 1989

Phillip E. Grillo
Attorney at Law
1727 N. W. Hoyt Street
Portland, OR 97209

Kurt Burkholder
Assistant Attorney General
1515 S. W. 5th Avenue, Suite 410
Portland, OR 97201

Re: SA-891-706

Enclosed is an order dismissing the City of Milwaukie's request for contested case hearing and affirming DEQ's withdrawal of its November 30, 1988 order. Enclosed, too, are copies of the pleadings and memoranda I have considered.

I understand the matter is on the October 20, 1989, EQC meeting agenda. As agreed, we will discuss further procedure after you have had a chance to review the order.

Sincerely,

Linda K. Zucker
Hearings Officer

LKA:y
HY8838
Enclosures
cc: Environmental Quality Commission
Fred Hansen, Director, DEQ
Environmental Cleanup Division, DEQ

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

In the Matter of: SITE INVENTORY LISTING OF PROPERTY LOCATED IN CLACKAMAS COUNTY, OREGON, CITY OF MILWAUKIE, Owner.	NO. SA-891-706 ORDER

The City of Milwaukie (City) seeks to compel the Environmental Quality Commission (EQC) to conduct contested case review to enable the City to challenge a November 30, 1988, Department of Environmental Quality (DEQ) order placing City property[1] on the inventory of facilities where a release of a hazardous substance is confirmed. DEQ resists the City's request.

BACKGROUND

In 1987 the Legislature established a program to address the presence of hazardous substances in the environment and, among other things, to establish a statewide inventory of facilities with confirmed releases of hazardous substances. ORS 466.557 et seq.

Program procedure required the Director of DEQ to notify facility owners of his decision to include a facility on the inventory. It authorized the facility owner to appeal the Director's decision in accordance with the provisions of statutes governing contested cases and their review. ORS 183.310 to 183.550.

On November 30, 1988, the DEQ issued 325 orders formally stating its decision to list facilities on the inventory. A Department Order,

---

[1] The property is located at 3800 SE Harvey, Milwaukie, Oregon.

Notice of Opportunity for Contested Case Hearing, was sent to the City. Two-hundred and ten recipients, including the City, responded to DEQ's order by filing appeals seeking a contested case hearing to challenge their inclusion on the list. A timely request for hearing automatically postponed the inclusion of the facility on the list pending final disposition of the appeal. DEQ's December 30, 1988 letter to City.

The large number of appeals prompted DEQ to propose legislation revising the conditions and process for placing facilities on the inventory. Environmental Cleanup Report, Attachment, August 18, 1989 letter to hearings officer from City. A significant feature of the proposed legislation was elimination of the facility owner's ability to obtain contested case review of DEQ's decision to place a facility on the list. The legislation was supported by key industry and environmental groups. Minutes, House Committee on Environment & Energy, March 22, 1989, p. 1. Because of the potential for legislative action, the agency did not proceed with the contested cases. Minutes, House Committee on Environment & Energy, March 3, 1989, p. 3.

The 1989 Legislature acted on DEQ's request by replacing the requirement of a single list of all facilities where a release is confirmed, with a dual list system separating facilities needing further investigation from facilities not needing further investigation. House Bill 3235, Sections 1 and 3 (1989). The legislation specifically eliminated the contested case and court appeal processes. Id., Section 1. Instead, it allowed owners or operators the opportunity to comment on the decision to add a facility to the

list. Id., Section 3. The 1989 legislation did not specifically state whether the amendments were to operate prospectively or retroactively.

ISSUES

1. Does HB 3235 operate retroactively to eliminate contested case review in the City's appeal to the EQC?

2. May DEQ unilaterally withdraw its November 30, 1988 order while the order is before the EQC for review?

CONCLUSIONS

The EQC has jurisdiction.

The 1989 Legislature intended House Bill 3235 to apply retroactively, eliminating contested case review and court appeal for all facilities subject to identification under ORS 466.557 et seq.

The City has a property interest in the review procedures of ORS 466.587 (1987). The interest is subject to due process protections.

The current review provides an appropriate and adequate process for the City to present its objections to DEQ's withdrawal of its November 30, 1988 order.

A balance of the competing interests of the City and DEQ supports DEQ's withdrawal of its November 30, 1988 order.

DISCUSSION

The intent of the Legislature governs when a legislative provision should be given effect. Whipple v Howser, 291 Or 475, 480 (1981). Where the language of the statute itself does not provide a clear statement of intent, intent is deduced from such considerations as the language used, the statutory objective to be accomplished ("mischief"

to be remedied) and the history behind the act. Sunshine Dairy v Peterson, 183 Or 305, 317 (1948); Statutory maxims or rules of statutory construction do not substitute for legislative intent. State v Tucker, 90 Or App 506, 509 (1988).

In the present case, the statutory language does not explicitly provide that it is to apply perspectively or retrospectively. In the absence of an explicit statement of intent, the agency must determine the Legislature's probable intent. In this case the problem to be remedied, the statutory objective and the legislative history combine to provide a strong indication that the legislative intent was to address all sites having a confirmed release, including those under orders on appeal.

The problem facing DEQ was well-defined and well understood. On November 30, 1988, DEQ had notified 325 facility owners that their property was identified for "listing" on DEQ's inventory of facilities where a release of hazardous substances had been confirmed. The statute authorized contested case appeal and judicial review. 210 facility owners availed themselves of this option by requesting contested case hearings before the EQC. Whether frivolous or undertaken in good faith, that number of appeals promised to sap limited agency resources intended for environmental cleanup, undermining the essential purpose of the program. Minutes, House E & E, March 3, 1989, pp. 5-6, passim.

The purpose of the relevant amendments was remedial. It raised the thresholds for inclusion eligibility and substituted a comment process for the extended administrative and judicial appeal procedures,

establishing a cost effective system for providing the information the list was designed to contain. Minutes, House E & E, DEQ Summary and Analysis of HB 3235 as Amended, March 22, 1989, Ex. H, p. 1.

The legislative history is illuminating. The March 3, 1989 minutes of the House Environment and Energy Committee provide the fullest expression of the shared concern to shield resources from dissipation in legal processes. The concern reached currently identified sites stalled in a process needing resolution. As stated by Chair Cease:

> The purpose of this bill is to: keep the agency and the state from going broke, to keep these things from being tied up in court over procedural issues, to make clear who has a right to know what, what right the public has in knowing, and to make this a simpler process. Minutes, House E & E, March 3, 1989, pp. 3-4.

She recognized that the statute's purpose was remediation of past, not prospective conduct:

> It seems that you have to look at the larger picture. What is going on right now is making it more difficult. We're talking about cleaning up messes from the past. How do we protect owners rights and clean it up? I would not be surprised if you told someone they had a toxic waste site that they would legally drag the issue out. Id. at 4.

Joel Ario, Executive Director of OSPIRG, a party to developing the joint submission, focused the legislative alternatives:

> Our basic perspective on this issue is that when the basic contested case provision was included in the original law, there was an assumption that use would be limited, it would be on a good faith basis. That is not what has happened. The process has been abused, and that is why we're here today. Joseph Forest Products and Park Place Development

> are examples of frivolous appeals. We face two basic choices of what to do: 1) Proceed into these cases and end up in a series of adversarial proceedings. We would take that to as an alternative to some long, drawn out process that doesn't move us ahead on the clean up. We think DEQ would win the appeals. 2) We could develop an alternative process so that the owners have an opportunity to be heard, but it would be something short of a contested case hearing. We thought it would be better to make this process as smooth as possible. Id. at 6.

His testimony was one example of a "clean slate" assumption:

> The solution presented in this bill has taken a number of hours to work out. There has been representation from DEQ, industry and the environmental community. It is a compromise. Essentially it will raise the threshold of getting on to the inventory so that people don't get on there incorrectly, participation by those getting on there and an opportunity for comment. There are those who would like to throw more roadblocks in front of those creating this public list. The basic agenda is to avoid being on that public list.
>
> We've given away quite a bit. We won't have any inventory until January 1, 1990, the inventory will include fewer sites because that threshold's higher, and the process of getting on will be longer. It's not the ideal bill, but it is better than any of the alternatives. Id. at 6.

The amendments represent an effort by the major parties--DEQ, OSPIRG and AOI--to proceed through the inventory process unburdened by 210 pending appeals. If intent can be gleaned short of an expressly labeled declaration, it is present in the record of this legislative process. The Legislature intended the amendments to operate retroactively. ORS 468.557 as amended applies to pending appeals. The right to contested case review is eliminated.

/ / / /

JURISDICTION

DEQ contends it may now use its "inherent authority" to declare its November 30, 1988 order withdrawn, leaving the City without an administrative action to challenge and the EQC without jurisdiction to review. The City protests this summary disposition of its appeal and claims constitutional and statutory support for its right to contested case review.

No statute or rule specifically addresses the procedure by which a DEQ order is dismissed, or what right, if any, a regulated party has in connection with dismissal. The absence of a specific provision does not mean an agency lacks authority to act; some authority exists by implication. See Campbell v Board of Medical Examiners, 16 Or App 381, appeal after remand 21 Or App 368 (1974). The absence of a specific provision does not leave a regulated party bereft of protection against possibly arbitrary action; the fourteenth amendment of the United States Constitution protects against the deprivation of property without procedural due process. Brady v Gebbie, 859 F2d 1543 (1988); US cert. den. in 109 SC 1577 (1989). Therefore, it is necessary to determine whether the asserted City interest rises to the level of a "property" interest. Board of Regents v Roth, 408 US 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972). If the City has a protectible property interest, it is entitled to some form of review of the agency's decision to dismiss its appeal, and the EQC has jurisdiction to act.

A property interest in a benefit protected by the due process clause results from a legitimate claim of entitlement created and

defined by an independent source, such as state law. Bateson v Geisse, 857 F2d 1300, 1305 (9th Cir. 1988); Parks v Watson, 716 F2d 646, 656 (1983). Procedural guarantees do not necessarily create constitutionally protected interests. However, where procedural requirements operate as significant substantive restrictions on government action, they can create a property interest. Id. Review procedures in former ORS 466.557 provided the City with an enforceable expectation of avoiding the inventory unless DEQ met the demanding proof and procedural requirements of contested case and judicial review. Consequently, review procedures in former ORS 466.577 qualify as a protected property interest.

Once the right to due process is established, various factors must be balanced to determine the process appropriate to protect the property interest. Matthews v Eldridge, 424 US 310, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). These have been identified as the private interest that will be affected by the official action; the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Id. at 96 S. Ct. at 893, 47 L. Ed. 2d at 33.

The City has provided its view of its interests to be weighed in the balance:

> DEQ's decision to place the subject property on the List has subjects the city to significant liabilities frequently associated with the

> characterization of a facility as a hazardous waste site. The implications of such a characterization places the city's reputation, and integrity at stake because of DEQ's failure to fulfill its statutory obligation in providing the city an opportunity to be heard. See Board of Regents v Roth. The listing of the city as a "Superfund Site" has resulted in the following deprivations: (1) depressed property values; (2) declining property development; (3) potentially spiraling insurance risks; (4) increased municipal water costs; and (5) strict liability for remedial action costs. City of Milwaukie, July 27, 1989 Memorandum p. 2.

Weighing against the City's request, the statute as amended provides for an alternate procedure involving additional time for notice and owner comments--a procedure designed to elicit the same information as formerly. The contested case review process entailed a heavy fiscal and administrative burden to the agency. The City will not be able to seek "vindication" in a contested case, but the onus it proposed to vindicate will be removed by withdrawal of the order. In light of these competing interests, I find that any protectible interest the City can establish can be adequately protected without a contested case hearing.

The procedures afforded by the EQC in the present proceeding provide the process due. The City has had an opportunity to state its objections to EQC's withdrawal of the November 30, 1988 order. It has had the opportunity to have the EQC, through its hearings officer, consider these objections. The record in this proceeding is in itself sufficient to determine whether DEQ may withdraw its November 30, 1988 order as it wishes. The withdrawal reflects DEQ's judgment that its responsibilities can best be met by

following the site identification system authorized by the 1989 Legislature. The City's interest in vindicating ostensible error is preserved in the procedures authorized by the amended statute. DEQ may withdraw its November 30, 1988 order.

It is ordered that: 1) the City's request for contested case hearing is dismissed; and 2) DEQ's withdrawal of its November 30, 1988 order is affirmed.

Dated this 25th day of September, 1989.

Linda K. Zucker
Hearings Officer

O'DONNELL, RAMIS, ELLIOTT & CREW
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PLEASE REPLY TO PORTLAND OFFICE

JEFF H. BACHRACH
CHARLES E. CORRIGAN*
STEPHEN F. CREW
KENNETH M. ELLIOTT
KENNETH H. FOX
PHILLIP E. GRILLO
WILLIAM A. MONAHAN
MARK P. O'DONNELL
TIMOTHY V. RAMIS
WILLIAM J. STALNAKER

*ALSO ADMITTED TO PRACTICE IN STATE OF WASHINGTON

CANBY OFFICE
[illegible] GRANT, SUITE 202
CANBY, OREGON 97013
(503) 266-1149

September 5, 1989

Mr. Fred Hansen, Director
Department of Environmental Quality
811 S.W. Sixth Avenue
Portland, OR 97204-1390

Re: Milwaukie Public Water Supply, Case No. SA-891-706

Dear Mr. Hansen:

I am in receipt of your August 29, 1989, letter and proposed order. I am not certain how, if at all, your August 29th letter differs in sustance from your Agency's July 14th letter regarding the same subject. In any event, as you know, the effect of these dismissal letters and HB 3235 is currently under consideration by the Environmental Quality Commission's hearings officer, Linda Zucker.

We are awaiting Ms. Zucker's decision. The City of Milwaukie will file written exceptions, if any, in a reasonable time after Ms. Zucker's adjudicatory findings and conclusions are made available to the parties. We request an opportunity to present oral argument to the EQC on this matter and request that the hearings officer's record be submitted to EQC, in the normal course, prior to its October 20th meeting.

For the record, we object to your proposed order dismissing our contested case proceeding and take exception to your August 29, 1989, letter. As you are aware, the City has filed extensive

legal memoranda and other pleadings in this matter. We ask that the Agency reconsider its decision to proceed with the Inventory of Confirmed Releases in this matter.

Sincerely,

O'DONNELL, RAMIS, ELLIOTT & CREW

Phillip E. Grillo

PEG/gaj

cc: William P. Hutchison, Jr.,
Mr. Wallace Brill
Dr. Emery Castle
Ms. Genevieve Pisarski Sage
Mr. William Wessinger
Ms. Linda Zucker
Mr. Kurt Burkholder
Mr. Dan Bartlett
Mr. Richard Bailey

PEG\MILWAUKI\HANSEN.LT3

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PLEASE REPLY TO PORTLAND OFFICE

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*ALSO ADMITTED TO PRACTICE IN STATE OF WASHINGTON

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181 N. GRANT, SUITE 202
CANBY, OREGON 97013
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August 18, 1989

Ms. Linda Zucker
Hearings Officer
Environmental Quality Commission
811 S.W. 6th Avenue
Portland, OR 97204

Re: City of Milwaukie, Case No.SA-89-706

Dear Ms. Zucker:

The City's of Milwaukie's Response Memorandum is attached. In addition, I would like to take this opportunity to briefly respond to the Attorney General's August 10th cover letter to you.

I am confused by the Attorney General's August 10, 1989, letter. I know from my representation of other clients that DEQ has not formally notified other owners of facilities listed in the Site Inventory. DEQ has issued informational items (see attachments), but has not formally notified other owners of the status of their contested case hearings in the wake of HB 3235. My information is that DEQ is "testing the water," so to speak, with the Milwaukie case. Since DEQ's action has been contested in this proceeding, DEQ's formal notification procedure has been suspended pending the outcome of this case.

Second, I am confused by the Attorney General's statement that DEQ will be submitting proposed dismissal orders to the EQC in order to "provide some administrative finality" to the volume of contested cases that have been filed. The Attorney General then indicates that he does not consider this "pro forma dismissal" by EQC to be inconsistent with DEQ's ability to act unilaterally under its "inherent authority."

Finally, I am confused when the Attorney General indicates that it will place all dismissals, except for the City of Milwaukie, on the October 20th agenda for EQC. The Attorney General then asks you to decide this case prior to that time so that DEQ can place the Milwaukie case on the EQC agenda for further action. My confusion with these statements is as follows:

First, with regard to notice, why would DEQ single out Milwaukie? Apparently, we were the only party who received a July 14 dismissal letter, despite the fact that HB 3235 was signed into law on June 28th. I would have expected the Agency to act consistently across the board. Why was Milwaukie a "test case," if the Agency was truly certain of its position?

As to DEQ's request for EQC action, why did the Agency have EQC schedule a hearing to adopt formal orders of dismissal, when DEQ itself insists that it can act unilaterally to dismiss its prior orders under its inherent authority? Why has the Agency chosen to get EQC's "stamp of approval" now, just as the City of Milwaukie is arguing that the Agency's procedures are flawed?

Finally, why has DEQ asked you to decide this case before it puts the Milwaukie matter on the EQC schedule. It seems to me that DEQ is trying to protect itself on the other cases while it attempts to concede nothing in this one. If the hearings officer grants the City's request for our contested case, I presume that DEQ will appeal to EQC and schedule the matter for the October 20th meeting. If DEQ prevails, and you decide that the City does not have a right to a contested case, the City will appeal. Either way, it seems that the EQC action should be scheduled tentatively with EQC. Specifically, leaving this matter off the EQC agenda and, at the same time, scheduling all 209 remaining appeals for a hearing in front of EQC on October 20th, is another indication of the Agency's confusion.

It is my belief that you, as the hearings officer, will not let this apparent tactical maneuvering by DEQ divert your attention from the important legal issues presented in the appeal. If the Agency wishes to complicate matters by stacking the October EQC agenda with all its pending appeals (except for Milwaukie), that is a separate agency decision which is irrelevant to your legal determination here. Obviously, the City of Milwaukie is interested in a timely and thorough decision by you in this case.

We believe that our legal position is correct. Apparently, DEQ must feel that our position has significant merit or they would not be taking the actions that they have.

Thank you for your continued consideration in the matter.

Sincerely,

O'DONNELL, RAMIS, ELLIOTT & CREW

Phillip E. Grillo

PEG/gaj
Enclosure

cc: Kurt Burkholder, Esq.
Mr. Dan Bartlett, City of Milwaukie
Mr. Richard Bailey, City of Milwaukie

PEG\MILWAUKI\ZUCKER.LT4

Environmental
CLEANUP REPORT
DEPARTMENT OF ENVIRONMENTAL QUALITY 811 S.W. Sixth Avenue Portland, Oregon 97204 (503) 229-5777

FACTS ABOUT CHANGES TO THE INVENTORY LAW

The Department of Environmental Quality's Environmental Cleanup Division is responsible for investigating and cleaning up sites contaminated with hazardous substances throughout the state. In order to do this, DEQ must first identify such sites. The Environmental Cleanup law, ORS 466.540 to 466.590, requires the Department to develop an inventory of facilities with a confirmed release of hazardous substances. The 1989 Oregon Legislature amended sections of the law dealing with the inventory. A new inventory process, based on those amendments, will begin in April 1990.

Why was the Law Changed?

In November 1988, the Department sent letters to the owners of 325 facilities throughout Oregon notifying them that their property would be included on the state's Inventory of Facilities with Releases of Hazardous Substances. Following this notification, the Department received 210 contested case appeals. The large number of appeals prompted the Department to propose legislation revising the threshold and process for placing facilities on the Inventory.

How has the Inventory Process Changed?

First, the state-wide Inventory of Facilities with Releases of Hazardous Substances, required by the original legislation, will be two separate lists; one, a list of sites with confirmed releases of hazardous substances and the other an inventory of facilities with confirmed releases that exceed a threshold requiring additional investigation or cleanup.

Second, the notification period for owners and operators of facilities proposed for either list has been expanded and extended to provide owners and operators an opportunity to comment or provide information about their sites before they are included on either of the new lists. However, they will no longer be able to appeal a final decision to have their property included on the List of Confirmed Releases or the Inventory.

What are the Criteria for Being Included on the Inventory?

In general, sites will be included on the Inventory if they meet two basic criteria: (a) have a confirmed release of a hazardous substance and (b) require additional investigation, removal, remedial action or long-term environmental or institutional control.

What Information Will the Inventory Have About a Site?

The Inventory will include the following information, if known:

- A general description of the facility and its address or location,
- When the release occurred,
- Name of current owner and operator and the names of any previous owners and operators when the release occurred,
- Type and amount of hazardous substance released,
- How the release occurred,
- The levels of hazardous substance, if any, in the groundwater, surface water, air and soils at the facility,
- Status of any removal or remedial actions at the facility,
- Whether the remedial action will be paid for by the State using the Hazardous Substance Remedial Action Fund.

The Inventory will also include information about threats to the environment and public health posed by a site.

Within nine months, the Environmental Quality Commission (EQC), DEQ's governing board, must establish a procedure for ranking facilities on the Inventory based on the short-term and long-term risks they pose to present and future public health, safety welfare and the environment. This hazard ranking information will be included on the Inventory.

What is a Confirmed Release of a Hazardous Substance?

The EQC will adopt rules defining a confirmed release by April 1990. A hazardous substance is any substance that, when released to the environment, may present sub-

STATE OF OREGON

ENVIRONMENTAL QUALITY COMMISSION

IN THE MATTER OF:	NO. SA-891-706
SITE INVENTORY LISTING OF PROPERTY LOCATED IN CLACKAMAS COUNTY, OREGON,	CITY OF MILWAUKIE'S RESPONSE MEMORANDUM
CITY OF MILWAUKIE, OREGON, OWNER,	

This memorandum responds to the Attorney General's legal memorandum dated August 10, 1989. The legal issue presented here is: Whether the City's perfected appeal is made "moot" by the agency's July 14, 1989, Order, or is affected by HB 3235 (1989)?

1. EFFECT OF THE JULY 14 ORDER

The July 14, 1989, action by DEQ meets the statutory definition of an "order" under ORS 183.310(5)(a). The effect of this characterization was the subject of Petitioners Hearing Memo: July 14 Agency Action Is an Order, July 27, 1989, and Hearing Memo: Jurisdiction, July 27, 1989, previously submitted.

The Attorney General's response is found on pages 9 through 14 of his August 10, 1989, memorandum. Essentially, the Attorney General argues that the City "elevates form over substance." He argues that a hearing would affect DEQ's administrative practice by imposing costly, time-consuming procedures for dismissal of site inventory orders.

At the time Site Inventory Orders were issued by the agency in November 1989, the then-existing law and policy provided for contested case proceedings and judicial review of Site

O'DONNELL, RAMIS, ELLIOTT & CREW
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Inventory Orders. The purpose of this contested case proceeding is not to determine what procedures are necessary as a matter of policy. The legislature established that policy in 1987 and, again, in 1989. At this stage of the proceedings, we are determining what administrative, statutory, and constitutional provisions apply, as a matter of law, in order to determine whether or not this contested case will proceed to a hearing on the merits.

At the outset of his analysis, the Attorney General analogizes the DEQ's July 14th action to other types of administrative actions where the State has exercised implied or inherent authority. The Attorney General's analogies do not apply to this proceeding. Applying those analogies to this case conflicts with DEQ's own rules and the Oregon Administrative Procedures Act. If, by his analogies on page 11, lines 1-15, the Attorney General is suggesting that DEQ made a mistake in listing the City as the owner of this facility, the City will gladly stipulate to a dismissal of this matter once such statements are forthcoming. Obviously, where an agency has acted based upon a factual mistake, and no party objects to curing that mistake, there is no adversarial relationship. It is unlikely that any party would challenge the procedures used by an agency to cure its mistakes, so long as the procedure in no way prejudices the parties. As a practical matter, so long as no party objects, an agency has broad discretion to act. However, once an agency action is appealed, its practices are constrained by applicable statutes and rules of procedure. Such is the case here.

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In footnote 5, page 11, the Attorney General notes that both the City of Milwaukie and the hearings officer suggest that the Environmental Quality Commission ("EQC") has authority to issue an order dismissing DEQ's order and/or the contested case. We agree. In this case, EQC, as the initial review body, has authority to decide jurisdictional questions. ORS 466.557 (1987), grants EQC authority to review Site Inventory Orders as contested case proceedings. ORS Chapter 183 and OAR Chapter 340 govern the procedures for that contested case. ORS 183.415(2)(b) requires the agency, in a contested case proceeding, to provide notice to the parties of the "authority and jurisdiction under which the hearing is to be held." See also Murray Well Drilling v. Deisch, 75 Or App 1, 704 P2d 1159 (1985); and Standard Insurance Company v. Washington County, LUBA No. 88-109 (1989) (Court of Appeals review pending). The EQC, therefore, has express authority to issue orders on jurisdictional questions.

Murray Well and Standard Insurance are the seminal cases in Oregon on the jurisdictional relationships between lower bodies and review bodies during appeals. Murray Well applies, by its facts, to the judicial context; Standard Insurance extends the Murray Well rule to agency action.

In a recent LUBA case, decided on August 16, 1989, LUBA clarified the Standard Insurance case, defining the types of agency action that truly "moot" administrative appeals. In Century 21 Properties, Inc. v. City of Tigard, LUBA No. 89-043 (opinion attached as Exhibit A), the City of Tigard attempted to take action

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on its prior decision while the matter was on appeal to the Land Use Board of Appeals ("LUBA"), so as to revoke its earlier decision and "moot" the appeal. In the Century 21 case, LUBA quoted the Oregon Supreme Court as follows:

> "A case becomes moot for purposes of an appeal when, because of a change of circumstances prior to the appellate decision, the decision would resolve merely an abstract question without practical effect."

Matter of Holland, 290 Or 765, 767, 625 P2d 1318 (1981). See also Thousand Friends v. Department of Environmental Quality, 7 Or LUBA 84, 85 (1982).

In Century 21, LUBA held that its review of the matter would have a "practical effect" since, by getting to the merits of the case, the court's decision could provide a basis for relief pursuant to ORS 271.130 or for other possible legal action by the petitioner.

Here, the City of Milwaukie has requested a decision on the merits of this case. If a contested case occurs, it will have a "practical effect" by providing the City with an opportunity for a decision on the merits which it may use to defend against any future listing of the City of Milwaukie on the inventory contemplated by HB 3235. If the site is not relisted, a judgment on the merits could provide a basis for other legal action against the State for damages due to wrongfully listing the City as the owner of a Superfund facility. Conversely, if DEQ is permitted to simply dismiss its order unilaterally, "without prejudice," and without a hearing, the City will be denied an opportunity to obtain judicial review of the Agency's listing decision. Clearly, a dismissal of this nature is not the relief contemplated by the

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petitioner. Under the Century 21 case, DEQ's attempt to "moot" this appeal is impermissible. Having failed to demonstrate that all of petitioner's allegations of error are addressed by the Agency's dismissal, it is inappropriate to allow the Agency to unilaterally dismiss this decision over petitioner's objections. See Century 21, Opinion at pages 12, 13.

Finally, the Attorney General asserts that ORCP 54 is analogous to the procedure at issue here. Aside from whatever value ORCP 54 may have as an analogy, that rule does not apply to this or any other contested case proceeding conducted under ORS Chapter 183. For the sake of argument though, ORCP 54 may have some value. The problem with the Attorney General's analysis under ORCP 54 is that he has confused the parties. Here, it is the City who acts as the "plaintiff." The City is the petitioner in this appeal, and it is the City who brings this appeal as the aggrieved party. The Agency, by virtue of its order dated November 30, 1988, is merely defending its prior order. Allowing DEQ to unilaterally dismiss this action, once appellate rights have properly vested, is analogous to allowing a defendant to dismiss himself from a lawsuit once it has been filed by the plaintiff. Here, the Agency stands as a defendant. ORCP 54 does not permit a defendant to unilaterally dismiss himself from plaintiff's action. Such a result under ORCP 54 would be absurd. A proper analogy to ORCP 54 supports petitioner's analysis.

In summary, the Attorney General's response does not provide any evidence, analysis, or authority to support DEQ's

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July 14th action. That action, by itself, is an invalid order. DEQ acted in an ultra vires manner, by attempting to informally dispose of its November 30th Order once it had lost jurisdiction over the matter. An agency order may only be revoked by another valid order, unless the parties stipulate otherwise. Here, since DEQ lost jurisdiction to issue new orders in this matter once EQC's jurisdiction was invoked by the filing of the City's Notice of Intent to Appeal, the July 14th letter has no legal effect on the status of this contested case proceeding.

2. EFFECT OF HB 3235

By its terms, HB 3235 does not provide for retroactive application. Oregon courts have long held that, barring express language in the statute indicating such legislative intent, amending statutes will only be applied prospectively. Joseph v. Lowey, 261 Or 545, 495 P2d 273 (1972). The City has previously briefed its position on this issue in its Hearing Memo: Retroactivity, July 27, 1989.

The Attorney General's response to this issue begins on page 2, line 13, and continues through page 4 of his memorandum. The Attorney General discusses the effects of HB 3235 again on pages 7-9. Essentially, the Attorney General's position is that the 1987 Site Inventory Law "has disappeared" (A.G., p. 8, l. 7), and that there is no "continued right to a hearing." A.G., p. 7, l. 20.

At the outset, it is important to recognize that the method by which the hearings officer legally analyzes the effect of

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HB 3235 is critical. Once a party has filed an appeal pursuant to the then-applicable law, that party has a right to rely on the procedural and substantive law as it existed at the time the appeal was perfected, unless the amending law applies retroactively.

The common law presumption on retroactivity is based on constitutional principles of due process and equal protection. The common law rule provides that:

> "The first rule of construction is that legislation must be considered as addressed to the future, not to the past *** (and) a retrospective operation will not be given to a statute which interferes with antecedent rights *** unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of a legislature.'"

Green v. U.S., 376 US 149, 160 (1964) (quoting Union Pacific Railway Company v. Laramie Stockyards Company, 231 US 190, 199 (1913).

The burden of proving whether legislation applies retroactively rests with the party asserting that position. Here, the Attorney General has not identified any unequivocal language in either the Act or the legislative history of HB 3235 which overcomes this strong presumption against retroactivity. It is worth noting that analyzing this problem as one of "retroactivity" comports with the Attorney General's continued reliance on Sutherland. In Sutherland, it is clear that new legislation is forward looking and does not affect the rights of parties in past or pending cases.

Conversely, if the hearings officer were to analyze this issue in the terms suggested by the Attorney General--that is,

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whether the City has any "continued right to a hearing"--in effect, the burden of proof would be unfairly shifted to the City to prove that it still has a right to its previously perfected appeal. This is simply not the City's legal burden. The burden is upon the moving party to demonstrate retroactive application.

Because the Attorney General has submitted certain portions of HB 3235's legislative history, the City feels it is appropriate to provide the hearings officer with that bill's complete legislative history. These additional legislative minutes are attached as Exhibit B.

The full legislative record does not demonstrate "unequivocal" legislative intent to apply HB 3235 retroactively. For instance, Fred Hansen, Director of DEQ, on page 2 of the March 3rd minutes, indicates that: "We believe that getting about the business of cleaning up hazardous substances that have been released into the environment is what is most important. The amendments that are in this legislation will accomplish that task and still preserve the rights of property owners (emphasis added)."

Although Mr. Hansen did not elaborate on what he thought those rights might be, clearly, the legislature was being assured by the Director that the rights of property owners would be protected. At the time of these legislative hearings, the City had a perfected right to appeal the Director's decision. Retroactive application of HB 3235 would destroy that right and would be contrary to Mr. Hansen's assurances to the legislature.

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Clearly, the legislature was concerned with the protection of property owners' rights under the Superfund Act. On page 2 of the March 3rd minutes, Representative Jones expressed his concern as to what the impact of being on list would have on the value of an owner's property. On page 2 of the March 3rd minutes, Representative Keisling was concerned with the rights of potential buyers to notice of the property being contaminated. The Agency itself, through Mike Downs, indicated that the bill would "come up with an alternative to the contested case process and give those who might be listed some assurance to get involved in the decision making, but not the appeal." Minutes, Comments from Mike Downs, p. 4 (March 3, 1989) (emphasis added). Mr. Down's use of the term "might" seems to indicate that HB 3235 was intended to apply to future listing decisions, not to those pending.

On March 22, 1989, the House Committee on Energy in the Environment met to discuss HB 3235. In that hearing, the following exchange took place:

> "MOTION: REPRESENTATIVE HOSTICKA:
>
> I move to accept the corrected amendments.
>
> REPRESENTATIVE WEHAGE:
>
> Is there a process for appeal, or no appeal?
>
> DONACA:
>
> The standard is very high, to be removed from (the) list. You have to meet the requirements of the Superfund law. We did not discuss it. Undoubtedly there is an appeal process.
>
> REPRESENTATIVE WEHAGE:
>
> Are we specifically disallowing an appeal?

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REPRESENTATIVE CEASE:

Is this a problem? Let them look at this on the other side.

MOTION: REPRESENTATIVE DIX:

I make a motion that HB 3235 do pass as amended.

REPRESENTATIVE AGRONS:

I will vote "No" for no other reason than I want to say something about it on the floor. It offends me. If there is a problem getting out of committee, I will support it.

VOTE:

HB 3235 passes 8-1. Agrons, nay.

REPRESENTATIVE CEASE:

We will send this over to the senate with a letter.

CLOSES WORK SESSION ON HB 3235."

By the time this legislation proceeded to the senate, it was assigned to the Committee on Agriculture and Natural Resources. At that committee's hearing on May 11, 1989, the following exchange took place:

"SENATOR BRENNEMAN:

Under this bill, if a person makes the list, there is no appeal?

TOM DONACA, ASSOCIATED OREGON INDUSTRIES:

There is no appeal under administrative rule, but if the Agency made a gross error, you can use either a direct judicial or legislative route."

Over all, the legislative history evinces a significant concern for the rights of property owners under HB 3235.

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Furthermore, there was some confusion over the appellate rights of owners under the bill. However, it is clear that those owners who perfected their appeals in December 1988 acquired rights under the then-existing Superfund Act. The legislative history does not clearly tell us what the legislature intended regarding retroactivity. Clearly, though, the legislature wanted to preserve the existing rights of owners. Whether the legislature knew it or not, owners who had already filed appeals had acquired perfected appellate rights relative to their property being listed as a Superfund site. In order to divest those property owners' rights, HB 3235 must have unequivocally provided for such retroactivity. In the face of a silent act, there is a strong presumption against retroactivity. That presumption has not been overcome by the evidence in this record. The legislature did not express an "unequivocal intent" to apply HB 3235 retroactively.

3. CONSTITUTIONAL ISSUES: DUE PROCESS

Underlying the City's administrative and statutory rights in this matter is a constitutional due process right to a hearing. This constitutional right is explained in the City's legal memorandum previously submitted, entitled Hearing Memo: Due Process, July 27, 1989.

The Attorney General responded to that memorandum by indicating that, since the listing action is not an enforcement action or determination of liability under the Act, there is no depravation of any protected property interest. The Attorney General maintains that the Site Inventory List "merely serves the

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purpose of informing the public that a particular property is contaminated with hazardous substances." A.G., p. 6.

The Attorney General's argument is a circular one, contradicted by his own statements, by the legislative history of HB 3235, and by the relevant facts. In the Attorney General's Memo, p. 6, n. 1, he notes that the Milwaukie property is contaminated by toxic waste. The Attorney General then states that: "This was publicly known before DEQ's November 30, 1988, order and would have been publicly known whether DEQ put Milwaukie's property on the Site Inventory or not." Clearly, the Attorney General's "public information" theory for the listing procedure is a misnomer.

The Site Inventory List has several purposes and has far-reaching impacts. In addition to notifying certain individuals and the public, the list is a trigger mechanism for certain activities under the Superfund. Granted, listing on the inventory is not a legal prerequisite to enforcement, but, as a practical matter, it is the first step leading to a determination of whether a preliminary assessment is in order. The list also serves to notify the legislature for budget purposes, serves as a tracking and management device for the Agency, and provides a basis for making legal and factual determinations as to the extent of the "facility," the "release," and the "owner."

The list has far-reaching effects for persons identified as "owners" of a "facility" since, under the act, the <u>owner</u> is jointly and severally liable for remedial action costs unless

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certain narrow statutory defenses apply. In the City's July 27th Due Process Memo, the City enumerated some of the many impacts caused as a direct result of the City being placed on the Site Inventory List. Granted, some of these impacts are caused simply by the fact that the City's wells were polluted. However, much of the impact, in this case, is caused by the fact that DEQ's November 1988 Order listing the facility is ambiguous and mistakenly identifies only the City as the "owner" of the "facility." As a legal and factual matter, the "facility" is the underground aquifer which polluted the City's wells. DEQ's November 1988 Order actually misinforms the public and should be corrected. This contested case proceeding provides the City with its only opportunity to get to the merits of this wrongful order. As Mr. Bach noted on page 7 of the March 3rd hearing on HB 3235: "Part of the problem industry is having with this is the suspicion involved with being put on the list."

The City of Milwaukie believes that it was wrongfully placed on the list, and that, by being named as an owner, suspicion unfortunately has been placed on the City. Simply taking us off the list now, without an opportunity to get to the merits of this appeal, will preclude the City from correcting this mistake. If the City is relisted without the benefit of this contested case, the same substantive issues will be present, but our procedural rights to appeal will be gone. If DEQ is willing to stipulate that it erred in its November 30th Order, then there would be no need for this contested case. Otherwise, a dismissal without prejudice

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is no remedy at all. Contrary to the Attorney General's assertion, neither the July 14th order, nor HB 3235, "accomplished the same result that Milwaukie could have hoped to have obtained from a contested case hearing." A.G., p. 14. Obviously, if DEQ is not in any way bound by its July 14th dismissal order, the matter is not settled. If it were, we would not be pursuing this appeal.

In conclusion, HB 3235 does not permit the Agency to "start over"; it merely permits the Agency to move forward, unencumbered by new appeals. The previously filed appeals have not "disappeared" as a result of HB 3235. Similarly, the Agency's July 14th order has no affect on the City's perfected appeal. The City respectfully requests a hearing on the merits.

Respectfully submitted this 18th day of August, 1989.

O'DONNELL, RAMIS, ELLIOTT & CREW

By: Phillip E. Grillo
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E-18

KAFOURY: It is my understanding that with domestic ships that use their masters as their own pilots, that person does both the bar crossing and the river transit. If this was applied to the bar pilot, you would always catch a ship that is being piloted by an Oregon licensed pilot.

PETER GREEN: Section 5 would read: The maritime pilot, piloting a ship subject to the provisions of section 3 of this 1989 act, shall report to the DEQ any ship owner or operator having control over oil who does not provide financial assurance as required under sections 3 and 4 of this 1989 act.

193 **MOTION SEN BRADBURY: Moves adoption of the -3 amendment, as amended.**

195 **VOTE: There being no objections, the amendment is adopted.**

199 **MOTION SEN BRADBURY: Moves SB 1038, as amended, to the Senate Floor with a DO PASS recommendation.**

VOTE: The motion carries in a unanimous roll call vote.

CARRIER: SEN BRADBURY

HB 3235

Relating to hazardous substances; and declaring an emergency.

218 PETER GREEN: Submits and explains the -A5 amendments suggested by DEQ **(EXHIBIT I).**

230 **MOTION SEN KERANS: Moves adoption of the -A5 amendments.**

VOTE: There being no objections, the amendment is adopted.

234 SEN SPRINGER: We will carry the bill over.

SB 1190

Relating to programs related to funding for hazardous waste programs; appropriating money, and declaring an emergency.

260 FRED HANSEN, DIRECTOR, DEQ: Historically, SB 1190 was a parallel bill to HB 2176. It was dealing with the funding of the Superfund program. It proposed to fund half off of hazardous chemicals and half off of the petroleum industry.

A lot of concern was expressed from the hazardous chemical people whether solid waste was a player and should be part of the solution. What began to be a potential compromise was the realization that a number of facilities that would be subject to state Superfund would be old landfills;

although about 40% of national priority listed federal Superfund sites are landfills, a number of those are industrial. The level of municipal landfills owned by municipalities represent about 20% of the federal Superfund sites. The realization that landfills will play a role and solid waste tipping fees will be tied to that activity lead to discussions on how to fashion a comprehensive Superfunds program to address both solid and hazardous waste sites.

One approach was to carve out solid waste facilities in terms of liability and the mechanism to pay. One concept was that they would not be eligible for state Superfund monies and yet be paid for by solid waste tipping fees.

Another approach was 1126. That would have said that at the municipal level, if there were a level fill that needed action, they could use a tipping fee to pay for that. This would be mandatory with the funds used as needed. DEQ felt that if the program were in place, it needed to be used. There was the question whether it should apply to all sites, public and private. How do you deal with small municipalities who couldn't afford it?

How do you deal with limited cash flow?

372 SEN KERANS: What is it that we are getting after in the land fills that is different from what we are now after? What makes it a clean up site?

HANSEN: The programs that are being aimed for in SB 424 are conditionally exempt small quantity: generators, household hazardous waste, and those items that are still legally able to go into a landfill but are going to cause problems and landfills that are probably already closed. In addition, municipal garbage will produce leachate that contains material considered contaminants to groundwater.

TAPE 153, SIDE B

004 SEN KERANS: How many times do we dip into the tipping fee? We have some agreement on the small quantity hazardous question. Part of the problem that I have is finding the scope of the issue.

HANSEN: There is the inability of not being able to pull out a single thread but that the whole sleeve falls off.

SEN KERANS: There has to be a point at which the tipping fee will become a deterrent. It's a question of how many times and how much.

020 HANSEN: SB 424 established a fee of about $2/ton, $1 for regulatory programs and another $1 for recycling. Most discussion is that we should take that $1 that was to avoid trench warfare on recycling and use that $1 to assist in some clean up of landfills. It also directed EQC to establish the "true" additional cost as a result of out of state waste and that fee would be paid in addition. I still have second thoughts on that.

Bonding was going to be used to take more limited cash flow and allow that for dead issuance and repayment over time. Depending on your assumptions

about inflation rates, that might be an attractive way to do that. The conclusion of most of us is that Revenue bonds will not work. The Pollution Control bond funds could be utilized. The Pollution Control Bond Fund Constitutional amendment provides that it may go for facilities to control pollution. Many of the activities associated with cleaning up hazardous waste are activities not facilities. To be affected the amendment would need to be amended to add activities.

There is the question of how much we are talking about, either as it refers to bonding or the cash flow. Tied to this is that some places asking why they should pay into the solid waste fund and not get everything out. Others are afraid there won't be enough money there to get what they need. It's a question of how much, fairness and equity.

One of the real issues is in-state and out-of-state. If the tipping fee is used as a way to raise funds, should it be on out-of-state as well as in-state equally or should certain programs not be funded by out-of-state fees at all. The fee being imposed for funding the Washington hazardous waste program is on petroleum products coming to Oregon. Oregonians are paying $6 - 9 million per year to Washington.

There is also the question of the CSSI fee. There is an existing $20/ton tipping fee. There is discussion whether that should be increased to provide for either interim funding or some potential long term.

A number of people who didn't seem to think that 424 was a very good bill, seem to think that it looks much more attractive as the discussions move along.

In the long run, if you're looking at petroleum as funding this, is some kind of a gasoline tax an answer? Is that a long term solution?

