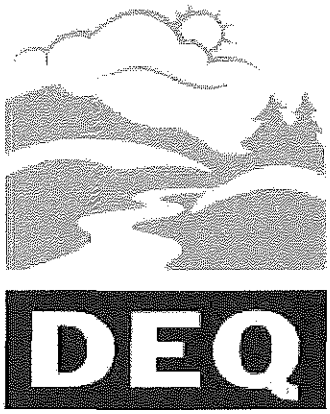
OREGON
ENVIRONMENTAL QUALITY
COMMISSION MEETING
MATERIALS 04/23/1992



State of Oregon
Department of Environmental Quality

State of Oregon

ENVIRONMENTAL QUALITY COMMISSION

A G E N D A

REGULAR MEETING - April 23, 1992
DEQ Conference Room 3a
811 S. W. 6th Avenue
Portland, Oregon
8:30 a.m.

8:30 a.m. **A.** Approval of Minutes

B. Approval of Tax Credit Applications

Rule Adoptions

Hearings have already been held on the 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.

C. Proposed Adoption of Solid Waste Permit Fee Rules

Other Items

9:00 a.m. **D.** Review of Hearings Officer's Decision in DEQ v. Baida

This is a contested case proceeding. Public testimony will not be received. The Commission will allow legal counsel for the parties ten (10) minutes each to summarize their position and present arguments. The Commission may ask questions of the parties. The Commission will then deliberate toward a decision in the matter.

E. Non-Point Source Program Overview

11:30 a.m. **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. Individual presentations will be limited to 5 minutes. The Commission may discontinue this forum after a reasonable time if an exceptionally large number of speakers wish to appear.

F. Commission Member Reports (Oral)

G. Director's Report (Oral)

12:15 p.m. **Lunch Break**

H. Work Session: Discussion of Tax Credit Program Issues

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 Commission and Department staff will hold an additional informal Work Session at Menucha beginning in the late afternoon on April 23, and continuing on April 24, 1992. Topics to be discussed at this informal Work Session may include budgeting for the 1993-95 biennium, potential legislative concepts for the 1993 legislative session, and other matters relating to Commission/Department operations.

The next Commission meeting will be Monday, June 1, 1992, in a location to be determined.

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.

April 8, 1992

Approved _____ Approved with Corrections _____

Minutes are not final until approved by the EQC

ENVIRONMENTAL QUALITY COMMISSION

Minutes of the Two Hundred and Nineteenth Meeting
March 12, 1992

Regular Meeting

The Environmental Quality Commission regular meeting was convened at 8:30 a.m. on Thursday, March 12, 1992, in the auditorium of the Public Services Center, 155 N. First Street, Hillsboro, Oregon. The following commission members were present:

William Wessinger, Chair
Dr. Emery Castle, Vice Chair
Henry Lorenzen, Commissioner
Anne W. Squier, Commissioner
Carol Whipple, Commissioner (arrived at 1:30 p.m.)

Also present were Larry Knudsen, Assistant Attorney General, Oregon Department of Justice, Fred Hansen, Director, DEQ, and other DEQ staff.

Note: Staff reports represented at this meeting, which contain the Department's recommendations, are on file in the Office of the Director, DEQ, 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. These written materials are incorporated into the minutes of the meeting by reference.

Chair Wessinger called the meeting to order.

Note: Agenda items were taken out of order and are presented as considered during the meeting.

A. *Approval of minutes of the December 20, 1991, telephone conference meeting and the January 23, 1992, regular meeting.*

Commissioner Squier **moved** that the December 20, 1991, and January 23, 1992, minutes be approved; Commissioner Lorenzen seconded the motion. The minutes were approved with four votes in favor.

B. Commission member reports.

No reports were presented.

C. Director's report.

Director Hansen provided an update on the budget, Governor's visit, Sheridan fire, RFP on mining, Olivia Clark, Whiting permits and hearing authorizations. Each is described below.

BUDGET: The Department is working on a staff reduction plan that has been requested by the Governor. DEQ has been asked to reduce 65 positions by June 30, 1993. Of those positions, 28 must be managers. The staff reductions are to begin in July of this year.

The Department is developing a "glide path" to reach the required reduction goals. The glide path time-line calls for 30 percent of the reductions by June, another 25 percent by September 1, another 25 percent of January 1 and the final 20 percent by April 1993.

The Department has been asked to provide the Governor with information on savings to the General Fund from position reductions. The total General Fund savings is expected to be $274,000.

GOVERNOR'S VISIT: Governor Barbara Roberts will visit DEQ headquarters on March 13, 1992, to talk to staff about measure 5 impacts on state government. The Governor will be in room 3A at 9:00 a.m. Commission members were invited to attend.

SHERIDAN FIRE: DEQ took over the lead at the site of the grain elevator fire in Sheridan on Tuesday. Water used to fight the fire carried farm chemicals across the yards of nearby homes and the Sheridan High School. Twenty-four homes remain in the "excluded zone" where residents are advised not to return until tests are completed. DEQ is working with the contractor for the owners, West Valley Farmers, to determine the extent of the contamination.

Samples of the soil and the air inside the high school and some homes were collected on Wednesday. Sample results will be available Friday or Saturday. Once the results are analyzed, a determination will be made on when the school can reopen and when it will be safe for residents to return to their homes.

DEQ sponsored a public meeting in Sheridan on March 11 to answer questions from residents.

REQUEST FOR PROPOSAL (RFP) ON MINING: DEQ issued notice of the RFP on Technical Advice on Mining Rules on February 7, 1992. Notices were published in newspapers in Portland, Denver, Seattle, Reno, and Vancouver B.C. The RFP was mailed to more than 50 firms or individuals--either in response to the published notices, or based on other suggestions or indications of potential interest.

The deadline for receipt of proposals was March 10, 1992, at 4:00 p.m. Proposals were received from two firms. Evaluation of the proposals in underway.

OLIVIA CLARK: Olivia Clark has started in her new position as Assistant to the Director, formally held by John Loewy. Olivia was Intergovernmental Affairs Specialist at the City of Salem where she managed their legislative policies and strategic agenda.

WHITING PERMITS: A new large-scale fishing industry with the potential to generate large volumes of fish wastes may be coming to Oregon ports. The Pacific Coast states are trying to get whiting allocations away from factory ships and into shore-based processing plants.

Eighty-five percent of the fish is wasted unless it is further processed into fish meal. Arctic Alaska is proposing a fish meal plant in Newport. Fish that is not processed into meal must be disposed of by landfill or ocean dumping. Ocean dumping is a serious concern and has caused environmental damage in Alaska. An NPDES permit would be required for dumping within our jurisdictional waters with appropriate environmental study and safeguards.

If Oregon receives a whiting allocation, more permit requests can be expected.

HEARING AUTHORIZATIONS: The Director authorized the Department to proceed with a rulemaking hearing on a proposal to modify the wastewater discharge permit fee schedule to add a fee of $150 for application processing for any new categories of general permits that may be issued in the future. The proposal would also add fees for disposal system plan review that may be required for any facilities covered by general permits. A general permit is a permit that is issued to cover a category of sources with similar characteristics. Individual sources apply to be covered by the general permit rather than obtaining an individual permit. The Department is pursuing issuance of additional general permits as an efficiency and streamlining measure.

E. Briefing by Unified Sewerage Agency (USA) on current status of facility construction, facility operation, stormwater management program and USGS study.

Bonnie Hays, Chair, USA Board of Directors and Washington County Commission Chair, welcomed the Commission to the Public Services Center. She spoke to the Commission about USA's business and financial plan, the new technologies being used by USA and the resulting increase in staff. Chair Hays introduced **Gary Krahmer**, General Manager of USA. Mr. Krahmer provided a brief background and history of USA which included DEQ compliance dates and milestones. Mr. Krahmer then presented a slide presentation of USA's public awareness campaign, an update on programs and a summary of the U. S. Geological Service Study conducted for USA. **Linda Kelly**, USA Public Affairs Manager, **Bill Gaffi**, USA Planning and Engineering Department Director and **John Jackson**, USA Planning Division Manager, were also a part of the slide presentation.

Messrs. Gaffi and Jackson answered questions from the Commission about the wastewater treatment process and the amount of nitrogen occurring in wetlands from the treatment applications. Director Hansen asked about USA's ability to have land available for the future. Mr. Jackson responded that USA has a land base adequate for 20 years and that the clean up of the water returned to the Tualatin River reduces the need for greater land application. Director Hansen said that a 20-year plan for effluent irrigation may not be far reaching enough and that land use of EFU zones will be important.

D. Approval of tax credit applications.

The Department requested approval of the following tax credit applications:

Application Number	Applicant	Facility
TC-2812	Pacific Power & Light Company	Oil spill containment system.
TC-2333	Challenge Mfg., Inc.	Conair Wor-Tex granulator; reclaimed plastic equipment.

Application Number	Applicant	Facility
TC-3619	Younger Oil Company	Installation of epoxy lining for two underground storage tanks, one new fiberglass tank, double wall piping, in-tank leak detection monitoring, line leak detectors, Stage II vapor recovery piping, spill containment basins, overfill alarms and monitoring wells.
TC-3680	Jerry Fuller	Installation of three fiberglass tanks and piping, spill containment basins, tank monitor, turbine leak detectors, automatic shutoff valves, monitoring wells and Stage I and II vapor recovery.
TC-3681	Carter's Service Stations, Inc.	Automobile air conditioner coolant recycling machine.
TC-3683	Bud's Repair Service	Automobile air conditioner coolant recycling machine.
TC-3684	Charles and Carol Adler	Installation of fiberglass piping, spill containment basins, tank monitor, monitoring wells and Stage II vapor recovery piping.
TC-3685	Baker Aircraft, Inc.	Installation of interior lining, spill containment basins and overfill devices on three underground storage tanks.
TC-3686	Lukas Auto Painting & Repair, Inc.	Automobile air conditioner coolant recycling machine.
TC-3687	Jake's Auto Electric	Automobile air conditioner coolant recycling machine.

Application Number	Applicant	Facility
TC-3688	Berger Brothers	Tiling of 33 acres.
TC-3689	Berger Brothers	14-foot Steiger Offset disk.
TC-3690	Clyde's Automotive	Automobile air conditioner coolant recycling machine.
TC-3693	Everett E. Miles	Installation of four STI-P3 tanks and fiberglass piping, spill containment basins, tank monitor, line leak detectors, overfill alarm, sumps, Stage I and II vapor recovery and automatic shutoff valves.
TC-3694	Far West Fibers, Western Systems	Kilkom Model A-6HD compactor and fabrication containers, 40 cubic yards.
TC-3695	Cordrey Enterprises, Inc., dba Hillsboro Auto Wrecking	Automobile air conditioner coolant recycling machine.
TC-3697	Oak Valley Auto Sales & Leasing, Inc.	Automobile air conditioner coolant recycling machine.
TC-3699	Michael Rainey	Installation of tank monitoring equipment including an overfill alarm.
TC-3702	D & W Automotive	Automobile air conditioner coolant recycling machine.
TC-3703	Tom Herndon	1987 John Deere flail chopper.
TC-3707	Scottie's Auto Body Repair, Inc.	Automobile air conditioner coolant recycling machine.
TC-3708	Truax Corporation	Installation of spill containment basins, line leak detectors and float vent valves.

Application Number	Applicant	Facility
TC-3709	Babbitt Enterprises, Inc.	Automobile air conditioner coolant recycling machine.
TC-3710	JBR Enterprises, Inc.	Automobile air conditioner coolant recycling machine.
TC-3711	Jon's Complete Auto Repair	Automobile air conditioner coolant recycling machine.
TC-3713	Eastgate Auto Body, Inc.	Automobile air conditioner coolant recycling machine.
TC-3715	Skylark III, Inc., dba Keith Schulz Garage & Diagnostic Center	Automobile air conditioner coolant recycling machine.
TC-3718	John's Frame Shope	Automobile air conditioner coolant recycling machine.
TC-3721	J & K Pohlschneider	Automobile air conditioner coolant recycling machine.

Action: Commissioner Castle **moved** approval of the above tax credit applications with the exception of Application Numbers 3688 and 3694; Commissioner Lorenzen seconded the motion. The Commission voted four yes votes to approve certification of the above tax credit applications excluding application numbers 3688 and 3694.

Discussion: **Harry Demaray**, Salem, spoke to the Commission about tax credit application numbers 3689 and 3703. He said that the percent allocable for both applications was 100 percent even though application number 3703 has no beneficial uses. Commissioner Squier said that application number 3689 (offset disk) was used to return straw to the soil; that application number 3703 (flail chopper) was performing a similar activity. **Roberta Young**, Management Services Division, said that both types of equipment returned nutrients to the soil and that no income was generated from this activity. Director Hansen added that what was at issue was whether disking straw, which provides nutrients to the soil, reduced the use of fertilizers. **Peter Dalke**, Administrator, Management Services Division, said that farmers are returning the straw back go the soil as a nutrient in an effort to get away from burning their fields by using other implements to reach the same results. He added that no significant return of investment was recognized.

Commissioner Lorenzen indicated that he did not see a problem on these tax credits since there was a basis for treating the soils differently; Commissioner Castle agreed. Chair Wessinger said the two tax credit applications tend to point out the difficulty of this issue and needs to be reconsidered at the legislative level.

Commissioner Castle questioned the word **approved** on page 2, 5.a., second sentence of tax credit application number 3688. **Larry Knudsen**, Assistant Attorney General, indicated that the approved methods of field sanitation had been designated by the Environmental Quality Commission; however, he said that the approval could be changed. Commissioner Lorenzen questioned the return on investment of this tax credit. He said he could envision an increase in profit annually and value of the land through increased crop yield. Commissioner Lorenzen said he would not want to approve this tax credit application until more analysis could be made on the return on investment issue.

Ms. Young indicated that the Oregon Department of Agriculture viewed this facility as giving up the grass seed crop, thus reducing the amount of acreage to be burned and that the difference in value was negligible. Commissioner Castle said there was a potential of upgrading the soils by tiling. Mr. Knudsen said that tiling may be an approved method but that the return on investment would need to be examined.

Action: Commissioner Castle **moved** to defer action on tax credit application number 3688; Commissioner Squier seconded the motion. The motion was approved with four yes votes.

Commissioner Lorenzen said he thought the Department should examine this type of tax credit application as a model and alternative to the return on investment issue.

The Commission then considered tax credit application number 3694, Far West Fibers, Inc. Director Hansen said that under the regulations, recycling is an eligible activity including the return on investment. He added that the facility was promoting recycling. **Stephanie Hallock**, Administrator, Hazardous and Solid Waste Division, said that Far West Fibers and the grocery store, Food Connection, were joined through a material recovery process. Ms. Hallock said that tax credits for recycling was treated differently since the applications were considered under the sole purpose criteria and that the equipment was approved for recycling.

Commissioner Castle indicated concern about a specialized business occurring from this activity and that this type of tax credit application would encourage the formation this industry. Mr. Knudsen said that the Commission may adopt rules to clarify the eligibility of this particular recycling process.

Action: Commissioner Castle **moved** that tax credit application number T-3694 be approved; Commissioner Squier seconded the motion. Tax Credit Application No. T-3694 was approved with four votes in favor.

The Commission then convened the Public Forum.

Mr. Demaray complained that the minutes of the February 18, Special EQC meeting, were not available. He also objected to the fact that a copy of the Attorney General's opinion on tax credits was not made readily available to the public. Mr. Demaray further stated that the definition of principal purpose of tax credit application number 3534 was being eroded back to substantial purpose and that Boise Cascade had not submitted a letter to support the purpose of the tax credit.

Gary Newkirk, Portland, spoke to the Commission about the sewage overflow that occurred at his home in Barview on September 1, 1990. Mr. Newkirk indicated that this was his fifth appearance about this subject before the Commission and said that DEQ had not responded to his December 29, 1990, letter. He said that the Twin Rocks Sanitary District did not report the overflow to DEQ and cited evidence of the spill occurring in September. Mr. Newkirk said he wanted DEQ to investigate the overflow and to require the sanitary district to immediately report all overflows.

Director Hansen said that the Department investigated the issue to determine if the failure of the system was localized or system wide. If the failure was system wide, the Department would be involved in correcting the problem; if the failure was localized, the residents of the sanitary district would be involved. Mr. Newkirk responded that the pump station was poorly designed and that the lift station was situated too high. He indicated that his house was located at the lowest natural outflow of the system.

Chair Wessinger said that the Department should investigate the current situation. Director Hansen indicated that the Department would look at the system failure. Commissioner Squier said that if the system is not working properly, the sanitary district should notify the Department as soon as possible. **Lydia Taylor**, Administrator, Water Quality Division, said that if the overflow had occurred as a spill to the waters, the Department would have been notified. She indicated that Mr. Newkirk needs to notify the Department immediately when an overflow does occur.

Director Hansen said that the Department would report back to the Commission and to Mr. Newkirk about the situation. Mr. Newkirk said that he would like his testimony to also be reflected in regard to the State/U. S. Environmental Protection Agency (EPA) Agreement staff report.

F. Proposed adoption of prevention of significant deterioration (PSD) rules.

Yone McNally, Air Quality Division, provided the Commission with a brief summary of this agenda item. Commissioner Squier **moved** that the PSD rules be adopted; Commissioner Castle seconded the motion. The rules were adopted with four yes votes.

H. Approval of preliminary plans and specifications for alleviation of health hazard in the Yaquina John Point area adjacent to Waldport.

Richard Santner, Water Quality Division, provided a brief summary of the plans and specifications. The Commission commented that the staff report was well written. Commissioner Squier **moved** that the plans and specifications be adopted; Commissioner Castle seconded the motion. The plans and specifications for the Yaquina Joint Point area were approved with four yes votes.

I. Review of the State/EPA Agreement (SEA) for Fiscal Year 1993.

Peter Dalke, Administrator, Management Services Division, indicated to the Commission that the agreement was informational and that the Department was seeking comment on the agreement. Commissioner Squier asked about the agreement in light of the upcoming budget cuts and how that would affect the lists in the agreements. Mr. Dalke said that the Department would use the document as a starting point for discussions with EPA on funding. Commissioner Squier said she would like to talk about groundwater at their next work session.
Commissioner Castle **moved** that the report be accepted; Commissioner Squier seconded the motion. The motion was approved with four yes votes.

G. Approval of oil and hazardous materials emergency response master plan.

Mike Downs, Administrator, Environmental Cleanup Division, gave a brief background on the plan. Chair Wessinger asked Mr. Downs if the plans really work in an actual situation. Mr. Downs responded that the plan does work and cited the Sheridan fire as an example of how the plan was used during the emergency. Commissioner Lorenzen **moved** that the plan be adopted; Commissioner Squier seconded the motion. The plan was adopted with four yes votes.

J. Appeal of the Hearings Officer's decision in the fuel processors contested case.

Arnold Silver, Assistant Attorney General, gave a background about the contested case to the Commission. Fuel Processors was accessed a civil penalty of $12,000 for violating regulations during an asbestos abatement project in Portland. The Department's Hearings Officer, **Linda Zucker**, after hearing the contested case, found the following:

1. That the civil penalty classification should be reduced from 1 to 2.

2. That the magnitude of the civil penalty should be reduced from major to moderate.

3. That no negligence was shown on the part of Fuel Processors.

4. That a higher cooperativeness value should be assigned.

As a result, Ms. Zucker reduced the civil penalty to $1,600. The Department appealed this decision and requested review by the Environmental Quality Commission.

Debra Olson Soren, attorney for Fuel Processors, told the Commission that the Hearings Officer carefully and completely reviewed all evidence submitted and correctly concluded that the civil penalty should be reduced. She said that the Department did not produce adequate evidence to support the civil penalty assessment.

Commissioner Squier referred to **cooperativeness** and the wording of that in the administrative rule. She said that the Hearings Officer was incorrect and agreed with the Department; Commissioner Castle concurred. In regard to **negligence**, Chair Wessinger said that the Department was correct in the findings. Commissioner Lorenzen agreed saying that Fuel Processors relied on the assessments and inspection of the property owner only. Commissioners Castle and Squier agreed. Commissioner Lorenzen said he believed there was a likelihood of public exposure and agreed with the Department's findings; Chair Wessinger and Commissioners Castle and Squier agreed.

The Commission discussed the wetness of the material and the ability of asbestos to become airborne even when moist. Commissioner Lorenzen said that Fuel Processors had relied on the word of the property owner, did not check to determine if the material contained asbestos and handled the material in a manner that would result in exposure to asbestos.

Commissioner Lorenzen said he supported the Department's findings and **moved** that the Commission sustain the Department's recommendation; Commissioner Castle seconded the motion. Mr. Knudsen advised that the issue of magnitude had not been discussed. Commissioner Castle stated that the Commission would implicitly hold the magnitude to be major if the Department's recommendation were upheld. Commissioner Squier asked if it was the intent of the motion to approve the Findings of Fact, Conclusions of Law and Final Order proposed by the Department in its exceptions. Commissioners Lorenzen and Castle responded yes. Commissioner Squier then suggested that item 16 on page 4 of the order be modified to reflect the weather conditions that occurred on the day the material was salvaged by adding to the beginning of that item "Available meteorological information indicates more likely than not ...". Commissioners Lorenzen and Castle agreed accepted that suggestion as an amendment to the motion. The motion to sustain the Department's recommendation by adopting the Findings of Fact, Conclusions of Law and Final Order as presented in the Department's exceptions and as amended by Commissioner Squier's suggestion was approved with four yes votes.

(Commissioner Whipple arrived.)

K. Hearings Officers' recommendation on the pulp mill permit appeals.

The Commission first considered a petition for rulemaking submitted on behalf of Columbia River United (CRU) by John Bonine, Western Environmental Law Clinic, Counsel for CRU. The petition asked the Commission to adopt a new rule that would impose upon pulp mills a monthly average discharge limit of 1.5 kilograms (kg) adsorbable organic halogens/air dried metric ton (AOX/AMDT) of pulp produced by November 31, 1992 [sic]; and require the mills to eliminate the discharge of organochlorine compounds by December 31, 1999. The Commission considered the petition without receiving testimony or hearing argument.

Commissioner Castle said that he had concern about considering a new rule before this contested case was heard and determined. Commissioner Squier said she did not want to confuse this issue with the appeal. She said she had interest in the merits of the rulemaking and would like to see more discussion of the budget implications. Mr. Knudsen advised the Commission that they could deny or approve the petition within the 30-day period provided in the Administrative Procedures Act, or they could seek an extension of time. Commissioner Squier said she would like to deny the petition now and discuss the issue at a subsequent work session. Commissioners Lorenzen and Whipple agreed.

Commissioner Squier **moved** that the petition for rulemaking be denied; Commissioner Lorenzen seconded the motion. The motion was denied with five yes votes. Mr. Knudsen stated that the denial must be in written form and suggested the Commission to authorize the director to sign an order affirming the Commission's action. The Commission concurred.

Mr. Knudsen then advised the Commission regarding two motions filed by the parties to the pulp mill contested case proceeding. Prior to the meeting, James River, Boise Cascade and the City of St. Helens filed a motion for an order (a) prohibiting the Attorney General's office from providing the Commission with confidential ex parte legal advice; and (b) prohibiting the Assistant Attorney General assigned to the Commission from communicating with the Assistant Attorney General assigned to the Department. They also filed a motion for an order deleting wording from the Commission's Order Establishing Procedure and Schedule dated January 28, 1992, which authorized the Commission to communicate with the Director with respect to facts already in the hearing record.

Commissioner Squier said the request to limit ability for legal advice set a precedent and suggested denying both portions of the requested order. Commissioner Lorenzen **moved** to deny the motion for an order (a) prohibiting the Attorney General's office from providing the Commission with confidential ex parte legal advice; and (b) prohibiting the Assistant Attorney General assigned to the Commission from communicating with the Assistant Attorney General assigned to the Department; Commissioner Whipple seconded the motion. The Commission voted unanimously to deny the motion for an order.

The Commission then discussed the motion for an order to prohibit the Commission from communicating with the Director with respect to facts already in the record. Commissioner Castle stated that the director plays two roles: first, staff to the Commission; and second, runs the Department. He noted that, as staff, the Director helps the Commission in reaching decisions; the Commission should not sever the relationship if that relationship could be useful.

Commissioner Lorenzen **moved** to deny the requested order prohibiting the Commission from communicating with the Director; Commissioner Castle seconded the motion. The Commission voted unanimously to deny the requested order.

Director Hansen indicated that the hearings officer of the pulp mills contested case was in the audience and was available to respond to questions. Director Hansen also disclosed for the record that he been in contact with the Chair and Commission members regarding procedures and scheduling.

Legal counsel for Boise Cascade, **Michael Woods**, and legal counsel for James River, **Richard Williams**, spoke to the Commission. Commissioner Lorenzen asked legal counsel to explain the three-day issue in the National Pollutant Discharge Elimination System (NPDES) permit. It was explained that the permits have a three-day limit and an annual limit. The mills' waste load allocations established in the EPA Total Maximum Daily Loads (TMDL) are long-term averages. The mills' indicated that the risks posed by the dioxin discharges are long-term risks, that the toxics must be present in the water for a long time to cause harm. As a result, isolated three-day tests revealing the presence of dioxin in greater quantities than the permit limits are not cause for alarm. The annual average limits, determined by monthly tests, are sufficient to ensure that the long-term limits are met. If the limits remain in the permit and are violated, the mills are subject to penalties for each violation.

Commissioner Lorenzen asked if the mills objected to the monthly limit or the method of measurement. Mr. Williams responded that they oppose a monthly limit however measured. Commissioner Squier asked if no monthly limit was required, how long would it take before enforcement could occur. Legal counsel for the mills responded that sampling would occur for three days each month and this data would be used to determine the annual average. However, if the annual average was met, the mill would not be vulnerable for an individual monthly value.

Commissioner Lorenzen asked why the mills consider it bad policy to control AOX. Counsel for the mills responded that they do not believe that AOX is a valid permit parameter, that control technology is excessively costly, and no environmental benefit is achieved.

Peter Linden, legal counsel for the City of St. Helens, noted that the City of St. Helens holds the permit which covers the Boise Cascade Mill. He said that the city must consider the economic long-term viability of the mill. He recommended affirming the Hearings Officer's decision.

John Bonine and **Jeffrey Bernhart**, Western Environmental Law Clinic, noted that a pulp mill in Idaho had just received an NPDES permit from the EPA which required the three-day testing and placed strict controls on dioxin discharges. They stated that organochlorines must be controlled under federal law, and controls are not as costly as the mills claim.

Judge Arno Denecke, Hearings Officer, answered questions asked by the Commission. Judge Denecke discussed the long-term effects which were explained in his order. Judge Denecke indicated in response to questions that he did not consider a three-month limit as an alternative to the monthly limit, and that Department witnesses said no effects could be determined by the discharging dioxin. He noted

that the Northwest Coalition for Alternatives to Pesticides (NCAP) testified to the contrary but he found DEQ witnesses to be more credible. He clarified that his conclusion was that there was no evidence of adverse effects; he was not concluding that there were no adverse effects. He also stated that the alternative presented in the findings regrading AOX provisions was a policy choice that could only be made by the Commission.

Larry Edelman, Assistant Attorney General, requested that the Commission take official notice of the NPDES permit issued by EPA to the Potlach Corporation of Lewiston, Idaho. He noted that a draft permit was previously available and was discussed in the record of the proceeding. As an option, the Department requested that the Department open the record and take the permit and accompanying documents into evidence in the proceeding. Counsel for James River and Boise Cascade objected to this action and requested the opportunity to review the documents.

Larry Knudsen advised the Commission on procedural matters related to opening the record to admit new facts. He noted that if the record was opened to admit new evidence, rebuttal should be allowed. Director Hansen suggested that the Commission could also decide to refer the matter back to the Hearings Officer if the record was to be reopened. Commissioners Lorenzen and Castle indicated a preference to keep it out of the record. Commissioner Squier suggested that if it is to be added to the record, there should be a break to allow review of the documents.

Mr. Edleman continued his comments on the proposed findings and order. He noted that if the monthly limit on dioxin was eliminated, the Department could not take enforcement action until a year has passed, the annual average was violated, notice of intent was issued, and another year passes and the annual average indicates violation. He noted that the monthly limit is less restrictive, based on the variation that would occur consistent with an annual average number. With respect to AOX, he stated that Best Available Technology (BAT) is required by the federal Clean Water Act and case law and is also sound policy. While there is no evidence of instream toxicity, that does not mean that there is no harm. Finally, he noted that harm is not an issue when limits are technology based.

Following a recess, the Commission returned to discussion of the proposal to include the Potlach Permit in the record. Director Hansen suggested that if the Commission believes it is important in making a decision, the matter should be returned to the Hearings Officer to open the record; otherwise, it should be excluded. Commissioner Squier indicated that it was hard to decide without some discussion among the Commission members. Commissioner Castle stated he was prepared to proceed without consideration of the Idaho permit. Commissioner Lorenzen stated he did not see the relevance of the final Idaho EPA permit.

Commissioner Lorenzen **moved** that the Commission deny the request to take official notice of the permit issued to a mill in Idaho by EPA or to open the record for receiving the permit as new evidence; Commissioner Castle seconded the motion. The motion was approved with four yes notes and one no vote from Commissioner Squier.

The Commission then discussed the issue of the monthly limit for dioxin and the alternative presented in the proposed order with respect to AOX. The Commission concluded that a three-day (monthly) maximum limitation for dioxin was not necessary to assure effective enforcement of the dioxin limits and that a quarterly limitation would be sufficient. Additionally, in regard to the effluent limitations for AOX, the Commission concluded that these pollutants in the mill effluent are of regulatory concern and should be reduced to the 1.5 kg/ADMT level established by the Department in the mill permits as the limit attainable by BAT.

Commissioner Lorenzen **moved** to adopt the Revised Proposed Findings of Fact and Conclusions of Law submitted by the Hearings Officer with modification of the Hearings Officer's findings and conclusions relating to the three-day maximum effluent limit for dioxin and the recommendation not to include the effluent limitation for organochlorines (AOX) as discussed above. Commissioner Castle seconded the motion; the motion was unanimously approved.

The Commission directed Mr. Knudsen and the Department to prepare written findings and conclusions and a final order which incorporated the Hearings Officer's proposed Findings of Fact, Conclusions of Law and Order with modifications as discussed and included in the action taken. The Commission further authorized Director Hansen to sign the final order on their behalf.

There was no further business, and the meeting was adjourned at 3:45 p.m.

Oregon

ENVIRONMENTAL QUALITY COMMISSION

MEMORANDUM

TO: ENVIRONMENTAL QUALITY COMMISSION

DATE: APRIL 23, 1992

FROM: Linda Zucker, Hearings Officer

SUBJECT: Review of Hearings Officer's Decision in DEQ v BAIDA, AQOB-SWR-90-09, April 23, 1992 Meeting, Agenda I D

Enclosed is the record on review. The order appealed from is at page 59. The briefs on appeal are at pages 37 (opening brief), 10 (answer), and 2 (reply).

The record also includes the following:

ITEM	DATE	PAGE
Denial of Motion	March 5, 1992	1
Reply Brief	February 19, 1992	2
Department's Memorandum in Opposition to Motion to Strike	February 19, 1992	6
Respondent's Motion to Strike	February 10, 1992	12
Department Reply Brief in Answer to Respondent's Appeal	January 29, 1992	20
Exceptions and Proposed Hearing Officer's Findings of Fact and Conclusions of Law	December 9, 1991	37

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LZ:z
HZ102850

file

Oregon

ENVIRONMENTAL QUALITY COMMISSION

March 5, 1992

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Irving Professional Building
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certified P 991 113 56

Arnold Silver
Assistant Attorney General
1515 SW 5th Avenue, Suite 410
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Re: DEQ v Baida
AQOB-SWR-90-09
Josephine County

Baida has moved to strike DEQ's brief on appeal for failure to provide specific reference to the record and for including facts and argument not previously presented. Baida cited OAR 340-11-132(4)(a) and (j).

DEQ opposes the motion.

I am denying the request for the following reasons:

1. DEQ as respondent was not required by OAR 340-11-132(4)(a) to cite to the record to identify issues on appeal; and

2. The remedy requested is not prescribed in agency rules and will not promote efficient and meaningful review. A drastic remedy is unnecessary because the evidence in the case is limited and information outside the record can easily be identified and ignored by the Commission in its review of the record.

I look forward to seeing you at the April 23, 1992 meeting.

Sincerely,

Linda K. Zucker
Hearings Officer

LKZ:z
HZ102481
cc: Enforcement Section, DEQ
Air Quality Division, Open Burning Program, DEQ
Southwest Region, DEQ

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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, vs. FRED BAIDA AND SUSAN BAIDA, DBA/CAVEMAN AUTO WRECKERS, Respondents.	No. AQOB-SWR-90-09 JOSEPHINE COUNTY REPLY BRIEF

Respondent has previously submitted motions relative to Department's answering brief, asking that it or portions of it be dismissed as not complying with the Oregon Administrative Rules relative to Brief's on appeal. This reply brief shall not otherwise be concerned with the Department's arguments relative to Articl ___, Section 9 of the Oregon constitution.

Regarding the Department's arguments to Respondent's specification of error number two and three, the Department misperceives the basis for the error. The Department's arguments are predicated upon due process considerations when respondent did not premises the errors upon the 14th amendment to the U.S. Constitution's "due process" clause, but rather upon the Oregon constitution Article I, section 20. Respondent does not have to disagree with the analysis submitted by the Department because it does not address the issues raised. Oregon does not have a "due process" clause in its constitution. Hans Linde, Without Due Process: Unconstitutional Law in Oregon, 49 Or L. Rev. 125 (1970).

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The laws and regulations are, of course, subject to the "due process" clause of the U.S. Constitution.

Any analysis of the constitutionality of a statute or regulation must first start with what authority the legislative body enunciating the statute, ordinance, or rule has. Since Respondent's attack is against the statute the analysis commences with, at least for purposes of this case, that the state legislature has plenary power to pass whatever statute it pleases unless proscribed by the Oregon or U.S. constitutions. Secondly, Respondent's position is that Article I, Section 20 of the Oregon constitution embodies a narrow prohibition that is applicable in this case. Namely, that if the state legislature decides to pass a statute that affects more that one class of persons, that it do so without granting unequal privileges or immunities.

While there are similarities to Respondent's assignments of error and "due process" arguments, they are not the same, nor has Respondent raised the lack of "due process" as an error.

Article I, Section 20 of the Oregon Constitution mandates equality of treatment for "any class of citizen" as well as for any "citizen". City of Salem v. Bruner, 299 Or 262 (1985). The right to pursue a legitimate trade, occupation, business, or property right is a natural, essential, and inalienable right and is protected by the Oregon Constitution, Article I, Section 20. General Electric Co. v. Wahle, 207 Or 302, 319, 326, 296 P2d 635, 643, 647 (1959); State v. Hudson House, Inc., 231 Or 164, 171, 371 P2d 675, 679 (1962). It is not a valid argument that a person can

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escape the discrimination by conforming to the privileged class Leathers v. City of Burns, 251 Or 206, 444 P2d 1010 (1968).

> "The general principle seems to be that if legislation, without good reason and just basis, imposes a burden on one class which is not imposed on others in like circumstances,..., it is a denial of equal protection of the laws to those subject to the burden and a grant of immunity to those not subject to it." State v. Savage, 96 Or 53, 59, 184 P567, 189 P 427 (1920).

Where the objective of the legislation is to reduce air pollution by prohibiting burning certain items, or at certain times, all those who would burn are within but that one circumstance. However, when the legislation creates sub-classes there must be good reason and a just basis to impose a burden on one of the classes which is not imposed on the other that shall advance the goal of reducing air pollution. To create a class of persons, those who burn for more than five days, or to exempt others from the requirements altogether, grants an immunity to those persons which is not granted to respondents, imposes a burden on respondents even though they are in like circumstances of the other classes, namely burning, without there being any good reason or just basis to do so. To allow others to burn does not advance the purpose of the legislation to reduce air pollution. Consequently, there is not a good reason, nor a just basis to create classes of citizens.

Respectfully submitted 19, February, 1992.

MICHAEL HENDERSON, P.C.

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CERTIFICATE OF SERVICE & TRUE COPY

I hereby certify that I served the foregoing true copy of the REPLY BRIEF on:

ARNOLD B. SILVER
Assistant Attorney General
Deptartment of Justice
1515 SW 5th Avenue, suite 410
Attorney for Department

by hand delivering or depositing a true, fully, and exact copy thereof in the United States Post Office at Bend, Oregon, enclosed in a sealed envelope, with postage paid, on the 19 day of February, 1992.

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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY, Department, FRED BAIDA and SUSAN BAIDA, dba CAVEMAN AUTO WRECKERS, Respondent.	)	No. AQOB-SWR-90-09 DEPARTMENT MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE

Respondent Baida/Caveman is the appellant in this appeal. Appellant-Respondent mistakenly cites OAR 340-11-132(4)(a) for the proposition that the Department is required to cite to "specific references to those portions to the record upon which the party relies." This subparagraph applies to Respondent-Appellant, not to the Department contending against the appeal.[1]

When Respondent filed its answer to the Department's assessment of civil penalty the answer set forth 11 affirmative defenses. The defenses were not artfully drafted and for the most part attempted to state legal conclusions, as distinguished from factual or legal defenses. These defenses ranged from the Department's failure to grant to Respondent a jury trial to the violation being too trivial. The Department answered these

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[1] Interestingly enough, Respondent failed to comply with this rule when it filed its appeal brief. The reason is Respondent probably failed to find any evidence in the record to support its position or claims, and thus was unable to cite to specific references to those portions of the record upon which Respondent relied.

defenses by a Memorandum of Law. Upon appeal to this Commission, Respondent abandoned all but four of its 11 defenses. These four defenses were substantially reformulated. In effect, the Department is now encountering new defenses set forth on appeal for the first time which were not clearly presented in the administrative proceeding itself.

The Department's reply brief is less an attempt to provide "specific references to those portions to the record upon which it relies," than an effort by the Department to point out there is a total absence of evidence supplied by Respondent to support its defenses. Respondents' new defenses now asserted on appeal are manufactured from hole cloth with an absence of evidence in the record to support his claims. If Respondents' property was posted "no trespassing" or "do not enter" or if public access was denied to the wrecking yard, Respondent should have clearly and affirmatively made this allegation in his answer. If Respondent did not consent to being interviewed by the Department or consent to having his property inspected, he again should have clearly and affirmatively made this allegation in his answer.[2] The failure to do so leads to the natural inference that the property was not so marked and that consent was freely given to inspect the property.

The following summary of the record serves to illustrate Respondents' absence of supporting evidence.

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[2] The burden is upon Respondent to allege affirmative defenses.

1. Respondents' admit they have a wrecking yard in Grants Pass, Oregon (amended answer, p. 1, ln. 25). Respondents do not allege that the wrecking yard is closed to the public; nor that signs are posted "no trespassing" or "restricted entry." The only logical and natural inference to draw from the fact that a person operates a wrecking yard is that it is open to the public to do business. What economic or retail purpose can be served by Respondent operating a wrecking yard that is closed to the public and business profit?

2. The affidavit of Stephen Guy Funk, an employee of Respondents, and part of the record herein, discloses the fire in the wrecking yard produced black smoke. The affidavit discloses the black smoke was caused by a burning tire and car seat on the Caveman property. Notwithstanding Respondents' own employee's affidavit, Respondent apparently denies these facts exist.

3. The affidavit of Kenan C. Smith, Jr., the Department Field Representative in this case, and part of the record, shows he visited the Caveman site on or about November 27, 1989. He states he inspected the burn site, interviewed Respondents', employees, interviewed Respondent Baida, interviewed Fire Department personnel and took photographs. Mr. Smith's inspection confirmed that commercial waste and debris, various automobile parts and a tire and car seat were being burned. He further confirms dense smoke was emitted from

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the fire and Respondent realized a minor economic gain by not properly disposing of the material at an authorized landfill.

The Department staff person interviewed Respondent and Respondents' employees, in addition to inspecting the site, taking pictures and gathering information. It is important to stress the following point once again. What other reasonable conclusion can be drawn from Respondents' engaging in conversation with the Field Representative than that he consented to the interview and gave permission to inspect the site? There is absolutely no evidence supplied by Respondent whereby it can reasonably be shown that Respondent denied entry to the staff person; had signs posted "no trespassing"; demanded the Department employee to leave or demanded he obtain a search warrant. Respondent in no way demonstrated that he had any reasonable expectation of privacy in the operation of his wrecking yard. Simply stated, Respondent consented to the inspection by the Department.

Finally, the inspection by Mr. Smith was not made in a vacuum. The inspection was made under a statute authorizing entry to property to investigate a source of air pollution. ORS 468.095. It was made in good faith and was consented to by Respondent.

In summary, Respondent erroneously cites ORS 340-11-132(4)(a) for the proposition that the Department's answering brief must point to specific references to the record upon which it relies. This rule applies to an appellant, which is

Respondent in this case. The Department answering brief merely replies to Respondents' new grounds for appeal and points out the absence of any evidence in the record supporting Respondents' constitutional claims.

DATED this 17 day of February, 1992.

Respectfully submitted,

ARNOLD B. SILVER
Assistant Attorney General

CERTIFICATE OF SERVICE BY MAIL

I certify that on February 19, 1992, I served the foregoing DEPARTMENT MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE upon the parties hereto by mailing, regular mail, postage prepaid, a true, exact and full copy thereof to:

Michael Henderson
Attorney at Law
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Bend, OR 97701-2014

ARNOLD B. SILVER OSB #58088
Assistant Attorney General
Of Attorneys for Department

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPT. OF ENVIRONMENTAL QUALITY, Department, v. FRED BAIDA and SUSAN BAIDA, dba CAVEMAN AUTO WRECKERS, Respondents.	No: AQOB SWR 90-09 RESPONDENTS' MOTION TO STRIKE

Respondents request that the Department of Envirnonment Quality's answering brief be striken because it fails to specifically reference those portions of the record upon which the Department relies.

Respondents request that a portion of the Department of Environment Quality's answering brief be striken, as set forth in annexed exhibit "A", which by this reference is incorporated herein, because it is repleat with alleged facts and arguments not presented to the hearing officer and not a part of the record.

POINTS AND AUTHORITIES

Respondents rely upon OAR 340-11-132 (4)(a) which provides in pertinent part that, "...with specific references to those portions to the record upon which the party relies."

Respondents rely upon OAR 340-11-132 (4)(a) and (j) for the proposition that the appeal to the commission is upon the record created before the hearing officer and that evidence and

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arguments not heard by the hearing officer are not to be considered on appeal.

DATED this 10 day of February, 1992.

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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY; Department, v. FRED BAIDA and SUSAN BAIDA, dba CAVEMAN AUTO WRECKERS, Respondents.	No. AQOB-SWR-90-09 DEPARTMENT REPLY BRIEF IN ANSWER TO RESPONDENTS' APPEAL

The Department submits its reply brief and memorandum of law in opposition to respondents' appeal of the hearings officer's order, findings, conclusions and judgment imposing a civil penalty against respondents in the amount of $1,000.

I. Background of Case

Respondents Fred Baida and Susan Baida, dba Caveman Auto Wreckers (hereafter Caveman), own and operate a commercial wrecking yard in Grants Pass, Josephine County, Oregon. On or about November 27, 1989, Caveman open burned a pile of materials in the wrecking yard which included brush, vines, [redacted] one car tire and plastic carseat. A Department staff member received an air pollution complaint that Caveman was engaged in open burning on the site which produced thick black smoke. The staff member visited the Caveman site [redacted] wrecking yard. The inspector conducted an investigation by interviewing Caveman employees, Fred Baida, Fire Department

personnel inspecting the burn pile and taking pictures of the burn pile. As a result of this inspection, the Department issued a notice of assessment of civil penalty against respondents in the sum of $1,200. Caveman requested a hearing. After a hearing, which included the detailed briefing of numerous constitutional issues by the parties, the hearings officer entered judgment in favor of the Department but reduced the civil penalty assessed by the Department from $1,200 to $1,000.[1]

II. Questions Presented by Respondents on Appeal to the Commission

1. Did the Department violate Article I, section 9, Constitution of Oregon, when a Department employee entered respondents' commercial business property in response to an air pollution complaint?

2. Does OAR 340-23-042(2) violate Article I, section 20, Constitution of Oregon, because two or more classes of persons who open burn are created by statute?

3. Does OAR 340-23-042(2) violate Article I, section 20, Constitution of Oregon, because certain classes of persons who open burn may be exempt from specific requirements of ORS chapter 468 while others who open burn are subject to such requirements?

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[1] Respondents raised twelve defenses and claims in the hearing before the hearings officer. With the exception of the five grounds of appeal now before the Commission, all other claims have been abandoned by respondents.

source of air pollution at any reasonable time. Second, the Department inspector did not enter Caveman's property without good cause. The inspector was responding to a citizen's complaint that respondents were presently engaged in the open burning of materials on their property which was an immediate source of air pollution. [redacted] The Department inspector's specific objective was to look for a source of air pollution and not to produce evidence of a crime.

Respondents urge that all evidence of their air pollution violation be suppressed contending that the Department inspector's warrantless entry of their property violated Article I, section 9, of the Oregon Constitution. The Supreme Court of Oregon has recently articulated a test to determine when the protections of this constitutional provision are applicable. State v. Dixson/Digby, 307 Or 195, 766 P2d 1015 (1988). This test requires that a person manifest an intent to exclude the public by erecting barriers to entry or by posting signs such as "No Trespassing" in order to preserve a constitutionally protected privacy interest. See also State v. Walsh, 99 Or App 180 (1989).

There are at least three reasons why respondents' argument fails.

First, respondents operate a commercial wrecking yard. This premise is not their residence. [redacted]

no evidence in record

[redacted] property and do [redacted] respondents have not installed [redacted] public out of their premises, not have [redacted] public not to enter the property [redacted] trespassing." Such signing would be inopposite to [redacted] gain the property.

Second [redacted] that a warrant is necessary [redacted] the doctrine of exigent [redacted] Mette v. Davis, 295 Or 227 (1983). Exigent circumstances [redacted] evidence would be destroyed [redacted] by the time a warrant could be obtained [redacted] materials being [redacted] would have been totally consumed by the fire and [redacted] materials being burned would have been [redacted] State v. Jordan, 73 Or App 84 (1985); Camara v. San Francisco, [redacted] (1967).

no evidence in the record

Third, another exception to the warrant requirement is consent [redacted] the premises. Consent may be either express or implied by conduct. Silence can be implied consent. State v. Radford, 30 Or App 807 (1977). The test for determining whether consent is given and valid is the "totality of the circumstances." State v. Smith, 73 Or App 282 (1985). The Oregon Court of Appeals has also found consent to be voluntary, even if entry was illegal, when a defendant had an

nothing in record on which to base consent. Record shows no consent

[redacted] and [redacted] was the [redacted] staff [redacted]

not in the record

In summary, the Department did not violate Article I, section 9, of the Oregon Constitution, for three reasons: (1[redacted] a [redacted] respondents.

2. <u>OAR 340-23-042(2) does not violate Article I, section 20 of the Oregon Constitution because two or more classes of persons who open burn are created by statute</u>.

The thrust of respondents' argument is that two classes of open burning were created by ORS 468.090, former ORS 468.125 and 468.140, whereby a person engaging in unlawful open burning which would not normally be in existence for five days is subject to an immediate civil penalty, and a person engaging in unlawful open burning which would normally be in existence for

CERTIFICATE OF SERVICE & TRUE COPY

I hereby certify that I served the foregoing true copy of the RESPONDENTS' MOTION TO STRIKE on:

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by hand delivering or depositing a true, fully, and exact copy thereof in the United States Post Office at Bend, Oregon, enclosed in a sealed envelope, with postage paid, on the 10 day of February, 1992.

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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

1/31/92

DEPARTMENT OF ENVIRONMENTAL QUALITY, Department, v. FRED BAIDA and SUSAN BAIDA, dba CAVEMAN AUTO WRECKERS, Respondents.	)	No. AQOB-SWR-90-09 DEPARTMENT REPLY BRIEF IN ANSWER TO RESPONDENTS' APPEAL

The Department submits its reply brief and memorandum of law in opposition to respondents' appeal of the hearings officer's order, findings, conclusions and judgment imposing a civil penalty against respondents in the amount of $1,000.

I. Background of Case

Respondents Fred Baida and Susan Baida, dba Caveman Auto Wreckers (hereafter Caveman), own and operate a commercial wrecking yard in Grants Pass, Josephine County, Oregon. On or about November 27, 1989, Caveman open burned a pile of materials in the wrecking yard which included brush, vines, automobile parts, and at least one car tire and plastic carseat. A Department staff member received an air pollution complaint that Caveman was engaged in open burning on the site which produced thick black smoke. The staff member visited the Caveman site and observed two Grants Pass fire trucks in the wrecking yard. The inspector conducted an investigation by interviewing Caveman employees, Fred Baida, Fire Department

personnel, inspecting the burn pile and taking pictures of the burn site. As a result of this inspection, the Department issued a notice of assessment of civil penalty against respondents in the sum of $1,200. Caveman requested a hearing. After a hearing, which included the detailed briefing of numerous constitutional issues by the parties, the hearings officer entered judgment in favor of the Department but reduced the civil penalty assessed by the Department from $1,200 to $1,000.[1]

II. Questions Presented by Respondents on Appeal to the Commission

1. Did the Department violate Article I, section 9, Constitution of Oregon, when a Department employee entered respondents' commercial business property in response to an air pollution complaint?

2. Does OAR 340-23-042(2) violate Article I, section 20, Constitution of Oregon, because two or more classes of persons who open burn are created by statute?

3. Does OAR 340-23-042(2) violate Article I, section 20, Constitution of Oregon, because certain classes of persons who open burn may be exempt from specific requirements of ORS chapter 468 while others who open burn are subject to such requirements?

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[1] Respondents raised twelve defenses and claims in the hearing before the hearings officer. With the exception of the five grounds of appeal now before the Commission, all other claims have been abandoned by respondents.

4. Does respondents' claimed ignorance of environmental law excuse respondents' violation of law?

5. Does the doctrine of "de minimus non curat lex" require the Department's assessment of civil penalty to be dismissed?

III. Respondents' Grounds for Appeal are Without Merit

1. The Department did not violate Article I, section 9, of the Oregon Constitution.

Article I, section 9, of the Constitution of Oregon, provides:

> "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

Article I, section 9, of the Oregon Constitution, is similar in scope and purpose to the 4th Amendment to the United States Constitution and protects citizens from unreasonable searches and seizures by the government. The Oregon Supreme Court has placed increased emphasis on an independent analysis under Article I, section 9, then soley relying upon federal 4th Amendment analysis. State v. Caraher, 293 Or 741, 653 P2d 942 (1982); Nelson v. Lane Co., 304 Or 97, 743 P2d 692 (1987). Oregon recognizes greater rights to privacy under the Oregon constitutional provision than are recognized under the 4th Amendment to the federal Constitution. The Oregon Constitution

protects both property and privacy rights. State v. Campbell, 306 Or 157 (1988); State v. Dixson/Digby, 307 Or 195 (1988). While there has been an abundance of court decisions dealing with Article I, section 9, in the criminal context, there is less current court analysis in the civil or administrative field. However, the analysis by the court in such criminal cases are helpful in considering issues presented by this appeal.

The Department does not have any argument with the conclusion that a warrantless entry by the government to inspect property for evidence of criminal violations is unlawful without the consent of the possessor of land or the existence of probable cause plus exigent circumstances. However, this principle of law is inapplicable to the facts under discussion.[2]

The record in this case shows that the Department neither acted unlawfully or unreasonably. First, it should be noted that the Department staff did not act in a vacuum. A legislative enactment specifically grants to the Department authority to make inspections of private and public property. ORS 468.095(1) authorizes Department personnel to enter and inspect private property to investigate an actual or suspected

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[2] This proceeding is not criminal in nature and constitutional questions relating to criminal search and seizure cases are not per se applicable to a public officer entering private land for a civil or administrative purpose.

source of air pollution at any reasonable time. Second, the Department inspector did not enter Caveman's property without good cause. The inspector was responding to a citizen's complaint that respondents were presently engaged in the open burning of materials on their property which was an immediate source of air pollution. Third, the Department inspector could observe smoke emanating from respondents' property even prior to entering the premises. The Department inspector's specific objective was to look for a source of air pollution and not to produce evidence of a crime.

Respondents urge that all evidence of their air pollution violation be suppressed contending that the Department inspector's warrantless entry of their property violated Article I, section 9, of the Oregon Constitution. The Supreme Court of Oregon has recently articulated a test to determine when the protections of this constitutional provision are applicable. State v. Dixson/Digby, 307 Or 195, 766 P2d 1015 (1988). This test requires that a person manifest an intent to exclude the public by erecting barriers to entry or by posting signs such as "No Trespassing" in order to preserve a constitutionally protected privacy interest. See also State v. Walsh, 99 Or App 180 (1989).

There are at least three reasons why respondents' argument fails.

First, respondents operate a commercial wrecking yard. This premise is not their residence. It is open to the public,

and in fact the public is invited to enter the property and do business with respondents. Respondents have not installed barriers to keep the public out of their premises; nor have they posted signs warning the public not to enter the property or stating "No Trespassing." Such signing would be inopposite to respondents' commercial desire to invite the public onto the property to do business.

Second, an exception to the requirement that a warrant is necessary to inspect for criminal violations is the doctrine of exigent circumstances. State v. Davis, 295 Or 227 (1983). Exigent circumstances includes a likelihood that evidence would be destroyed or dissipated by the time a warrant could be obtained. Under the facts of this case, certain materials being burned by respondents would have been totally consumed by the fire and evidence of such materials being burned would have been destroyed without an immediate inspection. State v. Jordan, 73 Or App, 84, rev den 299 Or 251 (1985); Camara v. San Francisco, 387 US 523 (1967).

Third, another exception to the warrant requirement is consent of the owner of the premises. Consent may be either express or implied by conduct. Silence can be implied consent. State v. Radford, 30 Or App 807 (1977). The test for determining whether consent is given and valid is the "totality of the circumstances." State v. Smith, 73 Or App 287 (1985). The Oregon Court of Appeals has also found consent to be voluntary, even if entry was illegal, when a defendant had an

opportunity to withdraw consent and failed to do so. State v. Land, 106 Or App 131 (1991). Under the specific circumstances of this case, the Department inspector entered the premises and interviewed the fireman present, interviewed Caveman's employees, took photographs, inspected the burn site and interviewed Fred Baida, Caveman's owner. At no time was the Department inspector told to exit the premises; told he was unwelcome or that he needed a warrant. At all times during the inspector's visit, his questions were answered and information freely and voluntarily given to him. Simply stated, respondents consented to the inspection by the Department staff member.

In summary, the Department did not violate Article I, section 9, of the Oregon Constitution, for three reasons: (1) respondents did not demonstrate any desire to maintain a reasonable expectation of privacy, (2) exigent circumstances, and (3) consent of respondents.

2. OAR 340-23-042(2) does not violate Article I, section 20 of the Oregon Constitution because two or more classes of persons who open burn are created by statute.

The thrust of respondents' argument is that two classes of open burning were created by ORS 468.090, former ORS 468.125 and 468.140, whereby a person engaging in unlawful open burning which would not normally be in existence for five days is subject to an immediate civil penalty, and a person engaging in unlawful open burning which would normally be in existence for

five days or more is not subject to an immediate civil penalty.[3]. Respondents' open burning was in the first class and they now argue this statutory scheme is a violation of Article I, section 20, Constitution of Oregon, because it grants privileges and immunities to one class of persons (burning normally in existence beyond five days) not available to the other class of persons (burning not normally in existence for five days).

The statutory scheme enacted by the legislature dealing with the imposition of a civil penalty by the Department for a violation of law is quite clear.

ORS 468.140 states in material part:

> "'(1) * * * any person who violates any of the following shall incur a civil penalty for each day of violation * * *
>
> "* * * * *
>
> "'(c) Any rule or standard or order of the commission * * *' (Emphasis added.)

ORS 468.140 should further be read in connection with ORS former 468.125, the so-called "warning" statute which requires the Department to furnish a five-day advance notice that a civil penalty will be imposed if a violation continues beyond the five-day period. Former subsection (1) of ORS 468.125 states:

> "'No advance notice shall be required under subsection (1) of this section.

[3] ORS 468.125 was repealed by Or Laws 1991 ch 650 § 8 and 468.126 was enacted in lieu thereof.

"'(b) The * * * air pollution or air contamination source would normally not be in existence for five days, including but not limited to open burning.' (Emphasis added.)

Statutes on the same subject should be construed as consistent with and in harmony with each other. Davis v. Wasco Intermediate Educ. Dist., 286 Or 261, 593 P2d 1152 (1978).

The plain sense of these statutes, when harmonized with each other is as follows:

1. The Department is ordinarily required to utilize a "conference, conciliation and persuasion" procedure to eliminate the source or cause of pollution which results in a violation. ORS 468.090.

2. A person who violates a rule of the Commission incurs a civil penalty. ORS 468.140.

3. Ordinarily the Department must furnish a person with five days advance notice of impending civil penalty prior to imposing such penalty to allow the person an opportunity to correct the violation. However, no advance notice is required if the air pollution source would normally not be in existence for five days, such as respondents' violation of open burning. Former ORS 468.125(2)(b).

Clearly, ORS 468.090 relates solely to on-going and continuing violations of law which may be corrected after conference, and after the Department furnishes the advance warning contemplated by former ORS 468.125(1). ORS 468.090 has no application to violations which have already occurred and

are thus impossible to eliminate by "talking" to the violator. Respondents' violation already occurred and would normally not be in existence for five days. A conference would result in no meaningful results. Following respondents' argument to its logical end, would allow respondents to violate the law every day of the week but insist upon a conference prior to the Department imposing a penalty. The Department obviously could never impose a penalty. Not choosing to follow this illogical course, the Department imposed a civil penalty pursuant to ORS 468.140 and is not required to "confer, conciliate or persuade" respondents to stop a violation which already occurred and is not ongoing.

When respondents' constitutional claim is applied to the legislatively enacted statutory scheme, it can readily be determined that such claim is without merit.

In combination, the equal protection clause of the 14th Amendment to the United States Constitution and Article I, section 20, Constitution of Oregon, prohibit the enactment of laws which either enlarge or diminish the privileges or immunities of citizens. Unless so called "suspect classes," such as those based upon race, nationality, religion or gender are involved in the selective enforcement, the equal protection clause is violated only if there is no rational basis to justify the selective enforcement of the law. City of Eugene v. Crooks, 55 Or App 351 (1981); Hewitt v. SAIF, 294 Or 33 (1982). No suspect class is involved in this case and

constitutional guarantees against so called class legislation do not prevent the legislature from resorting to classification in order to accomplish a legitimate public purpose. The burden is upon respondents to show beyond a reasonable doubt that the classification adopted is unreasonable and without any rational relationship to the end sought to be achieved. Thompson v. Dickson, et al, 202 Or 394 (1954). The legislature has wide discretion and the courts will not undertake to question the legislative judgment unless there were no public considerations justifying the distinction made by law. City of Klamath Falls v. Winters, 289 Or 757 (1980); 457 US 694 (1981); State v. Bowman, 60 Or App 184 (1982); Randall Co. v. City of Beaverton, 68 Or App 419 (1984).

In this case, the legislature made a clear distinction between on-going and continuing violations which may be corrected after advance warning and conference and those violations which have already occurred and thus cannot be eliminated after advance warning and conference. Respondents' violation had already occurred and would normally not be in existence for five days. A warning and proposed conference by the Department would result in no meaningful results. The legislative distinction is both rational and reasonable and Respondents' claim is without merit.

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3. OAR 340-23-042(2) does not violate Article I, section 20 of the Oregon Constitution because certain classes of open burning are exempt from regulation under ORS chapter 468.

Caveman again claims Article I, section 20, is applicable to this case and argues that the hearings officer should have dismissed this proceeding because former ORS 468.290 creates certain classes granted privileges and immunities which are not granted to respondents. Respondents contend they are in the same class as those granted privileges and immunities under former ORS 468.290, and are thus being discriminated against by reason of the civil penalty imposed against them for open burning. It is extremely difficult, if not impossible, to understand why respondents believe it is in the same class as persons conducting operations under former ORS 468.290. For much of the same reasons discussed under respondents' claim of error in assignment of error number 2, respondents' present claim is without merit.

Former ORS 468.290 is now codified as ORS 468A.020 and is entitled "Application of Air Pollution Laws." The statute lists eight categories of activities which are subject to varying degrees of state regulation. Agricultural land clearing and land grading, residential barbecue equipment, fires set by public officers in the performance of official duty for weed abatement, elimination of fire hazards, training of firefighting personnel, instructing employees of private concerns in firefighting and civil defense are generally not

subject to the air pollution laws of the state. However, this does not mean respondents have been unlawfully discriminated against by virtue of such exemption.

In evaluating whether a class exists under Article I, section 20, it must first be determined whether the class "is created by the challenged law itself" or by virtue of characteristics apart from the law in question. State v. Clark, 291 Or 231, 240 (1981). Classes of the first type are entitled to no special protection, and in fact, are not even considered to be classes for the purposes of Article I, section 20. Hale v. Port of Portland, 308 Or 508 (1989). Thus, terms like "class" and classification are usually invoked to mean whatever distinction is created by the challenged law itself. On the other hand, every law itself can be said to "classify" what is covers from what it excludes. Attacks on such laws as "class legislation" therefore tend to be circular and have been rejected by the courts whenever the law leaves it open to anyone to bring himself or herself within the favored class on equal terms. Jarvis v. City of Eugene, 289 Or 157, 184-85 (1985); State v. Clark, supra, pp. 240-41.

In the present case, any "class" that arguably is created is created by the law itself. ORS 468A.020 (1991 legislative session). Respondent Caveman is free to enter any "class" listed in the statute on equal terms. Respondents only have to engage in agricultural land clearing or land grading; seek permission to set a fire for weed abatement; or become a

firefighting officer and engage in fire fighting training; or work for a private industrial firm and engage in civil defense or fire fighting training to bring himself within the favored class on equal terms. This was and is respondents' choice. Instead, respondents choose to operate a commercial wrecking yard and engage in unlawful open burning. Such burning is subject to regulation and the imposition of a civil penalty.

4. Ignorance of the law is not a defense to the Department's assessment of civil penalty.

Caveman urges that this case be dismissed because the Baidas did not know it was unlawful to open burn automobile tires, parts, and plastic car seats. Respondents further assert the rule which they are charged of violating is "malum prohibitum" which was not made "reasonably available" resulting in their ignorance of the duties created thereby. This claim of error is without merit for the following reasons:

1. The Department and Commission provided notice of its proposed rulemaking pursuant to ORS 183.335; filed its rule with the Secretary of State, pursuant to ORS 183.355(1)(a) and copies of such rules are readily available upon request to the Secretary of State pursuant to ORS 183.355(6). Administrative rules have the force and effect of law. Bronson v. Moonen, 270 Or 469, 476 (1974). Additionally, courts take judicial notice of rules filed with the Secretary of State. ORS 183.360(4). Respondents have constructive notice of the Department's and Commission's rules.

2. A mistake of law is not a defense to this proceeding. State v. Baker, 48 Or App 999, 1003 (1980). An act 'malum prohibitum' is not excused by ignorance or mistake of fact where the specific act is made punishable irrespective of motive or intent. People v. Treen, 33 Misc 2d 571, 225 NYS 2d 787 (1957). In short, violation of the Commission's rule resulted in strict liability.

5. "De minimus non curat lex" is not a defense to the Department's assessment of civil penalty.

Respondents' Fifth Claim of Error is basically that their unlawful burning was too small a violation for the Department to impose a civil penalty.

This limited form of defense might have some merit if Caveman's unlawful burning was the sole source of air pollution in Grants Pass or Josephine County. However, the air pollutants emitted from Caveman's burning joined those air pollutants resulting from motor vehicle emissions; wood stove smoke; plywood mills and numerous other sources in the region. It is this combination of air pollutants that causes violations of air quality standards and a danger to the public health. Caveman's source of air pollution is not an island unto itself.

It is not within respondents' discretion or province to decide whether their conduct was customary; too trivial to warrant a "conviction" and penalty; and did not cause the harm or evil the legislature envisaged or sought to prevent. This decision is for the Department.