101 PETER GREEN: Reviews the amendments suggested by DEQ and the Department of Revenue. The Department of Revenue amendments were an attempt to remove about 10 sections of the bill and simply allude to the proper existing statutory provisions to allow them to collect the fees that are specified in 1190.

111 MIKE DOWNS, DEQ: Addresses the highlights of the -1 amendments (EXHIBIT J).
-On page 2, line 21 is our amendment to deal with our concern over the $21 million cap. We think it should not be operated in a cash fashion. This would provide for the exclusion of loan guarantees, encumbrances and other claims against the fund.
-The new section 10 is the Department of Revenue amendments. They eliminate excessive language.
-Page 2, line 20, amends page 7, line 43 and inserts language that matches the language used in HB 2156. Amendments on lines 23 and 24 do the same.
-Page 8, line 37 affects the $20 million cap.
-On page 4 of LC draft, lines 8 - 11 amend language on page 10. If the DEQ orders a responsible party to do a clean up and the party believes they are not responsible but goes ahead and does the clean up, they can make a claim against the state Superfund. This amendment would set aside a

portion of the Superfund in a reserve status to only be used for those loan guarantees.

SEN KERANS: You can't make a claim against the capital reserves.

DOWNS: Page 4, lines 18 - 21, broadens the definition for orphan sites.

171 SEN KERANS: The Department of Revenue's amendments of May 3 are incorporated in the -1 amendments.

DOWNS: That's my understanding.

179 SEN SPRINGER: We haven't heard any objections to 1190-1.

184 **MOTION SEN KERANS: Moves adoption of the 1190-1 amendments.**

VOTE: There being no objections, the amendments are adopted.

186 SEN BUNN: Have we ever dealt with the railroad amendments?

SEN SPRINGER: We have had them presented, but not in Legislative Counsel form.

207 DIANA GODWIN, OSSI: I met with interested parties on this issue of the role solid waste fees play in contributing to clean up of sites which are contaminated with hazardous materials. Does or should solid waste be brought into what will be called the omnibus Superfund? If it is not, what is the role of solid waste in contributing to or cleaning up its own problems such that this other Superfund is not tagged for cleaning up solid waste sites.

The argument of those who will be contributing is that they don't want to be the only ones contributing if some of the money will be used for the clean up of solid waste sites. We have been saying that solid waste is going to be responsible for cleaning up solid waster problems. We have SB 424 where we can deal with exempt quantity and household hazardous waste programs. What is missing is what to do with existing closed solid waste sites that may need remediation. Solid waste is prepared to pay for that problem. The mechanism with which there is some agreement, is SB 1126 wherein we give authority to cities and counties who own a large number of closed sites the ability to generate funds. By definition, they will not be orphan sites. The solid waste haulers will assist them in the collection from the rate payers. The commitment for payment remains, the difficulty is in the exact nature of how.

272 BRAD HIGBEE, CITY OF PORTLAND: The City of Portland brought amendments to SB 1126 because municipalities are not going to be orphan sites. The only current funding sources will be resorting to property tax. That is not adequate. Therefore, we would move forward with idea to authorize a surcharge on solid waste care of the problems at our closed landfills. We are not attempting to shirk our responsibility but looking for funding alternatives.

291 SEN SPRINGER: How about municipal liability for sites that may not be strictly solid waste related? What are the options?

297 HIGBEE: The SB 1126 approach is a likely method for public sites. We're limited in terms of financing and funding alternatives.

311 GODWIN: Our commitment is clearly to provide funding for cleanup of solid waste sites. We're disinclined to have the solid waste fees pay for a site that is contaminated with industrial chemicals. We want to keep a clear line of solid waste fees paying for solid waste problems.

324 SEN FAWBUSH: I hope we can break down this territoriality. We can only speculate, but I would assume that you will not continue to be specific in what is and isn't your responsibility, but give full consideration to the idea that maybe we are all in this together. Down the road what comes out of an old landfill will probably look like what comes out of a Supersite. The problem will belong to all of us. We're trying to look at a broader payment base. The Hood River Landfill is an example of one that will take a lot of money to clean up.

360 HIGBEE: The county, as the owner and operator, is on the hook for the full cost of cleanup. Without some alternative funding mechanisms, the county property tax would be only method that the county could turn to.

SEN FAWBUSH: An alternative is the county franchised garbage haulers.

HIGBEE: Which is what we are looking to do with the amendments to SB 1126.

375 SEN KERANS: Property tax versus charging more for the service is a distinction without a difference. It's coming out of our pockets.

GODWIN: Our concern is that my clients have been willing to put themselves in the role of specific tax collectors. In that case we would like to tell our customers that it is not going into the company's pocket. It may be important to send the message to customers that we have to pay to clean up landfills and pay for past mistakes.

TAPE 154, SIDE B

006 SEN SPRINGER: What about private solid waste sites? Should we continue the fee for that purpose as well? Is that something you'd be willing to support?

012 GORDON FULTZ, ASSOCIATED OREGON COUNTIES: Our Association is looking at the issue. We are supportive of the 1126 approach.

We don't know about the sites, how many there are and what their condition may be. We are responsible for those solid waste public landfill sites, the others are a question. We need to take a look at the private ones.

GODWIN: It's our position they (Associated Counties) should.

055 SEN FAWBUSH: You don't want them in, they don't want you in.

GODWIN: The debate is whether or not we should use this public funding mechanism to also clean up closed, privately owned but now orphaned sites. Where it was privately owned by a responsible party we have no dispute. Where it is clearly an orphaned site, county or city fees should go to help pay for clean up. All members of the community put their garbage there.

SEN FAWBUSH: That may be a moot point. If we have a single fund with several different contributors, addressed to two true orphan sites, what you're saying doesn't count. If you're using it as an argument to avoid paying into the fund, that's different.

GODWIN: I'm willing to pay into a separate fund that does cover the private orphans.

HIGBEE: There might be three ways. We are advocating not participating in the larger 1190 Superfund nor having a separate solid waste fund, but having those sites that are municipal responsibilities funded through the 1126 type approach; a locally created fund as needed.

062 SEN KERANS: Ms. Godwin would say, "Only when there is a landfill."

HIGBEE: That is a fair characterization.

070 SEN FAWBUSH: At some point we have to call a halt to separate funds.

083 **PAT MCCORMICK, AMERICAN ELECTRONICS ASSOCIATION:** We presented the option of not multiple funds, but of a single fund using bonds as the funding mechanism paid off by chemical user, petroleum and solid waste tipping fees with the right to use General Fund as a contributor. The alternative that the solid waste folks proposed seems to be an alternative AEA would consider if they came up with an iteration that would meet the test of the Assembly. We prefer the method we presented but are willing to look at alternatives. The solid waste people recognize they will share in the Superfund activity and they would prefer to segregate and pay separately. That may be a gamble for them -- they don't know how many are out there and who may be participating.

TOM DONACA, AOI: Amen.

117 SEN FAWBUSH: You're saying it is okay for the solid waste industry to continue to meet separately and that whatever solution they come up with doesn't need to be integrated into the larger Superfund picture?

MCCORMICK: The only responsible way to move this program forward is with a solid total program. It should be seen as a total package.

128 SEN FAWBUSH: They will be in separate rooms same building?

SEN KERANS: Separate funds, same bill?

MCCORMICK: Those are alternatives you could choose, and they would be alright from our standpoint.

134 SEN KERANS: It would be good to have a matrix showing preferred alternatives, how much, who pays, how much industry thinks they can recover in some later search, etc.

143 DONACA: One element of concern is that DEQ has made the case that there may be recalcitrant people who will need to be pursued. That will cost. Using orphan site fund for dealing with probable responsible people will impair the state's ability to deal directly with the orphan sites for which this fund is being created. That money might come from the General Fund. It should not come out of the orphan site fund.

171 SEN KERANS: Is that to be construed as a position on behalf of the AOI?

DONACA: We're hoping that there would not be an expenditure.

SEN FAWBUSH: If it's just a loan, take it out of the Superfund.

DONACA: The repayment is likely to be down the road a ways.

187 MCCORMICK: The principal piece of the solution is the participation of solid waste. There are details that need to be resolved.

204 SEN SPRINGER: The sources of money is blurry.

DONACA: Money from a gasoline tax would be instead of not dependent upon. If the constitutional amendment didn't pass, there would still be funding for the program.

216 SEN KERANS: Have you thought about a constitutional amendment to permit the taxation of petroleum products in all of their variations? Would you recommend that as opposed to a consumer tax?

MCCORMICK: I was only trying to reflect that the suggestion was a significant change from previous responses from the petroleum industry about how taxation might work. It is an option that should be dealt with only after we have assured ourselves that we have a program in place that is adequately funded that don't require that kind of constitutional change.

SEN SPRINGER: General Fund is still part of the program?

MCCORMICK: It should remain as one of the options.

256 DONACA: The General Fund could not directly be used as the fundamental backing for bonds. You can't tie down a revenue bond. We would prefer to have other streams of income that are more likely to be approved and kept in place.

273 TOM GALLAGHER, OREGON WASTE SYSTEMS: We agree with what the counties, cities and Ms. Godwin said about tax on solid waste.

281 SEN SPRINGER: What about out of state waste?

SEN FAWBUSH: Waste systems currently has a large landfill and we're looking at tipping fees. You are a privately owned landfill under contract to a municipality, do we need to include you in both? The private folks don't want the municipalities to be included and a separate specific fund to be created.

GALLAGHER: OWS does not believe that solid waste should be a part of the overall Superfund payment system as proposed by AEA. There are significant costs that are basically going to be paid by solid waste fees. Nobody will volunteer to pay for all costs.

SEN FAWBUSH: You don't want tipping fees for solid waste landfills to be involved with any Superfund clean up of orphan sites?

GALLAGHER: Yes, because of the way orphan sites are defined. I would agree with those we said that those solid waste landfills, starting with municipal landfills, are really not orphan sites. There is somebody there and the tip fee is as good a mechanism as any to pay for the clean up of those sites. I would consider looking at private landfills that dispose of domestic solid waste. The big problem is who pools the money together to pay for the big and little cities and counties. In this case, because the municipalities are not the primary responsible party for private landfills, the general orphan sites not related to solid waste should not be paid for by solid waste dollars.

380 SEN FAWBUSH: The private haulers said you should have a separate fund that deals only with private orphan landfill sites. You said you agreed.

GALLAGHER: Our company only landfills Portland's waste. With the way Portland raises fees and distributes the money, we only talking about $21.63 to put it into the ground? You need to be talking to Metro, the City of Portland, and all the other people who represent the folks in the city whose bill will be raised. It really isn't going to impact my landfill. I have a contract for 20 years.

SEN FAWBUSH: You don't care.

GALLAGHER: I have some concerns because of the industry. I don't have a vested interest.

SEN FAWBUSH: Nobody has come to volunteer with what has been behind us and threatens to poison our environment. We don't anticipate they will volunteer in the future.

GALLAGHER: You're going to raise the fee for the residents in the city of Portland. I don't think it's OWS's position to tell that's good or bad. In terms of the solid waste industry's thinking, there is no relationship between solid waste and orphan sites, there is a relationship between those municipal and private landfills which can be traced directly to cities and counties where they are dumping their refuse. We will have a significant problem in Portland as to how you divvy up the money. Will you take money from Portland an spend it on Bligh? If so, in what relationship and proportion? To some extent maybe there should be some pooling of the

money. Nobody has come up with a satisfactory proposal. The solid waste industry has been pushed into this position be the petroleum and chemical people. There are a lot of things you want the garbage can payer to pay for. At a certain point the people are not going to want to pay that much. The prices are going to keep going up.

TAPE 155, SIDE A

In the future, you aren't going to have any orphan site or solid waste disposal problems, because in the contract you have guaranteed are now paying for future closure. I think it is reasonable to separate out as say that the solid waste industry should find some mechanism to take care of public municipal garbage sites and, potentially, those in which sold waste has been disposed. We have no idea how many there are nor what the liability is. If you put us in the big pot, you'll be raising the tip fee to pay for Superfund sites we know are coming in. That won't leave any room to pay for other programs you've looked at.

041 SEN SPRINGER: Should out of state waste be subject to fee?

GALLAGHER: OWS is close to negotiating for two eastern Washington sites. We firmly believe an additional $2 charge on out of state waste, it would make OWS uncompetitive. The whole value of putting the fee on out of state waste is predicated on there being out of state waste to put that fee on. There are 6 - 7 companies trying to site in eastern Washington. The bid specifications coming out of Washington are very tightly written. Those from Clark Count are saying that the bidder must make every good faith effort to resist additional charges on our of state waste. Others are saying that the company will need to eat the cost themselves; that would mean $20 million for us. It makes more sense to have a lot of capacity and to be in a viable economic situation. My company has a responsibility to Gilliam County. If it is possible for us to go after those Washington contracts, we will do that. The Washington state jurisdictions don't think that they should pay for Oregon in state recycling, hazardous waste exemptions and Superfund clean up.

In **424**, we have suggested that the recycling piece be taken out and that a dollar fee be levied on both in state and out of state waste. The fee levied on out of state waste would be dedicated either to the DEQ programs for solid waste or for the cost the EQC would determine are associated with out of state waste. Anything left over would go into a closure fund. It would not be unreasonable to make that fund available to cities below a certain level. That agrees with our position that a dollar dedicated to an out of state fee is a reasonable position.

102 SEN SPRINGER: Metro, and others, are trying to gut **424**.

SEN FAWBUSH: You were talking about additional charges and needs, but you don't think now is the time to start. You're interested in a dollar of that, the money that would go to local levels to deal with recycling and local hazardous waste, but you're not ready.

GALLAGHER: Not at all. Because of the nature of the way our company

collects the money on in state waste, that's other people's argument. My argument is that if you collect that money of out of state waste, put the recycling program in there and don't differentiate between in and out of state waste, then you have out of state waste paying for the Oregon recycling program. That's what I have difficulty with. The level of the tip fee is not my issue. I'm only drug in to that because out of state waste is in that pot.

128 SEN FAWBUSH: You're willing to charge out of state people a dollar, and you don't care what the level is in state.

GALLAGHER: The garbage that goes in the ground in Oregon ought to be subject to the same waste reduction as in state and out of state and that fee should be born by the people who are producing that garbage. We don't believe we can ask the people of Washington to pay for Portland's recycling. There should be reduction. I don't have a position on how much people should pay.

161 JASON BOE, OREGON PETROLEUM MARKETERS: We feel that significant progress has been made. Prior to yesterday's discussions, it looked as if Superfund was going to be responsible for a lot of private landfill type things with no contribution from them. They've accepted a responsibility. The critical policy decision to be made is whether you want to see separate funds or go back to the Superfund tri-partide system. We are all taking a gamble on this thing. It's a policy decision that has to be made. We have no objection to them assuming the responsibilities for the solid waste, both private and public, so long as there isn't a slop over into the other Superfund that is left where we are asked to take care of other people's problems. We accept that there is an overall responsibility of the state of coming up with a fund. We made a suggestion to cut out solid waste and private and public landfills from the overall Superfund.

192 SEN BRADBURY: We would be asking certain people to pay for problems that are not clearly identified with any source and asking other people to pay for the problems that are clearly identified to their source. There is no clear justification for deciding who should be separate and who shouldn't.

JASON BOE: Ideally every industry ought to be responsible for the problems they have caused. That is not the way it is nor can be. The policy question is whether you are willing to set one part of the industry outside of the total Superfund to be responsible for themselves and relieve the rest of the fund from any responsibilities on those projects or putting it all together.

220 SEN SPRINGER: On Thursday, will we be prepared to talk real numbers?

JASON BOE: There is another problem with the leaking underground storage tank program. My group would just as soon go for a constitutional amendment on that one to set up an insurance program that would involve a gas tax. We are not dealing just with Superfund but other situations that need solutions. These are bigger than anybody can handle singly. The question is how. I would suggests that the only body that could get

the statistics would be DEQ.

277 SEN SPRINGER: Has 3080 gone to Ways and Means?

BOE: Some of these things are going to come together in Ways and Means. We're concerned with the efficiency of whatever process it is to take care of these problems. You have to set policy and act as you see best.

293 SEN SPRINGER: Given the circumstances, the House has made the only choice they could in terms of cutting loose a couple of specific programs with specific sources. How that all comes together is something we haven't figured out.

BOE: We feel progress has been made now that everybody has stepped up to the table, in one form or the other, and said that they have a responsibility. How to put them together is your job.

SEN SPRINGER: Sen Bunn commented earlier on the Railroad Association amendment.

BOE: The amount is not enough to even talk to. The point is that solid waste has joined the table and admitted there is a responsibility. They define it one way and we might prefer to define it in another. I would look with great care on anybody who says they need to escape some of the tentacles of this octopus that is going to grab us all. There will be all kinds of exclusions asked for. We need to keep everyone in on some kind of equal level. The oil industry will be paying the bulk of the taxes on this because it is locked in on fuel oil. Let's not lose track of the fact that when you talk about these oil companies, you're taxing a small portion of that market. This will probably be reflected back into higher oil fuel rates for many people who use oil heat. We all have competitive problems.

351 **TOM NOVICK, OSPIRG:** Although it is thought that progress has been made, we are still an octopus. There several points we would like to restress: 1) whatever we're looking at needs to be a long term proposal; 2) since there is currently no specific amount of money on the table, we need to be looking at an adequate amount of funding; 3) we don't have any opposition to solid waste being included if they want to be part of the party; 4) we would want to see the concepts married in one bill or in some way that they move at the same time and 5) we don't object to bonding as a measure, if we are, $20 million is not adequate.

We are committed to continuing to work with individuals here. The bottom line for us is to see that this session ends with a long term, adequate funding mechanism. We are keeping our options open. Taking it to the ballot is one of them.

TAPE 156, SIDE A

SEN SPRINGER adjourns the meeting at 5:45 p.m.

SENATE COMMITTEE ON
AGRICULTURE AND NATURAL RESOURCES

May 30, 1989
3:00 p.m.

Measures Heard:
HB 2269:ws
HB 2530:ws
HB 3235:ws
HB 2783:ws
HB 3236:ph
SB 816 :ws
SJR 41 :ph & ws
SJR 42 :ph & ws

Hearing Room C
Salem, Oregon

Tapes 173-176

MEMBERS PRESENT:
SEN. DICK SPRINGER, CHAIRMAN
SEN. BILL BRADBURY
SEN. JOHN BRENNEMAN
SEN. JIM BUNN
SEN. WAYNE FAWBUSH
SEN. GRATTAN KERANS
SEN. BOB KINTIGH

STAFF PRESENT:
PETER F. GREEN, COMMITTEE ADMINISTRATOR
HOLLY DUNCAN, RESEARCH ASSOCIATE
LISA ZAVALA, COMMITTEE ASSISTANT
SHANNON KIGGINS, COMMITTEE SUPPORT

WITNESSES:
REP. PETER COURTNEY, DISTRICT 33
REP. BERNIE AGRONS, DISTRICT 53
RON EBERT, DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
RUSS NEBON, ASSOCIATED OREGON COUNTIES
MIKE DOWNS, ADMINISTRATOR, ENVIRONMENTAL CLEAN UP DIVISION, DEQ
DELL ISHAM, AUTOMOBILE CLUB OF OREGON
JOHN BURNS, WESTERN STATE PETROLEUM ASSOCIATION
JOEL ARIO, DIRECTOR, OSPIRG
ANGUS DUNCAN, DISTRICT UTILITY SERVICES COMPANY
JOHN LUBDEL, NORTHWEST NATURAL GAS COMPANY
GARY BAUER, PORTLAND GENERAL CORPORATION
MIKE GRAINEY, OREGON DEPARTMENT OF ENERGY
TED HUGHES, HUGHES AND ASSOCIATION

THESE MINUTES PARAPHRASE AND/OR SUMMARIZE STATEMENTS MADE DURING THIS MEETING. TEXT ENCLOSED IN QUOTATION MARKS REPORTS A SPEAKER'S EXACT WORDS. FOR COMPLETE CONTENTS OF THE PROCEEDINGS, PLEASE REFER TO THE TAPES.

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because of this.

362 **SEN. KINTIGH:** Could you tell me where that is in the bill?

370 **DUNCAN:** Page 4, line 15, sub-a of sub-4.

380 **DUNCAN** continues with testimony.

TAPE 174, SIDE B

001 **DUNCAN** continues.

011 **JOHN LUBDEL, NORTHWEST NATURAL GAS COMPANY** testifies in opposition to HB 3236, summarizing his submitted testimony **(EXHIBIT G).**

075 **GARY BAUER, PORTLAND GENERAL CORPORATION** summarizes **EXHIBIT H** for the committee, asking for an exemption of heat from this regulation.

099 **CHAIR SPRINGER:** How does this stuff move around?

104 **BAUER:** You would negotiate with the city.

109 **MIKE GRAINEY, OREGON DEPARTMENT OF ENERGY** summarizes **EXHIBIT I** in support of HB 3236.

125 **CHAIR SPRINGER:** Which amendments are you referring to?

130 **GRAINEY:** Those were picked up on the House side, in Section 4 of the A-engrossed bill.

<u>HB 3235</u>

135 **GREEN** provides background of HB 3235.

152 **MOTION: SEN. KERANS** moves adoption the amendments contained in **EXHIBIT J.**

156 **SEN. KERANS:** The discussion was regarding publication of inventory.

171 **DOWNS:** OEC is satisfied with the publication issue. The issue is an appropriate addition. HB 3235 would require an inventory to indicate what the hazard ranking is. It puts narrative in there about what it means.

175 **SEN. KERANS:** So we're going to list more specific data, and everybody agrees to this?

180 **DOWNS:** Yes.

193 **SEN. BRENNEMAN:** What is the process of having oneself removed from the inventory list?

200 DOWNS: They have two opportunities before they are placed on the list to resolve the problem.

251 VOTE: With no objections, the MOTION carries.

254 MOTION: SEN. KERANS moves HB 3235B-engrossed as further amended to the floor with a do-pass recommendation.

260 VOTE: MOTION carries, with SEN. BRENNEMAN and SEN. KINTIGH voting no, and SEN. BRADBURY excused.

SJR 42

290 TED HUGHES, HUGHES AND ASSOCIATES: This ought to be expanded. It's a good idea. Independent service stations are being forced out of business by the new Federal program.

310 CHAIR SPRINGER: It sounds like you're endorsing OSPIRG's amendments?

31 HUGHES: Yes, but I'm going a bit further.

319 CHAIR SPRINGER: Do you have any specific language?

325 HUGHES: Not now, but I could have it within a few hours.

335 CHAIR SPRINGER: I'm not sure the language in the amendments is broad enough.

339 HUGHES: It is, I think.

355 SEN. BRADBURY: The materials that you store would qualify as a hazardous substance?

360 HUGHES: Yes.

365 SEN. BRADBURY: The language OSPIRG has brought forth is pretty broad. If we decided this activity is relating to protection of public health and safety, we can do this.

371 CHAIR SPRINGER: That would be the intention of the committee, and will be established.

375 MOTION: SEN. KERANS moves the adoption of OSPIRG amendments to SJR 42.

378 SEN. JIM BUNN: The intent that we just went over is that we could be able to replace the leaking tanks?

385 SEN. BRADBURY: My intention was that any activity relating to public safety from the use of those tanks could be covered by this bill.

050 Schreiner: Refers to report by EPA, Hospital Waste Combustion Study, attachment to Exhibit E.

Each state should handle its own waste. We should not be a dumping ground for states with stricter regimes.

The AG opinion relies on economic discrimination through the Department of Commerce. Lawyers come down on both sides of issue, depending on side they wish to argue.

090 There is ample precedent for the prohibition of medical waste. We have identified specifically infectious medical waste.

Let's make a policy decision in HB 2663, turn it over to the attorneys, to make it constitutional.

105 There is an economic argument that we need business, but is this the kind of business we want, to be a dumping ground for other states?

There must be a balance of economic gain and environmental harm. The potential for environmental harm is clearly winning the balance. The message from the West Coast is that our livability is not for sale.

160 **DONALD SUTHERLAND**, Keizer: Presents testimony in favor of HB 2663, Exhibit U.

170 **MANUEL MARTINEZ**, Salem: Refers to AG opinion. Presents testimony in favor of HB 2663, Exhibit V.

One of our problems is with the Department of Environmental Quality, who is supposed to be taking care of our safety.

Cites letter from the Governor that EPA will accept out of state medical waste.

DEQ is importing garbage from out of state. Cites SB 347, sponsored by DEQ. DEQ should be protecting our interests.

280 **JIM SEARS**, Marion County Solid Waste Management: Supports HB 2337. Presents testimony, Exhibit G.

If there must be legislation, it should focus on occupational hazards of those who have the greatest exposure.

It should require proper containers and collection services. There should be no undue hardship due to cost.

350 Describes Marion County program for disposal of medical waste.

390 REP. CEASE: Closes hearings on HB 2031, 2337, 2663.

WORK SESSION ON HB 3235

Opens works session on 3235.

TAPE 94, SIDE B

030 **TOM DONACA**, Associated Industries of Oregon: Cites participants in consensus process of HB 3235 amendment.

050 **MIKE DOWNS, DEQ**: Presents summary analysis, Exhibit H.

Reviews hand-engrossed HB 3235, Exhibit I.

235 Resumes review of HB 3235, hand-engrossed.

350 REP. CEASE: Is everyone is satisfied, including OSPIRG?

JOEL ARIO, OSPIRG: Yes.

365 REP. PARKINSON: Why I should support this bill?

Donaca: This is a rational compromise to resolve previous problems. It is not a perfect piece of legislation, and it will solve the problem.

Ario: We were going to send to courts, brought in parties affected, took legitimate complaints, result is a law made by this legislature instead of the courts.

400 REP. AGRONS: Refers to p. 6, section 5, Exhibit I.

TAPE 95, SIDE A

Will the inventory be published and distributed widely? I am very dubious about that. What good would it do the world?

Donaca: Section 9 of the bill requires notification in the media.

REP. AGRONS: I find that abysmal, it is a lousy deal. What good does it serve except intimidation? I have no objections to having it available, but it is a public branding.

025 Ario: This is part of the 87 law. The justification goes to information being in the public domain and easy to get. If not, sophisticated buyers will be in control. It ought to be available to everybody.

037 REP. CEASE: This is a law that this Committee did not deliberate. There has been some real problem with it. What you have is an agreement by the parties. It doesn't satisfy everybody. All in all, it is a good compromise. It is better than the current bill.

055 REP. AGRONS: As long as it is on the table, we should look at all of it. I feel like I want to raise the issue.

REP. CEASE: There is a danger that this whole thing would fall apart. I would much rather see it pass out.

There is an addition to amendment -1, line 16, p. 2, adding the words "protection of."

MOTION: REP. HOSTICKA: I move to accept the corrected amendments.

095 REP. WEHAGE: Is there a process for appeal, or no appeal?

100 Donaca: The standard is very high, to be removed from list. You have to meet the requirements of the Superfund law. We did not discuss it. Undoubtedly there is an appeal process.

REP. WEHAGE: Are we specifically disallowing an appeal?

REP. CEASE: Is this a problem? Let them look at this on the other side.

140 **MOTION:** REP. DIX: I make a motion that HB 3235 do pass as amended.

REP. AGRONS: I will vote no for no other reason than I want to say something about it on the floor. It offends me. If there is a problem getting out of committee, I will support it.

180 VOTE: HB 3235 passes 8-1. Agrons, nay.

REP. CEASE: We will send this over to the Senate with a letter.

Closes work session on HB 3235.

PUBLIC HEARING ON HB 2663

210 **FERNE BURCHARDT**, Salem resident: Presents testimony, Exhibit J.

250 **JOHN VANCE**, Citizens for Clean Water: Presents testimony, Exhibit K. Emphasizes toxics generated from incineration of plastic containers of medical waste.

TAPE 96, SIDE A

060 **DIANA GODWIN**, OSSI: Directs remarks to Exhibit L, proposed revision of HB 2337, including amendments, Exhibit M.

Cites task force contributors to legislation.

090 Outlines key provisions.

Section 3 defines "infectious waste," a narrow definition, which excludes diapers.

125 Section 4 is crucial to this bill.

HOUSE COMMITTEE ON
ENVIRONMENT AND ENERGY

March 22, 1989
1:30 p.m.
Tapes 93-96

Hearing Room E
State Capitol
Salem, OR 97310

MEMBERS PRESENT:
REP. RON CEASE, CHAIR
REP. FRED PARKINSON, VICE-CHAIR
REP. BERNIE AGRONS
REP. DAVID DIX
REP. CARL HOSTICKA
REP. DELNA JONES
REP. PHIL KEISLING
REP. BOB PICKARD
REP. RODGER WEHAGE

STAFF PRESENT:
CAROL KIRCHNER, COMMITTEE ADMINISTRATOR
LINDA PUTMAN, COMMITTEE ASSISTANT

WITNESSES:

HB 2031
STEVE YOCUM, BROWNING-FERRIS INDUSTRIES
MIKE CASETTA, BROWNING-FERRIS INDUSTRIES
ROBERT CECIL, MAYOR OF JACKSONVILLE

HB 2663
DIANA OBER, GERVAIS
SHIRLEY WAITE, WOODBURN
DAVID SCHREINER, KEIZER
DONALD SUTHERLAND, KEIZER
MANUEL MARTINEZ, SALEM
FERNE BURCHARDT, SALEM
JOHN VANCE, CITIZENS FOR CLEAN WATER

HB 2337
JIM SEARS, MARION COUNTY
DIANA GODWIN, OREGON SANITARY SERVICE INSTITUTE
DR. LARRY FOSTER, OREGON HEALTH DIVISION
BOB EMRICK, KE ENTERPRISES, YAMHILL COUNTY
SCOTT GALLANT, OREGON MEDICAL ASSOCIATION
ED PATTERSON, OREGON ASSOCIATION OF HOSPITALS
NAN DEWEY, DENTAL & VETERINARY ASSOCIATIONS
DR. GORDON CUNNINGHAM, VETERINARIAN
TOM GALLAGHER, OREGON WASTE SYSTEMS

HB 3235
TOM DONACA, ASSOCIATED OREGON INDUSTRIES
MIKE DOWNS, DEPARTMENT OF ENVIRONMENTAL QUALITY
JOEL ARIO, OSPIRG

EXHIBIT
B

SENATE COMMITTEE ON
AGRICULTURE AND NATURAL RESOURCES

May 11, 1989
3:00 p.m.

Hearing Room C
Salem, Oregon

Tapes 149-152

Measures Heard:
HB 3235:ph
SB 1190:ws
SB 425:ws
SB 840:ws
SB 887:ws
SB 572:ws
SB 718:ws
SB 1192:ph & ws
SB 889:ph & ws
SB 816:ph & ws
SB 769:ph & ws
HB 2713:ws

MEMBERS PRESENT:
SEN. DICK SPRINGER, CHAIR
SEN. BILL BRADBURY, VICE-CHAIR
SEN. JOHN BRENNEMAN
SEN. JIM BUNN
SEN. WAYNE FAWBUSH
SEN. GRATTAN KERANS
SEN. BOB KINTIGH

STAFF PRESENT:
PETER F. GREEN, COMMITTEE ADMINISTRATOR
HOLLY DUNCAN, RESEARCH ASSOCIATE
WILLIAM BUSH, COMMITTEE ASSISTANT
LISA ZAVALA, COMMITTEE ASSISTANT

WITNESSES:
MIKE DOWNS, ADMINISTRATOR, ENVIRONMENTAL CLEANUP DIVISION, DEPARTMENT OF ENVIRONMENTAL QUALITY
TOM DONACA, ASSOCIATED OREGON INDUSTRIES
JOEL ARIO, DIRECTOR, OSPIRG
DAVID BARROWS, CHEM SECURITIES SYSTEM, INC.
JEAN CAMERON, ASSOCIATE DIRECTOR, OREGON ENVIRONMENTAL COUNCIL
JOHN H. LOEWY, ASSISTANT TO THE DIRECTOR, DEPARTMENT OF ENVIRONMENTAL QUALITY
BOB DANKO, SENIOR ANALYST, HAZARDOUS AND SOLID WASTE DIVISION, DEPARTMENT OF ENVIRONMENTAL QUALITY
PAT McCORMICK, AMERICAN ELECTRONICS ASSOCIATION
JASON BOE, OREGON PETROLEUM MARKETERS ASSOCIATION and THE OIL HEAT INSTITUTE
EVERETT CUTTER, MANAGER, THE OREGON RAILROAD ASSOCIATION
DIANA GODWIN, OREGON SANITARY SERVICE INSTITUTE
SEN. SHIRLEY GOLD, DISTRICT 7
KEITH BURNS, VALLEY WINE

THESE MINUTES PARAPHRASE AND/OR SUMMARIZE STATEMENTS MADE DURING THIS MEETING. TEXT ENCLOSED IN QUOTATION MARKS REPORTS A SPEAKER'S EXACT WORDS. FOR COMPLETE CONTENTS OF THE PROCEEDINGS, PLEASE REFER TO THE TAPES.

TAPE 149, SIDE A

008 CHAIR SPRINGER call the meeting to order at 3:15 p.m. Explains the agenda for the day.

PUBLIC HEARING: SB 3235

022 **MIKE DOWNS, ADMINISTRATOR, ENVIRONMENTAL CLEANUP DIVISION, DEPARTMENT OF ENVIRONMENTAL QUALITY** summarizes his submitted testimony in support of the amended HB 3235 **(EXHIBIT A).**

140 **SEN. KERANS:** That is the bill as amended?

142 **DOWNS:** Yes.

144 **SEN. KERANS:** So at no time there is a general publication of toxic releases?

148 **DOWNS:** Yes. But we do include a list of some of the things you've indicated.

150 **SEN. KERANS:** But not every site is listed.

152 **DOWNS:** That is true.

166 **SEN. KERANS:** How long does it take to move from list status to inventory status?

173 **DOWNS:** Several weeks.

182 **SEN. KERANS:** But in some cases it could be several months, could it not? And so far, there has been no publication of this, correct?

191 **DOWNS:** Yes.

194 **SEN. KERANS:** Is the public protected during that period?

202 **DOWNS:** The public would be aware if they were interested.

208 **SEN. KERANS:** How?

210 **DOWNS:** You would have to call the agency.

219 **SEN. KERANS:** But I don't know. Am I supposed to call everyday?

220 **DOWNS:** You would just have to call us once. Also, listing as a confirmed release does not mean that we must use the inventory process.

232 **SEN. KERANS:** How do I know that you decide to do that?

234 **DOWNS:** We publish press releases.

239 **DOWNS** continues.

264 **SEN. KERANS:** How do I get a copy of that list? Calling you?

265 **DOWNS:** Yes.

375 **SEN. BRENNEMAN:** Under this bill, if a person makes the list there is no appeal?

380 **TOM DONACA, ASSOCIATED OREGON INDUSTRIES:** There is no appeal under administrative rule, but if the agency made a gross error, you can use either a direct judicial or legislative route.

404 **SEN. BRENNEMAN:** Why is that written that way?

TAPE 150, SIDE B

001 **DOWNS:** We're not afraid of our decisions; we don't want to spend lots of money on an insignificant part of the process.

011 **SEN. BRENNEMAN:** You never make mistakes?

013 **DOWNS:** The current process gives us opportunities to correct them.

015 **JOEL ARIO, DIRECTOR, OSPIRG:** This is a delicate compromise.

029 **SEN. BRENNEMAN:** What about the spotted owl?

032 **DONACA:** We wouldn't have signed off on this unless we felt it was fair.

052 **ARIO:** There was extensive legal review of this measure.

057 **CHAIR SPRINGER:** Any more comments?

058 **ARIO:** We could have continued appeals and have had courts write the superfund law, or we could have come back here, which is what we did.

069 **DONACA:** The emergency clause is imperative, because there are people out there who need to know their status.

076 **DOWNS:** We have one small amendment for this (EXHIBIT B).

101 CHAIR SPRINGER: The fee that's collected is on the accompanying material, or just the harmful substance?

104 DOWNS: They don't have an incinerator at Arlington.

130 DAVID BARROWS, CHEM SECURITIES SYSTEM, INC.: We support this amendment.

141 JEAN CAMERON, ASSOCIATE DIRECTOR, OREGON ENVIRONMENTAL COUNCIL, summarizes her submitted testimony in opposition to this amended bill (EXHIBIT C).

192 CHAIR SPRINGER: Under current law, who has the burden of proof?

199 DOWNS: I'm not sure I know.

205 CHAIR SPRINGER: Under the process, are these decisions made by the director and then appealed in the courts?

212 CAMERON: Yes. But the burden of proof varies depending on the circumstance.

219 CHAIR SPRINGER: When you talk about the court of appeals, they don't like increases in their workload.

222 CAMERON: There were agency guidelines in my testimony.

WORK SESSION: SB 425

278 SEN. KERANS: Gives a general explanation of the 425A-5 and 425A-6 amendments (EXHIBITS D & E).

292 GREEN: Gives a point by point analysis of the 425A-5 and 425A-6 amendments.

359 SEN. KERANS moves the adoption of the 425A-6 amendments.

370 SEN. FAWBUSH: Does that include the 425A-5?

375 SEN. KERANS: Yes.

380 SEN. JIM BUNN: I object to these; we should leave in the tax credit and let revenue deal with this.

389 SEN. KERANS: Well, why don't we put the fees back in, too, and get this bill out by December?

411 SEN. JIM BUNN: The main reason that makes this less likely is if revenue decides they don't got the dough, this is stuck, and the farmers get hurt.

TAPE 149, SIDE B

SENATE COMMITTEE ON
AGRICULTURE AND NATURAL RESOURCES

May 16, 1989
3:00 p.m.

Measures Heard:
SB 1038 WRK, SB 1190 WRK,
SB 423 WRK, HB 3235 WRK,
HB 2022 WRK, HJM 9 PPW,
HJM 11 PPW

Hearing Room C
Salem, Oregon

Tapes 153 - 156

MEMBERS PRESENT:
SEN. DICK SPRINGER, CHAIRMAN
SEN. BILL BRADBURY, VICE CHAIR
SEN. JOHN BRENNEMAN
SEN. JIM BUNN
SEN. WAYNE FAWBUSH
SEN. GRATTAN KERANS
SEN. BOB KINTIGH

STAFF PRESENT:
PETER F. GREEN, COMMITTEE ADMINISTRATOR
HOLLY DUNCAN, RESEARCH ASSOCIATE
LISA ZAVALA, COMMITTEE ASSISTANT
SHANNON KIGGINS, COMMITTEE SUPPORT

WITNESSES:
MIKE GRAINEY, DEPUTY DIRECTOR DOE
IRV FLETCHER, OREGON AFL-CIO
RANDY MACDONALD, SEN LARRY HILL'S OFFICE
TOM O'CONNOR, LEAGUE OF PUBLICLY OWNED UTILITIES
RICH REITER, DEQ
STEVE KAFOURY, BOARD OF MARITIME PILOTS
ROB DOUGLAS, PORTLAND STEAMSHIP OPERATORS ASSOC
FRED HANSEN, DIRECTOR DEQ
MIKE DOWNS, DEQ
DIANA GODWIN, OSSI
BRAD HIGBEE, CITY OF PORTLAND
GORDON FULTZ, ASSOCIATED OREGON COUNTIES
PAT MCCORMICK, AMERICAN ELECTRONIC ASSOC
TOM DONACA, AOI
TOM GALLAGHER, OREGON WASTE SYSTEMS
JASON BOE, JASON BOE & ASSOCIATES
TOM NOVIK, OSPIRG

THESE MINUTES PARAPHRASE AND/OR SUMMARIZE STATEMENTS MADE DURING THIS MEETING. TEXT ENCLOSED IN QUOTATION MARKS REPORTS A SPEAKER'S EXACT WORDS. FOR COMPLETE CONTENTS OF THE PROCEEDINGS, PLEASE REFER TO THE TAPES.

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CENTURY 21 PROPERTIES, INC.,	)	
	)	
Petitioner,	)	LUBA No. 89-043
	)	
vs.	)	FINAL OPINION
	)	AND ORDER
CITY OF TIGARD,	)	
	)	
Respondent.	)	

Appeal from the City of Tigard.

Forrest N. Reike, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Rieke, Geil & Savage, P.C.

Phil Grillo and Jeff Bachrach, Portland, filed the respondent's brief. With them on the brief was O'Donnell, Ramis, Elliott and Crew. Jeff Bachrach argued on behalf of respondent.

KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON, Referee, participated in the decision.

AFFIRMED 08/16/89

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

EXHIBIT
A

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals City of Tigard Resolution No. 89-27 which approves applications for a minor land partition, site development review and a variance.

FACTS

The subject property is designated Medium High Density Residential by the Tigard Comprehensive Plan (plan), and is zoned Multi-family, 25 units/acre (R-25). The property includes 35.39 acres. The applicant proposes to develop a 266 unit apartment complex on a portion of the property. Petitioner is the owner of property adjacent to the proposed development.

On December 22, 1988, the planning director approved the applications subject to several conditions, including a condition requiring the applicant to dedicate a right of way for street purposes between 130th and 135th Avenues. The planning director's decision was appealed to the planning commission.

On February 7, 1989, the planning commission upheld the planning director's decision approving the applications. However, the planning commission modified some of the conditions of approval and eliminated the condition of approval requiring dedication of right of way between 130th and 135th Avenues.

On February 21, 1989, the applicant appealed the decision

of the planning commission to the city council. The applicant's appeal cited several of the conditions of approval. However, the applicant's notice of appeal did not cite, as a ground for appeal, the planning commission's elimination of the condition of approval requiring the dedication of a right of way between 130th and 135th Avenues.[1] On February 24, 1989, the decision of the planning commission was brought to the attention of the council as an "Agenda Summary Item." Record 45. On February 27, 1989, the city council decided to initiate review of the decision of the planning commission on its own motion and refunded the applicant's appeal fee.

After a public hearing, the city approved the applications, reimposing the condition the planning commission removed, viz, that a right of way be dedicated for a public street between 130th and 135th Avenues. Record 25. This appeal followed.

MOTIONS

Before turning to the assignments of error, we first address several motions presented by the parties.

A. Motion to File Reply Brief

The oral argument in this case was held July 13, 1989. On July 10, 1989, this board received petitioner's motion to file a reply brief. Petitioner moved to file a reply brief to respond to the city's motion to dismiss included in its response brief.[2] During a conference call with the parties on July 12, 1989, respondent objected to petitioner's request

to file a reply brief because petitioner asked for additional time to prepare the reply brief extending beyond the oral argument scheduled for the next day. Respondent argued that the date of the oral argument should not be extended. Respondent maintained that the five (5) day period between the time it filed its response brief and the date petitioner filed its motion for permission to file a reply brief was adequate time to prepare a reply brief.

We agree with petitioner that respondent's first motion to dismiss raises new issues to which petitioner should be allowed to respond. Accordingly, we grant petitioner's motion for leave to file a reply brief.[3]

B. Petitioner's Motions to Strike

Respondent filed two motions to dismiss -- one in its response brief filed on July 3, 1989 (first motion to dismiss) and one on July 11, 1989, two days before oral argument in this appeal (second motion to dismiss). Petitioner moves to strike both. In its first motion to dismiss, respondent argues this appeal is moot because the disputed right of way condition has been satisfied by execution of the right of way dedication on April 25, 1989, and that acceptance of the right of way by the city on July 3, 1989. In its second motion to dismiss, respondent contends that certain actions taken by the city concerning Resolution 89-27 (after the decision was appealed to this Board) render this appeal moot and

alternatively, that the city has voted to remand its decision. Before turning to respondent's motions to dismiss, we first consider petitioner's motions to strike the motions to dismiss. We do this because petitioner contends we lack authority to consider the motions to dismiss.

Petitioner moves to strike respondent's motions to dismiss arguing that under our decision in Standard Insurance v. Washington Co., ___ Or LUBA ___ (LUBA No. 88-109, April 26, 1989), the city had no authority to meet for the purpose of deciding to move this Board for remand or to take any action which "moots" this appeal. Petitioner also maintains that if the city had authority to move this Board for remand, or to take action to moot the appeal, we may not consider respondent's motions because the evidence supporting the motions is not in the record of this appeal. Petitioner contends that the exceptions to the rule that LUBA's review is limited to the record below do not apply here.[4] Petitioner also contends that it violates the statutory policy favoring expeditious review of land use decisions to allow a local government to cause a remand, unilaterally, before LUBA has decided the issues on appeal.

Respondent argues that its actions were taken in local proceedings separate from the proceedings which resulted in the decision at issue in this appeal. Respondent

reasons, therefore, that the principle discussed in our decision in Standard Insurance, supra, does not apply to the city's actions. Alternatively, respondent asks that we reconsider our decision in Standard Insurance.

We said in Standard Insurance:

> "* * * [w]here jurisdiction is conferred upon an appellate review body, once appeal/judical review is perfected, the lower decision making body loses its jurisdiction over the challenged decision unless the statute specifically provides otherwise." * * * Slip op 16.

Nothing in our decision in Standard Insurance suggests a local government loses its authority to request that LUBA remand a land use decision while it is on appeal. The city claims both that it voted to request LUBA to remand its decision and that it has taken action which renders our review moot. We do not believe our decision in Standard necessarily precludes a local government from taking such actions, after an appeal of its decision is filed with this Board.[5] In any event, as we explain in our discussion of the second motion to dismiss, infra, the evidence the city provides to establish the city's representations that it has revoked, withdrawn and voided its decision does support those representations.[6]

Petitioner correctly points out that our review is generally limited to the record of proceedings below. ORS 197.830(11)(a). There are exceptions to this rule recognized for circumstances where standing is at issue or where our jurisdiction is questioned. In Hemstreet Improvement

Corp v. City of Seaside, ___ Or LUBA ___ (LUBA No. 87-094, April 22, 1988), aff'd, 93 Or App 73 (1988), we decided that consistent with sound principles of judicial review, we may look outside the local record to determine whether we have jurisdiction to review a land use decision. In this proceeding, respondent's motions to dismiss claim, essentially, that there is nothing for this Board to decide and also that it is unnecessary for us to decide the appeal. Under these circumstances, it does not serve the interests of judicial economy or the statutory policy in favor of the expeditious resolution of land use disputes for this Board to refuse to consider matters outside of the record to determine whether the appeal is moot. Similarly, we believe sound principles of judicial review support our review of matters outside of the record, if necessary, to determine whether the local government should be entitled to have its decision remanded for further consideration, over petitioner's objection. Accordingly, we deny petitioner's motions to strike.

C. Respondent's First Motion to Dismiss

Respondent claims

> "The appeal is moot and should be dismissed because the applicant has deeded the right of way to the city, satisfying the condition of approval challenged by petitioner."

Respondent asserts that the only real dispute in this appeal concerns the city's imposition of condition of approval No. 6 which states: "Right of way shall be dedicated to the public

for a street between 135th Avenue and 130th Avenue." Record 25. Respondent contends petitioner's appeal is "moot" because the applicant has deeded to the city the disputed right of way between 130th and 135th Avenues. Deeds conveying the right of way to the city are attached to respondent's brief. Respondent reasons that because the right of way has been conveyed to the city, "a LUBA decision on the merits will not have any effect on the challenged right of way dedication [and] the appeal is moot." Respondent's Brief 4. Respondent asserts "[n]o relief this Board could grant would undo the property conveyance." Respondent's Brief 5. Respondent contends that the deed conveying the right of way to the city contains no language requiring the property to be reconveyed to the applicant in the event the condition is invalidated. Respondent reasons, therefore, there is nothing this Board can do to affect the disputed condition of approval.

In Matter of Holland, 290 Or 765, 767, 625 P2d 1318 (1981) the Oregon Supreme Court explained:

> "A case becomes moot for purposes of an appeal when, because of a change of circumstances prior to the appellate decision, the decision would resolve merely an abstract question without practical effect."

See also Port of Brookings v. Mather, 245 Or 230, 231, 421 P2d 695 (1966) and Fluhrer v. Brammel, 158 Or 694, 73 P2d 1265 (1938). If respondent is correct that our review can only answer an abstract question, and will have no practical effect this appeal must be dismissed. 1000 Friends v. Dept. of

Environmental Quality, 7 Or LUBA 84, 85 (1982).

Petitioner asks that we deny respondent's motion on several grounds.[7] Petitioner contends that the appeal is not moot because the right of way deeded to the city may be vacated. Petitioner also contends the dedicated right of way was not lawfully accepted by the city. Finally, petitioner argues the condition of approval is not an abstract issue because this Board may determine that the condition was improperly imposed and require the city to amend or delete the condition.

We agree with petitioner that the motion to dismiss must be denied. The basic issue on appeal is whether the city went beyond the scope of its authority in imposing a condition requiring the dedication. Although the applicant executed a deed conveying right of way to the city, that action does not render the issues before us moot. In essence, the rule respondent urges would permit parties to avoid reversal or remand simply by racing to final completion of projects while an appeal is pending before this Board.

Our review will have "practical effect." It will determine the lawfulness of the city's condition regarding dedication of the right of way. Our decision could provide a basis for the applicant or petitioner to seek vacation of the right of way pursuant to ORS 271.130(1) or for legal action to require reconveyance.

Finally, even if a valid conveyance and acceptance of the right of way would render this appeal moot, petitioner argues

the city's acceptance of the deeds violates several city ordinance requirements. We are in no position to determine the validity of petitioner's claims concerning the alleged ordinance violations. Neither are we in a position to determine whether a separate proceeding to challenge acceptance of the deeds is possible and, if so, whether the city's acceptance would be invalidated. With such uncertainty concerning the deeds, they provide no basis for dismissing this appeal as moot.

Petitioner's first motion to dismiss is denied.

D. Respondent's Second Motion to Dismiss

Respondent claims that the Community Development Code of the City of Tigard, (CDC) sections 18.20.10(B) and 18.32.390(A)(4),[8] authorize the city to revoke or void any approval "'issued or granted in conflict with' applicable regulations." Respondent's Memorandum in Support of Motion to Dismiss 1. Respondent claims that it has exercised this authority and has "withdrawn," "revoked" and "voided" its decision on appeal:

> "* * * due to the defective notice of the planning commission decision * * * new notice will be sent to all parties, which will result in the original Planning Commission decision becoming final unless a new appeal of that decision is filed with LUBA or the City Council initiates a new review proceeding." Respondent's Memorandum in Support of Motion to Dismiss 1.

As evidence of the above action, respondent supplies unapproved draft of minutes of a July 10, 1989 meeting of

the city council, which provide as follows:

"9. NON-AGENDA ITEMS:

"Phil Grillo of the City Attorney's office recommended City Council consider a motion to voluntarily remand and review their decision concerning a minor land partition, site development review, and variance (MLP 88-16, SDR, V 88-39) requested by Burton Grabhorn (Centron). Council had considered this issue on April 10, 1989, and subsequently adopted Resolution No. 89-027. The issue was currently before the Land Use Board of Appeals; it was Legal Counsel's recommendation this matter be preserved for judicial review. Mr. Grillo suggested this action be considered tonight in advance of the LUBA oral argument which was scheduled for July 13th.

"Motion by Councilor Schwartz, seconded by Councilor Johnson, to voluntarily remand and review Council's previous action (Resolution No. 89-027) as was proposed by the City Attorney's office.

"Motion was approved by unanimous vote of the Council present.

"10. EXECUTIVE SESSION:

"The Tigard City Council went into Executive Session at 9:56 p.m., under the provisions of ORS 192.660(1), (d), (e) and (h) to discuss labor relations, real property transactions, and current and pending litigation issues.

"11. ADJOURNMENT: 10:15 P.M."

Respondent provides no explanation of the meaning or effect of the unsigned draft minutes other than the argument advanced in its memorandum in support of its motion to dismiss.

Our fundamental problem with respondent's second motion to dismiss and subsequent memorandum in support thereof, is that we are provided no evidence that the city has actually withdrawn, voided or repealed Resolution 89-27. Respondent must provide us with some evidence that the city has in fact

withdrawn, voided or revoked Resolution 89-27 as it argues it has in its memorandum. The draft minutes do not demonstrate that such action occurred. At most, those minutes suggest the city council desires that its decision be remanded for further action. We therefore deny respondent's second motion to dismiss, and treat that motion, instead, as a motion for voluntary remand.

Petitioner contends, as in its motions to strike, that the city does not have authority to affect its decision once its decision has been appealed to LUBA, and also that we cannot examine the draft minutes reflecting what the city did, because our review is limited to the record and the draft minutes are not in the record below.

We have stated above that nothing in our decision in Standard Insurance v. Washington County, supra, prevents the city from voting to ask this Board to remand its decision. Although the more conventional procedure for requesting a voluntary remand would be for the city to set forth its reasons for (and proposed course of action on) remand in its motion for remand, we see no reason why the city's proposal for voluntary remand cannot be included in the minutes of a meeting of the city council. In reviewing the minutes for this purpose, we do not exceed our statutory limitation to review of the local record any more than we would if the city's proposal for remand were contained solely in a motion for remand.

A local government's request for remand, over petitioner's

objection, is only appropriate where the local government demonstrates that remand will provide the petitioner with everything it would otherwise be entitled to from this Board. Mobile Crushing v. Lane County, (LUBA No. 84-092, January 16, 1985, Order Denying Motion for Remand of Respondent Lane County); Brice v. Portland Metropolitan Area Local Government Boundary Commission, 2 Or LUBA 245 (1980). For example, where a petitioner alleges that a local government adopted inadequate findings and requests that we remand the decision for adequate findings, the local government could agree its findings are inadequate and agree to a remand of its decision. If the local government's agreement to a remand of its decision includes an agreement to address all of petitioner's allegations regarding inadequate findings, remand is appropriate. Mobile Crushing v. Lane County, supra; Brice v. Portland Metropolitan Area Local Government Boundary Commission, supra.

The draft minutes, however, do nothing to explain what the city proposes to do on remand. The course of action respondent suggests in its memorandum does not make it clear to us that the city intends to address the errors petitioner alleges in this appeal.[9] Having failed to demonstrate that all of petitioner's allegations of error will be addressed on remand, we believe it is inappropriate to remand the city's decision over petitioner's objections, and respondent's motion for remand is denied.

/ / /

FIRST ASSIGNMENT OF ERROR

"The City Council did not take the matter up for consideration within the prescribed time limits, or in accordance with the procedures specified by the Community Development Ordinance."

Under CDC 18.32.310(b) city council review of a decision of the planning commission may be initiated in the following ways:

> "(1) The filing of a notice of review as provided by Section 18.32.340 by any party to the decision by the close of the city business day within ten days of the sending of the notice of final decision;
>
> "(2) The council or commission, on its own motion seeks review by voice vote within ten days of mailed notice of the final decision; or
>
> "(3) Referral of a matter under Section 18.32.090(d) by the initial hearings body to the council, upon closure of the hearing, when the case presents a public policy issue which requires council deliberation and determination, in which case the council shall decide the application.

Petitioner contends that under CDC 18.32.310(b)(2), the city council is required to, but did not, initiate its review of the decision of the planning commission within ten days from the date the decision of the planning commission was mailed to the parties. Petitioner contends that the city does not have authority to review the planning commission decision on its own motion if that motion is made more than ten days after notice of the planning commission's decision is mailed to the parties.

Respondent argues that petitioner may not attack, in this appeal of the council's final review decision, the council's earlier decision to initiate review. Respondent argues that to challenge the council's decision to initiate review petitioner

must, but did not, file a timely notice of intent of appeal to this Board from the council's decision to initiate review of the decision of the planning commission. Respondent also argues that the city council had authority to initiate review of the commission's decision in the manner it did. These arguments are addressed separately below.

A. Scope of Petitioner's Appeal

Respondent argues that petitioner may not attack the city's decision to review the action of the planning commission because no notice of intent to appeal was filed with this Board within 21 days from the time that the city council made its decision to initiate review.

We disagree. The city's council action to initiate review of the decision of the planning commission was not a final land use decision subject to our review. See ORS 197.015(10)(a). It was merely part of the process leading up to its adoption of the challenged resolution. The city council's final land use decision is the decision from which the petitioner's notice of intent to appeal was filed, i.e., the city council's resolution approving the applications. Any part of the single city process which led to the city council's adoption of the challenged resolution may be attacked so long as a timely notice of appeal is filed from the city's final decision adopting the resolution. We conclude that petitioner's first assignment of error is properly before us.

B. Authority of Council to Initiate Review

Respondent argues that the city council did timely initiate review of the decision of the planning commission. Respondent points out that under CDC 18.32.310(b)(2) the period during which the city must initiate its review begins to run ten days from the date of "mailed notice" of the commission's decision. Respondent contends that "mailed notice" means notice provided under CDC 18.32.270.[10] Respondent argues that under CDC 18.32.270, the council had ten days to initiate review of the planning commission decision from the date the decision was made available to the council, not ten days from the date the decision was mailed to the parties. Respondent argues that the time for the city council to initiate review of the decision of the planning commission does not begin to run until after the city council has been properly notified of the decision. Respondent contends the Court of Appeals reasoning in League of Women Voters v. Coos County, 82 Or App 673, 729 P2d 588 (1986), that a petitioner's time to appeal a land use decision should not begin until the petitioner receives the notice to which it is entitled, applies to the city council in these circumstances as well. Respondent maintains that the period for council review did not expire until the council received proper notice.

Respondent argues that the council did not receive the notice of the decision of the planning commision to which it was entitled, until the council was given the Council Agenda Summary Item on February 24, 1989 for its regular meeting of February 27, 1989. Respondent contends that this was the

council's notification under CDC 18.32.270 that the planning commission had reached a decision in the matter. Respondent points out that the city council took action to initiate review three days after the decision was made available to it, on February 27, 1989. Respondent concludes that the city council's initiation of review of the decision of the planning commission was timely.

We must decide whether the council initiated review of the decision of the planning commission within ten days of "mailed notice of the final decision" of the planning commission under CDC 18.32.310(b)(2) and 18.32.270. These CDC provisions are ambiguous. It is not clear whether the "mailed notice" to which CDC 18.32.310(b)(2) refers includes only notice mailed to the applicant and parties, or also includes notice of the decision "made available to the members of the council." CDC 18.32.270.

CDC 18.32.270 establishes a process for providing notice of the commission's final decisions. We believe the term "mailed notice of the final decision" in CDC 18.32.310(b)(2) is a shorthand description of this process. CDC 18.32.270 describes "notice" as <u>both</u> the provision of notice mailed to the applicant and the parties <u>and</u> provision of notice "made available to the members of the council." The purpose of CDC 18.32.310 is to provide a procedure for council initiation of review of decisions of the planning commission. It is reasonable to interpret the city's ordinance to provide that

the period for initiating council review of decisions of the planning commission does not expire before the council is made aware of the action it has authority to review. As respondent points out, it would be unreasonable to interpret the city's ordinance to require it to schedule special meetings to initiate review of planning commission decisions.[11] We review the city's interpretation of CDC 18.23.270 and 310 to determine whether it is correct. McCoy v. Linn County, 90 Or App 271, 275, 752 P2d 323 (1988). We also interpret the city's ordinance in a manner which gives meaning to all parts. League of Women Voters v. Metropolitan Service District, ___ Or LUBA ___, (LUBA No. 88-102, July 11, 1989), slip op 7.

In order to give effect to the purpose of CDC 18.32.310(b)(2) and 18.32.270, we conclude that proper notice of a planning commission decision includes both mailing the decision to parties and making the decision available to the city council. We believe that under these CDC provisions, the city council must initiate review of a planning commission decision within 10 days from the date notice of the decision of the planning commission is made available to the council pursuant to CDC 18.31.270.[12]

The planning commission's decision was made available to the council three days before the regularly scheduled council meeting following the planning commission's decision. Within three days after the decision was made available to the council, it met and decided to initiate review. Under these

circumstances, the council timely initiated review of the decision of the commission and, therefore, the council had authority to initiate review under CDC 18.32.310(b)(2).[13]

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The City Council exceeded their [sic] authority in reviewing the creation of an east-west street connecting 130th to 135th Avenue."

Petitioner contends that council review of the decision of the planning commission is limited by CDC 18.32.320(b)(6) as follows:

> "The review of a decision by the commission * * * by the council shall be:
>
> "* * * * *
>
> "(2) Limited to the grounds relied upon in the notice of review as provided in Section 18.32.340(a), and conducted in accordance with the provisions of Sections 18.32.160 through 18.32.260 and 18.32.310;
>
> "* * * * *."

Petitioner contends that because it believes the council did not properly initiate review of the decision by its own motion, it only had authority to review the issues raised in the applicant's appeal of the commission decision, notwithstanding that the council dismissed the applicant's appeal in favor of conducting its own review. Petitioner contends that because the right of way issue was not raised in the applicant's appeal, the council could not consider or impose a condition requiring dedication of right of way between 130th and 135th

Avenues.

Respondent contends that when the Council initiates review on its own motion, CDC 18.32.320(b)(2) does not apply. Respondent argues, alternatively, that the applicant's appeal sufficiently raised the 130th to 135th Avenue right of way issue for the council to consider that issue.

We agree with respondent that CDC 18.32.320(b)(2) does not apply in this case. By its terms, CDC 18.32.320(b)(2) only applies to city council reviews initiated by a notice of review. CDC 18.32.270 does not apply to limit the scope of council review where the council initiates review on its own motion. Accordingly, we conclude the council had authority to consider the condition of approval requiring dedication of right of way between 130th and 135th Avenues.[14]

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "The Planning Director exceeded his authority by requiring the dedication of a right-of-way and construction of an east-west street connecting 130th and 135th Avenues."

Petitioner contends that neither the planning director nor the city council has the authority to require as a condition of approval, dedication for a new street of right of way between 130th and 135th Avenues. Petitioner's contention is that because the planning director, who originally imposed the disputed condition, did not have authority to impose the condition, the council (in reviewing the planning commission

decision on the appeal of the decision of the planning director) did not have authority to impose the condition. Petition for Review 12. Petitioner maintains that although the code specifically gives the hearings officer authority to require a right of way dedication for a new street in approving conditional use permits (CDC 18.130.040(c)(6)), it does not specifically give such authority to the planning director in approving a minor partition or site review.

Respondent argues that the city council's authority to impose the condition does not depend on the decision of the planning director. Respondent argues the city council has the authority and responsibility to impose the disputed condition of approval under the comprehensive plan and the CDC in order to manage the impacts "on the transportation system occasioned by this development and future development." Respondent's Brief 15. Specifically, respondent points out that it has done exactly what is contemplated by its comprehensive plan by requiring the developer to dedicate the right of way for a street. Respondent cites the following comprehensive plan policies to support the right of way condition:

> "* * * Generally, new streets are dedicated and constructed by a developer. * * * [s]treet dedications and improvements can be required as part of the development approval process. Plan Vol. 1, page 227, 228.

We agree with respondent that it has authority under both its ordinance and comprehensive plan, to require as a condition of approval, that the applicant dedicate right of way to create

a new street. This is evidenced by the provisions cited by respondent[15] and by CDC 18.32.250(f)(2)(D)[16] which specifically authorizes the imposition of a condition requiring "dedication of easements," which is what the city did.[17] Respondent has established that the condition is an exercise of the city's authority to mitigate the impact of the proposed development. Respondent has shown that the condition is reasonably related to the development proposed. The condition is a valid exercise of the city's power. See Benjamin Franklin Dev. v. Clackamas County, 14 Or LUBA 284 (1986); O'Keefe v. West Linn, 14 Or LUBA 284 (1986).

Petitioner has not established that the condition exceeded the authority of the city.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

> "The Director, by requiring dedication of street right-of-way and construction of a new street, effectively changed the application from a minor partition to a major partition, without the authority to do so."

Petitioner points out that the CDC distinguishes between major partitions and minor partitions based on whether a new street is created. CDC 18.162.020(a) and (b). Petitioner reasons that because the application was for a minor partition, the city may not require, as a condition of approving a minor partition, the creation of a street. Petitioner claims that the city's condition requiring dedication of right of way for public street purposes converted the minor partition to a major

partition and the applicant must reapply for a major partition.

Respondent argues that if the city committed error in requiring dedication of a right of way for a public street as a condition of approval for a minor partition, the error is procedural and prejudices no one. Respondent points out that under ORS 197.835(8)(a)(B) we may not reverse or remand on the basis of a procedural error which does not prejudice petitioner's substantial rights.

Respondent further contends that under CDC 18.162.040(F) the procedures and the substantive approval criteria for major and minor partitions are identical.[18] Respondent maintains that requiring an applicant to apply for a major partition for the sole purpose of enabling the city to impose an otherwise lawful condition of approval accomplishes nothing. Respondent states that the only distinction between a major and minor partition is the description of the application on the mailing label placed on public notices.

Petitioner only identifies the distinction between the definitions of minor and major partitions regarding creation of a street as its basis for remand. We do not understand how this difference in definition affects the authority of the city to require dedication of right of way as a condition of approval of a minor partition.

There are three distinctions between the city's standards for major and minor partitions. For the preliminary applications

"[i]n the case of a major partition, the applicant shall include the proposed right of way location and width, and a scaled cross section of the proposed street (to include any reserve strip.)" CDC 18.162.070(b)(7).

For the final application

"[i]n the case of a major partition, the applicant shall include the proposed right of way location and width, and a scaled cross section of the proposed street (to include any reserve strip)." CDC 18.162.080(b)(10).

Finally, CDC 18.162.110 provides that major partitions must be monumented and provides monumenting standards. We do not view these provisions as providing a basis for us to conclude that the city's failure to nominally process this partition as a major partition is error.[19] Alternatively, if it is error, it is a procedural error and petitioner fails to demonstrate prejudice to its substantial rights, as required by ORS 197.835(8)(a)(B).[20]

We are cited to no distinction in the manner in which a major and minor partition are processed by the city and we find none. The persons entitled to receive notice of partition are the same for both, (CDC 18.162.040(e)); the approval criteria employed are the same for both (CDC 18.162.040(f)). The only distinctions relate to the information required to be placed on the partition map and to monumentation. The city, however, required both the monumentation and the major partition map information. Any error committed by the city is harmless.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

"Dedication of a "local street" right-of-way and construction of the required "local street" is inconsistent with the provisions of the Tigard Comprehensive Plan."

Petitioner contends that a condition of approval requiring dedication of a "local street" right of way and construction of the required local street is inconsistent with the provisions of the Tigard Comprehensive Plan (plan).

Petitioner points out that the disputed right of way is termed by the city a "local street." Petitioner points out, however, that 130th and 135th Avenues are classified by the city as minor collectors. Petitioner argues that any street connecting two minor collectors is not consistent with the plans specifications for a local street.[21]

Petitioner also argues the city's plan does not list a new collector connecting 130th and 135th Avenues, and contends the city may not authorize creation of such a street without first amending its plan. Petitioner asserts that the plan "* * * clearly articulates the location and number of collector streets that are required in the planning area, and does not include the proposed street." Petition for Review 16.

Respondent states that the disputed right of way dedication is for a "local street." Respondent maintains that this conclusion is inevitable because the right of way and pavement widths required for the right of way comply with plan standards for a local street. See n 21. Respondent agrees with petitioner that a local street is designed to allow traffic

movement out of neighborhoods "to major collectors and arterials." Respondent's Brief 23. Respondent points out that the right of way it required meets all of the standards for a local street and that, importantly, the city required the design of the right of way to be curvilinear to "discourage through traffic." Respondent Brief 23.

Respondent also contends that its condition of approval requiring a right of way be dedicated between 130th and 135th Avenue at the location proposed is consistent with plan policy 8.1.1, which provides "[t]he city shall plan for a safe and efficient roadway system that meets the current and anticipated growth and development." Respondent further argues that the right of way dedication is consistent with CDC 18.108.060(b) which discourages direct access onto collector streets such as 130th and 135th Avenues. Respondent's Brief 21.[22]

The city's findings state in part:

> "The creation of an east-west local street, * * * would enhance traffic circulation within the neighborhood and allow for improved access to Summerlake Park which lies to the east. The adopted park plan calls for improvements to Summerlake Park as a community park, with vehicular access primarily from 130th Avenue/Winterlake Drive. The park will be a traffic generator, attracting traffic from the residential areas along 135th Avenue. Currently, Brittany Drive is the only direct connection between 135th and 130th. Therefore, it is desirable to have an alternative connection to serve the multi-family residential area south of Scholls Ferry Road. * * *"

We believe the street right of way the city required is appropriately characterized by the city as a local street. A local street serves "primarily" to provide direct access to

abutting property and to allow traffic movement within the neighborhood. Direct access onto collector streets is discouraged under the plan. The city found that the proposed development will result in several driveway access points. Record 23. In order to avoid access direct from these driveway access points onto collector streets, the city required the provision of a right of way for a local street to accommodate the increased traffic circulation needs of the neighborhood due to the development. The city also found the local street will serve to facilitate the movement of traffic within the neighborhood as well as to allow improved access to Summerlake Park. Record 24.

The city's resolution does not appear to contemplate that the right of way it required will be used to "collect and transport traffic <u>from</u> local neighborhoods and abutting property <u>out</u> of the neighborhoods to major collectors and arterials," (emphasis supplied), a function properly satisfied by a minor collector. Similarly, there is nothing in the evidence or findings to which we have been cited which suggest that the right of way will serve the function of a major collector. The purpose of the right of way, as we understand it, is to provide for traffic movement within the neighborhood and to provide direct access to abutting properties. The right of way for the proposed steet also provides additional access to Summerlake Park, located in the neighborhood. We see nothing in the plan which requires that streets running through

neighborhoods be constructed to collector street standards simply because a park is located within the neighborhood and park traffic may be served. We are cited to no evidence to show that the expected traffic impact from creating the proposed street will exceed the volume or the other plan standards for a local street. See n 21. Nothing about provision of improved access to the park suggests that the primary function of the right of way for the proposed local street, is any more than a means for providing for traffic movement within the neighborhood and access to abutting property.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

> "The City Council's decision to require a new right-of-way and construction of a local access street across petitioner's property amounts to an unconstitutional taking."

Petitioner contends that the city's decision in this case authorizes and determines the existence of a street connecting 130th and 135th Avenues at the subject location. Petitioner argues that, because it has the misfortune of owning adjacent property in the path of the new street, petitioner will be required to dedicate to the city the balance of the contemplated right of way when petitioner attempts to develop its own property. Petitioner argues that the city's requirement that the applicant dedicate right of way for a new street has, therefore, taken petitioner's property in violation

of the Oregon and U.S. Constitutions.

Respondent argues that the appealed decision does not extend the right of way across petitioner's land, and does not exact anything from petitioner. Respondent argues that the petitioner's claim of an unconstitutional taking is premature at best.

We agree with respondent that no taking of petitioner's property has occurred. Petitioner has not requested development approval from the city, and the city has not made any decision which would deny petitioner any use of its property. Petitioner's claim of an unconstitutional taking is premature. See Williamson County Regional Planning Commission v. Hamilton Bank, 473 US 172, 105 S Ct 3108, 87 L Ed2d 126 (1985).

The sixth assignment of error is denied.

The decision of the city is affirmed.

FOOTNOTES

1 Planning staff suggested to the council that it review the decision of the planning commission to "evaluate the right of way issue raised by the applicant and the need for an east-west street as originally required by the Planning Division decision." Record 115.

2 Respondent's motion to dismiss is styled a "first affirmative defense." In this opinion, we refer to respondent's first affirmative defense contained in its response brief as respondent's first motion to dismiss.

3 Petitioner's motion for reply brief was granted orally by the Board during a conference call with the parties on July 12, 1989. We required that petitioner file the reply brief before the time set for oral argument in this proceeding, and petitioner did so.

4 The Board may consider matters outside of the record in determining whether a party has standing and to determine whether it has jurisdiction to consider an appeal, Hemstreet v. Seaside, ___ Or LUBA ___ (LUBA No. 87-094, April 24, 1988), slip op 4, and in the circumstances specified in ORS 197.830(11)(C) regarding evidentiary hearings.

5 The parties argue at length concerning the effect of our recent decision in Standard Insurance Co. v. Washington County, supra, on a local government's authority to withdraw, void or revoke a decision while that decision is pending before this Board. Standard Insurance did not concern a local government decision to revoke or repeal a decision while that decision was pending before this Board. We have no occasion in this proceeding to determine whether our decision in Standard Insurance is properly interpreted to preclude such action.

6 It is not clear that the city actually made a decision to request that we remand its decision. The minutes of the meeting at which the city voted to "voluntarily remand and

review [its] decision * * *" on appeal are unsigned.

7

Petitioner contends that the motion to dismiss relies entirely on new matter not in the record below. We have already explained above that we may review evidence outside the record to determine whether the appeal is moot.

8

CDC 18.20 010(B) provides:

"Any permit or approval issued or granted in conflict with the provisions of this chapter shall be void. (Ord. 89-06; Ord. 83-52)"

CDC 18.32.390(A)(4) provides:

"A material misrepresentation or mistake of fact or policy by the City in the written or oral report regarding the matter whether such misrepresentation be intentional or unintentional."

9

We have been asked in this case to reverse the city's decision on the basis that its decision, in several particulars, exceeds the city's authority. Remanding the case will not resolve issues which petitioner contends warrant reversal.

10

CDC 18.32.270 provides that notice of decisions of the planning commission "shall be mailed to the applicant, and to all parties to the decision, and shall be made available to the members of the council."

11

The Tigard City Council is a lay body which meets at regular intervals to conduct city business.

12

This interpretation ensures that the interests of the public are protected in that the council has a meaningful opportunity make a decision to initiate review of a planning commission decision under CDC 18.32.310(b)(2). We need not determine whether CDC 18.32.310(b)(2) would permit council

review where there was a unreasonably long delay between the decision by the planning commission and making the decision available to members of the council. Such was not the case here.

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13 Because of our interpretation of CDC 18.32.310(b)(2), we need not address respondent's alternative argument that the council had authority to review the planning commission's decision under CDC 18.32.310(b)(1).

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14 In view of our resolution of the first assignment of error, we need not consider respondent's alternative argument that the applicant's appeal adequately raised the right of way issue.

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15 Respondent identifies comprehensive plan policies and CDC approval criteria which it contends apply to the development proposed and justify the condition of approval requiring dedication of the right of way. Respondent cites comprehensive plan Policy 8.1.1 which states:

> "The city shall plan for a safe and efficient roadway system that meets the current needs and anticipated future growth and development."

Respondent also cites CDC 18.162.030 which provides that with regard to partitions the city must find:

> "(1) The proposal conforms with the City's Comprehensive Plan;
>
> "* * * * *
>
> "(3) Adequate public facilities are available to serve the proposal;
>
> "* * * * *"

Respondent further cites CDC 18.120.180(1)(H) which provides with regard to site development review:

> "Approval standards. The director shall make a finding with respect to each of the following criteria when approving, approving with conditions or denying an application:

"(1) Provisions. The provisions of the following chapters:

"* * * * *

"(H) Chapter 18.108, Access and Egress;

"* * * * *"

---

16 The CDC's definition of "development" includes partitions and site development. CDC 18.26.030. The provisions of CDC Chapter 18.32 are applicable to all development applications. CDC 18.32.250(F)(2)(d) provides:

"(F) The decision [of the approval authority on a development application] may be for denial, approval or approval with conditions, pursuant to (2) of this subsection:

"* * * * *

"(2) Conditions may include, but are not limited to:

"* * * * *

"(D) Dedication of easements."

---

17 Petitioner offers no explanation why authority to require as a condition of approval the dedication of easements, is not authority to require dedication of a right of way. We believe the term "easement," as used in this context, is broad enough to encompass a right of way.

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18 CDC 18.162.040(f) provides:

"The Director shall approve, approve with conditions or deny an application. The Director shall apply the standards set forth in Section 18.162.030 of this code when reviewing an application for a major or minor partition or the standards in 18.162.060 when reviewing an application for a lot line adjustment."

---

19 We note that the city requires in its decision monumentation of the partition. Record 27. We note also

that the city provides specific instructions regarding the location, and width of the right of way and requires that the right of way be approved by the city's engineering division before final approval is given. Record 25. We note also that notice of the decision of the planning director was provided petitioners. Record 191-206. This notice identified that the disputed right of way was required as a condition of approval. Record 200. Petitioner was provided notice of the planning commission's decision omitting the right of way condition. Record 140-157. Petitioner also was notified that the council had chosen to "review the planning commission's approval." Record 93-97. We have already decided that as a matter of law that the council had the authority to consider and impose the disputed right of way. Under these circumstances, petitioner was adequately advised of the scope of the issues which could be discussed at the council's meeting.

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20 Petitioner participated in the hearing before the city council and offered testimony on the disputed right of way. Record 44.

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21 The plan provides the following street classification definitions:

"3. Minor Collector:

"The primary function of a minor collector is to collect and transport traffic from local neighborhoods and abutting property out of the neighborhoods to major collectors and arterials. The minor collector should provide an efficient circulation pattern within the neighborhood for distribution of traffic to local streets as well as the major collectors and arterials. A secondary function is to provide a means for pedestrian and bike travel. Parking may or may not be provided.

"Standards:

"Right-of-Way Width	60 feet
"Pavement Width	40 feet
"Moving Lanes	2
"Volumes per day	500-3,00 vehicles
"Driving Speed	25-30 miles per hour

I-75

"* * * * *

"4. Local:

"This street classification's primary function is to provide direct access to abutting property and to allow traffic movement within a neighborhood. Local streets should also emphasize and provide for pedestrian and bike travel.

"Standards:

"Right-of-Way	50 feet
"Pavement Width	34 feet
"Moving Lanes	2
"Volumes	0-1,500 vehicles per day
"Driving Speed	10-25 miles per hour
"Cul-de-sacs	40 foot radius turn-around and 400 feet maximum length.

"* * * * *" Plan I-224.

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22 CDC 18.108.060(b) provides, in part as follows:

"Direct individual access to arterial or collector streets * * * shall be discouraged * * *"

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CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 89-043, on August 16, 1989, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Paul Ellis
Forrest N. Rieke
Rieke, Geil & Savage, P.C.
820 SW Second Avenue, S-200
Portland, OR 97204

Phillip Grillo
Timothy Ramis
O'Donnell, Ramis, Elliott & Crew
1727 NW Hoyt Street
Portland, OR 97209

Dated this 16th day of August, 1989.

Jan Zwemke
Management Assistant

DAVE FROHNMAYER
ATTORNEY GENERAL

JAMES E. MOUNTAIN, JR.
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

PORTLAND OFFICE
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August 10, 1989

HAND DELIVERY

Linda K. Zucker
Hearings Officer
Environmental Quality Commission
811 S.W. 6th Avenue
Portland, OR 97204

Re: City of Milwaukie; No. SA-891-706

Dear Ms. Zucker:

Enclosed is the Memorandum of the Department of Environmental Quality, filed per your instructions of July 27, 1989.

For your information, DEQ in the near future will be notifying other owners of facilities listed on the Site Inventory that DEQ is rescinding the inventory and dismissing all DEQ orders listing facilities on the inventory. DEQ also will notify persons who requested a contested case hearing that DEQ will submit to the EQC a proposed order dismissing all contested case proceedings. DEQ will be employing this procedure in order to provide some administrative finality to the contested case proceedings, and does not consider the EQC's pro forma dismissal of the contested case proceedings to be inconsistent with DEQ's authority to unilaterally dismiss its adminstrative orders.

DEQ intends to place dismissal of all contested cases other than Milwaukie's on the agenda for the EQC meeting scheduled for October 20, 1989. You instructed that Milwaukie

may respond to DEQ's enclosed motion by August 18. DEQ respectfully requests that any proposed order on the Milwaukie matter be issued in time for it also to be placed on the October 20, 1989 EQC agenda.

Sincerely,

Kurt Burkholder
Assistant Attorney General

KB:aa
#7876H
cc: w/enc Mike Downs
Phil Grillo
Michael Huston
Dave St. Louis

STATE OF OREGON
ENVIRONMENTAL QUALITY COMMISSION

In the Matter of:	)	
	)	No. SA-891-706
Site Inventory Listing of Property Located in Clackamas County, Oregon	)	MEMORANDUM OF DEPARTMENT OF ENVIRONMENTAL QUALITY
City of Milwaukie, Oregon,	)	
Owner.	)	

The issue is whether this matter should proceed to a contested case hearing. DEQ's position is that it should not, for two reasons:

1. The action has been voluntarily dismissed by DEQ; there is nothing to litigate.
2. The 1989 Legislature intended to wipe the slate clean under the Site Inventory Law, requiring DEQ to develop a new List and Inventory. DEQ's dismissal of Order No. SA-891-706 was consistent with and implemented the legislature's intent.

1. Background

The former Site Inventory Law, 1987 Or Laws ch 735, § 6, required the Department of Environmental Quality ("DEQ") to develop an inventory of all facilities where a release of hazardous substances is confirmed. ORS 466.557(1) (1987). The purpose of the inventory was to inform the public of the presence and extent of sites in the state that have been contaminated by toxic pollution. Id. It was not a purpose of the inventory to determine who might be liable for the

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contamination. The 1987 Legislature expressly made listing on the inventory independent of and not a prerequisite to DEQ enforcement against persons liable under the state superfund statute. ORS 466.557(6) (1987).

In accordance with the 1987 law, DEQ issued orders on November 30, 1988 listing 325 facilities on a Site Inventory. In response to those orders, 210 requests for contested case hearings were filed with the Environmental Quality Commission ("EQC"), a procedure expressly allowed under former ORS 466.557(4). The City of Milwaukie ("Milwaukie") requested a hearing regarding Order SA-891-706, which listed property owned by Milwaukie on the Site Inventory.

The Site Inventory Law was substantially amended by the 1989 Legislative Assembly under HB 3235. The amendments essentially replaced a one-step inventory process (i.e., DEQ listing where confirmed release) with a three-step process: (1) EQC rulemaking, to define "confirmed release" and establish exemptions and criteria for delisting, (2) DEQ development of a List of facilities having a confirmed release, and (3) DEQ development of an Inventory of facilities having both a confirmed release and a need for further investigation or cleanup. HB 3235 §§ 1, 3, and 7. As with the 1987 law, the purpose of the Site Inventory Law remained public information. HB 3235 §§ 1 and 3. The legislature again made clear that DEQ's placing a facility on a new List or Inventory would not "be a prerequisite to or otherwise affect the authority of the

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director to undertake, order or authorize a removal or remedial action under (the state superfund law)." HB 3235 § 6.

The legislature's objective in amending the Site Inventory Law was two-fold. First, the legislature intended the inventory process developed under the 1987 law to be started over. See Minutes, House Committee on Environment and Energy (HB 3235), Exhibit H at 1 (March 22, 1989) (copy attached). Second, the legislature intended that neither future listing decisions nor the November 30, 1988 listing orders go to contested case hearing. See Minutes, House Committee on Environment and Energy (HB 3235), at 2-6 (March 3, 1989) (copy attached). The legislative history of HB 3235 shows the concerns shared by the legislature, DEQ, industry, and environmental groups over the costs and delay that had resulted from the pending contested cases. Id. As stated by Bill Hutchison, Chair of the EQC:

> "My argument is that we need to protect the DEQ from laying on an administrative nightmare that isn't consistent with the goals and creates such a large number of appeals. The appeal process is an unnecessary process, and it could bleed the limited resources." Id. at 5.

Similarly, Representative Cease, Chair of the House Committee on Environment and Energy, stated:

> "The purpose of this bill is to: keep the agency and the state from going broke, to keep these things from being tied up in court over procedural issues, to make clear who has a right to know what, what right the public has in knowing, and to make this a simpler process." Id at 3-4.

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Consistent with these objectives, the legislature repealed the provision of former ORS 466.557(4) that provided for contested case appeals. HB 3235 § 1. The legislature also expressly provided that the decision of the DEQ Director to add a facility to the List or Inventory "is not appealable to the Environmental Quality Commission or subject to judicial review under ORS 183.310 to 183.550." HB 3235 §§ 1 and 3.

HB 3235 was signed into law on June 28, 1989. On July 14, 1989, DEQ notified Milwaukie by letter that DEQ dismissed Order No. SA-891-706. DEQ's letter also informed Milwaukie that all sites were being withdrawn from the Site Inventory developed under the 1987 law and that a new List and Inventory would not be developed until after the EQC had adopted rules.

Although DEQ dismissed the order listing Milwaukie property on the former Site Inventory, Milwaukie asserted in a July 18, 1989 letter to the Hearings Officer that the dismissed action nonetheless must go to hearing. Milwaukie bases its contention on the repealed contested case provision of ORS 466.557(4) and constitutional due process. DEQ appeared at a July 27, 1989 prehearing conference to state its position that this matter is moot, and that Milwaukie has no continued right to a hearing.

2. Discussion

A. Milwaukie Has No Right to a Hearing Under Existing Law

There are four ways relevant here that Milwaukie might have a right to a contested case hearing. Such right would

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exist only if provided by (1) statute, (2) agency rule, (3) agency order, or (4) constitutional provision. ORS 183.310(2); see Linnton Plywood Assoc. v. DEQ, 68 Or App 412, 681 P2d 1180 (1984).

The Site Inventory Law, as amended by the 1989 Legislature, does not provide for a contested case hearing on a DEQ listing action. No other statute provides for a hearing. No DEQ or EQC rule or order provides for a hearing. Milwaukie cites no existing statute, rule, or order to the contrary.

Any constitutional right, typically, is based on the due process clause of the Fourteenth Amendment of the U.S. Constitution. That constitutional right is triggered by an agency action depriving a person of a "liberty" or a "property" right. This threshold is not met here for two obvious reasons. First, even if DEQ were placing Milwaukie's property on a List or Inventory, that action would not deprive Milwaukie of any liberty or property interest. A listing decision is not an enforcement action or determination of liability. HB 3235 § 6; See also Minutes, House Committee on Environment and

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Energy (HB 3235), at 2 and 3. It merely serves the purpose of informing the public that a particular property is contaminated with hazardous substances.[1]

The second reason that the due process threshold is not met here is that there is no pending DEQ action against Milwaukie, let alone one depriving Milwaukie of a liberty or property interest.[2] DEQ has dismissed Order No.

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[1] Milwaukie describes "deprivations" suffered by the city as a result of DEQ's former listing, i.e., depressed property values, declining property development, potentially spiralling insurance costs, increased municipal water costs, and strict liability for remedial action costs. Memorandum to Linda Zucker re: "Due Process," dated July 27, 1989, p. 2. The record, of course, contains no evidence that Milwaukie has suffered any of these impacts at property owned by the city. At any rate, these impacts would not be caused by DEQ's placing the property in an information base such as the Site Inventory, but by the fact that Milwaukie property might be contaminated by toxic waste. This was publicly known before DEQ's November 30, 1988 Order and would have been publicly known whether DEQ put Milwaukie's property on the Site Inventory or not. Milwaukie has suffered no harm that it might not already have suffered by virtue of owning contaminated property.