Conclusion

Respondents' assignments of error 1 through 5 are totally without merit and present no defense to the Department's assessment of civil penalty. The findings, conclusions and judgment of the hearings officer should be affirmed by the Commission.

DATED this 29 day of January, 1992.

Respectfully submitted,

ARNOLD B. SILVER, OSB #58088
Assistant Attorney General
Of Attorneys for Department

CERTIFICATE OF SERVICE BY MAIL

I certify that on January 29, 1992, I served the foregoing Department Reply Brief in Answer to Respondents' Appeal upon the parties hereto by mailing, regular mail, postage prepaid, a true, exact and full copy thereof to:

Michael Henderson
Attorney at Law
160 NW Irving, Suite 203
Bend, OR 97701

ARNOLD B. SILVER #58088
Assistant Attorney General
Of Attorneys for Department

1 - CERTIFICATE OF SERVICE
(ABS:dld 0912N)

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, vs. FRED BAIDA AND SUSAN BAIDA, dba / CAVEMAN AUTO WRECKERS, Respondent.	NO AQOB SWR 90 09

EXCEPTIONS

Respondents object to the following findings of fact:

Baida had recently cleared and piled blackberries and brush.

The pile contained a tire and a car seat.

Baida did not know that there was a tire or a car seat in the pile.

Baida did not know of any burning permit requirements.

On November 27, 1989, Baida ignited the pile.

When it burned, it produced black smoke.

As soon as Baida observed black smoke, Baida acted to extinguish the fire.

A pile of brush containing a tire and a car seat would not normally burn five days.

Baida gained a minor economic benefit by open burning.

Evidence submitted by Baida provided some evidence of cash flow but did not establish economic and financial condition.

Respondents object to the following conclusions of law:

2. On November 27, 1989, Baida violated OAR 340-23-042 by burning a tire and a car seat, prohibited materials, and is liable for a civil penalty.

3. According to the penalty matrix established in OAR 340012-042 et seq., the appropriate penalty is $1,000.

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STATEMENT OF THE CASE

Nature of the Proceedings

This is a proceeding on appeal in which the respondents seek reversal of the imposition of a civil penalty.

Respondents were charged and penalized as follows:

NOTICE OF ASSESSMENT OF CIVIL PENALTY

II. VIOLATIONS FOR WHICH A CIVIL PENALTY IS BEING ASSESSED

On or about November 27, 1989, Respondents violated OAR 340-23-042(2), adopted pursuant to ORS 468.295(1), in that Respondents burned automobile parts, and at least one car tire and seat, materials which normally emit black smoke or noxious odors into the atmosphere when burned, at the north end of Respondents' wrecking yard located at 440 N.E. Agness Avenue, Grants Pass, Oregon.

III. ASSESSMENT OF CIVIL PENALTIES

The Director imposes civil penalties for the following violations cited in section II:

Violation	Penalty Amount
1	$1,200

Dated Feb. 26, 1990

Nature of the Case

Respondents denied the charge and proceeded to a hearing before a hearings officer of the Environment Quality Commission, who sustained the charge, imposing a penalty of $1,000. A copy the hearing officer's order is annexed as Appendix A.

Jurisdiction

Respondents invoke the jurisdiction of the commission under OAR 340-11-132.

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Questions Presented

(1) Did the DEQ investigation officer violate the Oregon Constitution, Article I, section 9, when he invaded respondents property without respondents' permission or first having procured a warrant?

(2) Do the statutes and regulations pursuant to which respondents have been charged, violate the Oregon Constitution, Article I, section 20, by discriminatorily classifying those who burn into two classes and proceeding differently against each class?

(3) Do the statutes and regulations pursuant to which respondents have been charged, violate the Oregon Constitution, Article I, section 20, by discriminatorily classifying those who burn into two classes, exempting one class from compliance with the statutes, rules and regulations while proceeding against the other class to assess penalties?

(4) Does respondents ignorance of DEQ's rules and regulations excuse the burning of prohibited material on a prohibited day?

(5) Is this case be dismissed because of the doctrine of "De Minimus Non Curat Lex"?

SUMMARY OF ARGUMENT

The hearings officer should have denied entry of any evidence relative to the charge because DEQ's investigating officer trespassed upon respondents' property when he drove on to the property without their permission or first obtaining a warrant, exoneration of Article I, section 9 of the Oregon

Constitution requiring under those circumstances that the evidence procured thereby be suppressed.

The classification of two classes of persons determined whether or not the burn is five days or more, or less than five days is irrationally related to the public policy of reducing air pollution and there for is a violation of Article I, section 20 of the Oregon Constitution because it provides privileges and immunities to one class of persons not available to the other class of persons?

The classification of two classes of persons determined on criteria not related to the public policy of reduction of air pollution is irrational, exempting from coverage of the law a class of persons who burn, granting that class privileges and immunities not granted others who burn, thereby violating Artile I, section 20 of the Oregon Constitution.

DEQ has a responsibility to inform the public of the scope and coverage of the rules and regulations in a reasonably, meaningful manner, the failure for which respondents should be required to bear the burden.

Under all the facts of this case the burning of any prohibited materials at a prohibited time was so inconsequential that it does not warrant government involvement. The case should be dismissed because of its deminimus nature.

SUMMARY OF FACTS

The facts most favorable to the prosecution, were that Fred Baida and Susan Baida operate a wrecking yard in Grants Pass,

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oregon. (Amended Answer pages 1-2). Baida had recently cleared and piled blackberries and brush. (Answer 10 March, 1990). The pile contained a tire and a car seat. (Answer 10 March, 1990). Baida did not know of any burning permit requirements. (Answer 10 March, 1990). On November 27, 1989, Baida ignited the pile. (Answer, 10 March, 1990). When the pile burned, it produced black smoke. (Answer, 10 March, 1990). As soon as Baida observed black smoke, Baida acted to extinguish the fire. (Answer, 10 March, 1990). In response to a complaint, a DEQ investigator drove onto Baida's property without first requesting permission and without first obtaining a search warrant. (Stipulated to the record) A pile of brush containing a tire and a car seat would not normally burn five days. (Department's motion for hearings officer to take official notice of ORS 468.125 (2)(b)). Baida gained a minor economic benefit by open burning. (Answer, 10 March, 1990). Evidence submitted by Baida provided some evidence of cash flow but did not establish economic and financial condition. (Submission of cash flow statements).

ASSIGNMENT OF ERROR NO. 1

The hearings officer erred in failing to suppress the evidence of violation because it was procured in violation of the Oregon Constitution, Article I, section 9.

The relevant portion of the record is the stipulation that the DEQ investigation officer went upon respondents' property, at the time in question, without first obtaining the permission of

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respondents or procuring a warrant.

Argument

"No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and not warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." Article I, section 9, Oregon Constitution.

The text of the constitutional provision respecting search and seizure does not specify enforcement of criminal laws. The constitutional provision is equally applicable to civil proceedings as well as criminal, as held by the Oregon Supreme Court in State v. Weist, 302 Or 370, 376 (1986).

> "A governmental intrusion into a portion of business premises not ordinarily open to the public for purpose of determining whether or not certain statutory or regulatory violations have occurred is a `search'. Camara v. Municipal Court, 387 US 523, 528-529, 87 S Ct 1727, 18 L Ed 2d 930 (1967). See See v. City of Seattle, 387 US 541, 87 S Ct 1737, 18 L Ed 2d 943 (1967). It follows that, as a rule, a warrant authorizing such a search will be required, unless exigent circumstances exist or consent is obtained. Marshall v. Barlow's Inc., __ US __, 98 S Ct __, 56 L Ed 2d 305 (1978); Camara v. Municipal Court, supra; See

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v. City of Seattle, supra; see generally State ex rel Accident Prev. Div. v. Foster, 31 Or App 291, 5760 P2d 398 (1977).

Where there has been a warrantless administrative search without exigent circumstances or consent the results of the search should be suppressed. State. Anderson, 101 Or App 594 (1990).

It is a trespass for a government official to go to the back of the premises without a search warrant, and such conduct violates Article I, section 9 of the Oregon Constitution. State v. Ohling, 70 Or App 249, 688 P2d 1384 (1984), S Ct rev. den. Law enforcement officers must secure and use search warrants whenever reasonably practicable. State v. Allen, 12 Or App 589, 507 P2d 42 (1973) S Ct Rev. Den. In consequence of the foregoing, the government violated Article I, section 9 of the Oregon Constitution when the DEQ's enforcement officer went upon respondents' property without a warrant, without consent of respondents, or without a showing of exigent circumstances. Therefore, the evidence that that officer obtained and the fruits of that poisonous tree should not be used to determine whether respondents were in violation of any statute or regulation and to assess a penalty. There is no evidence of respondents violating a statute or regulation other than that of the DEQ enforcement officer and that which was procured as a result the first obtained information.

ASSIGNMENT OF ERROR NO. 2

The hearing officer erred by not dismissing the case because

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the law, rules, and regulations improperly discriminated against respondents by imposing an immediate fine because the burn would not last five or more days, when if the burn had lasted five or more days the department could not fine them at all unless and after there had been written notice, conferencing, conciliation, and persuasion which had failed, thereby violating the Oregon Constitution, Article I, section 20 which prohibits according one class of persons privileges and immunities not afforded to all persons or classes.

Argument

If by statute the conduct of one person or group produces a certain legal consequence, and the conduct of another person or group produces a different legal consequence, there must be some rational distinction between the persons or groups of persons in question sufficient to warrant the application to them of different legal consequences for their acts, and if there is no rational basis for classifying one person or group of persons as being subject to one statute or regulation while subjecting others to a different regulation, then the legislation must fall. State v. Pirkey, 203 Of 697, 281 P2d 698 (19). A classification to be valid must always rest on a difference which bears a fair, substantial, natural, reasonable, and just relation to the object for which it is proposed. M & M Wood Working Co. v. State Industrial Copm., 176 Or 35, 155 P2d 933 (19). The classification must be based upon proper and justifiable distinctions, considering the purpose of the law. Upham v.

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Bramwell, 105 Or 597, 209 P 100, 25 ALR 919, mod on other grounds and reh den, 105 Or 618, 210 P 706, 25 ALR 929 (19).

Defendants are being discriminated against in that legislation because of invidious discrimination in that classification of immediate fine or conferencing is arbitrary, capricious, and not reasonable relative to the objective of reducing air pollution which is the policy underlying the legislation.

> "The general rule is that no one may be subject to any greater burdens and charges than are imposed on others in the same calling or condition or in like circumstances, and no burden can be imposed on one class of persons, natural or artificial, which is not, in like conditions, imposed on all other classes. A statute infringes this guaranty if it singles out for discriminatory legislation particular individuals not forming an appropriate class, and imposes upon them burdens or obligations or subjects them to rules from which others are exempt." State v. Savage, 96 Or 53, 58, 184 P 567 (1920).

The governmental policy respecting air pollution control germane to this case are expressed in ORS 468.280. The policies applicable to the inquiries herein are:

> "(1) In the interest of the public health and welfare of the people, it is declared to be the public policy of the State of Oregon:
>
> > (a) To restore and maintain the quality of the air resources of the state in a condition as free from air pollution as is practicable, consistent with the overall public welfare of the state....
>
> (2) The program for the control of air pollution in this state shall be undertaken in a progressive manner, and each of its successive objectives shall be sought to be accomplished by cooperation and conciliation among all the parties concerned."

ORS 468.125 and ORS 468.090 create two classes a persons

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for discriminatory enforcement of the laws and regulations relative to air pollution, effectuating the public policy of the State of Oregon as set forth above. One class is created for air pollution sources that would normally not be in existence for five days and a second class is created for air pollution sources that would be in existence for five or more days. The less than five day class is subject to immediate penalty, without advanced notice in writing, without first being engaged in conference, conciliation, and persuasion to eliminate the source of offense, and only without achieving positive results therefrom should the department be authorized to commence enforcement proceedings. The five or more day class is not subject to immediate penalty, in fact, is not subject to penalty at all unless a person of that class is first given written notice, and is engaged in conference, conciliation, and persuasion to eliminate the source of offense, and there is a failure to achieve positive results therefrom. The only distinction between the two classes is the length of time the air pollution source transpires. This distinction is not a valid basis for classification because it is not a rational distinction between the two classifications relative to achieving the public policy of reducing air pollution nor achieving the objectives of the legislation to progressively engage in cooperation and conciliation of all the parties.

A source of air pollution which lasts less than five days shall pollute the air less than the same or similar source of air pollution which lasts five days or more. Considering that the

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objective is to reduce air pollution, it is irrational to progress to levy a fine, without first engaging in cooperation and conciliation, in the first instance when the source lasts less than five days; but when the source lasts five days or more requiring that there be written notice, engagement in conference, conciliation, and persuasion, and the failure thereof before a penalty may be imposed. Such a scheme is not a just and proper distinction considering the purpose of the law.

ASSIGNMENT OF ERROR NO. 3

The hearing officer erred when she did not dismiss the case because it exempted from coverage others who burn, thereby creating a class granted privileges and immunities not granted respondents and those who are in the same class as respondents, in violation of Article I, section 20 of the Oregon Constitution.

Argument

Respondents have been further prejudiced in this case because to exempt from application of the legislation those sources of air pollution that produce the some of the greatest amounts of air pollution is a substantial distinction which is not fair, natural, or reasonable because rather seeking to reduce air pollution at some of its major sources shifts the burden to obtain clean air to others less able to obtain as a significant reduction as would the regulation of agricultural land clearing operations or land grading, 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

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or elimination of a fire hazard, or instruction of employees in the methods of fire fighting, fires set pursuant to permit for the purpose of instructions of employees of private industrial concerns in methods of fire fighting, or for civil defense instruction. ORS 468.290

ASSIGNMENT OF ERROR NO. 4

The hearing officer erred when she failed to dismiss the case because of respondents' ignorance that what they were doing would violate the law, under circumstances where performance of the act was not malum per se, and was not a warning to respondents that their actions might violate the law, and that the department had not conducted program of education that would have reasonably informed respondents and those in respondents' class of the restriction of actions person customarily have engaged in respecting their own property.

Argument

Not only does the foregoing assignments of error violate the functions of the department, but not seeking to educate respondents and the public in a meaningful way violates the function of the department. ORS 468.035 (1)(a) and (e), consistent with the public policy to enforce the legislation is a progressive manner and to do so through cooperation and conciliation, requires the department shall encourage voluntary cooperation by the people; and shall conduct and supervise programs of air pollution control education, including the preparation and distribution of information regarding air

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pollution sources and control.

Customarily, until recent times when air pollution legislation was enacted, it was the custom and right of a property owner to utilize his property in any manner he saw fit, including burning it or on it. When Chapter 468 of the Oregon Revised Statutes was enacted, it provided as a function of the department, that the department, "Shall conduct and supervise programs of air and water pollution control education, including the preparation and distribution of information regarding air and water pollution sources and control." ORS 468.035 (1)(e). Together with subsection (a) of the foregoing statute, which states, "Shall encourage voluntary cooperation by the people...", the intent of the legislature was to educate the people to the reasons for having air pollution controls and thereby obtain their cooperation as a preferred method of obtaining the objectives of the legislation, thereby recognizing that the legislation was a significant departure from custom and previous law. In light of the foregoing and that the air pollution legislation is a statute which requires one to perform an act and the circumstances do not indicate any need to inquire whether one is obliged to perform the duty, a malum prohibitum duty, the government must prove knowledge of the duty. Lambert v. California, 355 U.S. 225, 229 78 S. Ct. 240, 243, 2 L. Ed 2d 228, 232 (1957).

ASSIGNMENT OF ERROR NO. 5

The hearing officer erred when she failed to dismiss the

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case because the matter was so inconsequential that it was subject to the doctrine of "De Minimus Non Curat Lex".

Argument

The doctrine of "De Minimus Non Curat Lex" has long standing in the common law and in recent years has been statutorily enacted by some jurisdictions and has been promulgated by the Model Penal Code. Where the actor's condcut is too trivial to warrant the condemnation of being penalized, the proceeding should be dismissed. People v. Feldman, 73 Misc. 2d 824, 342 N.Y.S. 2d 956 (1973); State v. McCann, 354 N.W. 2d 202 (S.D. 1984); State v. Smith, 195 N.J.Super. 468, 480 A. 2d 236 (Law Div. 1984). In this particular case the offense was brief of a very minor nature, and was extinquished as soon as it was discovered.

CONCLUSION

For the reasons statedabove, respondents respectfully requests that the commission dismiss the case and exonerate any judgment entered against respondents.

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Michael Henderson

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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, vs. FRED BAIDA AND SUSAN BAIDA, dba / CAVEMAN AUTO WRECKERS, Respondent.	PROPOSED HEARING OFFICER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW NO AQOB SWR 90 09 JOSEPHINE COUNTY

FINDINGS OF FACT

Fred Baida and Susan Baida operate a wrecking yard in Grants Pass, Oregon.

In response to a complaint, a DEQ investigator drove onto Baida's property without first requesting permission and without first obtaining a search warrant.

OFFICIAL NOTICE

> Notice of Violation. (1) No civil penalty prescribed under ORS 468.140 shall be imposed until the person incurring the penalty has received five days' advance notice in writing from the department or the regional air quality control authority, specifying the violation and stating that a penalty will be imposed if a violation continues or occurs after the five-day period, or unless the person incurring the penalty shall otherwise have received actual notice of the violation not less than five days prior to the violation for which a penalty is imposed.
>
> (2) No advance notice shall be required under subsection (1) of this section if: . . . (b) The water pollution, air pollution or air contamination source would normally not be in existence for five days, including but not limited to open burning.

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CONCLUSIONS OF LAW

1. The Commission has jurisdiction.

2. Department of Environmental Quality Investigator by driving onto Baida's property without first requesting permission and without first obtaining a search warrant that the evidence procured by the investigator as a result of going upon Defendant's property at that time and the evidence obtained from Defendant and any other source in response to evidence then procured by the investigator and the charge stemming therefrom should be suppressed.

3. There being no evidence on which to predicate a penalty the matter should be dismissed.

DATED this _____ day of _____ 1991.

ENVIRONMENTAL QUALITY COMMISSION

_____
Hearings Officer

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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, vs. FRED BAIDA AND SUSAN BAIDA, dba / CAVEMAN AUTO WRECKERS, Respondent.	PROPOSED FINAL ORDER AND JUDGMENT NO AQOB SWR 90 09

The Environmental Quality Commission, through its hearings officer, orders that these proceedings against Defendants be dismissed. Review of this order is by appeal to the Court of Appeals. A request for review must be filed within 30 days of the date of this order.

DATED this _____ day of _____ 1991.

ENVIRONMENTAL QUALITY COMMISSION

_____
Hearings Officer

NOTICE: If you disagree with this Order you may request review by the Court of Appeals. Your request must be in writing directed to the Court of Appeals, Salem, Oregon, 97310. The request must be received by the Court of Appeals within 30 days of the date of mailing or personal service of Order. If you do not file a request for review within the time allowed, this order will become final and thereafter shall not be subject to review by any agency or court.

A full statement of what you must do to appeal a decision of the commission is contained in the Rules of Appellate Procedure.

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BEND, OREGON 97701

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing document(s) on the person(s) named below, who represent the party(s) named below, on 7 December, 1991, by hand delivering or mailing to the person a true copy thereof, certified by me as such, contained in a sealed envelope, with postage prepaid thereon, addressed to the person's last known address listed below, and deposited in the post office in Bend, Oregon, on the above date.

REPRESENTATIVE	CLIENT
Linda Zucker 811 SW Sixth Ave Portland, OR 97204	Environmental Quality Commission

Michael Henderson
MICHAEL HENDERSON, OSB 69075
Attorney for Defendant

TRUE COPY CERTIFICATION

I hereby certify that I have prepared the foregoing copy of the above mentioned document and have carefully compared it with the original thereof; that it is a true and correct copy thereof.

MICHAEL HENDERSON

MICHAEL HENDERSON, P.C.
ATTORNEY AT LAW
160 N.W. IRVING, SUITE 203
BEND, OREGON 97701

MICHAEL HENDERSON, P.C.
ATTORNEY AT LAW

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, vs. FRED BAIDA AND SUSAN BAIDA, DBA/CAVEMAN AUTO WRECKERS, Respondents.	No. AQOB-SWR-90-09 JOSEPHINE COUNTY NOTICE OF APPEAL

Respondents Baidas hereby give notice of appeal of the hearings officer's final order to the Commission for its review.

Dated: October 9, 1991.

MICHAEL HENDERSON, P.C.

Michael Henderson

Michael Henderson
Attorney for Respondent
OSB# 69075

MICHAEL HENDERSON, P.C.
ATTORNEY AT LAW
160 N.W. IRVING, SUITE 203
BEND, OREGON 97701

NOTICE OF APPEAL - END

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that I served the foregoing document(s) on the person(s) named below, who represent the party(s) named below, on October 9, 1991, by sending a true copy thereof, certified by me as such, via facsimile transmission to the person's receiving facsimile device at (503) 229-5120, on the above date, as evidenced by the annexed transmission report, which by this reference is incorporated.

REPRESENTATIVE	CLIENT
Arnold B. Silver 1515 S.W. 5th. Ave. Portland, OR 978201 FAX: 229-5120	State of Oregon

Dated: October 9, 1991.

Michael Henderson
MICHAEL HENDERSON
Attorney for Respondents

TRUE COPY CERTIFICATION

I hereby certify that I have prepared the foregoing copy of the above mentioned document and have carefully compared it with the original thereof; that it is a true and correct copy thereof.

MICHAEL HENDERSON

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

August 16, 1991

CERTIFIED MAIL - P 125 102 771

Michael Henderson, P.C.
Attorney at Law
Irving Professional Building
160 NW Irving, Suite 204
Bend, OR 97701

Re: DEQ v. Baida
NO. AQOB-SWR-90-09
Josephine County

Enclosed are my Findings of Fact, Conclusions of Law and Final Order in your contested case.

Please note that you and the Department each have thirty (30) days from the date of mailing or personal delivery of this letter to file with the Environmental Quality Commission, and serve on each other, a request (Notice of Appeal) that the Commission review my decision. Unless this request for Commission review is filed within the 30 days, my decision will be final.

A request for review by the Commission is considered filed only after being actually received in the office of the Director of the Department of Environmental Quality at 811 S.W. Sixth Avenue, Portland, Oregon 97204.

If you wish to appeal my decision to the Commission, you will note the following:

1. You have 30 days from the date you file your Notice of Appeal to also file with the Commission, and also send to the Department, your written exceptions to my decision and a brief.

2. These exceptions must include your proposed alternative findings of fact, conclusions of law and final order, with specific references to the parts of the hearing record on which you are basing your exceptions.

3. If you do not file these required exceptions and brief within 30 days from the date you file your Notice of Appeal, your appeal may be dismissed and my decision will be final.

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696

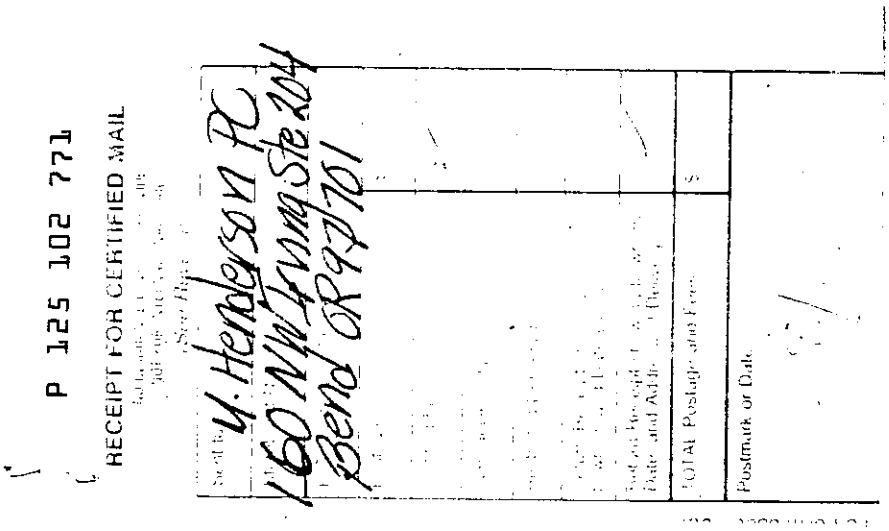
Enclosed is a copy of Oregon Administrative Rule (OAR) 340-11-132 which details the appeal process. Please read it carefully.

If you have questions, my phone number in Portland is 229-5383, or I can be reached toll-free at 1-800-452-4011.

Sincerely,

Linda K. Zucker
Hearings Officer

LKZ:z
HZ101916
Enclosure
cc: Environmental Quality Commission
Arnold Silver, Department of Justice
Fred Hansen, Director, DEQ
Tom Bispham, Regional Operations Division, DEQ
Enforcement Section, DEQ
Steve Greenwood, Air Quality Division, DEQ
Eastern Region, DEQ



BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FRED BAIDA AND SUSAN BAIDA, DBA/CAVEMAN AUTO WRECKERS, Respondent.	AMENDED HEARING OFFICER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW NO. AQOB-SWR-90-09 JOSEPHINE COUNTY

BACKGROUND

On February 26, 1990, DEQ notified Fred Baida and Susan Baida (Baida) that they were liable for a $1,200 civil penalty for violating OAR 340-23-042(2) when Baida "burned automobile parts, and at least one car tire and seat . . ." DEQ's penalty assessment assumed the violation was a Class I minor magnitude violation. The penalty was enhanced to account for assumed savings from avoiding landfill disposal costs. The penalty calculation did not assume that Baida was cooperative in correcting the violation.

Baida appealed the penalty, asserting there were mitigating factors not considered by DEQ. These were that Baida believed it was burning only vines and brush and on seeing black smoke acted promptly to extinguish the fire; that Baida had not burned before and was unaware of burning permit requirements or prohibitions and should have been informed of them by DEQ; and that the penalty assessed would impose a major hardship to the operation of its business. Later, represented by counsel, Baida filed a formal response denying the violation and the burning of auto parts and denying the remainder of the complaint for insufficient information

on which to form a belief. This response raised 11 "affirmative defenses," some accompanied by "counterclaims" and seeking "setoff." These are identified in the Opinion below. DEQ filed a memorandum providing its view of the issues presented.

On the understanding that the parties had agreed to submit the case on the record, the hearings officer issued a decision on January 10, 1991. Attachment 1. Later, advised that Baida's counsel had not intended that procedure, the hearings officer withdrew the January 10, 1991 order. Ultimately, the case was submitted on a written record, completed on July 3, 1991.

DEQ was represented by Arnold Silver, Assistant Attorney General. Baida was represented by Michael Henderson, its attorney.

ISSUES

Whether Baida open burned automobile parts including a tire, and, if so, whether Baida is, nonetheless, excused for 11 reasons addressed below, and, if not, whether $1,200 is the appropriate penalty.

FINDINGS OF FACT

Fred Baida and Susan Baida operate a wrecking yard in Grants Pass, Oregon.

Baida had recently cleared and piled blackberries and brush. The pile contained a tire and a car seat. Baida did not know that there was a tire or a car seat in the pile. Baida did not know of any burning permit requirements.

On November 27, 1989, Baida ignited the pile. When it burned, it produced black smoke. As soon as Baida observed black smoke,

Baida acted to extinguish the fire.

In response to a complaint, a DEQ investigator drove onto Baida's property without first requesting permission and without first obtaining a search warrant.

A pile of brush containing a tire and a car seat would not normally burn five days.

Baida gained a minor economic benefit by open burning. Evidence submitted by Baida provided some evidence of cash flow but did not establish economic and financial condition.

OFFICIAL NOTICE

As requested, I have taken official notice of ORS 468.125 which provides in part as follows:

> **Notice of violation.** (1) No civil penalty prescribed under ORS 468.140 shall be imposed until the person incurring the penalty has received five days' advance notice in writing from the department or the regional air quality control authority, specifying the violation and stating that a penalty will be imposed if a violation continues or occurs after the five-day period, or unless the person incurring the penalty shall otherwise have received actual notice of the violation not less than five days prior to the violation for which a penalty is imposed.
>
> (2) No advance notice shall be required under subsection (1) of this section if: . . .
>
> (b) The water pollution, air pollution or air contamination source would normally not be in existence for five days, including but not limited to open burning.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction.

2. On November 27, 1989, Baida violated OAR 340-23-042 by burning a tire and a car seat, prohibited materials, and is liable

for a civil penalty.

3. According to the penalty matrix established in OAR 340-12-042 et seq., the appropriate penalty is $1,000.

OPINION

The following addresses the affirmative defenses raised by Baida:

1. Baida argued that "conference, conciliation, and persuasion" was a prerequisite to penalty assessment.

ORS 468.090 directs DEQ to investigate violations and to attempt to use conference, conciliation and persuasion to eliminate the source of existing violations. It directs DEQ to use enforcement proceedings in case of failure to remedy such violations. Consistent with this emphasis on securing cooperation in remedying existing violations, ORS 468.125(1) provides that, in general, a person incurring a penalty is given five days' advance notice that a penalty will be imposed if a violation continues or occurs after the five-day period. However, ORS 468.125(2)(b) excuses advance notice when the source of the violation would normally not be in existence for five days.

The effect of this system is that in dealing with continuing or on-going violations, DEQ must seek to remedy the violation and generally must provide advance notice of intent to impose a penalty. However, where the violation source would not normally be in existence five days, DEQ may proceed directly to impose a penalty. In this case, the pollution source normally would not have been, and was not, in existence five days. An immediate penalty was

authorized.*

2. A DEQ investigator entered Baida's property without a search warrant and without Baida's authorization. Baida contended that this entry: A) prevented its liability for the open burning civil penalty sought by DEQ, and B) entitled Baida to payment of $5,000 from DEQ.

A. Baida's first contention is based on Baida's belief that the DEQ enforcement proceeding is a criminal proceeding entitling Baida to constitutional protection against unlawful search and seizure and exclusion of improperly procured evidence. In support of this position, Baida tendered the authority of Brown v Multnomah County Dist. Ct., 280 Or 95 (1977). In Brown, the Oregon Supreme Court held that despite the legislative characterization of the first offense of driving a motor vehicle under the influence of intoxicants as a traffic infraction, the law retained sufficient indicia of criminality to carry constitutional and statutory protection afforded in prosecution of other traffic crimes. Brown at 110-111. The Court identified a number of indicia for determining whether an ostensible civil penalty proceeding is, in fact, a "criminal prosecution" for constitutional purposes. Assuming the indicia are applicable to offenses identified at the outset as administrative, I have applied them to the law at issue in

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* DEQ argued (in effect) that ORS 468.125(2)(b) contains a presumption that open burning would normally not be in existence five days. The case facts do not require resolution of that argument.

this case. Although the law permits a very substantial penalty, it does not require a culpable mental state, it does not provide for imprisonment, it does not contain collateral consequences, and it does not have pre-hearing procedures normally attendant to criminal proceedings (e.g. arrest and detention). On balance, the law and its enforcement system are correctly characterized as administrative, not criminal, and do not carry the procedural safeguards constitutionally mandated for criminal proceedings. Consequently, even if DEQ's investigation were flawed,* the "exclusionary rule" would have no application here.

B. Baida has asserted entitlement to $5,000 as counterclaim and setoff for "injury and damage." Baida has not cited authority in support of this claim and none is apparent. Baida has not provided the notice of claim which is required of those seeking to impose liability against public bodies. See ORS 30.275. Consequently, Baida has not established entitlement to the monies claimed.

3. Baida's efforts and cost of defense are not chargeable to DEQ. See 2. B. above.

4. This enforcement proceeding does not violate Article I Section 20 of the Oregon Constitution relating to privileges and

---

* ORS 468.695 empowers DEQ "to enter upon and inspect, at any reasonable time, any public or private property, premises or place for the purpose of investigating either an actual or suspected source of water pollution or air pollution or air contamination or to ascertain compliance or noncompliance with any rule or standard adopted or order or permit."

immunities. Baida has offered no evidence to support its claim that DEQ selectively enforced air pollution laws by citing Baida without citing others.

No counter claim or setoff is authorized. See 2. B. above.

5. Baida argued that because there are different requirements and restrictions on different categories of outdoor burning, enforcement in this case "is unconstitutional because it grants privileges and immunities to a select group of persons not equally available to others..." Amended Answer p. 3, lines 13-15. Article I Section 20 of the Oregon Constitution provides:

> "Equality of privileges and immunities of citizens. No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

Even if the present case involved disparate treatment of classes of burners, any detriment suffered by Baida would be weighed against the state's justification for the classification. See, e.g., Planned Parenthood Assn. v. Dept. of Human Res., 630 Or App 41, 58 (1983). The state's interest in restricting open burning is expressed in its policy of eliminating open burning disposal practices where alternative disposal methods are feasible and practicable. OAR 340-23-045. The exemption of, for example, fire fighting training from burning restrictions is also consistent with the state's duty to restore and maintain air quality in a manner consistent with the overall public welfare of the state. See, ORS 468.280(1). The restriction on Baida's action is limited and

reasonable. Baida was not regulated under a constitutionally impermissible classification.

Also see 2. B. above.

6. Baida argued that the Oregon Constitution guarantees it a jury trial. In fact, under the Oregon Constitution, Article 1 Section 17, the right to a jury trial applies only in classes of cases in which the right was customary at the time the Oregon Constitution was adopted, or in cases of a similar nature. See, Accident Prev. Div. v N. Amer. Cont. 22 Or App 614, 616-617 (1975). Administrative proceedings such as the present one did not exist at the time of the adoption of the Oregon Constitution. Consequently, parties to administrative proceedings do not have a constitutional right to a jury trial.

Also see 2. B. above.

7. Baida argued that it is being deprived of its "constitutional rights relative to right of accused in criminal prosecutions, more specifically, the rights of respondents' case being submitted to a Grand Jury, that mens rea be an element, that the state carry the burden of proof beyond a reasonable doubt, the state carry the sole burden of proof, in violation of Article 1, Section 2 of the Oregon Constitution..." Amended Answer, p. 4, lines 1-8.

ORS 468.035(j) directs this agency to ". . . seek enforcement of the air and water pollution laws of the state." ORS Chapter 183 provides an administrative appeal process in which a regulated party may challenge the exercise of the agency's

6d

enforcement authority. ORS 468.135. This process may itself be tested judicially. ORS 183.482. The penalty in this case was issued pursuant to these statutes. Baida has not identified any authority for viewing this agency action as a criminal prosecution invoking grand jury, mens rea or "reasonable doubt" considerations. See discussion in 2. A. above. It is an administrative proceeding, and the burden of presenting evidence is specifically allocated. ORS 183.450(2).

Also see 2. B. above.

8. Baida argued that it is "being deprived of the constitutional protection of separate of powers (sic) required by Article III, Section 1 of the Oregon Constitution in that the agency charged with enforcement of the applicable laws is also the agency adjudicating respondents (sic) case..." Amended Answer, p. 4, lines 12-17.

The system of administrative action and review in which DEQ is authorized to initiate enforcement action and the EQC is authorized to review DEQ action is legislatively mandated. See ORS 468.010, 468.030 and 468.035(1)(J).

Statutory provisions authorizing state agencies to impose penalties for violations of environmental pollution control statutes do not violate the doctrine of separation of powers if the agency actions are subject to judicial review. Mazama Timber Products, Inc. v Lane Regional Air Pollution Authority, 17 Or App 288 (1973). The action in this case is subject to judicial review pursuant to ORS 183.482.

9. Baida has argued as follows:

> The statutes and regulations pursuant to which respondents are being penalized are malum prohibitum statutes and regulations. The government did not make the law, regulation, or both, pursuant to which respondents are being penalized, reasonably available, thereby resulting in respondents ignorance of their duties relative thereto, which has caused injury and damage to respondents in the amount of $5,000. Amended Answer, p. 4, lines 22-26.

Agency rules are promulgated according to practices outlined in ORS 183.325 et seq. and regulations promulgated pursuant to this law. Baida has not offered evidence or argument of any failure in agency execution of its notice responsibilities.

Also, see 2. B. above.

10. Baida contended it was not aware that there was any prohibited material in the pile.

That Baida was unaware of the presence of prohibited materials in the pile is not a defense to this proceeding in that the regulation does not require intent; it imposes liability without regard to fault.

Also see 2. B. above.

11. Baida argued:

> Respondents (sic) conduct was within customary license; was too trivial to warrant the condemnation of conviction and penalty; and did not cause the harm or evil the legislature envisaged or sought to prevent enacting the statute. Amended Answer, p. 5, lines 11-14.

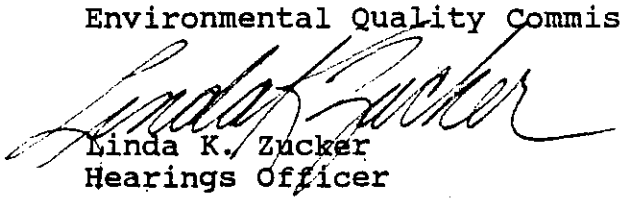
Even assuming a legal basis for Baida's arguments, this defense

fails because Baida has not provided evidence to identify agency custom or the effects of this violation.

DEQ used the formula listed in OAR 340-12-045 to determine the penalty amount: Penalty = BP + [(.1 x BP) (P + H + E + O + R + C)]. "BP" is the base penalty which is $1,000 for a Class I minor magnitude violation. "P" is prior violations. "H" is past history in taking all feasible steps or procedures necessary to correct any prior violations. "E" is the economic and financial condition. "O" is whether the violation was a single occurrence or was repeated or continuous during the period of the violation. "R: is the cause of the violation. "C" is cooperativeness. Values of zero were assigned to P, H, O and C. A value of 2 was assigned to E. This resulted in an assessed penalty of $1,200. Baida established cooperativeness and its value is changed to -2. While Baida provided some evidence of cash flow, it did not provide sufficient evidence to permit a conclusion as to its economic and financial condition. DEQ did prove that Baida obtained a minor economic benefit. That proof permits DEQ to enhance the penalty.

Dated this 16th day of August, 1991.

Environmental Quality Commission



Linda K. Zucker
Hearings Officer

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FRED BAIDA AND SUSAN BAIDA, dba/CAVEMAN AUTO WRECKERS Respondent.	)	AMENDED FINAL ORDER AND JUDGMENT NO. AQOB SWR 90 09

The Environmental Quality Commission, through its hearings officer, orders that Respondent, Fred and Susan Baida, are liable to the State of Oregon in the sum of $1,000 and that the State have judgment for and recover the amount pursuant to a civil penalty assessment dated February 26, 1990. Review of this order is by appeal to the Environmental Quality Commission pursuant to OAR 340-11-132. A request for review must be filed within 30 days of the date of this order.

Dated this 16th day of August, 1991.

ENVIRONMENTAL QUALITY COMMISSION

Linda K. Zucker
Hearings Officer

NOTICE: If you disagree with this Order you may request review by the Environmental Quality Commission. Your request must be in writing directed to the Environmental Quality Commission, 811 S.W. Sixth Avenue, Portland, Oregon 97204. The request must be <u>received</u> by the Environmental Quality Commission within 30 days of the

date of mailing or personal service of Order. If you do not file a request for review within the time allowed, this order will become final and thereafter shall not be subject to review by any agency or court.

A full statement of what you must do to appeal a hearings officer's order is in Oregon Administrative Rule (OAR) 340-11-132. That rule is enclosed.

Attachment 1.

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FRED BAIDA AND SUSAN BAIDA, DBA/CAVEMAN AUTO WRECKERS, Respondent.	HEARING OFFICER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW NO. AQOB-SWR-90-09 JOSEPHINE COUNTY

BACKGROUND

On February 26, 1990, DEQ notified Fred Baida and Susan Baida (Baida) that they were liable for a $1,200 civil penalty for violating OAR 340-23-042(2) when Baida "burned automobile parts, and at least one car tire and seat . . ." DEQ's penalty assessment assumed the violation was a Class I minor magnitude violation. The penalty was enhanced to account for assumed savings from avoiding landfill disposal costs. The penalty calculation did not assume that Baida was cooperative in correcting the violation.

Baida appealed the penalty, asserting there were mitigating factors not considered by DEQ. These were that Baida believed it was burning only vines and brush and on seeing black smoke acted promptly to extinguish the fire; that Baida had not burned before and was unaware of burning permit requirements or prohibitions and should have been informed of them by DEQ; and that the penalty assessed would impose a major hardship to the operation of its business. Later, represented by counsel, Baida filed a formal response denying the violation and the burning of auto parts and denying the remainder of the complaint for insufficient information

on which to form a belief. This response raised 11 affirmative defenses, some accompanied by "counterclaims" and seeking "setoff." These are identified in the discussion (Opinion) below. DEQ filed a memorandum providing its view of the issues presented.

During the informal review process, DEQ assigned a neutral value to the economic factor and credited Baida for cooperativeness. The parties agreed to submit the case on a written record.

DEQ was represented by Arnold Silver, Assistant Attorney General. Baida was represented by Michael Henderson, its attorney.

ISSUES

Whether Baida open burned automobile parts and, if so, whether Baida is, nonetheless, excused for 11 reasons addressed below.

FINDINGS OF FACT

Fred Baida and Susan Baida operate a wrecking yard in Grants Pass, Oregon.

Baida had recently cleared and piled blackberries and brush. The pile contained a tire and a car seat. Baida did not know that there was a tire or a car seat in the pile. Baida did not know of any burning permit requirements.

On November 27, 1989, Baida ignited the pile. When it burned, it produced black smoke. As soon as Baida observed black smoke, Baida acted to extinguish the fire.

A pile of brush containing a tire and a car seat would not normally burn five days.

OFFICIAL NOTICE

The contents of the burn pile were not of a kind or quantity

which would normally burn more than five days.

ORS 468.125 provides in relevant part as follows:

> **Notice of violation.** (1) No civil penalty prescribed under ORS 468.140 shall be imposed until the person incurring the penalty has received five days' advance notice in writing from the department or the regional air quality control authority, specifying the violation and stating that a penalty will be imposed if a violation continues or occurs after the five-day period, or unless the person incurring the penalty shall otherwise have received actual notice of the violation not less than five days prior to the violation for which a penalty is imposed.
>
> (2) No advance notice shall be required under subsection (1) of this section if: . . .
>
> (b) The water pollution, air pollution or air contamination source would normally not be in existence for five days, including but not limited to open burning.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction.

2. On November 27, 1989, Baida violated OAR 340-23-042 by burning a tire and a car seat, prohibited materials, and is liable for a civil penalty.

3. According to the penalty matrix established in OAR 340-12-042 et seq., the appropriate penalty is $800.

OPINION

The following responds to the "affirmative defenses" raised by Baida:

1. ORS 468.090 does not require "conference, conciliation, and persuasion" prior to penalty assessment for transitory pollution sources.

ORS 468.090 directs DEQ to investigate violations and to

attempt to use conference, conciliation and persuasion to eliminate the source of existing violations. It directs DEQ to use enforcement proceedings in case of failure to remedy the violation. Consistent with this emphasis on securing cooperation in remedying violations, ORS 468.125(1) provides that, in general a person incurring a penalty is given five days' advance notice that a penalty will be imposed if a violation continues or occurs after the five-day period. However, under ORS 468.125(2)(b), where the source of the violation would normally not be in existence for five days, no advance notice of intent to assess a civil penalty is required.

The effect of this system is that in dealing with continuing or on-going violations, DEQ must seek to remedy the violation and generally must provide advance notice of intent to impose a penalty. However, where the violation source would not normally be in existence five days, DEQ may proceed directly to impose a penalty. In this case, the pollution source normally would not have been, and was not, in existence five days. An immediate penalty was authorized.*

2. No search warrant was required. Baida did not prove trespass and is not entitled to damages against DEQ by counterclaim or setoff.

ORS 468.095 authorizes DEQ to enter upon and inspect private

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* DEQ argues (in effect) that ORS 468.125(2)(b) contains a presumption that open burning would normally not be in existence five days. The case facts do not require resolution of that argument.

property to investigate a source of pollution or ascertain compliance or noncompliance with DEQ's regulations. However, this case record does not contain any proof of entry (or unauthorized entry) by DEQ. It does not contain any evidence relating to trespass.

Moreover, Baida has not cited any authority to support a counterclaim or setoff of $5,000, or any amount, and none is apparent pursuant to this defense or other defenses raised in this proceeding. No counterclaim or setoff is authorized.

3. Baida's efforts and costs of defense are not chargeable to DEQ.

See 2 above.

4. Baida has not established selective enforcement based on systematic or intentional discrimination.

Baida has not provided any information or authority to establish a finding of selective enforcement. Moreover, Baida has not shown systematic or intentional discrimination as would be required to support a constitutionally based objection. See United States v. Nixon, 418 US 683, 693 (1974).

5. Baida has not shown a violation of the privileges and immunities clause of the Oregon Constitution.

Baida has asserted a violation of the Oregon Constitution, Article I, Section 20, but has not specified the nature of the violation. No violation is discerned.

6. Baida is not entitled to a jury trial.

ORS 183.413 et seq. establish the procedures for review of an

agency enforcement action. The procedure is initially administrative, not judicial. Further, the Oregon Constitution does not provide for trial by jury in administrative proceedings which were unknown at the time it was adopted. Cornelison v. Seabold, 254 Or 401, 405 (1969).

7. Baida is not entitled to the constitutional protections afforded criminal defendants.

ORS 468.035(j) directs this agency to ". . . seek enforcement of the air and water pollution laws of the state." ORS Chapter 183 provides an administrative appeal process in which a regulated party may challenge the exercise of the agency's enforcement authority. ORS 468.135. This process may itself be tested judicially. ORS 183.482. The penalty in this case was issued pursuant to these statutes. Baida has not identified any authority for viewing this agency action as a criminal prosecution invoking grand jury, mens rea or "reasonable doubt" considerations. It is an administrative proceeding, and the burden of presenting evidence is specifically allocated in ORS 183.450(2).

8. DEQ is authorized to initiate enforcement action and the EQC is authorized to review DEQ action.

Baida is not deprived of a constitutional protection of "separate powers" as a result of the agency being required both to enforce the laws and to adjudicate in a particular case. This system of action and review is legislatively mandated. See ORS 468.010, 468.030 and 468.035(1)(j).

Statutory provisions authorizing state agencies to impose

penalties for violations of environmental pollution control statutes do not violate the doctrine of separation of powers if the agency actions are subject to judicial review. Mazama Timber Products, Inc. v Lane Regional Air Pollution Authority, 17 Or App 288 (1973). The action in this case is subject to judicial review pursuant to ORS 183.482.

9. Baida has not shown that the agency failed to provide legally adequate notice of potential liability for the violation of the regulations charged in this case.

Agency rules are promulgated according to practices outlined in ORS 183.325 et seq. and regulations promulgated pursuant to this law. Baida has not offered evidence or argument of any failure in agency execution of its notice responsibilities.

10. OAR 340-23-042(2) imposes liability without fault.

That Baida was unaware of the presence of prohibited materials in the pile is not a defense to this proceeding in that the regulation does not require intent; it imposes liability without regard to fault.

11. The action taken was within the agency's authority.

Baida argued:

> Respondents (sic) conduct was within customary license; was too trivial to warrant the condemnation of conviction and penalty; and did not cause the harm or evil the legislature envisaged or sought to prevent enacting the statute.

Even assuming a legal basis for Baida's arguments, this defense

fails because Baida has not provided evidence to identify agency custom or the effects of this violation.

Dated this 10th day of January, 1991.

Environmental Quality Commission

Linda K. Zucker
Hearings Officer

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FRED BAIDA AND SUSAN BAIDA, DBA, CAVEMAN AUTO WRECKERS, Respondents.	ORDER AND JUDGMENT CASE NO. AQOB-SWR-90-09

The Environmental Quality Commission, through its hearing officer, orders that Fred Baida and Susan Baida are liable to the State of Oregon in the sum of $800 and that the State have judgment for that amount pursuant to a civil penalty assessment on February 26, 1990.

Review of this order is by appeal by the Environmental Quality Commission pursuant to OAR 340-11-132. A request for review must be filed within 30 days of the date of this order.

Dated this 10th day of January 1991.

ENVIRONMENTAL QUALITY COMMISSION

Linda K. Zucker
Hearings Officer

NOTICE: If you disagree with this Order you may request review by the Environmental Quality Commission. Your request must be in writing directed to the Environmental Quality Commission, 811 S.W. Sixth Avenue, Portland, Oregon 97204. The request must

be <u>received</u> by the Environmental Quality Commission within 30 days of the date of mailing or personal service of Order. If you do not file a request for review within the time allowed, this order will become final and thereafter shall not be subject to review by any agency or court.

A full statement of what you must do to appeal a hearings officer's order is in Oregon Administrative Rule (OAR) 340-11-132. That rule is enclosed.

DAVE FROHNMAYER
ATTORNEY GENERAL

JACK L. LANDAU
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

PORTLAND OFFICE
1515 SW 5th Avenue
Suite 410
Portland, Oregon 97201
Telephone: (503) 229-5725
FAX: (503) 229-5120

August 5, 1991

Linda Zucker
Hearings Officer
Environmental Quality Commission
811 SW Sixth Avenue
Portland, OR 97204

Re: DEQ v. Baida

Dear Ms. Zucker:

This letter is in reply to your recent inquiry. The Department is neutral on the issue of cooperativeness.

Sincerely,

Arnold B. Silver
Assistant Attorney General

ABS:dld 0267N
cc: Larry Cwik, DEQ
Michael Henderson

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

July 30, 1991

Arnold Silver
Assistant Attorney General
1515 SW 5th Avenue, Suite 410
Portland, OR 97201

Re: DEQ v Baida
Case No. AQOB-SWR-90-81

Kenan C. Smith Jr.'s affidavit addresses economic gain. Please confirm whether it is DEQ's intention to assert economic gain and be neutral on cooperativeness as alleged in its notice.

Sincerely,

Linda K. Zucker
Hearings Officer

LKZ:y
HZ101791
cc: Michael Henderson, P.C., Attorney at Law
Enforcement Section, DEQ

811 SW Sixth Avenue
Portland, OR 97204-139(
(503) 229-5696

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, vs. FRED BAIDA AND SUSAN BAIDA, DBA, CAVEMAN AUTO WRECKERS,, Respondents.	No. AQOB-SWR-90-09 AFFIDAVIT

STATE OF OREGON, County of Deschutes) ss.

I, the undersigned, being first duly sworn, depose and say that:

I am one of the respondents in the above entitle matter.

The department of Environmental Quality did not first engage in conference, conciliation, persuasion, or all three with myself, my wife, or both prior to citing us. Therefore, there was not a failure of achieving positive results therefrom. My wife and I both desire to be cooperative with the Department of Environmental Quality to the mutual goal of preventing pollution in the Rogue Valley. Certainly, a conference with my wife or myself would have resulted in our complete cooperation.

When the incident that occurred that prompted the Department of Environmental Quality to investigate, the officer of the department sped by the office at a speed that was unsafe for driving in the wrecking yard. He did not stop to ask permission to enter onto our property, nor did he present a search warrant. There were not any circumstances that would

84 7/3/91

otherwise privilege the Department's officer to ignore obtaining either our consent to come upon our property, or a search warrant. There was not any reason to think that any evidence would be destroyed, any responsible person would escape, or there would be any impediment to the department investigating or resolving any issues concerning the incident. Whatever there existed as probable cause for the department to investigate would have been sufficient basis for the department to obtain a search warrant. Respondents are entitled to the constitutional protection that there not be a search without first a magistrate review the facts and pass upon whether or not there is probable cause to issue a warrant or at the very least there be exigent circumstances that obviate the necessity of a warrant. Just because the penalty imposed is a financial one does not mean that the relationship between respondents and the state is not governed by Article I, section 9 of the Oregon Constitution which does not limit the prohibition against searches to only criminal prosecutions. Likewise, where the state is seeking to impose a penalty, that is sufficiently a criminal proceeding to be treated as one.

The laws under which respondents are being prosecuted are not applied to farmers when they burn their fields, tree harvesters when they burn slash, and the federal and state governments when they burn slash.

We, the respondents, are being deprived of equal protection of the laws in that if a person is burning for a period of time one set of rules applies to that person, whereby

the department must first have failed to persuade the person not to burn through a conference or some type of conciliation; and we have been prosecuted without that type of procedure even though our alleged violation would be considerably smaller and of much less impact on the air quality.

The Department of Environmental Quality has imposed the sanction without there being a jury trial. Article I, section 17 provides that, "In all civil cases the right of Trial by Jury shall remain inviolate.--" To reach into the purse of my wife and myself to penalize us is either a criminal proceeding or a civil proceeding, both of which we claim our right to have a jury trial.

My wife and I are being prosecuted without our case being submitted to the grand jury, without the state caring the sole burden of proof beyond a reasonable doubt; and we must respond not in damages but in penalties.

Neither myself nor my wife had any knowledge that to have burned on the particular day in question would have violated any law; nor did either one of us have any knowledge that what has been alleged to have been burned on the day in question was present and likely to be burned.

Dated: July 3, 1991.

Fred Baida

Fred Baida

Subscribed and sworn to before me on the above date.

Nancy R. Gray

Notary Public for Oregon
My Commission Expires: _____

OFFICIAL SEAL
NANCY R. GRAY
NOTARY PUBLIC - OREGON
COMMISSION NO. 001773
MY COMMISSION EXPIRES SEPT. 23, 1994

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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY, Department, v. FRED BAIDA and SUSAN BAIDA dba CAVEMAN AUTO WRECKERS, Respondents.	)	AFFIDAVIT OF KENAN C. SMITH, JR.

STATE OF OREGON)
) ss.
County of Multnomah)

I, Kenan C. Smith, Jr., being first duly sworn on oath depose and say:

1. I am employed by the Department of Environmental Quality as a field representative for the southwest region of the Department headquartered in Medford, Oregon. On or about November 27, 1989 my office received an air pollution complaint that Caveman Auto Wreckers (Caveman) in Grants Pass was engaged in open burning of material from which thick black smoke was being emitted.

2. I immediately visited the Caveman site at 440 Agness Avenue in Grants Pass. I observed two Grants Pass fire trucks in the wrecking yard.

3. My investigation consisted of inspecting the burn site, interviewing Caveman employees, interviewing Fred Baida, owner of Caveman, interviewing fire department personnel and taking pictures of the burn site.

4. My inspection and investigation disclose a pile of material had been burned by Caveman employees at the instruction of Mr. Baida. This material consisted of commercial waste and debris and various automobile parts, including at least one automobile tire and seat. The tire is a rubber product and the seat polyurethane material, a form of plastic. This material normally emits dense smoke when burned and did emit such dense smoke on November 27, 1989.

5. Caveman realized a minor economic gain by not disposing of the material burned on site at an authorized landfill.

I estimate that 29 cubic yards of waste (the pile was 20 feet in diameter by 2.5 feet high) was burned. It costs about $7.50 per cubic yard for waste disposal in the Grants Pass area plus $7.50 for one car seat and $2.50 for one car tire.

Kenan C. Smith, Jr.

SUBSCRIBED AND SWORN to before me on the 28 day of May, 1991.

Notary Public for Oregon
My commission expires 12/27/91

MICHAEL HENDERSON, P.C.

ATTORNEY AT LAW
160 N.W. IRVING, SUITE 204
IRVING PROFESSIONAL BUILDING
BEND, OREGON 97701
TELEPHONE: (503) 382-2925

4/5/91 LKZ

April 2, 1991

Linda K. Zucker
Hearings Officer
811 SW Sixth Ave.
Portland, OR 97204-5696

Re: DEQ v Baida

Dear Ms. Zucker:

I view the items specified as evidence and at a hearing the Baidas would show that there was and is haphazard selection, discrimination or both, individual discrimination, and perhaps, improper motive whatever that might be.

Sincerely,

Michael Henderson

Michael Henderson

MDH/jat

copy to Dave 4/5

Oregon

ENVIRONMENTAL QUALITY COMMISSION

February 22, 1991

Michael Henderson
Attorney at Law
160 NW Irving, Suite 203
Bend, OR 97701

Re: DEQ v Fred Baida and Susan Baida, dba Caveman Auto Wreckers
Case No. AQOB-SWR-90-09

I have reviewed the February 8, 1991 amendments to the answer in this case.

I am prepared to decide each affirmative defense as a matter of law with exception of the fourth. I need to know more about the nature of the claim of selective enforcement. The amendment reveals only the view that Baida was cited while other offenders were not. I would like to know whether that circumstance is the whole of Baida's challenge or whether there is, in addition, allegation and evidence of haphazard selection, improper motive, individual or class discrimination or similar circumstance. In the absence of additional circumstance, I am also prepared to decide this defense as a matter of law.

Thank you for this further help in defining the issues.

Sincerely,

Linda K. Zucker
Hearings Officer

LKZ:z
HZ101231
cc: Arnold B. Silver, Assistant Attorney General
Enforcement Section, DEQ
Air Quality Division, DEQ
Southwest Region, DEQ

811 SW Sixth Avenue
Portland, OR 97204
(503) 229-5696

MICHAEL HENDERSON, P.C.
ATTORNEY AT LAW
160 N.W. IRVING, SUITE 204
IRVING PROFESSIONAL BUILDING
BEND, OREGON 97701
TELEPHONE: (503) 382-2925

February 13, 1990

Linda Zucker
811 SW Sixth Avenue
Portland, Or 97204

Re: DEQ v. Baida

Dear Ms Zucker;

I most emphatically believe it was and is necessary for you to withdraw your order. I anticipate that the amended order that you shall subsequently enter shall still dispense with all but the four amended affirmative defenses and counterclaims, as legally insufficient. Once you consider the four amended affirmative defenses and counterclaims you might well dispose of one or more of them in same manner. If you find that one or more of the amended affirmative defenses and counterclaims has legal merit, then I anticipate putting on evidence in support of them.

If you find that any of the amended affirmative defenses and counterclaims has merit then the order dismissing all the other affirmative defenses and counterclaims shall be an interim order which is not appealable until the final order has been enter after the hearing to collect the evidence. If all of the amended affirmative defenses and counterclaims are dismissed because they do not state, in your opinion, neither a defense nor a counterclaims, then your order declaring so shall be the final order which the Baidas may appeal if they decide to do so.

If the foregoing is not the status and procedure that you believe we have agree to, then please notify me immediately. Thank you for your past and anticipated courtesies and cooperation.

Very truly yours,

Michael Henderson

Michael Henderson

DAVE FROHNMAYER
ATTORNEY GENERAL

JACK L. LANDAU
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

PORTLAND OFFICE
1515 SW 5th Avenue
Suite 410
Portland, Oregon 97201
Telephone: (503) 229-5725
FAX: (503) 229-5120

February 11, 1991

Linda Zucker
Hearing Officer
Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204

Re: Baida v. DEQ

Dear Ms. Zucker:

Your letter of February 7, 1991 should be clarified, at least from my perspective.

In my opinion, and I believe Mr. Henderson's, I do not think it necessary for you to withdraw your January 10, 1991 Order. I believe you could have entered an amended order finding the affirmative defenses insufficient as a matter of law (failure to state a defense). I also think Mr. Henderson concurs.

Rather than entering an amended Order, as outlined above, you chose to withdraw this Order and enter a new order. While I believe you have the authority to do so, I do not agree to such withdrawal.

Finally, I also am of the opinion that "reconsideration" of a decision is not based upon additional information subsequent to entry of the decision. Reconsideration is based upon the existing record upon claimed error therein.

Sincerely,

Arnold B. Silver
Assistant Attorney General

ABS:dld 5861H
cc: Michael Henderson, Esq.
Larry Cwik, DEQ

MICHAEL HENDERSON
160 N.W. IRVING, SUITE 203
BEND, OREGON 97701
(503) 382-2925
FAX (503) 382-0961

TO: [redacted] (229-6124)

FROM: Michael Henderson

RE: DEQ vs. Baida

DATE: February 8, 1991

Transmitted herewith are a total of three pages including this page. If the total number of pages are not received or the documents are not legible please notify me by telephoning or writing to me at the above telephone numbers or address.

I am also transmitting a facsimile to Arnold Silver at 229-5120.

The amendments to the answer is only of the specific affirmative defenses, counterclaims, and setoffs. I have retained the same paragraph number for convenience in referring to the original. If you have questions please notify me at once.

The citation for Brown vs. Multnomah County is 280 Or 95. The primary ingredient which determines whether a proceeding is civil or criminal is whether it is meant to impose a penalty or punishment, which would make this proceeding criminal in nature.

Very truly yours,

Michael Henderson

Michael Henderson

For a fourth affirmative defense, counterclaim, and setoff, respondents allege that:

7.

The department selectively enforces the air pollution laws, by citing respondents only, when other persons, both business (industrial and commercial) and private, were burning the same day, which burning was visible by the plume of smoke in the air, thereby creating a select class of entities granted privileges not accorded to others, specifically respondents in this case, in violation of Article I, section 20, of the Oregon Constitution, all to responderts injury and damage in the amount of $5,000.

For a fifth affirmative defense, counterclaim, and setoff, respondents allege that:

8.

Exempted from coverage of the laws by which the state is prosecuting respondents are agricultural operations, barbecue, agricultural land clearing operations or land grading, heating equipment, 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 instruction of employees in the methods of fire fighting, fires set pursuant to permit for the purpose of instruction of employees of private industrial concerns in methods of fire fighting, or for civil defense instruction, or fires set relative to the propagation and raising of nursery stock, and slash burning. The exemptions of the foregoing others from the laws use to prosecute respondents is unconstitutional because it grants privileges and immunities to a select group of persons not equally available to others, and

specifically respondents, all in violation of Article I, section 20 of the Oregon Constitution; all to respondents injury and damage in the amount of $5,000.

For a ninth affirmative defense, counterclaim, and setoff, respondents allege that:

12.

The statutes and regulations pursuant to which respondents are being penalized are malum prohibitum statutes and regulations. The government did not make the law, regulations, or both, reasonably available so that respondents would have personal knowledge of their duties with respect thereto, which has cause injury and damage to respondents in the amount of $5,000.

For an eleventh affirmative defense, counterclaim, and setoff, respondents allege that:

14.

Respondents conduct was within customary license; was too deminimis to warrant the condemnation of penalty; and did not cause the harm or evil the legislature envisaged or sought to prevent in enacting the statute.

file

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

February 7, 1991

CERTIFIED MAIL - P 178 451 744

Michael Henderson
Attorney at Law
160 NW Irving, Suite 203
Bend, OR 97701

Arnold B. Silver
Assistant Attorney General
1515 SW 5th Avenue, Suite 410
Portland, OR 97201

Re: DEQ v Fred Baida and Susan Baida,
dba Caveman Auto Wreckers
Case No. AQOB-SWR-90-09

It seems prudent for me to record an additional agreement we came to in our February 4, 1991 telephone conference.

Rather than proceed to EQC review, Mr. Henderson preferred to have me reconsider my order. We discussed our wish to preserve a right of appeal. We each believe that my withdrawal of the January 10, 1991 order prior to expiration of 30 days was effective to enable me to reconsider my decision, aided by additional information and, if appropriate, issue a new order providing a new 30-day appeal period.

Whatever the actual legal effect of this process, please advise me immediately if the above fails to reflect your understanding.

Sincerely,

Linda K. Zucker
Hearings Officer

LKZ:z
HZ101212

811 SW Sixth Ave
Portland, OR 97204-1390
(503) 229-5696

96

DEQ-46

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

February 4, 1991

CERTIFIED MAIL - P 178 451 742

Michael Henderson
Attorney at Law
160 NW Irving, Suite 203
Bend, OR 97701

Arnold B. Silver
Assistant Attorney General
1515 SW 5th Avenue, Suite 410
Portland, OR 97201

Re: DEQ v Fred Baida and Susan Baida, dba Caveman Auto Wreckers
Case No. AQOB-SWR-90-09

On January 10, 1991 I issued an Order and Judgment in this case in the belief that the parties had agreed that I would decide the case on a limited record which included all information the parties wished to submit. Subsequently, Michael Henderson has advised that he believed I had "ruled" on the affirmative defenses in an earlier telephone conference.

To assure the clarity and completeness of the record I am hereby withdrawing my January 10, 1991 Order. By Friday, February 8, 1991, Michael Henderson will file a supplement to his Amended Answer. The supplement will restate his fourth, fifth, ninth and eleventh affirmative defenses. He also will provide a citation to his authority for the view that this agency's practices are sufficiently like criminal practice to give rise to constitutional protections afforded criminal defendants. After review of the information, we will discuss whether the matter is ready for decision.