[2] By contrast, the decisions cited by Milwaukie in support of a due process right did involve an official action against the party alleging a liberty or property interest. See e.g., Matthews v. Eldridge, 424 US 310, 47 L Ed 2d 18, 96 S Ct 893 (1976) (termination of social security benefits); Stretten v. Wadsworth Veterans Hospital, 537 F2d 361 (9th Cir 1976) (dismissal from residency program).

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SA-891-706 and has withdrawn Milwaukie's property from the Site Inventory. Without the basic prerequisite of a governmental action, due process rights under the Fourteenth Amendment are irrelevant.

In short, since DEQ is not attempting "to do something to" Milwaukie, there is no right to (or need for) a contested case hearing.

B. Milwaukie Has no Continued Right to a Hearing Under Repealed Provisions of ORS 466.557

Despite there being no pending DEQ action against Milwaukie, let alone any law providing a contested case right regarding non-existent agency actions, Milwaukie contends it has continued right to a hearing regarding DEQ's dismissed inventory order under repealed provisions of the 1987 Site Inventory Law.

Again, at the risk of making this point ad nauseum, there is no pending DEQ action that could conceivably give rise to the right to or need for a contested case hearing. It therefore is curious that the parties must argue about a continued right to a hearing.

Addressing Milwaukie's contention nonetheless, there is no continued right to a hearing based on the contested case provision of ORS 466.577(4) that was repealed by HB 3235.

> "The effect of the repeal of a statute having neither a saving clause nor a general saving statute to prescribe the governing rule for the effect of the repeal, is to destroy the

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> effectiveness of the repealed act in futuro and to divest the right to proceed under the statute. Except as to proceedings past and closed, a statute is considered as if it had never had existed." Sutherland, Statutory Construction, § 23.33 (4th Ed Sands 1985).[3]

Thus, even if Milwaukie's reliance on the 1987 Site Inventory Law were relevant, that law provides Milwaukie no relief. It has disappeared.[4]

---

[3] Milwaukie argues that this rule does not apply to proceedings pending under the statute at the time of its repeal. Memorandum to Linda Zucker re: "Retroactivity," dated July 27, 1989, p. 2. A further reading of Sutherland rejects this notion:

> "Since the effect of the repeal is to terminate the statute and destroy its effective operation in futuro . . . any proceedings which have not culminated in a final judgment prior to the repeal are abated at the consummation of the repeal." Sutherland, Statutory Construction, § 23.33 (4th Ed Sands 1985).

[4] Milwaukie attempts to construct an "entitlement" right in the repealed procedures that is preserved by the due process clause of the Fourteenth Amendment. Memorandum re: "Retroactivity," p. 2. Since Milwaukie can point to no other liberty or property interest adversely affected by present DEQ action, Milwaukie argues that the former procedures themselves constitute a protected property interest. Milwaukie's argument lacks an essential factual premise, i.e., an agency action against which the procedural requirement is intended to afford protection. Compare, in contrast, the cases cited by Milwaukie, which protect procedural guarantees only where there is governmental action affecting the claimant. Parks v. Watson, 716 F2d 646 (9th Cir 1983) (city's denial of request to vacate streets); Cox v. Schweiker, 684 F2d 310 (5th Cir 1982) (federal agency's denial of social security benefits); Jacobson v. Hannifin, 627 F2d 177 (9th Cir 1980) (gaming commission's denial of casino license).

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Milwaukie argues that DEQ is attempting to apply HB 3235 retroactively to deny Milwaukie a contested case hearing, and that HB 3235 cannot be applied retroactively absent express legislative intent. See Memorandum re: "Retroactivity." Milwaukie's analysis is out of place. DEQ's dismissal of Order SA-891-706 did not require retroactive application of HB 3235. DEQ's July 14, 1989 letter did not dismiss the contested case requested by Milwaukie; it only dismissed the order initially giving rise to the contested case. While this had the practical effect of mooting the contested case, it nonetheless was not based on HB 3235's repeal of contested case appeals. Moreover, DEQ could have dismissed Order No. SA-891-706, for a variety of reasons, whether the legislature had adopted HB 3235 or not. Put another way, DEQ could have dismissed the order even if ORS 466.557 still provided for a contested case hearing. Retroactive application of HB 3235 was not required.

Even assuming DEQ did apply HB 3235 retroactively, such an action would have been supported by legislative intent that the existing Site Inventory be withdrawn and pending contested cases terminated. See Minutes of House Committee on Environment and Energy (attached).

C. DEQ's Dismissal of Order SA-891-706 was Proper

Milwaukie challenges the procedure DEQ employed in dismissing Order No. SA-891-706. Milwaukie argues that (1) DEQ did not have express authority to unilaterally dismiss the

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order, and (2) DEQ may not withdraw an order by letter, but only by issuing a "revised order." Memorandum to Linda Zucker re: "Jurisdiction," dated July 26, 1989, p. 4; Memorandum to Linda Zucker re: "July 14 Agency Action is an Order," dated July 27, 1989.

Milwaukie's argument elevates form over substance, and will not affect the final outcome of this case. Milwaukie is not entitled to a contested case because it has no such right under law, regardless of how DEQ should have dismissed Order No. SA-891-706. However, Milwaukie's argument, if accepted by the Hearings Officer, could affect DEQ's administrative practice by imposing costly, time-consuming procedures for dismissal of the 325 Site Inventory orders (as well as other types of administrative orders issued by DEQ), although such procedures legally are not necessary.

DEQ's authority to unilaterally dismiss administrative orders need not be expressly stated in statute or rule. An agency has those implied powers necessary to carry out its expressly granted powers. Warren v. Marion County, 222 Or 307, 320, 353 P2d 257 (1960); Fales v. Multnomah County, 119 Or 127, 133, 248 P 167 (1926). It is not required that a statute or rule prescribe every specific procedure under which an agency operates. Warren, Id.; see Campbell v. Board of Medical Examiners, 16 Or App 381, 392, 518 P2d 1040 (1974) (hearing officer has implied power to issue commissions for taking out-of-state depositions). DEQ's authority to issue

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administrative orders carries with it the implied authority (or inherent authority, as a matter of prosecutorial discretion) to withdraw or dismiss those orders in appropriate circumstances. For example, if DEQ issued an order assessing a civil penalty for a pollution violation and subsequently discovered that it had issued the order to the wrong party, DEQ certainly could dismiss the penalty order without going through a contested case proceeding or obtaining the respondent's consent. DEQ's orders under the 1987 Site Inventory Law are no different. If DEQ issued an inventory order to a person on the basis of records showing that person to be the owner of the property, and subsequently discovered the records to be erroneous, it would be absurd to suggest that DEQ must either obtain the person's stipulation or complete the contested case proceeding instead of simply dismissing the order.[5]

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[5] Both Milwaukie and the Hearings Officer suggested at the July 27, 1989 prehearing conference that the EQC has authority to issue an order dismissing DEQ's order and/or the contested case. Ironically, there is no statute or rule expressly authorizing the EQC to dismiss a DEQ order or contested case proceeding before it has gone to hearing or stipulated settlement. This is not to say that the EQC may not issue such orders (assuming there is a DEQ order pending before the EQC). But it underlines the fallacy of Milwaukie's argument that every procedural means of disposition of a DEQ order must be expressly set forth in statute or rule.

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Authorization of an agency power by necessary implication is particularly warranted when the agency's exercise of that power fulfills legislative intent, as did DEQ's dismissal of the inventory orders.

Authority cited by Milwaukie for its argument that DEQ may not unilaterally dismiss its order is inapplicable to this case. Specifically, Murray Well-Drilling v. Deisch, 75 Or App 1, 704 P2d 1159 (1985) (cited in Memorandum re: "Jurisdiction," pps. 1-3), applies to the jurisdiction of a trial court vis-a-vis the Court of Appeals, not to internal administrative appeals such as here. Moreover, Murray Well held that a trial court lacked jurisdiction to enter a judgment in decree of foreclosure against a defendant after the defendant had filed a notice of appeal with the Court of Appeals. DEQ's dismissal of its inventory order, unlike the trial court's judgment in Murray Well, was not a decision on the merits or adverse to Milwaukie. Similarly, DEQ's dismissal of its order is not analogous to the action Washington County attempted to take to petitioner's detriment while a LUBA appeal was pending, in Standard Insurance Company v. Washington County, LUBA No. 88-109 (1989) (cited in Memorandum re: "Jurisdiction," p. 3).

ORS 183.482(6), cited in Memorandum to Linda Zucker re "Jurisdiction," p. 4, applies only to agency withdrawal of an order for reconsideration, not outright dismissal, and only in

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the context of judicial review by the Court of Appeals, not internal administrative review as here. Finally, ORS 183.415(5), cited in Memorandum re: "July 14 Agency Action is an Order," p. 2, merely describes possible methods of informal resolution by parties of a contested case. It does not proscribe DEQ's ability to dismiss an order initially giving rise to the contested case.

If any procedure is analogous to the matter here, it is the rules governing civil litigation. A DEQ administrative order is analogous to a plaintiff's complaint. Until the administrative order has gone to contested case hearing, or the complaint to trial, there is no adjudication on the merits. A plaintiff may unilaterally dismiss its complaint, without order of the court or consent of the defendant, up to five days before trial if no counterclaim has been pleaded. ORCP 54. A.(1). This makes sense because, without a complaint to defend against or a counterclaim to prosecute, the defendant is not prejudiced by plaintiff's unilateral dismissal. Likewise, Milwaukie is not prejudiced by DEQ's unilateral dismissal of its order against the city.

It is apparent that Milwaukie's second contention--that DEQ may dismiss its order only by issuing another order--contradicts Milwaukie's argument that DEQ may not take unilateral action in the matter once contested case jurisdiction is vested in the EQC. See Memorandum re: "Jurisdiction," pps. 1 and 3. DEQ certainly does not contend

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that it may issue a second administrative order disposing of the merits or adverse to a respondent's interest after the initial order has been appealed to EQC. Neither did DEQ attempt to do so in issuing its July 14, 1989 letter to Milwaukie. DEQ's letter did not constitute a determination of the merits of DEQ's initial inventory order or in any other way adversely affect Milwaukie. If anything, it accomplished the same result that Milwaukie could have hoped to have obtained from a contested case hearing, i.e., removal or Milwaukie's property from the Site Inventory. Dismissal by letter was legally appropriate.[6]

In sum, DEQ possesses implied or inherent authority to unilaterally dismiss its administrative orders when such dismissal does not dispose of the merits or adversely affect the respondent. Such a dismissal does not require the issuance of a new order.

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[6] Similarly, a respondent may dismiss its request for a contested case by letter.

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3. Conclusion

DEQ respectfully urges the Hearings Officer to look behind Milwaukie's legalistic arguments and ask some basic questions. Why does Milwaukie want a contested case hearing? Since DEQ has already removed Milwaukie from the Site Inventory, what more could Milwaukie achieve through a contested case?

A careful reading of Milwaukie's filings shows that Milwaukie does not want a hearing on DEQ's November 30, 1988 Site Inventory order, but on any future listing DEQ might make under the amended Site Inventory Law. Milwaukie further does not want a hearing solely regarding whether there is a confirmed release on Milwaukie property, but also on whether Milwaukie is liable for the release. As stated in Milwaukie's Memorandum re: "Rectroactivity," pps 1-2:

> "(I)f the site is listed pursuant to the amended statutory scheme, the city may suffer a permanent loss of its right to appeal unless its vested right to appeal is preserved. Consequently, the listing decision could expose the city to the strict liability under ORS 466.567 and the ensuing costs of litigating its liability for remedial action costs incurred by the DEQ."

Milwaukie either misunderstands the Site Inventory Law, or is abusing it to achieve other ends.

A decision to list a property does not in itself expose the property's owner to strict liability under the state superfund statute. A DEQ listing on the future List or Inventory will merely be for informational purposes. In order

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to identify potentially liable persons for enforcement purposes, DEQ will have to apply numerous criteria under a statutory section, ORS 466.567, that is independent of the Site Inventory section, ORS 466.557. DEQ may determine that an owner of property placed on the List or Inventory under ORS 466.557 is not liable under ORS 466.567. Conversely, DEQ may determine that a person not identified on the List or Inventory is liable.

Even if this matter went to a contested case, the issue of liability would be beyond the scope of the hearing. DEQ's Order No. SA 891-706 only contained findings of a confirmed release on Milwaukie's property. Milwaukie's desire to expand the scope of the hearing to address liability would contravene ORS 466.570(6), which bars preenforcement review of DEQ cleanup actions against liable persons.

A decision to place a property on the future List or Inventory is subject to future EQC rulemaking. Neither DEQ nor the EQC has authority, prior to such rulemaking, to make decisions affecting what property will or will not be on the List or Inventory. Milwaukie's attempt to gain leverage on such future decisionmaking through the present proceeding is inappropriate.

In conclusion, DEQ's order giving rise to the contested case has been properly dismissed and Milwaukie has no continued right to a hearing. DEQ has requested that the Hearings Officer remove Milwaukie's request for a contested case

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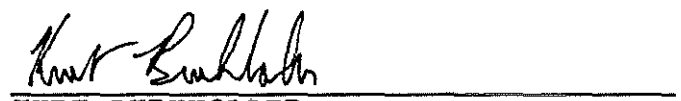
case hearing from the Hearings Officer's docket as an administrative measure. In the alternative to administrative removal from the docket, DEQ has requested that the Hearings Officer issue a proposed order pursuant to OAR 137-03-060 dismissing Milwaukie's request for a contested case.

DAVE FROHNMAYER
Attorney General



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HOUSE COMMITTEE ON
ENVIRONMENT AND ENERGY

March 3, 1989
1:00 p.m.
Tapes 73 - 74

Hearing Room E
State Capitol
Salem, OR 97310

MEMBERS PRESENT:
REP. RON CEASE, CHAIR
REP. FRED PARKINSON, VICE-CHAIR
REP. BERNIE AGRONS
REP. DAVID DIX
REP. CARL HOSTICKA
REP. DELNA JONES
REP. PHIL KEISLING
REP. BOB PICKARD
REP. RODGER WEHAGE

STAFF PRESENT:
CAROL KIRCHNER, COMMITTEE ADMINISTRATOR
STACEY WARDEN, COMMITTEE ASSISTANT

WITNESSES:
FRED HANSEN, DIRECTOR DEQ
MIKE DOWNS, ADMINISTRATOR ENVIRONMENTAL CLEAN UP DIVISION DEQ
BILL HUTCHINSON, CHAIR ENVIRONMENTAL QUALITY COMMISSION
JOE ARIO, EXECUTIVE DIRECTOR OSPIRG
TOM DONACA, ASSOCIATED OREGON INDUSTRIES
RICHARD BACH, CHAIRMAN ENVIRONMENTAL LAW SECTION STOLREYS, BOWLEY, JONES & GREY

These minutes paraphrase and/or summarize statements made during this meeting. Text in quotation marks reports a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

TAPE 73, SIDE A

005 **CHAIR CEASE:** Calls the meeting to order at 1:20 p.m.

PUBLIC HEARING ON HB 3235

Relating to hazardous substances; and declaring an emergency.

025 **FRED HANSEN, DIRECTOR DEQ:** In the 1987 session SB 122, the state Superfund bill, provided for a system by which hazardous substances could be cleaned up -- identification, analysis and process in terms of liability and procedures. The DEQ was given authority to develop rules. Those procedures have gone smoothly.

We have found there are a number of programs, such as voluntary clean ups, which were not anticipated. There are also a number of steps involved in cleaning up a site: analysis, preliminary assessment, remedial investigation, site investigation, remedial design, etc. One provision of SB 122 was that as soon as you had a confirmed release of a hazardous substance, you shall provide an inventory of those to the Legislature and the public. We identified 653 sites throughout the state. Of those 325 were confirmed and 328 suspected. We sent letters to the owners of the 325 confirmed sites. The statute provided that within 15 days those parties could request a contested case hearing to resolve the issue. It did not provide any authority for what a confirmed release was.

We operated with some discretion as to what was to be covered. Out of the 325 properties notified, 210 appealed.

095 **REP AGRONS:** Did you define release under administrative rule?

FRED HANSEN: Yes, in other parts of our statutes and rules, a release is defined.

REP AGRONS: In the contested case hearing, the quarrel would be whether or not this particular place fit the description.

102 **FRED HANSEN:** In general, yes. The statute did not provide that there was authority for the commission to adopt rules in relationship to the inventory or listing, but for clean up.

This process was necessary to get to clean up sites across the state. The process was what has produced the appeals. Of the 7 sites on the federal Superfund list, 4 appealed. They are in the process of clean up. In our view, they were clearly confirmed.

125 **REP AGRONS:** They must have had some other reason for appealing.

130 **FRED HANSEN:** It seems to me that some were legitimate and some were frivolous. It doesn't make sense to go through that protracted approach, but it is much more appropriate to have engineer to engineer solving problems and getting on about environmental clean up rather than focusing on legalistic issues.

The law was clear that the outcome of this listing and the contested case in no way affected the authorities of the DEQ to be able to require clean up, remediation or any other action. We believe that getting about the business of cleaning up hazardous substances that have been released into the environment is what is most important. The amendments that are in this legislation will accomplish that task and still preserve the rights of property owners.

Any sophisticated buyer or developer of property is not going to take or not take action because they are on the list. They are going to require their own environmental audit and determine if remediation is needed. The taint on the property, if it exists, is from the release or the hazardous substance, not from whether or not the property is on a list.

176 **REP AGRONS:** If the DEQ determines that a release has occurred, you can move forward in addressing the problem?

FRED HANSEN: Exactly right.

REP AGRONS: All we're talking about is a list that does nothing in terms of the clean up process or responsibilities. Are you suggesting that we don't need the list, that it is just getting in the way?

FRED HANSEN: The list has a value, public information. The authorities of the DEQ or the responsibilities of the property owner are not effected by the list.

REP JONES: You said the value of the property would not be determined by being on the list, is that a clear statement? The list is public. Whether or not people are aware of the hazardous substance could impact the value of the property.

194 **FRED HANSEN:** The list is not meant to be all encompassing. The purchaser is liable if they did not investigate the property before purchase. Without a list, if there is information in our file, potential buyers would not have that information. The information is required whether or not the property is on our

list.

215 **REP JONES:** The liability issue is the factor in relationship to the value, not whether they're on the list or not.

219 **REP AGRONS:** The list in your office is public information, so nothing is being withheld from interested parties.

230 **FRED HANSEN:** All information in our files is public. Without such a requirement as an inventory, we would not have identified them as confirmed release, rather those that needed investigation, remediation or something else.

235 **REP KEISLING:** If the site is suspected of release, you have already notified them?

FRED HANSEN: No, we have sent to the 325 that are confirmed releases.

REP KEISLING: If I'm the owner of this property and I have received a letter from DEQ, legally must I share that letter with a potential buyer?

FRED HANSEN: That would be subject to a civil claim if damage was experienced by the subsequent buyer. There is nothing in our law that requires sharing the information with prospective buyers. Whether that would be deceiving, I'm not the lawyer.

257 **CHAIR CEASE:** Would you comment on the nature of the list, what the statute says, who the list is available to and what the publicity is in reference to the list?

267 **MIKE DOWNS, ADMINISTRATOR ENVIRONMENTAL CLEAN UP DIVISION DEQ:** In terms of what the statute has -- reads ORS 466.577, subsections 1, 2 and 5.

285 **CHAIR CEASE:** We've had a lot of discussions on this issue. When the paper reported that you had sent letters to land owners, there was agitation because a list hadn't been seen. Even though it is public information, you did not list all of these people on a sheet and make it available to the pres or anyone else, correct?

296 **FRED HANSEN:** No, we did. We said these are people who have been sent a letter indicating that they have been proposed to be placed on an inventory of confirmed releases.

303 **REP JONES:** What are these contested cases costing us in terms of Attorney General's fees?

FRED HANSEN: Because of the potential for legislative remedy in this area, we have not proceeded with any contested cases and, therefore, I could not give you an average. In our view, a confirmed case included: either the owner/operator gave us a statement that said it was, there was a government official that had observed the release or evidence thereof, or there was laboratory data. If one wants to draw out a case on procedural grounds, it is easily done. That is our greatest fear. There are some sites where the clean up had gone ahead and we were not aware of it or there was some other potential error in listing. There were relatively few and they can be taken care of in a different fashion.

335 **REP JONES:** Are we spending any money on the contested appeals?

FRED HANSEN: Yes. Relatively small amounts because there haven't been contested cases yet.

CHAIR CEASE: The purpose of this bill is to: keep the agency and the state from

going broke, to keep these things from being tied up in court over procedural issues, to make clear who has a right to know what, what right the public has in knowing, and to make this a simpler process.

366 **FRED HANSEN:** That is absolutely correct.

The confidentiality of any of our public records are subject to the normal business and trade secrets.

377 **MIKE DOWNS:** Goes over submitted chart, **EXHIBIT A**, amendments to the inventory law.

TAPE 74,SIDE A

010 **MIKE DOWNS:** This would come up with an alternative to the contested case process and give those who might be listed some assurance to get involved in the decision making but not the appeal.

Continues reviewing **EXHIBIT A.**

060 **REP PARKINSON:** Under **HB 3235**, what is the maximum time from reporting of a suspected release until the final resolution?

064 **MIKE DOWNS:** There is no time line in the bill.

REP PARKINSON: Is it conceivable that it could be 5 or 10 years before a suspected release is solved?

070 **FRED HANSEN:** We have the first go around where we have 653 facilities that need preliminary assessments of which 105 have been completed. That lump has to be gotten through and has the potential of going through the next biennium. We would expect that as we found information on sites, that it would be done in a relatively short time, within 6 months.

087 **REP PARKINSON:** I don't think the whole process could happen in 6 months.

090 **FRED HANSEN:** A preliminary assessment could be done in 6 months. This statute would provide a 45 day period in which we would notify the owner/operator. If they did not respond, the listing would take place.

REP CEASE: It seems that you have to look at the larger picture. What is going on right now is making it more difficult. We're talking about cleaning up messes from the past. How do we protect owners rights and clean it up? I would not be surprised if you told someone they had a toxic waste site that they would legally drag the issue out.

116 **FRED HANSEN:** Some do, others want to be able to move as fast as possible.

MIKE DOWNS: For those who do want to move as fast as possible, the statute allows for them to do the preliminary assessment with our oversight.

120 Returns to his explanation of **EXHIBIT A.**

The proposed **HB 3235** would provide that the commission adopt rules to provide a procedure for ranking facilities according to the risk that they pose to future and public health and the environment. We want to be able to work first on those sites that present the greatest risk.

147 **CHAIR CEASE:** What is the politics of ranking? What kinds of things will you take into consideration?

159 **FRED HANSEN:** A ranking system is essential because this gives us a schedule of which to deal with first.

174 **MIKE DOWNS:** We would start with the EPA's ranking system as a model and work from that. They have developed a national system which looks at how many people live near the site, the pathways -- groundwater, air, surface water, the contaminants and their chronic and acute toxicity, etc. Their system is oriented towards public health. If we were to amend that it would be to try and improve the environmental side.

FRED HANSEN: We've tried to be able to build the system by looking at how we ought to be performing our work to accomplish the environmental clean up goals, see what those steps are and provide public information.

208 **BILL HUTCHINSON, CHAIR ENVIRONMENTAL QUALITY COMMISSION:** We have an existing statute that requires public information, we are not a confidential state. That statute says that everybody gets on that list, and you have the right of appeal. It's tough to get on that inventory, and we key to the process. If OSPIRG is right, higher profile will help drive this process, let's go ahead and do it. My argument is that we need to protect the DEQ from laying on an administrative nightmare that isn't consistent with the goals and creates such a large number of appeals. The appeal process is an unnecessary process, and it could bleed the limited resources.

People are so aware of this today that they are requiring disclosures, representations that no such notices have been received and that no such uses of the property have been made.

This is a nice improvement. It serves the public information purpose. It doesn't provide an appeal, but with the safeguards in place, it is perfect.

248 **REP AGRONS:** What do we need this inventory list published for? Groups who have an interest in it have no trouble looking at the DEQ records. When you publish a list, you have branded people and they are going to defend themselves. We've gone from a relatively simple idea to a complicated one so we can do what we probably don't need to do. Are we expending resources, energy and dollars on something that is available anyway, when we should be allocating them to the clean up process? I detect a diversion that is producing nothing.

275 **BILL HUTCHINSON:** To the extent that it helps drive this agenda, it is fine so long as it doesn't bleed the program of the energy and resources it needs. We must maintain a categorized data base with priorities. This is not a nightmare that this statute begets. This is what the marketplace and the DEQ are already doing. It's fine with us as long as the regulated community can live with no appeal. I think the appeal of the data base is an unnecessary overly.

299 **REP CEASE:** As part of this process a good part of the public is unhappy that you haven't done the clean up already and protected us instead of spending years dragging it out in procedural issues.

305 **FRED HANSEN:** All of this activity that is on **EXHIBIT A** are the steps we would go through to determine whether a release had occurred. The difference is that at the last stage a "snapshot" is being taken and put into a report.

340 **BILL HUTCHINSON:** The strategy that we are all implementing is one of waste minimization and trying to avoid these problems in the future.

345 **REP CEASE:** You have tremendous local and market pressures. The pressure is there for minimization and greater control. You're in the role of police.

FRED HANSEN: There have been those who think the process contains wasted effort. It is important to stress that the analysis of files that was done to gather information for our data base is what had to be done. At issue is the contested case. It is a minor part of the whole process.

406 **JOEL ARIO, EXECUTIVE DIRECTOR OSPIRG:** This inventory is something that is a part of a long set of negotiations in the last legislation. It represents something that was a consensus view by the end. This information is already public knowledge. The real question becomes whether we should make public access easier or harder. We should make it easier because: 1) It's simple right to know -- If I live in a community that has a known or suspected contamination and the government knows, I have the right to know; 2) We live in a society where we like to know what our government and the DEQ are up to. This improves the accountability. 3) If we want to get toxic waste sites cleaned up, the more the public knows, the more they will participate and encourage all of us.

TAPE 73, SIDE B

029 **JOEL ARIO** continues: We have a second principle here, we don't want to encourage forms of public information that get in the way of the goal -- getting the sites cleaned up. In terms of the DEQ's responsibilities, there are no new steps or diversions here.

Our basic perspective on this issue is that when the basic contested case provision was included in the original law, there was an assumption that use would be limited, it would be on a good faith basis. That is not what has happened. The process has been abused, and that is why we're here today. Joseph Forest Products and Park Place Development are examples of frivolous appeals. We face two basic choices of what to do: 1) Proceed into these cases and end up in a series of adversarial proceedings. We would take that to as an alternative to some long, drawn out process that doesn't move us ahead on the clean up. We think DEQ would win the appeals. 2) We could develop an alternative process so that the owners have an opportunity to be heard, but it would be something short of a contested case hearing. We thought it would be better to make this process as smooth as possible.

The solution presented in this bill has taken a number of hours to work out. There has been representation from DEQ, industry and the environmental community. It is a compromise. Essentially it will raise the threshold of getting o to the inventory so that people don't get on there incorrectly, participation by those getting on there and an opportunity for comment. There are those who would like to throw more roadblocks in front of those creating this public list. The basic agenda is to avoid being on that public list.

We've given away quite a bit. We won't have any inventory until January 1, 1990, the inventory will include fewer sites becuase that threshold's higher, and the process for getting on will be longer. It's not the ideal bill, but it is better than any of the alternatives.

123 **REP KEISLING:** The contested case is before an administrative law judge?

JOEL ARIO: I believe that to be the case. It can open itself up to beyond the initial administrative appeal into judicial review.

136 **TOM DONACA, ASSOCIATED OREGON INDUSTRIES:** The agency has 220 appeals pending. This piece of legislation must either pass this body and the Senate or else the appeals will have to be handled be the agency. People need to know what the status of their property is. We would suggest that what's before you could have been done under the existing law, but because the information was sent to the

affected parties, you have appeals for a number of reasons. This bill should be handled expediently.

164 **RICHARD BACH, CHAIRMAN ENVIRONMENTAL LAW SECTION STOLREYS, BOWLEY, JONES AND GREY:** Mr Ario gave stories of frivolous appeals, I know of a number of legitimate ones. A number of sites have already been deleted from the list. The cases should be addressed appropriately by this remedial legislation. Part of the problem industry is having with this is the suspicion involved with being put on a list. Unless there are built in safeguards, people will be concerned with being on the list and there will be problems with it. The EQC needs to be given rule making authority to establish threshold criteria, for de-listing procedures and for categorization of properties on the list so those voluntarily cleaning their property are not lumped in the same category with the recalcitrant land owner.

We have problems with some of the sections as drafted and are proposing some changes.

On the federal level we have the Comprehensive Environmental Response Liability Information System (CERLIS) and the National Priorities List (NPL). We understood that the mandated inventory was to have been the state version of an NPL, a list of sites where there was known contamination and the DEQ or property owner needed to do something about it. It wasn't intended to be a suspect list. If it is going to be a suspect list, then it needs to be so labeled.

240 **REP PARKINSON:** I supported the Endangered Species Act because I believed that it provided a method for getting the endangered species off the list. That hasn't happened, and I'm a little suspicious that I should support this because it provides a process and procedure for getting a property off the list.

250 **TOM DONACA:** The director has tried to find some ability to de-list. Currently, there is no way to get off the list. This bill provides a means for doing it.

269 **REP CEASE:** The major parties all agree that there is a need for something. I'm concerned that we might take too many things of a list, but more concerned that agitation and appeals going on with nothing getting cleaned up. we've got to expedite this process while, at the same time, provide protection.

278 **RICHARD BACH:** There really is no connection between the inventory list and the clean up process. They are two totally different things. Clean ups are not being driven not by the list but by market considerations, liability and DEQ's and EPA's enforcement tools. It ought to be a rational list with a purpose and a function.

CHAIR CEASE: There is an initial list and then you go through an assessment process until you get to the inventory.

RICHARD BACH: If we need that first list, it ought to be called what it is, a suspicion list.

305 **TOM DONACA:** We would look favorably on a directive from this committee for industry, DEQ and OSPIRG to sit down together, come to an agreement and then come back to you on those issues with which we do not agree.

320 **REP CEASE:** My intent would be to have another hearing after all of you people have all discussed it and have amendments, have a work session on the bill and move it out. I detect a concern by all interests that we do something and get on with it, correct? Hopefully, within one week we can get this worked out. There is some confusion here. We have to do a better job of getting at this issue.

MIKE DONACA: Whatever we don't agree with, they will know about in advance.

FRED HANSEN: With three parties trying to compromise something, the fairest way is when all the disagreements are brought forward.

CHAIR CEASE: Closes the hearing on **HB 3235.**

394 **CHAIR CEASE:** Introduces an LC Draft which relates to a surcharge on non durable plastic containers and a request from the OFIC in reference to slash burning. We will need to request approval for drafting and submission of the bills. I would like to do so.

There being no objections, I will do that.

Adjourns the meeting.

Submitted by,

Diane Highberger

Diane Highberger

EXHIBIT SUMMARY

A - Mike Downs, chart "Amendments to Inventory Law"

Department of Environmental Quality
Summary and Analysis
of
HB3235 as Amended
March 22,1989

The amendments to HB3235 represent a consensus by DEQ, OSPIRG and AOI regarding how the current confirmed release inventory law should be rewritten to meet the objective of providing the public information, at a reasonable cost, about the status of sites contaminated with hazardous substances, while ensuring owners and operators that their facilities will not be inappropriately listed on the inventory.

Section 1. List of Confirmed Releases This section amends the current Inventory law, ORS 466.557. The amendments require the Director to develop and maintain a "list", rather than an "inventory", of facilities that the Department determines had a confirmed release of hazardous substances. This section adds the requirement that the Environmental Quality Commission (EQC) adopt a definition of "confirmed release" for the Department to use in determining whether a release should be added to the list.

The purpose of the list is to provide access to public information. The list will be made available to the public at the Department's offices. It is not intended that the list be published by the Department, but rather that it is available upon request.

At least 60 days before a facility is added to the list, the Department must notify the owner and operator, if known, of the Director's decision to list the facility. The owner or operator then has 45 days to comment to the Department. For example, the owner or operator may have information that indicates that the listing decision is not in compliance with this Act or EQC rules adopted pursuant to this Act, or the owner or operator may have information to correct details of the proposed listing. It is intended that if the Department agrees with the information provided by the owner or operator, then the facility would not be listed, or the listing would be modified to reflect the information submitted, as appropriate. Otherwise, the Department would add the facility to the list after the end of the 45 day comment period.

The decision of the Director to add a facility to the list is final, and is not appealable to the EQC or subject to judicial review. In part, this means that the owner or operator cannot have access to a formal contested case appeal before the EQC. However, owners and operators will have substantially more access to the Department to provide corrections and new information before facilities are listed than they do under the current law.

The notice requirement for the list (described above) is the same as the notice requirement for the new inventory which is included in Section 3. This is intended to allow the Department to

provide a single notice, with a dual purpose, to the owner and operator in those cases where the Department determines that a facility should be added to both the list and the inventory concurrently. It is not intended that the Department must add a facility to the list before it is added to the inventory. The Department would have the discretion to add facilities to the list and inventory concurrently or sequentially, as it deems appropriate.

Section 2. Adds Sections 3 to 8 to ORS 466.540 to 466.590.

Section 3. Inventory of Facilities Needing Action This section requires the Director to develop and maintain an inventory of all facilities that meet two criteria. First, the Department must have a confirmed release of hazardous substances at the facility. This is the same criteria used for the list under Section 1. Second, the Department must determine, based on a preliminary assessment, that additional investigation, removal, remedial action, long-term environmental controls or institutional control is needed to assure protection of present and future public health, safety, welfare or the environment. The elements of a preliminary assessment needed to make this second determination will be defined by EQC rules.

The preliminary assessment must be conducted by the Department or approved by the Department. The "approved by" language is intended to include cases where the Department

authorizes or requires a responsible party (e.g. the owner or operator) to conduct the preliminary assessment in accordance with EQC rules and Department guidelines and under Department oversight, or where the Department otherwise approves a preliminary assessment as fulfilling these requirements. It also allows the Department to utilize preliminary assessments conducted by or for the U.S. Environmental Protection Agency (EPA). "Conducted by" is intended to include cases where the Department hires contractors to perform preliminary assessments.

Prior to conducting, authorizing or requiring the preliminary assessment, the Director must notify the facility owner and operator, if known, that the preliminary assessment is proceeding and that the owner or operator may submit information to the Department that would assure a complete and accurate preliminary assessment. This is intended to allow the owner or operator to either assist in preparation of the preliminary assessment by providing essential information to the Department, or to request Department approval to conduct the preliminary assessment.

After the preliminary assessment is completed, and at least 60 days before the Department adds a facility to the inventory, the Director must notify the owner and operator, if known, of the decision to add the facility to the inventory and provide a copy of the preliminary assessment conducted on the facility. The owner or operator then has 45 days to comment on the information in the preliminary assessment, or provide the Department additional

information about the facility. If the owner or operator can show good cause, the Department, at its discretion, can grant an extension of time to comment not to exceed an additional 45 days.

After the close of the 45 day comment period, or any extension granted, the Department must review the information submitted and add the facility to the inventory if it determines that a confirmed release has occurred and that additional investigation, removal, remedial action, long-term environmental controls or institutional control is needed to assure protection of present and future public health, safety, welfare or the environment. The Director's decision is final and is not appealable to the EQC or subject to judicial review.

In making the final decision about whether to add a facility to the inventory, the Director must consider relevant and appropriate information that was submitted by the owner or operator in a timely manner. It is intended that if the Department agrees with the information submitted that it would either modify the decision to list the facility on the inventory or modify information in the facility description, as appropriate.

The comment period, and the consideration of relevant and appropriate information, are intended to provide a formal opportunity and a specific time-frame for owners and operators to submit information to the Department if they wish it to be considered in the Director's decision about whether a facility

should be included in the inventory. However, it is not intended to limit the Department's discretion to consider or gather additional information either before or after this time frame if the Department determines that is appropriate.

Section 4. Removal from the List or Inventory This section provides a process to remove facilities from the list or inventory or both when the Director determines that the facility has attained a degree of clean up that is protective or that no further action is necessary to assure protection of present and future public health, safety, welfare and the environment. However, facilities would not be removed from the list or inventory if ongoing environmental or institutional controls are necessary to assure continuing protection. Decisions by the Department to remove facilities from the list or inventory would be made in accordance with rules to be adopted by the EQC.

Section 5. Inventory Access and Contents; Legislative Report The inventory must be made available to the public at the Department's offices. However, in contrast to the list, it is intended that the Department will publish the inventory and distribute it widely as the public's main vehicle for tracking the investigation and clean up of sites contaminated with hazardous substances. The inventory is intended to track all hazardous substance facilities in the state regardless of what program or statutory authority is involved in the investigation and cleanup.

The inventory must include at least the same facility information that is required for the list of confirmed releases. It must also include the following information, if known:

1. Whether the facility is being investigated and cleaned up primarily using state resources from the state superfund (Hazardous Substance Remedial Action Fund) or other state revenues; or

2. Whether the facility is being investigated and cleaned up primarily by a responsible party under an agreement with the Department pursuant to the state superfund law (ORS 466.540 to 466.590); or

3. Whether the facility is being investigated and cleaned up by a responsible party, the Department or another agency pursuant to another state or federal authority.

The Department is also given the authority to arrange the inventory into categories of facilities, including but not limited to, the three categories listed in the previous paragraph. The intention is to allow the Department to group the facilities on the inventory into categories if that will help to achieve the main objective of the inventory - to provide public information.

Beginning January 15, 1990 the Department must annually submit the inventory and a report to the Governor, the Legislative Assembly and the Environmental Quality Commission. The list of confirmed releases is not required to be submitted,

and it is intended that it not be included as a list but rather in summary form. Further, it is not intended or expected that the inventory will list all contaminated sites in the state the first year, but rather that it will be developed over a period of years as preliminary assessments are completed. Thus, the inventory submitted each year will be as completed to date.

The annual report must include information about the comprehensive state-wide program the Department is required to implement under ORS 466.560 to identify any release or threat of release from a facility that may require remedial action. This is commonly referred to as the Department's site discovery program.

In addition, the report must include quantitative and narrative summaries of Department accomplishments during the previous fiscal year, as well as Department goals for the current fiscal year in at least the following areas:

1. Facilities with a suspected release added to the Department's site assessment database (It is not intended that this be another list of specific sites, but rather a summary of activity);

2. Facilities with a confirmed release added to and removed from the Department's list of confirmed releases;

3. Facilities added to and removed from the inventory;

4. Removals initiated and completed;

5. Preliminary assessments initiated and completed;

6. Remedial investigations initiated and completed;

7. Feasibility studies initiated and completed; and

8. Remedial actions, including long-term environmental and institutional controls, initiated and completed.

Finally, beginning in 1991 and each four years thereafter the report must also include a four year plan of action, with respect to items 5 to 8 above, with projections of funding and staffing levels necessary to implement that plan.

Section 6. Preservation of Authority Provides that nothing in these requirements relating to the list of confirmed releases or the inventory shall be construed to be a prerequisite to or otherwise affect the authority of the Department to undertake, order or authorize a removal or remedial action under ORS 466.540 to 466.590 and 466.900. This means that whether or not a facility is included on the list or in the inventory has no bearing on the ability of the Department to proceed with investigation and cleanup of any site under the state superfund law.

Section 7. Rulemaking - Definitions, Criteria and Exclusions This section requires the EQC to adopt rules defining "confirmed release" and "preliminary assessment" and providing criteria for removing a facility from the list or the inventory. The rules on confirmed release are to include criteria for the Department to use in determining whether adequate information exists to confirm that a release has occurred. The rules will also establish

categories of releases to be excluded from the list or inventory which the Department will apply on a case by case basis.

In adopting rules regarding confirmed releases, the EQC must exclude from the list and inventory the following releases to the extent the EQC determines they pose no significant threat to present or future public health, safety, welfare or the environment:

1. De minimis releases;

2. Releases that by their nature rapidly dissipate to undetectable or insignificant levels;

3. Releases specifically authorized by and in compliance with a current and legally enforceable permit issued by the Department or EPA; and

4. Other releases the EQC finds pose no significant threat.

Additionally, the Director must exclude from the list and inventory releases that the Director determines have been cleaned up to a level consistent with the state superfund rules, or that otherwise pose no significant threat.

It is intended that the EQC would adopt rules defining each of these exclusions in a generic fashion and leaving the case by case determination of whether an exclusion applies at a specific facility to the Department. Again, it should be emphasized that these exclusions are only for the purposes of determining which sites would be excluded from the list and inventory. Exclusion

from the list or inventory does not remove responsible party liability for any release, provide a cleanup standard, or affect the ability of the Department to require or perform cleanup at any site where a release has occurred.

A critically important point also needs to be made regarding the two criteria in the bill that affect the list, inventory and preliminary assessment requirements. It is intended that a release that "poses no significant threat" generally represents a lower threshold than a release where action has been taken or is needed to "assure protection".

The language regarding releases that have been cleaned up (three paragraphs above) is intended to refer to cleanups completed prior to the time when the Department makes a determination about whether to add a facility to the list or inventory. It does not refer only to cleanups completed before the effective date of this Act. Further, the cleanup may be performed pursuant to an agreement with the Department or another agency, or on the responsible party's initiative, as long as adequate information is submitted to the Department so that it can determine that the release poses no significant threat.

If a release has been cleaned up such that the actions taken assure protection of public health and the environment, but the residual contamination from the release still presents a significant threat to public health or the environment, the

facility would not be excluded from the list or inventory. For example, a cleanup that required continuing environmental or institutional controls could be expected to be listed until the environmental or institutional controls are no longer needed. This is also consistent with the criteria described above for removing a facility from the list or inventory.

Section 8. Hazard Ranking Procedure This section requires the EQC to adopt rules providing a procedure for ranking facilities on the inventory based on the short-term and long-term risks they pose to present and future public health, safety, welfare and the environment. The Department will consider basing this ranking system on EPA's hazard ranking model to provide uniformity in evaluating sites for further state or federal remedial action.

Section 9. Conforming Amendment This section contains a conforming amendment to ORS 466.560 to retain the current requirement that the annual report to the Governor, Legislature and EQC includes information about the implementation and progress of the comprehensive state-wide site discovery program.

Section 10. Preliminary Assessments of Potential Facilities This section amends ORS 466.563 to require the Department to evaluate information it receives about a release or threat of release to determine if it presents a significant threat to present or future public health, safety, welfare or the

environment. The Department must document its conclusions, and if it determines the threat to be significant, a preliminary assessment must be conducted as expeditiously as possible within the budgetary constraints of the Department. The contents of the preliminary assessment will be defined by rule by the EQC.

It is intended that the preliminary assessment be conducted by the Department or by a responsible party with Department approval and oversight. The requirement that the Department conduct a preliminary assessment if it determines the release poses a significant threat, is not intended to prevent the Department from conducting preliminary assessments where a significant threat hasn't been documented yet. In many cases the Department will need to conduct a preliminary assessment to determine if a significant threat exists. This language does not interfere with or limit the Department's authority to conduct a preliminary assessment at its discretion.