Sincerely,

Linda K. Zucker
Hearings Officer

LKZ:z
HZ101209
cc: Enforcement Section, DEQ
Air Quality Division, DEQ
Southwest Region, DEQ

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FRED BAIDA AND SUSAN BAIDA, DBA/CAVEMAN AUTO WRECKERS, Respondent.	HEARING OFFICER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW NO. AQOB-SWR-90-09 JOSEPHINE COUNTY

BACKGROUND

On February 26, 1990, DEQ notified Fred Baida and Susan Baida (Baida) that they were liable for a $1,200 civil penalty for violating OAR 340-23-042(2) when Baida "burned automobile parts, and at least one car tire and seat . . ." DEQ's penalty assessment assumed the violation was a Class I minor magnitude violation. The penalty was enhanced to account for assumed savings from avoiding landfill disposal costs. The penalty calculation did not assume that Baida was cooperative in correcting the violation.

Baida appealed the penalty, asserting there were mitigating factors not considered by DEQ. These were that Baida believed it was burning only vines and brush and on seeing black smoke acted promptly to extinguish the fire; that Baida had not burned before and was unaware of burning permit requirements or prohibitions and should have been informed of them by DEQ; and that the penalty assessed would impose a major hardship to the operation of its business. Later, represented by counsel, Baida filed a formal response denying the violation and the burning of auto parts and denying the remainder of the complaint for insufficient information

on which to form a belief. This response raised 11 affirmative defenses, some accompanied by "counterclaims" and seeking "setoff." These are identified in the discussion (Opinion) below. DEQ filed a memorandum providing its view of the issues presented.

During the informal review process, DEQ assigned a neutral value to the economic factor and credited Baida for cooperativeness. The parties agreed to submit the case on a written record.

DEQ was represented by Arnold Silver, Assistant Attorney General. Baida was represented by Michael Henderson, its attorney.

ISSUES

Whether Baida open burned automobile parts and, if so, whether Baida is, nonetheless, excused for 11 reasons addressed below.

FINDINGS OF FACT

Fred Baida and Susan Baida operate a wrecking yard in Grants Pass, Oregon.

Baida had recently cleared and piled blackberries and brush. The pile contained a tire and a car seat. Baida did not know that there was a tire or a car seat in the pile. Baida did not know of any burning permit requirements.

On November 27, 1989, Baida ignited the pile. When it burned, it produced black smoke. As soon as Baida observed black smoke, Baida acted to extinguish the fire.

A pile of brush containing a tire and a car seat would not normally burn five days.

OFFICIAL NOTICE

The contents of the burn pile were not of a kind or quantity

which would normally burn more than five days.

ORS 468.125 provides in relevant part as follows:

> **Notice of violation.** (1) No civil penalty prescribed under ORS 468.140 shall be imposed until the person incurring the penalty has received five days' advance notice in writing from the department or the regional air quality control authority, specifying the violation and stating that a penalty will be imposed if a violation continues or occurs after the five-day period, or unless the person incurring the penalty shall otherwise have received actual notice of the violation not less than five days prior to the violation for which a penalty is imposed.
>
> (2) No advance notice shall be required under subsection (1) of this section if: . . .
>
> (b) The water pollution, air pollution or air contamination source would normally not be in existence for five days, including but not limited to open burning.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction.

2. On November 27, 1989, Baida violated OAR 340-23-042 by burning a tire and a car seat, prohibited materials, and is liable for a civil penalty.

3. According to the penalty matrix established in OAR 340-12-042 et seq., the appropriate penalty is $800.

OPINION

The following responds to the "affirmative defenses" raised by Baida:

1. ORS 468.090 does not require "conference, conciliation, and persuasion" prior to penalty assessment for transitory pollution sources.

ORS 468.090 directs DEQ to investigate violations and to

10C

attempt to use conference, conciliation and persuasion to eliminate the source of existing violations. It directs DEQ to use enforcement proceedings in case of failure to remedy the violation. Consistent with this emphasis on securing cooperation in remedying violations, ORS 468.125(1) provides that, in general, a person incurring a penalty is given five days' advance notice that a penalty will be imposed if a violation continues or occurs after the five-day period. However, under ORS 468.125(2)(b), where the source of the violation would normally not be in existence for five days, no advance notice of intent to assess a civil penalty is required.

The effect of this system is that in dealing with continuing or on-going violations, DEQ must seek to remedy the violation and generally must provide advance notice of intent to impose a penalty. However, where the violation source would not normally be in existence five days, DEQ may proceed directly to impose a penalty. In this case, the pollution source normally would not have been, and was not, in existence five days. An immediate penalty was authorized.*

2. No search warrant was required. Baida did not prove trespass and is not entitled to damages against DEQ by counterclaim or setoff.

ORS 468.095 authorizes DEQ to enter upon and inspect private

---

* DEQ argues (in effect) that ORS 468.125(2)(b) contains a presumption that open burning would normally not be in existence five days. The case facts do not require resolution of that argument.

property to investigate a source of pollution or ascertain compliance or noncompliance with DEQ's regulations. However, this case record does not contain any proof of entry (or unauthorized entry) by DEQ. It does not contain any evidence relating to trespass.

Moreover, Baida has not cited any authority to support a counterclaim or setoff of $5,000, or any amount, and none is apparent pursuant to this defense or other defenses raised in this proceeding. No counterclaim or setoff is authorized.

3. Baida's efforts and costs of defense are not chargeable to DEQ.

See 2 above.

4. Baida has not established selective enforcement based on systematic or intentional discrimination.

Baida has not provided any information or authority to establish a finding of selective enforcement. Moreover, Baida has not shown systematic or intentional discrimination as would be required to support a constitutionally based objection. See United States v. Nixon, 418 US 683, 693 (1974).

5. Baida has not shown a violation of the privileges and immunities clause of the Oregon Constitution.

Baida has asserted a violation of the Oregon Constitution, Article I, Section 20, but has not specified the nature of the violation. No violation is discerned.

6. Baida is not entitled to a jury trial.

ORS 183.413 et seq. establish the procedures for review of an

agency enforcement action. The procedure is initially administrative, not judicial. Further, the Oregon Constitution does not provide for trial by jury in administrative proceedings which were unknown at the time it was adopted. Cornelison v. Seabold, 254 Or 401, 405 (1969).

7. Baida is not entitled to the constitutional protections afforded criminal defendants.

ORS 468.035(j) directs this agency to ". . . seek enforcement of the air and water pollution laws of the state." ORS Chapter 183 provides an administrative appeal process in which a regulated party may challenge the exercise of the agency's enforcement authority. ORS 468.135. This process may itself be tested judicially. ORS 183.482. The penalty in this case was issued pursuant to these statutes. Baida has not identified any authority for viewing this agency action as a criminal prosecution invoking grand jury, mens rea or "reasonable doubt" considerations. It is an administrative proceeding, and the burden of presenting evidence is specifically allocated in ORS 183.450(2).

8. DEQ is authorized to initiate enforcement action and the EQC is authorized to review DEQ action.

Baida is not deprived of a constitutional protection of "separate powers" as a result of the agency being required both to enforce the laws and to adjudicate in a particular case. This system of action and review is legislatively mandated. See ORS 468.010, 468.030 and 468.035(1)(j).

Statutory provisions authorizing state agencies to impose

penalties for violations of environmental pollution control statutes do not violate the doctrine of separation of powers if the agency actions are subject to judicial review. Mazama Timber Products, Inc. v Lane Regional Air Pollution Authority, 17 Or App 288 (1973). The action in this case is subject to judicial review pursuant to ORS 183.482.

9. Baida has not shown that the agency failed to provide legally adequate notice of potential liability for the violation of the regulations charged in this case.

Agency rules are promulgated according to practices outlined in ORS 183.325 et seq. and regulations promulgated pursuant to this law. Baida has not offered evidence or argument of any failure in agency execution of its notice responsibilities.

10. OAR 340-23-042(2) imposes liability without fault.

That Baida was unaware of the presence of prohibited materials in the pile is not a defense to this proceeding in that the regulation does not require intent; it imposes liability without regard to fault.

11. The action taken was within the agency's authority.

Baida argued:

> Respondents (sic) conduct was within customary license; was too trivial to warrant the condemnation of conviction and penalty; and did not cause the harm or evil the legislature envisaged or sought to prevent enacting the statute.

Even assuming a legal basis for Baida's arguments, this defense

fails because Baida has not provided evidence to identify agency custom or the effects of this violation.

Dated this 10th day of January, 1991.

Environmental Quality Commission

Linda K. Zucker
Hearings Officer

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FRED BAIDA AND SUSAN BAIDA, DBA, CAVEMAN AUTO WRECKERS, Respondents.	ORDER AND JUDGMENT CASE NO. AQOB-SWR-90-09

The Environmental Quality Commission, through its hearing officer, orders that Fred Baida and Susan Baida are liable to the State of Oregon in the sum of $800 and that the State have judgment for that amount pursuant to a civil penalty assessment on February 26, 1990.

Review of this order is by appeal by the Environmental Quality Commission pursuant to OAR 340-11-132. A request for review must be filed within 30 days of the date of this order.

Dated this 10th day of January 1991.

ENVIRONMENTAL QUALITY COMMISSION

Linda K. Zucker
Hearings Officer

NOTICE: If you disagree with this Order you may request review by the Environmental Quality Commission. Your request must be in writing directed to the Environmental Quality Commission, 811 S.W. Sixth Avenue, Portland, Oregon 97204. The request must

be received by the Environmental Quality Commission within 30 days of the date of mailing or personal service of Order. If you do not file a request for review within the time allowed, this order will become final and thereafter shall not be subject to review by any agency or court.

A full statement of what you must do to appeal a hearings officer's order is in Oregon Administrative Rule (OAR) 340-11-132. That rule is enclosed.

DAVE FROHNMAYER
ATTORNEY GENERAL

JAMES E. MOUNTAIN, JR.
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

PORTLAND OFFICE
1515 SW 5th Avenue
Suite 410
Portland, OR 97201
Telephone: (503) 229-5725
FAX: (503) 229-5120

November 1, 1990

Linda Zucker
Hearing Officer
Environmental Quality
Commission
811 S.W. 6th Avenue
Portland, OR 97204

Re: DEQ v. Baida, No. AQAB-SWR-90-09

Dear Ms. Zucker:

Mr. Henderson asked me to send you copies of the following documents:

1. Letter to the undersigned dated May 2, 1990;

2. Letter, Grants Pass Fire Chief to Mr. Henderson dated April 25, 1990;

3. Affidavit of Guy Funk, employee of Caveman Auto Wreckers; and

4. A one-page cash flow sheet (entries received blurred).

The foregoing has been evaluated by DEQ staff.

Sincerely,

Arnold B. Silver
Assistant Attorney General

ABS:aa
#3398
Enclosure
cc: Michael Henderson
Attorney at Law
160 N.W. Irving, Suite 204
Irving Professional Building
Bend, OR 97701

MICHAEL HENDERSON, P.C.
ATTORNEY AT LAW
160 N.W. IRVING, SUITE 204
IRVING PROFESSIONAL BUILDING
BEND, OREGON 97701
TELEPHONE: (503) 382-2925

MAY -1 1990

May 2, 1990

Arnold B. Silver, Esq.
1515 S.W. 5th Avenue, suite 410
Portland, Or 97201

Re: DEQ/Baida
No. AQAB-SWR-90-09

Dear Arnold,

Enclosed is a letter from the fire chief of Grants Pass explaining that he did not have evidence to say that there was or was not fire suppression efforts by Caveman Auto Wrecking; a monthly cash flow statement for Caveman Auto Wrecking showing that the business is currently in a negative position; and an affidavit by the employee of Caveman who was conducting the fire suppression efforts until the arrival of the fire department.

If there are any question please notify me immediately so a quick resolution of this matter may be obtained.

Best regards,

Mike

Michael Henderson

1200
E-O 200
C + 2 = 200

Copies sent to Gen. R. for settlement copies 5-8-90

Fred Baida
% Caveman Auto Wreckers
440 N.E. Agnes Av.
Grants Pass, Or 97526

1200
200
1000
2
700

400
400
800

APR 2 6 1990

April 25, 1990

MAY

Mr. Michael Henderson
160 NW Irving, Suite 203
Bend, Oregon 97701

Dear Mr. Henderson:

Re: Alarm 1750-89

Regarding your phone call of yesterday concerning the fire incident at Caveman Auto Wreckers on November 27, 1989, I hope the following information is sufficient.

You ask whether I can confirm or contradict the assertion that employees of Caveman Auto Wreckers were engaged in any fire suppression activities upon arrival of fire units. The answer is no.

Upon my arrival at the scene, I recall no evidence of fire suppression activities. It is possible that some form of suppression activity was being conducted prior to my arrival with the fire engines. It is possible that this suppression activity was abandoned as we arrived.

Sincerely,

GRANTS PASS PUBLIC SAFETY

Ray Elliott
Captain

cc: George Holmbeck, FPO

City of
Grants
Pass
101 Northwest A Street
Grants Pass, Oregon 97526
503-474-6360

STATE OF OREGON, County of Josephine) ss.

I, the undersigned, being first duly sworn, depose and say that:

My name is Stephen Guy Funk. I am an employee of Caveman Auto Wreckers.

I was involved in the activities relating to the fire for which DEQ has levied a fine against Fred Baida, owner of Caveman Auto Wreckers.

At the time of the fire my duties were that of working in the yard where the fire occurred. As soon as the black smoke began Mr. Baida ordered me to put the fire out because he did not want to burn whatever was causing the black smoke. Later we discovered that the black smoke was cause by a tire and an old car seat that we did not know was in the blackberry brambles that was being burned. The orders to put the fire out were given over the loud speaker and through the"squawk-boxes". I used 5 gallon buckets which I carried on the "yard-car" to carry water to the fire to throw on the flames. I threw about 300 gallons of water on the fire before the fire department arrived. When the fire department was arriving I quit my efforts to put the fire out. I remained at the scene assisting by directing traffic. My "yard-car" with the buckets on it remained in the vicinity of the fire. However, I do not know whether any one saw the buckets or understood their purpose if they did see them.

I am willing to answer questions regarding further details of the event.

Dated: 5-1-90

Stephen Guy Funk

Subscribed and sworn to before me on the above date.

Notary Public for Oregon
My Commission Expires: 5/17/92

Dean Summerfield
NOTARY PUBLIC
5/17/92

	DATE	CHECK ISSUED TO				CHECK NUMBER		AMOU
		BALANCE FORWARD →						
1	~~4/18/90~~	~~Larry Andrews~~	~~13~~		VOID	~~6750~~		~~11~~
2	4/18/90	Family Bank	5			6751		
3	4/18/90	Dept of Rev	5			6752		11
4	4/18/90	Northwest Water Co	1			6753		3
5	4/18/90	[illegible]	13			6754		3
6	4/18/90	[illegible]	4			6755		314
7	4/18/90	GPHS	14 DON			6756		20
8	4/18/90	E&R Auto [illegible]	1			6757		
9	4/18/90	Fairport Auto Parts	1			6758		5
10	4/18/91	[illegible]				6759		5
11	4/19	Mitchells Transmission	2 [illegible]			6760		8
12	4/20	Transfer [illegible] # 01-09172-4	20% [illegible] - 22			6761		76
13	4/21	[illegible]				6762		50
14	4/24/90	[illegible]	= 1 [illegible]			6763		5
15	4/24/90	[illegible] 01-09273	[illegible]			6764		20
16	4/26/90	Safeway	12			6765		
17	4/26/90	[illegible]	21			6766		
18	4/30/90	[illegible]	[illegible] / tax			6767		20
19	4/30/90	[illegible]	20			6768		5
20	4/30/90	[illegible]	4 [illegible]			6769		3
21	4/30/90	[illegible]	4 [illegible]			6770		58
22	4/30/90	[illegible]	4 [illegible]			6771		4
23	4/30/90	[illegible]	2 [illegible]			6772		2
24	4/30/90	Transfer to [illegible] 72-4	20%	[illegible] 22		6773		148
25	4/30/90	[illegible]	[illegible]	17	#23	6774		34
26								
27								
28								
29								
		TOTAL(S) THIS PAGE						5 1
		TOTAL(S) TO DATE						460

RM NO. JD-11-35C

112

AMOUNT		BANK BALANCE	
		166 29	BAL FWD ←
		802 29	1
7(	74	39 55	2
114	00	889 55	
		775 55	3
3	50	738 05	4
2	00	706 05	5
45	62	560 43	6
200	00	360 43	7
	00	350 43	8
50	00	300 43	9
	00	1641 20	
		1111 20	10
83	27	102793	11
68	00	259 23	12
500	00		13
			14
200	00		15
1	00		16
217	00		17
200	00		18
50	00		19
24	50		20
180	00		21
40	00		22
50	00		23
86	00		24
45	00		25
			26
			27
			28
			29
91		<5026 11>	
60	01	BANK S CURRENT MEMO BANK BALAN	

Mike:
For cash flow purposes
this is the last page of April
Each register Note 2 Balanced
End of April minus $5026.11
I am holding back "blue" bills until
first part of May because of bad cash fl

Fred

MONTH OF	19	PAGE NO.	113

MICHAEL HENDERSON, P.C.

ATTORNEY AT LAW
160 N.W. IRVING, SUITE 204
IRVING PROFESSIONAL BUILDING
BEND, OREGON 97701
TELEPHONE: (503) 382-2925

October 29, 1990

Linda Zucker
811 SW 6th Ave
Portland, Or 97204

Re: DEQ v.Baida

Dear Ms Zucker;

Enclosed are additional materials relating to Caveman Auto Wreckers financial ability to respond to a fine. Arnold Silver is sending copies of the materials I previously submitted to DEQ on behalf of the Baidas.

If there are any questions, I would be happy to answer them. Of course, I continue to urge you to reconsider the defenses raised on behalf of the Baidas.

The most perplexing issue is why a small accidental incident warrants an immediate fine when if the matter were to last more than five days no fine is warranted unless negotiations fail. Furthermore, farmers and forestry companies are accorded special privileges. They are allowed to burn without being subject to the same regulations as is the Baidas. Somehow, all of this seems as though the Baidas constitutional rights to be treated equally with all other citizens is abridged. If not of sufficient legal merit to be a defense, since that is what you have informed me, at least it should weigh heavily in the Baidas' favor when considering a fine, particularly in the context that it was accidental and that efforts were immediately made to extinguish the fire upon discovering that objectionable articles were being burned.

Please include in your order the bases for finding that the affirmative defenses of the Baidas' are legally insufficient.

Very truly yours,

Michael Henderson

Michael Henderson

OCT 2 6 1990

October 25, 1990

Michael Henderson
160 NW Irving, Suite 203
Bend, OR 97701

Dear Mike:

Pursuant to our phone conversation 10-22-90, enclosed is a copy of the last page of my check register for each month in this year. Please note that the last total is a negative figure after the last bills were paid. Each month summary below:

Jan	$- 927.91
Feb	$-3702.57
Mar	$-1354.93
Apr	$-5026.11
May	$-2109.56
Jun	$-3948.18
Jul	$-2159.57
Aug	$-2800.43
Sep	$-3555.16

As you can see, it is obvious my cash flow has been struggling all year. Additionally, we are in desperate need to upgrade some of our equipment in order to continue to operate efficiently, but have been unable to afford to.

Please cite the Oregon Constitution where it states that no fine may be imposed without trial by a court of law. Why does the DEQ place so much importance on an honest accident while the real problems are being overlooked?

Sincerely,

Fred Baida

Fred Baida

FGB:sj
Enclosure

	DATE	CHECK ISSUED TO	A	B	C	CHECK NUMBER	D CHECK AMOUNT		E (MEMO) BANK BALANCE	
		BALANCE FORWARD →					25613	83	81091	BAL. FWD.
1										1
2	1/31/90	Timothy Simmons	4			6476	592	64 ✓	210521 / 151657	2
3	1/31/90	Stephen Jones	4			6477	440	50 ✓	107607	3
4	1/31/90	C Kenneth Woodridge	4			6478	380	56 ✓	69551	4
5	1/31/90	acct # 01 092436	20			6479	682	50 ✓	1351	5
6	1/31/90	Susan Kuda	20			6480	250	00 ✓	-236 49	6
7	1/31/90	Oregon Employment Division	1/4 by Payroll Tax			6481	215	63 ✓	-452 12	7
8	1/31/90	I R S	1/4 by Tax Form 940			6482	45	11 ✓	-497 31	8
9	1/31/90	20% to acct # 0102172 4	20% trans			6484	430	60 ✓	-927 91	9
10							3033	12		10

CASH DISBURSEMENT JOURNAL

	DATE	CHECK ISSUED TO	A	B	C	CHECK NUMBER	D CHECK AMOUNT		E (MEMO) BANK BALANCE	BAL. FWD.	
		BALANCE FORWARD →					19028 62		453 72		
1	2/20/90	Peterson's Auto Wrg	2			6550	3 00	✓	1099 37 / 1069 37		1
2	2/20/90	A-1 Auto Wrc	1			6551	50 00	✓	1019 37		2
3	2/20/90	K P Education	19			6552	294 85	✓	724 52		3
4	2/20/90	Gun Auction	13			6553	125 00	✓	599 52		4
5	2/20/90	B & R Auto Wrc	1			6554	25 00	✓	574 52		5
6	2/20/90	Coast Auto Wrg	1			6555	35 00	✓	539 52		6
7	2/20/90	Renton Auto Wrcs	1			6556	15 00	✓	524 52		7
8	2/20/90	L & R Auto Wrg	1			6557	200 00	✓	324 52		8
9	2/20/90	Mitchell & Transmission	2 mil			6558	140 71	✓	183 81		9
10	2/26/90	Bay Area Athletic Club	16			6559	175 00	✓	2393 81 / 2218 81		10
11	2/27/90	Jimmy Simmons	4			6560	588 64	✓	1630 17		11
12	2/27/90	Stephen Jones	4			6561	440 50	✓	1189 67		12
13	2/27/90	Mark A Mason	4			6562	356 11	✓	833 56		13
14	2/27/90	Susan L Boulden	20			6563	350 00	✓	483 56		14
15	2/27/90	Susan Boulden	20			6564	250 00	✓	233 56		15
16	2/28/90	Arnold	Used Engine Refund			6565	1125 00	✓	-891 44		16
17	2/28	Family Bank	tax			6566	932 03	✓	-1823 47		17
18	2/28/90	St. of Wash Dept of Rev	Tax Dept			6567	178 00	✓	-2001 47		18
19	2/28/90	First Interstate Bank	21 Notes Payable			6568	217 05	✓	-2218 52		19
20	2/28/90	United Parcel Service	35 rec'd			6569	115 83	✓	-2334 35		20
21	2/28/90	Mathers Bail	20			6570	350 00	✓	-2684 35		21
22	2/28	Transfer acct 01-02172-4	100% Transfer			6571	1672 52	✓	-3717 87 / -3702 87		22
23											23
24											24

BALANCED TO STMT 5/16

	2	3/27/90	Dept of Ken	5			6651	157	00	✓	800 22	30 56		2
	3	3/27/90	Kirch Auto Parts	1			6652	175	00	✓	163 56	1668 56		3
	4	3/27/90	AA Sons	1			6653	110	00	✓	1493 56	1383 56		4
	5	3/27/90	Mitchell	12			6654	167	00	✓	1216 56			5
	6	3/27/90	K & K Auto Wrecking	21			6655	200	00	✓	1016 56			6
	7	3/27/90	AJW	2			6656	334	21	✓	682 35			7
	8	3/29/90	Dallas Truck & Auto	1			6657	235	00	✓	447 35			8
	9	3/27/90	Lincoln Auto Electric	1			6658	180	00	✓	267 35			9
	10	3/27/90	Lucas Transmissions	3			6659	59	54	✓	207 81			10
	11	3/27/90	Larson Transmissions	3			6660	22	95	✓	178 86			11
	12	3/27/90	Gary Andrus	13			666661	32	00	✓	146 86			12
	13	3/27/90	Ace Auto Parts	1			666662	375	00	✓	984 36	609 36		13
	14	3/27/90	U S West	6			666663	148	02	✓	461 34			14
	15	3/27/90	L & K Auto Inc	1			666664	250	00	✓	436 34			15
	16	3/27/90	Hawk Oil Company	8			666665	263	62	✓	172 66			16
	17	3/27/90	H & S Express	3			666666	6	85	✓	165 81			17
	18	3/27/90	Parts Finder	12			666667	10	00	✓	155 81			18
	19	3/27/90	Montgomery Ward	12			666668	304	68	✓	1109 53	804 62		19
	20	3/27/90	Cats of Grants Pass	7			666669	19	25	✓	785 37			20
	21	3/28/90	Mikes Radiator	1			666670	450	00	✓	335 37			21
	22	3/30/90	Timothy Simmons	4			666671	588	64	✓	- 253 27			22
	23	3/30/90	Stephens Auto	4			666672	440	35	✓	- 693 77			23
	24	3/30/90	Alan Pitts	4			666673	311	12	✓	- 1004 89			24
	25	3/30/90	Susan Bridu	20			666674	350	47	✓	= 1354 93			25
	26													26
	27													27
	28													

5	4/18/90	Mark Cinder	13			6754	32	00	✓	706	05	5
6	4/18/90	Linda Sims	8			6755	145	62	✓	560	43	6
7	4/18/90	CMHS	14 DON			6756	200	00	✓	360	43	7
8	4/18/90	BK AUTO LNG	1			6757	10	00	✓	350	43	8
9	4/18/90	Fairport Auto Parts	1			6758	50	00	✓	300	43	9
10	4/18/90	So Wall Saloon	1			6759	530	00	✓	1641	20	10
										1111	20	
11	4/19	Mitchells Transmission	2 runs			6760	83	27	✓	1027	93	11
12	4/20	Transfer to Acct # 01-02172-4	20% Transfer #22			6761	768	90	✓	259	03	12
13	4/21	Killian & Assoc				6762	500	00	✓			13
14	4/24/90	Harvey Bishop	#1 Used Funds			6763	300	00	✓			14
15	4/24/90	Transfer to 01-09273-6	#20 Transfer			6764	200	00	✓			15
16	4/26/90	Safeway	12			6765	17	98	✓			16
17	4/26/90	First Interstate Funding	21			6766	217	05	✓			17
18	4/30/90	Oregon Dept of Revenue	5 1/4 % Tax Deposit			6767	200	00	✓			18
19	4/30/90	Susan Broida	20			6768	350	00	✓			19
20	4/30/90	Alan Pitts	4 Payroll			6769	394	30	✓			20
21	4/30/90	Timothy Simmons	4 Payroll			6770	588	68	✓			21
22	4/30/90	Stephen Funk	4 Payroll			6771	440	50	✓			22
23	4/30/90	Susan Broida	20 Loan			6772	250	00	✓			23
24	4/30/90	Transfer to 01-02172-4	20% #22			6773	1486	61	✓			24
25	4/30/90	Dan Auto Service	Process	17	#23	6774	340	00	✓			25
26												26
27												27
28												28
29												29
		TOTAL(S) THIS PAGE					8019	17		+ 5026	11	
		TOTAL(S) TO DATE										BANK BAL

CASH DISBURSEMENT JOURNAL

	DATE	CHECK ISSUED TO	A	B	C	CHECK NUMBER	D CHECK AMOUNT			E (MEMO) BANK BALANCE		BAL. FWD.
		BALANCE FORWARD →					19867	58		1493	46	
1	5/22/90	Lucian Garcia	20			6850	250	00	✓	1243	46	1
2	5/23/90	Michael Henderson	5 Parkway			6851	90	00	✓	1153	46	2
3	5/24/90	Transfer Acc # 01-02172-4	20% Trans. Acct. #22			6852	1100	70	✓	52	76	3
4	5/25/90	Jim Dickerson Clinic	21			6853	27	25	✓	92 1041	76 76	4
5	5/29/90	Insured	12			6854	28	35	✓	824	71	5
6	5/30/90	Timothy Simmons	4			6855	614	27	✓	796	36	6
7	5/30/90	Stephen Jones	4			6856	552	06	✓	182 626	09 09	7
8	5/30/90	Keel Scott	4			6857	292	36	✓	69	43	8
9	5/30/90	Susan Burden	20			6858	350	00	✓	−222	93	9
10	5/30/90	Susan Burden	20			6859	250	00	✓	−572	93	10
11	5/30/90	U.S. West	6 Watts			6860	142	61	✓	−822	93	11
12	5/30/90	H & S Express	3			6861	22	95	✓	−965	54	12
13	5/30/90	A-Z Autowerks	2			6862	25	00	✓	−988	49	13
14	5/30/90	Oregon Auto Wrks	2			6863	150	00	✓	−1013	49	14
15	5/30/90	UPS	3			6864	82	47	✓	−1163	49	15
16	5/30/90	Shine-Time	8			6865	41	44	✓	−1245	96	16
17	5/30/90	UPS	3			6866	51	67	✓	−1287	40	17
18	5/31/90	Mujica Designs, Music	13			6867	100	00	✓	−1339	07	18
19	5/31/90	R & Tour	16			6868	38	00	✓	−1437	07	19
20	5/31/90	Transfer to 01-02172-4	20% Trans. Acct. #22			6869	63249		✓	−1477	07	20
21										−2109	56	21
22												22
23												23
24												24

CASH DISBU[illegible]MENT JOURNAL

	DATE	CHECK ISSUED TO	A	B	C	CHECK NUMBER	D CHECK AMOUNT			E (MEMO) BANK BALANCE		F BAL. FWD.
		BALANCE FORWARD →					21313	73		483	99	
1	6/21/90	F & R Auto Wrks	1			6950	[illegible]	00	✓	413	99	1
2	6/21/90	J & S Auto	2			6951	[illegible]	00	✓	140	49	2
3	6/21/90	Kenton Auto Wrks	1			6952	35	00	✓	105	49	3
4	6/21/90	[illegible] Auto Wrks	1			6953	75	00	✓	30	49	4
5	6/21/90	US West	116	[illegible]		6954	57	00	✓	1419 44 1361	84	5
6	6/21/90	Steelcast	2			6955	130	00	✓	1231	84	6
7	6/21/90	Lasaline Allen	1			6956	15	00	✓	1216	84	7
8	6/21/90	I.V Auto Wrks	1			6957	10	00	✓	1206	84	8
9	6/21/90	Johnny's Auto Wrks	1			6958	400	00	✓	806	84	9
10	6/21/90	Florence Iron & Steel	1			6959	210	00	✓	596	84	10
11	6/22/90	Kayes Auto Supplies	[illegible] 21			6960	270	00	✓	326	84	11
12	6/25/90	Cal Tressler	1			6961	500	00	✓	1101 661	84 84	12
13	6/26/90	Rulon Hansen	8 co Veh			6962	86	70	✓	5[illegible]5	14	13
14	6/27/90	Transfer to Acc. # 01-02172-4	20 [illegible] #23			6963	1225	00	✓	- 809	86	14
15	6/29/90	Timothy Simmons	4			6964	614	27	✓	- 1421	13	15
16	6/29/90	Stephen Funk	4			6965	558	66	✓	- 1982	79	16
17	6/29/90	Kelly M Scott	4			6966	282	36	✓	- 2265	42	17
18	6/29/90	Matthew Burden	4			6967	363	93	✓	- 2629	35	18
19	6/29/90	01 092436	20			6968	350	00	✓	- 2979	35	19
20	6/29/90	Susan Burden	20			6969	250	00	✓	- 3229	35	20
21	6/30/90	Transfer to Acc #01-02172-4 #22 Transfer				6970	699	10	✓	- 3928	45	21
22										3948	18	22
23							[illegible]					23
24												24

BALANCE FORWARD →

Line	Date	Description		Check No.	Amount			Balance
					1724	07		- 5121 71
1	7/27/90	[illegible]	15	7050	52	50	✓	= ERLINE 3650 21
2	7/–/90	[illegible]	21	[illegible]	[illegible]		✓	- 582 26
3	7/31/	[illegible]		705[illegible]	114	[illegible]	✓	72 74 / - 1076 41
4	7/30/90	[illegible]		[illegible]	[illegible]		✓	- 1116 41 / - 1334 41
5	7/31/	[illegible]		7054	[illegible]		✓	554 54 / 390 33
6	7/31/90	[illegible]	[illegible]	7055	214	[illegible]	✓	175 89
7	7/31/90	[illegible]	12	7056	61	90	✓	1435 89 / 1373 99
8	7/31/90	[illegible]	4	7057	614	[illegible]	✓	759 72
9	7/31/90	Stephen [illegible]	4	7058	559	[illegible]	✓	201 06
10	7/31/90	Kelly Scott	4	7059	242	[illegible]	✓	- 40 95
11	7/31/90	Matthew [illegible]	4	7060	363	[illegible]	✓	- 404 88
12	7/31/90	Acct 21-092436	20	7061	350	00	✓	- 754 88
13	7/31/90	Susan [illegible]	20	7062	250	00	✓	- 1004 88
14	7/31/90	[illegible]	11 [illegible]	7063	238	[illegible]	✓	- 1243 05
15	7/31/90	Mountain Springs Bottled Water	[illegible]	7064	20	[illegible]	✓	- 1263 05
16	7/31/90	Truck & Grid	8	7065	108	[illegible]	✓	- 1371 05
17	7/31/90	[illegible] Oil	8	7066	291	[illegible]	✓	- 1662 05
18	7/31/90	[illegible]	2	7067	134	17	✓	- 1796 22
19	7/31/90	U.S. West Communications	6 Wats	7068	183	34	✓	- 1979 56
20	7/31/90	[illegible] Inc	8	7069	35	66	✓	- 2015 22
21	7/31/90	[illegible] Co Oil Co	8	7070	32	20	✓	- 2047 42
22	7/31/90	Transfer to acct # 21-02 72–4	20% Transfer - #22		487	99	✓	~~- 2535 41~~
23								- 2159 41
24								- 2159 57
25								
26								

90.00 D

122

Date	Description			Check No.	Amount	✓	Balance
	[illegible]			[illegible]	[illegible]	✓	-92 00
8/[illegible]	[illegible]			71[illegible]	[illegible]	✓	1432 00
8/[illegible]	[illegible]			71[illegible]	[illegible]	✓	1382 00
8/[illegible]	[illegible]			7153	[illegible]	✓	1333 00
8/[illegible]	[illegible]			7154	[illegible]	✓	1181 17
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8/31/90	[illegible]	4		7168	558 [illegible]	✓	
8/31/90	[illegible] Scott	4		7169	134 [illegible]	✓	
8/31/90	Matt [illegible]	4		7170	341 [illegible]	✓	
8/31/90	[illegible]	4		7171	269 [illegible]	✓	-2339 53
9/1/90	Transfer to acc # 01-02172-4	20% Transfer 22		7173	470 [illegible]	✓	-2800 43

123

CASH DISBURSEMENT JOURNAL

		DATE	CHECK ISSUED TO	A	B	C	CHECK NUMBER	D CHECK AMOUNT	E (MEMO) BANK BALANCE	BAL. FWD.
			BALANCE FORWARD →					2168472	-74 57	
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	2	9/ [illegible]	[illegible]	[illegible]	[illegible]			[illegible]	-391 62	2
8	3	1/25/10	[illegible]	[illegible]	[illegible]		7252	[illegible]	-441 62	3
	4	9/ [illegible]	[illegible]	4			7253	53 [illegible]	-1000 28	4
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12	6	9/27/10	Cassandra Simmons	4			7255	614 [illegible]	-1614 55	6
13	7	9/29/10	Christopher Tolbert	[illegible]			7256	309 [illegible]	-1923 91	7
14	8	9/29/10	Cassandra Sarella	[illegible]			7257	254 [illegible]	-2178 27	8
15	9	9/29/10	Allison Davis	20			7258	350 [illegible]	-2528 27	9
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17	11	9/30/10	Water Utility 0100724	[illegible]		[illegible]	7260	776 89	-3555 16	11
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DAVE FROHNMAYER
ATTORNEY GENERAL

JAMES E. MOUNTAIN, JR.
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

PORTLAND OFFICE
1515 SW 5th Avenue
Suite 410
Portland, OR 97201
Telephone: (503) 229-5725
FAX: (503) 229-5120

October 26, 1990

Linda Zucker
Hearings Officer
Environmental Quality
Commission
811 SW 6th Avenue
Portland, OR 97204

Re: Department v. Baida/Caveman Auto

Dear Ms. Zucker:

Enclosed is a Department Motion for you to take Judicial Notice of ORS 468.125(2)(b) which meets the burden of showing that the Department is not required to furnish a five day advance notice in this case.

Sincerely,

Arnold B. Silver

ABS/cam/aa 4304H
Enclosure
cc: Michael Henderson
Larry Cwik, DEQ

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY, Department, v. FRED BAIDA AND SUSAN BAIDA, dba CAVEMAN AUTO WRECKERS Respondents.	)	No. _____ DEPARTMENT MOTION FOR HEARINGS OFFICER TO TAKE OFFICIAL NOTICE OF ORS 468.125(2)(b)

Pursuant to ORS 183.450(4) the Department requests the Hearings Officer to take Judicial Notice of the Statutory Provisions of ORS 468.125 which states in material part:

"* * * *

"(2) No advance notice shall be required under subsection (1) of this section if:

"* * * *

"(b) The * * * air pollution or air contamination source would normally not be existence for five days including but not limited to open burning." (Emphasis added.)

The legislature has statutorily concluded that open burning is an air pollution or air contamination source that would normally not be in existence for five days. Respondents admit they have engaged in open burning (Answer March 10, 1990).

Dated this 26 day of October, 1990

Arnold B. Silver
Assistant Attorney General
of Attorneys for Department

CERTIFICATE OF SERVICE

I certify that that I served a true copy of the original Department Motion for Hearings Officer to Take Offical Notice of ORS 468.125(2)(b) by depositing said copy in the United States Mail, postage prepaid, addressed to:

Michael Henderson
Attorney at Law
160 NW Irving, Suite 204
Irving Professional Building
Bend, OR 97701

Dated this 26 day of October, 1990.

ARNOLD B. SILVER
Assistant Attorney General

CERTIFICATE OF SERVICE

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY, Department, v. FRED BAIDA and SUSAN BAIDA, dba CAVEMAN AUTO WRECKERS, Respondents.	)	DEPARTMENT REPLY TO RESPONDENTS' AMENDED ANSWER No. AQOB-SWR-90-09 Josephine County

Pursuant to the hearing officer's request, the Department submits its Reply Memorandum of Law in opposition to Respondents' Amended Answer and Affirmative Defense.

BACKGROUND SUMMARY

The Department imposed a $1,200.00 civil penalty against Respondents. Respondents requested a hearing, but did not assert any affirmative defenses. The hearings officer, after consulting with counsel, determined that this case should be decided on the record without the necessity of oral testimony. The hearings officer granted Respondents the opportunity to file affirmative defenses. Respondents have filed such affirmative defenses by way of an Amended Answer and the Department now replies to such affirmative defenses. For the hearings officer's ease in reviewing this matter, the Department's Reply identifies each of Respondents' affirmative defense in the order raised, and its arabic number and page found in the Amended Answer.

1. FIRST AFFIRMATIVE DEFENSE (Page 2, No. 3)

Respondents allege the Department failed to comply with the statutory procedure set forth in ORS 468.090 by imposing a civil penalty against Respondents without first engaging in "conference, conciliation and persuasion" to eliminate the source of the offense.

Respondents are incorrect in their conclusion that ORS 468.090 is somehow a prerequisite to the Department imposing a civil penalty against them for violation of Environmental Quality Commission rules. ORS 468.090 should be read in conjunction with ORS 468.125 and 468.140.

ORS 468.140 states in material part:

> "(1) . . . any person who violates any of the following shall incur a civil penalty for each day of violation . . .
>
> * * *
>
> (c) Any rule or standard or order of the commission . . . " (Emphasis added.)

ORS 468.140 should further be read in connection with ORS 468.125, the so-called "warning" statute which requires the Department to furnish a five-day advance notice that a civil penalty will be imposed if a violation continues beyond the five-day period. Subsection (1) of ORS 468.125 states:

> "No advance notice shall be required under subsection (1) of this section.
>
> "(b) The . . . air pollution or air contamination source would normally not be in existence for five days, including but not limited to open burning." (Emphasis added.)

Statutes on the same subject should be construed as consistent with and in harmony with each other. Davis v. Wasco Intermediate Educ. Dist., 286 Or 261, 593 P2d 1152 (1978).

The plain sense of these statutes, when harmonized with each other is as follows:

(1) The Department is ordinarily required to utilize a "conference, conciliation and persuasion" procedure to eliminate the source or cause of pollution which results in a violation. ORS 468.090.

(2) A person who violates a rule of the Commission incurs a civil penalty. ORS 468.140.

(3) Ordinarily the Department must furnish a person five days advance notice of impending civil penalty prior to imposing such penalty to allow the person an opportunity to correct the violation. However, no advance notice is required if the air pollution source would normally not be in existence for five days, such as Respondents' violation of open burning. ORS 468.125(2)(b).

Clearly, ORS 468.090 relates solely to on-going and continuing violations of law which may be corrected after conference, and after the Department furnishes the advance warning contemplated by ORS 468.125(1). ORS 468.090 has no application to violations which have already occurred and are thus impossible to eliminate by "talking" to the violator. Respondents' violation already occurred and would normally not be in existence for five days. A conference would result in

no meaningful results. Following Respondents' argument to its logical end, would allow Respondents to violate the law every day of the week but insist upon a conference prior to the Department imposing a penalty. The Department obviously could never impose a penalty. Not choosing to follow this illogical course, the Department imposed a civil penalty pursuant to ORS 468.140 and is not required to "confer, conciliate or persuade" Respondents to stop a violation which already occurred and is not ongoing. .

2. SECOND AFFIRMATIVE DEFENSE (Page 2, No. 4)

Respondents assert that Department employees trespassed upon Respondent's property without first procuring a search warrant and without first knocking and announcing their identify, purpose and authority, all to Respondents' injury and damage in the amount of $5,000.

The Department replies to this rather strained defense as follows:

(1) ORS 468.095(1) empowers the Department to enter upon and inspect any public or private property, premises or place for the purpose of investigating either an actual or suspected source of air pollution or to ascertain noncompliance with any rule.

(2) Respondents' defense relates solely to a criminal prosecution and this is not a criminal proceeding but an administrative proceeding.

/ / /

(3) Assuming Respondents think they have been damaged, and can prove damages, this proceeding is not the vehicle to claim damages; and

(4) Respondents have not alleged or established an affirmative defense.

For simplicity, the Department will reassert this reply as a continuing reply to each of Respondents' affirmative defenses which seek damages. This will avoid the necessity of repetition.

3. THIRD AFFIRMATIVE DEFENSE (Page 2, Nos. 5 and 6

See Department's reply to the Second Affirmative Defense.

4. FOURTH AFFIRMATIVE DEFENSE Page 3, No. 7)

Respondents assert the Department selectively enforces the air pollution laws and created a class of entities granted privileges not accorded others. Respondents assert Respondents were granted such a privilege. Aside from the fact, it is difficult to understand why Respondents would complain when granted a privilege, the assertion does not state a defense for the following reasons:

(1) Constitutional claims should identify the provisions of the constitution, state and federal, that the governmental action is said to contravene and should show the relevance of these provisions to the claim. Megdal v. Board, 288 Or 293, 296 (1980). State v. Clark, 291 Or 231 (1981). Department is unable to ascertain the relevance of the constitutional provision because Respondents have made no showing what

entities have been granted privileges and which entities have not received them or the nature of the claimed privilege and finally what is the claimed selective enforcement. Further, Respondents are free to become a member of the favored class by simply not violating the law.

5. FIFTH AFFIRMATIVE DEFENSE (Page 3, No. 8)

Respondents once again claim Respondents are being denied privileges and immunities granted others in violation of Article I section 20 of the Oregon Constitution and has suffered damages. Department replies to this defense as follows:

(1) Constitutional claims should identify the provisions of the constitution, state and federal, that the governmental action is said to contravene and should show the relevance of these provisions to the claim. Megdal v. Board, 288 Or 293, 296 (1980). State v. Clark, 291 Or 231 (1981). Department is unable to ascertain the relevance of the constitutional provision because Respondents have made no showing what entities have been granted privileges and which entities have not received them nor what is the claimed selective enforcement. Further, Respondents are free to enter the favored class by simply not violating the law.

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6. SIXTH AFFIRMATIVE DEFENSE Page 3, No. 9)

Respondents assert this proceeding deprives them of the constitutional right to a jury trial pursuant to Article I section 17, Constitution of Oregon and that they are damaged in the amount of $5,000. Department replies:

(1) Article I section 17 "assures a trial by jury in the classes of cases wherein the right was customary at the time the constitution was adopted. Cornelison v. Seabold, 254 Or 401, 405 (1969); Moore Mill & Lbr. Co. v. Foster, 216 Or 204, 225 (1959). A statute authorizing a state agency to assess a relative the amount of welfare payments paid another relative does not require a jury trial because there was no common law antecedent. Mallatt v. Luihn, 206 Or 678, 695 (1956). A statute authorizing a state agency to impose a civil penalty against a person for violation of safety rules also does not require a jury trial for the same reason. A.P.O. v. North American Contr's., 22 Or App 614, 616, 617 (1975). The present proceeding involving imposition of a civil penalty by the Department against Respondents falls clearly within the above legal doctrine. Respondents are not entitled to a jury trial.

7. SEVENTH AFFIRMATIVE DEFENSE (Pages 3-4, No. 10)

Respondents assert they are being deprived of their constitutional rights in violation of Article I section 11, Oregon Constitution, relative to the criminal rights of an accused in a criminal proceedings by (a) this case not being submitted to a grand jury; (b) that mens rea (intent) is not an

element of the charge; (c) that the state is not required to carry the burden of proof beyond a reasonable doubt; and (d) that the state is not required to carry the sole burden of proof. Respondents once again claim damages.

The Department replies to this assertion as follows:

This case is not a criminal proceeding but is an administrative proceeding and Respondent fails to distinguish between the two.

8. EIGHTH AFFIRMATIVE DEFENSE (Page 4, No. 11)

Respondents assert their constitutional right to separation of powers as assured by Article III section 1 of the Oregon Constitution. Respondents further assert this constitutional right is being violated in that the agency charged with enforcement of the applicable laws is also the agency adjudicating Respondents' case. Respondents also claim damages. The Department replies as follows:

(1) The Department of Environmental Quality is normally charged with enforcement of the applicable laws and the Environmental Quality Commission is the agency adjudicating Respondent's case. See ORS 468.010 and 468.030, and 468.035(1)(j).

(2) A state statutory provision authorizing an administrative agency to impose penalties for violation of environmental pollution control statutes does not violate the doctrine of separation of powers if agency orders are subject to judicial review. Mazama Timber Products, Inc. v. Lane

Regional Air Pollution Authority, 17 Or App 288 (1973). Any order adverse to Respondent in this case is subject to judicial review. See ORS 468.135(3), 183.480, and 183.482(1).

(3) Due process of law does not require a formal separation of the investigative functions from the adjudicative or decision making functions of an administrative agency. Fitz v. OSP, 30 Or App 1117 (1977); Richardson v. Perales, 402 US 389, 916 S Ct 1420, 28 L Ed ed 842 (1971).

9. NINTH AFFIRMATIVE DEFENSE (Pages 4 and 5, No. 12)

Respondents assert the rule which they are charged of violating is "malum prohibitum" which was not made "reasonably available" resulting in their ignorance of the duties created thereby. Respondents again claim damages. The Department replies as follows:

(1) The Department and Commission provided notice of its proposed rulemaking pursuant to ORS 183.335; filed its rule with the Secretary of State, pursuant to ORS 183.355(1)(a) and copies of such rules are readily available upon request to the Secretary of State pursuant to ORS 183.355(6). Administrative rules have the force and effect of law. Bronson v. Moonen, 270 Or 469, 476 (1974). Additionally, courts take judicial notice of rules filed with the Secretary of State. ORS 183.360(4). Respondents have constructive notice of the Department's and Commission's rules.

(2) A mistake of law is not a defense to this proceeding. State v. Baker, 48 Or App 999, 1003 (1980). An

act "malum prohibitum" is not excused by ignorance or mistake of fact where the specific act is made punishable irrespective of motive or intent. People v. Treen, 33 Misc 2d 571, 225 NYS 2d 787 (1957).

10. TENTH AFFIRMATIVE DEFENSE (Page 5, No. 13)

Respondents assert that they were unaware there was any material in the pile that they burned that was prohibited to be burned. The Department replies as follows:

An act "malum prohibitum" is not excused by ignorance or mistake of fact where the specific act is made punishable irrespective of notice or intent. See Discussion under the Ninth Affirmative Defense. Respondent is strictly liable for his conduct.

11. ELEVENTH AFFIRMATIVE DEFENSE (Page 5, No. 14)

Respondent asserts an argument, but not a defense. It is not within Respondent's discretion or province to decide whether his conduct was customary; too trivial to warrant a "conviction" and penalty; and did not cause the harm or evil the legislature envisaged or sought to prevent. This decision is for the Department.

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/ / /

CONCLUSION

The Department's civil penalty against Respondent should be affirmed and imposed against them

Respectfully submitted,

ARNOLD B. SILVER
Assistant Attorney General
Of Attorneys for Department of
Environmental Quality

CERTIFICATE OF SERVICE

I, Arnold B.Silver, hereby certify that on the 17 day of August, 1990, the herein DEPARTMENT OF ENVIRONMENTAL QUALITY'S REPLY TO RESPONDENT'S AMENDED ANSWER was served by placing said document in the U.S. mail, postage prepaid, at Portland, Oregon addressed to:

Michael Henderson
Attorney at Law
160 N.W. Irving, Suite 203
Bend, Oregon 97701

ARNOLD B. SILVER
Assistant Attorney General

CERTIFICATE OF SERVICE
#1396H/aa

DAVE FROHNMAYER
ATTORNEY GENERAL

JAMES E. MOUNTAIN, JR.
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

PORTLAND OFFICE
1515 SW 5th Avenue
Suite 410
Portland, OR 97201
Telephone: (503) 229-5725
FAX: (503) 229-5120

July 9, 1990

Linda Zucker, Hearings Officer
Environmental Quality Commission
811 S.W. 6th Avenue
Portland, Oregon 97204

Re: Baida/Caveman Auto

Dear Ms. Zucker:

This letter is in partial compliance with your June 18, 1990 instructions. As advised in our telephone conversations, the department was willing to review "E" financial circumstances, and assign it a "0"; and review "C", cooperativeness and assign it a "-2". The total penalty would be reduced from $1200.00 to $800.00.

At this time, I have not received a proposed set of agreed upon facts from Mr. Henderson. I will develop a set of such facts and send them to Mr. Henderson. I will shortly advise you of my position regarding the affirmative defenses recently made part of the record. I may take a short vacation next week and hope you will give the parties some grace in completing the record.

Sincerely,

Arnold B. Silver
Assistant Attorney General

ABS:kre
2807H

cc: Michael Henderson, Attorney at Law
w.enc Larry Cwik, DEQ

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, vs. FRED BAIDA AND SUSAN BAIDA, DBA/CAVEMAN AUTO WRECKERS, Respondents.	NOTICE OF ASSESSMENT OF CIVIL PENALTY No. AQOB-SWR-90-09 JOSEPHINE COUNTY AMENDED ANSWER

Respondents deny and admit as follows:

1.

Respondents deny:

a. They violated OAR 340-23-042(2);

b. They burned automobile parts;

c. Respondents have insufficient information on which to form a belief relative to "...materials which normally emit black smoke or noxious odors into the atmosphere when burned at the north end of Respondent's wrecking yard..." and therefore deny it;

d. Respondents have insufficient information on which to form a belief relative to the remainder of the complaint, other than what is admitted hereinafter, and, therefore deny it.

2.

Respondents admit that they have a wrecking yard located at 440 N.E. Agness Avenue, Grants Pass, Oregon; and they do business

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ATTORNEY AT LAW
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ving Professional Building
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as Caveman Auto Wrecking.

For a first affirmative defense respondents allege that:

3.

Department has failed to comply with the statutory procedure of ORS 468.090 prior to imposing a fine against respondents in that department has not first engaged in conference, conciliation, and persuasion to eliminate the source of offense, and that only in case of failure of achieving positive results therefrom is the department authorized to commence enforcement proceedings.

For a second affirmative defense, counterclaim, and setoff respondents allege that:

4.

Department trespassed upon respondents property without first procuring a search warrant and without first knocking and announcing their identity, purpose, and authority all to respondents injury and damage in the amount of $5,000.

For a third affirmative defense, counterclaim, and setoff respondents allege that:

5.

Respondents reallege paragraph three above.

6.

Respondents were injured and damaged as a result thereof by having to devote time, money, and effort to defend themselves when had the department complied with the requirements of statute such would not have been the case. Respondents have been damaged in the amount of $5,000.

:HAEL HENDERSON, P.C.
ATTORNEY AT LAW
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ing Professional Building
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For a fourth affirmative defense, counterclaim, and setoff respondents allege that:

7.

The department selectively enforces the air pollution laws, thereby creating a select class of entities granted privileges not accorded to others, specifically respondents in this case, in violation of Article I, section 20, of the Oregon Constitution, all to respondents injury and damage in the amount of $5,000.

For a fifth affirmative defense, counterclaim, and setoff, respondents allege that:

8.

The statute pursuant to which department is prosecuting respondents is unconstitutional because it grants privileges and immunities to a select group of persons not equally available to others, and in this case specifically respondents, all in violation of Article I, section 20 of the Oregon Constitution; all to respondents injury and damage in the amount of $5,000.

For a sixth affirmative defense, counterclaim, and setoff, respondents allege that:

9.

Respondents are being deprived of their constitutional right of a jury trial pursuant to Article I, section 17, of the Oregon Constitution, all to respondents injury and damage in the amount of $5,000.

For a seventh affirmative defense, counterclaim, and setoff, respondents allege that:

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10.

Respondents are being deprived of their constitutional rights relative to right of accused in criminal prosecutions, more specifically, the rights of respondents' case being submitted to a grand jury, that mens rea be an element, that the state carry the burden of proof beyond a reasonable doubt, that the state carry the sole burden of proof, in violation of Article I, section 11, of the Oregon Constitution; all to respondents injury and damage of $5,000.

For an eighth affirmative defense, counterclaim, and setoff, respondents allege that:

11.

Respondents are being deprived of the constitutional protection of separate of powers required by Article III, section 1., of the Oregon Constitution, in that the agency charged with enforcement of the applicable laws is also the agency adjudicating respondents case, all to respondent's injury and damage in the amount of $5,000.

For a ninth affirmative defense, counterclaim, and setoff, respondents allege that:

12.

The statutes and regulations pursuant to which respondents are being penalized are malum prohibitum statutes and regulations. The government did not make the law, regulation, or both, pursuant to which respondents are being penalized, reasonably available, thereby resulting in respondents' ignorance of their duties

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relative thereto, which has caused injury and damage to respondents in the amount of $5,000.

For a tenth affirmative defense, counterclaim, and setoff, respondents allege that:

13.

Respondents were unaware that there was any material in the pile that was burned that was material prohibited to be burned.

For an eleventh affirmative defense, counterclaim, and setoff, respondents allege that:

14.

Respondents conduct was within customary license; was too trivial to warrant the condemnation of conviction and penalty; and did not cause the harm or evil the legislature envisaged or sought to prevent in enacting the statute.

Wherefore, respondents pray that the department's complaint be dismissed, respondents be granted judgment against the department for each of their counterclaims, and for respondents costs and disbursements.

Dated: June 14, 1990.

MICHAEL HENDERSON, P.C.

Michael Henderson

Michael Henderson
Attorney for Respondents
OSB# 69075

MICHAEL HENDERSON, P.C.
ATTORNEY AT LAW
160 N.W. IRVING, SUITE 204
Irving Professional Building
BEND, OR 97701
TELEPHONE:
(503) 382-2925

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing document(s) on the person(s) named below, who represent the party(s) named below, on June 14, 1990, by mailing to the person a true copy thereof, certified by me as such, contained in a sealed envelope, with postage prepaid thereon, addressed to the person's last known address listed below, and deposited in the post office in Bend, Oregon on the above date.

REPRESENTATIVE	CLIENT
Arnold B. Silver, Esq. 1515 S.W. 5th Ave., Suite 410 Portland, Or 97201	Department of Environmental Quality

Dated: June 14, 1990.

Michael Henderson
MICHAEL HENDERSON
Attorney for Respondents

TRUE COPY CERTIFICATION

I hereby certify that I have prepared the foregoing copy of the above mentioned document and have carefully compared it with the original thereof; that it is a true and correct copy thereof.

Michael Henderson
MICHAEL HENDERSON

CAVEMAN AUTO WRECKERS

440 N.E. AGNESS AVE. • GRANTS PASS, ORE. 97526 • 476-8816

March 10, 1990

Fred Hansen, Director
Department of Environmental Quality
811 SW Sixth Avenue
Portland, Oregon 97204-1390

Re: AQOB-SWR-90-09

Dear Mr. Hansen:

As mentioned in your letter stamped February 26, 1990, I do believe their are mitigating factors not taken into consideration when assessing me a civil penalty.

This is the first time we have ever been involved in any type of burning on our property. We personally object to the results of open burning, ie., smell, smoke and general pollution of the air we breathe. To most people like us, it does not appear to be a criminal act as it is done continually by all types of commercial and residential inhabitants.

We had just had some work done by a dozer in which they cleared blackberries and brush and pushed it all into a large pile. We had NO idea that there were tires or any solid material at the bottom of the pile.

Because of a recent rise in the charges at our local landfill, we realized it was not feasible to haul off this material, so we waited until a clear breezy day to burn.

As soon as we observed the smoke change color, we immediately took measures to extinguish the fire and were in the process when the Fire Department arrived.

Apparently there have been some recent changes requiring permits to burn on your own property. We have never had any information provided to us regarding this law. It would seem that as the enforcer of these laws, you would have some responsibility to also be an informer of the laws.

I am a law abiding citizen. I would never intentionally break a law. It would be foolish to think you could burn and not be noticed.

It seems to me that a fine is excessive punishment for this inadvertant error, and to be honest, I am certainly not in a financial position to pay the amount you have assessed me without creating a major hardship in relation to the operation of my business.

Now that I am informed of the law, I will not infringe upon it, whether you feel it necessary to punish me or not.

The recycling industry is necessary to help preserve our environment and it seems that your agency should be putting forth its efforts to punish those that continually violate the rules and inform and protect those people like me that are trying to uphold your standards.

Please take the time to investigate me and the reputation of Caveman Auto Wreckers and discover that I am not the type to take advantage of the system. Please don't single me out to make an example of me while the continual violators go unpunished. What justice would be served if your department is $1200 richer and one of my employees is without a job??

Please accept this letter as our request for an appeal.

Sincerely,

Fred G. Baida

cc: Mike Henderson, Attorney
Bob Repine, Representative
Neil Goldschmidt, Governor
Jerry Ryan, Fire Department
Southwest Region, DEQ
Air Quality Division DEQ
Department of Justice
Environmental Protection Agency ✓

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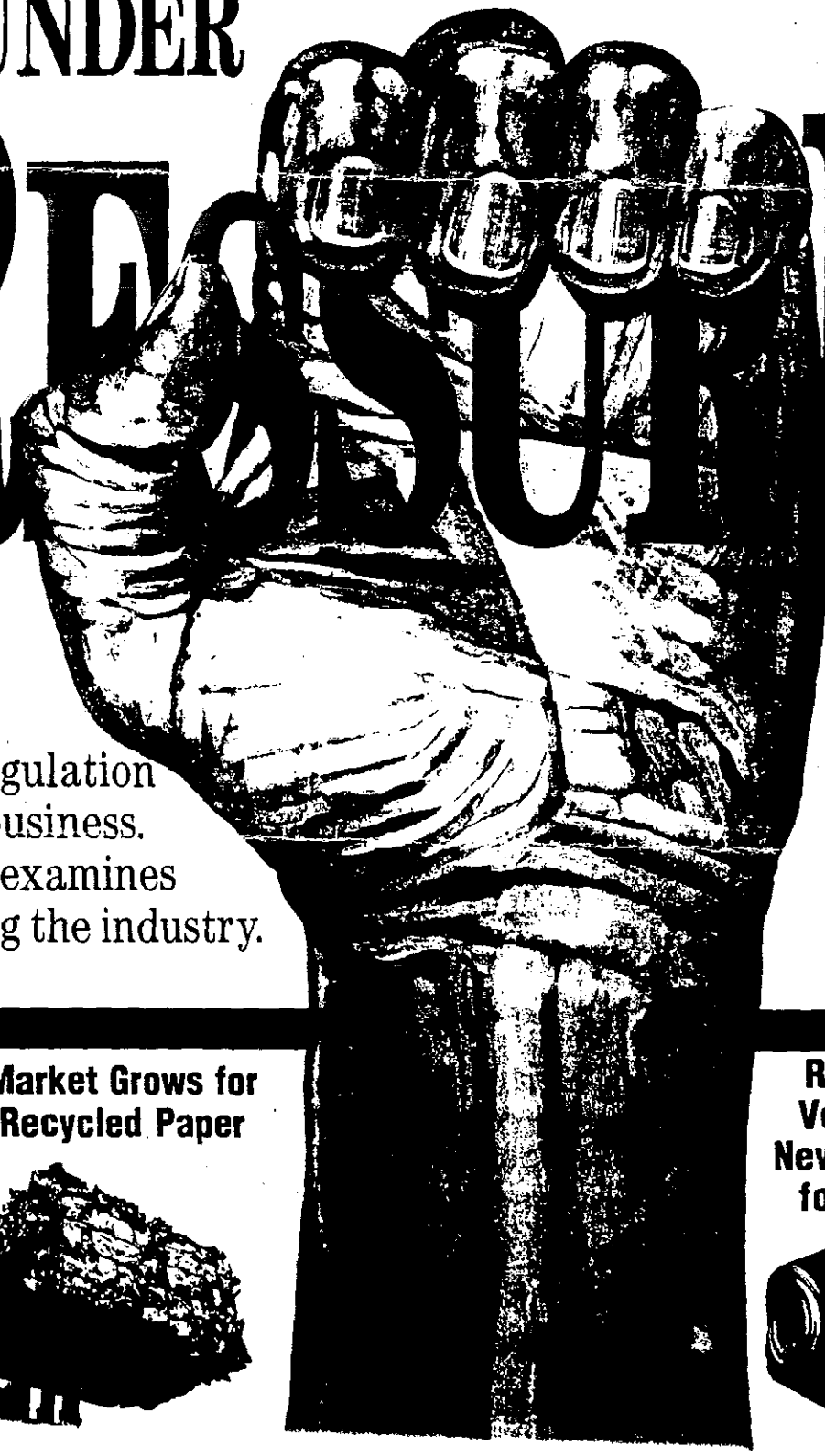

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NEIL GOLDSCHMIDT
GOVERNOR

Department of Environmental Quality

811 SW SIXTH AVENUE, PORTLAND, OREGON 97204-1390 PHONE (503) 229-5696

FEB 2 6 1990

CERTIFIED MAIL P 882 467 627

Fred Baida and Susan Baida,
dba/Caveman Auto Wreckers
440 N.E. Agness Avenue
Grants Pass, OR 97526

Re: Notice of Civil Penalty
Assessment
AQOB-SWR-90-09
Josephine County

On November 27, 1989, Grants Pass Fire Department staff and Mr. Kenan Smith of the Department's Southwest Region responded to a complaint of black smoke from open burning at the north end of your wrecking yard at 440 N.E. Agness Avenue, Grants Pass, a location within the Rogue Basin Open Burning Control Area. Fire department staff observed the open burning of commercial waste, auto parts, tires, and car seats made of polyurethane material. Fred Baida admitted doing the open burning.

The burning of automobile parts or any other materials which normally emit black smoke or noxious odors when burned is prohibited at all times anywhere in Oregon. Oregon regulations also prohibit the open burning of commercial waste within the Rogue Basin. Also, all open burning of any kind was prohibited in the Rogue Basin on November 27, 1989 because of poor atmospheric ventilation conditions.

Your open burning violated the Department's rules and is subject to a civil penalty. The civil penalty schedule provides for a penalty of up to $10,000 per day for each violation of these rules. In the enclosed notice, I have assessed a civil penalty of $1,200. In determining the amount of the penalty, I used the procedures set forth in Oregon Administrative Rules (OAR) 340-12-045. The Department's findings and civil penalty determination are attached to the Notice as Exhibit I.

The penalty is due and payable. Appeal procedures are outlined within Section V of the Notice. If you fail to either pay or appeal the penalty within twenty (20) days, a Default Order and Judgment will be entered against you.

If you wish to discuss this matter, or if you believe there are mitigating factors which the Department might not have considered in assessing the civil penalty, you may request an informal discussion by attaching your

request to your appeal. Your request to discuss this matter with the Department will not waive your right to a contested case hearing.

I look forward to your cooperation and efforts to comply with the open burning rules in the future. However, if additional violations occur, you may be assessed additional civil penalties. If you have any questions concerning future open burning, please contact the Department's Southwest Regional office in Medford, at 776-6010.

Copies of referenced rules are enclosed. If you have any questions about this action, please contact Larry Cwik with the Department's Enforcement Section in Portland at 229-5728 or toll-free at 1-800-452-4011.

Sincerely,

Fred Hansen
Director

FH:lc:b
GB9320L
Enclosures
cc: Southwest Region, DEQ
Air Quality Division, DEQ
Department of Justice
Environmental Protection Agency
Grants Pass Fire Department

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON, Department, v. FRED BAIDA AND SUSAN BAIDA, DBA/CAVEMAN AUTO WRECKERS, Respondents.	)	NOTICE OF ASSESSMENT OF CIVIL PENALTY No. AQOB-SWR-90-09 JOSEPHINE COUNTY

I. AUTHORITY

This notice is issued to Respondents, Fred Baida and Susan Baida, doing business as Caveman Auto Wreckers, by the Department of Environmental Quality (Department) pursuant to Oregon Revised Statutes (ORS) 468.125 through 468.140, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12.

II. VIOLATIONS FOR WHICH A CIVIL PENALTY IS BEING ASSESSED

1. On or about November 27, 1989, Respondents violated OAR 340-23-042(2), adopted pursuant to ORS 468.295(1), in that Respondents burned automobile parts, and at least one car tire and seat, materials which normally emit black smoke or noxious odors into the atmosphere when burned, at the north end of Respondents' wrecking yard located at 440 N.E. Agness Avenue, Grants Pass, Oregon.

III. ASSESSMENT OF CIVIL PENALTIES

The Director imposes civil penalties for the following violations cited in Section II:

Violation	Penalty Amount
1	$1,200

Respondent's total civil penalty is $1,200.

The findings and determination of Respondent's civil penalty pursuant to OAR 340-12-045 are attached and incorporated as Exhibit No. 1.

The penalties are being imposed without advance notice pursuant to OAR 340-12-040(3)(b)(D) as the air pollution source would not normally be in existence for five (5) days.

IV. PAYMENT OF CIVIL PENALTY

The total penalty is now due and payable. Respondent's check or money order in the amount of $1,200 should be made payable to "State Treasurer, State of Oregon" and sent to the **Business Office, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.**

V. OPPORTUNITY FOR CONTESTED CASE HEARING

Respondent has the right, if Respondent so requests, to have a formal contested case hearing before the Environmental Quality Commission (Commission) or its hearings officer regarding the matters set out above pursuant to ORS Chapter 183, ORS 468.135(2) and (3), and OAR Chapter 340, Division 11 at which time Respondent may be represented by an attorney and subpoena and cross-examine witnesses. **That request must be made in writing and must be received by the Commission's hearings officer within twenty (20) days from the date of mailing of this Notice (or if not mailed, the date of personal service), and must be accompanied by a written "Answer" to the charges contained in this Notice.** In the written "Answer," Respondent shall admit or deny each allegation of fact contained in this Notice and Respondent shall affirmatively allege any and all affirmative claims or defenses to the assessment of this civil penalty that Respondent may have

///

and the reasoning in support thereof. Except for good cause shown:

1. Factual matters not controverted shall be presumed admitted;

2. Failure to raise a claim or defense shall be presumed to be a waiver of such claim or defense;

3. New matters alleged in the "Answer" shall be presumed to be denied unless admitted in subsequent pleading or stipulation by the Department or Commission.

Send the request for hearing and "Answer" to: **Linda K. Zucker, Hearings Officer, Environmental Quality Commission, 811 S.W. Sixth Avenue, Portland, Oregon 97204.** Following receipt of a request for hearing and an "Answer," Respondent will be notified of the date, time and place of the hearing.

If Respondent fails to file a timely request for hearing or "Answer", the Director on behalf of the Environmental Quality Commission may issue a default order and judgment, based upon a prima facie case made on the record, for the relief sought in this Notice.

Failure to appear at a scheduled hearing or meet a required deadline, may result in a dismissal of the contested case.

FEB 2 6 1990
Date

Fred Hansen, Director

EXHIBIT 1

FINDINGS AND DETERMINATION OF RESPONDENTS' CIVIL PENALTY
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-12-045

VIOLATION NO: 1 (Open burning of automobile parts)

CLASSIFICATION: The violation is a Class I violation pursuant to OAR 340-12-050(1)(m).

MAGNITUDE: The magnitude of the violation is minor as the amount of prohibited material in Respondents' burn pile was minimal.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: BP+[(.1xBP)(P+H+E+O+R+C)].

"BP" is the base penalty which is $1,000 for a Class I, minor magnitude violation in the matrix listed in OAR 340-12-042(1).

"P" is Respondents' prior violation(s) and receives a value of 0, as Respondents have no prior violations as defined in OAR 340-12-030(13).

"H" is the past history of Respondents in taking all feasible steps or procedures necessary to correct any prior violation and receives a value of 0, as Respondents have no prior violations as defined in OAR 340-12-030(13).

"E" is the economic condition of Respondents and receives a value of +2, as Respondents realized a minor economic gain by failing to dispose of Respondents' waste at an authorized landfill. Disposal of approximately 29 cubic yards of commercial waste, a car seat, and a tire at an authorized landfill would have cost an estimated $225 in tipping fees.

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 0, as this was a single occurrence.

"R" is the cause of the violation and receives a value of 0, as there is insufficient information on which to base a finding. Respondent Fred Baida stated he was unaware that there was prohibited materials in the burn pile.

"C" is Respondents' cooperativeness in correcting the violation and receives a value of 0, as the Department has insufficient information upon which to make a determination.

PENALTY CALCULATION:

Penalty = BP+[(.1xBP) (P+H+E+O+R+C)]
= $1,000 + [(.1x1,000) (0+0+2+0+0-0)
= $1,000 + [(100)(2)]
= $1,000 + 200
= $1,200

CERTIFICATE OF MAILING

I hereby certify that I served the attached Notice of Civil Penalty Assessment,

Case Number AQOB-SWR-90-09

TO: Fred Baida and Susan Baida
dba/Caveman Auto Wreckers
440 NE Agness Avenue
Grants Pass, OR 97526

by mailing a true copy of the above by placing it in a sealed envelope, with postage prepaid, at the U. S. Post Office in Portland, Oregon, on February 26, 1990.

Kathryn I. Amidon

Kathryn I. Amidon

Department of Environmental Quality

P 882 467 627

RECEIPT FOR CERTIFIED MAIL
NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

Sent to	Fred & Susan Baida
Street and No.	440 NE Agness Ave.
P.O. State and ZIP Code	Grants Pass, OR 97526
Postage	$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	

SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.
Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.
1. ☐ Show to whom delivered, date, and addressee's address. *(Extra charge)* 2. ☐ Restricted Delivery *(Extra charge)*

3. Article Addressed to: Fred Baida and Susan Baida, dba/Caveman Auto Wreckers 440 NE Agness Avenue Grants Pass, OR 97526	4. Article Number P 882 467 627
	Type of Service: ☐ Registered ☐ Insured ☒ Certified ☐ COD ☐ Express Mail ☐ Return Receipt for Merchandise
	Always obtain signature of addressee or agent and DATE DELIVERED.
5. Signature — Address X	8. Addressee's Address *(ONLY if requested and fee paid)*
6. Signature — Agent X	
7. Date of Delivery 2-28-90	

PS Form 3811, Mar. 1988 * U.S.G.P.O. 1988-212-865 DOMESTIC RETURN REC

PS Form 3800, June 1985

State of Oregon

Department of Environmental Quality Memorandum

Date: April 15, 1992

To: Environmental Quality Commission

From: Fred Hansen, Director

Subject: Work Session - Nonpoint Source Program Overview

Purpose: to explore key elements of the surface water nonpoint source program in light of several current and important opportunities. These opportunities include:

- the review and reform of the Forest Practices Act (mandated by Senate Bill 1125 from the 1991 session);
- the Legislature's investigation of a grazing practices act (led by the Senate Interim Committee on Agriculture and Natural Resources); and
- the review of state water policy (being conducted by the Governor's Office with participation from members of the Strategic Water Management Group).

Content: erosion control and riparian zone protection and management. Staff will describe the importance of these approaches in terms of several current issues and will discuss possibilities for EQC/DEQ initiatives. In general, the presentation will follow the outline on the following page. The Commission is encouraged to interject questions and comments at any point.

I. Introduction of topic and personnel
II. Background on NPS problem, mandates, and current program
III. Description of erosion control/riparian management issue
IV. Opportunities and needs
    A. Forestry
    B. Construction/Urban
    C. Grazing/Agriculture
V. Initiatives/Solutions
    A. Oregon rules
    B. Other states (one or more invited speakers)
VI. Discussion/Wrap-up

Materials

Two attachments are provided: Attachment A, an overview of the current surface water NPS program; and Attachment B, a description of erosion related pollution.

RW/kp
Attachments

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RW/kp
Attachments

WORK SESSION: NONPOINT SOURCE PROGRAM OVERVIEW
ATTACHMENT A

The following materials were prepared for the 1992 305-b report to EPA, scheduled for submission this Spring. This 305-b write-up summarizes the Surface Water Section's current nonpoint source program, and also provides historical background and discusses nonpoint source pollution in general.

Nonpoint Source Pollution

Nonpoint source (NPS) water pollution results from land management practices that discharge pollutants such as suspended solids, sediments, and nutrients into surface water and groundwater in a diffuse manner, or that affect water quality by increasing temperature, changing pH, etc. This is in contrast to point source pollution which can be traced to a specific point of discharge, such as a sewage treatment effluent pipe.

Background

Oregon's effort to control NPS pollution began over a decade ago under Section 208 of the Clean Water Act. This initial effort was aimed at several critical needs. DEQ coordinated statewide studies on silviculture (forestry), confined animal feeding operations (such as dairies and feedlots), stream habitat restoration, and on-site (septic) system waste disposal. Numerous geographic area studies were completed. These studies covered problems such as irrigation return flows, erosion in dryland wheat-farming areas, fecal-waste impacts on shellfishing, streambank erosion, groundwater pollution, and urban runoff. The control strategies developed from these studies continue to be implemented as funds from EPA, USDA, and other federal, state, and local sources become available.

Program Description

The goal of Oregon's NPS program is the prevention or control of NPS pollution such that none of the beneficial uses of water are impaired by that pollution. In pursuit of this goal, the NPS program at DEQ identifies issues and problems related to NPS pollution and assesses levels of beneficial-use support. The program works with other agencies and individuals to set priorities for and define solutions to NPS problems. Solutions include contributing to public education programs, assisting with funding, coordinating interagency cooperation, and evaluating program achievement. The actual implementation of appropriate land management practices is generally accomplished by other agencies or by groups of agencies and landowners working together.

Strategies which are effective in controlling point sources (e.g., issuing permits to industrial and sewage facilities and monitoring their effluent) have not been widely applied to control nonpoint sources (an exception to this is the recently initiated stormwater control program described in Section _____). Instead, the development, implementation, and monitoring of "best management practices" has generally been used to control nonpoint source pollutants from grazing, transportation, construction, timber harvesting, chemical application, animal waste disposal, and other activities in agriculture, forest, and urban areas. Nonpoint source control efforts emphasize programs involving all the public and private land managers in a given watershed. This watershed-wide approach requires considerable public involvement, education, and interagency coordination, as well as thorough problem identification and program monitoring. When funding is adequate to properly employ this approach, the result is reliable and cost-effective problem solving with long-range sustainability.

Section 319 of the Water Quality Act of 1987 requires each state to assess its NPS caused water quality problems and describe a management program to prevent or control those problems. The products of Oregon's compliance with Section 319 are the 1988 Statewide Nonpoint Source Assessment and the Statewide Nonpoint Source Management Program Plan.

The 1988 Nonpoint Source Assessment displays the water quality condition, affected parameters, and probable pollution sources for about 28,000 miles of stream, as well as for some lakes, estuaries, and shallow groundwater aquifers. The Assessment indicated that one or more beneficial uses of water in many of the state's streams are being impaired by nonpoint source pollution.

The Management Program Plan describes the goals, issues, processes, and objectives of Oregon's statewide NPS program and serves as a framework for the development of agreements and site-specific action plans with key natural resource management agencies (such as the Agricultural Stabilization and Conservation Service (ASCS), the Bureau of Land Management (BLM), the Oregon Departments of Agriculture and Forestry, the Soil Conservation Service (SCS), and the U.S. Forest Service).

- Program Priorities

NPS program implementation: The highest priority is to complete the transition from development of the NPS program to aggressive implementation of the program's 26 program elements and 74 objectives. This transition began with completion (by DEQ) and acceptance (by EPA) of Oregon's Nonpoint Source Management Program Plan in 1990. Many elements of this Program Plan are designed to coordinate with or provide direct assistance to other water quality protection or natural resource management programs within DEQ and in other local, state, and federal agencies. However, identifying

NPS problems and writing a plan to deal with them is not the same as actually solving the problems. The solutions will not come without a very significant commitment of effort and resources by both the public and private sectors. A few of the most important opportunities for application of this effort are briefly described below.

Department of Forestry and Senate Bill 1125: Enacted by the 1991 Legislative Assembly, SB 1125 mandates the critical review of several aspects of Oregon forest practices which are crucial to water quality protection. DEQ is involved with the Oregon Department of Forestry and others in:

- revising the waterbody classification system and the associated riparian management practices (which are prescribed for the different classifications) to better recognize the importance of smaller streams and to better protect riparian zones;
- improving forest practices rules to better prevent landslides;
- reviewing the literature describing and documenting the impacts of forest practices on anadromous fisheries;
- evaluating and documenting the impacts of forest practices on water quality;
- evaluating the effectiveness of current water quality criteria as a means of assessing water quality on forest lands;
- studying and describing the cumulative effects of forest practices on air, soil, water, and fish and wildlife.

Beyond the mandates of SB 1125, citizen and agency input to the Oregon Board of Forestry has identified a number of other aspects of forest practices which need improvement in order to better protect and manage sensitive natural resources. DEQ is engaged in this process.

Agriculture and grazing practices and erosion control: Following the 1991 session, the Senate Interim Committee on Agriculture and Natural Resources initiated discussion of the need for, and the potential design of, a regulatory program to control natural resource degradation due to inappropriate grazing and agricultural practices. DEQ is assisting this effort by describing NPS-caused water quality problems and proposing rules and administrative structures suitable for protecting water quality and associated beneficial uses.

Critical basins: "Critical basins" are those in which a waterbody has been identified as "water quality limited" under Section 303 of the Clean Water Act (See Section ____). Because of the relative

severity of their water quality problems, these waters tend to be high priorities as ranked by the State Clean Water Strategy (see Section ____).

The NPS program contributes to the critical basins program by working with local designated management agencies to prepare watershed management plans addressing forestry, agriculture, grazing, and urban stormwater runoff. The program also works with local land managers to develop NPS control programs eligible for funding by Section 319 grants and Governor's Watershed Enhancement Board grants. During 1992-93, the program will focus on the Tualatin River, Bear Creek (Rogue River), and the upper Grande Ronde River.

Monitoring, assessment, evaluation: The chain of activities leading to water quality protection or enhancement begins with problem identification and prioritization. DEQ has developed a statewide NPS assessment and monitoring strategy which, if adequately funded, will give DEQ the information it needs to describe NPS problems in detail and with a high degree of confidence. A major component of the strategy will be the utilization of various bioassessment techniques to provide affordable yet relatively detailed assessments of levels and trends of beneficial-use support.

A major activity in this biennium is the updating of the 1988 NPS Assessment, with updates of the first basins due for completion in early 1993. In addition to expanding its own NPS assessment and monitoring capabilities, DEQ will help other agencies develop and implement NPS assessment and monitoring programs and will analyze and evaluate the data collected by these agencies. Expanded assessment and monitoring also is important to determine NPS program accomplishments; measure the effectiveness of selected best management practices; establish baseline levels of beneficial-use support in forest and agriculture areas; and resolve conflicts in classification of waterbodies identified as impaired due to nonpoint source pollution.

Enforcement: Two fundamental principles of Oregon's NPS program are:

- prevention of a problem is more desirable than remediation of damage after the fact, and

- voluntary cooperation by watershed managers is preferable to coercion.

Many of the objectives in DEQ's NPS Management Program are designed to achieve this voluntary, cooperative prevention. However, enforcement is a necessary tool to address situations where prevention and cooperation fail.

In Oregon, enforcement actions on NPS-related water quality violations have been limited by:

- a DEQ monitoring network focused largely on point sources,
- limited water quality data collection by BLM, USFS, and other watershed managers,
- water quality criteria which are sometimes awkward or costly to apply in the NPS context, and
- inadequate funding and staffing to respond to very many NPS-related problems each year.

DEQ must significantly increase its enforcement capability. It can do so by reducing or eliminating the limitations listed above, all of which are addressed by objectives in the NPS Management Program. Also important will be the development of NPS-dedicated staff in DEQ's regional operations offices. This increased field presence is necessary to provide a local liaison with local land managers and to investigate the NPS causes of water quality degradation.

Section 319 grant administration: Grant funds available through Section 319 of the Water Quality Act of 1987 are a critical element in turning Oregon's NPS Management Plan into water quality protection realities in watersheds throughout the state. In 1990 and 1991, DEQ identified eligible projects and requested funding from EPA, a process that will be repeated each year. Grant awards to Oregon through this program were $537,018 in FY 90 and $625,450 in FY 91. Key tasks in this program element include the targeting of high priorities, solicitation of proposals, disbursement of grant funds, oversight of program implementation, and evaluation of program accomplishments.

Intergovernmental reviews: Many federal, state, and local project proposals (e.g., for land swaps, pipeline projects, timber sales, grazing plans, road projects, and recreation plans) are routed to the NPS program at DEQ each year for evaluation of their potential to impact water quality. These project reviews provide an excellent opportunity to raise water quality issues and prevent pollution problems before resource harvesting or land management activities on a site have begun. DEQ evaluates the water quality protection and pollution-mitigation components of a proposed project and provides information on the condition of waters which might be affected by the project; on local watershed management issues; on project effectiveness monitoring; and on applicable BMPs. Similar to the interagency coordination mentioned below, intergovernmental reviews are a major vehicle for implementation of the NPS program and rely heavily on effective assessment and monitoring. During 1992 and 1993, DEQ will focus on reviewing the Bureau of Land Management's extensive Resource Management Plans for its Oregon Districts.

Implementation of agreements and action plans: NPS agreements with the major forestry, agriculture, and grazing agencies facilitate NPS control programs on most lands in Oregon. Memoranda of Agreement (MOAs) with ASCS, SCS, and the Oregon Department of Agriculture were signed in the spring of 1989. MOAs with BLM and USFS were signed in February 1990. Attached to each MOA is an action plan describing and prioritizing the site-specific projects necessary to address the most important NPS issues within the jurisdiction of each agency.

A high priority for the NPS program is to follow through with implementation and evaluation of these first MOAs and action plans and to regularly update the agreements to keep them current. A complete NPS program will eventually require agreements with other agencies concerned with transportation, land use planning, recreation, fish and wildlife, urban development, wetlands management, and water resources. Development of these additional agreements is a high priority for 1992-93, but will depend on the availability of adequate funding and staffing for implementation and follow-through.

Coordinated resource management and planning: Interagency coordination is a principal vehicle for integrating and applying the goals of the NPS Management Plan, the objectives of the interagency MOAs, the information from NPS assessments and monitoring, the priorities of the State Clean Water Strategy, and the funds from Section 319 grants and other sources. Through this coordination, DEQ is able to take the lead on identifying problems, prioritizing projects, selecting solutions, and monitoring the effectiveness of resource management operations throughout the state.

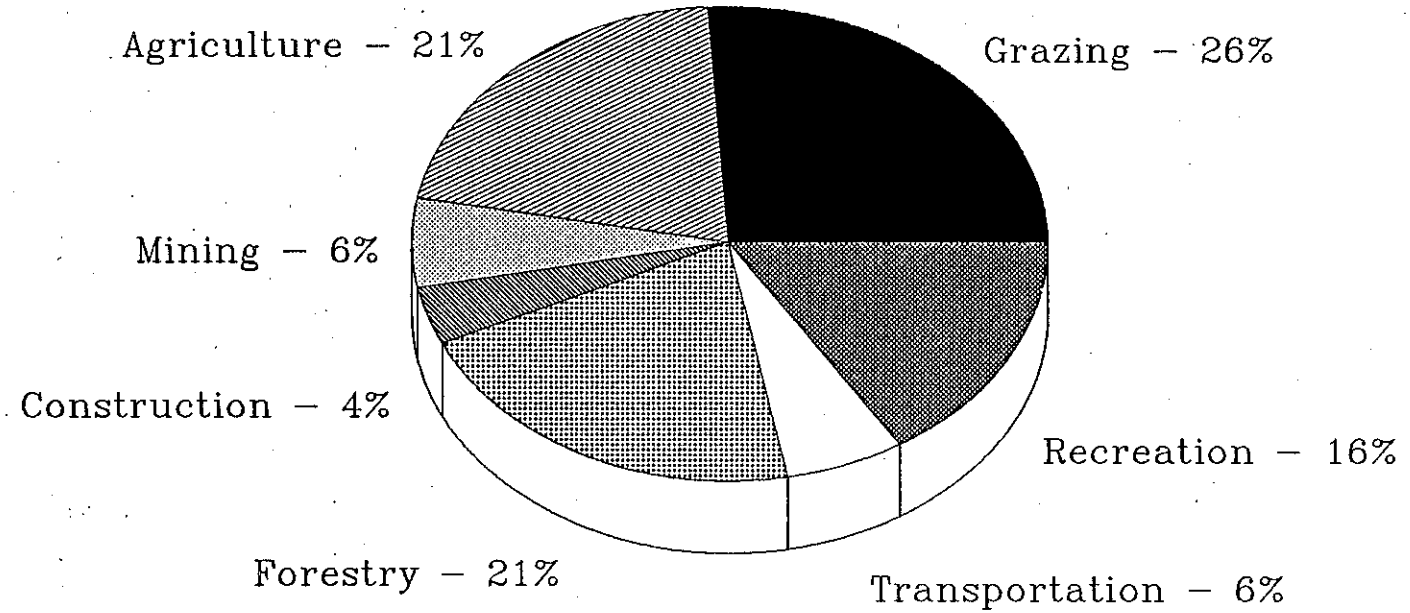
In addition to the federal and state natural resource agencies, the NPS network includes the Governor's Watershed Enhancement Board (GWEB), the Coordinated Resource Management and Planning Group (CRMP), Oregon's Strategic Water Management Group (SWMG), the Governor's Forest Planning Team, local soil and water conservation districts, the Northwest Power Planning Council, and a number of citizen-based special interest groups. All of these agencies and groups have their own approaches and priorities, yet all look to DEQ for guidance and leadership in water quality matters. As with other NPS program priorities, the depth and extent of DEQ involvement in these networks is governed by the availability of staff.

NPS Affecting Beneficial Uses*

▪ ▪ River Miles Affected by Each Land Use ▪ ▪

Miles Affected by More than One Source Are Counted Separately for Each Source

- Construction (1,420)
- Agriculture (7,605)
- Mining (2,280)
- Transportation (2,115)
- Recreation (6,005)
- Forestry (7,580)
- Grazing (9,305)



(Reported Sources of Water Quality Problems in Rivers where Beneficial Uses Are Not Fully Supported)

*Data from 1988 NPS Assessment.

WH4110C

WORK SESSION: NONPOINT SOURCE PROGRAM OVERVIEW
ATTACHEMENT B

POLLUTION OF OREGON WATERS BY RUNOFF AND ASSOCIATED EROSION

Environmental Effects of Erosion

Erosion is a natural process that has been occurring throughout geologic history. Complete control of erosion and sedimentation is neither realistic nor desirable. But management of human activities that cause excessive erosion and pollution is possible and highly desirable. The most obvious pollutant associated with erosion is sediment.

SEDIMENT -- Direct effects of sediment on public waters are:

- Accumulation of Bottom Deposits
  These include decomposable organics which form objectionable mud deposits, create oxygen demands, bury spawning areas, inhibit benthic processes.

- Increased Turbidity
  Interferes with and increases expense of municipal and industrial water treatment.

- Deterioration of Aesthetic Values
  Results in decreased support of recreational uses like boating, fishing and swimming.

- Changes in Aquatic Populations
  Decreased support of fish & aquatic life.

- Loss of Reservoir and Stream Capacity
  This can lead to expensive dredging operations and increased risks of flooding.

In addition to direct effects, sediment is a primary carrier for other pollutants. Control of human caused erosion will result in reduction of many other nonpoint source pollutants. Contaminates associated with sediment include:

- Pesticides
- Metals
- Ammonium Ions
- Phosphates
- Synthetic fertilizers
- Other toxic compounds

- Streambank erosion is often caused by removal of stream-side vegetation. This also causes increases in water temperature that devastate fish and other life.

- The runoff that causes erosion also often carries animal wastes that contain large bacteria loads.

- Pollutants and salts that dissolve during the erosion process can seep into and contaminate groundwater.

Magnitude of the Problem

Over four billion tons of sediment are delivered annually to rivers and streams in the lower 48 states as a result of runoff and associated erosion. Almost half of that originates from agricultural lands.

- It's estimated that non-federal lands in Oregon lose over 80 million tons of soil through erosion each year. This estimate includes less than half of the total land mass in Oregon (because 52% is in federal ownership).

- In Oregon, "acceptable" erosion rates, e.g. rates which do not exceed soil replacement rates, range from 2 - 5 tons/acre/year depending on soil type and other factors. The average rate of erosion from cropland in Oregon is 5.7 tons/acre/year. Some studies have shown that the rate of erosion from urban construction sites is 10 times higher than agricultural erosion rates.

According to some estimates, runoff and associated erosion contribute 80% of total nitrogen load, 50% of phosphorus load, and up to 98% of total bacteria load nationwide.

Human Caused Conditions that Often Result in Excessive Erosion:

- Farming long slopes without terraces or diversions
- Row cropping up and down slopes
- Bare soil after seeding
- Bare soil between harvest and establishment of new crop
- Cultivation, or other soil disturbance, adjacent to stream
- Gully formation
- Residential construction
- Commercial construction
- Highway construction
- Unstable road fills/banks
- Bare road drainage ditches
- Unstable stream banks
- Poorly managed forestry operations
- Over grazing
- Feedlots close to streams
- In-stream animal watering
- Any long exposure of disturbed soil to weather

State of Oregon
Department of Environmental Quality Memorandum

Date: April 13, 1992

To: Environmental Quality Commission

From: Fred Hansen, Director

Subject: Discussion of Tax Credit Program Issues
April 23, 1992 Work Session

The objective of this work session discussion is to have the Commission give the Department direction on any changes it would like made to the Tax Credit Program, whether they be administrative, rulemaking or legislative in nature. However, since legislative concepts are required to be submitted to the Executive Department by May 1st it would be particularly helpful if the Commission were to focus on potential legislative issues.

This memorandum is designed to assist the Commission in its discussion of Tax Credit Program issues, and is organized to provide a menu of options for the Commission to consider in its deliberations. The options include potential administrative, rulemaking and legislative changes to the program, and are organized into program-wide issues and issues specific to each of the types of facilities currently eligible for tax credits: air, water and noise pollution control facilities; alternatives to field burning; solid and hazardous waste recycling/resource recovery facilities; hazardous waste treatment/reduction facilities; and reclaimed plastics facilities.

It is hoped the Commission will discuss the various options presented and pick the ones it would like the Department to pursue, or add its own options and direct the Department accordingly. In order to keep this work session paper to a manageable size very little discussion and analysis of the various options is provided. Several background papers are attached to this memorandum to provide the Commission additional information and a historical perspective of the program.

Program-wide Issues

Obviously the Commission has a myriad of options at its disposal for changing the way the Tax Credit Program functions, from no changes at all to total elimination of the program. In undertaking its deliberations, it might be helpful if the Commission first determined what an ideal financial incentive program would accomplish and whether tax credits are the appropriate medium to accomplish the desired objectives. In other words, should the program be retained, and if so, what is its purpose?

Is it an incentive for business to install pollution control facilities?

Is it a subsidy for business that must install pollution control facilities?

Is it a state economic development tool?

Is it to encourage voluntary compliance, reduce enforcement costs and result in a more cooperative working relationship with industry?

Is it to help offset any competitive disadvantage to Oregon businesses where Oregon's environmental requirements are more stringent than neighboring states?

Is it to help keep Oregon's business climate on an equal footing with other states that provide pollution control incentives?

Is it to encourage the installation of the best pollution control facilities regardless of the environmental requirements?

Is it to assist in control of existing pollution or prevention of future pollution?

Is it all of the above?

If any or all of these are the purposes of the Tax Credit Program, do tax credits accomplish the desired results?

Some options for the Commission to consider that are program-wide in nature include:

1. Leave the program as it is, unchanged.

2. Eliminate the entire program.

3. Eliminate eligibility for certain types of facilities; e.g. noise pollution control facilities, or material recovery facilities.

4. Eliminate eligibility for facilities associated with new businesses or expansion of existing businesses.

5. Option 4. plus narrow eligibility to only those facilities that are installed at existing businesses to meet a new environmental requirement.

6. Option 5. plus allow eligibility only for those facilities that are installed by the compliance deadline.

7. Restrict eligibility to only those facilities installed at small businesses.

8. Eliminate eligibility for facilities installed to meet an environmental requirement (principal purpose). Retain eligibility for facilities installed voluntarily, or that exceed environmental requirements.

9. Eliminate allocable cost determination and ROI analysis. Replace with a flat tax credit benefit if meet eligibility criteria.

10. Eliminate tax credits for facilities that are an integral part of an operating business; e.g. landfill liners, material recovery facilities, etc. (The definition of "integral part of an operating business" may prove difficult.)

11. Provide eligibility only for facilities installed at companies that can demonstrate an economic hardship. May need to provide property tax relief for these companies. (Again, it will be difficult to establish objective criteria for a determination of "economic hardship".)

12. Place a dollar cap or limitation on available tax credits similar to the limitation on tax credits under the Department of Energy Small Scale Energy Loan Program.

13. Alter the percentage and/or length of the available tax credit.

14. Establish procedures to revoke prior tax credits if violations are discovered.

15. Provide for Director to administratively approve/deny tax credit applications with appeal rights to the Commission.

16. Establish specific statutory eligibility criteria for each type of facility that will qualify for tax credit.

17. Clarify whether the definition of sole purpose excludes or includes facilities that have other minor purposes or benefits in addition to pollution control.

Air, Water and Noise Pollution Control Facilities

Legislative Policy:

To assist in the prevention, control and reduction of air, water and noise pollution by providing tax relief for facilities constructed to accomplish such prevention, control or reduction.

Eligibility:

Air or water facility must be constructed on or after January 1, 1967.

Noise facility must be constructed on or after January 1, 1977.

Principal purpose of facility must be to comply with an environmental requirement to prevent, control or reduce air, water or noise pollution; or

Sole purpose of facility must be to prevent, control or reduce a substantial quantity of air, water or noise pollution.

Facility must prevent, control or reduce:

Air contaminants or air pollution as defined in ORS 468A.005;

Industrial waste as defined in ORS 468B.005; or

Noise pollution as defined by rule of the Commission.

Issues:

1. Should the Department assign resources to inspect facilities at time of certification, or afterwards, to verify they are actually used as claimed by the applicant?

2. Should the application/certification process be streamlined for low cost facilities such as CFC recycling, underground storage tank systems, and Stage I, II vapor recovery facilities?

3. Should facilities that are built to prevent, control or reduce air, water or noise pollution from non-point source activities be eligible for tax relief?

4. Since the Department no longer has staff resources to implement the Noise Control Program, should tax credits for noise control facilities be retained?

Options:

1. Instruct the Department to inspect facilities costing more than $_____ before tax credit certification.

2. Instruct the Department to develop streamlined tax credit certification process for facilities costing less than $_____.

3. Provide tax relief for facilities that are built to implement a best management practice or approved plan for farming practices that prevent, control or reduce groundwater or surface water pollution.

4. Eliminate tax credit eligibility for noise pollution control facilities.

Hazardous Waste Treatment, Reduction or Elimination Facilities

Legislative Policy:

To assist in the prevention, control and reduction of hazardous wastes by providing tax relief for facilities constructed to accomplish such prevention, control or reduction.

Eligibility:

Facility must be constructed on or after January 1, 1984.

Principal purpose of facility must be to comply with an environmental requirement to prevent, control or reduce hazardous waste; or

Sole purpose of facility must be to prevent, control or reduce a substantial quantity of hazardous waste.

Facility must treat, substantially reduce or eliminate hazardous waste as defined by ORS 466.005.

Issues:

1. There have been only 5 hazardous waste facilities approved costing a total of $473,291 in the 8 year history of the program. This low level of activity may indicate the program is not needed.

Options:

1. Amend the statute to remove eligibility for hazardous waste facilities.

Alternative Methods to Open Field Burning

Legislative Policy:

To assist grass seed farmers in the Willamette Valley transition from open burning to more environmentally acceptable agricultural practices.

Eligibility:

Facility must be an approved alternative method of field sanitation or straw utilization and disposal. Currently approved alternatives are:

Facilities for gathering, densifying, processing, handling, storing, transporting and incorporating grass straw or straw based products which will result in a reduction of open field burning.

Propane flamers or mobile field sanitizers which are alternatives to open field burning and reduce air quality impacts.

Drainage tile installations which will result in a reduction of grass seed acreage under production.

Facility must be constructed or installed on or after January 1, 1967.

Facility must prevent, control or reduce air contaminants or air pollution as defined in ORS 468A.005.

Issues:

1. Facilities that recover and reuse grass straw do not fit well under either the principal purpose or sole purpose eligibility criteria (e.g. custom balers). Nor do drainage tile installations fit well under these criteria. How should this be fixed?

2. There is no link between the tax credit program and registration and burning of grass straw to ensure acreage that receives a tax credit is actually removed from the practice of field burning or, if removed, that a like amount is not added elsewhere possibly by the same grower.

3. Facilities that recycle or reuse grass straw are generally an integral part of a business operation rather than traditional add-on pollution control equipment. How should eligibility and allocable costs be determined for these types of facilities?

4. The rule definition for drainage tile installations requires an actual reduction in grass seed acreage under production to be eligible rather than just a reduction in open field burning.

5. Eligibility of equipment that has general farming uses (e.g. tractors and plows) is troubling because it can be converted to other farm uses when not needed to implement an alternative to field burning, and it is difficult to determine the appropriate capacity of the equipment. How should percent allocable be determined for these facilities?

6. Should alternative methods to open field burning outside the Willamette Valley be eligible for tax credits? (An informal opinion of the Attorney General advises that the current statute would allow eligibility for alternative methods applied outside the Willamette Valley, however there is no explicit program or requirement to limit open field burning outside the Willamette Valley)

7. Is the ROI process defined in the tax credit rules appropriate for use with farm businesses, or is there a more specific ROI process that should be applied in farm business situations?

8. Rule definition of alternative methods of straw utilization is very broad and vague.

Options:

1. Amend the statutes to make approved alternatives to field burning specifically eligible for tax relief without meeting the principal or sole purpose eligibility criteria.

2. Require tax credit applicants to provide specific information (e.g. coordinates and legal descriptions) on fields that will no longer be burned to allow DEQ inspectors to confirm cessation of burning on these fields.

3. Amend the statute to specifically identify the types of facilities that would be eligible for certification and provide a specific flat rate tax credit for each (i.e. no percent allocable determination).

4. Amend the tax credit rules to clarify that drainage tile installations are to result in a reduction in open field burning.

5. Provide for a flat rate tax credit for general farm equipment used as an alternative to field burning.

6. Instruct the Department to research return on investment processes used in the farming community and determine whether a more appropriate ROI process should be adopted for alternatives to open field burning.

7. Instruct the Department to develop rule amendments to specifically identify the types of straw utilization facilities that will be eligible for tax credit as alternatives to open field burning.

Solid Waste, Hazardous Waste, or Used Oil Material Recovery & Recycling Facilities

Legislative Policy:

To assist in the prevention, control and reduction of solid waste, hazardous waste and used oil by providing tax relief to facilities constructed to accomplish such prevention, control or reduction.

Eligibility:

Solid waste facility must be constructed on or after January 1, 1973.

Hazardous waste or used oil facility must be constructed on or after October 3, 1979.

Principal purpose of facility must be to comply with an environmental requirement to prevent, control or reduce solid or hazardous waste or to recycle or provide for the appropriate disposal of used oil; or

Sole purpose of facility must be to prevent, control or reduce a substantial quantity of solid or hazardous waste or to recycle or provide for the appropriate disposal of used oil.

Facility must use a material recovery process which obtains useful material from material that would otherwise be:

Solid waste as defined in ORS 459.005,

Hazardous waste as defined in ORS 466.005, or

Used oil as defined in ORS 468.850.

The end product of the utilization must be an item of real economic value, and be competitive with an end product produced in another state.

The Oregon law regulating solid waste must impose standards at least substantially equivalent to the federal law.

Issues:

1. Facilities that recover and reuse materials do not fit well under either the principal purpose or sole purpose eligibility criteria. How should this be fixed?

2. Facilities that recycle or reuse materials are generally an integral part of a business operation rather than traditional add-on pollution control equipment. How should eligibility and allocable costs be determined for these types of facilities?

3. ORS 279.630(6), enacted by the 1991 Legislature, requires that persons receiving tax credit for recycled materials must show they give preference to Oregon producers of the recycled materials used. How should this be determined?

4. Are the eligibility criteria that (1) require the end product to be competitive with an end product produced in another state, and (2) require Oregon solid waste law be substantially equivalent to federal law really relevant and necessary criteria for determining tax credit eligibility of material recovery facilities?

Options:

1. Amend the statute to clarify that facilities for disposal of used oil are not eligible for tax relief, or to provide tax relief for used oil energy recovery facilities.

2. Amend the statute to allow tax credit for material recovery facilities without meeting the principal or sole purpose eligibility criteria.

3. Amend the statute to specifically identify the types of facilities that would be eligible for certification and provide a specific flat rate tax credit for each (i.e. no percent allocable determination).

4. Amend the tax credit rules to require the showing of preference for Oregon producers of recycled plastics. (Will require standards for review).

5. Delete the statutory eligibility criteria in ORS 468.165(1)(c)(D) - competitive with a product in another state, and 468.165(1)(c)(E) since Oregon's law is substantially equivalent to federal law.

Reclaimed Plastic Product Facilities

Legislative Policy:

To assist in the prevention, control and reduction of solid waste by providing tax relief to Oregon businesses that make investments in order to collect, transport or process reclaimed plastic or manufacture a reclaimed plastic product.

Eligibility:

Facilities for collection, transportation or manufacture of reclaimed plastic products.

Plastic must have originated in Oregon.

Plastic must be from a separate recycler or industrial producer of plastic waste.

Investment must be made between January 1, 1986 and July 1, 1995.

Preliminary certification required (unlike the other tax credit programs for which preliminary certification was eliminated at the request of the Department).

Issues:

1. Under the Reclaimed Plastics Tax Credit Program, facilities that reuse waste plastic in the generator's business are not eligible for tax credit. However, such facilities are potentially eligible under the Pollution Control Facilities Tax Credit Program. Therefore, there is an apparent discrepancy between the two programs.

2. The statutory definition of "reclaimed plastic product" does not clearly state that the entire product must be manufactured from plastic. At present, the statute may be interpreted to mean that products of combined media (i.e., plastic/metal) are potentially entirely eligible, rather than the portion which is directly related to the plastics operation.

3. The requirement for preliminary certification is burdensome and not very effective.

4. ORS 279.630(6), enacted by the 1991 Legislature, requires that persons receiving tax credit for recycled materials must show they give preference to Oregon producers of the recycled materials used.

Options:

1. Amend the Pollution Control Facilities Tax Credit statute to remove eligibility for plastic recycling/reuse facilities that reuse waste plastic in the generator's business, making the programs consistent in terms of eligibility for tax credits.

2. Amend the definition of "reclaimed plastic product" in the Plastics Recycling Tax Credit rules to clarify that the entire product (or substantial portion) must be manufactured of plastic.

3. Amend the Reclaimed Plastic Product Tax Credit law to delete the requirement for preliminary certification.

4. Amend the Plastics Recycling Tax Credit rules to require the showing of preference for Oregon producers of recycled plastics.

Attachments:

Tax Credit Eligibility of Farm Tractors, Memo from Fred Hansen to EQC, September 4, 1990.

Tax Credit Review Report for November 2 EQC Meeting, Memo from Fred Hansen to EQC, October 26, 1990.

Background Discussion: Eligibility of Agricultural Practices for Pollution Control Tax Credit Certification, Memo from Fred Hansen to EQC, September 9, 1991.

Eligibility of Non-Point Source Related Facilities for Tax Relief, Memo from Fred Hansen to William Wessinger, December 9, 1991.

Pollution Control Tax Credit Issues, Memo from Fred Hansen to EQC, February 4, 1992.

Legal Issues Relating to the Pollution Control Tax Credit Program, Letter from Larry Knudsen and Arnold Silver to EQC, February 11, 1992.

Pollution Control Tax Credit Issues, Memo from Fred Hansen to EQC, March 16, 1992.

Tax Credit Rule Amendments, Memo from Larry Knudsen to Roberta Young and Noam Stampfer, March 25, 1992.

Pollution Control Facilities Tax Credit Program - A Historical Perspective, DEQ, April 13, 1992.

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY

DATE: September 4, 1990

TO: Environmental Quality Commission

FROM: Fred Hansen, Director

SUBJECT: Tax Credit Eligibility of Farm Tractors

At its August 10, 1990 meeting, the Commission expressed concern regarding the degree of tax credit eligibility for farm tractors as an alternative field burning method because of their other general farm applications. The Commission directed the Department to examine the issue and develop a process that will provide a consistent approach in evaluating applications that involve tractors. The purpose of this agenda item is to provide some background information and to present alternative approaches for the Commission's consideration. It is the Department's expectation that the Commission provide further direction based on the identified alternatives.

AUTHORITIES

The Oregon statute governing the Pollution Control Tax Credit Program states that field sanitation and straw utilization and disposal methods shall be eligible for tax credit benefits. The statute further directs the Department and Field Burning Advisory Committee to determine "approved methods".

Department administrative rule, Division 16, defines alternative methods through the following language:

340-16-025 (2) (f) Approved alternative field burning methods and facilities which shall be limited to:

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

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

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

NON-BURNING OPTIONS FOR GRASS SEED FARMERS

Based on information from the Oregon State University Linn-Benton County Extension Service office, there are a number of non-burning options available to grass seed growers for perennial and annual crops. The following is a summary of the options for removing straw after the seed is removed.

Perennial Crops - Straw and stubble residue removal steps:

1. Remove cut straw by baling or using push rakes to push the straw into piles.(the straw is sold, used or given away or burned)
2. The post-harvest residue (stubble) can be eliminated by propane flaming, or crew cutting which removes the stubble and collects it in a wagon. (machinery includes rear's pakstak, vacuum equipment,stackwagon or flail chopper)
3. The stubble may also be removed with just the flail chopper. This chops and deposits the residue on the ground.
4. The stubble can also be re-clipped, windrowed and collected in a stackwagon. This does a better job than crew cutting.

Annual Crops - Straw and stubble residue removal steps:

1. The primary option if there is no burn is to chop the straw and stubble with a flail chopper and plow or disc the residue into the soil.
2. If there is a market for annual ryegrass, the straw may be baled.
3. There is some experimenting with mixing the residue into the soil using no-till drilling

CURRENT PROCEDURE FOR EVALUATION

The Department has determined under its interpretation of Section (A) of the rule that tractors may be eligible for certification based on the information and justification contained in the application. Tractors are typically needed to pull other implements such as propane flamers, flail choppers, plows, balers, etc.

Initially, the applicant states whether the tractor is going to be solely engaged in activities related to alternative methods to field burning, or used as an alternative method and for other farm uses that do not relate to an alternative method. If the former is stated, the Department summarizes the

applicant's description of how the tractor is used as an alternative method. If the latter applies, the percentage of the tractor that is used for alternative method purposes is the portion that is eligible for tax credit certification. This information, along with other information in the application, is then used to determine the tax credit amount.

Through the application process, the applicant provides the following information; however,the extent and quality of the information varies considerably:

1. A technical description and explanation of the function of the equipment.
2. The conditions that existed prior to the use of the claimed equipment, and other methods that were previously used.
3. The conditions that exist as a result of use of the equipment.
4. The effectiveness of the equipment as an alternative method.
5. The equipment's principal or sole purpose, and any use or function of the equipment that is other than pollution control related.
6. A return on investment calculation, if the equipment generates any income, to determine the portion of the costs that are allocable to pollution control.
7. Alternative methods or equipment considered for achieving the same objective.
8. Any other factors that may be relevant in establishing the percent allocable to pollution control.

ISSUES WITH THE CURRENT PROCEDURES

In the Department's current process the following issues are unique to field burning facilities, which include tractors.

1. The applicant is not required to provide an overall plan on how a reduction in open burning will be accomplished. Since tax credit applications are submitted when individual or units of equipment or facilities are purchased, the information is specific to the application.

2. The rule definition of approved alternative methods is somewhat general, thereby allowing the farmers considerable latitude in determining which methods or combination of methods to apply for purposes of a tax credit. There are no expressed restrictions on equipment or facilities that also have uses which do not apply under

alternative methods. This is addressed under the "principal purpose" and "sole purpose" provisions.

3. Decisions for utilizing alternative methods and the investment decisions in equipment vary considerably among farm operations. There is a broad range of variables including equipment size, cost, used vs. new equipment.

PROPOSED ALTERNATIVE APPROACHES FOR EVALUATING APPLICATIONS

The Commission's concern regarding the establishment of the degree of eligibility for tractors, and the above identified issues may be addressed through the following:

1. Revision of Current Procedures

This approach primarily involves expansion of the staff effort to review the application, verify information on benefits and options, and include supplemental information provided in the application. (Attachment A is an application which serves as an example of provided information.) The staff report would be expanded to provide the Commission with more information substantiating eligibility. The information would include:

- Description of the applicant's overall plan to reduce open field burning, the equipment necessary for accomplishing the plan.
- Complete justification of the need for a tractor to carry out an alternative method to open field burning, including an assessment of currently owned tractors and their uses.
- Detailed explanation of the applicant's decision regarding the tractor size and model in terms of meeting the anticipated uses.
- A statement as to whether the same objective could be accomplished using a less expensive tractor or perhaps smaller tractor.
- A detailed breakdown of the estimated usage for field burning related and other unrelated farm uses.

If this option is selected, the eight tractors that were withheld at the August 10th meeting will be re-processed using the above information, and placed on the November agenda.

2. Develop of a Standard Eligibility Percentage for Tractors

The Commission may choose to establish a predetermined level of eligibility of a tractor. This would be established in relation to the identification of general farm needs and other uses of tractors that are not related to pollution control. If desired, provisions for exceptions could be developed.

This option would require rulemaking to revise the definition of alternative methods (Section (A) above). It may also be appropriate to establish an advisory committee to assist the Department in developing an agreed upon rationale for a standard percentage

This option will take approximately six months due to the need to revise the rules, and utilize input from an advisory committee. If this option is selected, a decision is needed regarding the pending tractors. The eight applicants have anticipated certification prior to the year's end so that they could apply the credit against 1990 taxes.

3. Development of Eligibility Methodology

There has been some interest in exploring whether eligibility could be determined through a methodology which would consider the number of acres subject to the alternative method, and the annual hours of tractor usage which would be converted into a percentage allocable. The Department believes this approach may be a more difficult one in terms of establishing what constitutes full utilization of a tractor. Development of this alternative may involve an advisory committee and constitutes at least a six month staff effort.

RECOMMENDATION

It is the Director's recommendation that alternative 2. be pursued on the basis that tractors have broad farm applications and do not appear to be exclusively utilized for pollution control. The Department further recommends that the new procedures be applied prospectively, and that the eight pending applications be acted upon by the Commission under the existing application process.

In pursuing this alternative, it would be the Department's intent to re-examine the application and staff report process in terms of completeness, and to assure that the application includes information on the applicant's overall plan to reduce burning.

All applicants with pending applications involving tractors have been notified of this issue. Consequently, if certification were granted to the eight applicants, no additional applications would be processed until the new procedures are in place.

eqcfb
Attachment

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY INTEROFFICE MEMORANDUM

DATE: October 26, 1990

TO: EQC Commission Members

FROM: Fred Hansen, Director

SUBJECT: Tax Credit Review Report for November 2 EQC Meeting

At the September 21 EQC meeting, the Commission provided the Department further direction in determining the percent allocable to pollution control of farm tractors. The Department was asked to develop a procedure, within statutory and administrative rule guidelines, which would better identify and define the portion of a tractor that is used for alternative methods to open field burning. This need is premised on the Commission's view that, as an essential general farm implement, only the portion of a tractor utilized as an alternative method should be certified for tax relief.

With assistance from the Department of Agriculture and OSU Agriculture Extension Service, Department staff has developed a methodology which uses a standard average annual operating hours for a farm tractor. This standard of 450 hours was determined based on information from the Extension Service. Using a calculation, the estimated annual hours of operation is determined for each implement used with the tractor as an alternative field sanitation practice. (A table is provided which states the average acres/hour use for various implements using tractors of different horsepower, identified as attachment A in this report.) The total annual use hours for each implement are summed and divided by the standard average annual total of 450 hours. This provides the percent of the tractor that is allocable to pollution control.

It is the Department's position that the new methodology accomplishes the Commission's objective to better document and certify the portion of a tractor that is actually used as an alternative method to open field burning. As a general farm implement, it is reasonable to expect occasional use of tractor to extend beyond the narrowly defined uses as alternative methods, regardless of the purpose for the investment. This approach provides greater accountability from a state budgetary perspective, and provides the farmer a more reasonable basis for obtaining maximum utilization from an investment.

Other changes have been made to the application procedure to facilitate the applicant in completing the application, and to provide the Commission with sufficient information on which to

base certification decisions (see attached application). The application has been tailored specifically for facilities used as alternative methods, which should provide greater ease for the applicant. Additional information is requested so that a description is provided of the applicant's overall plan to reduce open field burning, and to state the relationship of the facility to the plan. This information will also be included in staff review reports.

These new procedures have been applied to one of the eight tractor applications that were deferred at the August Commission meeting. The staff review for this report is attached for Commission action November 2. The remaining seven applications are scheduled for the December meeting.

In applying the new methodology to TC-3262, the percent allocable is 92%. The Department is recommending this percentage be certified by the Commission. In this situation, the applicant has stated that the tractor is solely used for alternative method application. Since the annual use does not constitute total maximization based on the standard annual use, the remaining 8% may be used for purposes unrelated to alternative method practices.

The Department of Agriculture does not concur with the Department's recommendation on TC-3262. When the investment in a tractor is solely for alternative method utilization, the Department of Agriculture believes a credit of 100% is appropriate regardless of the number of hours the tractor is used. In DEQ's view, this is counter to the Commission's intent to better justify the actual use of a tractor because of its broad application in general farming practices. The Department will be prepared to discuss this issue at the November 2 meeting.

novtc

TABLE A
Average Machinery Capacity by Tractor Size
(in acres/hour)

75 Horsepower Tractor		120 Horsepower Tractor		190 Horsepower Tractor		260 Horsepower Tractor	
Square Bales	4	Square Bales	4	Square Bales	4		
Stack Loader	3	Stack Loader	3	Stack Loader	3		
Flail Chop	5	Flail Chop	6	Flail Chop	7		
Harrow	7	Harrow	7	Harrow	7		
Propane Burn	10	Propane Burn	10	Propane Burn	10		
Fluff	7	Disc or Plow	6	Disc or Plow	7	Disc or Plow	8
Lely Thatcher	8	Flail & Loaf	5	Flail & Loaf	5		
		Round Bales	4				

State of Oregon

Department of Environmental Quality Memorandum

Date: September 9, 1991

To: Environmental Quality Commission

From: Fred Hansen

Subject: Agenda Item L., September 18, 1991, EQC Meeting

Background Discussion: Eligibility of Agricultural Practices for Pollution Control Tax Credit Certification

This memorandum provides background information on the eligibility of certain agricultural capital investments for Pollution Control Tax Credits. The Department requests EQC input and guidance on how to proceed with the issue.

OVERVIEW OF TAX CREDIT ELIGIBILITY

Since the program began in 1968, the Commission (EQC) has approved pollution control tax credit certification of facilities that prevent, reduce or control a substantial quantity of air, water or noise pollution. Tax credit is also available for solid wastes, hazardous wastes and used oil recycling; the treatment, reduction or elimination of hazardous wastes; or, to provide for the appropriate disposal of used oil.

Under current law, a facility must serve a "principal purpose" or "sole purpose" of pollution control to be considered eligible for certification. A principal purpose applies if the primary purpose is to comply with an EPA or DEQ regulatory requirement. A sole purpose applies if the exclusive function is for pollution control. (Prior to enactment of the principal purpose/sole purpose eligibility test, the statute used the term "substantial purpose".)

The majority of certified facilities fall under the "principal purpose" criterion. The "sole purpose" criteria has applied to investments such as material recovery/recycling facilities and noise control investments. Also, equipment such as a baghouse or wet scrubber may meet a sole purpose if installed as a non-requirement pollution control measure if there are no production benefits.

THE ISSUE WITH AGRICULTURAL PRACTICES AND TAX CREDITS

With some exceptions, most agricultural activities are or have been specifically exempted from regulation under Oregon's air pollution control, noise, or solid waste statutes. Agricultural operations are not exempt from regulation under the water quality statutes. However, specific rules to regulate agricultural activities (with the exception of Confined Animal Feeding Operations) have not been enacted by the Commission.

Since most agricultural activities have not been subject to environmental regulation, capital investments that would reduce pollutant discharges have historically not been considered to qualify for tax credit certification under the "principal purpose" criteria. Further, few agricultural capital investments that reduce pollutant discharges are likely to be "solely" for pollution control in that they provide other economic benefits for the agricultural operation (at least as the term "sole purpose" has been historically interpreted).

Current and Past Eligible Activities

The following agricultural activities are, or at one time were, eligible for pollution control tax credits:

Field Burning

In 1975, the Legislature granted specific eligibility to grass seed growers for employing "alternative methods" to open field burning. The capital investment in the "alternative methods" can also be considered to qualify for certification under the "principal purpose" criteria of the tax credit statutes. This is because there is specific statutory regulation of field burning in the Willamette Valley for the purpose of reducing the amount of open field burning.

Open field burning also occurs in other parts of the state. Alternative methods in all unregulated areas would have to meet the "sole purpose" criterion to qualify under the current program. The Department has applied the alternative method authority only to the Willamette Valley. However, the statute is silent on the applicability of alternative methods to other regions or areas of the state.

Orchard Frost Control

Prior to enactment of the principal purpose/sole purpose criteria, the EQC certified a number of alternatives to "smudge pots" for frost control in orchards. These alternatives included fans, propane heaters, and sprinkler systems. The alternatives also provided other benefits to the growers. The Commission chose to certify the facilities under the earlier "substantial purpose" criteria, even though it was possible to argue that the alternatives were not eligible because smudging could not legally be regulated as an air pollution source. Conversion to these alternatives reduced a substantial amount of "real" air pollution and the EQC considered it good public policy to encourage the voluntary control of "real pollution". Since the principal purpose/sole purpose criteria was enacted, alternatives to smudging have not been certified because they do not meet either the principal purpose or sole purpose criteria.

Animal Waste Control

Capital investments associated with control of animal waste to prevent water pollution have

been certified for tax credit since the beginning of the program. Facilities have been certified under the earlier "substantial purpose" criteria, and the current sole purpose criterion in that the investment was made exclusively for pollution control purposes. Any other possible benefits have been determined insignificant. Now that the water quality general discharge permit prohibits direct discharge of wastes into water bodies, this activity could be considered as meeting a principal purpose as well.

Current Issues

Efforts to regulate air and water pollution resulting from agricultural activities are increasing, but have not yet reached the level of regulation that is imposed on the typical industrial sources. Public pressures, local ordinances, and new DEQ control strategies are placing pressure on the agriculture community. As investments are made to reduce agriculture's contribution to pollution, questions on the availability of tax credits have been raised. Under current law and rules, few investments by agriculture to control pollution qualify under historic interpretations of principal purpose and sole purpose. Issues may also rise as we consider the range of pollution controls potentially required to deal with nonpoint pollution from a variety of sources.

The Department's practice of generally applying the principal purpose criterion to requirements associated with point sources poses a policy issue: How should nonpoint regulated activities be treated under the statutory term "requirements".

PROPOSED COURSE OF ACTION

It is the Department's view that an examination and definition of federal and state requirements, as applied to the "principal purpose" criterion, is necessary at this time.

Legal Counsel has advised that the pollution control tax credit statutes and rules do not prohibit certification of agricultural practices if the eligibility criteria are met. In consideration of increased regulation of nonpoint sources, the Department believes a clearer definition of "principal purpose" is necessary in determining whether agricultural practices may in fact qualify.

A review of the "principal purpose" criterion should consider:

1. Management planning for water quality restricted waterways: Management planning is required for designated waterways and may involve restrictions on certain practices and the use of BMP's to meet assigned load allocations. Examples of facility investments necessary for meeting management planning objectives may include equipment for erosion control, tillage practices and storm water controls.

2. Management planning for groundwater Areas of Concern and Groundwater Management Areas: Groundwater management plans are required for designated

areas and may be voluntarily implemented or mandated. Management strategies may also involve the use of BMP's such as fertilizer management or tillage practices.

3. City, county or special district requirements for addressing EPA/DEQ directives. The responsibility for meeting EPA/State requirements such as wastewater discharge standards may be passed on to local government. Consequently, sources may be subject to additional requirements at the local level. The argument can be made that these requirements meet the tax credit's definition of "EPA/DEQ requirement".

4. Entering into a cooperative agreement with the USDA Soil Conservation Service to assure that a comprehensive farm planning approach is applied as an eligibility condition for agricultural practices relating to groundwater pollution.

The second eligibility criterion, "sole purpose" should also be explored to determine its applicability to agriculture and other nonpoint source pollution control practices. As earlier stated, this criterion has mostly applied to recycling and noise activities. Recycling has been applied under the sole purpose criterion in that the activity clearly meets a specific statutory eligibility directive. Recycling businesses do have economic benefits in that the entire recycling facility may be a business, rather than a pollution control device necessary for production purposes. These benefits are not considered to conflict with the sole purpose definition. The amount of credit is primarily based on a determination of the return on investment calculation. Noise facilities are more straightforward in constituting a sole purpose in that there generally are no other benefits.

Agriculture practices should be examined under the sole purpose criterion in the same vein as recycling and animal waste facilities. If it is possible to conclude a practice is employed solely for pollution control, the credit amount would consider any significant unrelated benefits through the return on investment requirement.

The Department is currently processing an application for certification of straw mulching equipment to reduce water pollution in Malheur County. The requirement for meeting a principal or sole purpose will be examined based on the Commission's discussion of this issue.

agtc2

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY MEMORANDUM

DATE: December 9, 1991

TO: William W. Wessinger, Chair
Environmental Quality Commission

FROM: for Fred Hansen, Director

SUBJECT: Agenda Item J, December 13, 1991, EQC Meeting

Eligibility of Non-Point Source Related Facilities for Tax Relief

At the September EQC meeting, the issue of eligibility of facilities used in agricultural practices for pollution control tax credits was discussed. The Department agreed to consider the discussion, seek input from others, and return at a later Commission meeting for further discussion on the application of "sole purpose" and "principal purpose" to specific agricultural situations and measures.

BACKGROUND

The initial aim of the pollution control tax relief legislation was to ease the financial burden of compliance with new environmental regulations. The Legislature created the category of "principal purpose" as a way to describe the facilities which would be eligible for tax credits. At the time they also recognized that there would be some limited times when an individual or company would install facilities which would reduce or eliminate a pollution discharge without being required to do so. For a subset of these limited cases, when the essential or main purpose of the facility was to reduce or eliminate the pollution, tax credit eligibility would be available under the legislative determined category of "sole purpose".

In both instances, the Legislature requires that the percent of facility cost properly allocable to pollution control be determined. This is normally done through the use of a "return on investment" determination, with the amount of tax credit reduced as the return on investment increases.

The legislature has also declared two specific categories of facilities to be eligible for tax credit in any event: alternative practices to open field burning, and recycling facilities. These are eligible without regard to the principal or sole purpose criteria, but a determination of the percent of facility cost allocable to pollution control is still required. As a matter of practice, and according to existing rules, these facilities are evaluated under the principal purpose and sole purpose criteria, respectively.

In summary, the tax credit program as set in statute is aimed at taking at least part of the sting out of environmental regulations which individuals or companies must comply with or face enforcement. Consequently, consideration of a new set of facilities, such as those related to agriculture and other non-point related facilities, must fall within the existing categories of "principal purpose" or "sole purpose".

What follows is a description of various possible rule interpretations in regard to agricultural practices and the statutory framework for tax credits. A specific application pending before the Department is used as an example for these possible rule interpretations.

SUMMARY OF EXAMPLE APPLICATION

The Department has received an inquiry from Mr. Joe Hobson regarding tax relief eligibility for a machine he has invented to spread straw mulch between the rows in cultivated fields. The primary purpose of straw mulching is to reduce erosion. A tax credit application for the straw mulching equipment for use in Malheur County has been submitted by Mr. Louis Wettstein. The application claims that air pollution is prevented by use of straw that would otherwise be burned, and that the practice of mulching reduces phosphorus and nitrate from surface water runoff. The practice of straw mulching is a recognized Soil Conservation Service (SCS) Best Management Practice for general application which primarily has surface water pollution benefit. The application does not substantiate groundwater pollution control benefit in that there are no identified or planned reductions in water and fertilizer application rates.

Research study information provided by the applicant suggests that the practice of straw mulching provides benefits other than pollution control. This information identifies significant potential benefits from increased crop yield and the potential for reduced fertilizer application needs. In addition, reduction of the loss of valuable productive topsoil is a savings of the primary asset of any farming operation.

Attachments A and B present the Department's preliminary evaluation of the Wettstein application.

APPLICATION OF PRINCIPAL PURPOSE TO AGRICULTURAL FACILITIES

Historically, most agricultural activities have not been subject to environmental regulation. Under the current tax credit law and rules adopted by the Commission, agricultural facilities claimed to be pollution control facilities have been found eligible under the "principal purpose" criterion if the facility is installed in response to a state or federal requirement and

the facility owner is subject to enforcement action if the facility does not achieve the requirement. Waste management facilities for confined animal feeding operations (CAFO's) that are subject to permit requirements under current rules are an example of facilities that qualify.

The Department believes that agricultural and other non-point source facilities that are installed to meet the requirements of an adopted TMDL would be eligible under the current interpretation for "principal purpose". Storm water non-point source facilities that may be installed to meet new permit requirements or TMDL requirements may also be eligible.

Field burning applications have been processed under the principal purpose criteria, even though the alternative methods to open field burning are considered outright to be eligible by provision of law. The program to regulate open field burning in the Willamette Valley has provided the regulatory framework for consideration under principal purpose. To date, no claims to reduce field burning outside the Willamette Valley have been processed. Processing of such applications would not comfortably fit under the principal purpose criteria since there is no regulation program on field burning outside the Willamette Valley.