Section 11. Rule Adoption Deadline This section requires the EQC to adopt the rules required under this Act within nine months of enactment.

Section 12. Inventory and Report Submittal Date This section requires the Department to submit the first report and inventory, as completed to date, to the Governor, Legislature and EQC on or before January 15, 1990.

Section 13. Declaration of Emergency This section declares an emergency and makes the Act effective upon its passage.

HB3235.SMY

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DATE July 26, 1989

TO Linda Zucker, Hearings Officer, Environmental Quality Commission

FROM Phillip Grillo, Attorney for City of Milwaukie

RE City of Milwaukie Contested Case No. SA-891-706:
Hearing Memo: Jurisdiction

The Department of Environmental Quality's ("DEQ") attempt to act on its earlier order after the city filed its Notice of Intent to Appeal raises serious jurisdictional questions. The primary question is whether the Director of DEQ has jurisdiction to take action on a matter after jurisdiction is conferred on the Commission by the filing of a Notice of Intent to Appeal.

By statute, the Director of DEQ (Director) has the sole authority to add a facility to the inventory where a release has been confirmed. ORS 466.557(4). That same statute specifically indicates that jurisdiction over the appeal of that decision is vested in a different authority, the Environmental Quality Commission ("Commission"). ORS 466.557(4) provides:

> The decision of the director to add a facility may be appealed in writing to the commission within 15 days after the owner receives notice. The appeal shall be conducted in accordance with the provisions of ORS 183.310 to 183.550 governing contested cases.

It is a well-settled rule that, after jurisdiction has been vested in an appellate court by the taking of an appeal, the lower court cannot proceed in any manner so long as to effect the jurisdiction required by the appellate court or defeat the right of the appellants to pursue the appeal with effect. This rule is said to be "universally recognized." See State v. Jackson, 228 Or. 371, 382, 365 P.2d 294 (1961).

The leading case on the vesting of appellate jurisdiction is Murray Well-Drilling v. Deisch, 75 Or. App. 1, 704 P.2d 1159 (1985). In Murray Well, the attorney general's office was called upon to represent the interests of the Oregon Director of Veteran's Affairs in an action to determine the priority of interests in certain property claimed by the Department of Veteran Affairs ("DVA"), two individuals, and a well-drilling corporation. DVA prevailed on summary judgment, and the corporation prematurely filed a notice of intent to appeal before

the trial court's order was final. The appellate court dismissed the untimely appeal for lack of jurisdiction, but did not issue its final appellate order until November 29. Meanwhile, on October 3, the trial court issued its final order and Murray filed a new notice of intent to appeal from that order.

The issue on appeal in Murray Well was whether the initial appeal deprived the trial court of jurisdiction to take any action on the case, despite the case that the court of appeals may not have had jurisdiction as a matter of law. Murray Well's analysis relied on the Oregon Supreme Court's earlier holding in Pohrman v. Klamath Falls Comm., 272 Or. 390, 397, 538 P.2d 70 (1975). In that case, the Oregon Supreme Court held that "when a notice of appeal is timely served and filed, the court has jurisdiction . . . ." In Murray Well, the attorney general's office conceded that the filing of a notice of appeal in any form confers jurisdiction on the appellate court to determine whether it has jurisdiction of the appeal on the merits. However, the attorney general's office took the position that the trial court is not thereby deprived of jurisdiction. The court rejected the attorney general's position and reasoned that "concurrent jurisdiction in two courts concerning the same cause presents an untenable situation." Murray Well at 1164.

The court in Murray Well held that:

> "[T]he interests of sound judicial administration lead to the conclusion that the acts of a timely filing and serving of notice of appeal are the sine qua non (the essence) of appellate jurisdiction which, concomitantly, divests the trial court of jurisdiction, at least for such time as it takes to determine finally whether the appellate court has jurisdiction of the cause.

Murray Well at 1165 (parenthetical added).

The court concluded that:

> "The better view is that, once a notice of appeal has been filed, the appellate court has jurisdiction and the trial court does not, until there is a final determination on the merits or a determination that the

> appellate court lacks jurisdiction. This view is consistent with the Supreme Court's holding in Pohrman v. Klamath Falls Comm., 272 Or 390, 397, 538 P2d 70 (1975)."

Murray Well at 1164.

The Murray Well rule has been followed in subsequent decisions including State v. Arnold, 90 Or. App. 596, 752 P.2d 1300 (1988), and Hawkins v. City of LaGrande, 93 Or. App. 63, 760 P.2d 1346 (1988).

The law regarding jurisdiction of lower bodies to act on a matter currently under appeal is well-settled. The rule applies to appeals in the judicial context as well as to appeals in the administrative context. Perhaps the most instructive case in Oregon regarding jurisdiction of administrative appeals arose out of a case in Washington County that recently was appealed to the Land Use Board of Appeals.

In Standard Insurance v. Washington County, LUBA No. 88-109 (5/11/89), Washington County was attempting to take action which would have had the result of mooting the LUBA case. If Washington County had been successful in their action, the appeal would have been dismissed on mootness grounds. LUBA held that:

> "Where jurisdiction is conferred on an appellate review body, once appeal/judicial review is perfected, a lower decision-making body loses its jurisdiction over the challenged decision unless the statute specifically provides otherwise."

In this case, the governing statute, ORS 466, does not authorize the Director to take further action on his prior decision while that decision is being reviewed by the Commission. This conclusion is consistent with DEQ's own administrative rule, OAR 340-11-132(2)(b) which provides in relevant part: "The timely filing and service of a Notice of Intent to Appeal is a jurisdictional requirement for the commencement of an appeal to the Commission and cannot be waived." Clearly, jurisdiction over this action transfers to the Commission upon appeal. The Director has no specific residual authority to take further action on his prior decision once the Commission has obtained jurisdiction.

Mr. Burkholder's July 20th letter indicates that "DEQ possesses inherent authority to dismiss inventory orders." (Burkholder letter, page 2.) Whatever the source of this "inherent authority" may be, the attorney general is unable to cite to any specific statute that allows the Director to dismiss an inventory order once an appeal of that order has been perfected with the Commission. In other words, whatever plenary authority DEQ may possess to carry out its inventory of hazardous facilities, the Director's authority to act on his prior decision is suspended once that decision is appealed to the Commission. If the Director's order is on appeal, he is simply not authorized by statute or by rule to dismiss his prior order until the commission has issued its final judgment.

There is only one method in ORS Chapter 183 by which an agency may reconsider its prior order while that order is on appeal. ORS 183.482(6) provides:

> "At any time subsequent to the filing of the petition for review and prior to the date set for the hearing, the agency may withdraw its order for purposes of reconsideration. If an agency withdraws an order for purposes of reconsideration, it shall, within such time as the court may allow, affirm, modify or reverse its order. If the petitioner is dissatisfied with the agency action after withdrawal for purposes of reconsideration, the petitioner may file an amended petition for review and the review shall proceed upon the revised order.

However, by its terms, this statute applies to judicial review, rather than in the context of internal administrative appeals. If the statute applies by analogy, the Director must reconsider his prior order by issuing a "revised order." By Mr. Burkholder's letter of July 20, 1989, the agency has made it very clear that, in its view, the July 14th "order" is "merely a letter notifying the city of DEQ's dismissal of order no. SA-891-706." Even if the agency were to issue a "revised order," the order must be filed prior to the date set for the hearing. If the agency withdraws its prior order, it is required to either affirm, modify, or reverse its prior order.

Moreover, if the petitioner is dissatisfied with the agency's action after withdrawal, the petitioner may file an

amended petition for review, and the review shall proceed upon the revised order. In other words, the agency may only withdraw an order with an order. If the withdrawal occurs by order, prior to the hearing, the petitioner retains his statutory right to a hearing by filing an amended petition for review. Review shall proceed upon the revised order.

On the other hand, since ORS 183.482(6), by its terms, applies only in the context of judicial review, it is clear that the legislature contemplated situations such as these. The legislature has not granted the agency any specific statutory authority to take action once that agency's prior order is on appeal within the administrative context.

In summary, the Commission has jurisdiction to hear this contested case proceeding. Its jurisdiction vested on December 12, 1988, when the Notice of Intent to Appeal was timely filed. At the same time, the Director temporarily lost authority to amend that order, especially if that action is designed to upset the jurisdiction of the Commission and/or affect the petitioner's appellate rights. The Director's July 14, 1989, letter, purporting to withdraw the order on appeal is ultra vires and void for lack of jurisdiction. Plenary authority or inherent authority to act is not a sufficient basis for defeating appellate jurisdiction.

PEG:gaj

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DATE July 27, 1989

TO Linda Zucker, Hearings Officer, Environmental Quality Commission

FROM Phillip E. Grillo, Attorney for the City of Milwaukie

RE City of Milwaukie Contested Case No. SA-891-706:
Hearing Memo: July 14 Agency Action Is an Order

DEQ's letter of July 14, 1989, purports to dismiss the city's appeal, in order to deny the city its right to a contested case hearing--a right established by ORS 466.557 (1987). Aside from Mr. Hansen's reference to amendments contained in HB 3235, the letter fails to state the source of DEQ's authority to dismiss this contested case hearing. Neither the original nor the amended version of ORS 466.557 authorizes DEQ to dismiss a contested case proceeding by letter. The issue addressed by this memo is whether DEQ's letter of July 14, 1989, is an agency order or whether it is some other statutorily authorized action. Until we know what the July 14 letter is, as a legal matter, it is impossible to determine its validity.

Order

Pursuant to the Oregon Administrative Procedures Act, an agency order is defined as:

> "'Order' means agency action expressed orally or in writing directed to a named person or named persons, other than employees, officers, or members of an agency. 'Order' includes any agency determination or decision issued in connection with a contested case proceeding."

ORS 183.310(5)(a).

Once DEQ issued its November 30, 1988, order proposing to list the city's water supply as a facility, the city responded by requesting an appeal pursuant to the unamended version of ORS 466.557(4). Because of this appeal, the order could be disposed of only through a contested case proceeding. Pursuant to the definition of an "order," as provided above, DEQ's July 14, 1989, letter is clearly a written agency decision issued in connection with a contested case proceeding. This letter constitutes an order for purposes of ORS Chapter 183.

Final Order

Any agency action expressed in writing which precludes further agency consideration of the subject matter of the statement or declaration constitutes a final order. ORS 183.310(5)(b). DEQ's July 14 order declares the agency's final position that pending contested case hearings are "no longer necessary since the law has been changed." Effectively, DEQ has decided to dismiss not only the city's Listing Order, but any pending contested case hearings--including this one. Since this agency action purports to terminate the hearing process created under the unamended version of ORS 466.557, it bears the essential elements of a final order.

However, final orders have additional requirements associated with them. Final orders issued in the context of a contested case hearing which are adverse to a party's interest must be in writing and must be accompanied by findings of fact and conclusions of law. ORS 183.470(1-2). The July 14 order must be accompanied by findings of facts or conclusions of law. Presumably, the agency has "found" that this contested case may be dismissed because "it is not necessary." Petitioner certainly does not agree with the agency's "finding" in this regard, but the statement is meant to reflect the agency's finding on the matter.

As a result of the foregoing analysis, the agency's July 14 letter is clearly an order and is arguably a final order. If the July 14 letter is not an order, what is it? The only other available means by which agencies may take legal action on contested cases are by informal dispositions or default orders.

Informal Dispositions

To engage in the informal disposition of a contested case, both DEQ and the city must engage in discussions or negotiations which result in a stipulation, a settlement agreement, consent order, or, lastly, a default. ORS 183.415(5). Informal dispositions only are available to DEQ when the parties agree to utilize them.

DEQ could have dismissed the city's contested case by using these informal procedures. However, mutual consent is necessary. At no time has either party agreed to modify contested case procedures or enter into formal negotiations and reduce the

results of these negotiations to a written agreement. The parties have talked, but no agreement has been reached. The letter of July 14, 1989, fails to comport with less rigid requirements of informal disposition.

In summary the DEQ letter constitutes an agency order that arguably renders a final determination of the city's contested case hearing. The letter does not fit the less formal categories of informal disposition. Essentially, the letter is a final decision that attempts to preclude any contested case proceedings on the matter. Therefore, the July 14, 1989, letter can only be construed as the DEQ's final order attempting to deny the city its perfected right to a contested case hearing and judicial review.

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DATE July 27, 1989

TO Linda Zucker, Hearings Officer, Environmental Quality Commission

FROM Phillip E. Grillo, Attorney for City of Milwaukie

RE City of Milwaukie Contested Case No. SA-891-706:
Hearing Memo: Due Process

DEQ's July 14, 1989, letter/order purports to deprive the city of its entitlement to a hearing which is a right protected by the Due Process Clause of the United States Constitution.

Generally speaking, due process is always a consideration in state administrative proceedings. Due process is guaranteed by the United States Constitution, Fifth Amendment, and is applied to the states and their officials through the fourteenth amendment. United States v. Raines, 362 U.S. 17, 4 L.Ed.2d 524, 80 S.Ct. 519 (1960). The due process clause applies when a liberty or property interest within the meaning of the clause is affected. Id. Normally, property interests protected by due process are not defined in the United States Constitution, but are created by statutes, rules, or precedents that secure certain benefits and support claims of entitlement to those benefits. Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

The factors which are balanced in determining the process which is appropriate to protect a property interest include:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of [a property] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Stretten v. Wadsworth Veterans Hospital, 537 F.2d 361, 367 (9th Cir. 1976) (quoting Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

Although there has been some debate as to whether state statutes providing for particular procedures amount to "entitlements" which are to be protected by the due process, the rule in the Ninth Circuit is that the United States Constitution protects such procedural rights. Parks v. Watson, 716 F.2d 646, 656 (1983).

Accordingly, Parks supports the proposition that the city has a property right in ORS 466.557(4) (1987) because it entitled the city to a contested case hearing to challenge the Director's decision to list the subject property.

Effects of Erroneous Deprivation

DEQ's decision to place the subject property on the List has subjects the city to significant liabilities frequently associated with the characterization of a facility as a hazardous waste site. The implications of such a characterization places the city's reputation, and integrity at stake because of DEQ's failure to fulfill its statutory obligation in providing the city an opportunity to be heard. See Board of Regents v. Roth. The listing of the city as a "Superfund Site" has resulted in the following deprivations: (1) depressed property values; (2) declining property development; (3) potentially spiraling insurance risks; (4) increased municipal water costs; and (5) strict liability for remedial action costs.

State Interest

The state's interest in denying the city its right to due process is grounded in DEQ's desire to reduce the burden of holding any of the hearings as previously required. The DEQ is obsessed with reducing its self-inflicted fiscal and administrative burdens additional or substitute procedural hearing requirements would entail. Although the government's interest in conserving scarce fiscal and administrative resources can be a factor to be weighted in the balance against the deprivation of an individual's protected rights, these costs alone are not controlling weight in the determination of whether due process requires a particular procedural safeguard prior to an administrative decision on the merits. Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

On balance, the mere preservation of administrative fiscal resources does not sufficiently outweigh the severe impacts that result from the deprivation of the city's constitutionally recognized right to a contested case hearing through which it may

challenge and compel the Director to comply with his statutory obligations originally set forth in ORS 466.557. The agency wrongfully placed the city on the list in November 1988, and now it hopes to preclude any challenge to its listing decisions. In this case, the consequences of depriving the city of a hearing far outweigh the state's interest in repealing that right. The city's right to a contested case hearing under ORs 466.557 (1987) is a constitutionally protected property right which cannot be abridged by subsequent state action. To the extent HB 3235 purports to deprive the city of these rights, the act is in violation of the city's right to due process guaranteed under the fifth amendment and fourteenth amendment of the United States Constitution.

PEG:gaj

RPH\MILWAUKI\SUPERFND.ME3/gaj

O'DONNELL, RAMIS, ELLIOTT & CREW
ATTORNEYS AT LAW
1727 N.W. HOYT STREET
PORTLAND, OREGON 97209
(503) 222-4402

DATE July 27, 1989

TO Linda Zucker, Hearings Officer, Environmental Quality Commission

FROM Phillip E. Grillo, Attorney for City of Milwaukie

RE City of Milwaukie Contested Case No. SA-891-706:
Hearing Memo: Retroactivity

The Department of Environmental Quality's ("DEQ") retrospective application of HB 3235 to deny the city a contested case hearing is unlawful because HB 3235 lacks express language indicating any legislative intent to apply HB 3235 retroactively.

The source of the DEQ's authority for issuing its dismissal order is altogether unclear. It may be purporting to base its action on authority granted by language contained in the amended version of ORS 466.557(4), which states in relevant part:

> "The decision of the Director to add a facility to the list is not appealable to the Environmental Quality Commission or subject to judicial review under ORS 183.310 to 183.550."

Oregon courts have held that, barring express language in the statute indicating a legislative intent to deny the party's right to a hearing, the amending statutes will only be applied prospectively. Joseph v. Lowery, 261 Or. 545, 495 P.2d 273 (1972). Absent the explicit indication of whether the legislation is intended to have a retroactive effect, it becomes the court's duty to determine the legislative intent. Perkins v. Willamette Ind., 273 Or. 566, 542 P.2d 473 (1975). Unless retroactive construction is made mandatory by the terms of the amendment, a court will not apply it retroactively if such construction will impair existing rights, create new obligations, or impose additional duties with respect to past transactions. Kemph v. Carpenter, 229 Or. 337, 367 P.2d 436 (1961), favorably citing Joseph v. Lowery, supra.

DEQ's reliance upon a grant of authority under HB 3235 impairs the city's presently valid and existing right to a contested case hearing. In addition, the city would be subject to new obligations arising from DEQ's decision because, if the site is listed pursuant to the amended statutory scheme, the city may suffer a permanent loss of its right to appeal unless its

vested right to appeal is preserved. Consequently, the listing decision could expose the city to the strict liability under ORS 466.567 and the ensuing costs of litigating its liability for remedial action costs incurred by the DEQ.

Mr. Burkholder in his letter of July 20, 1989, mischaracterizes the issue as one involving "residual rights." When a new law amends or repeals existing law, and an action is pending under existing law, the issue is whether the new law applies retroactively. When a party's appeal is properly filed and vests under the old law, the court must determine whether the legislature has expressed an intent to retroactively apply the amendment. Mr. Burkholder's citation to Sutherland states the basic legal proposition that: "Except as to proceedings past and closed, a statute is considered as if it had never existed." Sutherland Statutory Construction, § 23 at 417 (4th ed. Sands 1972).

As Sutherland notes, the effect of a repealing statute is to destroy the effectiveness of the repealed act in futuro. In other words, HB 3235 only applies prospectively future listing notices. The second half of the Sutherland quote confirms this result: "[E]xcept as to proceedings past (emphasis added) and closed, a statute is considered as if it had never existed." Hence, a silent amendment acts only prospectively and cannot divest the rights of a party who has timely filed an appeal under then-existing law. Accordingly, Sutherland confirms that the repeal of a statute does not apply retroactively to divest rights established in past proceedings. HB 3235 does not deny the city a right to a hearing because it does not apply retroactively to this contested case proceeding.

If HB 3235 is applied retroactively, the city will suffer a substantial impairment to its existing vested rights because the procedures provided by the original version of ORS 466.557(4) amounted to an "entitlement" protected by the United States Constitution, Fourteenth Amendment, Due Process Clause. In Parks v. Watson, 716 F.2d 646 (9th Cir. 1983) (per curiam), the court held that state statutes which provide for particular hearings procedures amount to an entitlement to the protected party which is preserved by the due process clause. Id. at 656. Moreover, the federal courts are inclined to extend due process protection to those procedural requirements which are intended by the state legislature to operate as a "significant substantive restriction" on the effected agency's action. Thus, a property interest arises in the protected procedural guarantees. Jacobsen v. Hannifin, 627 F.2d 177, 180 (9th Cir. 1980).

As in Parks and Jacobsen, here the city was granted a right to a hearing and judicial review by statute, ORS 466.557 (1987). ORS Chapter 466 establishes a minimum standard that DEQ must meet prior to placing a facility on the List. The city has alleged affirmative defenses which claim that DEQ has failed to meet these and other statutory criteria. Since these requirements are clear indications of the legislature's intent to grant substantial procedural protections to private interests and impose "significant substantive restrictions" on DEQ's listing decision-making capacity, a denial of the city's right to a hearing would result in the impairment of the city's existing rights.

These due process entitlements vest when a party engages in the administrative hearing process. In Cox v. Schweiker, 684 F.2d 310 (5th Cir. 1982), the court held that a state statute which contained the entitlement vests once a person fulfills the statutory requirements and vests despite the fact that agency has misapplied the statute. (emphasis added). Id. at 319. Moreover, the court held that subsequent legislative amendments to those entitlements do not affect prior vested rights unless the legislature so declares by express language. Id.

The city's right to a contested case hearing in which to challenge the Director's decision to list the subject property as a facility stems from ORS 466.557(4) which incorporates additional procedural guarantees as contained in ORS 183.310 - ORS 183.550. According to Cox, these rights to a hearing vested when the city filed its Notice of Intent to Appeal and requested a contested case hearing.

In summary, the retroactive application of the amended version of ORS 466.557(4), as set forth in HB 3235, would operate to deprive and impair the city's substantive rights protected by the United States Constitution, Fourteenth Amendment. Therefore, DEQ cannot constitutionally rely upon HB 3235 as a means of depriving the city of a hearing once the city's right to a hearing was perfected under prior authority.

PEG:gaj

RPH\MILWAUKI\SUPERFND.ME2/gaj

DAVE FROHNMAYER
ATTORNEY GENERAL

JAMES E. MOUNTAIN, JR.
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

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Portland, OR 97201
Telephone: (503) 229-5725
FAX: (503) 229-5120

July 20, 1989

Linda K. Zucker
Hearings Officer
Environmental Quality Commission
811 S.W. 6th Street
Portland, OR 97204

Re: City of Milwaukie; No. SA-891-706

Dear Ms. Zucker:

This letter responds to the City of Milwaukie's letter of July 18, 1989. It is the Department of Environmental Quality's position that this matter is no longer before the Environmental Quality Commission and that the EQC's Hearings Officer has no jurisdiction to conduct a contested case.

Before discussing the basis for DEQ's position, I would correct a misperception on the City's part. The City characterizes DEQ's letter of July 14, 1989 as an "order" dismissing the original listing order. DEQ's letter is not an order, but merely a letter notifying the City of DEQ's dismissal of Order No. SA-891-706. The City's misperception of the letter as being an order might be due to the letters "RE:", which reads "Dismissal Order No. SA-891-706." This is a typographical error, and should read "RE: Dismissal of Order No. SA-891-706." DEQ's July 14 letter is not otherwise an order in any respect. DEQ does not have to issue a new order to withdraw or dismiss an administrative order.

Returning to DEQ's position that this matter is no longer before EQC as a contested case proceeding, it is obvious that, once DEQ dismissed its order, the City's request for a contested case hearing became moot. Simply put, there is nothing to litigate. There is no longer a pending agency decision. Property owned by the City is not at present proposed to be listed on an inventory of confirmed releases.

M-1

The City's contention that DEQ may not dismiss its own order unilaterally is unfounded. DEQ possesses inherent authority to dismiss inventory orders, just as it has inherent authority to unilaterally dismiss other types of administrative orders. For example, if DEQ issued an order assessing a civil penalty for a pollution violation and subsequently discovered that it had issued the order to the wrong party, DEQ certainly could dismiss the penalty order without going through a contested case proceeding or obtaining the respondent's consent. DEQ's inventory orders are no different.

The City's reliance on ORS 183.415(5) to the contrary is misplaced. That statute merely describes possible methods of informal resolution by parties of a contested case. It does not proscribe DEQ's ability to dismiss an order initially giving rise to the contested case. The City also argues that DEQ may only "delist" a facility by following House Bill 3235, § 4. This argument presupposes that City property is on a list, which, of course, is no longer the case.

DEQ's ability to unilaterally dismiss its inventory orders would have existed regardless of the City's right to a contested case under ORS 466.557(4) being repealed by HB 3235, § 1. Put another way, DEQ could have dismissed Order No. SA-891-706 even if ORS 466.557 still provided for contested case appeals. However, the legislature's repeal of that provision removed any argument that the City has a continued right to a contested case hearing. A party is entitled to a contested case only if so provided by statute, rule, or constitution. ORS 183.310(2). The Site Inventory Law, as amended by the 1989 Legislature, does not require a contested case hearing. No other statute or rule requires a contested case hearing for a dismissed, non-existent agency action. Similarly, there is no constitutional due process right to a hearing where there is no governmental action affecting a protected interest of the City. The City cites no authority to the contrary.

Not only does the City not have a right to a contested case under current law, it does not have a residual right to a hearing based on repealed provisions of ORS 466.557(4):

> "The effect of the repeal of a statute having neither a saving clause nor a general saving statute to prescribe the governing rule for the effect of the repeal, is to destroy the effectiveness of the repealed act in futuro and to divest the right to proceed under the statute. Except as to proceedings past and closed, a statute is considered as if it had never existed." Sutherland Statutory Construction, § 23.33 at 417 (4th ed Sands 1972); see also 73 Am Jur 2d Statute § 34; see generally Whipple v. Howser, 51 Or App 85 (1981).

The City cites no authority for its proposition that its right to a hearing somehow "vested" when the City "perfected" its appeal. This matter does not involve something akin to a property or water right, but only the question of whether a hearing is legally available to litigate an agency decision that has been dismissed.

DEQ respectfully submits that the EQC Hearings Officer has no jurisdiction to hear the City's contested case appeal. The DEQ order giving rise to the appeal has been dismissed and the City has no continued right to a hearing. DEQ further suggests that Order No. SA-891-706 may be removed from the Hearings Officer's contested case docket as an administrative matter.

While DEQ's position is that the Hearings Officer no longer has jurisdiction over this matter, I represented to Phil Grillo that DEQ would concur with the City's request that the prehearing conference scheduled for July 20 be postponed until July 27, 1989. DEQ's concurrence was a matter of courtesy, not for the purpose of discussing "settlement," since there is no longer any pending agency action to settle. DEQ will appear July 27 to inform you of the status of this matter, if it is not resolved before then.

Sincerely,

Kurt Burkholder
Assistant Attorney General

KB:aa
#7605H
cc: Mike Downs
Phil Grillo
Fred Hansen
Michael Huston
Dave St. Louis

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*ALSO ADMITTED TO PRACTICE IN STATE OF WASHINGTON

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CANBY, OREGON 97013
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July 18, 1989

BY HAND DELIVERY

Ms. Linda K. Zucker
Hearings Officer
Environmental Quality Commission
811 S.W. Sixth Avenue
Portland, OR 97204

Mr. Fred Hansen, Director
Department of Environmental Quality
811 S.W. Sixth Avenue
Portland, OR 97204

Re: City of Milwaukie; No. SA-891-706

Dear Ms. Zucker and Mr. Hansen:

The city is in receipt of DEQ's July 14, 1989, order purporting to dismiss the agency's November 30, 1988, order listing the city as the owner of a contaminated facility. On behalf of the city, I would like to take this opportunity to respond in a preliminary way to your July 14th order.

Your letter of July 14, 1989, indicates that DEQ will be replacing the November 1988 list (List 1) with a new, two-tier list, pursuant to HB 3235 (List 2). In List 2, owners have an opportunity to "comment" on DEQ's decision to add a facility to either list in the new two-tiered system. It is the agency's position that owners are precluded from a hearing on the agency's listing decision and are, likewise, specifically precluded from seeking judicial review of that agency decision.

Based upon your July 14th letter, it is not clear under what authority the agency purports to dismiss itself from this contested case hearing. The agency and the city are currently engaged in a statutory contested case proceeding in order to decide various legal and factual issues under ORS Chapter 466 (1987). The agency's purported dismissal is not authorized by either ORS Chapter 466 (1987) or HB 3235. Since the agency does not have the authority to unilaterally dismiss itself from a contested case proceeding under either the original version of the Oregon Superfund Act or its 1989 amendments, the agency's July 14th order is invalid.

A. Oregon Superfund Act (1987)

The Oregon Superfund Act of 1987 provides the city with a right to a hearing before the Environmental Quality Commission and to seek judicial review of the EQC's decision, in accordance with the provisions of ORS Chapter 183. The city's right to this hearing vested when it perfected its appeal by filing its Notice of Intent to Appeal with the agency on December 12, 1988. As of that date, all necessary procedures were satisfied in order to commence a contested case proceeding under ORS Chapter 183.

The procedures which govern this contested case proceeding are outlined in ORS Chapter 183 (Oregon Administrative Procedures Act) and OAR 340 Division 11 (DEQ Administrative Rules). The original Oregon Superfund Act did not contain any delisting procedures, nor did the agency promulgate any rules in that regard. Therefore, any authority for the agency to delist or dismiss the pending contested case proceeding under the original Act must be found in either ORS Chapter 183 or OAR Chapter 340.

OAR Chapter 340 does not authorize the agency to informally delist or dismiss facilities. ORS 183.415 governs the procedure for informal disposition of all contested case proceedings. ORS 183.415(5) provides, in relevant part:

> "(5) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default. . . ."

The city is willing to negotiate stipulations, an agreed settlement, or a consent order with the agency at its earliest convenience. In the absence of such stipulation, settlement, or

consent order, the city will regard the agency's July 14, 1989, Order of Dismissal as a default judgment as to all affirmative defenses raised by the city in its amended answer.

B. SB 3235 (1989)

SB 3235 was signed by the governor on June 28, 1989, and, by its terms, took effect on that date. It is the city's position that SB 3235 does not retroactively apply to the city's contested case proceeding in this matter. The law which governs this contested case proceeding is ORS Chapter 466, as that statute existed at the time the city's appeal was perfected.

Nonetheless, if the agency is purporting to take its July 14, 1989, action based upon the new Act, it must comply with HB 3235 Section 4, governing the removal of a facility from the list or inventory. Such removal is only authorized after EQC rulemaking regarding delisting and, even then, must be based on a finding that one or more of three criteria set out in Section 4(1)(a)-(c) have been satisfied. Those criteria are as follows:

(1) Actions taken at the facility have attained a degree of cleanup and control of further release which assures protection of present and future public health, safety, welfare, and environment;

(2) No further action is needed is to assure protection of present and future public health, safety, welfare, and the environment; or

(3) The facility satisfies other appropriate criteria for assuring protection of present and future public health, safety, welfare, and the environment.

C. Conclusion

In summary, by its own rules and governing statutes, DEQ is precluded from informally dismissing the city from its list. Once this contested case proceeding commenced, the city obtained a vested right to a decision on the merits which cannot be extinguished by unilateral agency action without the city's

consent. The agency, in this case, is attempting to bypass the city's preexisting statutory and constitutional rights to a hearing by substituting one list for another. The Oregon Administrative Procedures Act and constitutional due process guaranties do not permit the agency to act in such a fashion without the consent of the city or a resulting default order.

The city is prepared to move forward on schedule to decide the procedural and substantive issues raised by its answer in this contested case proceeding. However, in light of the agency's order of July 14, 1989, the city invites DEQ to engage in settlement negotiations prior to resolving the issues in the formal contested case hearing. Given the dates tentatively set for the prehearing conference (July 20, 1989) and the hearing itself (July 27, 1989), I request that each of these dates be delayed by one week in order to give the agency an opportunity to consider scheduling a settlement conference with the city.

Thank you for your continued cooperation in this matter.

Sincerely,

Phillip E. Grillo
Of Attorneys for the City of Milwaukie
O'DONNELL, RAMIS, ELLIOTT & CREW

PEG/gaj

cc: Mr. Dan Bartlett
Mr. Dick Bailey
Mr. Kurt Burkholder
Mr. Michael Downs

PEG\MILWAUKI\ZUCKER.LT3

Department of Environmental Quality.

811 SW SIXTH AVENUE, PORTLAND, OREGON 97204-1390 PHONE (503) 229-5696

July 14, 1989

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

City of Milwaukie
10964 S. E. Oak
Milwaukie, OR 97222

ATTN: Manager of Environmental Affairs

RE: Dismissal Order No. SA-891-706
Milwaukie Public Water Supply
Inventory of Confirmed Releases

This letter is to notify you that the order the Department of Environmental Quality mailed on November 30, 1988 stating that the facility listed above was proposed for listing on the Inventory of Confirmed Releases, established pursuant to ORS 466.557 as that statute was then in effect, is hereby dismissed. If a request for a contested case hearing to appeal the listing was submitted, that appeal is no longer necessary since the law has been changed and the Department has withdrawn all sites from the proposed list.

The Oregon Legislature has amended the Inventory law. The new law, House Bill 3235, requires the Environmental Quality Commission (EQC) to adopt rules regarding the listing process. The Department will solicit the advice of a citizen advisory committee in the development of the rules.

The Department will be operating under a significantly different approach. The new law requires the Department to develop two lists--the List of Confirmed Releases and the Inventory of Facilities Needing Further Action. The new law requires the agency to notify the owner and operator of a facility before the facility is placed on either list. The owner or operator will then have an opportunity to provide comments. Once those comments have been made the Department's decision to add a facility to either list is final. These lists will not, however, be developed until the new rules are adopted.

After the adoption of rules, expected to occur in about nine months, the Department will contact you in writing only if the captioned site is again proposed for listing. If this is the case, you will be given an opportunity to submit information concerning the site. Let me point out, however, that neither this letter nor any future decision to list affects liability, further investigation, remedial action or similar issues at the site.

NN-1

If you have any questions about this letter, the new law, or the rulemaking process, please contact the Site Assessment Section of the Environmental Cleanup Division at (503) 229-5733.

Sincerely,

Fred Hansen
Director

SL:m
SM2336
cc: Linda Zucker, EQC Hearings Officer
Northwest Regional Office, DEQ

NN-2

NEIL GOLDSCHMIDT
GOVERNOR

Environmental Quality Commission

811 SW SIXTH AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

June 16, 1989

CERTIFIED MAIL P 882 474 932

Phillip E. Grillo, Esq.
1727 N.W. Hoyt St.
Portland, OR 97209

Kurt Burkholder
Assistant Attorney General
Department of Justice
1515 SW 5th Ave., Suite 410
Portland, OR 97201

Re: City of Milwaukie
No. SA-891-706

This is to acknowledge City of Milwaukie's request that a hearing be scheduled in this matter and to set a schedule to meet the City's claim to hearing under current law.

Recognizing the practical requirements of preparing administrative litigation of this kind, I ask you to reserve Thursday, July 20, 1989 for pre-hearing conference and Thursday, July 27, 1989 for hearing at DEQ offices, 811 SW Sixth Avenue, Portland, Oregon 97204.

If, in the meantime, legislative action affects this plan, we can respond to changed circumstances.

Sincerely,

Linda K. Zucker
Hearings Officer

LKZ:y
HY8529
cc: Michael Downs, Environmental Cleanup Division, DEQ

I hereby certify that I served the attached Hearing schedule

_____, Case # SA-891-706

To:

Phillip E. Grillo, Esq.
1727 NW Hoyt Street
Portland, OR 97209

by mailing them a true copy of the order by placing it in a sealed envelope, with postage prepaid, at the United States Post Office at Portland, Oregon on June 16, 1989.

Joan B. Glascock

(Name) Joan B. Glascock

DEPARTMENT OF ENVIRONMENTAL QUALITY

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*ALSO ADMITTED TO PRACTICE IN STATE OF WASHINGTON

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June 28, 1989

Ms. Linda K. Zucker
Hearings Officer
Environmental Quality Commission
811 S.W. Sixth Avenue
Portland, OR 97204

Re: City of Milwaukie; No. SA-891-706

Dear Ms. Zucker:

Enclosed is the City of Milwaukie's Supplemental Answer in the above-entitled case, now set for a hearing on July 27, 1989.

Copies of the Supplemental Answer have been forwarded to Messrs. Michael Downs and Kurt Burkholder.

This Supplemental Answer has been filed 28 days prior to the hearing so that the agency will have sufficient time to prepare their response in advance of the hearing.

We look forward to our opportunity to a hearing in this case.

Sincerely,

Phillip E. Grillo
Of Attorneys for the City of Milwaukie
O'DONNELL, RAMIS, ELLIOTT & CREW

PEG/gaj

cc: Mr. Dan Bartlett
Mr. Dick Bailey
Mr. Kurt Burkholder
Mr. Michael Downs

PEG\MILWAUKI\ZUCKER.LT2

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF: SITE INVENTORY LISTING OF PROPERTY LOCATED CLACKAMAS COUNTY, OREGON, CITY OF MILWAUKIE, OWNER	NO. SA-891-706 SUPPLEMENTAL AND AMENDED ANSWER OF CITY OF MILWAUKIE

Pursuant to ORS 466.557(4), on December 12, 1988, the City of Milwaukie (Appellant) appealed the decision of the Director, Oregon Department of Environmental Quality (DEQ or Department), in Order No. SA-891-706 (Order), to place the property described in the Order (Subject Property) on the inventory of facilities where a release of a hazardous substance is confirmed by the Department under ORS 466.557(2) (Site Inventory). Pursuant to ORS 466.557(4) and OAR 340-11-107, Appellant answered the Order and Notice and requested a hearing. Appellant now supplements and amends its original Answer to the Department's Findings of Fact and Conclusions of Law as follows:

1.

Appellant admits that it is the owner of the Subject Property and has standing under ORS 466.540 to appeal the decision of the Department to place the Subject Property on the inventory of facilities where a release of a hazardous substance is confirmed by the Department under ORS 466.557.

///

///

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P-2

2.

Appellant is unable to admit or deny the remaining factual matters contained in the Order and Notice as the Department has not specified, stated, or separated facts from conclusions of law. Appellant finds the wording and organization of the Order and Notice ambiguous and fundamentally flawed. In the alternative, Appellant denies all factual allegations contained in Sections I(B) to I(D) of the Order and Notice.

PROCEDURAL AFFIRMATIVE DEFENSES:

FIRST AFFIRMATIVE DEFENSE

(Failure to Comply with Statutory Requirements - Defective Notice Contents)

3.

The Order and the November 30, 1988, accompanying letter failed to comply with ORS 466.557 because neither the letter nor the order contained all the information described in ORS 466.557(3). More particularly, the information required by ORS 466.577(3)(a) (a general description of the facility), ORS 466.557(3)(c) (time period during which a release occurred), ORS 466.557(3)(d) (name of current owner and operator and names of any past owners and operators during the time period of a release of a hazardous substance), ORS 466.557(3)(e) (type and quantity of a hazardous substance released at the facility), ORS 466.557(3)(f) (manner of release of the hazardous substance), ORS 466.557(3)(g) (levels of hazardous substance, if any, in ground water, surface water, air, and soils at the facility), and ORS 466.557(3)(h)

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P-3

(status of removal or remedial actions at the facility) has not been provided. Accordingly, the Order is defective and invalid.

SECOND AFFIRMATIVE DEFENSE

(Failure to Comply with Statutory Requirements - Inadequate Notice Period)

4.

Once the Department proposed to include the Subject Property on the Site Inventory, ORS 466.557(4) required the Department to notify the owner of such property prior to the Department's proposal. ORS 466.557(4) gives Appellant only fifteen (15) days after receipt of the Notice in which to appeal the proposed listing on the Site Inventory. Hence, Appellant's ability to respond in a timely manner to the Department's proposed listing depended both on the adequacy of the information in the Order and the availability of the information on which the Department made its decision.

5.

The Department has deprived Appellant of an adequate opportunity to respond in the following respects:

A. The Order and the November 30, 1988, accompanying letter failed to provide the information required by ORS 466.557, more particularly described in the First Affirmative Defense, above.

B. The information on which the Department based its decision to include the Subject Property does not support that decision.

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P-4

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6.

The Department denied Appellant adequate response time by failing to comply with the statutory provision of ORS 466.557(4) which stipulates that the Appellant has fifteen (15) days after receipt of Notice to request a Contested Case hearing. The Department's Order stipulates that Appellant's request must be received by the Director within fifteen (15) days of receipt. In order to have Appellant's Answer received within the stipulated time period, the Appellant must mail the Answer within approximately thirteen (13) days of receipt to allow adequate time for the Answer to be transmitted via mail to the Director.

7.

As a result of the Department's failure to comply with ORS 466.557(4), Appellant was deprived of the opportunity to adequately respond to the Department's decision within the statutorily mandated time period.

THIRD AFFIRMATIVE DEFENSE

(Failure to Define Terms)

8.

Oregon law imposes severe consequences, including potential strict liability and civil penalties, on an "owner or operator" of a "facility" within the meaning of ORS 466.540(6).

9.

Once the Department has proposed to include the Subject Property on the Site Inventory, a rebuttable presumption of liability is created by this act, wherein the named party is

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Portland, Oregon 97209
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P-5

considered an owner of an alleged facility whereupon the Department has confirmed the alleged release of hazardous substances. By virture of ORS 466.567(1), once a party has been identified and listed, the named party is destined to become subject to strict liability and/or civil penalties associated with or attributable to a release from the facility. The named party's primary sources of defense to this strict liability are the liability exclusions of ORS 466.567(1) to ORS 466.567(4).

10.

The Department has failed to define terms contained within these exclusions. More particularly, the terms which require definition are found in: ORS 466.567(1)(d) (any "acts or omissions, caused, contributed to or exacerbated" the release, unless the acts or omissions were in "material compliance"); ORS 466.567(1)(e) ("unlawfully hinders"); ORS 466.567(2)(b) (if the facility was "contaminated by the migration" of a hazardous substance from real property not owned or operated by the person); ORS 466.567(2)(c)(C) (what constitutes "acts or omissions of a third party"); ORS 466.567(3)(a)(B) ("exercise of eminent domain authority by purchase or condemnation"); ORS 466.567(4)(b) (failed to take "reasonable precautions" against "reasonably foreseeable acts or omissions" of a third party and the "reasonably foreseeable consequences"); and ORS 466.567(7)(b) ("emergency").

11.

The Oregon Legislature delegated to the Department authority to refine legislative policy generally expressed in these

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statutory terms under ORS 466.553(1). Based on the Department's failure to define and promulgate rules which interpreted these operative terms, Appellant was unable to prepare adequate defenses to rebut the presumptions created by the Department's Notice and Order. Accordingly, the Order violates ORS 466.553(1) and is invalid.

FOURTH AFFIRMATIVE DEFENSE

(Ad Hoc Rule Making)

12.

Pursuant to ORS 466.553(1), the Department must adopt rules in accordance with the applicable provisions of ORS 183.310 to ORS 183.550. The Department implemented certain oral and/or written procedures, methodologies, and response actions relating to properties proposed to be included on the Site Inventory. Those procedures, methodologies, and response actions include: requiring Appellant and others to respond in a time period shorter than prescribed by statute; failing to provide Appellant with information necessary to understand the alleged facts in the Order and Notice, thereby hindering Appellant's ability to prepare a defense; and failing to complete factual inquiries necessary to determine if placement of the Subject Property on the Site Inventory was appropriate.

13.

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

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of any agency, is a rule within the meaning of ORS 183.025(3). The procedures, methodologies, and response actions adopted and implemented by the Department substantially affect Appellant and the public interest.

14.

By its informal procedures, methodologies, and response actions, the Department has adopted new rules without the benefit of administrative rulemaking as required by ORS Chapter 183. These informal rules are therefore statutorily defective and void. Accordingly, the Order and Notice are invalid.

FIFTH AFFIRMATIVE DEFENSE

(Abuse of Discretion)

15.

The Department breached its statutory duty, mandated by ORS 466.557(3), in that its decision to include the Subject Property on the Site Inventory was not based on sufficient credible and/or authoritative information in the record.

16.

The Department breached its statutory duty, mandated by ORS 466.557(4), in that it denied Appellant adequate response time by failing to provide a time period of fifteen (15) days for Appellant's preparation and transmission of its answer to the Director.

17.

The Department breached its statutory duty to define statutory terms which would refine generally expressed legislative

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policy denied Appellant the opportunity to prepare an adequate defense.

18.

The Department breached its statutory duty to promulgate rules according to procedures mandated by ORS 183.310 to ORS 183.550.

19.

These repeated failures by the Department to comply with legislatively and statutorily delegated duties, more particularly described in Appellant's Affirmative Defenses I-IV, are outside the range of discretion delegated to the agency by law. Accordingly, the Order is invalid.

SIXTH AFFIRMATIVE DEFENSE

(Denial of Procedural Due Process)

20.

The Due Process Clause of the United States Constitution, as applied to the states through the fourteenth amendment, protects a person from arbitrary state actions which serve to deprive the individual of its right to receive adequate notice.

21.

Oregon law imposes severe consequences, including potential strict liability and civil penalties, on an "owner or operator" of a "facility" within the meaning of ORS 466.540(6). Accordingly, the Department's decision to include the Subject Property on the Site Inventory has potentially severe consequences to Appellant.

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22.

Once the Department proposed to include the Subject Property on the Site Inventory, ORS 466.557(4) required the Department to notify the owner of such property prior to the Department's proposal. ORS 466.557(4) gives Appellant only fifteen (15) days after receipt of the Notice in which to appeal the proposed listing on the Site Inventory. Hence, Appellant's ability to respond in a timely manner to the Department's proposed listing depended both on the adequacy of the information in the Order and the availability of the information on which the Department made its decision.

23.

The Department has deprived Appellant of an adequate opportunity to respond in the following respects:

A. The Order and the November 30, 1988, accompanying letter failed to provide the information required by ORS 466.557, more particularly described in the First Affirmative Defense, above.

B. The information on which the Department based its decision to include the Subject Property does not support that decision.

24.

The Department denied Appellant adequate response time by failing to comply with the statutory provision of ORS 466.557(4) which stipulates that the Appellant has fifteen (15) days after receipt of Notice to request a Contested Case hearing. The

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Department's Order stipulates that Appellant's request must be received by the Director within fifteen (15) days of receipt. In order to have Appellant's Answer received within the stipulated time period, the Appellant must mail the Answer within approximately thirteen (13) days of receipt to allow adequate time for the Answer to be transmitted via mail to the Director.

25.

As a result of the Department's actions in depriving Appellant of an adequate opportunity to respond to the Department's decision, the Department has deprived Appellant of its constitutional and statutory rights to due process of law. Accordingly, the Order is invalid.

SEVENTH AFFIRMATIVE DEFENSE

(Denial of Due Process - Defective Notice Contents)

26.

The Due Process clause of the United States Constitution, as applied to the states through the fourteenth amendment, protects a person from arbitrary state actions which serve to deprive the individual of its right to be made aware of the nature and extent of pending state claims.

27.

The Department has not stated adequate facts to notify Appellant of the nature and extent of the Department's claims. Appellant is not able to prepare an adequate defense from the information provided by the Department in the Order and Notice.

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The Order and Notice are fundamentally flawed. Accordingly, the Order and Notice are invalid.

EIGHTH AFFIRMATIVE DEFENSE

(No Retroactive Loss of Substantive Right to a Hearing)

28.

The Due Process clause of the United States Constitution, as applied to the states through the fourteenth amendment, protects a person from arbitrary state actions which serve to deprive the individual of its right to be heard.

29.

Appellant realleges paragraph 21.

30.

Once the Department has proposed to include the Subject Property on the Site Inventory, a rebuttable presumption of liability is created by this act, wherein the named party is considered an owner of an alleged facility whereupon the Department has confirmed the alleged release of hazardous substances. By virture of ORS 466.567(1), once a party has been identified and listed, the named party is destined to become subject to strict liability and civil penalties associated with or attributable to a release from the facility. The named party's sole source of defense too the above presumed liability is set forth in the liability exclusions of ORS 466.567(1) to ORS 466.567(4).

31.

The Department has sponsored legislation (HB 3235), which is expected to be enacted before this matter has been heard, that

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removes an appellant's opportunity to a hearing contesting the agency's decision to list the property. The Department's pending attempt to remove Appellant's vested substantive right to a hearing violates the Appellant's constitutional and statutory rights to due process. Accordingly, the Order is invalid.

NINTH AFFIRMATIVE DEFENSE

(Equal Protection)

32.

The fourteenth amendment to the United States Constution, and article I, paragraph 20, of the Oregon Constitution, prohibit the Department from denying to any person within its jurisdiction the equal protection of the laws.

33.

The Department denied Appellant's constitutional right to equal protection by failing to treat similarly situated properties, owners, and operators equally as follows: The Department did not include on the Site Inventory any other properties or facilities that are similarly situated.

34.

As a result of the Department's denial of Appellant's equal protection rights, Appellant was prejudiced and forced to respond to aquifer-wide contamination based solely on the Appellant's ownership of one out of several wells which draw water from this large and widely polluted aquifer. There is no evidence that Appellant is responsible for contamination of the aquifer. Accordingly, the Order is invalid.

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SUBSTANTIVE AFFIRMATIVE DEFENSES:

35.

ORS 466.567 provides that certain owners or operators are strictly liable for remedial action costs incurred by the state or any other person that are attributable to the cleanup of the contaminated facility. If, through this agency's listing procedure, the City is found to be an "owner" of a facility where a release has been confirmed, this ownership status may form an independent basis for liability under the Oregon Superfund Act.

36.

The Notice provided to the City by DEQ indicates that the "owner" must affirmatively allege any and all affirmative claims or defenses the owner might have. Conversely, the agency's letter of transmittal indicates that the listing of a facility on the inventory is not a determination that an owner is responsible for the release nor legally liable. However, in a case such as this where ownership is at issue, ownership status may, by itself, form a basis for liability under the Act.

37.

Because of this ambiguity and the potential legal relationships between the agency's listing procedure under ORS 466.557 and the agency's liability provisions under ORS 466.567, the Appellant is, in the alternative, pleading substantive defenses to liability based upon the agency's allegation that the City is an "owner" of a facility where a release has been confirmed.

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38.

The Oregon Superfund Act sets out various defenses to its strict liability provisions in ORS 466.567. The Appellant alleges that the following exceptions to strict liability apply to the City in this case and preclude the agency from finding that the City is an "owner" of a "facility" where a "release" has been confirmed:

TENTH AFFIRMATIVE DEFENSE

(Eminent Domain)

39.

ORS 466.567(3)(a)(B) provides that a local government is not liable for remedial action costs or natural resource damages if it acquired ownership or operation of the property through the exercise of its eminent domain authority either by purchase or condemnation.

40.

The Subject Property was acquired by the City in 1947 from Clackamas County through the use of the City's eminent domain power. The City purchased the property from Clackamas County for the public purpose of expanding its municipal water system. Accordingly, for purposes of ORS Chapter 466, the City is not an "owner" or "operator" of a facility where a release has been confirmed because the City purchased the property through the exercise of its eminent domain power.

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ELEVENTH AFFIRMATIVE DEFENSE

(Migration)

41.

ORS 466.567(2)(b) provides that an owner or operator shall not be liable for remedial action costs or natural resource damages if the facility was contaminated by the migration of a hazardous substance from real property not owned or operated by the person.

42.

The City does not use, generate, or store TCE or PCE as part of its municipal operations. On the other hand, many industries and consumers in the vicinity of the Troutdale aquifer have used, generated, stored, or continue to use, generate, or store, these hazardous substances. The Department itself has confirmed numerous releases of these substances from specific private facilities in the area, some of which were found in the aquifer. In addition, there have been releases of these substances confirmed on private properties which overlay the aquifer in wells that have tested at or above the levels of contamination found in the City's wells.

43.

Accordingly, for purposes of ORS Chapter 466, the City is not an owner or operator of a facility where a release has been confirmed because the City's wells were contaminated by the migration of hazardous substances from real property not owned or operated by the City.

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TWELFTH AFFIRMATIVE DEFENSE

(Third-Party Acts or Omissions)

44.

ORS 466.567(2)(c)(C) provides that an owner or operator is not liable for acts or omissions of a third party other than that of an employee or agent of the person asserting the defense, or other than a person whose acts or omissions occured in connection with a contractual relationship existing directly or indirectly, with the person asserting this defense.

45.

The City realleges Paragraph 42.

46.

Accordingly, for purposes of ORS Chapter 466, the City is not the owner of a facility where a release has been confirmed because the release confirmed on the Subject Property is the result of acts or omissions of unknown third parties with whom the City has no agency or contractual relationship.

THIRTEENTH AFFIRMATIVE DEFENSE

(Innocent Purchaser)

47.

Liability under ORS 466.567(1)(b) requires that the City must have known or reasonably should have known of the release when the City first became the owner or operator of the facility. Furthermore, ORS 466.567(6) provides that, in order for the City to show that it did not have reason to know of the release, it must have undertaken, at the time of acquisition, all appropriate

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inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.

48.

The City acquired the Subject Property in 1947 from Clackamas County. At the time the City purchased the property from the county, it did not have any knowledge that the aquifer was or might be contaminated, nor did it have any knowledge that the Subject Property itself might be contaminated. At the time of the acquisition, the City made all appropriate inquiries consistent with customary practices for acquiring municipal well sites. At the time of the acquisition, the City was in material compliance with all applicable laws relating to hazardous substances and municipal water operations. Testing for TCE in municipal water systems was not required until such time as the City initially tested the wells in June 1988.

49.

Accordingly, at the time the Subject Property through the City's use of eminent domain authority, the City did not know, nor could it have reasonably known that the Subject Property or the aquifer which underlaid the property, was contaminated.

FOURTEENTH AFFIRMATIVE DEFENSE

(Material Compliance with Applicable Laws)

50.

ORS 466.567(1)(d) provides that an owner or operator who may have caused, contributed to, or exacerbated a release is not

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liable for remedial action costs or damages to natural resources if the acts or omissions were in material compliance with applicable laws, standards, regulations, licenses, or permits.

51.

The City's municipal water system has, at all relevant times, been in material compliance with all applicable legal requirements. The City has not caused, contributed, or exacerbated the release through any act or omission, and there is no evidence in the record to the contrary.

52.

Accordingly, for purposes of ORS Chapter 466, the City has not caused, contributed to, or exacerbated the release and has been in material compliance with all applicable laws, standards, regulations, licenses, and permits.

FIFTEENTH AFFIRMATIVE DEFENSE

(Entry and Investigation)

53.

ORS 466.567(1)(e) provides that an owner operator who unlawfully hinders or delays entry to, investigation of, or removal or remedial action of a facility shall be liable for remedial action costs and damages to natural resources caused by the release.

54.

At all material times, the City has encouraged and assisted with entry into its well sites, encouraged and assisted in a timely and thorough investigation, and has discussed the initial

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financing and construction of packed aerated towers employing filters to be used as an option for purifying water used by the City.

55.

Accordingly, for purposes of ORS Chapter 466, the City has not hindered or delayed entry into the facility and has not hindered or delayed investigation or remedial action on the site. In fact, the City has requested that the agency move forward with increased efficiency and speed and has offered complete assistance and cooperation at all material times.

SIXTEENTH AFFIRMATIVE DEFENSE

(Emergency Response)

56.

ORS 466.567(7)(b) provides that:

> "No state or local government shall be liable under ORS 466.540-ORS 466.590 and ORS 466.900 for costs or damages as a result of actions taken in response to an emergency created by the release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the state or local government. For the purposes of this paragraph, reckless, willful, or wanton misconduct shall constitute gross negligence."

57.

In September 1988, when testing of the City's wells confirmed the presence of two potentially hazardous chemicals, TCE and PCE, the City immediately shut off its well-driven water sources and began buying water from Portland's Bull Run system.

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58.

Eventually, DEQ gave the City permission to put wells numbers 6 and 8 back into operation after the installation of chlorine filters and after testing had confirmed that the contamination in the aquifer would not be affected by the use of these wells. Testing has confirmed that wells numbers 6 and 8 do not draw contaminated water from the aquifer.

59.

The City has responded to the emergency created by the discovery of contamination in its drinking water source. The City does not own the aquifer. Contamination of the aquifer is the result of unknown third-party acts or omissions at a facility or facilities owned by persons other than the City. The City has not acted in a grossly negligent or intentionally malicious manner in response to the emergence created by the loss of its drinking water source.

60.

Accordingly, for purposes of ORS Chapter 466, the City is not liable for costs or damages as a result of any actions taken subsequent to its discovery of the contamination. The City has responded, and continues to respond, to the emergency created by the loss of its municipal drinking water source due to the release of hazardous substances into the aquifer by unnamed parties at unknown locations and times.

WHEREFORE, Appellant, having fully answered the Order, respectfully intends to pursue its request for a hearing on the

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merits of this case, as provided in the Order, in ORS 466.557, and in applicable department rules of procedure.

Respectfully submitted this 23rd day of June, 1989.

O'DONNELL, RAMIS, ELLIOTT & CREW

By: _____
Phillip E. Grillo
Of Attorneys for
City of Milwaukie

RPH\ANS&AD.DEQ/gaj

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FAX (503) 243-2944

PLEASE REPLY TO PORTLAND OFFICE

JEFF BACHRACH
CHARLES E. CORRIGAN*
STEPHEN F. CREW
KENNETH M. ELLIOTT
KENNETH H. FOX
PHILLIP E. GRILLO
WILLIAM A. MONAHAN
MARK P. O'DONNELL
TIMOTHY V. RAMIS
WILLIAM J. STALNAKER

*ALSO ADMITTED TO PRACTICE IN STATE OF WASHINGTON

CANBY OFFICE
181 N. GRANT, SUITE 202
CANBY, OREGON 97013
(503) 266-1149

6/13/89

June 9, 1989

Ms. Linda K. Zucker
Hearings Officer
Department of Environmental Quality
811 S.W. 6th Avenue
Portland, OR 97204

Re: City of Milwaukie

Dear Ms. Zucker:

The City of Milwaukie has requested a hearing with regard to its proposed listing as an owner of a facility where hazardous substances have been released. Our formal request for a hearing was filed with the agency in a timely fashion on December 12, 1988 (attached). Since that time, we have attempted to resolve important preliminary issues with the agency through various conferences and correspondence, to no avail.

We are aware that HB 3235 is currently pending before the Oregon legislature. In our opinion, this bill precludes our ability to obtain a hearing on this matter and prevents judicial review of the agency's decision. The city therefore wishes to schedule a contested case proceeding with the agency pursuant to ORS 466.557(4) (1987). The city has a right to rely on the existing statutory framework. The city has acted in reliance on the agency's proposed listing of the "facility" and has made good faith efforts to resolve the matter with the agency in a direct but less formal manner.

Please provide us with a written response within five (5) days from the date of this letter regarding the scheduling of a hearing on this matter. If we do not receive a written response

from the agency within this period, we will consider such action a denial of our right to a contested case proceeding under the applicable statutory authority. Thank you for your consideration of this matter.
Sincerely,

O'DONNELL, RAMIS, ELLIOTT & CREW

Phillip E. Grillo
Of Attorneys for the City of Milwaukie

PEG/gaj

cc: Mr. Fred Hansen, Director, Dept. of Environmental Quality
Mr. Kurt Burkholder, Attorney General's Office
Mr. Dan Bartlett, Manager, City of Milwaukie
Mr. Dick Bailey, Director of Public Works, City of Milwaukie

PEG\MILWAUKI\ZUCKER.LTR

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY

In the Matter of:	No. SA-891-706
SITE INVENTORY LISTING OF PROPERTY LOCATED IN CLACKAMAS COUNTY, OREGON, CITY OF MILWAUKIE, Owner,	OWNER'S NOTICE OF APPEAL

Pursuant to ORS 466.557(4), the city of Milwaukie hereby appeals the Proposed Findings, Conclusions, and Order of the Oregon Department of Environmental Quality ("DEQ"), which places certain municipal property on the inventory of facilities where a release of hazardous substances has been confirmed. The city received notice of DEQ's proposed order on December 2, 1988.

The city believes that this appeal can be resolved without engaging in a formal contested case proceeding under ORS Chapter 183, and requests a conference with the Director at your earliest possible convenience in order to resolve this matter. In the meantime, the city intends to preserve its rights to a formal contested case proceeding under the applicable statutory authority.

DATED this 12th day of December, 1988.

O'DONNELL, RAMIS, ELLIOTT & CREW

By Timothy V. Ramis

Timothy V. Ramis OSB #75311
City Attorney
City of Milwaukie

PEG\MILWAUKI\APPEAL.NOT

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R-1

NEIL GOLDSCHMIDT
GOVERNOR

Department of Environmental Quality

811 SW SIXTH AVENUE, PORTLAND, OREGON 97204-1390 PHONE (503) 229-5696

November 30, 1988

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

City of Milwaukie
10964 SE Oak
Milwaukie, OR 97222

ATTN: Manager of Environmental Affairs

RE: Listing of Milwaukie Public Water Supply
on Inventory of Confirmed Releases
DEQ Site Identification No. 706

This letter is to notify you that the facility located at

3800 S.E. Harvey, Milwaukie

is hereby proposed for listing on the Department of Environmental Quality (DEQ) Inventory of facilities where a release of hazardous substances has been confirmed. Based on a review of records

City of Milwaukie

has been identified as an owner of all or part of the facility. While the Department has identified you as an owner for purposes of the Inventory, this is not a determination as to your responsibility for the release or legal liability.

For the purpose of providing public information, the DEQ is required to develop and maintain an Inventory of all facilities where a release of hazardous substances is confirmed by the Department. The development of the Inventory is directed by Oregon Revised Statutes (ORS) 466.557. The Inventory will be submitted to the Governor, the Legislative Assembly and the Environmental Quality Commission on January 15, 1989 and each year thereafter, as specified in ORS 466.557(5).

Attached to this letter is an order by the Department formally stating our decision to list the facility on the Inventory. The facility will be listed on the Inventory unless you appeal the listing by submitting to me a request for a hearing before the Environmental Quality Commission.

This request for hearing must be submitted within 15 days of receiving this notice letter. Otherwise the facility will be listed on the Inventory. Again, the listing of a facility on the Inventory is not a determination that an owner is responsible for the release nor legally liable. If a timely request for hearing is made, the decision to list the facility on the Inventory will automatically be postponed until final disposition of the appeal.

The Department will attempt to resolve appeals without using a formal contested case hearing. Where this is not possible, a hearing will be scheduled and conducted in accordance with contested case hearing procedures provided for in ORS Chapter 183, as described in the attached order. You may appeal the decision to list the facility on the Inventory if you believe any of the items listed in Section 1. Findings of Fact and Conclusions of Law in the attached order are in error or based on any other factual or legal reasons.

The Inventory is a list of all facilities that have confirmed releases of hazardous substances, regardless of the status of the site. Many sites will need preliminary assessments to determine whether further investigation or cleanup is needed or whether cleanup actions taken previously are adequate. At other sites, investigations or actions have already been taken to address the release. Depending on the status of the site, the Department will determine the appropriate response for each site and schedule follow-up action based on the environmental hazard and available Department resources.

Should you want copies of the state Environmental Cleanup law or Environmental Cleanup rules, please contact Carol Harris at 503-229-6853 or write to:

Environmental Cleanup Division
811 S.W. Sixth Avenue
Portland, Oregon 97204

If you have specific questions about the Inventory or the listing of your facility, please contact the Site Assessment Section of the Environmental Cleanup Division at 503-229-5733.

Sincerely,

Fred Hansen
Director

cc: Northwest Region

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF:	)	
	)	DEPARTMENT ORDER AND NOTICE
SITE INVENTORY LISTING OF	)	OF OPPORTUNITY FOR CONTESTED
PROPERTY LOCATED IN	)	CASE HEARING
CLACKAMAS COUNTY, OREGON,	)	
	)	NO. SA-891-706
CITY OF MILWAUKIE, OWNER	)	
	)	

Pursuant to ORS 466.557, the Director, Oregon Department of Environmental Quality (DEQ), issues this order placing the property described in this order on the inventory of facilities where a release of a hazardous substance is confirmed (Site Inventory).

I.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. City of Milwaukie is the owner of the following described property:

3800 S.E. Harvey, Milwaukie

B. On the basis of laboratory data, DEQ has confirmed that

trichloroethylene
tetrachloroethylene

have been "released" at the property within the meaning of ORS 466.540(14).

C. The substance(s)

trichloroethylene
tetrachloroethylene

are "hazardous substances" within the meaning of ORS 466.540(9).

D. The property is a "facility" within the meaning of ORS 466.540(6).

II.

ORDER

Based upon the above Findings of Fact, Conclusions of Law and supporting documentation in DEQ files, DEQ orders that the above-described property shall be placed on the Site Inventory thirty (30) days from the date of receipt of this order by the owner, except as provided for in Section 3.

III.

OPPORTUNITY FOR HEARING

In accordance with ORS 466.557(4), the owner may request a hearing before the Environmental Quality Commission (EQC) or its hearings officer regarding this order. Any request for a hearing must be made in writing and received by the Director of DEQ within fifteen (15) days from the owner's receipt of this order and notice. Any such request must be accompanied by a written answer admitting or denying all factual matters contained in this order, and must affirmatively allege any and all affirmative claims or defenses the owner might have. Any hearing shall be conducted under ORS Chapter 183 and OAR Chapter 340 Division 11.

If the owner does not request a hearing within fifteen (15) days of receipt of this order and notice, the owner shall waive the right to a hearing under ORS Chapter 183, except as provided under OAR 137-03-075(6) and (7). In the absence of a timely answer and request for hearing, this order shall become effective, based on a prima facie case made on agency files and records. If the owner is an agency, corporation, or unincorporated association, the owner must be represented by an attorney

licensed in Oregon, except as provided under OAR 340-11-102.

DATED this 30th day of November, 1988.

DEPARTMENT OF ENVIRONMENTAL
QUALITY OF THE STATE OF OREGON

BY: Fred Hansen
Fred Hansen, Director

P 915 446 112

RECEIPT FOR CERTIFIED MAIL

(See Reverse)

Sent to City of Milwaukie

Street and No. 10964 SE Oak

P.O. State and ZIP Code Milwaukie OR 97222

Postage	$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom, Date, and Address of Delivery	
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NEIL GOLDSCHMIDT
GOVERNOR

Environmental Quality Commission

811 SW SIXTH AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

REQUEST FOR EQC ACTION

Meeting Date: December 1, 1989
Agenda Item: J
Division: Air Quality
Section: Program Operations

SUBJECT:

Rule Adoption:

Kraft Mill Regulations: Modifications to Correct Deficiencies, Add Opacity Standards, and Clarify Monitoring Requirements.

Neutral Sulfite Semi-Chemical (NSSC) Pulp Mills: Addition of Regulations Specific to this Source Class.

PURPOSE:

Revisions of the Kraft Pulp Mill Regulations are required to comply with Federal Clean Air Act Section 110 and Section 111(d) for short term emission standards, control of total Reduced Sulfur (TRS) compounds, and correction of existing discrepancies. More stringent regulations are also proposed to limit opacity.

Neutral Sulfite Semi-Chemical (NSSC) Pulp Mill Regulations are required to adequately address emissions and unique operating conditions encountered with this source class.

ACTION REQUESTED:

___ Work Session Discussion
- ___ General Program Background
- ___ Potential Strategy, Policy, or Rules
- ___ Agenda Item ___ for Current Meeting
- ___ Other: (specify)

___ Authorize Rulemaking Hearing
_X_ Adopt Rules

Proposed Rules	Attachment A
Rulemaking Statements	Attachment B
Fiscal and Economic Impact Statement	Attachment B
Public Notice	Attachment B

___ Issue a Contested Case Order
___ Approve a Stipulated Order
___ Enter an Order
Proposed Order Attachment ___

___ Approve Department Recommendation
___ Variance Request Attachment ___
___ Exception to Rule Attachment ___
___ Informational Report Attachment ___
___ Other: (specify) Attachment ___

DESCRIPTION OF REQUESTED ACTION:

Adoption of the proposed Kraft Pulp Mill Regulations would:

1. Revise the existing particulate and TRS standards from monthly averages to daily averages to conform with the short term daily averaging period for the particulate ambient air quality standard in accordance with EPA requirements.

2. Revise the existing standards based on monthly averages to reflect daily averaging periods. EPA guidelines specify 12-hr averaging periods for TRS. However, a 24-hour averaging period is acceptable provided that the Department shows equivalency or provides justification based on information submitted by industry. The Department's justification will be based on equivalency, for the recovery furnace emission, and control costs for other sources.

3. Revise the existing sulfur dioxide (SO_2) standard from a monthly average to a 3-hr average to conform with the short term ambient air quality standard for SO_2 in accordance with EPA requirements.

4. Implement an opacity standard for recovery furnace exhaust stacks. Opacity is the degree to which emissions reduce the transmission of light and obscure the view of an object in the background of the exhaust stack. It can be measured in the exhaust stack by a transmissometer or visually at or near the stack exit. Pulp mills are the only industrial sources in Oregon not currently subject to opacity limitations. The proposed standard is 35 percent corrected to a path length of 10 feet if the stack diameter exceeds 10 feet. The path length correction was requested by industry because equivalent emissions appear darker from a large diameter stack than from a small diameter stack.

5. Require recovery furnaces to meet a more stringent particulate standard, equivalent to the Federal New Source Performance Standard (NSPS), if the source replaces or significantly upgrades the control equipment.

6. Add a TRS standard specifically for smelt dissolving tank vents in lieu of inclusion of smelt dissolving tank TRS emissions with TRS from "other sources". This change conforms to EPA guidelines.

7. Add opacity standard of 20 percent for lime kilns and smelt dissolving tanks.

8. Clarifies monitoring requirements and provides for oxygen corrections when oxygen levels exceed specified levels. This change will improve the Department's ability to evaluate compliance and will meet EPA requirements.

Adoption of the proposed Neutral Sulfite Semi-Chemical Pulp Mill regulations would:

1. Provide specific regulations tailored to control the emissions from this particular source class. The sulfite pulp mill regulations which have been previously applied are not adequate for the neutral sulfite semi-chemical pulp process.

2. Add 24-hr emission standards for particulate and TRS and 3-hr emission standards for SO2.

3. Add monitoring and reporting requirements.

4. Add opacity standards for spent liquor incinerators, acid absorption towers, and other NSSC sources.

AUTHORITY/NEED FOR ACTION:

___ Required by Statute: _____ Attachment ___
Enactment Date: _____
_X_ Statutory Authority: ORS 468.020/468.295(3) Attachment _B_
___ Pursuant to Rule: _____ Attachment ___
___ Pursuant to Federal Law/Rule: _____ Attachment ___

___ Other: Attachment ___

_X_ Time Constraints:

The State EPA/DEQ Agreement (SEA) requires the Department of Environmental Quality (Department, DEQ) to propose rule adoption by the end of 1989.

DEVELOPMENTAL BACKGROUND:

___	Advisory Committee Report/Recommendation	Attachment ___
_X_	Hearing Officer's Report/Recommendations	Attachment _C_
___	Response to testimony/Comments	Attachment ___
_X_	Prior EQC Agenda Items: Request for Hearing Authorization	Attachment _B_
_X_	Other Related Reports/Rules/Statutes Effect of Proposed Rules on Kraft Mills	Attachment _D_
___	Supplemental Background Information	Attachment ___

REGULATED/AFFECTED COMMUNITY CONSTRAINTS/CONSIDERATIONS:

EPA, industry representatives, and DEQ met and discussed each party's concerns after the public hearing. Except as discussed below, the concerns have been addressed by nonsubstantive wording changes; revisions to conform to minimum federal requirements, with some dissent from the industry; or revisions which address industry concerns without relaxing emission limitations.

The effect of the proposed rule changes on existing mills is highlighted in Attachment D.

The Kraft pulp mill industry remains opposed to two primary aspects of the proposed rules. They oppose the use of continuous emission monitors as an enforcement tool and opacity limitations for recovery furnaces. The greatest opposition is the use of continuous opacity data obtained from transmissometers. This opposition is based on the certainty that there will be recovery furnace opacity excursions for various reasons resulting in exceedances of the standard. However, other states with Kraft mill recovery furnaces have opacity standards which range from 20-45 percent. The Federal New Source Performance Standard for recovery furnaces is 35 percent, therefore, an opacity limitation of 35 percent was considered to be appropriate. However, provisions for correcting the measured opacity to a path length of 10 feet, if the actual path length is greater than 10 feet, were added. For the same conditions, large diameter stacks will have an apparent opacity greater than smaller diameter stacks due to the greater optical density resulting from a longer path length. The correction for path length would allow a higher limit for sources with large diameter stacks. Industry requested a 7 foot path length correction, which the Department considers to be excessive.

Transmissometers (continuous opacity monitors) will not be required where wet pollution control devices are currently in use, as the wet plumes interfere with the readings. An

opacity limitation of 20 percent was also established for lime kilns and smelt dissolving tanks. This limitation is based on visual observations because of stack moisture content.

Industry requested that exceedances of the recovery furnace opacity standard not be considered violations if the total contiguous periods of excess opacity in a quarter (excluding periods of startup, shutdown or malfunction and when the unit is not operating) is less than six percent. This is not consistent with the hourly compliance monitoring period in opacity regulations for other source classes. Further, the Environmental Protection Agency (EPA) requires that the opacity monitoring period be consistent with the test period (3 one-hour tests) for determination of compliance with the short-term particulate emission limits, since opacity is also used as an indicator of particulate emissions.

The proposed rules reference a Department Continuous Emission Monitoring manual. An interim manual has been prepared and will be used until industry comments are received and/or reviewed, and a final manual is issued.

There is little impact on the Neutral Sulfite Semi-Chemical (NSSC) Pulp Mill industry and only one comment was received. The affected mill questioned the need for a 35 percent limitation for spent liquor incinerators and suggested 45 percent opacity, although they feel that they can meet 35 percent.

PROGRAM CONSIDERATIONS:

Departmental impacts are as follows:

1. Improved ability to ascertain compliance status.

2. Minimal staff impact (some need for increased auditing by the Laboratory Division, corrective actions may also be required if the mills do not meet the new standards).

3. Adoption of the proposed rule changes will require some staff time to modify existing Air Contaminant Discharge Permits to include the revisions.

ALTERNATIVES CONSIDERED BY THE DEPARTMENT:

During development of the proposed rules, the following options were considered:

1. Recovery Furnace Opacity:

a. As proposed: The one hour opacity standard would allow visual observations to be made which would not be practicable with an averaging period longer than one hour. Visual evaluation is necessary when continuous emissions monitors cannot be used because of excessive stack moisture.

b. Daily average opacity: This option would preclude visual observations. However, it would be easier for mills to comply with a daily average.

c. Limit compliance monitoring for opacity to visual observations but use continuous opacity monitors as an indicator of particulate emission controls performance. This would be inconsistent with attempts to increase the Department's ability to monitor compliance and to utilize staff resources most effectively.

d. Correct opacity readings to a path length of 7 feet if the path length exceeds 7 feet. This alternative was requested by industry but would allow excessively high limits on opacity.

e. Status quo: Opacity as an indicator of particulate control only (could be based on correlation with mass emissions). This, however, would conflict with EPA requirements for day-by-day compliance determination.

2. Place the amended proposed rules out on public notice, as requested by industry. The Department sees no advantage to this. No general public comments were received on the rules, and the affected industry has been involved throughout the process. Some of the changes required to obtain EPA approval increase the impacts on mills, but to a minor extent compared to the overall cost of pollution controls.

DEPARTMENT RECOMMENDATION FOR ACTION, WITH RATIONALE:

Adopt the revisions to be effective upon filing, to both the Kraft Pulp Mill regulations and the Neutral Sulfite Semi-Chemical (NSSC) Pulp Mill regulations. We believe these revisions to be approvable by EPA, uses Department resources wisely, and satisfies environmental criteria.

CONSISTENCY WITH STRATEGIC PLAN, AGENCY POLICY, LEGISLATIVE POLICY:

This rule adoption is expected to be consistent with the strategic plan, agency policy, and legislative policy.

ISSUES FOR COMMISSION TO RESOLVE:

1. Should the existing Kraft Mill Rules be amended to correct deficiencies identified by EPA?

2. Should limits on opacity beyond those required to demonstrate particulate emissions control for Kraft recovery furnaces and additional compliance determination methods be adopted?

3. Should the Environmental Quality Commission (Commission, EQC) adopt rules specific to the Neutral Sulfite mills to more effectively regulate emissions from the Neutral Sulfite Industry?

INTENDED FOLLOWUP ACTIONS:

1. Submit an approved version of the Kraft Pulp Mill regulations to the Secretary of State for codification.

2. Modify Air Contaminant Discharge Permits to conform to the new requirements.

Approved:

Section: _____

Division: _____

Director: _____

Report Prepared By: William J. Fuller

Phone: 229-5749

Date Prepared: November 14, 1989

WJF:l
PO\AR1745
(11/14/89)

Kraft Pulp Mills

[**ED. NOTE:** Administrative Order DEQ 50 repealed previous rules 340-25-155 through 340-25-195 (consisting of SA 38, filed 4-4-69).]

DEFINITIONS

340-25-150 As used in these regulations, unless otherwise required by context:

(1) "Continual Monitoring" means sampling and analysis, in a [~~continuous or~~] timed sequence, using techniques which will adequately reflect actual emission levels or concentrations on an [~~continuous~~] ongoing basis.

(2) "Department" means the Department of Environmental Quality.

(3) "Emission" means a release into the atmosphere of air contaminants.

(4) "BLS" means Black Liquor Solids, dry weight.

(5) "Kraft Mill" or "Mill" means any industrial operation which uses for a cooking liquor an alkaline sulfide solution containing sodium hydroxide and sodium sulfide in its pulping process.

(6) "Lime Kiln" means any production device in which calcium carbonate is thermally converted to calcium oxide.

(7) "Non-Condensibles" means gases and vapors, contaminated with TRS compounds [~~gases~~], from the digestion and multiple-effect evaporation processes of a mill [~~that are not condensed with the equipment used in said processes~~].

(8) "Other Sources" means sources of TRS emissions in a kraft mill other than recovery furnaces and lime kilns, including but not limited to:

(a) Vents from knotters, brown stock washing systems, evaporators, blow tanks, [smelt tanks,] blow heat accumulators, black liquor storage tanks, black liquor oxidation system, pre-steaming vessels, tall oil recovery operations; and

[(b) Any operation connected with the treatment of condensate liquids within the mill; and]

[(c)](b) Any vent which is shown to [be a significant contributor of odorous gases] contribute to an identified nuisance condition.

(9) "Particulate Matter" means all solid or liquid material, other than uncombined water, emitted to the ambient air [which may be removed on a glass fiber filter maintained during sampling at stack temperature or above the water vapor dew point of the stack gas, whichever is greater, but not more than 202° C. (400° F.). The glass fiber filter to be used shall be MSA 1106BH or equivalent.] as measured by EPA Method 5 or an equivalent test method in accordance with the Department Source Test Manual. Particulate matter emission determinations by EPA Method 5 shall use water as the cleanup solvent instead of acetone, and consist of the average of three (3) separate consecutive runs having a minimum sampling time of 60 minutes each, a maximum sampling time of eight (8) hours each, and a minimum sampling volume of 31.8 dscf each.

(10) "Parts Per Million (ppm)" means parts of a contaminant per million parts of gas by volume on a dry-gas basis (1 ppm equals 0.0001% by volume).

(11) "Production" means the daily [average] amount of air-dried unbleached pulp, or equivalent, produced during the 24-hour period each calendar day, [as determined by dividing the monthly total production by the number of days specific production equipment operates,] or Department approved equivalent period, and expressed in air-dried metric tons (admt) per day. The corresponding English unit is air-dried tons (adt) per day.

(12) "Recovery Furnace" means the combustion device in which [~~pulping chemicals are converted to a molten smelt and~~] dissolved wood solids are incinerated and pulping chemicals recovered from the molten smelt. For these regulations, and where present, this term shall include the direct contact evaporator.

(13) "Significant Upgrading of Pollution Control Equipment" means a modification or a rebuild of an existing pollution control device for which a capital expenditure of 50 percent or more of the replacement cost of the existing device is required, other than ongoing routine maintenance.

[~~(13)~~] (14) "Standard Dry Cubic Meter" means the amount of gas that would occupy a volume of one cubic meter, if the gas were free of uncombined water, at a temperature of 20° C. (68° F.) and a pressure of 760 mm of Mercury (29.92 inches of Mercury). The corresponding English unit is standard dry cubic foot. When applied to recovery furnace gases "standard dry cubic meter" requires adjustment of the gas volume to that which would result in a concentration of 8% oxygen if the oxygen concentration exceeds 8%. When applied to lime kiln gases "standard dry cubic meter" requires adjustment of the gas volume to that which would result in a concentration of 10 [~~percent~~]% oxygen if the oxygen concentration exceeds 10%. The mill shall demonstrate that oxygen concentrations are below noted values or furnish oxygen levels and corrected pollutant data.

[~~(14)~~] (15) "Total Reduced Sulfur (TRS)" means the sum of the sulfur compounds [~~in~~] hydrogen sulfide, methyl mercaptan[~~s~~], dimethyl sulfide, and dimethyl disulfide, and any other organic sulfides present[~~ in an oxidation state of minus two~~] expressed as hydrogen sulfide (H_2S).

(16) "Continuous monitoring" means instrumental sampling of a gas stream on a continuous basis, excluding periods of calibration.

(17) "Daily Arithmetic Average" means the average concentration over the twenty-four hour period in a calendar day, or Department approved equivalent period, as determined by continuous monitoring equipment or reference method testing. Determinations based on EPA reference methods or equivalent methods in accordance with the Department Source Test Manual consist of three (3) separate consecutive runs having a minimum sampling time of sixty (60) minutes each and a maximum sampling time of eight (8) hours each. The three values for concentration (ppm or grains/dscf) are averaged and expressed as the daily arithmetic average which is used to determine compliance with process weight limitations, grain loading or volumetric concentration limitations and to determine daily emission rate.

(18) "Smelt dissolving tank vent" means the vent serving the vessel used to dissolve the molten smelt produced by the recovery furnace.

STATEMENT OF POLICY

340-25-155 Recent technological developments have enhanced the degree of malodorous emission control possible for the kraft pulping process. While recognizing that complete malodorous and particulate emission control is not presently possible, consistent with the meteorological and geographical conditions in Oregon, it is hereby declared to be the policy of the Department to:

(1) Require, in accordance with a specific program and time table for all sources at each operating mill, the highest and best practicable treatment and control of atmospheric emissions from kraft mills through the utilization of technically feasible equipment, devices, and procedures. Consideration will be given to the economic life of equipment, which when installed, complied with the highest and best practicable treatment requirement;

(2) Require degrees and methods of treatment for major and minor emission points that will minimize emissions of odorous gases and eliminate ambient odor nuisances;

(3) Require effective monitoring and reporting of emissions and reporting of other data pertinent to air quality or emissions. The Department will use these data in conjunction with ambient air data and observation of conditions in the surrounding area to develop and revise emission and ambient air standards, and to determine compliance therewith;

(4) Encourage and assist the kraft pulping industry to conduct a research and technological development program designed to progressively reduce kraft mill emissions, in accordance with a definite program, including specified objectives and time schedules.

HIGHEST AND BEST PRACTICABLE TREATMENT AND CONTROL REQUIRED

340-25-160 (1) Notwithstanding the specific emission limits set forth in rule 340-25-165, in order to maintain the lowest possible emission of air contaminants, the highest and best practicable treatment and control currently available shall in every case be provided, with consideration being given to the economic life of the existing equipment.

(2) All installed process and control equipment shall be operated at full effectiveness and efficiency at all times, such that emissions of contaminants are kept at lowest practicable levels.

EMISSION LIMITATIONS

340-25-165 (1) Emission of Total Reduced Sulfur (TRS):

(a) Recovery Furnaces:

(A) The emissions of TRS from each recovery furnace placed in operation before January 1, 1969, shall not exceed 10 ppm [as a daily arithmetic average] and 0.15 Kg [-S]/metric ton (0.30 lb[-S]/ton) of production as [a monthly] daily arithmetic averages;

(B) TRS emissions from each [new] recovery furnace placed in operation after January 1, 1969, and before September 25, 1976, or any recovery furnace modified significantly after January 1, 1969, and before September 25, 1976, to expand production shall be controlled such that the emissions of TRS shall not exceed 5 ppm [as a daily arithmetic average] and [0.08] 0.075 Kg[-S]/metric ton (0.150 lb[-S]/ton) of production as [a monthly] daily arithmetic averages.

(b) Lime kilns. Lime Kilns shall be operated and controlled such that emissions of TRS shall not exceed:

[(A) 40 ppm and 0.1 Kg S/metric ton (0.2 lb S/ton) of production as monthly arithmetic averages;

(B) As soon as practicable, but not later than July 1, 1978, 20 ppm and 0.05 Kg S/metric ton (0.1 lb S/ton) of production as monthly arithmetic averages;

(C) As soon as practicable, but not later than July 1, 1983,]

(A) 20 ppm as a daily arithmetic average and 0.05 Kg[-S]/metric ton (0.10 lb[-S]/ton) of production as a [monthly] daily arithmetic average[;]. This paragraph applies to those sources where construction was initiated prior to September 25, 1976.

[(D) 20 ppm as a daily arithmetic average and 0.05 Kg S/metric ton (0.1 lb S/ton) of production as a monthly 12 hour arithmetic averages from each new lime kiln placed in operation or any lime kiln modified significantly to expand production.]

(c) Smelt Dissolving Tanks.

(A) As soon as practicable, but not later than July 1, 1990, TRS emissions from each smelt dissolving tank shall not exceed 0.0165 gram/Kg BLS (0.033 lb/ton BLS) as a daily arithmetic average, except as provided in paragraph (B) below.

(B) Where an explosion hazard, which was in existence on March 26, 1989, exists and control is not practical or economically not feasible and adequate documentation of these conditions is provided to the Department, the affected smelt dissolving tank shall not exceed 0.033 gram/Kg BLS (0.066 lb/ton BLS) as a daily average.

[~~(c)~~] (d) Non-Condensibles:

(A) Non-condensibles from digesters, [~~and~~] multiple-effect evaporators and contaminated condensate stripping shall be continuously treated to destroy TRS gases by thermal incineration in a lime kiln or incineration device capable of subjecting the non-condensibles to a temperature of not less than 650° C. (1200° F.) for not less than 0.3 second[~~s~~]. An alternate device meeting the above requirements shall be available in the event adequate incineration in the primary device cannot be accomplished. Venting of TRS gases during changeover shall be minimized but in no case shall the time exceed one hour.