Facilities installed in response to a non-point source management plan that seeks to achieve a voluntary reduction in the discharge of pollutants would not be considered eligible under the present "principal purpose" criteria. This is because the installation of the facility is not the result of a "requirement" of state or federal law or rules. In the case of groundwater, it can be argued that planning is required, but the legislation stops short of establishing directly enforceable implementation requirements.

In the case of the Wettstein application, the Department has not identified an enforceable requirement that necessitated purchase and use of the claimed facility. Mr. Wettstein's farm is in the Malheur County Groundwater Management Area. The plan calls for voluntary action. Implementation is not required. In addition, reduction of pollutant discharge to groundwater by reducing water and fertilizer application rates is not substantiated. There is currently no plan or requirement for implementation of non-point source pollution control measures to protect surface water. Finally, there is no requirement to reduce open field burning in the area.

APPLICATION OF SOLE PURPOSE TO AGRICULTURAL FACILITIES

As previously noted, the legislature recognized that there may be instances where people install facilities that are not "required" by enforceable pollution control requirements, but provide pollution control benefits. The legislature determined that such facilities could be eligible for pollution control tax credits if the "sole purpose" was for pollution control. The

statute provides for a determination of the percent of the facility cost allocable to pollution control to effectively remove tax credit for the portion of a facility that serves other purposes. Commission rules define sole purpose in terms of a substantial pollution control benefit and an exclusive purpose of pollution control.

The Department has interpreted and used the "sole purpose" criteria in two different ways. Recycling facilities have been processed under the sole purpose criteria. The purpose of these facilities (exclusive purpose, main purpose, essential purpose) is to reduce the solid waste going into disposal sites. There also may be some return on the investment in these facilities. The legislature originally provided 100% tax credit for all recycling facilities. The law was subsequently changed to provide that the facilities are eligible, but the percent of the cost allocable to pollution control should be determined in a manner similar to other facilities. Since there is no "enforceable requirement" for installation of recycling facilities, they have been processed under the sole purpose criteria.

Other facilities have been determined to be eligible under sole purpose if they meet the definition in the rules; i.e. they serve an exclusive purpose of pollution control and the non-pollution benefits are very small. From a practical standpoint, for facilities other than recycling facilities, the current interpretation has almost limited the application of sole purpose to facilities that have no non-pollution benefits.

In the case of the Wettstein application, the Department concludes that under current interpretations and based on currently available information, it does not appear to qualify under sole purpose. Research information provided to the Department suggests that use of straw mulch can result in significant benefit from increases in crop yields for onions and potatoes. The applicant has not provided information to suggest that such benefits do not occur in his operation. Additionally, the information suggests that the erosion pollution control benefit diminishes with each successive application of water after the straw mulch is applied.

POTENTIAL ALTERNATIVES TO PRESENT ELIGIBILITY CRITERIA

Discussion at the September Commission meeting identified a concern that the existing eligibility criteria penalize voluntary pollution preventive practices and are inequitable. The Department understands the concern. However, the legislative determinations on eligibility seem clear -- the tax credit program was intended to reduce the sting of enforceable environmental regulations, and to support voluntary environmental actions only to the limited extent that a facility qualifies under sole purpose. The Department concludes that any substantially broadened use of the tax credit program as an incentive to implementation of voluntary pollution control measures would take a statutory change.

In response to the concern of the Commission, the Department has explored options that may be currently available through the rulemaking process to interpret and apply the principal and sole purpose criteria differently. Discussion of two options follows:

ALTERNATIVE 1: Declare through rulemaking that non-point source facilities voluntarily installed in response to and consistent with a DEQ/EQC approved area-wide non-point source management plan will be deemed to be eligible for tax credit consideration under the principal purpose criteria.

At this time the Malheur County Groundwater and the Tualatin Basin and Bear Creek Surface Water Management Plans are being developed. These plans are intended to be implemented voluntarily (at least in the initial phase). This option would allow the use of the tax credit program to encourage the implementation of these management plans. Legal counsel has informally indicated that such an interpretation of "principal purpose" may be within the scope of the Commission's authority. The Commission could, through rulemaking, specify the conditions or specific circumstances that would have to be met to qualify.

Potential Consequences:

- This option would direct additional incentives at the most significant or priority non-point source pollution problems in that a level of significance has been determined, an area has been designated and control strategies have been developed.

- This alternative differs substantially from the present interpretation of "principal purpose" in that a voluntary action in response to a management plan is presently not considered an enforceable requirement.

The Department is not comfortable with this alternative because it departs significantly from our understanding of the intent of the tax credit legislation, and would significantly broaden tax credit eligibility without legislative consideration. A written Attorney General's opinion should be obtained before this option is further pursued.

ALTERNATIVE 2: Declare through rulemaking that non-point source facilities voluntarily installed in response to and consistent with a DEQ/EQC approved area-wide non-point source management plan will be deemed to be eligible for tax credit consideration under the sole purpose criteria.

This alternative would be based on the assumption that installation of pollution control facilities called for in the approved management plan would be considered as evidence that the main or essential purpose was for pollution control. In other words, the applicant would not have made the investment but for the existence of a management plan. As such, other benefits could be identified and removed through the return on investment calculation. This concept could be expanded to include other Department/Commission approved plans or strategies.

Potential Consequences:

- Expanding "sole purpose" to include the "but for" concept could provide some additional incentive for preventative non-point source practices under a management plan.

- This alternative would treat voluntary non-point related facilities in a similar fashion as recycling facilities. The key difference is that there is specific statutory eligibility of recycling facilities.

- Application evaluation under this alternative may be complex unless eligibility is specifically addressed before management plans are approved.

Pursuit of an alternative similar to this would have to include elaboration in the rule on the "exclusive" or "main" or "essential" purpose so as to provide clear criteria for determining eligibility.

DEPARTMENT CONCLUSION

Should the Commission choose to provide broader tax relief for non-point source related facilities, the Department would support further development of Alternative 2.

The Department has purposely chosen not to recommend approval or denial of the Wettstein application, instead waiting for discussion and direction by the Commission. If the Commission gives no new direction or explicitly maintains the current direction, the Department would conclude that the Wettstein application should be denied. This is because there is no enforceable requirement, by DEQ, EPA, or Regional Air Authority, to utilize mulch or gain the benefit of runoff control achieved by the practice. Consequently, it is not eligible under the "principal purpose" criteria.

Under the "sole purpose" eligibility criteria, it appears to the Department that two review tests need to be met. First, the facility must result in a substantial reduction of pollution in Oregon. Second, its main or essential purpose must be for pollution control benefit. Information provided by the applicant, Joe Hobson, the SCS and Malheur Experiment Station offices was used in the Department's evaluation.

As to the first test, research information provided by the applicant concluded that pollution of surface water could be reduced during the first application of flood irrigation water. These benefits would be diminished, however, with each subsequent application of irrigation water. Although not claimed in this case, groundwater protection pursuant to a management plan could have been claimed as a benefit. If it had been, however, a reduction in irrigation water and fertilizer application would have to be demonstrated, and neither was demonstrated by the applicant.

As to the second test, the research information supplied by the applicant indicates that straw mulching as proposed for onions would provide substantial benefit in terms of increased crop yield. Either new information showing why this is not the case or that the results are different would have to be shown.

In any event, both tests would need to be met and in the Department's judgment, neither currently have been met.

Attachments

Oregon

DEPARTMENT OF ENVIRONMENTAL QUALITY

February 4, 1992

MEMORANDUM

TO: Environmental Quality Commission

FROM: Fred Hansen, Director

SUBJECT: Pollution Control Tax Credit Issues

Significant pollution control tax credit issues emerged from the December and January EQC meetings. Department staff also met with Commission Chair Wessinger and Commissioner Squier on January 13 to examine in depth the two main issues raised at the December EQC meeting: 1) tax credit eligibility for nonpoint sources; and 2) definition of alternative methods to open burning. At the January 23 EQC meeting, Chemical Waste Management's application for certification of a landfill liner raised additional issues related to tax credit eligibility. The Commission deferred action on the application until legal counsel provides further guidance on the Commission's eligibility authorities.

Over the past two months, Department staff and legal counsel have sought to define more clearly the tax credit issues the Commission needs to address. Staff and counsel plan to present the EQC with information and advice for the special EQC meeting on February 18. The Chemical Waste Management application will also be on the agenda for Commission action.

This memo summarizes the tax credit issues to be considered at the February meeting and frames specific questions and issues on which staff or counsel will prepare written responses.

The pollution control tax credit program has become more complex in recent years. Factors adding to the complexity include broader environmental regulations and related pollution control practices. The issues that the Commission will discuss on February 18 will assist in resolving some of the concerns arising from these factors. These include:

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- Facilities for agriculture and other nonpoint source pollution have not generally been eligible under the program. How does eligibility apply given recent regulations imposed in this area, e.g., Total Maximum Daily Loads, groundwater management areas?

- Solid and hazardous waste landfills elicit questions about the applicability of tax credit eligibility. On the one hand, EPA and DEQ impose numerous requirements on such activities, leading one to conclude that any "required facilities" should be eligible for tax credits. On the other hand, the very nature of some of these "required facilities," specifically liners, seems an integral part of the business operation rather than an added pollution control device. In this regard, such facilities raise the question of whether or not they should be eligible for tax credits.

  It should be noted that while we certainly have had both solid and hazardous waste landfills in this state for a number of years, we have not faced applications for tax credits for such things as liners until December 1991.

  Does the law allow the Commission to make distinctions among different types of facilities required by federal or state law? If so, should the nature of these businesses, specifically the relationship of required pollution facilities to the business product, affect the eligibility or degree of eligibility?

- The law allows tax credit eligibility when the facility is not "required" if the facilities are installed voluntarily and solely for pollution benefit. Does "sole" mean, in the Webster dictionary definition, "only"? If there are de minimis or other benefits derived from the facility, does this eliminate eligibility under the "sole" provision of the law?

- Under ORS 468.150, alternatives to open field burning are eligible for tax credits. Historically, these have been used to assist in reducing open field burning in the Willamette Valley. Does the Commission have the authority to restrict eligibility by type of facility or by geography? If so, should the Commission do so and what guiding policy should be used?

Prior to the February 18 special EQC meeting, Commission members will receive a staff report which will consist of Department and Assistant Attorney General responses to the following:

1. Is there any statute or other legal regulation which mandates the EQC to grant tax credit certification for new business investment to meet existing environmental law and regulations?

   If the answer to the above is no, are there other factors that relate to the Chemical Waste Management application which would mandate the Commission to grant certification?

2. Has the Commission a legal basis to determine that certain required pollution facilities are integral components of a business such as waste disposal? Would the integral components be eligible for pollution control tax credit certification?

   If there is no discretion for this determination, what is the Commission's authority for determining the portion of the facility that is allocable to pollution control? On what basis does the return on investment apply?

3. One definition for whether a facility is being installed pursuant to a requirement (and, therefore, eligible for a tax credit under the principal purpose authority) is whether the Department may take formal enforcement action if the facility is not installed or properly functioning. Are there any legal constraints on the Commission's ability to define the range of enforcement authority to substantiate an environmental requirement?

4. Under the "sole purpose" definition, what are the legal and policy options for dealing with minor or de minimis benefits derived from the pollution control facility?

5. The purpose of authorizing alternatives to open field burning for tax credit eligibility is to reduce the amount of open field burning. What options are available to the Commission to ensure that approved tax credits will actually result in acreage removed from open burning?

6. What frameworks might provide a clearer definition of eligibility for alternative methods to open field burning, including definitions of specific types of facilities which are and are not eligible for tax credit relief? Are there statutory limits or legislative intent which would limit eligibility to the Willamette Valley?

Within the framework provided by the Department and legal counsel, it is my hope that the Commission will be able to give us policy direction on how you wish to have the current statutes applied. In addition, for any areas where the statutes limit what the Commission believes should be done, I would expect that we can prepare proposed legislation to be considered by the Governor for possible submission to the 1993 Legislature.

DEPARTMENT OF JUSTICE
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February 11, 1992

Environmental Quality Commission
811 SW Sixth Avenue
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Re: Legal Issues Relating to the Pollution Control Tax Credit Program

This letter provides advice on a number of legal issues relating to the pollution control tax credit program. Each question is set out separately below along with a brief answer and the supporting analysis.

1. Are facilities erected, constructed or installed by a new business to comply with existing regulations eligible for tax credit certification under the "principal purpose" provisions of ORS 468.155 and 468.170 and the rules adopted by the Commission? If so, does the Commission have authority to exclude such businesses from eligibility?

Brief Answer

Facilities developed by new businesses to comply with new or existing rules are eligible for certification under the statutes. We conclude that the Commission does not have authority to adopt rules excluding such facilities from eligibility.

Analysis

A. Background

Historically, the Commission has found both new and existing businesses to be eligible for tax credits under the principal purpose test. Similarly, the Commission has certified facilities that were necessary to comply with pre-existing rules. These certifications were consistent with advice from the Attorney General's office.[1]

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[1] This advice generally has been oral and no formal opinions have been written on these issues.

This interpretation of eligibility is consistent with the literal language of the tax credit statutes. Under ORS 468.165(1), "any person" may apply for certification if (1) the facility in question meets the definition of "pollution control facility" in ORS 468.155 and (2) the facility was constructed or installed within the time period specified in ORS 468.165.[2] If these requirements are satisfied and proper application is made, then the facility is eligible, so long as the facility "is necessary to satisfy the intents and purposes" of the state statutes relating to treatment works, sewage disposal and treatment, solid waste, recycling, hazardous waste, noise control, used oil recycling, air quality, and water quality. ORS 468.170(4)(a).[3]

We have located no provisions in the statutes that show an intent to limit tax credit eligibility to existing businesses or to limit eligibility under the principal purpose test to facilities necessary to comply with requirements imposed after a business began operation.

B. Legislative History

The tax credit statutes were enacted in 1967 and they have been amended in almost every subsequent legislative session.[4] The legislative record provides clear evidence that new businesses were intended to be eligible for certification. Further, the legislature considered and then rejected statutory language that would have limited the ability of new businesses to use the tax benefits available for a certified facility. The various amendments in subsequent years do not indicate a change of legislative intent.

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[2] There are certain other requirements relating to solid waste, hazardous waste, and used oil facilities that are not at issue here.

[3] As discussed in the response to question 3, the Commission does exercise discretion with respect to the costs properly allocated to the facility.

[4] Attachment A to this letter provides a brief history of the tax credit statutes.

During the 1967 legislative session, three pollution control tax credit bills were introduced in Oregon. One measure (SB 272) apparently was sponsored on behalf of industry and another (SB 471) was sponsored on behalf of the Sanitary Authority (the Commission's predecessor). Eventually a compromise bill, SB 546, was drafted and, after numerous debates and amendments, enacted. Or Laws 1967, ch 592.

Each of the three bills shared the purpose of accelerating the installation of air and water pollution control equipment. "General Explanation of Tax Incentive Measure Based on SB 272 and SB 471," Exhibit (unnumbered), Senate Committee on Air and Water Quality Control, April 11, 1967. Tax benefits were intended to be available to both new and existing businesses. See, e.g., Testimony of Herb Hardy,[5] Senate Committee on Air and Water Quality Control, April 11, 1967. The bills varied, however, in their tax treatment of existing businesses that had already installed equipment or that might be required to retrofit existing plants. Id.

Under the compromise provisions in SB 546, the Sanitary Authority was required to issue a certificate if the principal purpose of the facility was the prevention, reduction or control of air or water pollution and if the facility would be effective to that end. A taxpayer with a certified facility could elect to take an income or corporate excise tax credit or, alternatively, to have the facility removed from the ad valorem property tax rolls.

Under the original version of the bill, a taxpayer could have taken a tax credit (as opposed to the exemption from ad valorem taxation) only in two circumstances. First, a taxpayer could have taken the credit if the certified facility was constructed within five years of the effective date of the act. (Sections 8(2)(a) and 11(2)(a).) The objective of this requirement was to create the incentive for accelerated installation of any new pollution control equipment and the credit was intended to be available to new or existing business ventures. Second, a taxpayer could have taken the credit if

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5 Mr. Hardy, a lobbyist for the canneries, was a principal figure in the drafting of the legislation.

the certified facility was constructed after December 31, 1957[6] and was used "in connection with a trade or business conducted by the taxpayer on the effective date of [the] Act. (Id. at Sections 8(2)(b) and 11(2)(b).) The objective of this provision was retroactive relief to existing businesses that had already installed equipment and relief for the costs of retrofitting existing plants.

The conditions in SB 546 for qualifying to use a certified facility for tax credit purposes were amended several times prior to enactment. First, the qualification period for any new facilities was enlarged to include the period from January 1, 1967 to December 31, 1978. Then, the provisions authorizing tax credits for facilities constructed between 1958 and 1967 and for retrofitting of existing businesses were deleted. Finally, tax credits were made available for new facilities. The intent and the effect of these amendments was to remove any distinction in the tax treatment of certified facilities operated by new or existing businesses.

This legislative history points out that the Legislature did not intend to distinguish between new and existing businesses when certifying a facility and that it considered and then rejected language that would have distinguished between new and existing business with respect to the type of tax benefits available from a certified facility.

C. Commission Authority

Agency rulemaking authority is generally divided into two categories: completion of an incompletely expressed legislative policy or the interpretation and application of an expressed legislative policy. See Springfield Education Ass'n. v. Springfield School District No. 19, 290 Or 217 (1980). The Commission's authority to define the standards for eligibility for tax credit certification generally falls in the latter category, because the statutes set out both the general policy

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[6] Apparently, 1957 was the effective date of the first statute requiring pollution control equipment. See Testimony of Herb Hardy, supra.

and specific requirements that must be satisfied.[7] ORS 468.155 to 468.170. In defining statutory terms, an agency must try to give effect to the legislature's intent. Fifth Avenue Corp. v. Washington County, 282 Or 591 (1978). Generally, the Commission's interpretation will be upheld if the definitions are reasonable and consistent with the statutory provisions and legislative purpose. In our opinion, a Commission rule excluding facilities constructed by new business ventures would be inconsistent with legislative intent.[8]

D. Conclusion

In light of the broadly stated eligibility provisions, past Commission interpretation, lack of any express or implied exclusion for new business and the relevant legislative history, we conclude that the Commission does not have the authority to limit eligibility for tax credits to existing business enterprises.

2. **Could the Commission determine that certain facilities that otherwise meet the statutory requirements are not eligible for certification because they are integral components of a waste disposal business or other environmental service enterprise?**

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[7] This conclusion does not apply to provisions relating to alternative methods of field sanitation (ORS 468.150) and exclusion of portions of facilities that make insignificant contributions (ORS 468.155(2)(d)).

[8] This conclusion is bolstered by the fact that the legislature has delegated the Commission significant substantive authority with respect to other aspects of the tax credit program. As discussed below, ORS 468.190(1) sets out an incomplete expression of legislative policy with respect to allocation of costs. There are four specific factors that the Commission must consider when determining cost allocation. The statute goes on to allow consideration of "any other factors which are relevant" to establishing the cost properly allocated to pollution control. The Commission is then given express authority to adopt rules establishing methods to be used to determine the portion of costs properly allocable." ORS 468.190(3).

Brief Answer

Probably not.

Analysis

The tax credit statutes do not include any express provisions that would allow the Commission to determine eligibility based upon whether the facility is a component of a business producing traditional goods or services as opposed to one providing waste disposal or other environmental services. This issue has been before the legislature. It was debated during the 1983 legislative session with respect to the eligibility of waste incinerators. Later, in 1989, the legislature amended the statutes to exclude waste-to-energy incinerators from the definition of eligible solid waste facilities, but it has not excluded otherwise eligible pollution control facilities merely because they are components of a waste disposal business. Or Laws 1989, ch 802.

This does not mean, of course, that all components of a waste disposal business are eligible for certification. Facilities must still satisfy the principal or sole purpose test. As early as 1967, the record indicates legislators were told that facilities necessary for the operation of the business per se would be treated differently from those that are necessary for the purpose of pollution control. See, e.g., Discussion between Rep. Jim Redden and Herb Hardy, House Taxation Committee, May 11, 1967, at 1159.[9]

Following the same reasoning used in question 1 above, we believe it is likely that a court would find that the Commission does not have authority to exclude facilities from eligibility merely because they are components of a waste disposal or other environmental service business.

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[9] In the case of a landfill, it would seem that the land and excavation would be necessary for the operation of the business per se, while liners and leachate collection and treatment systems ordinarily would not be required in the absence of environmental concerns.

3. If the answer to question 2 is no, what is the Commission's authority with respect to the determination of the portion of the facility allocable to pollution control?

Brief Answer

The Commission could determine that some portion of the cost of facilities integral to a waste disposal or similar environmental service business is not properly allocable to pollution control. However, if the determination is not based on the methodologies established by existing Commission rules, then the determination should be based on carefully articulated reasoning and supported by findings. There is some risk that such a determination would not be upheld by the courts.

Analysis

The Commission is responsible for determining the actual cost of a facility and the portion of such costs that is properly allocated to the pollution control or waste facility. ORS 468.190. In making this determination the Commission is required to consider four specific factors (recovery of usable commodities, return on investment, alternative methods or equipment, and increased or decreased costs). The Commission also must consider "any other factors which are relevant in establishing the portion of actual cost of the facility properly allocable" to pollution control. Id. These "other factors" must have the same general characteristics as those expressly stated by the legislature. See, e.g., Employment Div. v. Pelchat, 108 Or App 395 (1991).

In previous cases, the Commission has rejected the notion that disposal businesses should be treated differently for purposes of cost allocation. See, e.g., Minutes of Special Meeting of the Oregon Environmental Quality Commission, December 19, 1986 (Ogden-Marten waste incinerator). The Commission can change its position, of course, but if it does, it will need to explain its reasoning and make findings explaining how it will calculate the allocable costs for such components. ORS 468.170(3).[10]

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[10] It might be tempting to conclude that all pollution control facilities are integral to a landfill business or other environmental service industry and that no costs of facilities are properly allocable. The result would be the same as concluding that such facilities are ineligible for certification. As previously discussed, this interpretation appears to be contrary to legislative intent.

For example, the Commission might determine that some disposal businesses are essentially marketing compliance with environmental laws and that the pollution control facilities, in some sense, are of greater value to these businesses than it is to other businesses where a pollution control facility is merely incidental to production. Such a factor might be considered a factor similar to return on investment.

If the Commission were to determine that there is a reasonable basis for allocating costs differently for some pollution control facilities that are integral to waste disposal businesses, it would also need to develop a methodology for calculating the allocation costs. For example, the Commission has adopted a methodology for determining return on investment. OAR 340-16-030(5), but this rule does not treat facilities differently based upon the nature of relationship between the facility and the applicant for certification.

The likelihood that the courts would uphold an allocation determination based upon an "other factor" depends upon the persuasiveness of the reasoning supporting the distinction, the extent to which this "other factor" is similar to one of the four specific factors, and the logical nexus between the factor identified and the methodology used to reduce the cost allocation.

4. May the Commission defer action on the pending Chemical Waste Management application until after the Commission has amended the rules for the pollution control tax credit program and then apply the amended rules to the application?

Brief Answer

In theory, yes. However, the application is supposed to be approved or denied within 120 days. This time frame will make it difficult to complete amendments to the rule prior to taking action on the application.

Analysis

There is no general legal prohibition against retroactive application of an administrative rule. See Gooderham v. AFSD, 64 Or App 104, 108 (1983).[11] Retroactive application is not allowed, however, if it would be "unreasonable." The courts determine reasonability by applying a balancing test to determine whether retroactive application would be contrary to statutory design or recognized legal principles. Gooderham, supra. In performing this balancing test, the courts often look to whether the matter is a case of first impression and the rule merely attempts to fill a void or, to the contrary, whether the new rule represents an abrupt departure from well established practice. Id. at 109. The courts also will consider the extent to which an applicant has relied on the former rule and whether there is a statutory interest in applying the new rule despite reliance by the applicant. Id.

Thus, whether the Commission may retroactively apply an amendment to the tax credit rules will depend largely upon the nature of the amendment and the extent, if any, to which Chemical Waste Management has relied on the existing rules or past practice.

It should be noted, however, that ORS 468.170(2) requires the Commission to reach a decision within 120 days of the filing of the application. The Chemical Waste Management application was found to be complete on November 13, 1991. As a result, the 120 day deadline appears to be March 22, 1992.[12] It would be difficult to adopt a regular rule amendment by that date. Similarly, it might be difficult to justify the adoption of a temporary rule with an immediate effective date.

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11 The intent to apply a provision retroactively should be expressed in the rule. See Guerrero v. AFSD, 67 Or App 119 (1984).

12 Failure to certify within 120 days does not result in automatic certification. An applicant could seek a court order, though, requiring the Commission to act.

5. What is the Commission's authority to further define the term "requirement" as used in the principal purpose test in ORS 468.155?

Brief Answer

The Commission has relatively broad authority to define the term "requirement" so long as the definition is consistent with ordinary usage of the term and legislative intent. The Commission could limit the term to requirements specifically imposed by rules or permits and enforceable by actions for permit revocation, civil penalties or court order.

Analysis

The term "requirement" is not defined in the statute. It was added to the statutes as a part of the reformulation of the principal purpose test in 1983. Or Laws 1983, ch 637. There was very little discussion of the new language during the legislative committee hearings. (The discussion in 1983 centered around solid waste incinerators.)

When a word in a statute is not defined, the courts will usually give the term its ordinary and common meaning so long as that meaning is consistent with legislative intent. ORS 174.020; Fletcher v. SAIF, 48 Or App 777, 781 (1980). While not controlling, dictionary definitions can provide some guidance. Webster's defines "requirement" as something required, wanted, or needed or as an essential requisite or condition. See also City of Portland v. State Bank of Portland, 107 Or 267 (1923) (definition of "required by law"); Beakey v. Knutson, 90 Or 574 (1919) ("direct" means mandatory and synonymous with "require").

As discussed in the answer to question 1 above, the Commission has authority to define statutory provisions as part of its implementation of the tax credit program. So long as an interpretation is reasonable and is consistent with legislative intent, it will generally be upheld. Accordingly, we believe that the Commission could define the term "requirement" narrowly to include only those agency directives that are mandatory and that are enforceable against the taxpayer by virtue of a specific regulation or permit condition. Ordinarily, such enforcement authority would include civil penalties, permit revocation, or court order.

The Commission could also adopt a somewhat broader construction of the term that includes requirements imposed under areawide management plans even though such requirements are enforceable by another government entity. An example would be mandatory management practices imposed by the designated management agency in a basin in which TMDLs are in place. There is a risk that the courts would reject a Commission's definition of "requirement" that includes directives that are not enforceable by any means.

6. **What is the Commission's authority to further define the phrase "sole purpose" as used in ORS 468.155?**

Brief Answer

The Commission has authority to further define the phrase "sole purpose."

Analysis

The "sole purpose" test was also added by the 1983 legislation. As with the term "requirement," it is not defined in the statute and there is very little helpful legislative history. Again, we conclude that the Commission has authority to define the term, so long as the definition is consistent with the statutory scheme.

The present "principal purpose" and "sole purpose" tests replaced the "substantial purpose" test and the legislative history does indicate an intent to restrict eligibility for certification. See Testimony of Bill Young, Director of DEQ, (SB 112) Senate Committee on Energy and Environment, March 2, 1983 at 383. Accordingly, we assume that the phrase "sole purpose" should not be defined so broadly that it essentially duplicates the previous substantial purpose test.

The Commission presently defines the term narrowly as the "exclusive purpose." OAR 340-16-010(9). This definition is clearly consistent with the statutory scheme. A somewhat broader interpretation that overlooked incidental or de minimis purposes would probably be upheld as well.

7. What is the Commission's authority to adopt rules governing approval of "alternative methods" to open field burning under ORS 468.150 and could such rules limit approval of some or all alternative methods to those used in the Willamette Valley?

Brief Answer

The Commission has broad authority to approve or to refuse to approve alternative methods. So long as there is a rational basis for the classification, the Commission could limit approval of some or all alternative methods to the Willamette Valley. Similarly, the Commission could base approval on its estimation of whether the use of the alternative method would result in an actual decrease in acreage burned or increased air quality.

Analysis

In 1975, the legislature added "approved alternative methods for field sanitation" to list of facilities eligible for certification. ORS 468.150. Or Laws 1977, ch 559, section 15. We previously advised that "approved alternative methods" are eligible for certification. However, the legislature has delegated significant authority to the Commission[13] to approve or disapprove such methods in the first place.

The legislature has not provided express standards for approval. Accordingly, it falls upon the Commission to

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13 ORS 468.150 actually gives the authority to approve alternative methods to the department and to "the committee." The Commission, however, has general authority to adopt rules directing the Department's decisions with respect to approval of methods. ORS 468.015, 468.020. The exercise of this supervisory authority would not appear to be inconsistent with ORS 468.150.

The committee referred to in the statute is the Oregon Field Sanitation Committee. This committee was abolished and its duties transferred to the Department. Or Laws 1977, ch 650, section 6. See also Or Laws 1991, ch 920, section 24 (abolishing the 1977 advisory committee established to assist the Department).

complete the expression of legislative policy. See Springfield Education Assn., supra. Rules that are reasonable and consistent with the underlying statutes will ordinarily be upheld. (See discussion at page 5, supra.)

The record of the proceedings leading to the enactment of ORS 468.150, shows that the legislature wanted to create an incentive to develop practices and equipment that would reduce the need for open field burning in the Willamette Valley. See Comments of Sen. Betty Roberts, (SB 311) Senate Committee on Agriculture, March 18, 1975. Thus, rules that limit approval of some or all alternative methods to the Willamette Valley would be consistent with the statute. See also ORS 468A.005(6); 468A.025; 468A.035 (authorizing different air quality regulations for different areas of the state).[14]

Similarly, rules limiting approval to alternative methods that the Commission determines are likely to result in an overall reduction of air pollutants or the actual removal of acreage from open burning are consistent with legislative intent. These were objectives of the 1975 package of field burning statutes that included ORS 468.155. Or Laws 1975, ch 559.

Sincerely,

Larry Knudsen
Assistant Attorney General

Arnold B. Silver
Assistant Attorney General

LK:dld 0938N
cc: Fred Hansen
Peter Dalke
Roberta Young

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[14] Although we believe that approval could be limited to the Willamette Valley, such a limitation is not required. The statute itself contains no provision limiting eligibility to the Willamette Valley.

ATTACHMENT A

History of Pollution Control Tax Credit Statutes

Following is a brief history of the more important eligibility and cost allocation provisions of the tax credit statutes. Provisions relating to tax treatment of the certificate, fees and required dates for construction and application are not discussed.

The pollution control tax credit program was established by statute in 1967. Or Laws 1967, ch 592. Apparently, 23 states and the federal government already had pollution control tax credit programs at that time and Oregon may have borrowed some of its original provisions from these other jurisdictions. Testimony of Herby Hardy on SB 546, House Taxation Committee, May 11, 1967, at 1147, 1168. Always controversial, the tax credit statutes have been significantly amended during nearly every legislative session since 1967.

The original version of the statute was remarkably similar to the present law. There were a number of important differences, however. Facilities (defined essentially as they are today) were eligible for certification if the "principal purpose" of the facility was preventing, controlling, or reducing air or water pollution. The pollution control had to be by means of waste disposal, air pollutant disposal, elimination of air contaminant sources, or use of air-cleaning devices. There was no general mandate that the principal purpose be compliance with requirements imposed by the Sanitary Authority (the Commission's and department's predecessor) or Environmental Protection Agency. Similarly, there was no "sole purpose" provision. The Sanitary Authority was not given express authority to determine the allocation of costs.

In 1969, the legislature replaced the "principal purpose test" with a "substantial purpose test." Or Laws 1969, ch 340, section 4. The 1969 amendments also gave the Sanitary Authority the ability to determine the portion of cost properly allocable to pollution control. Id. at section 5. Allocation of costs was limited to increments of 20 percent, however. In addition, the Sanitary Authority was given express authority to adopt procedural rules for administering the tax credit program. Id. at section 8. A bill enacted later in 1969 transferred the responsibilities of the Sanitary Authority to the Commission and department. Or Laws 1969, ch 593.

Amendments in 1973 authorized a tax credit for certain solid waste facilities. Or Laws 1973, ch 831, section 4. The legislature also adopted standards for allocating actual cost

of the facility. Id. at section 6. See also Or Laws 1973, ch 835 (a different bill with several of the same provisions); Or Laws 1974 special session, ch 37 (resolving conflicts between the two 1973 bills).

In 1975, the tax credit statutes were recodified and placed in ORS chapter 468 and new provisions relating to solid waste were added. Or Laws 1975, ch 496. Provisions were adopted requiring preliminary certification by the department. Id. at section 5. The legislature also enacted ORS 468.150, which provides that approved alternative methods to open field burning are eligible for pollution control tax credits. Or Laws 1975, ch 559, section 15.

Amendments in 1977 made noise pollution control facilities eligible for tax credits and further refined the requirements for solid waste control facilities. Or Laws 1977, ch 795. Similar amendments in 1979 made hazardous waste and used oil facilities eligible. Or Laws 1979, ch 802. The 1979 amendments also excluded from eligibility of solid or hazardous waste facilities a list of items found to make an "insignificant contribution" (e.g., office buildings, cars and parking lots). Id. at section 1.

The next major revision in eligibility requirements occurred in 1983. Or Laws 1983, ch 637. The legislature repealed the substantial purpose test and reinstated the principal purpose test. Id. at section 1. Rather than readopt the specific list of purposes, however, the amendment stated that the principal purpose must be "to comply with a requirement imposed by the department, the federal Environmental Protection Agency, or regional air pollution authority. The legislature also added the sole purpose test. Id. In addition, recycling facilities were made eligible for certification.

The legislature also addressed the issue of replacement or reconstruction of facilities. Id. The legislature limited eligibility to replacements due to regulatory requirements and to costs greater than the "like for like" costs of replacement.

The legislature also replaced the Commission's authority to allocate costs based on 20 percent increments with authority to allocate costs from 1 to 100 percent. Id. at section 4. The Commission was given express authority to adopt rules establishing methods to be used for calculating such costs.

In 1987, the legislature excluded "property installed, constructed or used for clean up of emergency spills or unauthorized releases" from eligibility. Or Laws 1987, ch 596,

section 4. The legislature gave the Commission express authority to adopt rules further defining this particular exclusion. Id.

The 1989 legislature extended the exclusion for portions of facilities making "insignificant contribution" (office buildings, fences, parking lots, etc.) from solid waste and hazardous waste facilities to all facilities. Or Laws 1989, ch 802, section 4. Asbestos abatement facilities and solid waste incinerators were excluded. Id. In addition, the legislature continued to fine tune the provisions on cost allocation, this time by limiting actual cost of the taxpayer's own cash investment in the facility. Id. at section 6. The provisions for preliminary certification by the department were repealed. Id. at section 8.

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY INTEROFFICE MEMORANDUM

DATE: March 16, 1992

TO: Environmental Quality Commission

FROM: Fred Hansen, Director

SUBJECT: Pollution Control Tax Credit Issues

An Attorney General's opinion was requested in January on several pollution control tax credit program issues (see attachment). At its February meeting, the Commission only addressed the opinion issues that related to the Chemical Waste, Inc. application. The remaining issues, as summarized below, are scheduled for discussion at the April 23 meeting.

1. Legal constraints in defining environmental "requirement."

The issue of tax credit eligibility of nonpoint source practices has raised the question of what constitutes a requirement. Currently a requirement exists for tax credit purposes if failure to comply results in a formal enforcement action.

The Attorney General has advised that the Commission has considerable authority in defining what constitutes a requirement. The term could narrowly be tied to specific regulations or permit conditions. Alternatively, the term may be defined to apply to mandated areawide groundwater or water quality limited stream management plans where there may be a link, albeit weaker link, between the mandate and the enforcement entity.

The Commission has expressed a desire to provide tax credit eligibility to facilities for nonpoint source practices when carried out to comply with management plans. In the Department's view, this is an appropriate position which would provide point and nonpoint sources equal access to the tax credit program.

2. Legal authority to define the sole purpose eligibility criterion.

The Department has experienced difficulty in applying the sole purpose criterion. The Attorney General has advised that the criterion may be interpreted as totally exclusive, or may also

apply where there are insignificant or minor nonpollution-related benefits. It is the Department's preference that the term be applied as narrowly as possible. This would be consistent with the Legislature's intent to further restrict the previous "substantial purpose" criterion. This action would also be consistent with the current rule definition of "exclusive purpose."

3. Authority to base alternative methods to open field burning on verified decrease in acreage burned.

There are no specific statute or rule directives to base certification on a substantiation of reduced acreage burned. However, the Attorney General advises that the Commission has authority to condition certification in this manner if it so chooses. The Department and Department of Agriculture are supportive of requiring the verification of burned acreage as a condition for certification. Staff is currently comparing acreage registration records with certified tax credit application.

4. Authority regarding geographic area of eligibility for alternative methods to open field burning.

The Commission has authority to define geographically, the areas eligible for tax relief for field burning purposes. Historically, applications have only been received and certified from the Willamette Valley. It has been the Department's belief that eligibility was limited to the valley since the focus of the Legislature was on this area. The Attorney General, however, has advised that the statute does not specifically limit eligibility to the Valley.

It is the Department's view that eligibility should be extended beyond the valley. There are open burning air quality problems in Union and Jefferson counties where there is considerable grass seed farming. Union county has adopted an ordinance which requires burn fees and the registration of acreage to be burned. The tax credit program would be a potential incentive mechanism to reduce burning in these unregulated areas.

5. Facility cost evaluation by Department.

A final issue relates to the Commission's February 18 directive that the Department examine how a more complete documentation of costs can be provided.

Currently, the applicant is required to itemize all costs associated with the facility and submit an independent

certified public accountant (cpa) verification of these costs. In this review, the cpa does not verify any costs from total project costs that the applicant has assigned to the specific pollution control facility. This applies in cases where the pollution control facility is just one component of a larger project i.e. renovation of processing equipment which includes pollution control investment.

The Department believes it appropriate to expand the cpa role to include a review and verification of the allocation of facility costs for facilities with values that exceed $250,000. This can be accomplished two different ways:

1. Applicants for projects that exceed $250,000 would be required to have their independent cpa provide an analysis of the applicant's allocation methodology, including documentation of:

    a. all indirect costs associated with the facility or project which include the pollution control facility;

    b. all project costs assigned or prorated to the claimed pollution control facility.

2. Alternatively, the Department could itself contract with an independent cpa to review and document the cost allocations for facilities valued over $250,000 described in 1. a. & b..

It is the Department's view that the first option is the most appropriate and expedient way to provide improved documentation of costs. Written information would be added to the application which would explain the depth of cost review needed for facility costs over $250,000, which was the threshold suggested by the Commission. The Department sees no problem revising the cost documentation requirements under existing rules. OAR 340-16-030 (1) (c) state that...Certification of the actual cost of the claimed facility must be documented by a certified public accountant for facilities with a claimed facility cost over $20,000.

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MEMORANDUM

DATE: March 25, 1992

TO: Roberta Young, Coordinator
Intergovernmental Coordination Section
Department of Environmental Quality

Noam Stampfer, Manager
Finance Section
Department of Environmental Quality

FROM: Larry Knudsen
Assistant Attorney General
Natural Resources Section

SUBJECT: Tax Credit Rule Amendments
DOJ File No. 340-990-PO011-91

As requested, here are some additional thoughts on the tax credit issue.

It seems likely that the Commission will ask the 1993 Legislative Assembly to eliminate or at least substantially restrict eligibility for pollution control tax credits. If the latter, proposed restrictions might take the form of eliminating eligibility for alternatives to field burning and for facilities meeting the principal purpose test. Also, there might be a proposal to eliminate or reduce credits for facilities that in some way are tied to profitable pollution control enterprises. Of course, it is not at all clear how the legislature will react to these proposals.

Unless and until we have a "legislative solution," the Commission may want to "tighten up" the rules under the existing statutes. On one hand, it can be argued that this will be wasted effort if the tax credit program is repeal or substantially modified by the legislature. On the other hand, substantial general fund dollars may be lost in the interim, especially if there is a rush to file on existing or contemplated facilities in

anticipation of the legislative changes. If the Commission wants to consider rule revisions, it may want to consider the following:

1. Alternatives to field burning

Perhaps the most fertile ground (no pun intended) for amendments would be in the area of alternatives to field burning. At a minimum, the Commission might want to repeal OAR 340.16.025(2)(f) and adopt a new rule section that specifically address credits authorized under ORS 468.150. This section should set out those practices which are approved and state that such facilities are subject to other relevant provisions of ORS 468.155 to 468.190 and rules adopted thereunder.

In addition, the could Commission further restrict the eligibility of facilities under 468.150. This might be accomplished by adding an overlay of narrative requirements for existing approved alternatives or by removing some alternatives from the approved list. Obviously, the latter approach would be the easiest to administer.

2. Return on investment

The Commission has indicated a desire to do more with its authority to allocate costs to the facility under ORS 468.190 and the Department is pursuing this objective through its own administrative efforts. There are other approaches, however, that the Commission might want to consider, either to enhance analysis of the return on investment (ROI) factor or to allocate costs based upon "other relevant factors" as authorized by ORS 468.190(1)(e).

Traditional ROI

The standards provided in OAR 340-16-030 could be modified to decrease the amounts allocable to the facility. Similarly, the rule could be expanded to cast a broader net in terms of identifying and evaluating non-traditional income or cost savings associated with the facilities. To this end, an employee with expertise in valuations of this nature could be hired or an existing employee could be trained.

Other factors

Several commissioners have expressed a desire to allocate costs based upon the relationship between the facility and the business enterprise using the facility. As I have previously

noted, this may be difficult but not impossible. A court might well conclude, for example, that an other relevant factor includes that a facility represents the majority of capital investment for an extremely profitable enterprise. Similarly, whether an enterprise markets its goods or services based upon the qualities of its pollution control facilities might be found to be a relevant factor.

If we were to examine particular types of facilities, we could probably come up with standards for determining when the relationship constitutes an "other relevant factor." More difficult, but not impossible, would be establishing standards or a formula for reducing the allocable cost. Once again, it might be advantageous to seek the services of someone with expertise in making such valuations.

3. Recycling

The statutes can be construed in a manner that makes it relatively easy to establish eligibility for any recycling operation. Such an interpretation is not required, however. I understand that, as a matter of policy, the Department favors the more liberal interpretation; so I have not offered specific guidance on a more restrictive interpretation. If the Commission desires to change this policy, I can provide a number of options.

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POLLUTION CONTROL FACILITIES TAX CREDIT PROGRAM
A Historical Perspective
April 13, 1992

Historic Overview

The Oregon Pollution Control Tax Credit Program was established to help industry offset the cost of pollution control, and to create incentives to encourage better environmental practices in the state. The program has been in existence for over 24 years and its governing legislation has been amended many times during that period (see Table 1).

The initial legislation establishing DEQ's Pollution Control Tax Credit Program was approved in 1967 and limited eligibility to air and water related facilities. An industry could elect to apply the credit against property taxes over 20 years or against income taxes over a 10 year period. The credit could also be carried forward up to three years. In the following session, the Legislature provided for determination of the portion of a facility that was allocable to pollution control in ranges of 20% (percent). This concept was designed to limit the credit to only that portion of the facility considered to be utilized for pollution control.

Subsequent amendments in the 1970's and early 1980's added specific types of facilities as eligible for tax relief which included: mobile field incinerators; solid waste, hazardous waste and used oil facilities that recover useful products; hazardous waste treatment, reduction and elimination facilities; and noise control facilities. By the late 1970's the Legislature began taking steps to narrow the program. The property tax exemption was eliminated except for nonprofits and cooperatives. In 1983, the eligibility requirements were further restricted in that a facility had to be required by DEQ or EPA and be principally for pollution benefit, or else the facility must be constructed voluntarily for the sole purpose of pollution control. Provisions were added to require submittal of an application within two years of facility completion. The allocable range of 20 percent was revised to require certification in increments of one percent. Replacement pollution facilities were also determined as ineligible except under certain conditions where DEQ or EPA requirements apply, or when a facility is removed before the end of its useful life.

During the 1987 legislative session, the program was scheduled to sunset in 1990 and the amount of allowable credit reduced from 50% to 25% after June 1989. Tax relief was further restricted to exclude facilities that produce energy, or those facilities for the cleanup of hazardous waste spills. In 1989, the Legislature extended the sunset through 1995 and maintained the allowable credit at 50%. Asbestos abatement was determined not eligible for tax relief and energy recovery was reaffirmed as an ineligible facility.

Governor Roberts proposed a bill in the 1991 legislative session calling for a repeal of the tax credit program. However, the bill was not acted on.

Certification Provisions

To apply for a tax credit certificate, a taxpayer must submit an application within two years of the facility's completion. To be eligible the facility must prevent, control or reduce pollution from industrial wastewater, air pollution, or noise pollution; involve material recovery of solid waste, hazardous waste, or used oil; or involve the treatment, substantial reduction or elimination of hazardous waste. Secondly, a facility is eligible if: 1) it was constructed to comply with a requirement of the EPA/DEQ or Regional Air Authority; or, 2) it is a voluntary action with an exclusive function of pollution control.

The program provides an actual credit of 50% of the cost portion of a facility that is determined allocable to pollution control. For example, if a facility cost is $500,000 with 75% ($375,000) determined allocable to pollution control, the actual amount that could be applied against tax liability is 50% ($187,500) of the allocable cost. This amount is applied at 5% per year for ten years or over the life of the facility, whichever is the lessor. The credit may be carried forward for three years.

Eligible Facilities

Of total eligible facility costs, 45.3% has been claimed for air quality facilities, 31.2% for water quality facilities, 23.4% for solid waste facilities, and less than 1% for hazardous waste, noise and reclaimed plastics facilities (see Figure 1). The vast majority of applications are certified as meeting a principal purpose requirement. This means the facilities were constructed or installed because of an EPA/DEQ requirement, such as through an air emission or water discharge permit requirement.

Due to the "principal purpose" eligibility criteria, new pollution
control devices that are required of industry may be eligible for tax credit, which in effect, automatically expands the program as new environmental requirements are added by rule or statute. Recent inclusions are underground storage tank upgrades, Stage I and II vapor recovery devices, and machines to capture and recycle CFC's (Freon). Future EPA/DEQ requirements foreseen at this time that may involve eligible facilities include the dioxin control equipment for pulp mills, chemical mining control equipment, and requirements of the new Clean Air Act.

Program Costs To General Fund

As of September 13, 1991, the Environmental Quality Commission (EQC) has certified 2540 applications at a facility cost of $800,955,904. Of this, $384 million can potentially be directly applied against tax liability (see Table 2).

There have been dramatic swings in the level of program activity over its life. Figures 2 and 3 compare the average cost of facility applications with the number of certificates issued. There has been a significant drop in the average facility cost amounts, and dramatic increase in the number of submitted applications. The number of applications received in 1991 represents a four-fold increase over previous years (see Table 2).

Program Cost Projections

The projected cost of the program to the general fund is based on historic information and anticipated pollution control installation activity. The state of the economy, the types of EPA/DEQ requirements, and market factors all play into the level of industry participation in the program. In the near future, DEQ anticipates a continued increase in program activity due to new environmental requirements. Figure 4 shows future general fund impacts using the 1995 program sunset date.

Another factor to consider in determining future costs to the general fund, is the actual amount of credit that has been applied against taxes. Table 3 has been provided by the Department of Revenue which shows the number of certificates claimed yearly and the dollar amounts (returns are incomplete for 1990 and 1991).

Program Evaluations

In recent years, the Department has carried out various efforts for the purpose of improving and updating the pollution control tax credit program:

1. Significant revisions were made to the tax credit statutes in 1983. At the time the program was viewed as being instrumental in cleaning up the Willamette River and improving the ongoing efforts in working with industry. However, it was also believed that the program needed to be narrowed in scope and that administrative procedures needed to be improved. Senate Bill 112 contained the following provisions:

   - Revised 20% allocable ranges to percentages ranging from 1% to 100%.
   - Limited the property tax exemption to nonprofits and cooperatives.
   - Required application submittal within two years of facility completion.
   - Broadened eligibility of hazardous waste management facilities.

   Until 1983, the Department had administered the program through the statute provisions without the benefit of rules. In 1984, program rules were developed and adopted. The rules established an administrative procedure for tax credit certification and included provisions for the legislative revisions in SB 112.

2. In 1986, an advisory committee was established which consisted of representatives from the Departments of Revenue and Economic Development, AOI and industry. Although no formal recommendation came out of the committee, there were two areas of consensus:

   - Tax credits should be retained where DEQ standards are more stringent than other states, or where DEQ enforces more stringently than other states, i.e. BMPs for spill control, LUST, noise control and curbside recycling.

   - Tax credits should be retained for new programs and for monitoring and prevention, i.e. groundwater monitoring, spill control, LUST, asbestos control.

Other issues discussed by the committee included:

   - Elimination of preliminary certification.

   - Placing monetary ceilings on credits certified.

   - Include programs that DEQ encourages but does not require, i.e. small businesses that recycle HW/SW, woodstove retrofit, and control of pollution beyond minimum requirements.

3. In 1987, Governor Goldschmidt asked the DEQ to examine the substitution of a low interest loan program for the existing program. Department staff, industry and financial experts looked at a low interest loan process, a property tax credit and the present income tax credit. The Department concluded that:

   - A low interest loan program was not the best alternative because the loan method would still come off the top of state revenues, and this option would necessitate a large administrative system to manage such a program.

   - The property tax method was viewed as attractive but would require extensive selling to local government. The cost impact of a property tax credit would be spread over a smaller tax base.

   - The present income tax method was viewed as the best alternative in that program costs are spread statewide to all Oregonians.

4. As a consequence of the above program evaluations, 1989 legislative revisions were approved, which included:

   - The elimination of preliminary certification.

- Asbestos abatement determined not eligible.

- Limited the cost certified to taxpayers' own cash investment.

- Extended 50% tax credit through December 31, 1995.

- Required facility to be in compliance before being certified.

Current Program Issues

Because of the complexity of the program, the Department continues to be confronted with issues that result in costly processing delays.

Broad Program Issues:

1. What are the real benefits of the pollution control tax credit program? Is it resulting in compliance efficiencies, or pollution control investment that would not otherwise be considered?

2. Should the state subsidize environmental compliance or should compliance be viewed as the cost of doing business?

3. Should the program be structured as a state incentive mechanism for purposes of economic development?

4. Increased regulation has resulted in types of pollution control requirements that do not relate well to the established program procedures, i.e. alternatives to open field burning, UST upgrade, CFC equipment.

5. Should the program be available to nonpoint source related facilities because there is increasing regulation in this area?

6. The program has long been viewed as an overly complex and burdensome, particularly for small businesses.

7. The existing program procedures place significant responsibilities on staff, but tax credit work has been assigned a low priority. Areas of noted deficiencies include:

   - Facility inspections.

   - Compliance with 120 day processing timeframe.

   - Adequate division review of application review reports.

8. Generally vague and inconsistent statute and rule provisions result in considerable staff time devoted to interpretive issues.

9. The number of applications have dramatically increased in recent years, and staff have not been able to devote additional time to the program (64 applications in 1989 versus 424 applications submitted in 1991).

10. It has become more difficult to define the eligibility criterion "requirement" as it relates to new environmental regulations. The restrictive nature of the "sole purpose" criterion is also frequently questioned.

Several of the above issues can only be resolved by the State Legislature while others are within the Department's purview. The following are issues that relate more specifically to an environmental media:

11. Alternatives to open field burning:

- The alternative methods definition is worded broadly and is difficult to apply to individual investments that are only one aspect of a farmer's approach to straw removal. This is particularly a problem in determining the return on investment for these facilities.

- The statutes and rules are silent on geographic eligibility of alternative methods. Although, the Willamette Valley was the area of consideration when the law was revised.

- Certification of alternative method facilities has not been linked with the registration of acreage.

- Equipment necessary for carrying out alternative methods involves general farm equipment that has many other uses than for grass seed removal.

12. Used Oil

- Statue and rule provisions appear inconsistent in terms of whether recycling is a requirement of used oil eligibility. Staff has interpreted it as such, but rules should be revised. The statutory eligibility provision for used oil is equally vague in intent.

13. Air Quality

- The existing program procedures appear excessive when applied to Stage I and II vapor recovery equipment and CFC removal/recycling equipment. These

facilities are low value facilities and the degree of review and evaluation is considerably less than that required for more complex facilities.

- A greater presence and oversight in the division is needed for field burning application processing and policy issues.

14. UST Upgrade

- The same issue exists as with the CFC and vapor recovery facilities in that a streamlined review, processing and approval would be beneficial.

15. Plastics Recycling

- The statute does not specify what constitutes reclaimed plastic. Staff has interpreted the definition to mean that reclaimed plastic is a product that is 100% plastic. This issue needs to be addressed in the rules.

- "Personal property" is identified as an eligible cost but is not defined in statute or rule.

- SB 66, from the 1991 legislative session, requires that the Department show preference for Oregon generated materials. This needs to be addressed in the rules, however, there are no program restrictions that relate to this directive.

16. Solid Waste/Hazardous Waste Recycling

- These facilities do not fit well under the principal and sole purpose criteria.

- The ROI methodology may not be suited to the recycling industry.

Other State Tax Incentive Programs

In the examination of pollution control tax incentive programs in other states, only three states appear to provide for an income tax credit. However, eleven states have an income tax deduction, and at least thirty-two states offer pollution control tax incentives in the form of income tax deductions, property tax exemptions or sales and use tax exemptions. Overall, forty-plus states provide some sort of tax incentive for investments in pollution equipment.

Aside from Oregon, the states of Connecticut and Oklahoma have income tax credit programs. The Connecticut credit is equal to 5% of annual expenditures for air and water pollution equipment. The state also exempts pollution control equipment from sales and use taxes and property taxes. The Oklahoma credit is provided up to 20% of the cost of new air and water pollution equipment for each taxable tax year following installation.

No studies have been found which address the effectiveness of income tax credits for encouraging installation of pollution control equipment. However, two recent studies have been completed which examined tax incentives for recycling and minimization of hazardous waste. The state of Illinois conducted a feasibility study of tax credits for the purchase of recycling equipment or recycled products. This study concluded that tax credits are not cost effective or the most efficient way of promoting recycling and utilization of material from the waste stream. Although tax credits are not determined to be the way to go, it was felt that some sort of financial incentive would be appropriate for future investigation into market development. This study recognized some positive benefits of providing tax credits, but questioned whether the cost-to-benefit ratio was sufficiently low. The conclusions, which again relate to recycling, are summarized as follows:

- Financial subsidies may increase desired activity.

- Potential creditees are generally in favor of tax credits, but data cited show that often doesn't increase production or jobs.

- Tax credits may be politically workable because they are not direct expenditures.

- Tax credits may help the business climate and be a signal of state cooperativeness with business ventures.

- The cost-to-benefit ratio has not been documented.

- Tax credits may be an inefficient mechanism for reaching desired goals. Tax credits may be controversial in that new businesses may be viewed as gaining advantages not available to existing businesses.

- Tax credits do not help companies with weak profits and poor cash flow.

The University of Oklahoma conducted a study on state programs and policy options to promote minimization of hazardous waste. A survey of large generators found that only 19% felt tax credits would make a difference in their assessment of waste minimization options. It was concluded that tax concessions play a minor role in business investment decisions.

In researching other state tax incentive programs and studies there is no evidence of state efforts to examine the costs-to-benefit ratio of investment.