[~~(B) When steam or air stripping of condensates or other contaminated streams is practiced, the stripped gases shall be subjected to treatment in the non-condensible system or otherwise given equivalent treatment.~~]

[~~(d)~~] (e) Other Sources:

(A) [~~As soon as practicable, but not later than July 1, 1978,~~ t]The total emission of TRS from other sources including, but not limited to, knotters and brown stock washer vents, brown stock washer filtrate tank vents, and black liquor oxidation vent [~~, and contaminated condensate~~

stripping] shall not exceed [0.1] 0.078 Kg[-S]/metric ton ([0.2] 0.156 lb[S]/ton) of production[;] as a daily arithmetic average.

(B) Miscellaneous Sources and Practices. [When] If it is determined that sewers, drains, and anaerobic lagoons significantly contribute to an odor problem, a program for control shall be required.

[(c) Compliance Programs.--Each mill with any sources not in compliance with the 1978 emission limits shall submit a program and schedule for achieving compliance to the Department for approval by no later than August 1, 1977.--As soon as practicable, but not later than January 1, 1980, each mill with lime kiln(s) not in compliance with the 1983 limits shall submit a program and schedule for achieving compliance.]

(2) Particulate Matter:

(a) Recovery Furnaces. The emissions of particulate matter from each recovery furnace stack shall not exceed: [a monthly arithmetic average of:]

(A) 2.0 kilograms per metric ton ([four (4)] 4.0 pounds per ton) of production as a daily arithmetic average; [and]

(B) 0.30 gram[s] per dry standard cubic meter (0.13 grain[s] per dry standard cubic foot) as a daily arithmetic average in accordance with 340-25-150(17) and the Department Source Test Manual; and

(C) 35 percent opacity for periods exceeding six (6) minutes in any sixty minute period (excluding periods when the facility is not operating). If the path length is greater than ten (10) feet, the transmissometer path length shall be adjusted to ten (10) feet in accordance with the Department Continuous Emissions Monitoring Manual.

(b) Lime Kilns. The emissions of particulate matter from each lime kiln stack shall not exceed [a monthly arithmetic average of]:

(A) 0.50 kilogram per metric ton ([one (1)] 1.00 pound per ton) of production as a daily arithmetic average; [and]

(B) 0.46 gram[s] per dry standard cubic meter (0.20 grain[s] per dry standard cubic foot)[.] as a daily arithmetic average in accordance with 340-25-150(17) and the Department Source Test Manual; and

(C) The visible emission limitations in section 340-25-165(4).

(c) Smelt Dissolving Tanks. The emission of particulate matter from each smelt dissolving tank stack shall not exceed: [a monthly arithmetic average of 0.25 Kg/metric ton (one-half (1/2) pound per ton of production).]

(A) A daily arithmetic average of 0.25 kilogram per metric ton (0.50 pound per ton) of production; and

(B) The visible emission limitations in section 340-25-165(4).

(d) Replacement or Significant Upgrading of existing particulate pollution control equipment after July 1, 1988 shall result in more restrictive standards as follows:

(A) Recovery Furnaces.

(i) The emission of particulate matter from each affected recovery furnace stack shall not exceed 1.00 kilogram per metric ton (2.00 pounds per ton) of production as a daily arithmetic average; and

(ii) 0.10 gram per dry standard cubic meter (0.044 grain per dry standard cubic foot) as a daily arithmetic average in accordance with 340-25-150(17) and the Department Source Test Manual.

(B) Lime Kilns.

(i) The emission of particulate matter from each affected lime kiln stack shall not exceed 0.25 kilogram per metric ton (0.50 pound per ton) of production as a daily arithmetic average; and

(ii) 0.15 gram per dry standard cubic meter (0.067 grain per dry standard cubic foot) as a daily arithmetic average in accordance with 340-25-150(17) and the Department Source Test Manual when burning gaseous fossil fuel; or

(iii) 0.50 kilogram per metric ton (1.00 pound per ton) of production as a daily arithmetic average; and

(iv) 0.30 gram per dry standard cubic meter (0.13 grain per dry standard cubic foot) as a daily arithmetic average in accordance with 340-25-150(17) and the Department Source Test Manual when burning liquid fossil fuel.

(C) Smelt Dissolving Tanks. The emissions of particulate matter from each smelt dissolving tank vent stack shall not exceed 0.15 kilogram per metric ton (0.30 pound per ton) of production as a daily arithmetic average.

(3) Sulfur Dioxide (SO_2). Emissions of sulfur dioxide from each recovery furnace stack shall not exceed a ~~[daily]~~ 3-hour arithmetic average of 300 ppm on a dry-gas basis except ~~[during]~~ when burning fuel oil. The sulfur content of fuel oil used shall not exceed the sulfur content of residual and distillate oil established in 340-22-010(2) and 340-22-015, respectively. ~~[start-up and shut-down periods.]~~

(4) ~~[New Facility Compliance. As soon as practicable, but not later than within 180 days of the start-up of a new kraft mill or of any new or modified facility having emissions limited by these regulations, that facility shall be operated, controlled, or limited to comply with the applicable provisions of these regulations and the mill shall conduct source sampling or monitoring as appropriate to demonstrate compliance.]~~ All kraft mill sources with the exception of recovery furnaces shall not exceed an opacity equal to or greater than 20 percent for a period exceeding three (3) minutes in any one (1) hour.

(5) New Source Performance Standards

(a) New or modified sources that commenced construction after September 24, 1976, are subject to each provision of this section and the New Source Performance Standards, OAR section 340-25-630, whichever is more stringent.

(6) Each mill with any recovery furnace, lime kiln, or smelt dissolving tank not in compliance by January 1, 1990 with the emission limitations of this section shall submit by July 1, 1990 a program and schedule for achieving compliance as soon as practicable but no later than July 1, 1991.

MORE RESTRICTIVE EMISSION LIMITS

340-25-170 The Department may establish more restrictive emission limits than the numerical emission standards contained in rule 340-25-165 and maximum allowable daily mill site emission limits in kilograms per day for an individual mill upon a finding by the Department [Commission] that:

(1) [the individual mill is located or is proposed to be located in a special problem area or an area where ambient air standards are exceeded or are projected to be exceeded.] /or are projected to be exceeded or where the emissions will have a significant air quality impact in an area where the standards are exceeded; or

(2) An odor or nuisance problem has been documented at any mill, in which case the TRS emission limits may be reduced below the regulatory limits; or

(3) Other rules which are more stringent apply.

PLANS AND SPECIFICATIONS

340-25-175 Prior to construction of new kraft mills or modification of facilities affecting emissions at existing kraft mills, complete and detailed engineering plans and specifications for air pollution control devices and facilities and such other data as may be required to evaluate projected emissions and potential effects on air quality shall be submitted to and approved by the Department. All construction shall be in accordance with plans as approved in writing by the Department.

MONITORING

340-25-180 (1) General:

(a) The details of the monitoring program for each mill shall be submitted to and approved by the Department. This submittal shall include diagrams and descriptions of all monitoring systems, monitoring frequencies, calibration schedules, descriptions of all sampling sites, data reporting formats and duration of maintenance of all data and reports. Any changes that are subsequently made in the approved monitoring program shall be submitted in writing to the Department for review and approved in writing prior to change;

(b) All records associated with the approved monitoring program including, but not limited to, original data sheets, charts, calculations, calibration data, production records and final reports shall be maintained for a continuous period of at least ~~[365 days]~~ **2 calendar years** and shall be furnished to the Department upon request.

(c) All source test data; TRS and SO_2 concentrations (ppm), corrected for oxygen content, if required, that are determined by continuous monitoring equipment; and opacity as determined by continuous monitoring equipment or EPA Method 9 will be used to determine compliance with applicable emission standards.

All continuous monitoring data, excluding the above, will be used to evaluate performance of emitting processes and associated control systems, and for the qualitative determination of plant site emissions.

(2) Total Reduced Sulfur (TRS). Each mill shall ~~[continually]~~ **continuously** monitor TRS in accordance with the following:

(a) The monitoring equipment shall determine compliance with the emission limits and reporting requirements established by these regulations,

and shall [~~continually~~] continuously sample and record concentrations of TRS[~~;~~]:

(b) The sources monitored shall include, but are not limited to[~~,-the~~] individual recovery furnaces, [~~stacks-and-the~~] and lime kilns. [~~stacks;~~]- All sources shall be monitored downstream of their respective control equipment, in accordance with the Department Continuous Emissions Monitoring (CEMS) Manual.

(c) At least [~~one~~] once per year, vents from other sources as required in subsection 340-25-165(1)[~~(d)~~](e), Other Sources, shall be sampled to demonstrate the representativeness of the emissions of TRS using EPA Method 16, 16A, 16B or continuous emission monitors. EPA methods shall consist of three (3) separate consecutive runs of one hour each in accordance with the Department Source Test Manual. Continuous emissions monitors shall be operated for three consecutive hours in accordance with the Department Continuous Emissions Monitoring Manual. [~~and-the~~] All results shall be reported to the Department.

(d) Smelt dissolving tank vents shall be sampled for TRS quarterly except that testing may be semi-annual when the preceding six source tests were less than 0.0124 gram/Kg Bls (0.025 lb/ton Bls) using EPA Method 16, 16A or 16B. EPA methods shall consist of three (3) separate consecutive runs of one hour each in accordance with the Department Source Test Manual.

(3)[~~(a)~~] Particulate Matter

(a) [~~Particulate-Matter:-~~]Each mill shall sample the recovery furnace(s), lime kiln(s) and smelt dissolving tank[~~(s)~~] vent(s) for particulate emissions [~~with:~~] in accordance with the Department Source Test Manual.

[~~(A) The-sampling-method;-and~~

~~(B)-The-analytical-method-approved-in-writing-by-the-Department;~~]

(b) Each mill shall provide [~~continual~~] continuous monitoring of opacity of emissions discharged to the atmosphere from [~~the~~] each recovery furnace stack [~~in a manner~~] in accordance with the Department Continuous Emissions Monitoring Manual; or

(c) Where monitoring of opacity from each recovery furnace is not feasible, provide continuous monitoring of particulate matter from each recovery furnace using sodium ion probes in accordance with the Department Continuous Emissions Monitoring Manual.

(d) Recovery furnace particulate source tests shall be performed quarterly except that testing may be semi-annual when the preceding six (6) source tests were less than 0.225 gram/dscm (0.097 grain/dscf) for furnaces subject to 340-25-165(2)(a) or 0.075 gram/dscm (0.033 grain/dscf) for furnaces subject to OAR 340-25-165(2)(d)(A).

(e) Lime kiln source tests shall be performed semi-annually.

(f) Smelt dissolving tank vent source tests shall be performed quarterly except that testing may be semi-annual when the preceding six (6) source tests were less than 0.187 Kilogram per metric ton (0.375 pound per ton) of production.

(4) Sulfur Dioxide (SO_2). Representative sulfur dioxide emissions from each recovery furnace[~~(s)~~] shall be determined at least once each month by the average of three (3) one hour source tests in accordance with the Department Source Test manual or from continuous emission monitors. If continuous emission monitors are used, the monitors shall be operated for three consecutive hours in accordance with the Department Continuous Emissions Monitoring Manual.

(5) Combined Monitoring. The Department may allow the monitoring for opacity of a combination of more than one emission stream if each individual emission stream has been demonstrated with the exception of

opacity to be in compliance with all the emission limits of rule 340-25-165. The Department may establish more stringent emission limits for the combined emission stream [shall be established by the Department].

REPORTING

340-25-185 Unless otherwise authorized or required by permit, data shall be reported by each mill for each calendar month by the fifteenth day of the subsequent calendar month as follows:

(1) Applicable daily average emissions of TRS gases expressed in parts per million of H_2S on a dry gas basis with oxygen concentrations, if oxygen corrections are required, for each source included in the approved monitoring program;

(2) [Monthly] Daily average emissions of TRS gases in [kilograms] pounds of total reduced sulfur per equivalent [metric] ton of pulp processed, expressed as H_2S, for each source included in the approved monitoring program;

(3) [Monthly] 3-Hour average emission of SO_2 based on all samples collected in one sampling period from the recovery furnace(s), expressed as ppm, dry basis:

(4) [Monthly average emission of particulates in grams per standard cubic meter; and kilograms per metric ton of pulp produced based upon the sampling conducted in accordance with the approved monitoring program;] All daily average opacities for each recovery furnace stack where transmissometers are utilized.

(5) [Average monthly equivalent kraft pulp production;]All 6-minute average opacities from each recovery furnace stack that exceeds 35 percent.

(6) [Average daily and the value of the maximum hourly opacity, and/or the average daily and the value of the maximum hourly particulate emissions

~~in grams per standard cubic meter for each recovery furnace stack on a daily basis;~~] Daily average Kilograms of particulate per equivalent metric ton (pounds of particulate per equivalent ton) of pulp produced for each recovery furnace stack. Where transmissometers are not feasible, the mass emission rate shall be determined by alternative sampling conducted in accordance with 340-25-180(3)(c).

(7) The results of each recovery furnace particulate source test in grams per standard cubic meter (grains per dry standard cubic foot) and for the same source test period the [~~continual~~] hourly average opacity [~~or~~] , where transmissometers are used, and the particulate monitoring record obtained in accordance with the approved [~~continual~~] or the alternate monitoring program [~~required~~] noted in section 340-25-180(3)(c).

(8) Unless otherwise approved in writing, [~~the cumulative number of hourly averages each day that the recovery furnace particulate and TRS, and lime kiln TRS emissions exceed the numerical regulatory or permit limits;~~] all periods of non-condensible gas bypass shall be reported.

(9) Upset conditions shall be reported in accordance with section 340-25-190(3);

(10) Each kraft mill shall furnish, upon request of the Department, such other pertinent data as the Department may require to evaluate the mill's emission control program.

(11) Monitoring data reported shall reflect actual observed levels corrected for oxygen, if required, and analyzer calibration.

(12) Oxygen concentrations used to correct pollutant data shall reflect oxygen concentrations at the point of measurement of pollutants.

(13) The Department shall be notified at least ten (10) days in advance of all scheduled reference method testing including all scheduled changes.

UPSET CONDITIONS

340-25-190 (1) Each mill shall [~~immediately~~] report to the Department abnormal mill operations including control and process equipment maintenance, or [~~breakdowns~~] unexpected upsets [~~which~~] that result in [~~violations~~] emissions in excess of the regulatory or air contaminant discharge permit limits within one hour, or when conditions prevent prompt notice, as soon as possible but no later than one hour after the start of the next working day. The mill shall also take immediate corrective action to reduce emission levels to regulatory or permit levels.

(2) [~~Significant~~] [~~u~~]Upsets shall be reported in writing with an accompanying report on measures taken or to be taken to correct the condition and prevent its reoccurrence within five (5) working days of each incident.

(3) Each mill shall report the cumulative duration in hours each month of the upsets reported in section (1) of this rule and classified as to:

(a) Recovery Furnace:

(A) TRS;

(B) Particulate.

(b) Lime Kiln:

(A) TRS;

(B) Particulate.

(c) Smelt Tank Particulate.

OTHER ESTABLISHED AIR QUALITY LIMITATIONS

340-25-195 [DEQ 50, f. 2-9-73, ef. 3-1-73;
Repealed by DEQ 137, f. & ef. 6-10-77]

PUBLIC HEARING

340-25-200 [DEQ 50, f. 2-9-73, ef. 3-1-73;
Repealed by DEQ 137, f. & ef. 6-10-77]

CHRONIC UPSET CONDITIONS

340-25-205 If the Department determines that an upset condition is chronic and correctable by installing new or modified process or control procedures or equipment, a program and schedule to effectively eliminate the deficiencies causing the upset conditions shall be submitted. Such reoccurring upset conditions causing emissions in excess of applicable limits ~~[may be exempted from rules 340-21-065 and 340-21-070 through 340-21-075 and]~~ may be subject to civil penalty or other appropriate action.

NEUTRAL SULFITE SEMI-CHEMICAL (NSSC) PULP MILLS

Definitions

340-25-220 As used in these regulations, unless otherwise required by context:

(1) "Continual Monitoring" means sampling and analysis, in a timed sequence, using techniques which will adequately reflect actual emission levels or concentrations on an ongoing basis.

(2) "Department" means the Department of Environmental Quality.

(3) "Emission" means a release into the atmosphere of air containments.

(4) "BLS" means black liquor solids, dry weight.

(5) "Neutral Sulfite Semi-Chemical (NSSC) Pulp Mill" means any industrial operation which uses for cooking, a liquor prepared from a sodium carbonate solution and sulfur dioxide at a neutral PH, range 6-8.

(6) "Particulate Matter" means all solid or liquid material, other than uncombined water, emitted to the ambient air as measured by EPA Method 5 or an equivalent test method in accordance with the Department Source Test Manual. Particulate matter emission determinations by EPA Method 5 shall use water as the cleanup solvent instead of acetone, and consist of the average of three (3) separate consecutive runs having a minimum sampling time of 60 minutes each, a maximum sampling time of eight (8) hours each, and a minimum sampling volume of 31.8 dscf each.

(7) "Parts per Million (ppm)" means parts of a contaminant per million parts of gas by volume on a dry-gas basis (one ppm equals 0.0001% by volume).

(8) "Production" means the daily amount of virgin air-dried unbleached NSSC pulp, or equivalent, produced during the 24-hr period each calendar day, or Department approved equivalent period, expressed in air-dried metric

tons (ADMT) per day. The corresponding English unit is air-dried tons(ADT) per day.

(9) "Spent Liquor Incinerator" means the combustion device in which pulping chemicals are subjected to high temperature to evaporate the water, incinerate organics and reclaim the sodium sulfate (saltcake) and sodium carbonate.

(10) "Acid Absorption Tower" means the device where the sodium carbonate and sulfur dioxide react to form a sodium sulfite solution prior to use as the cooking liquor.

(11) "Standard Dry Cubic Meter" means the amount of gas that would occupy a volume of one cubic meter, if the gas were free of uncombined water, at a temperature of 20°C.(68°F.) and a pressure of 760 mm of mercury.

(12) "Total Reduced Sulfur (TRS)" means the sum of the sulfur compounds hydrogen sulfide, methyl mercaptan, dimethyl sulfide, and dimethyl disulfide, and any other organic sulfides present. These monitors shall be located downstream of the control device.

(13) "Continuous Monitoring" means instrumental sampling of a gas stream on a continuous basis, excluding periods of calibration.

(14) "Daily Arithmetic Average" means the average concentration over the twenty-four hour period in a calendar day or, Department approved equivalent period, as determined by continuous monitoring equipment or reference method testing. Determinations based on EPA reference methods or equivalent methods in accordance with the Department Source Test Manual consist of three (3) separate consecutive runs having a minimum sampling time of sixty (60) minutes each and a maximum sampling time of eight (8) hours each. The three values for concentration (ppm or grains/dscf) are averaged and expressed as the daily arithmetic average which is used to

determine compliance with process weight limitations, grain loading or volumetric concentration limitations and to determine daily emission rate.

Highest and Best Practicable Treatment and Control Required

340-25-222 (1) Notwithstanding the specific emission limits set forth in 340-25-224, in order to maintain the lowest possible emission of air contaminants, the highest and best practicable treatment and control currently available shall in every case by provided, with consideration being given to the economic life of the existing equipment.

(2) All installed process and control equipment shall be operated at full effectiveness and efficiency at all times, such that emissions of contaminants are kept at lowest practicable levels.

Emission Limitations

340-25-224 (1) Emission of Total Reduced Sulfur (TRS): Spent Liquor Incinerator. The emissions of TRS from any spent liquor incinerator stack shall not exceed 10 ppm and 0.07 gram/kg BLS (0.14 lb/ton BLS) as a daily arithmetic average in accordance with 340-25-220(14).

(2) Particulate Matter: Spent Liquor Incinerator. The emissions of particulate matter from any spent liquor incinerator stack shall not exceed:

(a) 3.6 grams/kg BLS (7.2 lbs/ton BLS) as a daily arithmetic average in accordance with 340-25-220(14) and the Department Source Test Manual; and

(b) Exhibit an opacity equal to or greater than 35 percent for a period exceeding 3 minutes in any one hour (excluding periods when the facility is not operating).

(3) Sulfur Dioxide (SO_2):

(a) Spent Liquor Incinerator. The emissions of sulfur dioxide from each spent liquor incinerator stack shall not exceed a 3-hr arithmetic average of 10 ppm on a dry-gas basis.

(b) Acid Absorption Tower: The emissions of sulfur dioxide from the acid absorption tower stack shall not exceed 20ppm as a 3-hr arithmetic average on a dry gas basis.

(4) All NSSC sources with the exception of spent liquor incinerators shall not exhibit an opacity equal to or greater than 20 percent for a period exceeding three (3) minutes in any one hour.

More Restrictive Emission Limits

340-25-226 The Department may establish more restrictive emission limits than the numerical emission standards contained in 340-25-224 and maximum allowable daily mill site emission limits in kilograms per day, for an individual mill, upon a finding by the Department that:

(1) The individual mill is located or is proposed to be located in a special problem area or an area where ambient air standards are exceeded or are projected to be exceeded; or

(2) When an odor or nuisance problem has been documented at any mill the TRS emission limits may be reduced below the regulatory limits.

Plans and Specifications

340-25-228 Prior to construction of new neutral sulfite semi-chemical (NSSC) pulp mills or modification of facilities affecting emissions at existing NSSC mills, complete and detailed engineering plans and specifications for air pollution control devices and facilities and such data as may be required to evaluate projected emissions and potential effects on air quality shall be submitted to and approved by the Department. All construction shall be in accordance with plans as approved in writing by the Department.

Monitoring

340-25-230 (1) General

(a) The details of the monitoring program for each mill shall be submitted to and approved by the Department. This submittal shall include diagrams and descriptions of all monitoring systems, monitoring frequencies, calibration schedules, descriptions of all sampling sites, data reporting formats and duration of maintenance of all data and reports. Any changes that are subsequently made in the approved monitoring program shall be submitted in writing to the Department for review and approved in writing prior to change.

(b) All records associated with the approved monitoring program including, but not limited to, original data sheets, charts, calculations, calibration data, production records and final reports shall be maintained for a period of at least two calendar years and shall be furnished to the Department upon request.

(2)(a) Total Reduced Sulfur (TRS). Each mill shall continuously monitor the spent liquor incinerator for TRS emissions using: continuous monitoring equipment, except where a vibration problem, which was in existence on March 26, 1989, exists and continuous monitoring equipment is not practical or economically feasible; in which case, upon documentation of the above condition, the spent liquor incinerator shall be sampled for TRS emissions using the reference method and the analytical method (EPA Method 16, 16A, or 16B) as outlined in the Department Source Test Manual.

(b) Spent liquor incinerator TRS source tests shall be performed quarterly except that testing may be semi-annual when the preceding six (6) source tests were less than 7.5 ppm.

(c) Flow rate measurements used to determine TRS mass emission rates shall be corrected for cyclonic flow, where applicable.

(3)(a) Particulate Matter. Each mill shall sample the spent liquor incinerator for particulate emissions with:

(A) The sampling method; and

(B) The analytical method specified in the Department source Test Manual.

(b) Spent liquor incinerator particulate source tests shall be performed quarterly except that testing may be semi-annual when the preceding six (6) source tests were less than 0.05 Gram/Kg Bls (0.10 lb/ton BLS). All sampling data shall be corrected for cyclonic flow, where applicable.

(c) Each mill shall provide continuous monitoring of opacity of emissions discharged to the atmosphere from the spent liquor incinerator, and the acid plant in accordance with the Department Continuous Emission monitoring Manual; except that when continuous monitoring of opacity is not

feasible due to excessive moisture then EPA Method 9 shall be used for the determination of opacity.

(4) Sulfur Dioxide (SO_2). Representative sulfur dioxide emissions from spent liquor incinerators and from the acid absorption tower shall be determined at least once every six (6) months with:

(A) The sampling method; and

(B) The analytical method specified in the Department Source Test Manual.

Reporting

340-25-232 Unless otherwise authorized by permit, data shall be reported by each mill for each sampling period by the fifteenth day of the first month following the applicable sampling period as follows:

(1) Daily average emissions of TRS gases in Kilograms of total reduced sulfur per metric ton (pounds of total reduced sulfur per ton) of black liquor solids expressed as H_2S based on all samples collected in one sampling period from the spent liquor incinerator.

(2) Daily average emissions of particulate in Kilograms per metric ton (pounds per ton) of black liquor solids based on all samples collected in one sampling period from the spent liquor incinerator.

(3) Daily average concentration of sulfur dioxide in ppm for each source included in the approved monitoring program based on all samples collected in any one sampling period.

(4) Daily average amount of virgin air-dried unbleached NSSC pulp produced expressed as air dried metric tons per day (Air dried tons per day).

(5) Daily average amount of black liquor solids, dry weight, fired in the spent liquor incinerator during periods of operation.

(6) Upset conditions shall be reported in accordance with 340-25-234 (3).

(7) Each mill shall furnish, upon request of the Department, such other pertinent data as the Department may require to evaluate the mills emission control program.

(8) The Department shall be notified at least ten (10) days in advance of all scheduled reference method testing including all scheduled changes.

(9) Data reported shall reflect actual observed levels.

Upset Conditions

340-25-234 (1) Each mill shall report abnormal mill operations to the Department including control and process equipment maintenance, or unexpected upsets that result in emissions in excess of the regulatory or air containment discharge permit limits within one hour, or when conditions prevent prompt notification, as soon as possible but no later than one hour after the start of the next working day. The mill shall also take immediate corrective action to reduce emission levels to regulatory or permit levels.

(2) Upsets shall be reported in writing with an accompanying report on measures taken or to be taken to correct the condition and prevent its reoccurrence within five (5) working days of each incident.

(3) Each mill shall report the cumulative duration in hours each month of the upsets reported in section (1) of this rule and classified as to:

(a) Spent Liquor Incinerator

(A) TRS

(B) Particulate

(C) SO_2

(D) Opacity

(b) Acid Absorption Tower

(A) SO_2

(B) Opacity

PO\AR1573

NEIL GOLDSCHMIDT
GOVERNOR

Environmental Quality Commission

811 SW SIXTH AVENUE, PORTLAND, OR 97204 PHONE (503) 229-5696

REQUEST FOR EQC ACTION

Meeting Date: March 3, 1989
Agenda Item: G
Division: Air Quality
Section: Program Operations

SUBJECT:

Authorization for a public hearing to consider amending the Air Quality Kraft Mill Regulations and adoption of regulations for Neutral Sulfite Semi-Chemical Pulp Mills

PURPOSE:

Revisions of the Kraft Pulp Mill Regulations are required to comply with EPA requirements, for the control of Total Reduced Sulfur (TRS), daily emission standards, and correction of discrepancies and adopt new Neutral Sulfite Mill Regulations specific to that process.

ACTION REQUESTED:

___ Work Session Discussion
- ____ General Program Background
- ____ Program Strategy
- ____ Proposed Policy
- ____ Potential Rules
- ____ Other: (specify)

_X_ Authorize Rulemaking Hearing

Proposed Rules (Draft)	Attachment A
Rulemaking Statements	Attachment B
Fiscal and Economic Impact Statement	Attachment B
Draft Public Notice	Attachment C

___ Adopt Rules

Proposed Rules (Final Recommendation)	Attachment ___
Rulemaking Statements	Attachment ___
Fiscal and Economic Impact Statement	Attachment ___
Public Notice	Attachment ___

___ Issue Contested Case Decision/Order

Proposed Order	Attachment ___

___ Other: (specify)

DESCRIPTION OF REQUESTED ACTION:

Authorization of a public hearing to receive testimony on revision of the Kraft Mill Regulations and adoption of Neutral Sulfite Semi-Chemical (NSSC) regulations. The proposed regulations adopt daily standards in lieu of monthly standards, implement opacity standards and meet EPA TRS guidelines for Kraft Mills. The proposed NSSC regulations are required to better regulate that specific chemical pulping process.

AUTHORITY/NEED FOR ACTION:

X	Required by Statute: ORS 468.295 Enactment Date: July 1989	Attachment D
___	Statutory Authority: _____	Attachment ___
___	Amendment of Existing Rule: _____	Attachment ___
___	Implement Delegated Federal Program: _____	Attachment ___
___	Other:	Attachment ___
___	Time Constraints: (explain)	

DEVELOPMENTAL BACKGROUND:

X	Department Report (Background/Explanation)	Attachment E
	Advisory Committee Report/Recommendation	Attachment ___
___	Hearing Officer's Report/Recommendations	Attachment ___
___	Response to Testimony/Comments	Attachment ___
___	Prior EQC Agenda Items: (list)	Attachment ___
___	Other Related Reports/Rules/Statutes:	Attachment ___
___	Supplemental Background Information	Attachment ___

REGULATED/AFFECTED COMMUNITY CONSTRAINTS/CONSIDERATIONS:

Seven Kraft Mills and one Neutral Sulfite Semi-Chemical Pulp Mill will be affected. The amount that each mill will be affected will vary depending upon compliance status of each mill and whether additional control is required. Testimony received at the public hearing should define the impact to each mill.

PROGRAM CONSIDERATIONS:

No significant impact

ALTERNATIVES CONSIDERED BY THE DEPARTMENT:

1. Authorize public hearings to obtain testimony on the proposed draft rules in Attachment A.

2. Modify the draft rules as proposed in Attachment A and authorize public hearings.

3. Refuse request for public hearing on the proposed rule.

DEPARTMENT RECOMMENDATION FOR ACTION, WITH RATIONALE:

The Department recommends that the Commission authorize public hearings to gather testimony on adoption of the revised Kraft Mill Regulations and the Neutral Sulfite Semi-Chemical Regulations. Adoption of the proposed regulations are considered necessary to conform with Section 110 and 111d of the Clean Air Act and allow EPA approval of Kraft Mill Regulations and Neutral Sulfite Mill Regulations, as amendments to the State Implementation Plan.

CONSISTENCY WITH STRATEGIC PLAN, AGENCY POLICY, LEGISLATIVE POLICY:

ISSUES FOR COMMISSION TO RESOLVE:

1. Whether existing Kraft Mill rules should be amended to correct deficiencies identified by EPA.

2. Whether to implement new rules for Neutral Sulfite Mills, to more effectively regulate emissions from the neutral sulfite industry.

INTENDED FOLLOWUP ACTIONS:

- Public Hearing Notices in the Secretary of State's Bulletin and local newspapers.
- Notify local jurisdictions and interested parties of public hearings and comment period.
- Hold public hearing in Portland on March 26, 1989.
- Evaluate and respond to comments of industry and public.
- Incorporate comments into proposed rules, based on Department's evaluation.
- Submit final rules for adoption at the July 14, 1989, EQC meeting.

Approved:

Section: _____

Division: _____

Director: _____

Report Prepared By: W.J. Fuller

Phone: 229-5749

Date Prepared: February 15, 1989

WJF:ax
AX324
(2/15/89)

ATTACHMENT A

Kraft Pulp Mills

[ED. NOTE: Administrative Order DEQ 50 repealed previous rules 340-25-155 through 340-25-195 (consisting of SA 38, filed 4-4-69).]

DEFINITIONS

340-25-150

As used in these regulations, unless otherwise required by context:

(1) "Continual Monitoring" means sampling and analysis, in a continuous or timed sequence, using techniques which will adequately reflect actual emission levels or concentrations on a continuous basis.

(2) "Department" means the Department of Environmental Quality.

(3) "Emission" means a release into the atmosphere of air contaminants.

(4) "BLS" means Black Liquor Solids, dry weight.

(5) "Kraft Mill" or "Mill" means any industrial operation which uses for a cooking liquor an alkaline sulfide solution containing sodium hydroxide and sodium sulfide in its pulping process.

(6) "Lime Kiln" means any production device in which calcium carbonate is thermally converted to calcium oxide.

(7) "Non-Condensibles" means gases and vapors, contaminated with TRS <u>compounds</u> [~~gases~~], from the digestion and multiple-effect evaporation processes of a mill [~~that are not condensed with the equipment used in said processes~~].

(8) "Other Sources" means sources of TRS emissions in a kraft mill other than recovery furnaces and lime kilns, including but not limited to:

(a) Vents from knotters, brown stock washing systems, evaporators, blow tanks, smelt tanks, blow heat accumulators,

black liquor storage tanks, black liquor oxidation system, pre-steaming vessels, tall oil recovery operations;

(b) Any operation connected with the treatment of condensate liquids within the mill; and

(c) Any vent which is shown to be a significant contributor of odorous gases.

(9) "Particulate Matter" means all solid material in an emission stream ~~[which may be removed on a glass fiber filter maintained during sampling at stack temperature or above the water vapor dew point of the stack gas, whichever is greater, but not more than 202°C (400°F). The glass fiber filter to be used shall be MSA 1106BH or equivalent.]~~ as measured by EPA Method 5, or EPA Method 17 if the stack temperature is no greater than 205°C (400°F).

(10) "Parts Per Million (ppm)" means parts of a contaminant per million parts of gas by volume on a dry-gas basis (1 ppm equals 0.0001% by volume).

(11) "Production" means the daily ~~[average]~~ amount of air-dried unbleached kraft pulp, or equivalent, produced as determined by dividing the monthly total production by the number of days specific production equipment operates, and expressed in air-dried metric tons (admt) per day. The corresponding English unit is air-dried tons (adt) per day.

(12) "Recovery Furnace" means the combustion device in which pulping chemicals are converted to a molten smelt and wood solids are incinerated. For these regulations, and where present, this term shall include the direct contact evaporator.

(13) "Significant Upgrading of Pollution Control Equipment" means a modification or a rebuild of an existing pollution control device for which a capital expenditure of 50 percent or more of the replacement cost of the existing device is required.

[~~(13)~~] (14) "Standard Dry Cubic Meter" means the amount of gas that would occupy a volume of one cubic meter, if the gas were free of uncombined water, at a temperature of 20° C. (68° F.) and a pressure of 760 mm of Mercury (29.92 inches of Mercury). The corresponding English unit is standard dry cubic foot. When applied to recovery furnace gases "standard dry cubic meter" requires adjustment of the gas volume to that which would result in a concentration of 8% oxygen if the oxygen concentration exceeds 8%. When applied to lime kiln gases "standard dry cubic meter" requires adjustment of the gas volume to that which would result in a concentration of 10 [~~percent~~]% oxygen if the oxygen concentration exceeds 10%. The mill shall demonstrate that oxygen concentrations are below noted values.

[~~(14)~~] (15) "Total Reduced Sulfur (TRS)" means the sum of the sulfur compounds [~~in~~] hydrogen sulfide, methyl mercaptan[~~s~~], dimethyl sulfide, and dimethyl disulfide, and any other organic sulfides present in an oxidation state of minus two.

Stat. Auth.: ORS Ch. 468

Hist.: DEQ 50, f. 2-9-73, ef. 3-1-73; DEQ 137, f. & ef. 6-10-77

STATEMENT OF POLICY

340-25-155

Recent technological developments have enhanced the degree of malodorous emission control possible for the kraft pulping process. While recognizing that complete malodorous and particulate emission control is not presently possible, consistent with the meteorological and geographical conditions in Oregon, it is hereby declared to be the policy of the Department to:

(1) Require, in accordance with a specific program and time table for all sources at each operating mill, the highest and best practicable treatment and control of atmospheric emissions from kraft mills through the utilization of technically feasible equipment, devices, and procedures. Consideration will be given to the economic life of equipment, which when installed, complied with the highest and best practicable treatment requirement;

(2) Require degrees and methods of treatment for major and minor emission points that will minimize emissions of odorous gases and eliminate ambient odor nuisances;

(3) Require effective monitoring and reporting of emissions and reporting of other data pertinent to air quality or emissions. The Department will use these data in conjunction with ambient air data and observation of conditions in the surrounding area to develop and revise emission and ambient air standards, and to determine compliance therewith;

(4) Encourage and assist the kraft pulping industry to conduct a research and technological development program designed to progressively reduce kraft mill emissions, in accordance with a definite program, including specified objectives and time schedules.

Stat. Auth.: ORS Ch.

Hist.: DEQ 50, f. 2-9-73, ef. 3-1-73

OAR25155 (1/89)

HIGHEST AND BEST PRACTICABLE TREATMENT AND CONTROL REQUIRED

340-25-160

(1) Notwithstanding the specific emission limits set forth in rule 340-25-165, in order to maintain the lowest possible emission of air contaminants, the highest and best practicable treatment and control currently available shall in every case be provided, with consideration being given to the economic life of the existing equipment.

(2) All installed process and control equipment shall be operated at full effectiveness and efficiency at all times, such that emissions of contaminants are kept at lowest practicable levels.

Stat. Auth.: ORS Ch.

Hist.: DEQ 50, f. 2-9-73, ef. 3-1-73

OAR25160 (1/89)

EMISSION LIMITATIONS

340-25-165

(1) Emission of Total Reduced Sulfur (TRS):

(a) Recovery Furnaces:

(A) The emissions of TRS from each recovery furnace placed in operation before January 1, 1969, shall not exceed 10 ppm [~~as a daily arithmetic average~~] and 0.15 Kg [S]/metric ton (0.30 lb[-S]/ton) of production as [~~a monthly~~] daily arithmetic averages;

(B) TRS emissions from each new recovery furnace placed in operation after January 1, 1969, and before September 25, 1976, or any recovery furnace modified significantly to expand production shall be controlled such that the emissions of TRS shall not exceed 5 ppm [~~as a daily arithmetic average~~] and 0.08 Kg[-S]/metric ton (0.15 lb[-S]/ton) of production as [~~a monthly~~] daily arithmetic averages.

(b) Lime kilns. Lime Kilns shall be operated and controlled such that emissions of TRS shall not exceed:

(A) 40 ppm and 0.10 Kg[-S]/metric ton (0.20 lb[-S]/ton) of production as monthly arithmetic averages;

(B) As soon as practicable, but not later than July 1, 1978, 20 ppm and 0.05 Kg[-S]/metric ton (0.10 lb[-S]/ton) of production as monthly arithmetic averages;

(C) As soon as practicable, but not later than July 1, 1983, 20 ppm as a daily arithmetic average and

0.05 Kg[-S]/metric ton (0.10 lb[-S]/ton) of production as a monthly arithmetic average;

(D) 20 ppm [~~as a daily arithmetic average~~] and 0.05 Kg[S]/metric ton (0.10 lb[-S]/ton) of production as [a ~~monthly~~] 12 hour arithmetic averages from each new lime kiln placed in operation or any lime kiln modified significantly to expand production. This paragraph applies to those sources where construction was initiated prior to September 25, 1976.

(c) Smelt Dissolving Tanks.

(A) As soon as practicable, but not later than July 1, 1990, TRS emissions from each smelt dissolving tank shall not exceed 0.033 g/Kg BLS (0.066 lb/ton BLS) as a 12 hour average.

[~~(c)~~] (d) Non-Condensibles:

(A) Non-condensibles from digesters and multiple-effect evaporators shall be continuously treated to destroy TRS gases by thermal incineration in a lime kiln or incineration device capable of subjecting the non-condensibles to a temperature of not less than 650° C. (1200° F.) for not less than 0.3 second[~~s~~;]. An alternate device shall be available in the event adequate incineration in the primary device cannot be accomplished. Venting of TRS gases during changeover shall be minimized but in no case shall the time exceed one hour.

(B) When steam- or air-stripping of condensates or other contaminated streams is practiced, the stripped gases shall be subjected to treatment in the non-condensible incineration system or otherwise given equivalent treatment.

[(d)] (e) Other Sources:

(A) As soon as practicable, but not later than July 1, 1978, the total emission of TRS from other sources including, but not limited to, knotters and brown stock washer vents, brown stock washer filtrate tank vents, black liquor oxidation vents, and contaminated condensate stripping shall not exceed 0.10 Kg[-S]/metric ton (0.20 lb[-S]/ton) of production;

(B) Miscellaneous Sources and Practices. When it is determined that sewers, drains, and anaerobic lagoons significantly contribute to an odor problem, a program for control shall be required.

[(e)] (f) Compliance Programs. [Each mill with any sources not in compliance with the 1978 emission limits shall submit a program and schedule for achieving compliance to the Department for approval by no later than August 1, 1977. As soon as practicable, but not later than January 1, 1980, each mill with lime kiln(s) not in compliance with the 1983 limits shall submit a program and schedule for achieving compliance.] Each mill with any recovery furnace or lime kiln not in compliance with the 1988 averaging period or smelt dissolving tanks not in

compliance with the July 1, 1990 limit shall submit a program and schedule for achieving compliance as soon as practicable but no later than January 1, 1990.

(2) Particulate Matter:

(a) Recovery Furnaces. The emissions of particulate matter from each recovery furnace stack shall not exceed: ~~[a monthly arithmetic average of:]~~

(A) 2.0 kilograms per metric ton ([~~four (4)~~] 4.0 pounds per ton) of production as a daily arithmetic average; [~~and~~]

(B) 0.30 gram[~~s~~] per dry standard cubic meter (0.13 grain[~~s~~] per dry standard cubic foot); and

(C) Exhibit 35 percent opacity or greater based on a path length of 10 feet, if greater than 10 feet, for periods exceeding six (6) percent of the six (6) minute average opacities in a quarter (excluding periods when the facility is not operating).

(b) Lime Kilns. The emissions of particulate matter from each lime kiln stack shall not exceed ~~[a monthly arithmetic average of]~~:

(A) 0.50 kilogram per metric ton ([~~one (1)~~] 1.00 pound per ton) of production as a daily arithmetic average; [~~and~~]

(B) 0.46 gram[~~s~~] per standard cubic meter (0.20 grain[~~s~~] per standard cubic foot)[~~.~~] ; and

(C) The visible emission limitations in section 340-25-165(4).

(c) Smelt Dissolving Tanks. The emission of particulate matter from each smelt dissolving tank stack shall not exceed: [a

~~monthly arithmetic average of 0.25 Kg/metric ton (one-half (1/2) pound per ton of production).~~]

(A) A daily arithmetic average of 0.25 kilogram per metric ton (0.50 pound per ton) of production; and

(B) The visible emission limitations in section 340-25-165(4).

(d) Replacement or Significant Upgrading of existing particulate pollution control equipment after July 1, 1988 shall result in more restrictive standards as follows:

(A) Recovery Furnaces. The emission of particulate matter from each affected recovery furnace stack shall not exceed 0.67 kilogram per metric ton (1.35 pounds per ton) of production as a daily arithmetic average and 0.10 gram per dry standard cubic meter (0.044 grain per dry standard cubic foot).

(B) Lime Kilns. The emission of particulate matter from each affected lime kiln stack shall not exceed 0.17 kilogram per metric ton (0.34 pound per ton) of production as a daily arithmetic average and 0.15 gram per dry standard cubic meter (0.067 grain per dry standard cubic foot) when burning gaseous fossil fuel; or 0.33 kilogram per metric ton (0.65 pound per ton) of production as a daily arithmetic average and 0.30 gram per dry standard cubic meter (0.13 grain per dry standard cubic foot) when burning liquid fossil fuel.

(C) Smelt Dissolving Tanks. The emissions of particulate matter from each smelt dissolving tank vent stack shall

not exceed 0.15 kilogram per metric ton (0.30 pound per ton) of production as a daily arithmetic average.

(3) Sulfur Dioxide (SO_2). Emissions of sulfur dioxide from each recovery furnace stack shall not exceed a daily arithmetic average of 300 ppm on a dry-gas basis except during start-up and shut-down periods.