Attachments

Table 1

POLLUTION CONTROL TAX CREDIT PROGRAM LEGISLATIVE HISTORY

Initial Legislation - 1967

- Eligibility limited to air and water pollution control facilities
- Election for property tax exemption or income tax credit
  - 20 year property tax exemption
  - credit for 5% of cost for 10 year with 3 year carry forward
  - Set 1978 sunset date

Amendments - 1969

- Established 20% ranges allocable to pollution control
- Set an annual two year reduction in 20 year property tax allowance; program to phase out by 1979

Amendments - 1971

- Added mobile field incinerators if purchased by 1976
- Reset starting year to 1971 for property tax 20 minus two year phase out

Amendments - 1973

- Added requirement for preliminary certification
- Extended eligibility to facilities for solid waste utilization that produced energy or viable end product
- Again extended the property tax reduction to begin 1973

Amendments - 1975

- Extended eligibility to facilities that recover useful products from solid waste
- Allowed federal depreciation and amortization deductions for certifies facilities

Amendments -1977

- Extended eligibility to noise control facilities
- Limited property tax exemption to nonprofits and cooperatives
- Allowed credit taken over life of facility when less than 10 years
- Deleted reductions in depreciation and capital gains for tax credits taken
- Allowed credit for individual shareholders of small business corporations
- Extended sunset to 1988

Amendments - 1979

- Extended eligibility to facilities recovering products from hazardous waste and used oil

Amendments - 1981

- Allowed transfer of tax credits and provided for partnership credits

Amendments - 1983

- Narrowed the substantial purpose criterion to apply as sole purpose and principal purpose
- Revised eligibility of hazardous waste facilities to include waste reduction, neutralization, recycling or appropriate disposal of used oil
- Required application for tax credit be submitted within two years of facility completion
- Limited property tax relief to cooperatives and nonprofit corporations
- Allowed partnerships to apply credit to each partner's personal income tax
- Replaced the twenty percent range allocable to pollution control with percentages in single increments from 0 - 100
- Stipulated that maximum annual credit allowed be lesser of the holder's liability or that credit be spread over the life of the equipment or ten years, whichever the lesser

New Legislation - 1985

- established recycled plastics tax credit program

Amendments - 1987

- Established sunset of program in 1990
- Reduced tax credit by 50% for facilities constructed after 6/30/89
- Determined facilities that produced energy product and clean up of hazardous waste spills ineligible

Amendments - 1989

- Extended sunset of program to 12/31/95
- Removed requirement for preliminary certification
- Maintained 50% tax credit
- Allowed tax credit on investor's cash investment for federal cost share facilities
- Determined asbestos abatement ineligible
- Reaffirms energy recovery facilities as ineligible
- Stipulates that facilities must be in compliance before being certified
- re-established plastics program, expanded eligibility

Tax Credit Program Totals

Approved Tax Credit Applications

Table 2

Year	Total Applications Approved	Total Cost Certified	Total Cost Eligible	Average Eligible Cost
1968	40	$ 5,904,216	$ 2,952,108	$ 73,803
1969	37	5,212,055	2,606,028	70,433
1970	50	7,602,709	3,553,209	71,064
1971	65	17,213,754	8,566,588	131,794
1972	124	16,954,813	7,663,056	61,799
1973	142	25,858,037	12,720,643	89,582
1974	80	23,551,735	11,744,998	146,812
1975	94	34,685,070	17,339,494	184,463
1976	112	36,512,152	18,026,115	160,947
1977	96	20,257,581	10,104,534	105,256
1978	81	60,925,439	30,431,490	375,697
1979	85	35,899,699	17,714,066	208,401
1980	161	71,454,137	34,440,257	213,915
1981	142	96,466,937	47,810,981	336,697
1982	99	82,118,963	40,682,873	410,938
1983	79	68,966,510	33,871,933	428,759
1984	60	34,143,243	15,553,898	259,232
1985	48	6,948,762	3,420,580	71,262
1986	77	61,426,221	23,718,062	308,027
1987	70	3,939,778	1,839,775	26,283
1988	46	15,746,371	7,852,420	170,705
1989	64	14,246,913	5,000,586	78,134
1990	264	10,680,076	4,495,681	17,029
1991	424	45,240,733	21,586,001	50,910
Totals	2,540	800,955,904	383,695,373	

Corporate Excise Tax Claims

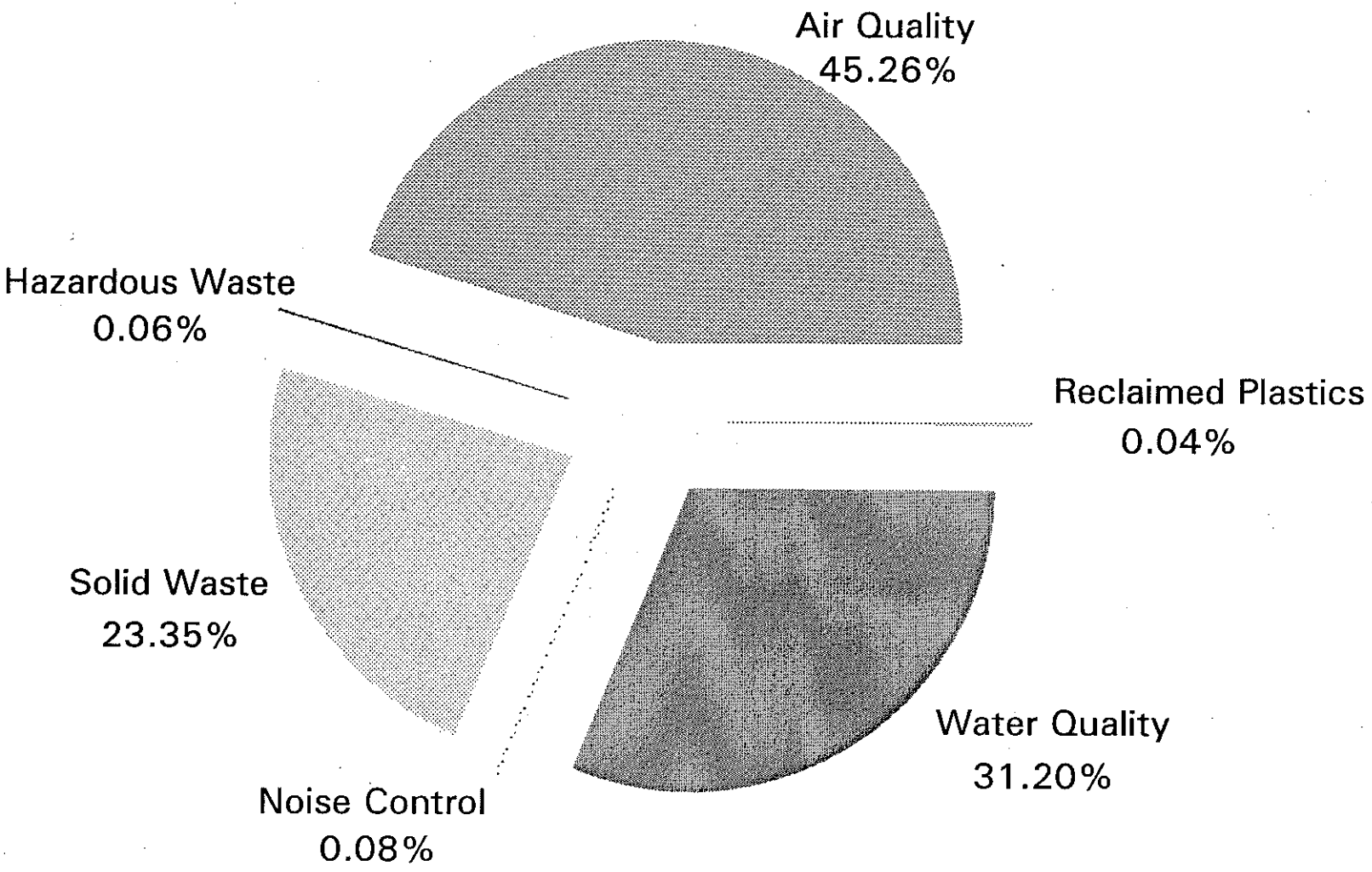
Through December 31, 1991

Table 3

Tax Year	Number of Taxpayers	No. Credits Claimed
1977	91	$ 6,336,109
1978	84	7,725,869
1979	84	9,256,119
1980	95	9,881,025
1981	88	7,612,911
1982	82	5,973,576
1983	78	8,748,539
1984	83	25,225,486
1985	92	17,182,030
1986	93	20,410,312
1987	80	19,211,197
1988	82	16,809,917
1989	87	14,566,016
1990	64	6,934,160

The filing and processing of 1990 returns is not complete as of 12/31/91

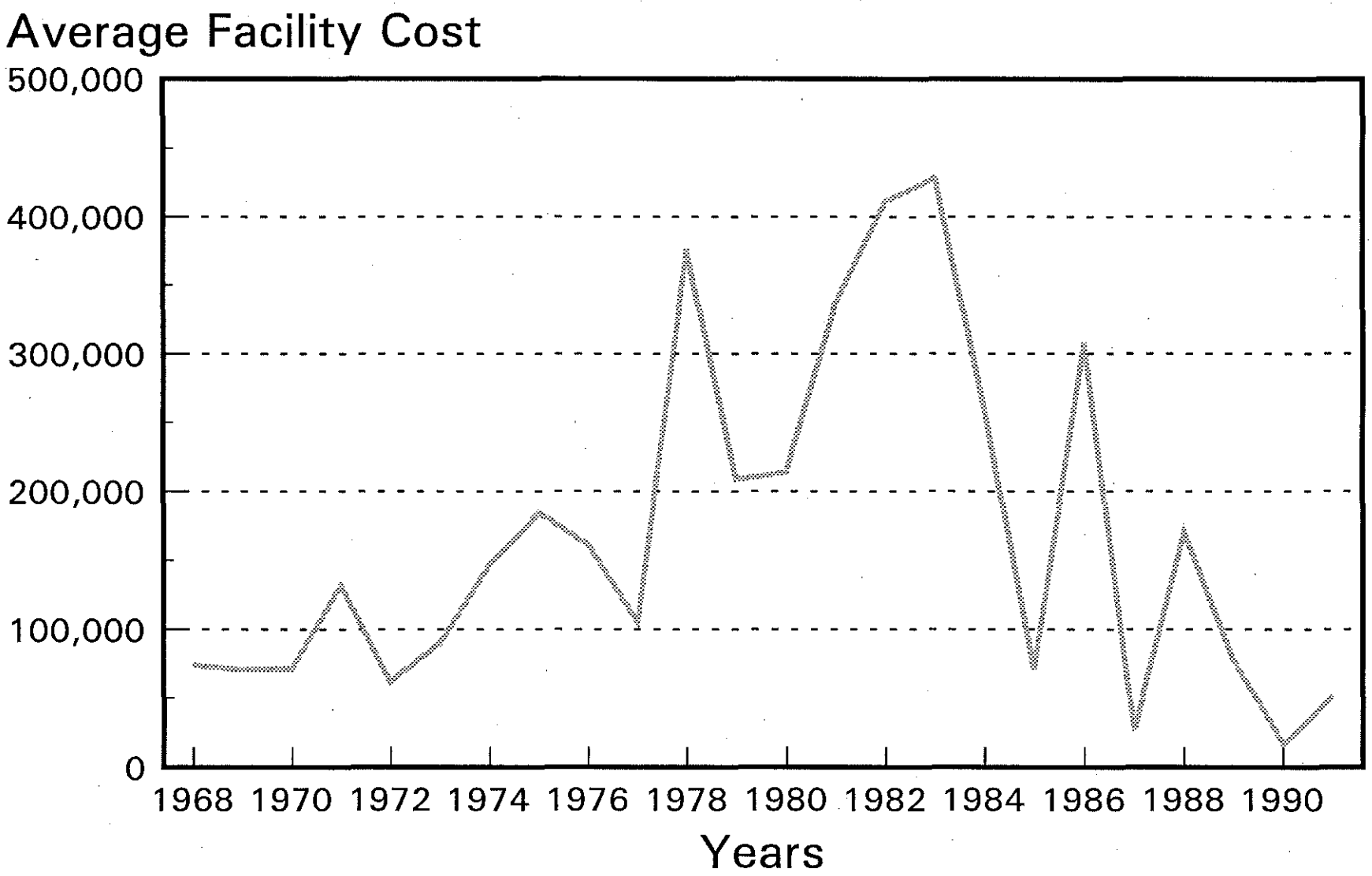
Figure 1
Tax Credit Certification Totals
Eligible Costs by Program 1968 - 1991



Tax Credit Program Applications

Average Cost of Approved Facilities

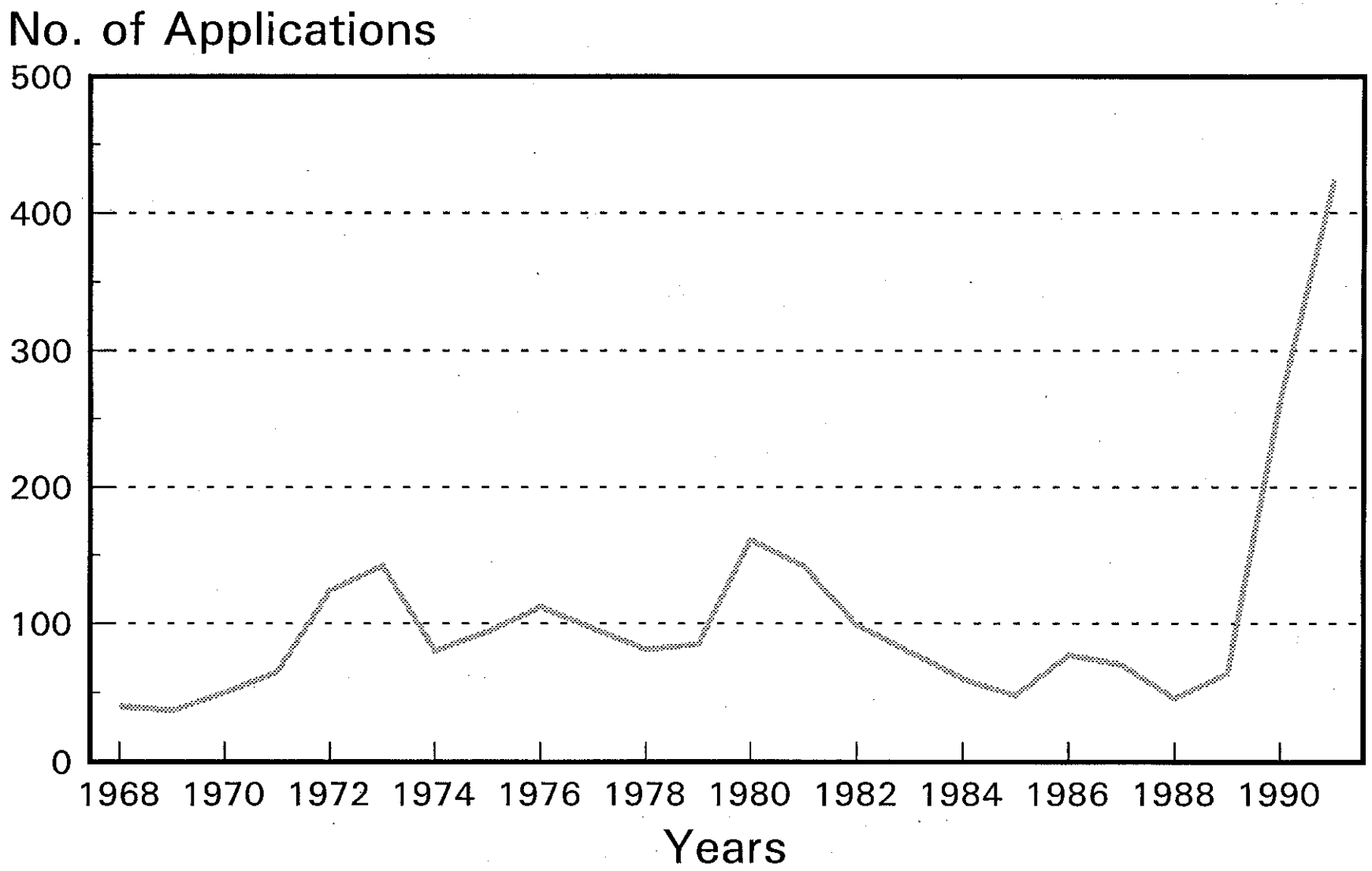
Figure 2



Tax Credit Program Applications

Number of Approved Facilities

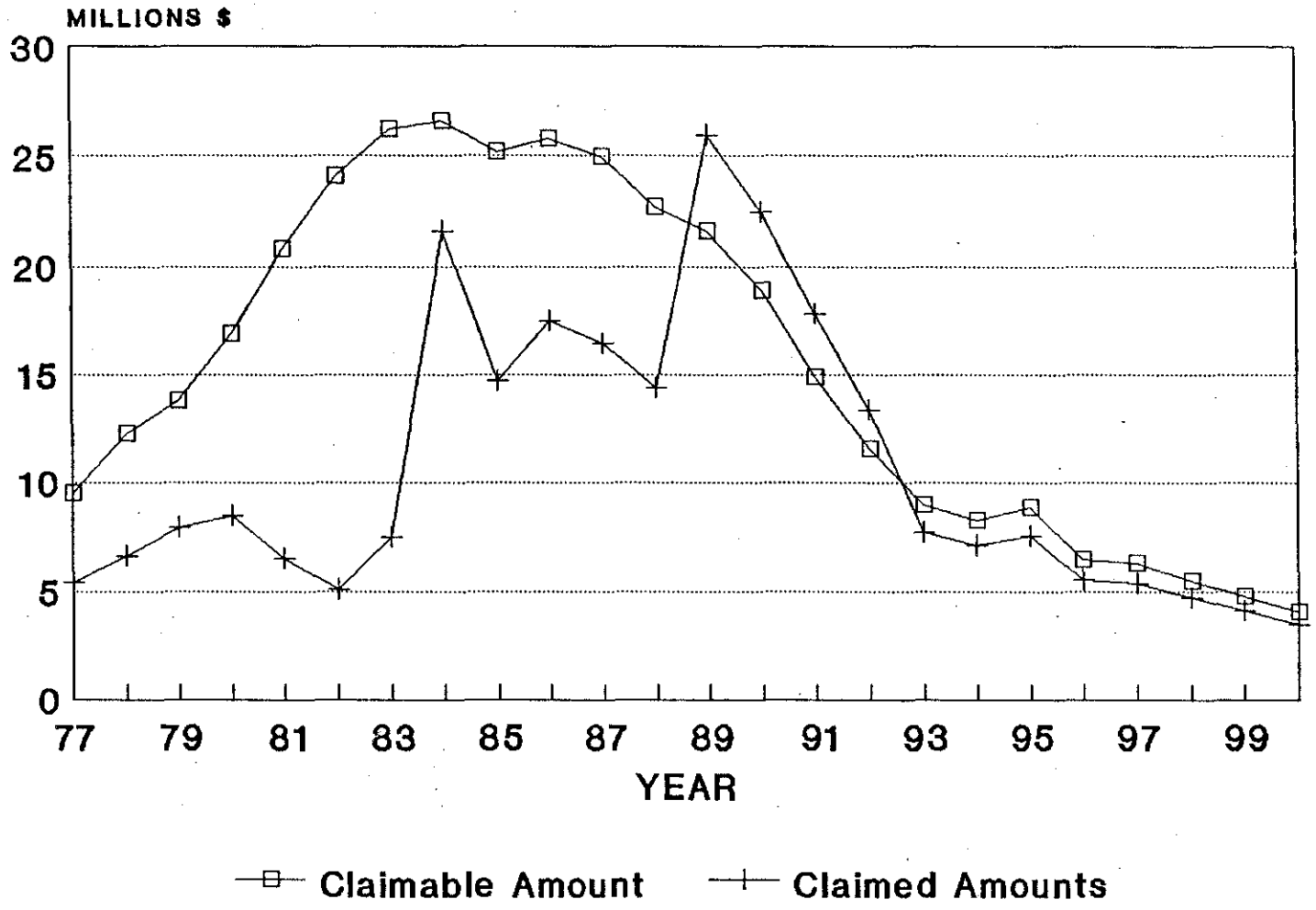
Figure 3



ANALYSIS OF FUTURE GENERAL FUND IMPACTS

1995 Sunset Date

Figure 4



Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

REQUEST FOR EQC ACTION

Meeting Date: April 23, 1992
Agenda Item: B
Division: MSD
Section: Administration

SUBJECT:

Approval of 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 ___
- __ Other: (specify) — Attachment ___

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696

Tax Credit Application Review Reports:

TC-3497 Mark & Dean McKay Farms	Grass seed straw storage shed.
TC-3569 Portland General Electric	Oil-water separator and associated drainage piping.
TC-3582 Dinihanian Recycling & Manufacturing	Used single drive tractor; two used trailers for plastic recycling.
TC-3618 Younger Oil Company	UST spill containment barrier and oil/ water separator with fiberglass piping; underground fiberglass piping for above ground tank.
TC-3682 Jeld-Wen, Inc.	Primary filter baghouse.
TC-3688 Berger Brothers	Tiling of 33 acres.
TC-3704 Briggs Farms, Inc.	4 bottom, 18" plow.
TC-3706 Klamath Auto Wreckers, Inc.	Automobile air conditioner coolant recycling machine.
TC-3719 Delon Olds Co.	Automobile air conditioner coolant recycling machine.
TC-3720 Delon Olds Co.	Automobile air conditioner coolant recycling machine.
TC-3722 Rex's Garage	Automobile air conditioner coolant recycling machine.
TC-3723 M & G Body and Fender Service	Automobile air conditioner coolant recycling machine.
TC-3727 City Automotive	Automobile air conditioner coolant recycling machine.

TC-3729 Larry Launder, Inc., dba Mt. Park Chevron	Automobile air conditioner coolant dba recycling machine.
TC-3733 Artisan Automotive, Inc.	Automobile air conditioner coolant recycling machine.
TC-3734 Seaside Auto Body	Automobile air conditioner coolant recycling machine.
TC-3735 Oregon Rootstock & Tree Co., Inc.	Two fiberglass USTs with leak detection, spill containment basins, overfill alarms and Stage II vapor recovery piping.
TC-3736 Oregon Rootstock & Tree Co., Inc.	Grass seed straw storage shed.
TC-3742 David R. Briggs	John Deere model 2810 plow.
TC-3743 Small World Auto Center, Inc.	Automobile air conditioner coolant recycling machine.
TC-3744 Small World Auto Center, Inc.	Automobile air conditioner coolant recycling machine.
TC-3745 Small World Auto Center, Inc.	Automobile air conditioner coolant recycling machine.

DESCRIPTION OF REQUESTED ACTION:

Issue Tax Credit Certificates for Pollution Control Facilities.

AUTHORITY/NEED FOR ACTION:

_X_	Required by Statute: ORS 468.150-468.190 Enactment Date: _____	Attachment ___
__	Statutory Authority: _____	Attachment ___
_X_	Pursuant to Rule: OAR 340 Division 16	Attachment ___
__	Pursuant to Federal Law/Rule: _____	Attachment ___
__	Other:	Attachment ___
__	Time Constraints:	

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 certification for the above identified tax credit applications which includes fieldburning related applications processed and recommended by the Department of Agriculture.

CONSISTENCY WITH STRATEGIC PLAN, AGENCY POLICY, LEGISLATIVE POLICY:

Yes.

Note - Pollution Tax Credit Totals:

Proposed April 23, 1992 Totals

	Certified Costs*	# of Certificates
Air Quality	$ 217,292	1
CFC - AQ	30,501	12
Field Burning	214,248	5
Hazardous Waste	0	0
Noise	0	0
Plastics	9,850	1
Solid Waste	0	0
Underground Storage Tanks	71,461	2
Water Quality	18,267	1
TOTAL	$ 561,619	22

1992 Calendar Year Totals through March 31, 1992

	Certified Costs*	# of Certificates
Air Quality	$ 0	0
CFC - AQ	57,104	23
Field Burning	296,827	6
Hazardous	10,119,299	1
Noise	0	0
Plastics	14,798	1
Solid Waste	18,922	1
Underground Storage Tanks	322,314	9
Water Quality	138,437	5
TOTAL	$10,967,701	46

*These amounts represent the total facility costs. To calculate the actual dollars that can be applied as credit, the total facility cost is multiplied by the determined percent allocable of which the net credit is 50 percent of that amount.

INTENDED FOLLOWUP ACTIONS:

Notify applicants of Environmental Quality Commission actions.

Approved:

Section: _____

Division: _____

Director: _____

Report Prepared By: Roberta Young
Phone: 229-6408
Date Prepared: March 25, 1992

RY:y
MY102842
April 16, 1992

State of Oregon
Department of Agriculture

TAX RELIEF APPLICATION REVIEW REPORT

---

1. Applicant

Mark McKay Farms, Inc.
Dean McKay Farms, Inc.
19172 French Prairie Road NE
St. Paul, OR 97137

The applicant owns and operates a grass seed farm operation in Marion County, 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 200'x100'x22' metal clad, concrete footed, grass seed straw storage shed, located at 19172 French Prairie Road NE, St. Paul, Oregon. The land is leased from McKay Acres, Inc. and the building is owned by the applicant.

Claimed facility cost: $122,177
(Accountant's Certification was provided.)

3. Description of farm operation plan to reduce open field burning.

The applicants have 1,000 acres of perennial grass seed varieties under cultivation. Prior to using alternatives, the applicants open field burned as many of their acres as the weather and smoke management program permitted.

In approximately 1988, the applicants began to use a custom baler to remove the straw from the fields on about 700 acres in lieu of open field burning. However, the stacks of baled straw often had to be burned due to rain damage. The construction of the straw storage shed enabled the applicants to compete with other area growers to provide quality straw to the custom balers "in return for baling and disposal of unwanted straw".

The shed appears to be an appropriate size to accommodate 700 acres of baled grass straw. The acreage produces approximately 1,750 tons of straw and when stored in the 20,000 square foot building is housed at approximately 11.43 tons per square foot. This falls in the range of 7 tons per square foot to 13 tons per square foot and is above the average of 10.1 tons per square foot established by prior certified tax credit applications.

4. 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:

Construction of the facility was substantially completed on October 15, 1991. The application for certification was submitted on May 10, 1991 and found to be complete on March 3, 1992. The application was submitted within two years of substantial completion of the facility.

5. Evaluation of Application

a. The facility is eligible under ORS 468.150 because the equipment is an approved alternative method for field sanitation and straw utilization and disposal that reduces a substantial quantity of air pollution. This reduction is accomplished by reduction of air contaminants, defined in ORS 468A.005; by reducing the maximum acreage to be open burned in the Willamette Valley as required in OAR 340-26-013; and, the facility's qualification as a "pollution control facility", defined 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 because the shed provides protection from the elements until the straw can be marketed by a custom baler. Before, the straw damaged from precipitation had to be burned.

2. The estimated annual percent return on the investment in the facility.

There is no annual percent return on the investment as applicant claims no gross annual income. He states that the straw is given to the custom baler in exchange for baling services.

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 an increase in operating costs of $800 to annually maintain and operate the facility. Annual operating costs include land lease ($100), insurance ($300), and repairs ($400). These costs were considered in the return on investment calculation.

   There is an annual savings to the applicant in that registration and burn fees are no longer required to treat the field. Subsequent to 1991 legislation the savings are $10 per acre or $7,000 for the 700 acres of grass seed straw baled and placed in storage. Minimum additional annual costs to the applicant would be approximately $18.50 per acre for additional fertilizer (Phosphate and Potash) required because of the straw removal or $12,950 for the 700 acres of grass seed straw baled and placed in storage. The cost figures are derived from a report prepared by Mark Mellbye, OSU District Extension Agent-Field Crops.

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 pollution.

   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%.

6. Summation

   a. The facility was constructed in accordance with all regulatory deadlines.

   b. The facility is eligible under ORS 468.150 as an approved alternative method for field sanitation and straw utilization and disposal that reduces a substantial quantity of air pollution as defined in ORS 468A.005.

   c. The facility complies with DEQ statutes and rules.

   d. The portion of the facility that is properly allocable to pollution control is 100%.

7. Director's Recommendation

Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $122,177, with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application Number TC-3497.

Jim Britton, Manager
Smoke Management Program
Natural Resources Division
Oregon Department of Agriculture
(503) 378-6792

jb:kcTC3497
April 6, 1992

Application No.T-3569

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

---

1. Applicant

Portland General Electric Company
Fleet Major Maintenance (Natkin Site)
121 S.W. Salmon Street, 1WTC-10
Portland, OR 97204

The applicant owns and operates an electric utility company with operations throughout Oregon.

Application was made for tax credit for a water pollution control facility.

2. Description of Facility

The claimed facility consists of an oil-water separator and associated drainage piping to direct water from an equipment cleaning pad to the Tigard sanitary sewer system.

Claimed Facility Cost: $18,267.69
(copies of invoices were included with the application)

The facility is located at 14725 SW 72nd Avenue, Tigard, Oregon.

The facility consists of an oil-water separator and associated drainage piping that directs wash water from the cleaning pad to the Tigard Publicly-Owned Treatment Works (POTW). The oil-water separator provides pre-treatment of the wastewater before it discharges to the POTW. The oil-water separator is cleaned out approximately once per year. One to two thousand gallons of oil, water and sludge are treated and removed.

3. Procedural Requirements

The facility is governed by ORS 468.150 through 468.190 and by OAR Chapter 340, Division 16.

The facility met the statutory deadline in that:

Construction of the facility was substantially completed November 1, 1990, and the application for final certification was filed on June 24, 1991, 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 federal Environmental Protection Agency to control water pollution. This control is accomplished by redesign to contain industrial waste as defined in ORS 468B.005.

Industrial dischargers are required by federal and state law to treat their waste under a POTW's pre-treatment program before discharging to the POTW. It has been the Department's practice to grant tax-credit eligibility for the cost of required pre-treatment technology.

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 revenue generated from this facility and therefore no return on investment.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant considered washing vehicles at another location but chose this alternative, instead.

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 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 proper disposal 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 comply with a requirement imposed by the federal Environmental Protection Agency to prevent water pollution and accomplishes this purpose by the containment of industrial waste as defined in ORS 468B.005.

c. The facility complies with DEQ statutes and rules.

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 $18,267.69 with 100% allocated to pollution control be issued for the facility claimed in Tax Credit Application No. T-3569.

JE Turnbaugh
(503) 229-5374
IW\WC9\WC9814
3/20/92

Application No. TC-3582

State of Oregon
Department of Environmental Quality

RECLAIMED PLASTIC TAX CREDIT
TAX RELIEF APPLICATION REVIEW REPORT

---

1. Applicant

Dinihanian Recycling & Manufacturing
Vahan M. Dinihanian
15005 NW Cornell Road
Beaverton, OR 97006

The applicant owns and operates a plastic product manufacturing facility at Beaverton, Oregon.

Application was made for Reclaimed Plastic Tax Credit.

2. Description of Equipment, Machinery or Personal Property

Claimed Investment Cost: $9,850.00
(Cost documented. Salvage value of $3,000 deducted from total cost of claimed equipment.)

The claimed equipment is utilized to collect reclaimed plastic. It includes:

- 1987 Used Mercedes Single Drive Tractor (truck) - $9,400
- 1982 Used Dry Van Trailer - $1,500
- 1983 Used Dry Van Trailer - $1,950

The equipment will be used to collect and transport water bottles from companies such as Crystal Springs and Aqua Cool in the Portland metropolitan area. The water bottles are ground, and the material is used by the applicant to manufacture Christmas wreath frames.

3. Procedural Requirements

The investment is governed by ORS 468.925 through 468.965, and by OAR Chapter 340, Division 17.

The investment met all statutory deadlines in that:

a. The request for preliminary certification was filed June 24, 1991.

b. The request for preliminary certification was approved before application for final certification was made.

c. The investments were made December 17, 1991, to February 6, 1992, prior to June 30, 1995. The application for final certification was found to be complete on March 18, 1992.

4. Evaluation of Application

a. The investment is eligible because the equipment is necessary to collect reclaimed plastic.

b. Allocable Cost Findings

In determining the portion of the investment costs properly allocable to reclaiming and recycling plastic material, the following factors from ORS 468.960 have been considered and analyzed as indicated:

1) The extent to which the claimed collection, transportation, processing or manufacturing process is used to convert reclaimed plastic into a salable or usable commodity.

This factor is applicable because the entire purpose of the tractor and trailers is to collect reclaimed plastic that is ground and used to manufacture a reclaimed plastic product. The applicant estimates he collects 5,000 plastic bottles in Oregon. He also collects water bottles in western Washington.

2) The alternative methods, equipment and costs for achieving the same objective.

The applicant considered buying new equipment, but decided to buy the used tractor and trailers because they were within his price range, and met his needs.

3) Any other factors which are relevant in establishing the 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.

There are no other factors to consider in establishing the actual cost of the investment properly allocable to reclaiming and recycling plastic material.

5. Summation

a. The investment was made in accordance with all regulatory deadlines.

b. The investment is eligible for final tax credit certification in that the equipment is necessary to collect reclaimed plastic.

c. The qualifying business complies with DEQ statutes and rules.

d. The portion of the investment cost that is properly allocable to reclaiming and recycling plastic is 100%.

6. Director's Recommendation

Based upon these findings, it is recommended that a Reclaimed Plastic Tax Credit Certificate bearing the cost of $9,850.00 with 100% allocated to reclaiming plastic material, be issued for the investment claimed in Tax Credit Application No. TC-3582.

Moon:k
RECY\RPT\YK4137
(503) 229-5479
March 20, 1992

Application No. TC-3618

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

---

1. Applicant

Younger Oil Company
260 SW Ferry St.
PO Box 87
Albany, OR 97321

The applicant owns and operates a retail service station and cardlock at 33380 SE Highway 34, Albany OR 97321, facility no. 3579.

Application was made for a tax credit for a water pollution control facility involving an aboveground storage tank.

2. Description of Claimed Facility

The claimed pollution control facilities described in this application are the installation of an oil/water separator with double wall fiberglass piping and a spill containment barrier. (The applicant also installed an above ground storage tank that the spill containment barrier was built around.)

Claimed facility cost (Accountant's certification was provided)	$29,672
Percent allocable to pollution control	100%

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 installation of the facility was substantially completed on July 5, 1991. The application for final certification was received August 21, 1991 and found to be complete on February 20, 1992, within two years of substantial completion of the facility. The facility was placed into operation on July 5, 1991.

4. Evaluation of Application

a. The facility is eligible because the principal purpose of the facility is to comply with aboveground storage tank requirements imposed by the federal Environmental Protection Agency to prevent pollution of soil and water. This is accomplished by preventing releases into soil or water. The facility qualifies as a "pollution control facility", defined in OAR 340-16-025(2)(g): "Installation or construction of facilities which will be used to detect, deter or prevent spills or unauthorized releases."

Prior to the installation of pollution control, the facility consisted of four completely upgraded underground storage tanks with corrosion protection, spill and overfill prevention and leak detection equipment. (See TC-3176)

The applicant installed:

1) For spill and overfill prevention - Spill containment barrier and oil/water separator with fiberglass piping.

The applicant also installed underground fiberglass piping for the above ground tank.

The applicant did not indicate if any soil assessment or tank tightness testing was accomplished before undertaking the project. Leak detection equipment was installed in December 1989 and has been functioning, without detecting any reportable releases, since that time.

Based on information currently available, the applicant is in compliance with all applicable DEQ regulations in that these tanks are permitted and fee payments are current. (The applicant is also in compliance with the applicable federal rules for spill containment barriers and SPCC plans.)

The Department concludes that all of the costs claimed by the applicant ($29,672) are eligible pursuant to the definition of a pollution control facility in ORS 468.155.

b. Eligible Cost Findings

In determining the percent of the eligible 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 equipment 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 investment as the applicant claims no gross annual income from the facility.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant considered using cathodically protected steel piping instead of fiberglass. The applicant considered the method chosen to be a preferable material. The method chosen is acceptable for meeting the requirements of federal regulations.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

The applicant claims no savings or increase in costs as a result of the installation.

5) Any other factors which are relevant in establishing the portion of the actual cost of the facility properly allocable to pollution control.

The Department determined the percent allocable pursuant to Department procedures under Oregon Administrative Rules Chapter 340, Division 16. The result is displayed in the following table.

	Eligible Facility Cost	Percent Allocable	Amount Allocable
Corrosion Protection:			
Fiberglass piping	$ 4,250	89%(1)	$ 3,766
Spill & Overfill Prevention:			
Oil/water separator	4,617	100	4,617
Spill containment barrier	6,295	100	6,295
Labor & materials	14,510	100	14,510
Total	$29,672	98%	$29,188

(1) The Department has determined the percent allocable on the cost of a corrosion protected tank and piping system by using a formula based on the difference in cost between the protected tank and piping system and an equivalent bare steel system as a percent of the protected system. Applying this formula to the costs presented by the applicant, where the protected system cost is $4,250 and the bare steel system is $484, the resulting portion of the eligible tank and piping cost allocable to pollution control is 89%.

5. Summation

a. The facility was constructed in accordance with all regulatory requirements.

b. The facility is eligible for tax credit certification in that the principal purpose of the claimed facility is to comply with requirements imposed by the federal Environmental Protection Agency to prevent pollution of soil and water. This is accomplished by preventing releases in soil or water. The facility qualifies as a "pollution control facility" defined in OAR 340-16-025(2)(g): "Installation or construction of facilities which will be used to detect, deter or prevent spills or unauthorized releases."

c. The facility complies with DEQ statutes and rules.

d. The portion of the facility cost that is properly allocable to pollution control is 98%.

6. Director's Recommendation

Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $29,672 with 98% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. TC-3618.

Mary Lou Perry:ew
(503) 229-5731
March 16, 1992

Application No. TC-3682

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Jeld-Wen Inc.
Jeld-Wen Fiber of Oregon
PO Box 1329
Klamath Falls, OR 97601

The applicant owns and operates a hardboard manufacturing facility that molds fiber into door skins in Klamath Falls, Oregon.

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

2. Description of Facility

The facility consists of a Clarke 57-20 Pneu-Aire primary filter baghouse. This baghouse performs two functions. It has a primary cyclone separator that removes the majority of coarser particles from the dust air stream. The remaining particles are filtered out of the air through a series of hanging bags.

Emissions from seven sources are delivered to the facility by a forced air delivery system. The sources consist of one dry material storage silo vent, one green material storage silo vent, one primary cyclone, two screeners, two recycle cyclones.

Facility cost declared by applicant: $227,291.80

Accountant's Certification was provided.

Expenses were attributed to the following categories:

Supplies and contractor expenses;	
foundation materials and labor	$ 17,996.86
bag house materials and labor	$ 152,823.22
electrical materials and labor	$ 25,934.82
Jeld-Wen expenses;	
mechanical labor	$ 2,135.25
electrical labor	$ 11,820.38
mechanical engineering	$ 1,989.00
electrical engineering	$ 2,986.00
On site stock	$ 2,346.27
Project coordination	$ 9,260.00

The project coordination expenses were arrived at by a three percent surcharge on contracts and material purchases over $10,000. There was a ten percent surcharge for both material purchases less than $10,000 and labor performed by Jeld-Wen employees.

Total expenditures were $227,291.80.

The applicant declared a salvage value of $10,000 for facilities removed from service.

Adjusted claimed facility cost: $217,291.80

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:

Construction of the facility was substantially completed on January 19, 1991 and placed into operation on January 21, 1991. The application for certification was submitted to the Department on December 11, 1991, within two years of substantial completion. The application was found to be complete on March 24, 1992.

4. Evaluation of Application

Jeld-Wen modified their wood dust containment system. Dust previously vented into the atmosphere and settled to the ground. It was retrieved by crews with brooms and shovels. This method did not effectively prevent dust from escaping off site. The dust is now delivered to a baghouse in an enclosed delivery system. The baghouse removes dust from the air vented to the atmosphere.

a. The facility is eligible because the principal purpose of the facility is to comply with a requirement imposed by the Department to control fugitive particulate emissions. This is in accordance with OAR Chapter 340, Sections 21-050 through 21-060. The Air Contaminant Discharge Permit for this source, 18-0006, item G-6, requires the permittee to meet the above sections. The emission reduction is accomplished by the elimination of air contaminants as defined in ORS 468A.005

Emissions from sources range in size from wood chips to wood dust. Once in the air, these types of particles are suspended by air currents for a short distance before settling to the ground. Large particles such as wood chips settle almost immediately. Smaller particles such as wood dust may be suspended for long distances. Once particles settle the wind may entrain them and distribute a portion in the local neighborhood.

There were nine sources of emissions before the baghouse was installed. There were three cyclones on the screen house. Two of these cyclones were removed and the screen they served is now supplied material through a conveyor system. The third cyclone on the screen house is still in service. All three of these cyclones previously vented into the atmosphere. The remaining cyclone presently vents into the baghouse. There are two screens in the screen house. They separate the wood particles by size. Fine particles precipitate from both screens. These particles used to be dropped onto a chain conveyor system. This system was not effective in capturing all the fines. The precipitate from the screens is now captured by a vacuum system which feeds the fines into the baghouse. There are three silos, two dry chip silos and one green chip silo. Only one of the dry chip silos will vent at any time. The silos used to vent into the atmosphere. They presently vent into the baghouse. There are two cyclones which separate recycled material from fines. The recycled material returns directly to the manufacturing process. The exhaust from these cyclones used to vent into the atmosphere. It now vents into the baghouse. Before the baghouse, nine sources vented into the atmosphere. Seven sources now vent into the baghouse.

This plant had a history of complaints from local residents about fugitive wood dust emissions. Prior to installation of the facility wood dust was allowed to vent into the atmosphere. Wood dust accumulated on site and was subsequently blown off site by the wind into adjacent residential areas. Clean up crews were utilized to retrieve the material in an attempt to reduce off site effects. This solution proved to be inadequate as neighborhood complaints, a series of source inspections comments, and a notice of noncompliance attest to.

Until July 25, 1990 the plant was considered marginally in compliance with regard to fugitive wood dust emissions. However a series of Department source

inspections made note of the dust accumulation at the screen house area and documented the need to address this problem. The Department sent Jeld-Wen correspondence stressing the need for the development of a strategy to control emissions on September 8, 1987.

A notice of non-compliance was issued by the Department on July 30, 1990. The inspection found the plant to not be in compliance with fugitive emissions, permit emission limits, and monitoring and reporting. The notice of non-compliance instructed the company to re-evaluate its strategy to reduce the amount of fugitive material on the plant site and provide a comprehensive dust suppression plan by September 1, 1990.

The primary filter baghouse was installed in response to the notice of non-compliance and Department requirements to control dust emissions. A September 1, 1991 source inspection indicates the source met all permit conditions. The comment in the additional remarks section states, "New bag filter a(nd) screening area has visually improved the accumulation of fugitive material."

b. Eligible Cost Findings

In determining the percent of the 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.

A portion of the waste product is converted into a usable commodity consisting of wood particulates retrieved from the bag house. The wood particulates are delivered to a hog fuel boiler via a high pressure air delivery system. The average annual value of this fuel is estimated by the applicant to be $4,645.00. Before the installation of the baghouse, the material that accumulated on site was retrieved manually and added to the boiler.

2) The estimated annual percent return on the investment in the facility.

There is no return on investment provided by the facility because the average annual operating cost of $81,484 exceeds the total of the average annual income of $4,645.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant considered Carter-Day filters as an alternative to the Clarke bag house. The prices were within ten percent of each other. The applicant chose Clarke's equipment on the basis of references and past performance. The applicant also considered a standard cyclone system. They decided this option was too inefficient.

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 is $81,484 annually. The operating expenses are incurred through power usage for the bag house, maintenance, and bag cleaning.

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 pollution.

There are no other factors to be considered.

The actual cost of the facility properly allocable to pollution control as determined by using the above factors is %100.

5. Summation

a. The facility was constructed in accordance with all regulatory deadlines.

b. The facility is eligible for tax credit certification. The principal purpose of the facility is to comply with a requirement imposed by the Department, to conduct dust suppression measures.

c. The facility complies with 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 $217,291.80 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. TC-3682.

Brian Fagot:a
MISC\AH50230
(503)- 229-5365
April 15, 1992

Application No. TC-3688

State of Oregon
Department of Agriculture

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Berger Bros.
34125 Riverside Drive
Albany, Oregon 97321

The applicant owns and operates a grass seed farm operation in Linn County, 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 33 acres tiled of a 40 acre field with 1,150' of 6" main lines and 26,500' of 3" lateral lines, located south of Walnut Drive and west of Oakville Road in Linn County, Oregon. The land is owned by the applicant.

Claimed facility cost: $15,673.96
(The applicant provided copies of invoices and cancelled checks.)

3. Description of farm operation plan to reduce open field burning.

The applicant has 600 acres of perennial grass-seed and 300 acres of annual grass-seed under cultivation. Until 1989 the applicant open field burned as much acreage annually as the weather and smoke management program permitted. Records indicate that acreage registered for open field burning has continued to progressively decline while actual open field burning was less than 100 acres annually over the last three years.

The 40-acre field supported a perennial grass-seed crop and was chosen for the drainage tile installation because it was located close to two busy roads creating a hazard to traffic when it was open field burned. The applicant has stated his intention to discontinue open field burning on the field now that improved soil drainage allows the planting of an alternative crop. The applicant is alternating a wheat grain crop with an annual grass-seed crop. Other alternate crops were not considered because of the soil type. The applicant provided the Soil Conservation Service wetland determination allowing the drainage tile installation.

4. 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:

The facility was determined to be substantially completed on August 20, 1991. The application was submitted on December 23, 1991

and found to be complete on January 16, 1992. The application was submitted within two years of substantial completion of the facility.

5. Evaluation of Application

a. The facility is eligible under ORS 468.150 because the facility is an approved alternative method for field sanitation and straw utilization and disposal that reduces a substantial quantity of air pollution. This reduction is accomplished by reduction of air contaminants, defined in ORS 468A.005; by reducing the maximum acreage to be open burned in the Willamette Valley as required in OAR 340-26-013; and, the facility's qualification as a "pollution control facility", defined in OAR 340-16-025(2)(f)(C): "Drainage tile installations which will result in a reduction of grass seed acreage under production."

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. The tile drainage installation provides improved soil drainage allowing alternative crops to be grown on a prior dedicated grass-seed field.

2. The estimated annual percent return on the investment in the facility.

There is no annual percent return on the investment as applicant claims no gross annual income.

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 an increase in operating costs of $1,000 to annually maintain and operate the facility. These costs were considered in the return on investment calculation.

There is an annual savings to the applicant in that registration and burn fees are no longer required to treat the field. Subsequent to 1991 legislation the savings are $10 per acre or $400 for the 40-acre field. Minimum additional annual costs to the applicant would be approximately $45 per acre for chopping the straw and plowing it under or $1,800 for the 40-acre field. The cost figures are derived from a report prepared by Mark Mellbye, OSU District Extension Agent-Field Crops and Tim Cross, OSU Extension Economist-Farm Management.

There is also the question of whether the alternative crop's value compared to the grass seed crop's value will substantially benefit the applicant. The ryegrass seed crop yields approximately 1,700 pounds of seed per acre annually. Historically, the price of annual ryegrass seed has ranged between 10 to 25 cents per pound. This range produces an annual gross income of $170 to $425 per acre. The alternate crop (wheat) yields approximately 2,970 pounds of grain per acre annually. Historically, the price of wheat grain has ranged between 6 to 15 cents per pound. This range produces an annual gross income of $178 to $445 per acre. There appears to be little, if any, return on investment advantage of either crop over the other.

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 pollution.

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%.

6. Summation

a. The facility was constructed in accordance with all regulatory deadlines.

b. The facility is eligible under ORS 468.150 as an approved alternative method for field sanitation and straw utilization and disposal that reduces a substantial quantity of air pollution as defined in ORS 468A.005.

c. The facility complies with DEQ statutes and rules.

d. The portion of the facility that is properly allocable to pollution control is 100%.

7. Department of Agriculture's Recommendation

Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $15,673.96, with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application Number TC-3688.

Jim Britton, Manager
Smoke Management Program
Natural Resources Division
Oregon Department of Agriculture
(503) 378-6792

jb:bmTC3688
April 1, 1992

Application No. TC-3704

State of Oregon
Department of Agriculture

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Briggs Farms, Inc.
91593 North Coburg Road
Eugene, OR 97401

The applicant owns and operates a grass seed farm operation in Lane County, Oregon.

Application was made for tax credit for air pollution control equipment.

2. Description of Claimed Facility

The equipment described in this application is a 1992 Case International, Model 165, rollover, 4 bottom, 18" plow, located northeast of Coburg off Brownsville Road East, Eugene, Oregon. The equipment is owned by the applicant.

Claimed equipment cost: $8,600
(The applicant provided copies of the purchase order and invoice.)

3. Description of farm operation plan to reduce open field burning

The applicant has 500 acres of annual grass seed under cultivation. Prior to investigating alternatives the applicant open field burned as many acres as the weather and smoke management program permitted.

Several years ago the applicant began to plow down about half of his acreage and open field burned as much of the remaining acreage as he could. After burning, the applicant drill punched the field to reseed, a process that does not disturb the soil. With the purchase of this plow, the applicant states that he will be able to plow down all of his 500 acres in a timely manner each year because it has an additional bottom and advanced design. The applicant is now able to prepare the land for replanting, without open field burning, in a reasonable length of time.

4. 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:

Purchase of the equipment was substantially completed on January 4, 1992. The application was submitted on January 14, 1992 and the application for final certification was found to be complete on

January 20, 1992. The application was submitted within two years of substantial purchase of the equipment.

5. Evaluation of Application

a. The equipment is eligible under ORS 468.150 because the equipment is an approved alternative method for field sanitation and straw utilization and disposal that reduces a substantial quanity of air pollution. This reduction is accomplished by reduction of air contaminants, defined in ORS 468A.005; by reducing the maximum acreage to be open burned in the Willamette Valley as required in OAR 340-26-013; and, the facility's qualification as a "pollution control facility", defined 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 equipment is used to recover and convert waste products into a salable or usable commodity.

The equipment does not recover or convert waste products into a salable or usable commodity.

2. The estimated annual percent return on the investment in the equipment.

There is no annual percent return on the investment as applicant claims no gross annual income.

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 purchase of the equipment.

There is an annual savings to the applicant in that registration and burn fees are no longer required to treat the field. Subsequent to 1991 legislation the savings are $10 per acre or $2,500 for the 250 acre increase in plowed acreage. Minimum additional annual costs to the applicant would be approximately $18.80 per acre for disking the plowed ground in preparation for planting or $4,700 for the additional 250 plowed acres. The cost figures are derived

from a worksheet prepared by Harold Youngberg, Extension Agronomist, Department of Crop Science, Hugh Hickerson, Benton-Linn County Extension Agent and Stanley Miles, Extension Economist, Department of Agriculture and Resource Economics, Oregon State University.

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 pollution.

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%.

6. Summation

a. The equipment was purchased in accordance with all regulatory deadlines.

b. The equipment is eligible under 468.150 as an approved alternative method for field sanitation and straw utilization and disposal that reduces a substantial quantity of air pollution as defined in ORS 468A.005.

c. The equipment complies with DEQ statutes and rules.

d. The portion of the equipment that is properly allocable to pollution control is 100%.

7. Department of Agriculture's Recommendation

Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $8,600, with 100% allocated to pollution control, be issued for the equipment claimed in Tax Credit Application Number TC-3704.

Jim Britton, Manager
Smoke Management Program
Natural Resources Division
Oregon Department of Agriculture
(503) 378-6792

jb:kcTC3704
April 6, 1992

Application No. TC-3706

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Klamath Auto Wreckers, Inc.
3315 Washburn Way
Klamath Falls, OR 97603

The applicant owns and operates an automotive dismantling and recycling business in Klamath Falls, Oregon.

Application was made for tax credit for an air pollution control facility which is leased by the applicant. Applicant has provided authorization from the lessor to receive tax credit certification.

2. Description of Facility

Facility is a machine which removes and cleans auto air conditioner coolant. The machine is self contained and includes pumps, tubing, valves and filters which rid the spent coolant of oil, excess air, water, acids and contaminant particles.

The applicant has identified the useful life of the equipment to be 10 years.

Claimed Facility Cost: $2945.00
(Costs have been documented)

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 the facility was determined substantially completed on 12/31/91, and the application for certification was filed on 1/15/92, within two years of substantial completion.

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. This reduction is accomplished by capturing and/or recycling air contaminants, as defined in ORS 468.275. The requirement is to comply with ORS 468.612-621 and OAR 340-22-410 to 415.

Eligible equipment must be certified by Underwriters Laboratory (UL) as meeting the requirements and specifications of UL1963 and the Society of Automotive Engineers (SAE) standards, J1990 and J1991, or other requirements and specifications determined by the Department as being equivalent. The facility meets these requirements.

b. Eligible Cost Findings

In determining the percent of the 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 recovery and recycling machine serves two purposes. It prevents the release of spent auto A/C coolant to the environment, thereby meeting Department regulations requiring capture of this air contaminant. Second, it provides a means to recover and clean waste coolant for reuse as an auto A/C coolant.

2) The estimated annual percent return on the investment in the facility.

The percent return on investment from facility use was calculated using coolant cost and retrieval rate data from the applicant and generic cost of facility operations estimated by the Department.

Specifically, the applicant estimated the income to applicant from the sale of recycled coolant at $2.00/pound. The applicant estimated an annual coolant recovery rate of 120 pounds.

In estimating the operating costs for use of the recovery and recycling machine, the Department developed a standardized methodology which considers the following factors:

- Electricity consumption of machine
- Additional labor to operate machine
- Machine maintenance costs
- Depreciation of machine

Based on these considerations, the applicant estimated the return on investment to be less than zero, in that machine operating costs exceeded income from the use of the machine.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant has identified no alternatives.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There are savings from the facility to recover and reuse coolant. The applicant may use the recycled coolant in customer vehicles. In this case the savings are tied to the displaced cost of virgin coolant. Alternately, the applicant could sell the coolant to a second shop where the coolant is used. In this case the savings to the applicant are tied to the sales price of recycled coolant.

However, for this applicant increases in business operations and maintenance costs exceeded facility savings. These cost estimates are discussed in 2) above.

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 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 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 $2945.00 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. TC-3706.

Jerry Coffer:JC
(503) 731-3049
March 16, 1992

Application No. TC-3719

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Delon Olds Co.
PO Box 110
Salem, OR 97308

The applicant owns and operates an automobile sales and service business in Salem, Oregon.

Application was made for tax credit for an air pollution control facility which is owned by the applicant.

2. Description of Facility

Facility is a machine which removes and cleans auto air conditioner coolant. The machine is self contained and includes pumps, tubing, valves and filters which rid the spent coolant of oil, excess air, water, acids and contaminant particles.

The applicant has identified the useful life of the equipment to be 7 years.

Claimed Facility Cost: $2750.00
(Costs have been documented)

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 the facility was determined substantially completed on 3/29/91, and the application for certification was filed on 1/28/92, within two years of substantial completion.

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. This reduction is accomplished by capturing and/or recycling air contaminants, as defined in ORS 468.275. The requirement is to comply with ORS 468.612-621 and OAR 340-22-410 to 415.

Eligible equipment must be certified by Underwriters Laboratory (UL) as meeting the requirements and specifications of UL1963 and the Society of Automotive Engineers (SAE) standards, J1990 and J1991, or other requirements and specifications determined by the Department as being equivalent. The facility meets these requirements.

b. Eligible Cost Findings

In determining the percent of the 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 recovery and recycling machine serves two purposes. It prevents the release of spent auto A/C coolant to the environment, thereby meeting Department regulations requiring capture of this air contaminant. Second, it provides a means to recover and clean waste coolant for reuse as an auto A/C coolant.

2) The estimated annual percent return on the investment in the facility.

The percent return on investment from facility use was calculated using coolant cost and retrieval rate data from the applicant and generic cost of facility operations estimated by the Department.

Specifically, the applicant estimated the cost to applicant of virgin coolant at $3.46/pound. The applicant estimated an annual coolant recovery rate of 122 pounds.

In estimating the operating costs for use of the recovery and recycling machine, the Department developed a standardized methodology which considers the following factors:

- Electricity consumption of machine
- Additional labor to operate machine
- Machine maintenance costs
- Depreciation of machine

Based on these considerations, the applicant estimated the return on investment to be less than zero, in that machine operating costs exceeded income from the use of the machine.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant has identified no alternatives.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There are savings from the facility to recover and reuse coolant. The applicant may use the recycled coolant in customer vehicles. In this case the savings are tied to the displaced cost of virgin coolant. Alternately, the applicant could sell the coolant to a second shop where the coolant is used. In this case the savings to the applicant are tied to the sales price of recycled coolant.

However, for this applicant increases in business operations and maintenance costs exceeded facility savings. These cost estimates are discussed in 2) above.

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 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 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 $2750.00 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. TC-3719.

Jerry Coffer:JC
(503) 731-3049
March 16, 1992

Application No. TC-3720

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Delon Olds Co.
PO Box 110
Salem, OR 97308

The applicant owns and operates an automobile sales and service business in Salem, Oregon.

Application was made for tax credit for an air pollution control facility which is owned by the applicant.

2. Description of Facility

Facility is a machine which removes and cleans auto air conditioner coolant. The machine is self contained and includes pumps, tubing, valves and filters which rid the spent coolant of oil, excess air, water, acids and contaminant particles.

The applicant has identified the useful life of the equipment to be 7 years.

Claimed Facility Cost: $2663.00
(Costs have been documented)

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 the facility was determined substantially completed on 5/9/90, and the application for certification was filed on 1/28/92, within two years of substantial completion.

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. This reduction is accomplished by capturing and/or recycling air contaminants, as defined in ORS 468.275. The requirement is to comply with ORS 468.612-621 and OAR 340-22-410 to 415.

Eligible equipment must be certified by Underwriters Laboratory (UL) as meeting the requirements and specifications of UL1963 and the Society of Automotive Engineers (SAE) standards, J1990 and J1991, or other requirements and specifications determined by the Department as being equivalent. The facility meets these requirements.

b. Eligible Cost Findings

In determining the percent of the 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 recovery and recycling machine serves two purposes. It prevents the release of spent auto A/C coolant to the environment, thereby meeting Department regulations requiring capture of this air contaminant. Second, it provides a means to recover and clean waste coolant for reuse as an auto A/C coolant.

2) The estimated annual percent return on the investment in the facility.

The percent return on investment from facility use was calculated using coolant cost and retrieval rate data from the applicant and generic cost of facility operations estimated by the Department.

Specifically, the applicant estimated the cost to applicant of virgin coolant at $3.46/pound. The applicant estimated an annual coolant recovery rate of 211 pounds.

In estimating the operating costs for use of the recovery and recycling machine, the Department developed a standardized methodology which considers the following factors:

- Electricity consumption of machine
- Additional labor to operate machine
- Machine maintenance costs
- Depreciation of machine

Based on these considerations, the applicant estimated the return on investment to be less than zero, in that machine operating costs exceeded income from the use of the machine.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant has identified no alternatives.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There are savings from the facility to recover and reuse coolant. The applicant may use the recycled coolant in customer vehicles. In this case the savings are tied to the displaced cost of virgin coolant. Alternately, the applicant could sell the coolant to a second shop where the coolant is used. In this case the savings to the applicant are tied to the sales price of recycled coolant.

However, for this applicant increases in business operations and maintenance costs exceeded facility savings. These cost estimates are discussed in 2) above.

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 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 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 $2663.00 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. TC-3720.

Jerry Coffer:JC
(503) 731-3049
March 16, 1992

Application No. TC-3722

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Rex's Garage
PO Box 117
Bonanza, OR 97623

The applicant owns and operates a general auto repair shop in Bonanza, Oregon.

Application was made for tax credit for an air pollution control facility which is owned by the applicant.

2. Description of Facility

Facility is a machine which removes and cleans auto air conditioner coolant. The machine is self contained and includes pumps, tubing, valves and filters which rid the spent coolant of oil, excess air, water, acids and contaminant particles.

The applicant has identified the useful life of the equipment to be 3 years.

Claimed Facility Cost: $1985.00
(Costs have been documented)

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 the facility was determined substantially completed on 10/16/91, and the application for certification was filed on 1/30/92, within two years of substantial completion.

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. This reduction is accomplished by capturing and/or recycling air contaminants, as defined in ORS 468.275. The requirement is to comply with ORS 468.612-621 and OAR 340-22-410 to 415.

Eligible equipment must be certified by Underwriters Laboratory (UL) as meeting the requirements and specifications of UL1963 and the Society of Automotive Engineers (SAE) standards, J1990 and J1991, or other requirements and specifications determined by the Department as being equivalent. The facility meets these requirements.

b. Eligible Cost Findings

In determining the percent of the 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 recovery and recycling machine serves two purposes. It prevents the release of spent auto A/C coolant to the environment, thereby meeting Department regulations requiring capture of this air contaminant. Second, it provides a means to recover and clean waste coolant for reuse as an auto A/C coolant.

2) The estimated annual percent return on the investment in the facility.

The percent return on investment from facility use was calculated using coolant cost and retrieval rate data from the applicant and generic cost of facility operations estimated by the Department.

Specifically, the applicant estimated the cost to applicant of virgin coolant at $3.76/pound. The applicant estimated an annual coolant recovery rate of 30 pounds.

In estimating the operating costs for use of the recovery and recycling machine, the Department developed a standardized methodology which considers the following factors:

- Electricity consumption of machine
- Additional labor to operate machine
- Machine maintenance costs
- Depreciation of machine

Based on these considerations, the applicant estimated the return on investment to be less than zero, in that machine operating costs exceeded income from the use of the machine.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant has identified no alternatives.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There are savings from the facility to recover and reuse coolant. The applicant may use the recycled coolant in customer vehicles. In this case the savings are tied to the displaced cost of virgin coolant. Alternately, the applicant could sell the coolant to a second shop where the coolant is used. In this case the savings to the applicant are tied to the sales price of recycled coolant.

However, for this applicant increases in business operations and maintenance costs exceeded facility savings. These cost estimates are discussed in 2) above.

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 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 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 $1985.00 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. TC-3722.

Jerry Coffer:JC
(503) 731-3049
March 16, 1992

Application No. TC-3723

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

M & G Body and Fender Service
3082 W. 11th
Eugene, OR 97402

The applicant owns and operates an auto body repair shop in Eugene, Oregon.

Application was made for tax credit for an air pollution control facility which is owned by the applicant.

2. Description of Facility

Facility is a machine which removes and cleans auto air conditioner coolant. The machine is self contained and includes pumps, tubing, valves and filters which rid the spent coolant of oil, excess air, water, acids and contaminant particles.

The applicant has identified the useful life of the equipment to be 10 years.

Claimed Facility Cost: $2200.00
(Costs have been documented)

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 the facility was determined substantially completed on 8/1/91, and the application for certification was filed on 1/30/92, within two years of substantial completion.

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. This reduction is accomplished by capturing and/or recycling air contaminants, as defined in ORS 468.275. The requirement is to comply with ORS 468.612-621 and OAR 340-22-410 to 415.

Eligible equipment must be certified by Underwriters Laboratory (UL) as meeting the requirements and specifications of UL1963 and the Society of Automotive Engineers (SAE) standards, J1990 and J1991, or other requirements and specifications determined by the Department as being equivalent. The facility meets these requirements.

b. Eligible Cost Findings

In determining the percent of the 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 recovery and recycling machine serves two purposes. It prevents the release of spent auto A/C coolant to the environment, thereby meeting Department regulations requiring capture of this air contaminant. Second, it provides a means to recover and clean waste coolant for reuse as an auto A/C coolant.

2) The estimated annual percent return on the investment in the facility.

The percent return on investment from facility use was calculated using coolant cost and retrieval rate data from the applicant and generic cost of facility operations estimated by the Department.

Specifically, the applicant estimated the cost to applicant of virgin coolant at $3.00/pound. The applicant estimated an annual coolant recovery rate of 60 pounds.

In estimating the operating costs for use of the recovery and recycling machine, the Department developed a standardized methodology which considers the following factors:

- Electricity consumption of machine
- Additional labor to operate machine
- Machine maintenance costs
- Depreciation of machine

Based on these considerations, the applicant estimated the return on investment to be less than zero, in that machine operating costs exceeded income from the use of the machine.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant has identified no alternatives.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There are savings from the facility to recover and reuse coolant. The applicant may use the recycled coolant in customer vehicles. In this case the savings are tied to the displaced cost of virgin coolant. Alternately, the applicant could sell the coolant to a second shop where the coolant is used. In this case the savings to the applicant are tied to the sales price of recycled coolant.

However, for this applicant increases in business operations and maintenance costs exceeded facility savings. These cost estimates are discussed in 2) above.

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 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 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 $2200.00 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. TC-3723.

Jerry Coffer:JC
(503) 731-3049
March 16, 1992

Application No. TC-3727

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

City Automotive
1515 Redwood Ave.
Grants Pass, OR 97527

The applicant owns and operates an auto repair shop in Grants Pass, Oregon.

Application was made for tax credit for an air pollution control facility which is owned by the applicant.

2. Description of Facility

Facility is a machine which removes and cleans auto air conditioner coolant. The machine is self contained and includes pumps, tubing, valves and filters which rid the spent coolant of oil, excess air, water, acids and contaminant particles.

The applicant has identified the useful life of the equipment to be 5 years.

Claimed Facility Cost: $2995.00
(Costs have been documented)

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 the facility was determined substantially completed on 6/29/90, and the application for certification was filed on 2/5/92, within two years of substantial completion.

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. This reduction is accomplished by capturing and/or recycling air contaminants, as defined in ORS 468.275. The requirement is to comply with ORS 468.612-621 and OAR 340-22-410 to 415.

Eligible equipment must be certified by Underwriters Laboratory (UL) as meeting the requirements and specifications of UL1963 and the Society of Automotive Engineers (SAE) standards, J1990 and J1991, or other requirements and specifications determined by the Department as being equivalent. The facility meets these requirements.

b. Eligible Cost Findings

In determining the percent of the 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 recovery and recycling machine serves two purposes. It prevents the release of spent auto A/C coolant to the environment, thereby meeting Department regulations requiring capture of this air contaminant. Second, it provides a means to recover and clean waste coolant for reuse as an auto A/C coolant.

2) The estimated annual percent return on the investment in the facility.

The percent return on investment from facility use was calculated using coolant cost and retrieval rate data from the applicant and generic cost of facility operations estimated by the Department.

Specifically, the applicant estimated the cost to applicant of virgin coolant at $4.84/pound. The applicant estimated an annual coolant recovery rate of 100 pounds.

In estimating the operating costs for use of the recovery and recycling machine, the Department developed a standardized methodology which considers the following factors:

- Electricity consumption of machine
- Additional labor to operate machine
- Machine maintenance costs
- Depreciation of machine

Based on these considerations, the applicant estimated the return on investment to be less than zero, in that machine operating costs exceeded income from the use of the machine.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant has identified no alternatives.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There are savings from the facility to recover and reuse coolant. The applicant may use the recycled coolant in customer vehicles. In this case the savings are tied to the displaced cost of virgin coolant. Alternately, the applicant could sell the coolant to a second shop where the coolant is used. In this case the savings to the applicant are tied to the sales price of recycled coolant.

However, for this applicant increases in business operations and maintenance costs exceeded facility savings. These cost estimates are discussed in 2) above.

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 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 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 $2995.00 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. TC-3727.

Jerry Coffer:JC
(503) 731-3049
March 16, 1992

Application No. TC-3729

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Larry Launder, Inc.
dba Mt. Park Chevron
2 Monroe Parkway
Lake Oswego, OR 97034

The applicant owns and operates a service station in Lake Oswego, Oregon.

Application was made for tax credit for an air pollution control facility which is owned by the applicant.

2. Description of Facility

Facility is a machine which removes and cleans auto air conditioner coolant. The machine is self contained and includes pumps, tubing, valves and filters which rid the spent coolant of oil, excess air, water, acids and contaminant particles.

The applicant has identified the useful life of the equipment to be 3 years.

Claimed Facility Cost: $2175.00
(Costs have been documented)

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 the facility was determined substantially completed on 7/1/91, and the application for certification was filed on 2/10/92, within two years of substantial completion.

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. This reduction is accomplished by capturing and/or recycling air contaminants, as defined in ORS 468.275. The requirement is to comply with ORS 468.612-621 and OAR 340-22-410 to 415.

Eligible equipment must be certified by Underwriters Laboratory (UL) as meeting the requirements and specifications of UL1963 and the Society of Automotive Engineers (SAE) standards, J1990 and J1991, or other requirements and specifications determined by the Department as being equivalent. The facility meets these requirements.

b. Eligible Cost Findings

In determining the percent of the 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 recovery and recycling machine serves two purposes. It prevents the release of spent auto A/C coolant to the environment, thereby meeting Department regulations requiring capture of this air contaminant. Second, it provides a means to recover and clean waste coolant for reuse as an auto A/C coolant.

2) The estimated annual percent return on the investment in the facility.

The percent return on investment from facility use was calculated using coolant cost and retrieval rate data from the applicant and generic cost of facility operations estimated by the Department.

Specifically, the applicant estimated the cost to applicant of virgin coolant at $5.50/pound. The applicant estimated an annual coolant recovery rate of 60 pounds.

In estimating the operating costs for use of the recovery and recycling machine, the Department developed a standardized methodology which considers the following factors:

- Electricity consumption of machine
- Additional labor to operate machine
- Machine maintenance costs
- Depreciation of machine

Based on these considerations, the applicant estimated the return on investment to be less than zero, in that machine operating costs exceeded income from the use of the machine.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant has identified no alternatives.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There are savings from the facility to recover and reuse coolant. The applicant may use the recycled coolant in customer vehicles. In this case the savings are tied to the displaced cost of virgin coolant. Alternately, the applicant could sell the coolant to a second shop where the coolant is used. In this case the savings to the applicant are tied to the sales price of recycled coolant.

However, for this applicant increases in business operations and maintenance costs exceeded facility savings. These cost estimates are discussed in 2) above.

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 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 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 $2175.00 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. TC-3729.

Jerry Coffer:JC
(503) 731-3049
March 16, 1992

Application No. TC-3733

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Artisan Automotive, Inc.
1270 W. 7th Ave.
Eugene, OR 97402

The applicant owns and operates an auto and light truck repair shop in Eugene, Oregon.

Application was made for tax credit for an air pollution control facility which is owned by the applicant.

2. Description of Facility

Facility is a machine which removes and cleans auto air conditioner coolant. The machine is self contained and includes pumps, tubing, valves and filters which rid the spent coolant of oil, excess air, water, acids and contaminant particles.

The applicant has identified the useful life of the equipment to be 5 years.

Claimed Facility Cost: $3355.04
(Costs have been documented)

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 the facility was determined substantially completed on 5/13/91, and the application for certification was filed on 2/20/92, within two years of substantial completion.

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. This reduction is accomplished by capturing and/or recycling air contaminants, as defined in ORS 468.275. The requirement is to comply with ORS 468.612-621 and OAR 340-22-410 to 415.

Eligible equipment must be certified by Underwriters Laboratory (UL) as meeting the requirements and specifications of UL1963 and the Society of Automotive Engineers (SAE) standards, J1990 and J1991, or other requirements and specifications determined by the Department as being equivalent. The facility meets these requirements.

b. Eligible Cost Findings

In determining the percent of the 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 recovery and recycling machine serves two purposes. It prevents the release of spent auto A/C coolant to the environment, thereby meeting Department regulations requiring capture of this air contaminant. Second, it provides a means to recover and clean waste coolant for reuse as an auto A/C coolant.

2) The estimated annual percent return on the investment in the facility.

The percent return on investment from facility use was calculated using coolant cost and retrieval rate data from the applicant and generic cost of facility operations estimated by the Department.

Specifically, the applicant estimated the cost to applicant of virgin coolant at $3.79/pound. The applicant estimated an annual coolant recovery rate of 90 pounds.

In estimating the operating costs for use of the recovery and recycling machine, the Department developed a standardized methodology which considers the following factors:

- Electricity consumption of machine
- Additional labor to operate machine
- Machine maintenance costs
- Depreciation of machine

Based on these considerations, the applicant estimated the return on investment to be less than zero, in that machine operating costs exceeded income from the use of the machine.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant has identified no alternatives.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There are savings from the facility to recover and reuse coolant. The applicant may use the recycled coolant in customer vehicles. In this case the savings are tied to the displaced cost of virgin coolant. Alternately, the applicant could sell the coolant to a second shop where the coolant is used. In this case the savings to the applicant are tied to the sales price of recycled coolant.

However, for this applicant increases in business operations and maintenance costs exceeded facility savings. These cost estimates are discussed in 2) above.

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 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 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 $3355.04 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. TC-3733.

Jerry Coffer:JC
(503) 731-3049
March 16, 1992

Application No. TC-3734

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Seaside Auto Body
1478 S. Holladay Dr.
Seaside, OR 97138

The applicant owns and operates an auto body repair shop in Seaside, Oregon.

Application was made for tax credit for an air pollution control facility which is owned by the applicant.

2. Description of Facility

Facility is a machine which removes and cleans auto air conditioner coolant. The machine is self contained and includes pumps, tubing, valves and filters which rid the spent coolant of oil, excess air, water, acids and contaminant particles.

The applicant has identified the useful life of the equipment to be 5 years.

Claimed Facility Cost: $3903.92
(Costs have been documented)

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 the facility was determined substantially completed on 4/22/91, and the application for certification was filed on 2/25/92, within two years of substantial completion.

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. This reduction is accomplished by capturing and/or recycling air contaminants, as defined in ORS 468.275. The requirement is to comply with ORS 468.612-621 and OAR 340-22-410 to 415.

Eligible equipment must be certified by Underwriters Laboratory (UL) as meeting the requirements and specifications of UL1963 and the Society of Automotive Engineers (SAE) standards, J1990 and J1991, or other requirements and specifications determined by the Department as being equivalent. The facility meets these requirements.

b. Eligible Cost Findings

In determining the percent of the 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 recovery and recycling machine serves two purposes. It prevents the release of spent auto A/C coolant to the environment, thereby meeting Department regulations requiring capture of this air contaminant. Second, it provides a means to recover and clean waste coolant for reuse as an auto A/C coolant.

2) The estimated annual percent return on the investment in the facility.

The percent return on investment from facility use was calculated using coolant cost and retrieval rate data from the applicant and generic cost of facility operations estimated by the Department.

Specifically, the applicant estimated the cost to applicant of virgin coolant at $4.50/pound. The applicant estimated an annual coolant recovery rate of 20 pounds.

In estimating the operating costs for use of the recovery and recycling machine, the Department developed a standardized methodology which considers the following factors:

- Electricity consumption of machine
- Additional labor to operate machine
- Machine maintenance costs
- Depreciation of machine

Based on these considerations, the applicant estimated the return on investment to be less than zero, in that machine operating costs exceeded income from the use of the machine.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant has identified no alternatives.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There are savings from the facility to recover and reuse coolant. The applicant may use the recycled coolant in customer vehicles. In this case the savings are tied to the displaced cost of virgin coolant. Alternately, the applicant could sell the coolant to a second shop where the coolant is used. In this case the savings to the applicant are tied to the sales price of recycled coolant.

However, for this applicant increases in business operations and maintenance costs exceeded facility savings. These cost estimates are discussed in 2) above.

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 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 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 $3903.92 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. TC-3734.

Jerry Coffer:JC
(503) 731-3049
March 16, 1992

Application No. TC-3735

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Oregon Rootstock & Tree Co.
10906 Monitor-McKee Rd. NE
Woodburn, OR 97071

The applicant owns and operates a tree nursery at 10906 Monitor-McKee Rd. NE, Woodburn OR, facility no. 7554.

Application was made for a tax credit for a water pollution control facility involving underground storage tanks.

2. Description of Claimed Facility

The claimed pollution control facilities described in this application are the installation of two fiberglass USTs with leak detection, spill containment basins, overfill alarms and Stage II vapor recovery piping.

Claimed facility cost (Accountant's certification was provided)	$ 41,789
Percent allocable to pollution control	100%

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 installation of the facility was substantially completed on October 17, 1991. The application for certification was received on February 24, 1992 and found to be complete on March 17, 1992, within two years of substantial completion of the facility. The facility was placed into operation October 17, 1991.

4. Evaluation of Application

a. The facility is eligible because the principal purpose of the facility is to comply with underground storage tank requirements imposed by the federal Environmental Protection Agency to prevent pollution of soil and water. This is accomplished by preventing releases into soil or water. The facility qualifies as a "pollution control facility", defined in OAR 340-16-025(2)(g): "Installation or construction of facilities which will be used to detect, deter or prevent spills or unauthorized releases."

Prior to the installation of pollution control, the facility consisted of five bare steel USTs - three regulated and two exempt. These tanks were permanently decommissioned in October of 1991. The old tanks had no corrosion protection, no spill and overfill prevention or leak detection equipment.

To respond to requirements established 12-22-88, the applicant installed:

1) For corrosion protection - Fiberglass tanks.

2) For spill and overfill prevention - Spill containment basins and overfill alarms.

3) For leak detection - A tank monitor system with monitoring wells.

The applicant also installed Stage II vapor recovery piping in anticipation of that requirement.

The applicant reported that soil testing was performed at the time of tank removal and no contamination was found.

Based on information currently available, the applicant is in compliance with all applicable DEQ regulations in that these tanks are permitted and fee payments are current.

The Department concludes that all of the costs claimed by the applicant ($41,789) are eligible pursuant to the definition of a pollution control facility in ORS 468.155.

b. Eligible Cost Findings

In determining the percent of the eligible 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 equipment 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 investment as the applicant claims no gross annual income from the facility.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant indicated that no alternative methods were considered. The methods chosen are acceptable for meeting the requirements of federal regulations.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

The applicant claims no savings or increase in costs as a result of the installation.

5) Any other factors which are relevant in establishing the portion of the actual cost of the facility properly allocable to pollution control.

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 is determined by using these factors as displayed in the following table.

	Eligible Facility Cost	Percent Allocable	Amount Allocable
Corrosion Protection:			
Fiberglass tanks & piping	$ 7,520	34%(1)	$ 2,520
Spill & Overfill Prevention:			
Spill containment basins	447	100	447
Overfill alarm	375	100	375
Leak Detection:			
Tank monitor system	4,436	90 (2)	3,992
Monitoring wells	175	100	175
Stage II vapor recovery	80	100	80
Labor & equipment	28,756	100	28,756
Total	$41,789	87%	$36,345

(1) The Department has determined the percent allocable on the cost of a corrosion protected tank and piping system by using a formula based on the difference in cost between the protected tank and piping system and an equivalent bare steel system as a percent of the protected system. Applying this formula to the costs presented by the applicant, where the protected system cost is $7,520 and the bare steel system is $5,000, the resulting portion of the eligible tank and piping cost allocable to pollution control is 34%.

(2) The applicant's cost for a tank monitor is reduced to 90% of cost based on a determination by the Department that this is the portion properly allocable to pollution control since the device can serve other purposes, for example, inventory control.

5. Summation

a. The facility was constructed in accordance with all regulatory requirements.

b. The facility is eligible for tax credit certification in that the principal purpose of the claimed facility is to comply with requirements imposed by the federal Environmental Protection Agency to prevent pollution of soil and water. This is accomplished by preventing releases in soil or water. The facility qualifies as a "pollution control facility" defined in OAR 340-16-025(2)(g): "Installation or construction of facilities which will be used to detect, deter or prevent spills or unauthorized releases."

c. The facility complies with DEQ statutes and rules.

d. The portion of the facility cost that is properly allocable to pollution control is 87%.

6. Director's Recommendation

Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $41,789 with 87% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. TC-3735.

Mary Lou Perry:ew
(503) 229-5731
March 17, 1992

State of Oregon
Department of Agriculture

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Oregon Rootstock and Tree Co., Inc.
dba TRECO
10906 Monitor-McKee Road NE
Woodburn, OR 97071

The applicant owns and operates a grass seed farm operation in Marion County, 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 130'x62'x22' wood framed, grass seed straw storage shed, located at 7727 54th Ave. NE, Salem, Oregon. The land and buildings are owned by the applicant.

Claimed facility cost: $53,597.21
(Accountant's Certification was provided.)

3. Description of farm operation plan to reduce open field burning.

The applicant has 311 acres of perennial grass varieties under cultivation. Open field burning was not used by the applicant for several years by giving the straw to a custom baler in return for baling and removal services. As straw became more available in the valley, the custom baler became less reliable for the applicants because the applicant could not provide storage to the custom baler. The applicant returned to open field burning on approximately 100 acres in 1990 because the custom baler did not remove the straw on that acreage.

In 1991, the applicant purchased a baler, bale wagon, loader and propane flamer enabling the applicant to become self-sufficient in timely straw removal and field treatment. Construction of the straw storage shed allows the applicant to keep the straw in a usable condition throughout the year or until it is given away. The shed appears to be an appropriate size to accommodate 311 acres of baled grass straw. The acreage produces approximately 778 tons of straw and when stored in the 8,060 square foot building is housed at approximately 10.86 tons per square foot. This falls in the range of 7 tons to 13 tons per square foot and is above the average of 10.1 tons per square foot established by prior certified tax credit applications. The applicant states that he will no longer need to

resort to open field burning or stack burning on any of his 311 acres.

4. 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:

Construction of the facility was substantially completed on September 30, 1991. The application was submitted on February 24, 1992, and the application for certification was found to be complete on March 5, 1992. The application was submitted within two years of substantial completion of the facility.

5. Evaluation of Application

a. The facility is eligible under ORS 468.150 because the facility is an approved alternative method for field sanitation and straw utilization and disposal that reduces a substantial quantity of air pollution. This reduction is accomplished by reduction of air contaminants, defined in ORS 468A.005; by reducing the maximum acreage to be open burned in the Willamette Valley as required in OAR 340-26-013; and, the facility's qualification as a "pollution control facility", defined in OAR 340-16-025(2)(f)(A): "Facility, 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 usable commodity by providing protection from the elements until the applicant can give it away.

2. The estimated annual percent return on the investment in the facility.

There is no annual percent return on the investment as applicant claims no gross annual income.

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. The applicants tried to use the straw as mulch on rootstock layer beds and a tree growing operation, but found that chopping and blowing expenses were not economical.

   There is a potential annual savings to the applicant in that registration and burn fees are no longer required to treat the field. Subsequent to 1991 legislation the savings would be $10 per acre or $3,110 on his 311 acres of perennial grass varieties. Minimum additional annual costs to the applicant would be approximately $51 per acre for straw removal and delivery to storage or $15,861 for his 311 acres of perennial grass varieties. The cost figures are derived from a preliminary report compiled by Tom Hartung, Department of Economic Development.

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 pollution.

   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%.

6. Summation

   a. The facility was constructed in accordance with all regulatory deadlines.

   b. The facility is eligible under ORS 468.150 as an approved alternative method for field sanitation and straw utilization and disposal that reduces a substantial quantity of air pollution as defined in ORS 468A.005.

   c. The facility complies with DEQ statutes and rules.

   d. The portion of the facility that is properly allocable to pollution control is 100%.

7. Director's Recommendation

Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $53,597.21, with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application Number TC-3736.

Jim Britton, Manager
Smoke Management Program
Natural Resources Division
Oregon Department of Agriculture
(503) 378-6792

jb:kcTC3736
April 6, 1992

Application No. TC-3742

State of Oregon
Department of Agriculture

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

David R. Briggs
92001 North Coburg Road
Eugene, OR 97401

The applicant owns and operates a grass seed farm operation in Lane County, Oregon.

Application was made for tax credit for air pollution control equipment.

2. Description of Claimed Facility

The equipment described in this application is a 1992 John Deere, model 2810 plow, located at 92001 North Coburg Road, Eugene, Oregon. The equipment is owned by the applicant.

Claimed equipment cost: $14,200
(The applicant provided copies of invoice and cancelled check.)

3. Description of farm operation plan to reduce open field burning

The applicant has 546 acres of annual grass seed under cultivation. In the last three years the applicant has open field burned 200 acres annually and plowed 346 acres. The applicant claims that he was prohibited from plowing more acreage in a reasonable period of time to ready the land for replanting by the size of his plow.

The applicant states that the new plow has an additional bottom and advanced design enabling him to plow 125 acres more than in previous years. The applicant verifies that open field burning will be reduced to approximately 75 acres annually and plowing will be increased to 471 acres annually.

4. 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:

Purchase of the equipment was substantially completed on January 2, 1992. The application was submitted on February 28, 1992, and the application for certification was found to be complete on March 18, 1992. The application was submitted within two years of substantial purchase of the equipment.

5. Evaluation of Application

a. The equipment is eligible under ORS 468.150 because the equipment is an approved alternative method for field sanitation and straw utilization and disposal that reduces a substantial quantity of air pollution. This reduction is accomplished by reduction of air contaminants, defined in ORS 468A.005; by reducing the maximum acreage to be open burned in the Willamette Valley as required in OAR 340-26-013; and, the facility's qualification as a "pollution control facility", defined 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 equipment is used to recover and convert waste products into a salable or usable commodity.

The equipment does not recover or convert waste products into a salable or usable commodity.

2. The estimated annual percent return on the investment in the equipment.

There is no annual percent return on the investment as applicant claims no gross annual income.

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 purchase of the equipment.

There is an annual savings to the applicant in that registration and burn fees are no longer required to treat the field. Subsequent to 1991 legislation the savings are $10 per acre or $1,250 for the increase of 125 acres in plowed acreage. Minimum additional annual costs to the applicant would be approximately $18.80 per acre for disking the plowed ground in preparation for planting or $2,350 for the additional 125 plowed acres. The cost figures are derived from a worksheet prepared by Harold Youngberg, Extension Agronomist, Department of Crop Science, Hugh Hickerson, Benton-Linn County Extension Agent and Stanley

Miles, Extension Economist, Department of Agriculture and Resource Economics, Oregon State University.

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 pollution.

   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%.

6. Summation

   a. The equipment was purchased in accordance with all regulatory deadlines.

   b. The equipment is eligible under ORS 468.150 as an approved alternative method for field sanitation and straw utilization and disposal that reduces a substantial quantity of air pollution as defined in ORS 468A.005.

   c. The equipment complies with DEQ statutes and rules.

   d. The portion of the equipment that is properly allocable to pollution control is 100%.

7. Department of Agriculture's Recommendation

   Based upon these findings, it is recommended that a Pollution Control Facility Certificate bearing the cost of $14,200, with 100% allocated to pollution control, be issued for the equipment claimed in Tax Credit Application Number TC-3742.

Jim Britton, Manager
Smoke Management Program
Natural Resources Division
Oregon Department of Agriculture
(503) 378-6792

jb:kcTC3742
April 6, 1992

Application No. TC-3743

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Small World Auto Center, Inc.
2090 W. 11th
Eugene, OR 97402

The applicant owns and operates an auto wrecking yard in Eugene, Oregon.

Application was made for tax credit for an air pollution control facility which is owned by the applicant.

2. Description of Facility

Facility is a machine which removes and cleans auto air conditioner coolant. The machine is self contained and includes pumps, tubing, valves and filters which rid the spent coolant of oil, excess air, water, acids and contaminant particles.

The applicant has identified the useful life of the equipment to be 10 years.

Claimed Facility Cost: $1875.00
(Costs have been documented)

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 the facility was determined substantially completed on 12/13/91, and the application for certification was filed on 3/3/92, within two years of substantial completion.

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. This reduction is accomplished by capturing and/or recycling air contaminants, as defined in ORS 468.275. The requirement is to comply with ORS 468.612-621 and OAR 340-22-410 to 415.

Eligible equipment must be certified by Underwriters Laboratory (UL) as meeting the requirements and specifications of UL1963 and the Society of Automotive Engineers (SAE) standards, J1990 and J1991, or other requirements and specifications determined by the Department as being equivalent. The facility meets these requirements.

b. Eligible Cost Findings

In determining the percent of the 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 recovery and recycling machine serves two purposes. It prevents the release of spent auto A/C coolant to the environment, thereby meeting Department regulations requiring capture of this air contaminant. Second, it provides a means to recover and clean waste coolant for reuse as an auto A/C coolant.

2) The estimated annual percent return on the investment in the facility.

The percent return on investment from facility use was calculated using coolant cost and retrieval rate data from the applicant and generic cost of facility operations estimated by the Department.

Specifically, the applicant estimated the income to applicant from the sale of recycled coolant at $3.78/pound. The applicant estimated an annual coolant recovery rate of 50 pounds.

In estimating the operating costs for use of the recovery and recycling machine, the Department developed a standardized methodology which considers the following factors:

- Electricity consumption of machine
- Additional labor to operate machine
- Machine maintenance costs
- Depreciation of machine

Based on these considerations, the applicant estimated the return on investment to be less than zero, in that machine operating costs exceeded income from the use of the machine.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant has identified no alternatives.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There are savings from the facility to recover and reuse coolant. The applicant may use the recycled coolant in customer vehicles. In this case the savings are tied to the displaced cost of virgin coolant. Alternately, the applicant could sell the coolant to a second shop where the coolant is used. In this case the savings to the applicant are tied to the sales price of recycled coolant.

However, for this applicant increases in business operations and maintenance costs exceeded facility savings. These cost estimates are discussed in 2) above.

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 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 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 $1875.00 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. TC-3743.

Jerry Coffer:JC
(503) 731-3049
March 16, 1992

Application No. TC-3744

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Small World Auto Center, Inc.
2090 W. 11th
Eugene, OR 97402

The applicant owns and operates an auto repair, parts and machine shop in Eugene, Oregon.

Application was made for tax credit for an air pollution control facility which is owned by the applicant.

2. Description of Facility

Facility is a machine which removes and cleans auto air conditioner coolant. The machine is self contained and includes pumps, tubing, valves and filters which rid the spent coolant of oil, excess air, water, acids and contaminant particles.

The applicant has identified the useful life of the equipment to be 10 years.

Claimed Facility Cost: $1943.70
(Costs have been documented)

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 the facility was determined substantially completed on 8/24/90, and the application for certification was filed on 3/3/92, within two years of substantial completion.

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. This reduction is accomplished by capturing and/or recycling air contaminants, as defined in ORS 468.275. The requirement is to comply with ORS 468.612-621 and OAR 340-22-410 to 415.

Eligible equipment must be certified by Underwriters Laboratory (UL) as meeting the requirements and specifications of UL1963 and the Society of Automotive Engineers (SAE) standards, J1990 and J1991, or other requirements and specifications determined by the Department as being equivalent. The facility meets these requirements.

b. Eligible Cost Findings

In determining the percent of the 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 recovery and recycling machine serves two purposes. It prevents the release of spent auto A/C coolant to the environment, thereby meeting Department regulations requiring capture of this air contaminant. Second, it provides a means to recover and clean waste coolant for reuse as an auto A/C coolant.

2) The estimated annual percent return on the investment in the facility.

The percent return on investment from facility use was calculated using coolant cost and retrieval rate data from the applicant and generic cost of facility operations estimated by the Department.

Specifically, the applicant estimated the cost to applicant of virgin coolant at $3.78/pound. The applicant estimated an annual coolant recovery rate of 90 pounds.

In estimating the operating costs for use of the recovery and recycling machine, the Department developed a standardized methodology which considers the following factors:

- Electricity consumption of machine
- Additional labor to operate machine
- Machine maintenance costs
- Depreciation of machine

Based on these considerations, the applicant estimated the return on investment to be less than zero, in that machine operating costs exceeded income from the use of the machine.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant has identified no alternatives.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There are savings from the facility to recover and reuse coolant. The applicant may use the recycled coolant in customer vehicles. In this case the savings are tied to the displaced cost of virgin coolant. Alternately, the applicant could sell the coolant to a second shop where the coolant is used. In this case the savings to the applicant are tied to the sales price of recycled coolant.

However, for this applicant increases in business operations and maintenance costs exceeded facility savings. These cost estimates are discussed in 2) above.

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 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 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 $1943.70 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. TC-3744.

Jerry Coffer:JC
(503) 731-3049
March 16, 1992

Application No. TC-3745

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT

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1. Applicant

Small World Auto Center, Inc.
2090 W. 11th
Eugene, OR 97405

The applicant owns and operates an auto repair, parts and machine shop in Eugene, Oregon.

Application was made for tax credit for an air pollution control facility which is owned by the applicant.

2. Description of Facility

Facility is a machine which removes and cleans auto air conditioner coolant. The machine is self contained and includes pumps, tubing, valves and filters which rid the spent coolant of oil, excess air, water, acids and contaminant particles.

The applicant has identified the useful life of the equipment to be 10 years.

Claimed Facility Cost: $1710.00
(Costs have been documented)

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 the facility was determined substantially completed on 9/11/90, and the application for certification was filed on 3/3/92, within two years of substantial completion.

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. This reduction is accomplished by capturing and/or recycling air contaminants, as defined in ORS 468.275. The requirement is to comply with ORS 468.612-621 and OAR 340-22-410 to 415.

Eligible equipment must be certified by Underwriters Laboratory (UL) as meeting the requirements and specifications of UL1963 and the Society of Automotive Engineers (SAE) standards, J1990 and J1991, or other requirements and specifications determined by the Department as being equivalent. The facility meets these requirements.

b. Eligible Cost Findings

In determining the percent of the 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 recovery and recycling machine serves two purposes. It prevents the release of spent auto A/C coolant to the environment, thereby meeting Department regulations requiring capture of this air contaminant. Second, it provides a means to recover and clean waste coolant for reuse as an auto A/C coolant.

2) The estimated annual percent return on the investment in the facility.

The percent return on investment from facility use was calculated using coolant cost and retrieval rate data from the applicant and generic cost of facility operations estimated by the Department.

Specifically, the applicant estimated the cost to applicant of virgin coolant at $3.78/pound. The applicant estimated an annual coolant recovery rate of 90 pounds.

In estimating the operating costs for use of the recovery and recycling machine, the Department developed a standardized methodology which considers the following factors:

- Electricity consumption of machine
- Additional labor to operate machine
- Machine maintenance costs
- Depreciation of machine

Based on these considerations, the applicant estimated the return on investment to be less than zero, in that machine operating costs exceeded income from the use of the machine.

3) The alternative methods, equipment and costs for achieving the same pollution control objective.

The applicant has identified no alternatives.

4) Any related savings or increase in costs which occur or may occur as a result of the installation of the facility.

There are savings from the facility to recover and reuse coolant. The applicant may use the recycled coolant in customer vehicles. In this case the savings are tied to the displaced cost of virgin coolant. Alternately, the applicant could sell the coolant to a second shop where the coolant is used. In this case the savings to the applicant are tied to the sales price of recycled coolant.

However, for this applicant increases in business operations and maintenance costs exceeded facility savings. These cost estimates are discussed in 2) above.

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 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 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 $1710.00 with 100% allocated to pollution control, be issued for the facility claimed in Tax Credit Application No. TC-3745.

Jerry Coffer:JC
(503) 731-3049
March 16, 1992

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

REQUEST FOR EQC ACTION

Meeting Date: 4/23/92
Agenda Item: E
Division: HSW
Section: SWPC

SUBJECT:

Solid Waste Permit Fees: Adoption of Rules to Implement Fee Increases

PURPOSE:

To implement increases in solid waste permit fees required by 1991 Senate Bill 66 (SB 66) and by the Legislatively Approved Budget for 1991-93 for the Department of Environmental Quality (DEQ, Department). An additional purpose is to simplify the solid waste permit processing fee schedule.

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 C
- Public Notice — Attachment D

___ Issue a Contested Case Order
___ Approve a Stipulated Order
___ Enter an Order
- Proposed Order — Attachment

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___ Approve Department Recommendation

___ Variance Request	Attachment ___
___ Exception to Rule	Attachment ___
___ Informational Report	Attachment ___
___ Other: (specify)	Attachment ___

DESCRIPTION OF REQUESTED ACTION:

The Department is proposing a change to Solid Waste administrative rules (Division 61) which will simplify the annual solid waste permit fee schedule (currently based on tonnage categories) to a system using a per-ton rate. The proposed changes also simplify the solid waste permit processing fee schedule, eliminating most fees but raising application fees for new solid waste sites.

> The annual solid waste permit fee ("permit fee") is NOT the same as the per-ton solid waste disposal fee which increased from $.50 to $.85 in January, 1992. The permit fee funds the Department's solid waste disposal site permitting and inspection activities and some waste reduction program activities. The $.85 per-ton solid waste disposal fee funds programs to reduce environmental risks at waste disposal sites and to reduce the amount of solid waste generated in Oregon.

These rules change the permit fee in two ways: 1) they increase it, and 2) the fee will now be calculated on a per-ton rate. These rules do not have any effect on the $.85 per-ton solid waste disposal fee.

The rules also implement the new tonnage-based annual fee created by SB 66 ("SB 66 annual fee"), establishing a $.09 per-ton rate and specifying how it is to be paid. (See discussion under paragraph 3, page 5.)

In brief, the proposed rule establishes the following fee structure:

1. Permit fee (based on solid waste received in previous calendar year):

   a. $0.21/ton, landfills ($200 minimum fee)

   b. $0.13/ton, energy recovery facilities

   c. $0.10/ton, permitted mixed waste compost facilities

2. SB 66 annual fee (based on solid waste received in previous calendar year): $0.09/ton for all types of facilities except "captive" industrial sites.

3. Application fee for new sites: $1,000 to $10,000, depending on type and size of facility.

See Attachment J for a complete summary of the proposed overall solid waste permit fee structure as put out for public comment.

AUTHORITY/NEED FOR ACTION:

X	Required by Statute: SB 66 Enactment Date: 1991	Attachment E
X	Statutory Authority: ORS 459.170, 459.235	Attachment F
___	Pursuant to Rule: _____	Attachment ___
___	Pursuant to Federal Law/Rule: _____	Attachment ___
___	Other:	Attachment ___

X Time Constraints:

The Environmental Quality Commission (EQC, Commission) adopted a temporary rule on July 24, 1991 establishing a one year increase in the permit fee for FY 92 (July 1, 1991 - June 30, 1992) of 122 percent. Rather than requesting that the 122 percent increase be made permanent, the Department, aided by the Solid Waste Permit Fee Work Group (including members from the Solid Waste Advisory Committee) examined the entire permit fee schedule with an eye toward restructuring and simplification.

A rule change is required to implement the restructuring and simplification of the permit fee schedule. The rule change must be in place before June 1992 when the Department sends the annual billing for FY 93 to permittees. This requires rule adoption by the EQC at its April 23 meeting.

DEVELOPMENTAL BACKGROUND:

X	Advisory Committee Report/Recommendation	Attachment G
X	Hearing Officer's Report/Recommendations	Attachment H
X	Response to Testimony/Comments	Attachment I
X	Prior EQC Agenda Items:	

Agenda Item I, 7/24/91 EQC Meeting - Temporary Rule for Solid Waste Permit Fee Increase

Attachment ___

___ Other Related Reports/Rules/Statutes:

Attachment ___

___ Supplemental Background Information

Department's 2/19/92 Memo on Proposed Rule As Put Out for Public Comment	Attachment J
Members, Solid Waste Permit Fee Work Grp	Attachment K
Land Use Evaluation Statement	Attachment L
Effects of Proposed Fee Schedule on Representative Solid Waste Permittees	Attachment M
Department's Memo to SWAC: Recommended Modifications to Processing Fees	Attachment N

REGULATED/AFFECTED COMMUNITY CONSTRAINTS/CONSIDERATIONS:

See Attachment J for a discussion of input from the regulated community, including the Solid Waste Permit Fee Work Group and the Solid Waste Advisory Committee, in development of the draft rule as put out for public comment.

Additional concerns were raised during the public comment process, and the Department is proposing certain changes from the draft rule in response. Because parts of the fee structure supported by the Work Group are proposed for change, the Department reconvened this group on April 7 to discuss the proposed changes. The Department will present the Work Group's comments and recommendations to the April 23 EQC meeting.

The Department's proposed major changes from the draft rule are:

1. Lower the $300 minimum permit fee to $200.

   The proposed final rule bases the permit fee on the tonnage of solid waste received in the previous calendar year multiplied by a per-ton rate. The rate for landfills is $.21 per ton. The draft rule proposed to establish a minimum permit fee of $300 per site, regardless of the tonnage of solid waste collected. A site would have to collect over 1,400 tons of solid waste a year before the $.21 per-ton rate amounted to $300.

   The $300 minimum permit fee was supported by the Work Group and the SWAC during discussions developing the

draft rule. They felt that even small sites should pay a permit fee sufficient to support one annual DEQ on-site inspection.

Public comment was received that the $300 minimum permit fee was unfair to small localities. With a $300 minimum permit fee, small municipal sites would pay a higher per-ton fee than larger sites. For the smallest sites the per-ton difference is significant. (See Attachment I, Addendum A) Small municipal sites serve small communities which are hard-pressed to pay this fee as well as the other fee increases they are subject to, including the new SB 66 annual fee of $.09 per ton, and the $.85 per ton solid waste disposal fee.

Upon further review of the per-ton fiscal impact of the $300 minimum permit fee, the Department believes it would be overly burdensome on small sites, and proposes to lower it to $200. This would cover an annual site visit to some sites, although not the most remote ones. The very smallest sites would still pay a higher per-ton rate, but the difference is reduced.

2. Lower the per-ton rate for energy recovery facilities from $.15 to $.13.

The draft rule included a per-ton rate of $.15 to calculate the permit fee for energy recovery facilities. Marion County commented that a $.15 per ton rate would cause waste going to their energy recovery facility to pay a higher rate than if it were landfilled, when the fee costs of landfilling the ash are included. That was not the Department's intent. The Department is proposing to lower the rate for energy recovery facilities to $.13 per ton. At that rate, the total solid waste fees generated are slightly lower than if the waste were landfilled.

3. Exempt captive industrial facilities from the $.09 per-ton SB 66 annual fee.

SB 66 created a new tonnage-based annual permit fee, in addition to existing solid waste permit processing and compliance fees. The Legislature also determined the amount of revenue to be collected by this fee. This new statute (ORS 459.235(3)) specifies that the Commission "shall establish a schedule of annual permit fees...The fees shall be assessed annually and shall be based on the amount of solid waste received at the disposal site in the previous calendar year." Comment was received

that the $.09 per-ton SB 66 annual fee should apply only to domestic waste. The Department believes legislative intent was that captive industrial facilities were not to be subject to this fee. (The proposed rule defines a "captive industrial facility" as one where the permittee is the generator of all solid waste received at the site.) However, "off-site industrial facilities" (all industrial facilities other than "captive") should be subject to this fee, as the waste they receive could alternatively go to a municipal site. It is equitable that industrial facilities receiving "off-site" solid waste be subject to this fee.

An alternative interpretation would be to apply the $.09/ton SB 66 annual fee to all solid waste disposal sites receiving solid waste. This would have the effect of including most of the approximately 90 captive industrial facilities that would be exempt under the Department's proposal.

The Department proposes to exempt captive, but not off-site, industrial facilities from the new SB 66 annual fee of $.09.

4. Extend scale requirement to off-site industrial landfills receiving over 50,000 tons of waste a year.

A comment was received that larger industrial sites as well as domestic sites should be subject to the requirement for tonnage to be based on certified scale weights. A tonnage-based system will work best if scaling is encouraged. The Department in general agrees, and proposes that "municipal" facilities (including demolition sites) as well as "off-site industrial facilities" receiving over 50,000 tons of solid waste a year be required to base tonnages on certified scales after January 1, 1994.

5. Establish additional solid waste conversion factors to be used at industrial facilities and at those municipal facilities without certified scales.

In order to get more accurate tonnage reports from industrial sites, the draft rule proposed factors to convert several types of industrial solid waste from cubic yards to tons. A proposal was received to establish three additional conversion factors, for contaminated soils, asbestos and demolition debris. It was also recommended that municipal facilities use these factors (instead of the existing standards for

"compacted" and "uncompacted" wastes) when they receive those types of waste. The Department agrees that this would improve the accuracy of reporting tonnages, and is incorporating the above changes into the proposed rule.

The Department has made certain other minor changes from the draft rule to provide clarification or maintain consistency.

See Attachment I for the Department's response to other comments and suggestions which were not incorporated into the proposed final rule.

PROGRAM CONSIDERATIONS:

In general, the proposed fee structure encourages the formation of new transfer stations and discourages new landfills. It encourages more accurate reporting of solid waste tonnages received, which is crucial in a tonnage-based fee structure and in determining the statewide and local recovery rates, as required by SB 66. It simplifies the fee structure, eliminating several fee categories. See Attachment J for a more complete discussion.

ALTERNATIVES CONSIDERED BY THE DEPARTMENT:

1. "Base case" alternative: Keep the existing permit fee structure, and simply add a surcharge of 122% on annual permit compliance determination fees, as was done for the fiscal year July 91-June 92.

2. "Existing fee structure doubled" alternative: Double the permit fee for existing permittee categories, keeping existing size categories which represent a range of solid waste accepted annually. Double all existing permit processing fees.

3. Recommended alternative: Simplify the solid waste permit processing and annual permit fees as described in this report. Incorporate existing permit processing fees and annual solid waste and recycling fees into the "permit fee," based on the volume (tonnage) of solid waste received at the site in the previous calendar year multiplied by a flat per-ton rate depending on the type of site. The rate for most sites is $.21 per ton.

4. "Sliding fee" alternative: Same as Alternative 3, but uses a "sliding" rather than a flat per-ton rate. The per-ton rate decreases as the tonnage of solid waste received at the site increases, and could range from $.13 to $.31 per ton. (See discussion in Attachment I, Comment 8)

5. "Capped fee" alternative: Places a maximum fee cap on top of a base per-ton fee to determine the annual permit fee. For example, a cap might be set at $150,000. The "cap" would take into account that the Department's costs of regulating larger landfills are not directly proportionate to the amount of waste received. With such a cap, a landfill receiving 1 million tons of waste a year would pay $150,000 instead of $210,000 under Alternative 3. However, this would require the base rate for all smaller sites to be increased to $.23/ton to replace the lost revenue.

The SB 66 annual fee of $.09 per ton for waste received in the previous calendar year is proposed to take effect regardless of which Alternative is selected, i.e. the Department recommends Alternative 3, which would be $.21/ton plus $.09/ton in most cases.

DEPARTMENT RECOMMENDATION FOR ACTION, WITH RATIONALE:

The Department's proposed rule incorporates Alternative 3 (with the modifications discussed above) as the solid waste permit fee schedule. It treats all classes of permittee equitably, as their permit fee is based directly (instead of approximately) on the tonnage of solid waste received at the site. It supports the State's statutory "hierarchy" for managing solid waste. In establishing a minimum permit fee of $200 for all sites, it takes service-related costs into account. It encourages the establishment of transfer stations. It includes a two-tiered application fee for new facilities, which will make establishment of a new landfill less onerous for small permittees. It equalizes the per-ton fee charges for landfills throughout the state (with the exception of landfills subject to the service-related $200 "minimum charge").

CONSISTENCY WITH STRATEGIC PLAN, AGENCY POLICY, LEGISLATIVE POLICY:

The proposed fee structure follows direction from the 1991 Legislature, and is consistent with Department policy and the Solid Waste Permits and Compliance Section's Operating Plan. It is consistent with the statute.

ISSUES FOR COMMISSION TO RESOLVE:

1. Should the solid waste fee structure encourage the establishment of new transfer stations over new solid waste landfills, through high application fees for new landfills and low ones for transfer stations?

2. Is it appropriate to establish a "service fee" related minimum annual permit fee of $200, even though this results in higher per-ton rates to small sites under this schedule?

3. Should captive industrial facilities be exempt from the new SB 66 annual fee?

4. Should the permit fee schedule take into account -- through a sliding rate or cap -- that the Department's costs of oversight do not increase in direct proportion to the amount of solid waste received at a disposal site?

INTENDED FOLLOWUP ACTIONS:

File the adopted rule with the Secretary of State's Office upon adoption.

Notify interested persons of the rule adoption, and that the billing for the annual solid waste permit fee for FY 93 will follow.

Consult with industrial facilities who have not been required to report tonnage to ensure that accurate per-ton information is available to the Department for permit fee billings.

Send a billing for FY 93 to all solid waste permittees for the annual permit fee and the new SB 66 annual fee in early June.

Fees are to be submitted to the Department by July 1, 1992.

Revise quarterly reporting forms and send to permittees by August, 1992 to incorporate the new solid waste conversion factors.

Approved:

Section: _____

Division: _____

Director: _____

Report Prepared By: Deanna Mueller-Crispin

Phone: 229-5808

Date Prepared: 4/6/92

dmc
eqc.423
4/6/92

Attachment A

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY
ADMINISTRATIVE RULES
SOLID WASTE MANAGEMENT
DIVISION 61
Proposed Revisions
4/6/92

Proposed deletions are in brackets [ ].
Proposed additions are underlined.

PERMIT FEES

340-61-115

(1) Each person required to have a Solid Waste Disposal Permit shall be subject to a three-part fee consisting of [a filing fee,] an application processing fee, [and] an annual [compliance determination] solid waste permit fee as listed in OAR 340-61-120[.] and the SB 66 annual fee as listed in OAR 340-61-120(4). In addition, each disposal site receiving domestic solid waste shall be subject to [an annual recycling program implementation fee as listed in OAR 340-61-120, and] a per-ton solid waste disposal fee on domestic solid waste as specified in Section 5 of OAR 340-61-120. In addition, each disposal site or regional disposal site receiving solid waste generated out-of-state shall pay a per-ton solid waste disposal fee as specified in Section 6 of OAR 340-61-120 or a surcharge as specified in Section 7 [6] of OAR 340-61-120. The amount equal to the [filing fee,] application processing fee[, the first year's annual compliance determination fee and, if applicable, the first year's recycling program implementation fee] shall be submitted as a required part of any application for a new permit. [The amount equal to the filing fee and application processing fee shall be submitted as a required part of any application for renewal or modification of an existing permit.]

[(2) As used in this rule unless otherwise specified, the term "domestic solid waste" includes, but is not limited to, residential, commercial and institutional wastes; but the term does not include:]

[(a) Sewage sludge or septic tank and cesspool pumpings;]

[(b) Building demolition or construction wastes and land clearing debris, if delivered to disposal sites that are not open to the general public;]

[(c) Yard debris, if delivered to disposal sites that receive no other residential wastes.]

(2) [(3)] The annual [compliance determination] solid waste permit fee and, if applicable, the SB 66 annual fee [fee and, if applicable, the annual recycling program implementation fee] must be paid for each year a disposal site is in operation or under permit. The fee period shall be the state's fiscal year (July 1 through June 30) and shall be paid annually by July 1. [Any annual compliance determination fee and, if applicable, any recycling program implementation fee submitted as part of an application for a new permit shall apply to the fiscal year the permitted disposal site is put into operation. For the first year's operation, the full fee(s) shall apply if the disposal site is placed into operation on or before April 1.] Any new disposal site placed into operation after January 1 [April 1] shall not owe [a compliance determination fee and, if applicable, a recycling program implementation fee] an annual solid waste permit fee or a SB 66 annual fee until July 1 of the following year. Any existing disposal site that receives solid waste in a calendar year must pay the annual solid waste permit fee and SB 66 annual fee, if applicable, as specified in OAR 340-61-120(3)(a) and 340-61-120(4) for the fiscal year which begins on July 1 of the following calendar year. If no solid waste was received in the previous calendar year and the site is closed, a solid waste permittee shall pay the annual solid waste permit fee for closed sites as specified in OAR 340-61-120(3)(c). The Director may alter the due date for the annual [compliance determination fee and, if applicable, the recycling program implementation] solid waste permit fee and, if applicable, the SB 66 annual fee upon receipt of a justifiable request from a permittee.

(3) [(4) For the purpose of determining appropriate fees, each disposal site shall be assigned to a category in OAR 340-61-120 based upon the amount of solid waste received and upon the complexity of each disposal site. Each disposal site which falls into more than one category shall pay whichever fee is higher. The Department shall assign a site to a category on the basis of estimated annual tonnage or gallonage of solid waste received unless the actual amount received is known.] Permittees are responsible for accurate calculation of solid waste tonnages. For purposes of determining appropriate fees under OAR 340-61-120(3) through (7), annual tonnage of solid waste received shall be calculated as follows:

(a) Municipal solid waste facilities. Annual tonnage of solid waste received at municipal solid waste facilities, including demolition sites, receiving 50,000 or more tons annually shall be based on weight from certified scales after January 1, 1994. If certified scales are not required or not available, [E]estimated annual tonnage for [domestic waste disposal sites] municipal solid waste will be based upon 300 pounds per cubic yard of uncompacted waste received, 700 pounds per cubic yard of compacted waste

received, or, if yardage is not known, one ton per resident in the service area of the disposal site, unless the permittee demonstrates a more accurate estimate. For other types of wastes received at municipal solid waste sites and where certified scales are not required or not available, the conversions and provisions in subsection (b) of this Section shall be used. [Loads of solid waste consisting exclusively of soil, rock, concrete, rubble or asphalt shall not be included when calculating the annual amount of solid waste received.]

(b) Industrial facilities. Annual tonnage of solid waste received at off-site industrial facilities receiving 50,000 or more tons annually shall be based on weight from certified scales after January 1, 1994. If certified scales are not required or not available, industrial sites shall use the following conversion factors to determine tonnage of solid waste disposed of:

(A) Asbestos: 500 pounds per cubic yard.

(B) Construction, demolition and landclearing wastes: 1,000 pounds per cubic yard.

(C) Pulp and paper waste other than sludge: 1,000 pounds per cubic yard.

(D) Wood waste: 1,200 pounds per cubic yard.

(E) Food waste, manure, sludge, septage, grits, screenings and other wet wastes: 1,600 pounds per cubic yard.

(F) Ash and slag: 2,000 pounds per cubic yard.

(G) Contaminated soils: 2,400 pounds per cubic yard.

(H) Asphalt, mining and milling wastes, foundry sand, silica: 2,500 pounds per cubic yard.

(I) For wastes other than the above, the permittee shall determine the density of the wastes subject to approval by the Department.

(J) As an alternative to the above conversion factors, the permittee may determine the density of their own waste, subject to approval by the Department.

[(5) Modifications of existing, unexpired permits which are instituted by the Department due to changing conditions or standards, receipt of additional information or any other reason pursuant to applicable statutes and do not require refiling or review of an application or plans and specifications shall not require submission of the filing fee or the application processing fee.]

[(6) Upon the Department accepting an application for filing, the filing fee shall be non-refundable.]

(4) [(7)] The application processing fee may be refunded in whole or in part, after taking into consideration any costs the Department may have incurred in processing the application, when submitted with an application if either of the following conditions exist:

(a) The Department determines that no permit will be required;

(b) The applicant withdraws the application before the Department has granted or denied preliminary approval or, if no preliminary approval has been granted or denied, the Department has approved or denied the application.

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

(6) Submittal schedule.

(a) The annual solid waste permit fee shall be billed to the permittee by the Department, and is due by July 1 of each year.

(b) The SB 66 annual fee shall be billed to the permittee by the Department, and is due by July 1 of each year.

(c) The per-ton solid waste disposal fees on domestic and out-of-state solid waste are not billed by the Department. They are due on the following schedule:

(A) Quarterly, on the 15th day of the month following the end of the calendar quarter; or

(B) On the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent.

(d) The surcharge on disposal of solid waste generated out-of-state is not billed by the Department. It is due on the same schedule as the per-ton solid waste disposal fees above.

PERMIT FEE SCHEDULE

340-61-120

[(1) Filing Fee. A filing fee of $50 shall accompany each application for issuance, renewal, modification, or transfer of a Solid Waste Disposal Permit. This fee is non-refundable and is in addition to any application processing fee or annual compliance determination fee which might be imposed.]

(1) For purposes of this rule:

(a) A "new facility" means a facility at a location not previously used or permitted, and does not include an expansion to an existing permitted site.

(b) An "off-site industrial facility" means all industrial solid waste disposal sites other than a "captive industrial disposal site."

(c) A "captive industrial facility" means an industrial solid waste disposal site where the permittee is the owner and operator of the site and is the generator of all the solid waste received at the site.

(2) Application Processing Fee. An application processing fee [varying between $50 and $2,000] shall be submitted with each application for a new facility. The amount of the fee shall depend on the type of facility and the required action as follows:

(a) A new municipal solid waste landfill facility, incinerator, energy recovery facility, composting facility for mixed solid waste, off-site industrial facility or sludge disposal facility: [(including substantial expansion of an existing facility:)]

(A) Designed to receive over 7,500 tons of solid waste per year:	$10,000
(B) Designed to receive less than 7,500 tons of solid waste per year:	$5,000
[(A) Major facility[1]	$ 2,000]
[(B) Intermediate facility[2]	$ 1,000]
[(C) Minor facility[3]	$ 300]

[[1]**Major Facility Qualifying Factors:**]

[-a- Received more than 25,000 tons of solid waste per year; or]

[-b- Has a collection/treatment system which, if not properly constructed, operated and maintained, could have a significant adverse impact on the environment as determined by the Department.]

[[2]**Intermediate Facility Qualifying Factors:**]

[-a- Received at least 5,000 but not more than 25,000 tons of solid waste per year; or]

[-b- Received less than 5,000 tons of solid waste and more than 25,000 gallons of sludge per month.]

[[3]**Minor Facility Qualifying Factors:**]

[-a- Received less than 5,000 tons of solid waste per year; and]

[-b- Received less than 25,000 gallons of sludge per month.]

[All tonnages based on amount received in the immediately preceding fiscal year, or in a new facility the amount to be received the first fiscal year of operation.]

[(b) Preliminary feasibility only (Note: the amount of this fee may be deducted from the complete application fee listed above):]

[(A)	Major facility	$ 1,200]
[(B)	Intermediate facility	$ 600]
[(C)	Minor facility	$ 200]

[(c) Permit renewal (including new operational plan, closure plan or improvements):]

[(A)	Major facility	$ 500]
[(B)	Intermediate facility	$ 250]
[(C)	Minor facility	$ 125]

[(d) Permit renewal (without significant change):]

[(A)	Major facility	$ 250]
[(B)	Intermediate facility	$ 150]
[(C)	Minor facility	$ 100]

[(e) Permit modification (including new operational plan, closure plan or improvements):]

[(A)	Major facility	$ 500]
[(B)	Intermediate facility	$ 250]
[(C)	Minor facility	$ 100]

[(f) Permit modification (without significant change in facility design or operation):]

[All categories $ 50]

[(g) Permit modification (Department initiated):]

[All categories No fee]

(b) A new captive industrial facility: $1,000

(c) A new transfer station or material recovery facility -

(A) Receiving over 50,000 tons of solid waste per year: $500

(B) Receiving between 10,000 and 50,000 tons of solid waste per year: $200

(C) Receiving less than 10,000 tons of solid waste per year: $100

(d) [(h)] Letter authorizations (pursuant to OAR 340-61-027) [, new or renewal: $ 100]: $500

(e)[(i)] Before June 30, 1994: Hazardous substance authorization (Any permit or plan review application which seeks new, renewed, or significant modification in authorization to landfill cleanup materials contaminated by hazardous substances):

(A) Authorization to receive 100,000 tons or more of designated cleanup waste per year $50,000

(B) Authorization to receive at least 50,000 but less than 100,000 tons of designated cleanup material per year $25,000

(C) Authorization to receive at least 25,000 but less than 50,000 tons of designated cleanup material per year $12,500

(D) Authorization to receive at least 10,000 but less than 25,000 tons of designated cleanup material per year $ 5,000

(E) Authorization to receive at least 5,000 but less than 10,000 tons of designated cleanup material per year $ 1,000

(F) Authorization to receive at least 1,000 but less than 5,000 tons of designated cleanup material per year $ 250

(3) Annual [Compliance Determination] Solid Waste Permit Fee. The Commission establishes the following fee schedule including base per-ton rates to be used to determine the annual solid waste permit fee beginning with fiscal year 1993. The per-ton rates are based on the estimated solid waste received at all permitted solid waste disposal sites and on the Department's Legislatively Approved Budget. The Department will review annually the amount of revenue generated by this fee schedule. To determine the annual solid waste permit fee, the Department may use the base per-ton rates, or any lower rates if the rates would generate more revenue than provided in the Department's Legislatively Approved Budget. Any increase in the base rates must be fixed by rule by the Commission. (In any case where a facility fits into more than one category, the permittee shall pay only the highest fee):

[(a) Domestic Waste Facility:]

[(A) A landfill which received 500,000 tons or more of solid waste per year: $60,000]

[(B) A landfill which received at least 400,000 but less than 500,000 tons of solid waste per year: $48,000]

[(C) A landfill which received at least 300,000 but less than 400,000 tons of solid waste per year: $36,000]

[(D) A landfill which received at least 200,000 but less than 300,000 tons of solid waste per year: $24,000]

[(E) A landfill which received at least 100,000 but less than 200,000 tons of solid waste per year: $12,000]

[(F) A landfill which received at least 50,000 but less than 100,000 tons of solid waste per year: $ 6,000]

[(G) A landfill which received at least 25,000 but less than 50,000 tons of solid waste per year: $ 3,000]

[(H) A landfill which received at least 10,000 but less than 25,000 tons of solid waste per year: $ 1,500]

[(I) A landfill which received at least 5,000 but not more than 10,000 tons of solid waste per year: $ 750]

[(J) A landfill which received at least 1,000 but not more than 5,000 tons of solid waste per year: $ 200]

[(K) A landfill which received less than 1,000 tons of solid waste per year: $ 100]

[(L) A transfer station which received more than 10,000 tons of solid waste per year: $ 500]

[(M) A transfer station which received less than 10,000 tons of solid waste per year: $ 50]

[(N) An incinerator, resource recovery facility, composting facility and each other facility not specifically classified above which receives more than 100,000 tons of solid waste per year: $ 8,000]

[(O) An incinerator, resource recovery facility, composting facility and each other facility not specifically classified above which receives at least 50,000 tons but less than 100,000 tons of solid waste per year: $ 4,000]

[(P) An incinerator, resource recovery facility, composting facility and each other facility not specifically classified above which receives less than 50,000 tons of solid waste per year: $ 2,000]

[(Q) A landfill which has permit provisions to store over 100 waste tires -- the above fee or $250 whichever is highest.]

[(b) Industrial Waste Facility:]

[(A) A facility which received 10,000 tons or more of solid waste per year: $ 1,500]

[(B) A facility which received at least 5,000 tons but less than 10,000 tons of solid waste per year: $ 750]

[(C) A facility which received less than 5,000 tons of solid waste per year: $ 150]

[(c) Sludge Disposal Facility:]

[(A) A facility which received 25,000 gallons or more of sludge per month: $ 150]

[(B) A facility which received less than 25,000 gallons of sludge per month: $ 100]

(a) All facilities accepting solid waste except transfer stations and material recovery facilities:

(A) $200; or

(B) An annual solid waste permit fee based on the total amount of solid waste received at the facility in the previous calendar year, at the following rate:

(i) All municipal landfills, demolition landfills, industrial facilities, sludge disposal facilities, and incinerators: $.21 per ton.

(ii) Energy recovery facilities: $.13 per ton.

(iii) Composting facilities receiving mixed solid waste: $.10 per ton.

(C) If a disposal site (other than a municipal solid waste facility) is not required by the Department to monitor and report volumes of solid waste collected, the annual solid waste permit fee may be based on the estimated tonnage received in the previous year.

(b) Transfer stations and material recovery facilities:

(A) Facilities accepting over 50,000 tons of solid waste per year: $1,000

(B) Facilities accepting between 10,000 and 50,000 tons of solid waste per year: $500

(C) Facilities accepting less than 10,000 tons of solid waste per year: $50

(c)[(d)] Closed Disposal Sites: Each landfill which closes after July 1, 1984:. . . . . .[10% of fee which would be required, in accordance with subsections (3)(a), (3)(b), and (3)(c) above, if the facility was still in operation or $50 whichever is greater.] $150, or the average tonnage of solid waste received in the 3 most active years of site operation multiplied by $.025 per ton, whichever is greater; but the maximum annual permit fee shall not exceed $2,500.

[(e) Facility with Monitoring Wells: In addition to the fees described above, each facility with one or more wells for monitoring groundwater or methane, surface water sampling points, or any other structures or locations requiring the collection and analysis of samples by the Department, shall be assessed a fee. The amount of the fee shall depend on the number of wells (each well in a multiple completion well is considered to be a separate well) or sampling points as follows:. . . . . .$ 250 for each well or sampling point.]

[(4) Annual Recycling Program Implementation Fee. An annual recycling program implementation fee shall be submitted by each domestic waste disposal site, except transfer stations and closed landfills. This fee is in addition to any other permit fee which may be assessed by the Department. The amount of the fee shall depend on the amount of solid waste received as follows:]

[(a) A disposal site which received 500,000 tons or more of solid waste per year: $20,000]

[(b) A disposal site which received at least 400,000 but less than 500,000 tons of solid waste per year: $18,000]

[(c) A disposal site which received at least 300,000 but less than 400,000 tons of solid waste per year: $14,000]

[(d) A disposal site which received at least 200,000 but less than 300,000 tons of solid waste per year: $ 9,000]

[(e) A disposal site which received at least 100,000 but less than 200,000 tons of solid waste per year: $ 4,600]

[(f) A disposal site which received at least 50,000 but less than 100,000 tons of solid waste per year: $ 2,300]

[(g) A disposal site which received at least 25,000 but less than 50,000 tons of solid waste per year: $ 1,200]

[(h) A disposal site which received at least 10,000 but less than 25,000 tons of solid waste per year: $ 450]

[(i) A disposal site which received at least 5,000 but less than 10,000 tons of solid waste per year: $ 225]

[(j) A disposal site which received at least 1,000 but less than 5,000 tons of solid waste per year: $ 75]

[(k) A disposal site which received less than 1,000 tons of solid waste per year: $ 50]

(4) Senate Bill 66 (SB 66) annual fee.

(a) A SB 66 annual fee shall be submitted by each solid waste permittee which received solid waste in the previous calendar year, except transfer stations, material recovery facilities and captive industrial facilities. The Commission establishes the SB 66 annual fee as $.09 per ton for each ton of solid waste received in the subject calendar year.

(b) The $.09 per-ton rate is based on the estimated solid waste received at all permitted solid waste disposal sites in the previous calendar year and on the Department's Legislatively Approved Budget. The Department will review annually the amount of revenue generated by this rate. To determine the SB 66 annual fee, the Department may use this rate, or any lower rate if the rate would generate more revenue than provided in the Department's Legislatively Approved Budget. Any increase in the rate must be fixed by rule by the Commission.

(c) The Department shall bill the permittee for the amount of this fee together with the annual solid waste permit fee in Section 3 of this rule. This fee is in addition to any other permit fee and per-ton fee which may be assessed by the Department.

(5) Per-ton solid waste disposal fees on domestic solid waste. Each solid waste disposal site that receives domestic solid waste, except transfer stations, shall submit to the Department of Environmental Quality the following fees for each ton of domestic solid waste received at the disposal site:

(a) A per-ton fee of 50 cents.

(b) From January 1, 1992, to December 31, 1993, an additional per-ton fee of 35 cents.

(c) Beginning January 1, 1994 the additional per-ton fee established in subsection (5)(b) of this rule shall be reduced to 31 cents.

(d) Submittal schedule:

(A) These per-ton fees shall be submitted to the Department quarterly, or on the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent. Quarterly remittals shall be due on the 15th day of the month following the end of the calendar quarter.

(B) Disposal sites receiving less than 1,000 tons of solid waste per year shall submit the fees annually on July 1, beginning in 1991. If the disposal site is not required by the Department to monitor and report volumes of solid waste collected, the fees shall be accompanied by an estimate of the population served by the disposal site.

(e) As used in this rule, [section,] the term "domestic solid waste" includes, but is not limited to, residential, commercial and institutional wastes; but the term does not include:

(A) Sewage sludge or septic tank and cesspool pumpings;

(B) Building demolition or construction wastes and land clearing debris, if delivered to a disposal site that is limited to those purposes;

(C) Source separated recyclable material, or material recovered at the disposal site;

(D) Waste going to an industrial waste facility;

(E) Waste received at an ash monofill from an energy [resource] recovery facility; or

(F) Domestic solid waste which is not generated within this state.

(f) For solid waste delivered to disposal facilities owned or operated by a metropolitan service district, the fees established in this section shall be levied on the district, not on the disposal site.

(6) Per-ton solid waste disposal fee on solid waste generated out-of-state. Each solid waste disposal site or regional disposal site that receives solid waste generated out-of-state shall submit to the Department a per-ton solid waste disposal fee. The per-ton solid waste disposal fee shall be the sum of the per-ton fees established for domestic solid waste in subsections (5)(a), (5)(b) and (5)(c) of this rule.

(a) The per-ton fee solid waste disposal fee shall become effective on the dates specified in section (5) of this rule and shall apply to all solid waste received after July 1, 1991.

(b) This per-ton solid waste disposal fee shall apply to each ton of out-of-state solid waste received at the disposal site, but shall not include source separated recyclable materials, or material recovered at the disposal site.

(c) Submittal schedule: This per-ton solid waste disposal fee shall be submitted to the Department quarterly, or on the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent. Quarterly remittals shall be due on the 15th day of the month following the end of the calendar quarter.

(d) This per-ton solid waste disposal fee on out-of-state solid waste shall be collected at the first disposal facility in Oregon receiving the waste, including but not limited to a solid waste land disposal site, transfer station or incinerator, and remitted directly to the Department on the schedule specified in this rule.

(e) [(d)] If, after final appeal, the surcharge established in section (7) of this rule is held to be valid and the state is able to collect the surcharge, the per-ton fee on solid waste generated out-of-state established in this section shall no longer apply, and the person responsible for payment of the surcharge may deduct from the amount due any fees paid to the Department on solid waste generated out-of-state under section (6) of this rule.

(7) Surcharge on disposal of solid waste generated out-of-state. Each solid waste disposal site or regional solid waste disposal site that receives solid waste generated out-of-state shall submit to the Department of Environmental Quality a per-ton surcharge of $2.25. This surcharge shall apply to each ton of out-of-state solid waste received at the disposal site.

(a) This per-ton surcharge shall apply to all solid waste received after January 1, 1991.

(b) Submittal schedule: This per-ton surcharge shall be submitted to the Department quarterly, or on the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent. Quarterly remittals shall be due on the 15th day of the month following the end of the calendar quarter.

(c) This surcharge shall be in addition to any other fee charged for disposal of solid waste at the site.

(d) This surcharge on out-of-state solid waste shall be collected at the first disposal facility in Oregon receiving the waste, including but not limited to a solid waste land disposal site, transfer station or incinerator, and remitted directly to the Department on the schedule specified in this rule.

OAR61.rev

ATTACHMENT B

RULEMAKING STATEMENTS
for
Proposed Revisions to Existing Rules
Pertaining to Permit Fees for Solid Waste Permits

OAR Chapter 340, Division 61

Pursuant to ORS 183.335, these statements provide information on the intended action to adopt a rule for implementation of solid waste permit fee increases required by Senate Bill 66 and the Department of Environmental Quality's (DEQ, Department) legislatively approved budget for the 1991-93 biennium.

STATEMENT OF NEED:

Legal Authority

The 1991 Oregon Legislature passed Senate Bill 66 which establishes a new "tonnage-based" permit fee to be paid by solid waste permittees. The Department's legislatively adopted budget also contained increased revenue of over 100 percent above the current level of solid waste permit fees.

Need for the Rule

Rules are needed to specify how the new "tonnage-based" permit fee is to be assessed. The statute simply states that the fee shall be based on the solid waste received in "the previous calendar year." The statute does not specify the level of the fee for individual permittees, nor how the fee is to be paid. Rules are needed to clarify these issues.

The solid waste permit fee schedule in existing rule must be amended in order to generate the amount of revenue approved in the Department's budget.

Principal Documents Relied Upon

a. 1991 Senate Bill 66.
b. DEQ 1991-93 Legislatively Adopted Budget
c. ORS 459.170, 459.235
d. Oregon Administrative Rules, Chapter 340, Division 61.

permfee.rs
1/7/92

FORM 3: Hazardous Waste Generated

SUMMARY

- **Who Completes the Form?** -- Large Quantity Generators and Small Quantity Generators (SQGs skip Part B.)

- **What Information is Collected?** Generator completes one two-page answer sheet for <u>each</u> hazardous waste stream generated at the facility. The following information is provided for each waste stream.

  Part A
  - Details about the waste stream, including waste codes, waste form, and source of generation.

  Part B
  - More EPA questions regarding source reduction and recycling activities at the facility. Unlike Form 2, these questions relate to the specific waste stream.
  - Only need to complete this section if you "achieved waste min" for this waste stream in 1991.
  - Requests details about reduction/recycling measures implemented and results achieved.

  Part C
  - How and where was this waste stream managed?

DETAILED WALK-THROUGH OF FORM USING AN EXAMPLE

QUESTIONS

ATTACHMENT C

FISCAL AND ECONOMIC IMPACT STATEMENT

I. Introduction

Proposed Actions:

1991 Senate Bill 66 (SB 66) establishes a "tonnage-based" permit fee to be paid by solid waste permittees. The Department's legislatively adopted budget established $287,500 as the amount to be collected through that fee in the 1991-93 biennium. The Department's budget also requires increased revenues from solid waste permitting, and continues the existing recycling implementation fee. Those fees are as follows:

Solid waste permitting:	$1,505,500
New "tonnage-based" fee (SB 66):	287,500
Recycling implementation fees:	175,000
Total, biennium:	$1,968,000

The proposed fee schedule generates the above amount of revenue in the biennium. Since accurate reporting of tonnage received becomes crucial under this proposal, the rule also requires domestic landfills receiving 50,000 tons or more of solid waste annually to have certified scales by January 1, 1994.

a. Annual solid waste permit fee. All existing annual solid waste permit fees (including the recycling implementation fee) would be incorporated into one volume-based "annual solid waste permit fee." The fee would be assessed on the basis of all solid waste received in the previous calendar year. The annual solid waste permit fee would be $.21 per ton for all waste received at domestic and industrial landfills, incinerators and sludge disposal sites. This fee would be $.15 per ton for energy recovery facilities, and $.10 per ton for composting facilities. There will be a minimum fee of $300 for all sites. Transfer stations will pay a flat fee of $50, $500 or $1,000, depending on the size of the facility. The annual solid waste permit fee will be due to the Department on July 1 of each year. Closed landfills will be charged an annual fee of $150 or the average tonnage of solid waste received in the three most active years of site operation multiplied by $.025 per ton, whichever is more, but with a maximum of $2,500.

b. New "tonnage-based" permit fee. The proposed rule specifies how the new "tonnage-based" permit fee is to be determined and paid. It is to be assessed on the tonnage of solid waste received in the previous calendar year. It is to be assessed on all solid waste received at all permitted solid waste facilities (except transfer stations) during the calendar year previous to the annual permit fee billing, which occurs every June. The first billing

will be based on waste received in calendar year 1991, and will be at the rate of $.09 per ton.

c. Solid waste permit processing fees. The rule also establishes a new schedule for solid waste permit processing fees. Revenue projected to be generated by processing fees and by the annual solid waste permit fee, will equal the level of revenue determined in the Department's budget. The processing fee schedule would be greatly simplified, eliminating most of the existing fees. The Department's costs to process permit actions (except for new permits) would be included in the overall annual solid waste permit fee. The application fee for new facilities would be substantially increased, to $10,000 for "large" sites (receiving over 7,500 tons of solid waste annually) and $5,000 for "small" sites (less than 7,500 tons). The one exception would be for new on-site industrial facilities, with a uniform fee of $1,000. The application fee for Letter Authorizations would be increased to $500. The fee for new transfer stations would be reduced. Application fees are paid at the time a new application is submitted.

Overall Economic Impacts:

The Department estimates that the existing permit fee schedule, plus a supplementary annual permit compliance determination fee of 122% (implemented by a temporary rule passed by the Environmental Quality Commission on July 24, 1991) will generate approximately $920,000 in Fiscal Year 92 (FY92), leaving $1,048,000 of the Department's legislatively approved budget for 91-93 to be generated in Fiscal Year 93 (FY93). DEQ estimates that the following revenues will be generated in FY93 under the proposed permit fee schedule:

Annual solid waste permit fees (incorporates recycling fees):	$ 765,000
New "tonnage-based" fee:	300,000
Permit processing fees:	12,200
Total, FY93:	$1,076,200

The revenue will be used to fund five new positions for core technical support in the solid waste program to address landfill upgrades, closures and cleanups, and to ensure that landfills do not cause pollution in the future. The revenue from the new "tonnage-based" fee will cover part of the cost of implementing SB 66, the comprehensive solid waste recycling and planning bill.

The proposed annual solid waste permit fees increases do not affect all permittees proportionately. This is due to several factors. Currently there is an annual fee for monitoring wells.

If a smaller facility has several monitoring wells, the per-ton fiscal impact is greater than at a larger facility. Under the proposal, the monitoring well fee is eliminated, so the corresponding per-ton discrepancy (between sites with several and sites with few or no monitoring wells) is also eliminated.