(4) ~~[New Facility Compliance. As soon as practicable, but not later than within 180 days of the start-up of a new kraft mill or of any new or modified facility having emissions limited by these regulations, that facility shall be operated, controlled, or limited to comply with the applicable provisions of these regulations and the mill shall conduct source sampling or monitoring as appropriate to demonstrate compliance.]~~ All kraft mill sources with the exception of recovery furnaces shall not exhibit an opacity equal to or greater than 20 percent for a period exceeding three (3) minutes in any one (1) hour.

(5) New Source Performance Standards

(a) New or significantly modified sources that commenced construction after September 24, 1976 are subject to New Source Performance Standards, see section 340-25-630.

Stat. Auth.: ORS Ch. 468

Hist.: DEQ 50, f. 2-9-73, ef. 3-1-73; DEQ 137, f. & ef. 6-10-77

OAR25165 (2/89)

MORE RESTRICTIVE EMISSION LIMITS

340-25-170

The Department may establish more restrictive emission limits than the numerical emission standards contained in rule 340-25-165 and maximum allowable daily mill site emission limits in kilograms per day for an individual mill upon a finding by the Department ~~[Commission]~~ that: ~~[the individual mill is located or is proposed to be located in a special problem area or an area where ambient air standards are exceeded or are projected to be exceeded.]~~

(1) The individual mill is located or is proposed to be located in a special problem area or an area where ambient air standards are exceeded or are projected to be exceeded; or

(2) When an odor or nuisance problem has been documented at any mill the TRS emission limits may be reduced below the regulatory limits.

Stat. Auth.: ORS Ch. 468

Hist.: DEQ 50, f. 2-9-73, ef. 3-1-73; DEQ 137, f. & ef. 6-10-77

OAR25170 (1/89)

PLANS AND SPECIFICATIONS

340-25-175

Prior to construction of new kraft mills or modification of facilities affecting emissions at existing kraft mills, complete and detailed engineering plans and specifications for air pollution control devices and facilities and such other data as may be required to evaluate projected emissions and potential effects on air quality shall be submitted to and approved by the Department. All construction shall be in accordance with plans as approved in writing by the Department.

Stat. Auth.: ORS Ch. 468

Hist.: DEQ 50, f. 2-9-73, ef. 3-1-73; DEQ 173, f. & ef. 6-10-77

OAR25175 (1/89)

MONITORING

340-25-180

(1) General:

(a) The details of the monitoring program for each mill shall be submitted to and approved by the Department. This submittal shall include diagrams and descriptions of all monitoring systems, monitoring frequencies, calibration schedules, descriptions of all sampling sites, data reporting formats and duration of maintenance of all data and reports. Any changes that are subsequently made in the approved monitoring program shall be submitted in writing to the Department for review and approved in writing prior to change;

(b) All records associated with the approved monitoring program including, but not limited to, original data sheets, charts, calculations, calibration data, production records and final reports shall be maintained for a continuous period of at least 365 days and shall be furnished to the Department upon request.

(2) Total Reduced Sulfur (TRS). Each mill shall continually monitor TRS in accordance with the following:

(a) The monitoring equipment shall determine compliance with the emission limits and reporting requirements established by these regulations, and shall continually sample and record concentrations of TRS;

(b) The sources monitored shall include, but are not limited to, the recovery furnace stacks and the lime kiln stacks;

(c) At least [~~one~~] once per year, vents from other sources as required in subsection 340-25-165(1)[~~(d)~~](e), Other Sources, shall be sampled to demonstrate the representativeness of the emissions of TRS and the results shall be reported to the Department.

(3)[~~(a)~~] Particulate Matter

(a) [~~Particulate Matter.--~~]Each mill shall sample the recovery furnace(s), lime kiln(s) and smelt dissolving tank(s) for particulate emissions with:

(A) The sampling method; and

(B) The analytical method approved in writing by the Department.

(b) Each mill shall provide continual monitoring of opacity of emissions discharged to the atmosphere from [~~the~~] each recovery furnace or particulate matter from [~~the~~] each recovery furnace[~~(s)~~] [~~in a manner~~] using an alternate method approved in writing by the Department.

(c) Recovery furnace particulate source tests shall be performed quarterly except that when the preceding six (6) samples were less than 0.097 gr/dscf the sampling frequency may be semi annual.

(4) Sulfur Dioxide (SO_2). Representative sulfur dioxide emissions from the recovery furnace(s) shall be determined at least once each month.

(5) Combined Monitoring. The Department may allow the monitoring of a combination of more than one emission stream if each individual emission stream has been demonstrated to be in compliance with all

the emission limits of rule 340-25-165. The emission limits for the combined emission stream shall be established by the Department.

Stat. Auth.: ORS Ch. 468

Hist.: DEQ 50, f. 2-9-73, ef. 3-1-73; DEQ 137, f. & ef. 6-10-77

OAR25180 (2/89)

REPORTING

340-25-185

Unless otherwise authorized or required by permit, data shall be reported by each mill for each calendar month by the fifteenth day of the subsequent calendar month as follows:

(1) Applicable daily or 12-hour average emissions of TRS gases expressed in parts per million of H_2S on a dry gas basis with oxygen concentrations, if oxygen corrections are required, for each source included in the approved monitoring program;

(2) ~~[Monthly]~~ Daily average emissions of TRS gases in kilograms of total reduced sulfur per metric ton of pulp processed, expressed as H_2S, for each source included in the approved monitoring program;

(3) ~~[Monthly]~~ Daily average emission of SO_2 based on all samples collected in any one day from the recovery furnace(s), expressed as ppm, dry basis:

(4) ~~[Monthly average emission of particulates in grams per standard cubic meter; and kilograms per metric ton of pulp produced based upon the sampling conducted in accordance with the approved monitoring program;]~~ All daily average opacities for each recovery furnace where the utilization of transmissometers for the measurement of opacity is used;

(5) ~~[Average monthly equivalent kraft pulp production;]~~ All 6-minute average opacities that exceed 35 percent.

(6) ~~[Average daily and the value of the maximum hourly opacity; and/or the average daily and the value of the maximum hourly particulate emissions in grams per standard cubic meter for each recovery~~

~~furnace-stack-on-a-daily-basis;~~] Daily average kilograms of particulate per metric ton of pulp produced for each recovery furnace where the utilization of transmissometers for the measurement of opacity is not feasible and the mass emission rate is determined based upon alternative sampling conducted in accordance with the approved monitoring programs.

(7) The results of each recovery furnace particulate source test in grams per dry standard cubic meter and for the same source test period the [~~continual~~] hourly average opacity or the particulate monitoring record obtained in accordance with the approved [~~continual~~] alternate monitoring program required in section 340-25-180(3).

(8) Unless otherwise approved in writing, [~~the-cumulative-number-of hourly-averages-each-day-that-the-recovery-furnace-particulate-and TRS,-and-lime-kiln-TRS-emissions-exceed-the-numerical-regulatory or-permit-limits;~~] all periods of non-condensible gas bypass shall be reported.

(9) Upset conditions shall be reported in accordance with section 340-25-190(3);

(10) Each kraft mill shall furnish, upon request of the Department, such other pertinent data as the Department may require to evaluate the mill's emission control program.

(11) Monitoring data reported shall reflect actual observed levels corrected for oxygen, if required, and analyzer calibration.

(12) Oxygen concentrations used to correct pollutant data shall reflect oxygen concentrations at the point of measurement of pollutants.

(13) The Department shall be notified at least ten (10) days in advance of all scheduled reference method testing including all scheduled changes.

Stat. Auth.: ORS Ch. 468

Hist.: DEQ 50, f. 2-9-73, ef. 3-1-73; DEQ 137, f. & ef. 6-10-77

OAR25185 (2/89)

UPSET CONDITIONS

340-25-190

(1) Each mill shall immediately report abnormal mill operations including control and process equipment maintenance, or breakdowns which result in violations of regulatory or air contaminant discharge permit limits. The mill shall also take immediate corrective action to reduce emission levels to regulatory or permit levels.

(2) Significant upsets shall be reported in writing with an accompanying report on measures taken or to be taken to correct the condition and prevent its reoccurrence.

(3) Each mill shall report the cumulative duration in hours each month of the upsets reported in section (1) of this rule and classified as to:

(a) Recovery Furnace:

(A) TRS;

(B) Particulate.

(b) Lime Kiln:

(A) TRS;

(B) Particulate.

(c) Smelt Tank Particulate.

Stat. Auth.: ORS Ch. 468

Hist.: DEQ 50, f. 2-9-73, ef. 3-1-73; DEQ 137, f. & ef. 6-10-77

OAR25190 (1/89)

OTHER ESTABLISHED AIR QUALITY LIMITATIONS

340-25-195 [DEQ 50, f. 2-9-73, ef. 3-1-73;

Repealed by DEQ 137, f. & ef. 6-10-77]

OAR25195 (1/89)

PUBLIC HEARING

340-25-200 [DEQ 50, f. 2-9-73, ef. 3-1-73;
Repealed by DEQ 137, f. & ef. 6-10-77]

OAR25200 (1/89)

CHRONIC UPSET CONDITIONS

340-25-205

If the Department determines that an upset condition is chronic and correctable by installing new or modified process or control procedures or equipment, a program and schedule to effectively eliminate the deficiencies causing the upset conditions shall be submitted. Such reoccurring upset conditions causing emissions in excess of applicable limits may be exempted from rules 340-21-065 and 340-21-070 through 340-21-075 and may be subject to civil penalty or other appropriate action.

Stat. Auth.: ORS Ch. 468

Hist.: DEQ 50, f. 2-9-73, ef 3-1-73

OAR25205 (1/89)

NEUTRAL SULFITE SEMI-CHEMICAL (NSSC) PULP MILLS

Definitions

340-25-220

As used in these regulations, unless otherwise required by context:

(1) "Continual Monitoring" means sampling and analysis, in a continuous or timed sequence, using techniques which will adequately reflect actual emission levels or concentrations on a continuous basis.

(2) "Department" means the Department of Environmental Quality.

(3) "Emission" means a release into the atmosphere of air containments.

(4) "BLS" means black liquor solids, dry weight.

(5) "Neutral Sulfite Semi-Chemical (NSSC) Pulp Mill" means any industrial operation which uses for cooking, a liquor prepared from a sodium carbonate solution and sulfur dioxide at a neutral PH, range 6-8.

(6) "Particulate Matter" means all solid material in an emission stream as measured by EPA Method 5, if the stack temperature is no greater than 205°C (400°F).

(7) "Parts per Million (ppm)" means parts of a contaminant per million parts of gas by volume on a dry-gas basis (one ppm equals 0.0001% by volume).

(8) "Production" means the daily average amount of virgin air-dried unbleached NSSC pulp, or equivalent, produced as determined by dividing the monthly total production by the number of days

specific production equipment operates, and expressed in air-dried metric tons (ADMT) per day. The corresponding English unit is air-dried tons (ADT) per day.

(9) "Spent Liquor Incinerator" means the combustion device in which pulping chemicals are subjected to high temperature to evaporate the water, incinerate organics and reclaim the sodium sulfate (saltcake) and sodium carbonate.

(10) "Acid Absorption Tower" means the device where the sodium carbonate and sulfur dioxide react to form a sodium sulfite solution prior to use as the cooking liquor.

(11) "Standard Dry Cubic Meter" means the amount of gas that would occupy a volume of one cubic meter, if the gas were free of uncombined water, at a temperature of 20°C.(68°F.) and a pressure of 760 mm of mercury.

(12) "Total Reduced Sulfur (TRS)" means the sum of the sulfur compounds hydrogen sulfide, methyl mercaptan, dimethyl sulfide, and dimethyl disulfide, and any other organic sulfides present in an oxidation state of minus two.

Highest and Best Practicable Treatment and Control Required

340-25-222

(1) Notwithstanding the specific emission limits set forth in rule 340-25-224, in order to maintain the lowest possible emission of air contaminants, the highest and best practicable treatment and control currently available shall in every case by provided, with consideration being given to the economic life of the existing equipment.

(2) All installed process and control equipment shall be operated at full effectiveness and efficiency at all times, such that emissions of contaminants are kept at lowest practicable levels.

OAR25-222(2-2-89)

Emission Limitations

340-25-224

(1). Emission of Total Reduced Sulfur (TRS):

(a) Spent Liquor Incinerator. The emissions of TRS from any spent liquor incinerator stack shall not exceed 10 ppm and 0.07 g/kg BLS (0.14 lb/ton BLS) as daily arithmetic averages.

(2) Particulate Matter:

(a) Spent Liquor Incinerator. The emissions of particulate matter from any spent liquor incinerator shall not exceed:

(A) 3.6 g/kg BLS (7.2 lb/ton BLS) as a daily arithmetic average; and

(B) Exhibit an opacity equal to or greater than 35 percent for a period exceeding 3 minutes in any one hour.

(b) Acid Absorption Tower. Visible emissions shall not exceed the limitations in section 340-25-224 (4).

(3) Sulfur Dioxide (SO_2):

(a) Spent Liquor Incinerator. The emissions of sulfur dioxide from each spent liquor incinerator stack shall not exceed a daily arithmetic average of 10 ppm except during start-up and shut-down periods.

(b) Acid Absorption Tower: The emissions of sulfur dioxide from the acid absorption tower stack shall not exceed 20ppm as a daily arithmetic average.

(4) All NSSC sources with the exception of spent liquor incinerators shall not exhibit an opacity equal to or greater than 20 percent for a period exceeding three (3) minutes in any one hour.

More Restrictive Emission Limits

340-25-226 The Department may establish more restrictive emission limits than the numerical emission standards contained in rule 340-25-224 and maximum allowable daily mill site emission limits in kilograms per day for an individual mill upon a finding by the Department that:

(1) The individual mill is located or is proposed to be located in a special problem area or an area where ambient air standards are exceeded or are projected to be exceeded; or

(2) When an odor or nuisance problem has been documented at any mill the TRS emission limits may be reduced below the regulatory limits.

OAR25-226(2-2-89)

Plans and Specifications

340-25-228

Prior to construction of new neutral sulfite semi-chemical (NSSC) pulp mills or modification of facilities affecting emissions at existing NSSC mills, complete and detailed engineering plans and specifications for air pollution control devices and facilities and such data as may be required to evaluate projected emissions and potential effects on air quality shall be submitted to and approved by the Department. All construction shall be in accordance with plans as approved in writing by the Department.

OAR25-228(2-2-89)

Monitoring

340-25-230 (1) General

(a) The details of the monitoring program for each mill shall be submitted to and approved by the Department. This submittal shall include diagrams and descriptions of all monitoring systems, monitoring frequencies, calibration schedules, descriptions of all sampling sites, data reporting formats and duration of maintenance of all data and reports. Any changes that are subsequently made in the approved monitoring program shall be submitted in writing to the Department for review and approved in writing prior to change.

(b) All records associated with the approved monitoring program including, but not limited to, original data sheets, charts, calculations, calibration data, production records and final reports shall be maintained for a period of at least one yeaar and shall be furnished to the Department upon request.

(2)(a) Total Reduced Sulfur (TRS). Each mill shall sample the spent liquor incinerator for TRS emissions with:

(A) The sampling method; and

(B) The analytical method approved in writing by the Department.

(b) Spent liquor incinerator TRS source tests shall be performed quarterly except when the preceding six (6) samples demonstrated that the concentrations were less than 7.5 ppm the sampling frequency may be semi-annual.

(c) Flow rate measurements used to determine TRS mass emission rates shall be corrected for cyclonic flow, where applicable.

(3)(a) Particulate Matter. Each mill shall sample the spent liquor incinerator for particulate emissions with:

(A) The sampling method; and

(B) The analytical method approved in writing by the Department.

(b) Spent liquor incinerator particulate source tests shall be performed quarterly except when he preceding six (6) samples demonstrated that the emissions rates were less than 0.10 lb/ton BLS, the sampling frequency may be semi annual. All sampling data shall be corrected for cyclonic flow, where applicable.

(4)(a) Sulfur Dioxide (SO_2). Representative sulfur dioxide emissions from spent liquor incinerators and from the acid absorption towers shall be determined at least once every six (6) months with:

(A) The sampling method; and

(B) The analytical method approved in writing by the Department.

OAR25-230(2-2-89)

Reporting

340-25-232

Unless otherwise authorized by permit, data shall be reported by each mill for each sampling period by the fifteenth day of the first month following the applicable sampling period as follows:

(1) Daily average emissions of TRS gases in grams of total reduced sulfur per kilogram of black liquor solids, expressed as H_2S based on all samples collected in any one day from the spent liquor incinerator.

(2) Daily average emissions of particulate in grams per kilogram of black liquor solids based on all samples collected in any one day from the spent liquor incinerator.

(3) Daily average concentration of sulfur dioxide in ppm for each source included in the approved monitoring program based on all samples collected in any one day.

(4) Daily average amount of virgin air-dried unbleached NSSC pulp produced expressed as air dried metric tons per day (ADMT/day).

(5) Daily average amount of black liquor solids, dry weight, fired in the spent liquor incinerator during periods of operation.

(6) Upset conditions shall be reported in accordance with section, 340-25-234 (3).

(7) Each mill shall furnish, upon request of the Department, such other pertinent data as the Department may require to evaluate the mills emission control program.

(8) The Department shall be notified at least ten (10) days in advance of all scheduled reference method testing including all scheduled changes.

(9) Data reported shall reflect actual observed levels.

OAR25-232(2-2-89)

Upset Conditions

340-25-234

(1) Each mill shall immediately report abnormal mill operations including control and process equipment maintenance, or breakdowns which result in violation of regulatory or air containment discharge permit limits. The mill shall also take immediate corrective action to reduce emission levels to regulatory or permit levels.

(2) Significant upsets shall be reported in writing with an accompanying report on measures taken or to be taken to correct the condition and prevent its reoccurrence

(3) Each mill shall report the cumulative duration in hours each month of the upsets reported in section (1) of this rule and classified as to:

(a) Spent Liquor Incinerator

(A) TRS

(B) Particulate

(C) SO_2

(b) Acid Absorption Tower

(A) SO_2

(B) Opacity

OAR25-234(2-2-89)

Chronic Upset Conditions

340-25-236

If the Department determines that an upset condition is chronic and correctable by installing new or modified process or control procedures or equipment, a program and schedule to effectively eliminate the deficiencies causing the upset conditions shall be submitted. Such reoccurring upset conditions causing emissions in excess of applicable limits may be exempted from rules 340-21-065 and 340-21-070 through 340-21-075 and may be subject to civil penalty or other appropriate action.

OAR25-236(2-2-89)

ATTACMENT B

RULEMAKING STATEMENTS

for
Kraft Pulp Mills OAR 340-25-150
through 340-25-205 and Neutral
Sulfite Semi-Chemical (NSSC) Pulp Mills
OAR 340-25-220 through OAR 340-25-236

Pursuant to ORS 183.335, these statements provide information on the intended action to amend a rule.

STATEMENT OF NEED:

Legal Authority

This proposal amends OAR 340-25-150 through 340-25-205 and adds OAR 340-25-220 through 340-25-236.
It is proposed under authority of ORS 468.295 Air Purity Standards;

Need for the Rule

1. To comply with EPA guidelines on the control of TRS emissions from Kraft mills, EPA regulations requiring opacity standards and EPA requirements limiting emission standards to 24-hour averaging periods or 12-hour averaging periods.

2. To add regulations specific for the Neutral Sulfite Semi-Chemical Pulp mills which contain opacity standards, 24-hour averaging periods and emission standards consistent with the pulping process.

Principal Documents Relied Upon

1. EPA 450/2-78-003b Kraft Pulping, Control of TRS Emissions from existing Mills.

2. Kraft Mill and Neutral Sulfite Mill monitoring data.

3. Section 110 and 111 of the Clean Air Act.

FISCAL AND ECONOMIC IMPACT STATEMENT:

These amendments will result in varying degrees of impact on the Kraft Pulp Mills, depending upon additional control requirements and control methods. There is little or no impact on the Neutral Sulfite Mills as a result of the proposed regulation.

LAND USE CONSISTENCY STATEMENT:

The proposed rule revision OAR 340-25-150 through 340-25-205 Kraft Pulp Mills and the addition of OAR 340-25-220 through 340-25-236 does not affect land use and is consistent with the statewide planning goals.

With regard to Goal 6 (air, water, and land resources quality) the rules are designed to enhance and preserve air quality in the affected area and are considered consistent with the goal.

Goal 11 (public facilities and services) is deemed unaffected by the rule. The rule does not appear to conflict with other goals.

Public comment on any land use issue involved is welcome and may be submitted in the same fashions as are indicated for testimony in this notice.

It is requested that local, state, and federal agencies review the proposed action and comment on possible conflicts with their programs affecting land use and with Statewide Planning Goals within their expertise and jurisdiction.

The Department of Environmental Quality intends to ask the Department of Land Conservation and Development to mediate any apparent conflict brought to our attention by local, state, or federal authorities.

AX323 (2/89)

Oregon Department of Environmental Quality

A CHANCE TO COMMENT ON...

NOTICE OF PUBLIC HEARING

Hearing Date: April 26, 1989
Date Prepared: February 2, 1989
Comments Due: May 3, 1989

WHO IS AFFECTED: Seven Kraft pulp mills, one of which also operates a neutral sulfite semi-chemical pulp production line and one neutral sulfite semi chemical pulp mill.

WHAT IS PROPOSED: The Department of Environmental Quality is proposing to amend OAR 340 25-150 through 340-25-205 "Kraft Pulp Mills" and to add OAR 340-25-220 through 340-25-236 "Neutral Sulfite Semi-Chemical (NSSC) Pulp Mills, as amendments to the Oregon State Implementation Plan OAR 340-20-047.

WHAT ARE THE HIGHLIGHTS: Revised Kraft mill TRS standards to conform with EPA guidelines for existing Kraft Mills, addition of opacity standards, implementation of daily averaging in lieu of monthly averaging for particulate and SO_2 standards and the addition of regulations specifically for the neutral sulfite semi-chemical pulp mills.

HOW TO COMMENT: Copies of the complete proposed rule package may be obtained from the Air Quality Division in Portland 811 S.W. Sixth Avenue or the regional office nearest you. For further information contact William J. Fuller at 229-5749.

A public hearing will be held before a hearings officer at:

9:00 am
April 26, 1989
811 SW 6th Avenue, Room 4A
Portland, OR 97204

Oral and written comments will be accepted at the public hearing. Written comments may be sent to the DEQ, but must be received by no later than May 3, 1989.

811 S.W. 6th Avenue
Portland, OR 97204

11/1/86

FOR FURTHER INFORMATION:

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

WHAT IS THE NEXT STEP:

After public hearing the Environmental Quality Commission may adopt rule amendments identical to the proposed amendments, adopt modified rule amendments on the same subject matter, or decline to act. The adopted rules will be submitted to the U. S. Environmental Protection Agency as part of the State Clean Air Act Implementation Plan. The Commission's deliberation should come in July 1989 as part of the agenda of a regularly scheduled Commission meeting.

A Statement of Need, Fiscal and Economic Impact Statement, and Land Use Consistency Statement are attached to this notice.

AX322:x (2/89)

(1) Agricultural operations and the growing or harvesting of crops and the raising of fowls or animals, except field burning which shall be subject to regulation pursuant to ORS 468.140, 468.150, 468.455 to 468.480 and this section;

(2) Use of equipment in agricultural operations in the growth of crops or the raising of fowls or animals, except field burning which shall be subject to regulation pursuant to ORS 468.140, 468.150, 468.455 to 468.480 and this section;

(3) Barbecue equipment used in connection with any residence;

(4) Agricultural land clearing operations or land grading;

(5) Heating equipment in or used in connection with residences used exclusively as dwellings for not more than four families, except woodstoves which shall be subject to regulation under this section and ORS 468.630 to 468.655;

(6) Fires set or permitted by any public agency when such fire is set or permitted in the performance of its official duty for the purpose of weed abatement, prevention or elimination of a fire hazard, or instruction of employes in the methods of fire fighting, which in the opinion of the agency is necessary;

(7) Fires set pursuant to permit for the purpose of instruction of employes of private industrial concerns in methods of fire fighting, or for civil defense instruction; or

(8) The propagation and raising of nursery stock, except boilers used in connection with the propagation and raising of nursery stock. [Formerly 449.775; 1975 c.559 §3; 1983 c.333 §2; 1983 c.730 §3]

468.295 Air purity standards; air quality standards. (1) By rule the commission may establish areas of the state and prescribe the degree of air pollution or air contamination that may be permitted therein, as air purity standards for such areas.

(2) In determining air purity standards, the commission shall consider the following factors:

(a) The quality or characteristics of air contaminants or the duration of their presence in the atmosphere which may cause air pollution in the particular area of the state;

(b) Existing physical conditions and topography;

(c) Prevailing wind directions and velocities;

(d) Temperatures and temperature inversion periods, humidity, and other atmospheric conditions;

(e) Possible chemical reactions between air contaminants or between such air contaminants and air gases, moisture or sunlight;

(f) The predominant character of devel ment of the area of the state, such as resident highly developed industrial area, commercial other characteristics;

(g) Availability of air-cleaning devices;

(h) Economic feasibility of air-clean devices;

(i) Effect on normal human health of parti lar air contaminants;

(j) Effect on efficiency of industrial operat resulting from use of air-cleaning devices;

(k) Extent of danger to property in the a reasonably to be expected from any particular contaminants;

(L) Interference with reasonable enjoym of life by persons in the area which can reaso bly be expected to be affected by the air contar nants;

(m) The volume of air contaminants emit from a particular class of air contaminat source;

(n) The economic and industrial devel ment of the state and continuance of put enjoyment of the state's natural resources; an

(o) Other factors which the commission m find applicable.

(3) The commission may establish air qual standards including emission standards for entire state or an area of the state. The standa shall set forth the maximum amount of air pol tion permissible in various categories of air co taminants and may differentiate betwe different areas of the state, different air contar nants and different air contamination sources classes thereof. [Formerly 449.785]

468.300 When liability for violati not applicable. The several liabilities wh may be imposed pursuant to ORS 448.3 454.010 to 454.040, 454.205 to 454.255, 454.4 454.425, 454.505 to 454.535, 454.605 to 454.7 and this chapter upon persons violating t provisions of any rule, standard or order of t commission pertaining to air pollution shall n be so construed as to include any violation wh was caused by an act of God, war, strife, riot other condition as to which any negligence wilful misconduct on the part of such person w not the proximate cause. [Formerly 449.825]

468.305 General comprehensive pla Subject to policy direction by the commissi the department shall prepare and develop a ge eral comprehensive plan for the control or aba ment of existing air pollution and for the cont or prevention of new air pollution in any area

ATTACHMENT E

Department Report

Background Information:

The Department has concluded that the existing Kraft Mill regulations are not approvable by EPA in their present form. This became apparent after a review of the current regulations by the EPA and subsequent discussion between the agencies. The EPA, however, has not formally disapproved the regulations.

The Department is proposing to amend the Kraft Mill regulations to correct these deficiencies. The revisions include the following:

1. Adoption of daily averaging in lieu of monthly averaging for TRS, SO_2 and particulate emissions from recovery furnaces. EPA has indicated that monthly averaging is not adequate to protect the environment and therefore not approvable.

2. Implement the NSPS opacity standard (35%) for existing recovery furnaces. EPA regulations require visible emission limitations or other means to ensure continual compliance to be approvable.

3. Implement a 12-hour averaging period in lieu of daily averaging for lime kiln TRS emissions. EPA regulations require TRS emission limitations to be as stringent or more stringent than the proposed standards in the EPA guidelines document, "control of TRS emissions from existing mills", the proposed standard meets this criteria.

4. Revise the lime kiln particulate standard to reflect daily averaging in lieu of monthly averaging. This change is required to protect the environment on a daily basis and to obtain EPA approval.

5. Implement a 20% opacity standard for lime kilns and smelt dissolving tank vents. EPA regulations require visible emission limitations or other means to ensure continual compliance to be approvable.

6. Adopt the NSPS standard of 0.033 g/kg of black liquor solids as a 12-hour average for TRS emissions from smelt dissolving tank vents. This standard is identical to the proposed standard, in the EPA guidelines document.

7. Revise the smelt dissolving tank vent particulate standard to reflect daily averaging in lieu of monthly averaging. This is required to protect the environment on a daily basis and to obtain EPA approval.

These changes have been discussed with industry representatives who acknowledge that changes are required to circumvent disapproval by EPA of the Kraft Mill regulations. Industry is currently studying the impact of the proposed regulations on the various mills. It is anticipated that the impact on each mill will become known during the public hearing process.

Neutral Sulfite Mills

The implementation of regulations for neutral sulfite mills is desirable to more effectively control the industry. At the present time the sources are regulated under the sulfite regulations, a different chemical pulping process. To more adequately address emissions from the neutral sulfite industry a regulation tailored to their specific process is required. These changes will also address EPA concerns regarding daily averaging in lieu of monthly averaging and implementation of opacity standards.

The proposed regulations for the Neutral Sulfite Semi-Chemical Pulp mills was developed jointly with representatives of the industry. The proposed regulations are more stringent than existing standards, however, they do not present any problem to the industry.

HEARINGS OFFICER'S REPORT ON RULE ADOPTION

Modifications to Correct Deficiencies, Add Opacity Standards, and Clarify Monitoring Requirements.

Neutral Sulfite Semi-Chemical (NSSC) Pulp Mills
Addition of Regulations Specific to this Source Class.

After the required public notice period, a public hearing was held April 26, 1989 in Portland. The hearing began at 9:00 AM in Room 4A at the DEQ offices, with William J. Fuller as the Hearing Officer. A summary of all oral and written testimony received by the Department at the Hearing and during the comment period, which was extended to June 9, 1989 at the request of industry, follows.

The only oral testimony received was from Douglas S. Morrison of Northwest Pulp & Paper, representing all of the affected Kraft mills. The hearing was attended by twelve industry representatives and one EPA representative. Personnel from individual mills also submitted written comments related primarily to their respective mill.

Concerns were voiced on the topics listed below. The concerns appear to center on the effect of the rules on the ability of some or all of the mills to demonstrate and maintain compliance:

1. Test procedures and methods to document compliance.

2. Continuous emission monitoring practices, including the interpretation of continuous emission monitoring records as it relates to compliance determination.

3. Consideration of emissions from multiple emission points that are combined and discharged from a common stack.

4. Opacity, as well as the interpretation of this emission parameter to determine compliance with particulate standards and as a visible emission limitation similar to other source classes.

5. Specific language changes in response to EPA comments that were still under consideration by the Department at the time of the hearing.

6. Preparation of a draft for public review prior to submittal to the EQC for approval.

7. 24 hour averaging in lieu of monthly averaging.

8. Compatibility of the proposed 35% opacity limitation with the particulate mass emission rate and grain loading requirements.

9. The proposed odor or nuisance condition allowing DEQ to control an odor or nuisance condition at an individual mill upon documentation of the condition.

10. No provisions for an alternate particulate monitoring system where opacity monitoring is not feasible due to excessive stack moisture.

11. Lack of provisions for alternate 24 hour monitoring periods corresponding to individual mill schedules in lieu of calendar day.

12. Potential problems related to the 20% lime kiln opacity limitation for kilns burning fuel oil.

Comments submitted by Lane Regional Air Pollution Authority (LRAPA) supported an hourly opacity standard, elimination of the one hour changeover time allowed to switch from the primary Total Reduced Sulfur incineration system to the secondary system, and more stringent standards for mills that may impact poor air quality areas.

Comments received from the EPA were directed toward the required revisions necessary to make the proposed rules approvable. The comments were made on individual rule subsections. In general, these comments addressed the following:

1. Need for standards to be written in a federally-enforceable manner.

2. Need for time frames in standards which are adequate to monitor and demonstrate compliance with both short term and long term National Ambient Air Quality Standards.

3. Need to meet EPA TRS guidelines unless an alternate demonstration of acceptability is made.

4. The latest Kraft Pulp Mill Rules, approved by EPA, as adopted by EQC on January 26, 1973, will be used by EPA to ensure that no unacceptable relaxations in emission limits are made.

PO\AR1744
Attachments: Excerpts from written testimony. Additional testimony will be sent separately to the Commission.

COMMENTS OF THE OREGON KRAFT PULPING INDUSTRY ON REVISIONS OF THE KRAFT MILL EMISSION RULES

(PRESENTED AT THE ODEQ PUBLIC HEARING OF APRIL 26, 1989)

HISTORICAL REVIEW

The kraft pulping industry in Oregon and Washington has been at the leading edge of technology for TRS and particulate emission control. Oregon and Washington adopted the first emission rules or regulations for the industry to comply with in 1969, about 20 years ago. These served as a model that was used by other states. The information developed to document compliance with these rules served as the technical basis for the adoption of the "Kraft Pulping Process New Source Performance Standards" by the EPA which became effective in 1976.

RECENT INDUSTRY COOPERATION

The Oregon mills have been working with the Air Quality Staff of the ODEQ to provide input to this rule making process. The objective is to assure that advances made in control technology are either practiced or implemented in a timely manner while not placing undue stress on the mills. This input has been to some degree focused along fine lines since most of this industry's major emission sources are controlled to levels where the monitoring equipment is operating at or near detection levels. The direction initially taken by the Oregon mills for the control of minor TRS emission sources differs in practice from that published some ten years latter in an EPA document which we are told is now a regulatory requirement. We believe this document is identified as a guideline. Most of the changes that are proposed to the existing Rule are designed to satisfy the EPA State Implementation Plan (SIP) requirements rather than implement changes that will substantially reduce current emission levels and impact on the environment.

In reference to the Kraft Pulp Emission Rule Revision Process the Department must be applauded for involving the Oregon mills. In August of 1988, the kraft mills were notified of the upcoming rule revision. Subsequently, the Department and Oregon Kraft Technical Committee have met and/or exchanged correspondence six times. On February 27, 1989, the Technical Committee submitted precise changes to language in reference to the Proposed Draft distributed by the Department at the end of January. The Committee was extremely disappointed to find that none of the recommended changes were incorporated into the draft included in the Request for EQC Action dated March 3. The

Technical Committee believes that substantial changes must be made to the existing Draft Regulations and that a Public Hearing is premature at this time. Certainly, the Department should not become a slave to a proposed adoption schedule that will compromise the quality and efficacy of the final regulations.

EPA REQUIREMENTS

This revision process is more cumbersome and difficult to the DEQ than similar past efforts. ODEQ must now satisfy EPA Region X while trying to adopt numerical values which are realistic and can be consistently achieved by the industry. In some instances the past exemplary record of the Oregon mills in the control of Kraft pulping process emissions has made this rule revision process more difficult.

As an example of difficulties faced by the ODEQ, the EPA has recently accepted a TRS limit of 40 ppm on a 12-hour averaging basis for some existing DCE kraft recovery furnaces located in a southern state. This higher emission rate was justified on the basis of economic hardships that would have resulted for individual mills. The EPA requirement/guideline to be satisfied for existing DCE recovery furnaces is 20 ppm on a 12-hour averaging basis. The Kraft recovery furnace is potentially the highest emission source of TRS in the Kraft pulping process.

For the past 15 years, the Oregon mills have been complying with a limit of 10 ppm on a 24-hour averaging basis for some DCE recovery furnaces. Those built after 1970 have had to satisfy a 5 ppm 24 hour average TRS emission limit. This longer averaging time has been questioned by the EPA and the need for a change to a shorter time interval indicated. Data developed by the Oregon mills using monitoring records submitted to the DEQ have shown that more excursions above the emission level were reported under the current ODEQ limit than under the EPA requirement/guideline. The truth of the matter is that the current ODEQ TRS emission limit for DCE kraft recovery furnaces is more stringent than that presented as "required". The Department should be praised for its initiative rather than questioned. Hopefully such discrepancies can be resolved without the Oregon Industry being placed at a disadvantage due to past and present exemplary performance and cooperation with the Department.

TIMELINESS OF PUBLIC HEARING AND DISTRIBUTION OF DRAFT DOCUMENT

As previously mentioned, the kraft pulp mills have worked closely with the ODEQ Air Quality Staff to upgrade the existing Rule. In the process the industry has developed technical input that may be of help to address some of the questions posed by the EPA on the Draft Document distributed less than 60 days ago. No questions or comment were received on the technical input provided the ODEQ. A representative from the EPA was present at all three ODEQ/Industry meetings.

Adding to the question of timeliness, the EPA comments which include over 40 questions were made available officially about three weeks ago. We therefore see no reason for the scheduling of this Public Hearing at this time. This is too soon in the process for a meaningful Public Hearing in view of the industry concerns and recent EPA comments to this effort.

MAJOR UNRESOLVED POINTS

There are major questions that resulted from the EPA review and comments that are of concern to the Oregon mills. Some of these were not addressed in the ODEQ/Industry cooperative review.

These include:

1) test procedures and methods to document compliance,
2) continuous emission monitoring practices,
3) the interpretation of continuous emission monitoring records,
4) the considering of emissions that are combined and discharged via a common stack (a practice that was encouraged by the ODEQ and resulted in considerable expenditures that now could penalize the source),
5) opacity as well as the interpretation of this emission parameter, and
6) response to specific language changes suggested by the Oregon Mills.

The Oregon Kraft mills encouraged use of the philosophies in the EPA Kraft Pulping Process New Source Performance Standard to document operation and maintenance in a manner consistent with good air pollution control practices giving consideration to the age of the source. The Draft ODEQ Rule Revision Document covers more than is required by the EPA. This may be the reason for some of the comments from the EPA.

INDUSTRY PRESENT AND PAST COMMITMENT

The mills recognize that Oregon is ahead of other states in the control of emissions from the Kraft pulping process and will retain that distinction. Some of the points of concern to the EPA and the industry might be better addressed in the "Air Contaminant Discharge Permit Process" than in the rule revisions. Together we can satisfy the ODEQ goals, protect the environment, address the EPA requirements, and ensure the continued viability of the Kraft pulping industry.

Enclosed for the record are copies of pertinent correspondence between the Industry Technical Committee and the Air Quality Section of the ODEQ.

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

APR 26 1989

REPLY TO ATTN OF: AT-082

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY
RECEIVED
APR 28 1989
AIR QUALITY CONTROL

Bill Fuller
Air Quality Division
Oregon Department of Environmental Quality
811 S.W. Sixth
Portland, Oregon 97204

Dear Mr. Fuller:

We have reviewed the proposed revisions to Oregon's kraft pulp mill rules and the proposed rules for neutral sulfite semi-chemical pulp mills and have a number of serious concerns with them, primarily with respect to the enforceability of the emission limitations and the consistency of the emission limitation averaging times with the averaging periods of the national ambient air quality standards. These proposals do not comply with EPA's requirements for state implementation plan (SIP) regulations and as such, would not be approvable as revisions to the Oregon SIP if adopted as currently written.

We also have concerns with the emission limits for total reduced sulfur compounds (TRS). Neither the current rules nor the proposed revisions satisfy the Clean Air Act and EPA regulations (40 CFR 60.24) which require that emission limits for each designated facility be no less stringent than the section 111(d) emission guideline. Unless the emission limits are revised or an adequate demonstration is made by ODEQ pursuant to the provisions of 40 CFR 60.24(f), EPA would not be able to approve the TRS provisions as a section 111(d) plan for Oregon.

Enclosed are our detailed comments on these proposed rules and rule revisions. Our comments are in numerical order consistent with the Oregon rules. Furthermore, we have tried to clearly indicate with an asterisk which changes are required for the rules to be approvable, as opposed to comments which are simply questions regarding intent, or recommendations for clarification or improvement.

The currently-approved rules for kraft pulp mills in the Oregon SIP are those rules which were adopted by the Environmental Quality Commission on January 26, 1973 (effective on March 1, 1973) and approved by EPA on August 7, 1975. Please be aware that any revisions which would relax the emission limits in the currently-approved SIP must be accompanied by analyses which demonstrate that any increases in either actual or allowable emissions would not:

(1) cause or contribute to a violation of any national ambient air quality standard;
(2) cause or contribute to a violation of any prevention of significant deterioration increment; or
(3) cause or contribute to visibility impairment in any mandatory federal Class I area.

We are providing these comments for the official public hearing record on these proposed rules and rule revisions. I propose that we meet in the near future to discuss these comments and attempt to arrive at revisions to the pulp mill rules that meet your needs and are approvable by EPA. If you have any questions on our comments or concerns, please contact David Bray at (206) 442-4253.

Sincerely,

George Abel

George Abel, Chief
Air Programs Branch

Enclosure

cc: J. Herlihy, OOO
N. Nikkila, ODEQ

EFFECT OF PROPOSED RULES ON KRAFT MILLS

Mill	Recovery Furnace Stack Opacity: Stack I DIA	Recovery Furnace Stack Opacity: Proposed Limit (1)	Recovery Furnace Stack Opacity: Observed Opacity	24-hour Averaging(5)	Alternate Part. Monitoring Procedure	Compliance Test Methods(7)	Proposed Odor and Nuisance Cond (8)
International Paper, Gardiner							
Rec Furn 1 & 3	8.0 ft	35.0%	12.0-22.4%	Part of mill(6)	not applicable	minor (6)	slightly affected(6)
Georgia Pacific, Toledo							
Rec Furn 1,2, & 3	13.0 ft	42.9%	unknown	yes	applicable	Minor or major (particulate impact TBD)	affected
James River, Wauna							
Rec Furn (East)	8.0 ft	35.0%	11.0-19.0%	yes	not applicable	minor	slightly affected
(West)	8.0 ft	35.0%	<10.0%				
Boise Cascade, St. Helens							
Rec Furn 2	8.0 ft	35.0%	40.0-65.-0%(2)	Part of mill(6)	not applicable	minor(6)	slightly affected(6)
Rec Furn 3	13.0 ft	42.9%	10.0-20.0%				
Willamette Industries, Albany							
Rec Furn 1 & 2(3)	13.3 ft	43.5%	27.0-35.0%	yes	not applicable	minor	affected
Pope & Talbot, Halsey							
Rec Furn(4)	9.3 ft	35.0%	15.0-25.0%	part of mill(6)	not applicable	minor(6)	slightly(6) affected
Weyerhaeuser, Springfield							
Rec Furn 3 & 4	13.0 ft	42.9%	10.0-20.0%	yes	not applicable	minor unless smelt dis. tank TBD.	slightly affected

Notes:
(1) The proposed limit is based on 35% opacity adjusted to a path length of 10 feet, if the path length exceeds 10 feet. Values indicated are corrected for path length which is equivalent to the stack exit diameter shown as "Stack I Dia".
(2) Boise Cascade is installing a new electrostatic precipitator to reduce particulate emissions from the no.2 recovery furnace.
(3) Willamette Industries 2 recovery furnaces share the exhaust stack with 2 lime kilns, 2 smelt dissolving tank vents, and 2 power boilers.
(4) The Pope & Talbot stack is used to exhaust recovery furnace and lime kiln emissions.
(5) Adoption of standards based on 24-hour averaging periods in lieu of 30 day averages increases the potential for exceedance.
(6) Some components of these mills are subject to Federal New Source Performance Standards and therefore are less affected.
(7) Extent to which mill may be effected by increased use of continuous emission monitors for compliance determination and shorter averaging periods.
(8) Potential for rule change to affect mills. Georgia-Pacific has recently made improvements to address nuisance conditions. Willamette Industries is likely to be affected because of the mill location.

PO\AR1746