In addition, under the existing permit fee schedule, permittees are assigned to a category representing a "range" of solid waste accepted annually. Permittees then pay a fixed fee depending on the category. When stated in terms of a per-ton charge, permittees in the largest categories pay less per ton than smaller sites, since the largest category is "too low" to proportionately reflect the amount of solid waste actually received at those large facilities. Thus, the percentage permit fee increase from the existing fee schedule (including the FY92 "supplementary" annual compliance determination fee billing) to the proposed schedule is greatest for the largest sites: 110% for the largest regional landfill, and 98% for a representative large industrial landfill. The preceding also takes into account the effect of the new "tonnage-based" permit fee (SB 66). Typical increases in fiscal impact for domestic landfills other than the largest size category range from 5% to 43%. A typical small industrial landfill would experience a 75% increase. An energy recovery facility would have a 75% increase, and a large compost facility would experience a 10% increase.

There are currently about 41 landfills under closure permits, which also pay an annual fee to the Department. The current fee schedule is 10% of what the facility would pay if operating, or a minimum of $50 (or $110, including the FY92 supplementary billing), plus $250 (and $310, supplementary FY92 billing) per monitoring well. The proposal is for the facility to pay a minimum of $150, or the average tonnage of solid waste received in the three most active years of site operation multiplied by $.025 per ton, whichever is more, up to a maximum annual fee of $2,500. This is a $40 per year increase (over FY 92) for the approximately 25 closed landfills in the smallest category. Larger closed landfills experience from a 93 percent decrease (large sites with numerous monitoring wells) to a 42 percent increase. In a very few cases the increase may cause a hardship, since the permittee responsible for the closed facility may not have made provision for sufficient funds to pay this fee while the facility was in operation. If the permittee is a local government, the increase may result in an increased budget item.

As noted above, the proposed permit processing fee schedule would eliminate most permit processing fees, and therefore the revenue generated by these fees would decrease (from an estimated $94,000 in FY92 to $20,900 in FY93). The current fee schedule does not reflect Department costs in processing permit changes, such as reviewing engineering plans for which there is no discrete fee. Under the proposal, generation of most of the revenue which previously came from the permit processing fees would be shifted

to the annual solid waste permit fee. The result would be that most permit processing costs are shared among all permittees, proportionately to the amount of solid waste received. This is a defensible basis, since size of a site is reasonably related to the effort required from the Department in processing and reviewing permits for that site over time.

The proposal retains permit processing fees for applications for new facilities. These fees, including fees for Letter Authorizations for one-time disposal, will be increased considerably. However, the Department does not anticipate receiving many such applications annually: one new municipal site, two new on-site industrial landfills and six new Letter Authorizations. Filing fees, permit renewal and permit modification fees, which currently generate much of the Department's permit processing fee revenue, would all be eliminated, with a positive economic effect for permittees requiring such permit actions. The proposed application fee structure for new transfer stations is reduced (from $100 for small facilities to $500 for facilities receiving over 50,000 tons, compared with the current schedule range of $300 to $2,000). The Department expects to receive about four applications for new transfer stations a year.

The requirement to have solid waste weighed at certified scales may require installation of scales at the one or two domestic landfills receiving over 50,000 tons of solid waste a year which do not currently have scales. The installation of a scale could cost from $24,000 (for a 25' scale) to $60,000 or more for a 70' scale. Annual fees, maintenance and calibration could cost an additional $350 to $700. This requirement would become effective on January 1, 1994, allowing permittees time to budget for it. Installing scales allows landfill operators to determine precisely the amount of solid waste received; it is possible that landfill operators will experience increased revenue as a result of being able to accurately charge for the amount of solid waste received.

Solid waste permittees will pay the fees to DEQ, but landfill operators will likely pass the costs on to their customers. Thus, the major impact of the fees will fall on solid waste generators and ratepayers (see "General Public").

Operators of solid waste disposal sites which serve the public will incur some administrative expense in gaining approval to raise rates to cover the increased fees, although many permittees have already done this prompted by the 122% "supplementary annual permit compliance determination fee" assessed in FY92. If an additional rate increase is needed, expenses incurred by a landfill operator might range from a few hundred dollars if filing is relatively simple, to as much as $5,000, including legal costs, if the fee increase requires adopting an ordinance.

II. General Public

Current fees for garbage service vary widely by vendor and geographic area. Per-ton monthly rates for one-can service range from about $5.50 to $18. The annual solid waste permit fee is a cost of doing business for the site operator, and is likely to be passed along to the customer. Stated in "per-ton" terms, the effect of all FY92 solid waste permit fees on waste received at domestic landfills ranged from about $.16/ton to about $.29/ton. Including the new SB66 "tonnage-based" fee of $.09/ton, the per-ton rate under the proposed fee schedule will range from $.30/ton to $.38/ton for FY93. The Department estimates that the effect of an increase from $.16 per ton to $.30 per ton will cost a typical household with one-can service an additional 13 cents per year. If the waste is taken to an energy recovery facility, the effect of the proposed fee, stated in terms of cost per ton, would increase from $.14 to $.24/ton. The effect of the proposed fee for composting facilities, stated in cost per ton, increases from $.17 to $.19.

III. Small Business

Small businesses would be affected in the same way as the general public. However, the impact on businesses will be proportionately greater if the impact of the fee increase is spread evenly between residential and commercial customers, because as a general rule commercial customers pay less per unit measure for garbage services. A typical range for commercial garbage rates is between $30 and $70 a month for weekly collection of a one-yard container. DEQ estimates that the rate increase to businesses will still be relatively insignificant (less than 2% additional costs for garbage service). Assuming garbage disposal fees of $50 per month for a small business (weekly removal of one yard of solid waste), an increase from $.16 to $.30 per ton would have an effect of about $1.12 per year.

Some small businesses such as wood products operations may operate industrial landfills to dispose of their own waste. Under the proposal the annual permit fees for a typical small industrial site could increase from $335 (FY92) to $585 or more, depending on the amount of waste disposed of ($.30 per ton).

Transfer stations, which are required to have solid waste permits, may be operated by small businesses. The proposed permit fee schedule in general lowers permit fees for small and intermediate transfer stations from the level in effect for FY92, keeping them the same as in FY91 and previously. A new permit fee category is created for large transfer stations (accepting over 50,000 tons of waste per year), establishing a $1,000 annual solid waste permit fee for such sites -- lower than FY92, but double what they would have paid in FY91 and before.

Small businesses may wish to use a Letter Authorization to dispose of land clearing debris (or other solid waste which does not create a risk of pollution) on site, rather than taking it to a regular landfill for disposal. The permit processing fee for such actions is increased from $100 to $500. Such businesses may determine it is in their interest to instead take the waste for regular disposal.

V. Large Business

Large businesses would also be affected in the same way as the general public and small businesses. Some large businesses such as pulp and paper mills may operate industrial landfills to dispose of their own waste. Under the proposal the annual permit fees for a typical larger industrial site could increase from $3,340 (FY92) to $6,600 or more, depending on the amount of waste disposed of ($.30 per ton). In addition, under the existing rule, industrial landfills are not required to pay an annual recycling implementation fee. Under the proposal, the recycling fee is rolled into all annual solid waste permit fees, with the effect that industrial facilities would contribute to the amount of revenue approved to be generated by the recycling implementation fee. This accounts for about three cents of the 30 cent per ton rate.

VI. Local Governments

Local governments would be affected in the same way as the general public and as small or large businesses which own or operate landfills. In some cases local governments operate landfills for their citizenry, and may cover the cost of operating these landfills through the annual budgetary process. In that case ratepayers pay for solid waste services indirectly and any fee increase will likely be passed through to the public through the local government's budget. Some local governments will have to find alternatives for solid waste disposal as existing landfills have to be closed. In general, the fee structure favors establishing transfer stations (to take solid waste to larger, regional landfills). However, the proposed fee structure creates an application fee category for new small landfills (receiving less than 7,500 tons of solid waste a year); the application fee for this category would be $5,000 rather than $10,000 for larger facilities. This fee structure would create less of a burden on small municipalities which may need to establish a new local landfill, but represents a significant increase over the smallest category in the existing fee schedule ($300 for sites with less than 5,000 tons of solid waste a year).

VII. Other State Agencies

DEQ has received authority for five new positions for core technical support in the solid waste program to be funded from the annual solid waste permit fee increase. The revenue from the new "tonnage-based" fee will cover part of the cost of implementing SB 66, the comprehensive solid waste recycling and planning bill. As generators of solid waste, other state agencies would be affected by modestly increased collection service rates in the same way as the general public.

Note: Analyses based on information collected by DEQ and maintained in files at DEQ; and used in preliminary analyses by the Department. These are available at DEQ Headquarters, 811 SW 6th, Portland, Oregon during regular business hours.

permfee.fis
2/20/92

Oregon Department of Environmental Quality

A CHANCE TO COMMENT ON...

SOLID WASTE PERMIT FEES

Hearing dates: 3/16/92
3/17/92
3/18/92

Comments Due: 3/20/92

WHO IS AFFECTED: General public disposing of solid waste, other generators of solid waste (including generators in states other than Oregon who send solid waste to Oregon for disposal), owners and operators of solid waste landfills, garbage haulers, local governments.

WHAT IS PROPOSED: The Department proposes to modify its rules to implement increases in solid waste permit fees required by 1991 Senate Bill 66 (SB 66), and in accordance with the budget authorized by the 1991 Legislature for the Department of Environmental Quality.

WHAT ARE THE HIGHLIGHTS: Beginning with billings for Fiscal Year 1993, the proposed amendments would base the annual solid waste permit fee for all permittees (except transfer stations) on volume of solid waste received in the previous calendar year. The proposed rate for landfills is $.21 per ton; for energy recovery facilities, $.15 per ton; and for composting facilities, $.10 per ton; or a minimum of $300 per year, whichever is more. In addition, a new "tonnage-based" annual permit fee required by SB 66 would be established, beginning with FY 93. The schedule of solid waste permit processing fees would be simplified, with fees for <u>new</u> sites increasing to $1,000 - $10,000; most other processing fees would be eliminated. (See attached Fact Sheet for complete summary of proposed fee schedule changes.)

HOW TO COMMENT: Public hearings will be held before a hearings officer at the following times and locations:

Monday, March 16, 1992
9:30 am - 11 am
Department of Environmental Quality Headquarters
Hearing Room 3A (Third Floor)
811 SW 6th Avenue
Portland, Oregon

Monday, March 16, 1992
9:30 am - noon
Oregon Institute of Technology
Mt. Shasta Room, College Union
3201 Campus Drive
Klamath Falls, Oregon

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.

Tuesday, March 17, 1992
9:30 am - noon
Museum Club Room
(behind Harney County Chamber of Commerce)
18 West "D" Street
Burns, Oregon

Wednesday, March 18, 1992
2:30 pm - 5:00 pm
Jackson County Courthouse Auditorium
10 South Oakdale (at Main and Oakdale)
Medford, Oregon

Wednesday, March 18, 1992
9:30 am - noon
La Grande City Hall Council Chambers
1000 Adams Avenue
La Grande, Oregon

All persons interested in commenting on solid waste issues in general are also encouraged to attend the hearings, as DEQ solid waste and waste reduction staff will be available to listen to citizen concerns and answer questions.

Written or oral comments on the proposed rule changes may be presented at the hearings. Written comments may also be sent to the Department of Environmental Quality, Solid Waste Permits and Compliance Section, 811 SW 6th Avenue, Portland, OR 97204, and must be received no later than 5:00 p.m., Friday, March 20, 1992.

Copies of the complete proposed rule package including rulemaking statements may be obtained from the DEQ Hazardous and Solid Waste Division at 229-6922. For further information on proposed solid waste permit fees, contact Deanna Mueller-Crispin at 229-5808. Or call toll-free at 1-800-452-4011.

WHAT IS THE NEXT STEP: The Environmental Quality Commission may adopt rule revisions identical to the ones proposed, adopt modified rules as a result of testimony received, or may decline to adopt rules. The Commission will consider the proposed rule revisions at its April 1992 meeting.

Attachment: Fact Sheet

SW\RPT\SK4038 (1/92)

Tuesday, March 17, 1992
9:30 am - noon
Museum Club Room
(behind Harney County Chamber of Commerce)
18 West "D" Street
Burns, Oregon

Wednesday, March 18, 1992
2:30 pm - 5:00 pm
Jackson County Courthouse Auditorium
10 South Oakdale (at Main and Oakdale)
Medford, Oregon

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Attachment: Fact Sheet

SW\RPT\SK4038 (1/92)

FACT SHEET
PROPOSED SOLID WASTE PERMIT FEES

March 1992

Background: The Department of Environmental Quality must revise the schedule of existing permit fees for solid waste facilities. The 1991 Legislature directed increased funding for the Department to come from solid waste permit fees, and established an additional "tonnage-based" annual permit fee. This fact sheet summarizes the solid waste permit fee structure proposed by the Department.

There are two general categories of solid waste permit fees, and both would be changed by this proposal.

I. Proposed Solid Waste Permit Processing Fees

Permit application fee (for new facilities only). Due when application is submitted to DEQ for a new solid waste facility. Fee schedule:

1. All types of facilities (except on-site industrial):
   - "Large" sites (receiving >7,500 tons of solid waste a year: $10,000
   - "Small" sites (receiving <7,500 tons of solid waste a year: $5,000

2. On-site industrial facilities: $1,000

3. New transfer stations:
   - Receiving >50,000 tons/year: $500
   - 10,000 - 50,000 tons/year: $200
   - <10,000 tons/year: $100

4. Letter Authorization: $500

Proposed for elimination: Filing fee, permit renewal fee, permit modification fee. (Hazardous substance authorization fee to end June 30, 1994)

II. Proposed Annual Solid Waste Permit Fee

Fee paid annually on July 1 by all solid waste permittees. Proposal would eliminate the recycling implementation fee and the monitoring well fee. All permittees (other than transfer stations) would pay either a "site-based" OR a "volume-based" annual solid waste permit fee, whichever is more, in addition to the new "tonnage-based" annual permit fee. Transfer stations pay only a site-based fee.

1. Proposed annual solid waste permit fee (Pay A or B):

A. "Site-based"

- Minimum fee for all sites (except transfer stations): $300
- Transfer stations:
  - >50,000 tons/year: $1,000
  - 10,000 - 50,000 tons/year: $500
  - <10,000 tons/year: $50
- Closed sites $150 - $2,500[1]

[1]Fee for closed sites is based on the average amount of solid waste received in the three most active years of site operation, multiplied by $.025/ton, with a minimum of $150 and a maximum of $2,500.

- OR -

B. "Volume-based"

Fee determined by per-ton rate, multiplied by the volume (tonnage) of solid waste received in the preceding calendar year. Per-ton rate:

- Domestic, demolition and industrial landfills, incinerators: $.21/ton
- Energy recovery facilities: $.15/ton
- Composting facilities: $.10/ton

2. Additional "tonnage-based" annual permit fee (from SB 66):

All solid waste facilities (except transfer stations) pay this fee in addition to the above. Fee was mandated by the 1991 Legislature and determined in same way as B. above: per-ton rate multiplied by the tonnage of solid waste received in the preceding calendar year.

Per-ton rate, all facilities (except transfer stations): $.09/ton

NOTE: These solid waste permit fees are in addition to existing per-ton solid waste disposal fees ("tipping fees"), currently $.85/ton on domestic and out-of-state solid waste coming in the gate.

III. Other Proposed Requirements

1. Certified scale requirement:

Domestic solid waste sites receiving over 50,000 tons of waste per year: annual tonnage must be based on weight from certified scales (after January 1, 1994).

2. Conversion factors for industrial waste:

The proposed rule would establish conversion factors for industrial sites which do not weigh incoming waste. Examples:

Ash and slag:	2,000 lbs per cubic yard
Wood waste:	1,200 lbs per cubic yard
Pulp & paper waste (other than sludge):	1,000 lbs per cubic yard

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2/11/92

- OR -

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SW\RPT\SK4058
2/11/92

66th OREGON LEGISLATIVE ASSEMBLY--1991 Regular Session

D-Engrossed
Senate Bill 66

Ordered by the House June 17
Including Senate Amendments dated March 4 and April 25 and House Amendments dated June 7 and June 17

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with presession filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Joint Interim Committee on Environment, Energy and Hazardous Materials)

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.

Establishes statewide integrated solid waste management program. Establishes solid waste reduction goals and rates. Specifies duties of local governments on solid waste reduction. Establishes procurement requirements for state and public agencies for reused or recycled products. Modifies waste disposal rates and schedules. Establishes education requirements. Creates Recycling Markets Development Council and Oregon Newsprint Recycling Task Force. Establishes minimum content requirements for newsprint and labeling requirements for plastic containers. Appropriates money. **Limits expenditures.**

Declares emergency, effective July 1, 1991.

A BILL FOR AN ACT

Relating to solid waste; creating new provisions; amending ORS 182.375, 279.731, 279.733, 279.739, 459.005, 459.015, 459.165, 459.175, 459.180, 459.185, 459.190, 459.235, 459.294 and 459.995; appropriating money; limiting expenditures; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 459.292, 459.293, 459.294 and 459.295 and sections 2, 4, 5 and 13a of this Act are added to and made a part of ORS 459.165 to 459.200.

SECTION 2. (1) It is the goal of the State of Oregon that by January 1, 2000, the amount of recovery from the general solid waste stream shall be at least 50 percent.

(2) In addition to the requirements of ORS 459.165, the "opportunity to recycle" shall include the requirements of subsection (3) of this section, which shall be implemented on or before July 1, 1992, by using the following program elements:

(a) Provision of at least one durable recycling container to each residential service customer by not later than January 1, 1993.

(b) On-route collection at least once each week of source separated recyclable material to residential customers, provided on the same day that solid waste is collected from each customer.

(c) An expanded education and promotion program conducted to inform citizens of the manner and benefits of reducing, reusing and recycling material. The program shall include:

(A) Provision of recycling notification and education packets to all new residential, commercial and institutional collection service customers that includes at a minimum the materials collected, the schedule for collection, the way to prepare materials for collection and reasons that persons should separate their material for recycling;

(B) Provision of quarterly recycling information to residential, commercial and institutional collection service customers that includes at a minimum the materials collected, the schedule for

NOTE: Matter in bold face in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.

1991 Act.

(b) The commission may grant all or part of a variance under this section.

(c) Upon granting a variance, the commission may attach any condition the commission considers necessary to carry out the provisions of ORS 459.015, 459.165 to 459.200 and 459.250.

(d) In granting a variance, the commission must find that:

(A) Conditions exist that are beyond the control of the applicant;

(B) Special conditions exist that render compliance unreasonable or impractical; or

(C) Compliance may result in a reduction in recycling.

[*(9)*] **(2)** An affected person may apply to the commission to extend the time permitted under ORS 459.005, 459.015, 459.035, 459.165 to 459.200, 459.250, 459.992 and 459.995 for providing for all or a part of the opportunity to recycle or submitting a recycling report to the department. The commission may:

(a) Grant an extension upon a showing of good cause;

(b) Impose any necessary conditions on the extension; or

(c) Deny the application in whole or in part.

SECTION 12a. ORS 459.235 is amended to read:

459.235. (1) Applications for permits shall be on forms prescribed by the department. An application shall contain a description of the existing and proposed operation and the existing and proposed facilities at the site, with detailed plans and specifications for any facilities to be constructed. The application shall include a recommendation by the local government unit or units having jurisdiction and such other information the department deems necessary in order to determine whether the site and solid waste disposal facilities located thereon and the operation will comply with applicable requirements.

(2) [*Subject to the review of the Executive Department and the prior approval of the appropriate legislative review agency,*] The commission [*may*] **shall** establish a schedule of fees for disposal site permits. The permit fees contained in the schedule shall be based on the anticipated cost of filing and investigating the application, of issuing or denying the requested permit and of an inspection program to determine compliance or noncompliance with the permit. The permit fee shall accompany the application for the permit.

(3) In addition to the fees imposed under subsection (2) of this section, the commission shall establish a schedule of annual permit fees for the purpose of implementing this 1991 Act. The fees shall be assessed annually and shall be based on the amount of solid waste received at the disposal site in the previous calendar year.

[*(3)*] **(4)** If the application is for a regional disposal facility, the applicant shall file with the department a surety bond in the form and amount established by rule by the commission. The bond or financial assurance shall be executed in favor of the State of Oregon and shall be in an amount as determined by the department to be reasonably necessary to protect the environment, and the health, safety and welfare of the people of the state. The commission may allow the applicant to substitute other financial assurance for the bond, in the form and amount the commission considers satisfactory.

SECTION 13. ORS 459.294 is amended to read:

459.294. (1) In addition to the permit fees provided in ORS 459.235, the commission shall establish a schedule of fees [*to begin July 1, 1990,*] for all disposal sites that receive domestic solid waste except transfer stations. The schedule shall be based on the estimated tonnage or the actual

ORS 459.005, 459.015, 459.035, 459.165 to 459.200, 459.250, 459.992 and 459.995.

(2) Review department reports on compliance with and implementation of ORS 459.005, 459.015, 459.035, 459.165 to 459.200, 459.250, 459.992 and 459.995.

(3) Submit a report to each regular session of the Legislative Assembly regarding compliance with and implementation of the provisions of ORS 459.005, 459.015, 459.035, 459.165 to 459.200, 459.250, 459.992 and 459.995. [1983 c.729 §9]

459.170 Commission to adopt rules regarding waste disposal and recycling. (1) By January 1, 1985, and according to the requirements of ORS 183.310 to 183.550, the commission shall adopt rules and guidelines necessary to carry out the provisions of ORS 459.005, 459.015, 459.035, 459.165 to 459.200, 459.250, 459.992 and 459.995, including but not limited to:

(a) Acceptable alternative methods for providing the opportunity to recycle;

(b) Education, promotion and notice requirements, which requirements may be different for disposal sites and collection systems;

(c) Identification of the wastesheds within the state;

(d) Identification of the principal recyclable material in each wasteshed;

(e) Guidelines for local governments and other persons responsible for implementing the provisions of ORS 459.005, 459.015, 459.035, 459.165 to 459.200, 459.250, 459.992 and 459.995;

(f) Standards for the joint submission of the recycling report required under ORS 459.180 (1); and

(g) Subject to prior approval of the appropriate legislative agency, the amount of an annual or permit fee or both under ORS 459.235, 459.245 and 468.065 necessary to carry out the provisions of ORS 459.005, 459.015, 459.035, 459.165 to 459.200, 459.250, 459.992 and 459.995.

(2) In adopting rules or guidelines under this section, the commission shall consider:

(a) The purposes and policy stated in ORS 459.015.

(b) Systems and techniques available for recycling, including but not limited to existing recycling programs.

(c) Availability of markets for recyclable material.

(d) Costs of collecting, storing, transporting and marketing recyclable material.

(e) Avoided costs of disposal.

(f) Density and characteristics of the population to be served.

(g) Composition and quantity of solid waste generated and potential recyclable material found in each wasteshed. [1983 c.729 §3]

459.175 Notice to affected person in wasteshed; appeal; request for modification or variance. (1) After the commission identifies a wasteshed, the department shall notify each affected person to the extent such affected persons are known to the department, of the following:

(a) That the affected person is within the wasteshed; and

(b) The recyclable material for which affected persons within the wasteshed must provide the opportunity to recycle in all or part of that wasteshed.

(2) Any affected person may:

(a) Appeal to the commission the inclusion of all or part of a city, county or local government unit in a wasteshed;

(b) Request the commission to modify the recyclable material for which the commission determines the opportunity to recycle must be provided; or

(c) Request a variance under ORS 459.185 (8). [1983 c.729 §5]

459.180 Recycling report; implementation of opportunity to recycle. (1) Upon final determination of the wasteshed and identification of recyclable material and any variance, the cities and counties within the wasteshed shall coordinate with all other affected persons in the wasteshed to jointly develop a recycling report to submit to the department. The report to the department shall explain how the affected persons within the wasteshed are implementing the opportunity to recycle.

(2) Unless extended by the commission upon application under ORS 459.185 after the affected persons show good cause for an extension, the affected persons within the wasteshed shall implement the opportunity to recycle and submit the recycling report to the department not later than July 1, 1986. [1983 c.729 §6]

459.185 Approval, disapproval of recycling report; effect of disapproval. (1) The department shall review a recycling report submitted under ORS 459.180 to determine whether the opportunity to recycle is being provided within all of the affected portion of the wasteshed.

(2) The department shall notify the affected persons who participated in preparing the report of acceptance or disapproval of

(4) A variance or conditional permit may be revoked or modified by the commission after a public hearing held upon not less than 10 days' notice. Such notice shall be served upon all persons who the commission knows will be subjected to greater restrictions if such variance or conditional permit is revoked or modified, or who are likely to be affected or who have filed with the commission a written request for such notification.

(5) The establishment, operation, maintenance, expansion, alteration, improvement or other change of a disposal site in accordance with a variance or a conditional permit is not a violation of ORS 459.005 to 459.105, 459.205 to 459.245 and 459.255 to 459.385 or any rule or regulation adopted pursuant thereto.

459.230 [1969 c.90 §3; repealed by 1971 c.648 §33]

459.235 Applications for permits; fees; bond. (1) Applications for permits shall be on forms prescribed by the department. An application shall contain a description of the existing and proposed operation and the existing and proposed facilities at the site, with detailed plans and specifications for any facilities to be constructed. The application shall include a recommendation by the local government unit or units having jurisdiction and such other information the department deems necessary in order to determine whether the site and solid waste disposal facilities located thereon and the operation will comply with applicable requirements.

(2) Subject to the review of the Executive Department and the prior approval of the appropriate legislative review agency, the commission may establish a schedule of fees for disposal site permits. The permit fees contained in the schedule shall be based on the anticipated cost of filing and investigating the application, of issuing or denying the requested permit and of an inspection program to determine compliance or noncompliance with the permit. The permit fee shall accompany the application for the permit.

(3) If the application is for a regional disposal facility, the applicant shall file with the department a surety bond in the form and amount established by rule by the commission. The bond or financial assurance shall be executed in favor of the State of Oregon and shall be in an amount as determined by the department to be reasonably necessary to protect the environment, and the health, safety and welfare of the people of the state. The commission may allow the applicant to substitute other financial assurance for the bond, in the form and amount the commission considers satisfactory. [1971 c.648 §9; 1977 c.37 §1; 1983 c.144 §1; 1987 c.876 §18; 1989 c.833 §154]

459.236 Additional permit fees for remedial action or removal; amount; utilization; eligibility of local governments. (1) In addition to the permit fees provided in ORS 459.235, upon approval by the Emergency Board of the sale of bonds to provide funds for the Orphan Site Account, and annually on January 1 thereafter, there is imposed a fee on all disposal sites that receive domestic solid waste except transfer stations. The amount raised shall be up to $1 million per year, based on the estimated tonnage or the actual tonnage, if known, received at the site and any other similar or related factors the commission finds appropriate.

(2) For solid waste generated within the boundaries of a metropolitan service district, the fee imposed under subsection (1) of this section, but not the permit fees provided in ORS 459.235, shall be levied on the district, not the disposal site.

(3)(a) A local government unit that franchises or licenses a domestic solid waste site shall allow the disposal site to pass through the amount of the fees established by the commission in subsection (1) of this section to the users of the site.

(b) If a disposal site that receives domestic solid waste passes through all or a portion of the fees established by the commission in subsection (1) of this section to a solid waste collector who uses the site, a local government unit that franchises or licenses the collection of solid waste shall allow the franchisee or licensee to include the amount of the fee in the solid waste collection service rate.

(4) Except as provided in subsection (5) of this section, moneys collected under this section shall be deposited in the Orphan Site Account created under ORS 466.590 to be used to pay the costs of removal or remedial action of hazardous substances, in excess of the maximum amount collected under ORS 459.311 at:

(a) Solid waste disposal sites owned or operated by a local government unit; or

(b) Privately owned or operated solid waste disposal sites that receive or received domestic solid waste for which the department determines the responsible party is unknown, unwilling or unable to undertake any portion or phase of a removal or remedial action.

(5) The moneys collected under this section, or proceeds of any bond sale under ORS 468.195 for which moneys collected under this section are pledged for repayment shall be made available to a local government unit to pay removal or remedial action costs at a site if:

(a) The local government unit is responsible for conducting removal or remedial action under ORS 466.570; and

(b) The local government unit repays any moneys equal to the amount that may be raised by the charge imposed under ORS

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY INTEROFFICE MEMORANDUM

DATE: January 14, 1992

TO: Solid Waste Advisory Committee

FROM: Charles W. Donaldson, Deanna Mueller-Crispin

SUBJECT: Solid Waste Permit Fee Work Group's Recommended Fee Schedule

I. Action Requested

The Department requests comments from the Solid Waste Advisory Committee on the Work Group's proposals.

II. Background

The Department's legislatively approved budget for the 91-93 biennium included increased revenue from "solid waste permitting," amounting to an increase in solid waste permit fees of about 122 percent. During the '91 session, the Department committed to reviewing the existing permit fee schedule to incorporate this increase. The Environmental Quality Commission adopted a temporary rule on July 24, 1991 establishing a one-time supplementary annual compliance determination fee (of 122 percent) for solid waste permittees for Fiscal Year 92, which would generate about half of the needed additional revenue. A change in the solid waste permit fee schedule is required to generate the rest of the revenue approved for the biennium. 1991 Senate Bill 66 (SB 66) also established a new "tonnage-based" permit fee on solid waste sites.

A Work Group (membership in Attachment F) was established to assist the Department in developing recommendations for amending the solid waste permit fee schedule to meet legislative budget direction. The Solid Waste Permit Fee Work Group met three times in late 1991, and came to consensus on several, but not all, elements of a revised solid waste permit fee schedule. The majority also supported a tonnage-based ("volume") annual solid waste site permit fee structure. The Department has also incorporated comments received from several Group members since the Group's last meeting.

III. Work Group's Recommendation

Following is a summary of the elements supported by the Group. (Attachment A further summarizes the recommendation.) It is noted whether the support was by Group consensus, or by majority.

1. "PROCESSING FEE" categories are eliminated, except for fees for new sites. Eliminated fees include filing fee, permit renewal fee and permit modification fee. (Consensus) The hazardous substance authorization fee will be phased out after two years.

2. APPLICATION FEES for new sites are retained, on the following schedule: (Consensus)

a.	New dom. solid waste LF or incinerator[1]	$20,000
b.	New industrial landfill:	1,000
c.	New transfer station -	
	>50,000 tons/yr	500
	10,000 - 50,000 tons/yr	200
	<10,000 tons/yr	100
d.	Letter authorization:	1,000

3. Monitoring well fees are eliminated. (Consensus)

4. ANNUAL SOLID WASTE PERMIT FEES are divided into two categories:
   a. site-based (consensus); and
   b. tonnage-based (majority support, but not consensus).

   (Annual permit fees for a site fall into one category or the other, not both.)

   a. "Site-based" disposal site permit fee:
      - Minimum fee for all sites $300
      (All active sites other than transfer stations and material recovery facilities pay either this fee or the tonnage-based fee, whichever is more.)
      - Transfer stations, material recovery:

>50,000 tons/yr	$1,000
10,000 - 50,000 tons/yr	500
<10,000 tons/yr	50
- Closed sites	1,000

      - OR -

   b. "Volume-based" disposal site permit fee:
      - Fee set at level sufficient to generate revenues authorized for recycling implementation fee in order to incorporate that fee into one "global" fee; will also cover DEQ's costs in overseeing monitoring wells.

      - All types of site pay per-ton fees at differing levels based on the solid waste "hierarchy:"
         . Domestic landfills, industrial facilities and incinerators pay same per-ton rate ($.21/ton).

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[1] Incinerators added by staff.

. Energy recovery facilities pay $.15/ton.
. Composting facilities pay lower per-ton rate ($.10/ton).

5. NEW "TONNAGE-BASED" ANNUAL PERMIT FEE (from SB 66):
- Fee based on tonnage received in previous calendar year. Amount of fee determined by revenue to be collected ($287,500 for 91-93 biennium) divided by tons of solid waste received (est. 3.35 million tons). Per-ton rate: $.09.

(Group did not discuss in detail; they felt that this fee was quite clearly defined by the statute.)

The Group also recommended (at its November meeting) that all landfills receiving over 50,000 tons of waste a year be required to bill on the basis of certified weight. The Department is considering including a requirement in rule that all domestic landfills serving a population of over 25,000 weigh incoming solid waste on certified scales, effective January 1, 1994.

IV. Rationale

The following is a summary of the Group's thinking on the main elements of the recommendation:

1. Retain application fee for new facilities, but drop all other permit processing fees. This greatly simplifies the fee structure. Existing permittees paying a tonnage-based fee will in effect "pay for" DEQ's costs in processing permit renewals and modifications. New permittees, however, are not yet paying tonnage-based fees, so they need to pay application fees to cover DEQ's costs.

2. Transfer stations receive preferential treatment in the fee schedule. Material recovery facilities were also included in this category, as they operate similarly to transfer stations. The Group agreed that it is good policy to encourage the establishment and operation of transfer stations. The fee structure does this. In addition, transfer stations require less technical review effort than landfills, so the fee schedule should reflect this.

3. High application fee ($20,000) for new domestic solid waste facilities, but low application fee ($1,000) for new industrial facilities. Any new domestic facilities are likely to be larger facilities, and to require a high level of review. DEQ anticipates that there will be very few of these. Any new industrial permit applications are likely to come from wood waste sites. These may not necessarily be new sites, but rather existing sites that DEQ determines may need permits for wood waste disposal. The site may have no choice but to obtain a permit. The application fee for such sites should not be set so high that it is prohibitive for these

operations. There was some discussion as to whether a two-tiered fee structure should be set for industrial sites, but the Group felt the advantage of simplicity (one fee for all) outweighed the advantage of setting a higher fee for larger sites.

4. Elimination of monitoring well fees. The Group felt it was important not to establish disincentives for monitoring wells in the fee structure. Monitoring wells are very important, and need to be encouraged. The Group felt DEQ's costs in overseeing wells should be covered by the annual solid waste permit fee.

5. Taking the solid waste hierarchy into account in the per-ton rate. There was some discussion on whether energy recovery facilities should have a lower per-ton rate than incinerators (since they are higher in the solid waste management hierarchy). It was pointed out that statute now prohibits straight incinerators from being built. There was also discussion that energy recovery facilities would be paying twice if they pay a per-ton disposal site permit fee on waste received, and then also have to pay a per-ton fee on ash disposal. Comment after the Work Group's meeting pointed out that about 72% of the in-coming waste volume is destroyed at the Brooks energy recovery facility. Part of what is left is recovered and recycled, leaving 25% ash to be landfilled (contributing to the tonnage on which the $.21/ton annual fee would be assessed). A $.15 per ton rate for waste-to-energy facilities is about equal to a $.21 per ton rate "at the gate" if ash were not subject to the rate. (Group consensus not reached. One member felt there were sufficient problems with energy recovery facilities such as ash disposal and creating a disincentive to recycling, that energy recovery facilities should be subject to the $.21 rate, as should the ash generated.) Since a number of the members felt the waste at energy recovery facilities should not be "double billed," the Department has used $.15 per ton as the proposed rate.

6. Using a per-ton base for the major portion of the permit fees. The Group acknowledged that using a per-ton basis would result in larger sites subsidizing DEQ costs to administer the solid waste program for smaller sites. There was general Group consensus that, to some extent, this was inevitable and sound public policy. Some smaller sites will cause problems disproportionate to their ability to pay for the attention that DEQ must devote to helping solve them. It is important to keep in mind that DEQ has a statewide solid waste program, and that the entire program must be paid for. It is impossible to do that by adopting a fee schedule that would amount to "hourly billing" by DEQ for time devoted to a particular site. The difference of opinion within the Group arose mainly over the extent of the subsidy. There was general agreement that DEQ's oversight costs do not increase in direct proportion to increased tonnage at a landfill. There was also general agreement that the need is to fund the Department's overall program, and many of the Department's costs in administering the program are not attributable to individual sites. Tonnage is not an unreasonable basis on which to determine permit fees.

A major point of disagreement was on whether out-of-state solid waste should be counted when determining the per-ton annual solid waste permit fee. Some Group members noted that the volume of out-of-state waste disposed of in Oregon is not predictable or stable; it will flow to the cheapest disposal option. Relying on out-of-state waste to partly fund a basic Department program decreases the stability of funding for that program, whereas the opposite is desirable. Furthermore, if out-of-state waste is diverted from Oregon, the per-ton rate would have to be increased for the remaining domestic waste (unless the Department's budget were proportionately decreased). Thus the continuity of program funding suffers, and permit fees are not predictable for permittees over time. Most Group members felt that although not desirable, it was inevitable that the per-ton rate would change over time. The Department must propose a budget level to the Legislature every two years, subject to public scrutiny; that level is unlikely to remain the same over time. Most Group members also felt it was appropriate to include all waste when calculating the permit fee, and deal with the effects of changes in tonnage when they occur.

Another argument against including out-of-state solid waste was that fees on out-of-state waste should only cover any incremental costs they create, rather than contributing to the costs of the state's base program regulating solid waste. Since these wastes are received by sites that are already permitted, there are no additional costs involved with permitting that are attributable to out-of-state waste. The majority of the Group, however, did not subscribe to the incremental cost argument. They felt that there are costs associated with the disposal of any waste in Oregon, regardless of its origin.

V. Next Steps

The Department is reviewing the Work Group's proposal. The Department is not yet comfortable with the revised processing fee schedule, especially for applications for new facilities and significant lateral expansions. DEQ will present a revised proposal for processing fees at the January 23 SWAC meeting. DEQ will take comments from the SWAC into consideration in preparing proposed rule changes to implement the solid waste fee structure change. The Department expects to hold hearings in March to accept public comment on the proposed rule, and expects to take a final rule to the Environmental Quality Commission for adoption at their April meeting.

Attachments:
- A - Summary, Recommended Solid Waste Permit Fee Schedule
- B - Spreadsheet: Fiscal Effects, Recommended Schedule
- C - Effects of Proposal on Representative Permittees
- D - Assumptions, Solid Waste Generation
- E - Derivation of Per-Ton Rate
- F - Solid Waste Permit Fee Work Group Membership

Attachment A

SUMMARY,
RECOMMENDED SOLID WASTE PERMIT FEE SCHEDULE
1/15/92

The Solid Waste Permit Fee Working Group met several times and in general supports the following proposal for revising annual permit compliance determination fees. DEQ solid waste staff have made a few refinements to the Work Group's proposal; DEQ's additions are shown in bold face.

I. Overall Structure

The current solid waste fee structure is composed of two major parts: 1) permit processing fees; and 2) annual permit compliance determination fees (including recycling implementation fees).

The proposal keeps these two parts, but greatly simplifies both, eliminating "range" categories in most cases for both parts. The second part would now be called an "annual solid waste permit fee." It would encompass the existing annual permit compliance determination fee, the annual recycling implementation fee, and would be in addition to the new "tonnage-based" permit fee required by 1991 Senate Bill 66 (of about $.09 per ton, based on tonnage received in the "previous calendar year").

A summary of the proposal follows.

II. Permit Processing Fees

Eliminated:

- Filing fee
- Permit renewal fee
- Permit modification fee
- Hazardous substance authorization fee (to be phased out after 7/1/94).

Fee structure:

- Application fee:

New facility[1]	$20,000
New industrial LF (on-site)	1,000
New transfer station/mat. recov. site:	
>50,000 tons/yr	500
10,000 - 50,000 tons/yr	200
<10,000 tons/yr	100
Letter authorization	1,000

[1] Including domestic solid waste landfill, incinerator/energy recovery, composting facility, and off-site industrial facility.

III. Annual Solid Waste Permit Fees

Eliminated:

- o Monitoring well fees
- o Separate recycling implementation fee

Fee structure: Divided into two categories, 1) site-based and 2) volume-based.

1. Site-based: A minimum fee is established for all active sites other than transfer stations. Sites (other than transfer stations and closed sites) pay either this fee or the volume-based fee, whichever is more.

o Minimum fee for all active sites	$300
o Transfer stations (incl. material recovery):	
>50,000 tons/yr	1,000
10,000 - 50,000 tons/yr	500
<10,000 tons/yr	50
o Closed sites	1,000

(DEQ is considering the following for closed sites: the average tonnage of solid waste received in the 3 most active years of site operation x $.025 per ton, with a minimum of $150 and a maximum of $2,500/year)

2. Volume-based: Fee is set at a level sufficient to generate revenues authorized by the Legislature for "solid waste permit fees" and for the recycling implementation fee. All types of site pay per-ton fee, but fee level varies based on the solid waste "hierarchy." The volume-based fee would depend on the amount of tons received. Fee would be billed once annually by the Department.

o Domestic landfills, industrial facilities (including sludge), demolition fills, and incinerators	$.21/ton
o Energy recovery facilities	.15/ton
o Composting	.10/ton

Determining accurate tonnage is essential. The Work Group recommended that DEQ require all solid waste sites receiving over 50,000 tons/year to have incoming waste weighed on certified scales. **DEQ is considering a requirement for any domestic solid waste site serving a population of 25,000 or more to weigh solid waste, effective January 1, 1994.** For industrial and sludge facilities, conversions (from cubic yards and gallons) will have to be made.

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ATTACHMENT H

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY INTEROFFICE MEMORANDUM

DATE: March 19, 1992

TO: Environmental Quality Commission

FROM: Deanna Mueller-Crispin, Hearings Officer

SUBJECT: Public Hearings: Proposed Rule Amendments to Implement Increases in Solid Waste Permit Fees; Portland, Oregon, 9:30 a.m., March 16, 1992 and Medford, Oregon, 2:30 p.m., March 18, 1992

On March 16 and March 18, 1992, public hearings were held regarding proposed rule changes to implement increases in solid waste permit fees required by 1991 Senate Bill 66 (SB 66) and in accordance with the budget authorized by the 1991 Legislature for the Department of Environmental Quality (DEQ). The March 16 hearing took place in the DEQ headquarters, Room 3A, 811 SW Sixth Avenue, Portland, Oregon. The March 18 hearing was at the Jackson County Courthouse Hearing Room in Medford, Oregon.

Portland Hearing: Two individuals attended the meeting, and one provided both oral and written testimony. The hearing was opened at 10:00 a.m. and closed at approximately 10:20 a.m.

A summary of the testimony follows:

Jeff Bickford of Marion County Solid Waste expressed Marion County's concern that under the proposed annual solid waste permit fee schedule, solid waste going to energy recovery facilities would be charged twice. The proposed rate is $.15 per ton for solid waste taken to energy recovery facilities, and $.21/ton for landfills. The solid waste received at the Marion County Brooks energy recovery facility would "count" in its annual total of solid waste for purposes of determining the annual permit fee. Ash remaining after incineration (about 26% by weight) is taken to a landfill for disposal, and would also "count" in the landfill's total solid waste, subject to the $.21/ton rate. As a result, solid waste disposed of at an energy recovery facility would pay more than if it were just landfilled. He commented that the DEQ proposal does not support the solid waste hierarchy, nor is it in line with the intent of SB 66.

To remedy this, Marion County proposed that ash from energy recovery facilities be excluded from the basis on which annual solid waste permit fees are calculated. Mr. Bickford gave two other alternatives: 1) Create a separate rate for ash (at $.14/ton or lower). 2) Reduce the per-ton rate for energy recovery facilities to $.13 per ton or lower, keeping ash at $.21/ton. The $.13/ton would break even with the $.21/ton rate for landfills.

Medford Hearing: Two individuals (a County Commissioner and a State Representative) and a member of the media attended. No oral or written testimony was provided. The hearing was officially opened at 2:50 p.m. and closed shortly thereafter.

pdxswhea

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY INTEROFFICE MEMORANDUM

DATE: March 24, 1992

TO: Environmental Quality Commission

FROM: Terence Hollins, for Charles Donaldson, Hearings Officer

SUBJECT: Public Hearing: Proposed Rule Amendments to Implement Increases in Solid Waste Permit Fees; Klamath Falls, Oregon, 9:30 a.m., March 16, 1992.

On March 16, 1992, a public hearing was held regarding proposed rule changes to implement increases in solid waste permit fees required by 1991 Senate Bill 66 (SB66) and in accordance with the budget authorized by the 1991 Legislature for the Department of Environmental Quality (DEQ). The hearing took place at the Oregon Institute of Technology College Union, 3201 Campus Drive, Klamath Falls, Oregon. The hearing opened at 9:30 a.m. and closed at approximately 10:30 a.m. An informal discussion lasting approximately one hour took place after the formal hearing proceedings.

Two DEQ Headquarters staff were present to conduct the hearings, and two DEQ Central Region staff assisted with answering questions from the public. Eight members of the public attended the hearings, four of whom provided testimony.

A summary of testimony follows:

Don Phelps of Klamath Falls expressed disappointment more Klamath Falls area public officials were not notified of the hearings. Mr. Phelps said he'd contacted several area public officials who had not been notified. DEQ staff presented Mr. Phelps with a copy of written comments already received from Keith Read, Solid Waste Division, Klamath County Public Works. Mr. Phelps mentioned recycling policies, in general, make it more expensive to throw things away. Mr. Phelps felt Klamath Falls' problems with recycling are different from Portland's, but recycling requirements suit Portland only. Mr. Phelps mentioned Portland may not have enough area for landfilling, but Klamath Falls would always have enough area. Mr. Phelps said more effort should be made to consult with non Portland locals, before imposing "Portland's" recycling requirements.

Irving H.Hart III, Klamath Falls City Councilman, agreed with Mr. Phelps on lack of notification. Mr. Hart said the citizens of Klamath Falls have done a good job meeting voluntary recycling standards, and noted a strong preference for voluntary over mandatory. He noted several areas in which Klamath Falls has voluntarily taken recycling initiatives such as "less trash along the roads" and "tightening up of loads going to the dump". He reiterated such initiatives should be voluntary.

Nancy Roeder expressed strong disapproval of transporting garbage down the Columbia Gorge. Ms. Roeder said she feels DEQ wants Oregon to become the dump for other States. She said she believes DEQ allows other states' waste into Oregon because of trucking interest money and a connection with the Mafia in eastern states. Ms. Roeder added that Oregon is subsidizing companies bringing hazardous waste into Oregon from 6 eastern states.

Dr. James Fenner said solid waste fees are too low and won't cover the cost of disposal longrun. He suggested higher fees be used to encourage markets for recycled products. Mr. Fenner suggested the bottle deposit should be increased, since its been twenty years, and that all fees should be tied to inflation.

Other issues informally discussed included how waste tonnage at landfills is to be determined, incineration, permitting of geothermal injection wells, Solid Waste Advisory Committee membership.

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY INTEROFFICE MEMORANDUM

DATE: March 24, 1992

TO: Environmental Quality Commission

FROM: Terence Hollins, for Charles Donaldson, Hearings Officer

SUBJECT: Public Hearing: Proposed Rule Amendments to Implement Increases in Solid Waste Permit Fees; Burns, Oregon, 9:30 a.m., March 17, 1992.

On March 17, 1992, a public hearing was held regarding proposed rule changes to implement increases in solid waste permit fees required by 1991 Senate Bill 66 (SB66) and in accordance with the budget authorized by the 1991 Legislature for the Department of Environmental Quality (DEQ). The hearing took place at the Harney County Chamber of Commerce, Museum Club Room, 18 West "D" Street, Burns, Oregon. The hearing opened at 9:30 a.m. and closed at approximately 10:30 a.m. An informal discussion lasting approximately one hour took place after the formal hearing proceedings.

Two DEQ Headquarters staff were present to conduct the hearings, and two DEQ Central Region staff assisted with answering questions from the public. Seven members of the public attended the hearings, one of whom provided testimony.

A summary of testimony follows:

Donald Welch of the City of Prairie City expressed discontent over small landfills having to pay at least $300.00 in disposal fees. He said it seems DEQ wants $300.00 regardless of the amount of waste disposed of in a landfill. The $300.00, in addition to other fees, is an unfair burden to small landfills, and will "hurt" or "break" these landfills. Mr. Welch felt it was extremely important DEQ address this issue.

An informal discussion followed. Issues discussed included: Subtitle D Regulations and their impact on small landfills, fears over the possible discontinuance of the solid waste planning grant program, the burden to small landfills left with no options for disposal of batteries, tires, car bodies, etc., but prohibited from landfilling these items by SB66.

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY INTEROFFICE MEMORANDUM

DATE: March 24, 1992

TO: Environmental Quality Commission

FROM: Terence Hollins, for Charles Donaldson, Hearings Officer

SUBJECT: Public Hearing: Proposed Rule Amendments to Implement Increases in Solid Waste Permit Fees; LaGrande, Oregon, 9:30 a.m., March 18, 1992.

On March 18, 1992, a public hearing was held regarding proposed rule changes to implement increases in solid waste permit fees required by 1991 Senate Bill 66 (SB66) and in accordance with the budget authorized by the 1991 Legislature for the Department of Environmental Quality (DEQ). The hearing took place at LaGrande City Hall Council Chambers, 1000 Adams Avenue, LaGrande, Oregon. The hearing opened at 9:30 a.m. and closed at approximately 10:00 a.m. An informal discussion lasting approximately two hours took place after the formal hearing proceedings.

Two DEQ Headquarters staff were present to conduct the hearings, and one DEQ Eastern Region staff assisted with answering questions from the public. Six members of the public attended the hearings. No one provided testimony.

Informal discussion was wide ranging and lengthy. A prominent issue was the cost of waste disposal to small communities without sufficient resources of meet the requirements of State and federal laws and regulations. Feelings expressed were very strong that waste disposal regulations and costs burden small communities beyond what they can reasonably be expected to do. Strong resentment was expressed that DEQ does not provide funds to implement regulations it mandates. It was felt citizens of small communities will be forced to "dump" garbage illegally because they cannot pay higher disposal costs.

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY **INTEROFFICE MEMORANDUM**

DATE: April 3, 1992

TO: Environmental Quality Commission

FROM: Deanna Mueller-Crispin

SUBJECT: Written Testimony

Written testimony was received by the Department in response to a request for public comment on proposed revisions to solid waste rules to implement increases in solid waste permit fees. The written testimony consisted of letters from Doug Coenen, General Manager of Oregon Waste Systems, Inc.; Dick Johnson, Management Analyst and Waste Shed Manager of the Deschutes County Department of Public Works; Keith Read, Solid Waste Division Supervisor of the Klamath County Public Works Department; James Sears, Director of Solid Waste Management of Marion County; Douglas Morrison, Northwest Pulp and Paper Association; and Donald Welch, Public Works Director, City of Prairie City.

The following summarizes the written testimony.

Doug Coenen, Oregon Waste Systems, Inc: Mr. Coenen submitted two separate written comments. The first expressed concern that the solid waste permit fee system developed by the Solid Waste Permit Fee Work Group and proposed by the Department of Environmental Quality (DEQ) is based on an unfair distribution of costs. It consists of a "flat" ($.21) per-ton fee which fails to take into account that DEQ's oversight costs do not increase proportionately with the amount of waste received at the facility. Mr. Coenen states that this would result in OWS (the largest landfill in the state) having to unfairly subsidize smaller sites. He proposes instead that a "sliding" per-ton rate be used to assess the annual solid waste permit fee, with several "fee tiers." The rate used in each subsequent tier would decrease with increasing tonnage. He submitted a hypothetical example where a landfill would pay $.31/ton for the first "tier" of 1,000 tons received; $.265/ton for the next 9,000 tons, etc; decreasing to $.13/ton for all tonnage over 500,000 tons. Mr. Coenen believes that a sliding fee would be much more equitable in that it would better recognize the actual distribution of costs incurred by DEQ in administering the solid waste program. He notes that his

proposal would still result in some subsidy by OWS to smaller sites.

Mr. Coenen's second letter reiterated OWS's support for the "sliding fee" schedule, and mentioned that a "capped" fee proposal is now being considered for the Department's Hazardous Waste Generator Fee rule. He stated that although OWS supports a "sliding fee" for the solid waste fee schedule (without an absolute cap), DEQ's approach to the hazardous waste fee lends credence to OWS's recommendation. The letter also suggested a number of technical changes to the rule (for example, clarifying the payment deadlines, and applicability of the definition of "domestic solid waste"). He recommended conversion factors (cubic yards to tons) for three additional categories of solid waste.

Mr. Coenen suggested that the conversion factors be used by municipal landfills which do not have scales when they accept those types of waste. He recommended that industrial landfills receiving over 50,000 tons of solid waste a year be required to base tonnages on certified scales. He suggested that the permit processing fee for "new sites" be expanded to include existing sites which are expanding horizontally or vertically.

Keith Read, Klamath County Public Works: Mr. Read notes that the proposed fee increase would result in over a 100% increase over the current fee level. The County will not receive commensurate value from DEQ for this increase, which represents over 12 percent of the County solid waste budget. Mr. Read also objects to the requirement that landfills receiving over 50,000 tons of waste annually base their tonnage reporting on certified scale weight, beginning January 1, 1994. He states that this would add unjustified costs to the County's program. He also questions whether DEQ has the authority to impose such a requirement.

Dick Johnson, Deschutes County Public Works: Mr.Johnson expresses Deschutes County's strong opposition to the proposed fee increase. He believes that the $.85 per-ton solid waste disposal fee is more than sufficient to cover the services DEQ now provides the County. He states that the proposed $.10/ton rate for composting facilities is "counterproductive," since composting should be encouraged as a way to reduce the volume of waste materials going into the ground. Mr. Johnson suggests that DEQ's best course of action would be to keep solid waste fees at their current level (to discourage illegal dumping), and help expand markets for recyclables and compost.

James Sears, Marion County Solid Waste Management: Mr. Sears recommends that ash from energy recovery facilities be exempt from the per-ton rate of $.21 in computing the annual solid waste permit fee. Otherwise, the overall rate for solid waste going to energy recovery facilities ($.15/ton plus $.21 per ton for ash disposal) will be greater than the rate for solid waste being landfilled (flat $.21/ton). This results in charging twice for such waste. Moreover, it is not consistent with the state's solid waste management hierarchy.

Douglas Morrison, Northwest Pulp and Paper Association: Mr. Morrison questioned DEQ's authority to adopt a tonnage-based fee in place of the present annual compliance determination fee. He stated that DEQ's costs of administering the program at a solid waste disposal site do not rise in direct proportion to the amount of waste received at the site. He recommended that the proposed tonnage fee of $.21 apply only to sites receiving domestic solid waste, as industrial sites cannot readily reduce the amount of waste they generate. The present annual permit fee structure for industrial sites should be kept. He also stated that the $.09 tonnage fee (created by SB 66) should apply only to domestic waste.

Donald Welch, City of Prairie City: Mr. Welch wrote that the proposed permit fees are inequitable. He especially objected to the proposed minimum of $300 for landfills required to pay $.21/ton as their annual permit fee. Based on tonnage, a landfill would have to receive about 1430 tons a year to reach a $300 fee. However, there are about 50 small landfills which receive less tonnage than that annually. These small facilities would pay a proportionately higher per-ton rate than the $.21 paid by the 45 or so larger landfills. He also mentioned the problems that rural and eastern regions of the State have in complying with the recycling requirements of SB 66. The fee increases will further deplete the revenue needed to get recyclables to the market.

Copies of all written testimony are attached.

Attachments
writtest.fee

Oregon Waste Systems, Inc.
Columbia Ridge Landfill & Recycling Center
Star Rt. Box 6
Arlington, Oregon 97812
503/454-2030 • FAX: 503/454-2133

A Waste Management Company

February 6, 1992

Oregon Department of Environmental Quality
Solid Waste, Permit and Compliance Section
811 SW Sixth Avenue
Portland OR 97204-1390

Attention: Mr. Chuck Donaldson

Subject: Solid Waste Permit Fee Schedule

Dear Chuck:

Thank you for the efforts of you and your staff on involving the SWAC and its work group on the fee schedule issue.

Oregon Waste Systems, Inc. fully supports the effort to ensure sufficient funding for the solid waste permitting and compliance function. This issue is so important to us that we are very willing to support and participate in substantially increased fees that are levied on an equitable basis. We also realize and accept the notion that larger facilities must subsidize the extremely small, rural, and publically-owned facilities that simply cannot afford substantial permit fees while they phase out their operations in accordance with new Subtitle D requirements.

The challenge facing the Department is developing a reasonably equitable fee schedule. The SWAC Work Group addressed many key issues in an appropriate way. However, we must express our deep concern over the unfair distribution of the fee system they developed. This system, which provides for a "flat" per-ton fee,

fails to recognize the fact (recognized by the Work Group) that the Department's oversight costs and resource requirements for any given facility do not increase proportionately with the amount of waste received at that facility. The flat per-ton fee would result in OWS having to subsidize moderately-sized and other large sites, many of whom we compete with in the market place. This is clearly evidenced in Attachment A and Table 2 of your January 22, 1992 memorandum, which shows that OWS would be required to pay about 43% of the total tonnage-based compliance fees received from all domestic waste landfills in the state.

We propose a "sliding" per-ton fee that would better recognize the actual distribution of costs experienced by the Department. A hypothetical example is attached. (We cannot provide a "real-word" example because we do not have access to detailed facility data; if ODEQ could provide us with the number, type, and tonnages for each permitted facility, we would be pleased to prepare a detailed proposal). This sort of fee structure is not only very simple, but is much more equitable than the structure currently being addressed. It also provides for the "rural-urban subsidy".

Many, if not all, of the moderately-sized and larger landfill sites in Oregon will require vast attention from ODEQ as they upgrade their plans and facilities to meet the new Subtitle D requirements. It is not only fair, but also prudent public policy, that these sites bear the related financial burden of regulatory oversight, particularly in consideration of the fact that they have (or should have) the wherewithal to meet this burden.

We realize that there will never be a perfectly equitable fee schedule, and accept the fact that OWS may have to pay somewhat more than its fair share to support the critical function of permitting and compliance oversight. Although merely an example, the attached concept would still require the one extremely large landfill to fund about 28% of DEQ's total state-wide permit and compliance costs for all landfills (or about 33% of fees collected from domestic waste landfills); it is unfathomable that the DEQ resources dedicated to that site would ever approach this percentage. We are nevertheless willing to consider accepting some level of inequity to ensure that the Department's critical function is properly funded.

We supported the Department's efforts in the 1991 Legislative

session to acquire authority for fee-based funding with the understanding that the Department would work towards equitable approach. We believe that a "sliding" fee schedule is most equitable and appeal to the Department's sense of fairness in considering this sort of approach while drafting the proposed rules.

Sincerely,

OREGON WASTE SYSTEMS, INC.

Doug Coenen
General Manager

DC\Odeq1-30.blw

cc: Doris Bjorn, OWS
Art Dudzinski, WMNA
Bob Danko, ODEQ

EXAMPLE
"SLIDING" FEE SCHEDULE

Basic Concept: There are 5 fee tiers based on tonnage received. Each domestic, industrial, and sludge landfill site (except for "very small" domestic sites benefitting from the rural/urban subsidy) pays the same per ton fee as other sites for wastes received within each tier. Fees per ton are reduced for higher tiers to recognize the reduction in DEQ resource requirements on a per-ton basis for higher volume sites.

Assumptions:

1. DEQ revenue required from landfills is about $600,000.
2. Total landfilled solid waste is about 3,150,000 tons annually.
3. There are 194 landfills, 128 of which are "very small" and accept less than 1,000 tons per year. The remaining 66 landfills receive tonnages according to the distribution shown below.

Annual Tonnage Tier	Average Tonnage Per Site	Number of Sites	Total Tonnage (000)	D E Q REVENUE (000) Tier I $0.31 per ton	Tier II $0.265 per ton	Tier III $0.22 per ton	Tier IV $0.175 per ton	Tier V $0.13 per ton	Total DEQ Revenue	Cost Per Site	% DEQ Revenue Per Site
I. 0-1000	200	128	26	0	0	0	0	0	0	0	0
II. 1000-10,000	3,000	42	126	13.0	22.3	0	0	0	$35.3	$840	0.1
III. 10,000-100,000	20,000	15	300	4.7	35.8	33.0	0	0	$73.5	$4900	0.8
IV. 100,000-500,000	200,000	8	1600	2.5	19.1	158.4	140.0	0	$320.0	$40,000	6.7
V. >500,000	1,100,000	1	1100	0.3	2.4	19.8	70.0	78.0	$170.5	$170,500	28.4
		194	3,152	20.5	79.6	211.2	210.0	78.0	$599,300		

NOTES:

1. Assume that there are 24 industrial and sludge landfills, 7 in Tier I, 8 in Tier II, 8 in Tier III and 1 in Tier IV. DEQ revenues from these sites would total about $81,900, leaving $517,400 to be generated from domestic waste sites.
2. This schedule is only an example to demonstrate the basic concept of a sliding fee schedule. It is not intended to be a specific proposal.

Oregon Waste Systems, Inc.
Columbia Ridge Landfill & Recycling Center
Star Rt. Box 6
Arlington, Oregon 97812
503/454-2030 • FAX: 503/454-2133

A Waste Management Company

March 18, 1992

Oregon Department of Environmental Quality
Solid Waste, Permit and Compliance Section
811 SW Sixth Avenue
Portland OR 97204-1390

Attention: Deanna Mueller-Crispin

Subject: Proposed Solid Waste Permit Fees

Dear Deanna:

Thank you for the opportunity to present the attached comments on the proposed Solid Waste Permit Fee rules. We urge the Department to carefully evaluate these comments and to integrate these notions into the final version of the rules to be presented for adoption by the Environmental Quality Commission. We have endeavored to ensure that our comments represent changes that will enhance the fairness and clarity of the new permit fee program.

We would be pleased to provide more detail or information regarding our comments. Please contact me at 454-2030 if you have any questions or desire further assistance.

Sincerely,

OREGON WASTE SYSTEMS, INC.

Doug Coenen
General Manager

DC/ch/odeq3-16.ch

cc: Art Dudzinski, WMNA
Bob Danko, DEQ
Chuck Donaldson, DEQ

COMMENTS

Proposed Rule: Solid Waste Permit Fees: Proposed Rule Revision to Implement Fee Increases (OAR 340-61-115 and 120)

Comments By: Oregon Waste Systems, Inc. (OWS)

1. Fee Structure: OWS has previously submitted a recommendation for a "sliding" per-ton permit fee in our letter to Chuck Donaldson of DEQ dated February 24, 1992, and requests that this letter be reviewed and placed in the record as part of the subject rulemaking action. OWS feels strongly that this approach would be much more equitable and fair than the proposed "straight-line" fee of $0.21, as discussed in detail in that letter.

   The notion of a capped user fee has recently been embraced by DEQ in its efforts to promulgate the Hazardous Waste Generator Fee Rule. In that proposed rule, a $15,000 maximum fee cap was placed on top of a variable base per-ton fee. Although OWS is proposing only a sliding scale, not an absolute cap, the approach advocated by DEQ in this related action lends credence to our recommendation.

2. Waste Exemption: We recommend that proposed section 340-61-115(2) be deleted. This provision, which exempts certain waste types from definition of domestic solid waste, would appear to exempt these waste types from the tonnage computation of section (4)(a) and consequently the payment of permit fees and tonnage-based fees. It does not seem that this is DEQ's intention; if it is, OWS strongly disagrees in that it would unfairly shift the burden of costs for regulating the disposal of these waste types to the handlers of other solid wastes.

3. Payment Deadline: Proposed section 340-61-115(3) seems to imply that payment would be due by July 1 for the year before that date. We propose that some reasonable amount of time after the end of the fiscal year be allowed for completing tonnage computations and providing payment to DEQ. See related comment #8 below.

4. Tonnage Determination: Regarding proposed section 340-61-115(4):

Permit Fee Comments (cont.)

a. As drafted, the conversions for uncompacted and compacted wastes would appear to apply only to small sites but not to sites receiving 50,000 or more tons per year prior to January 1, 1994. Therefore, we recommend deleting the new phrase "receiving less than 50,000 tons of solid waste annually" from the sixth line of this section. This phrase appears unnecessary.

b. We believe the blanket conversions of 300 and 700 pounds per cubic yard should apply to municipal solid waste only. Therefore, we propose that:

- the phrase "municipal solid waste" be substituted for "domestic solid waste disposal sites" on the fifth line.

- the following sentence be added after the phrase "more accurate estimate" on the eleventh line: "For other types of wastes received at domestic waste disposal sites and where certified scales are not available, the conversions and provisions in section (5) shall be used."

These changes would allow for a much improved estimate of tonnages, because industrial wastes in an uncompacted (as is normal) form usually weigh far more than 300 pounds per cubic yard.

c. We propose the following industrial waste conversions be added to subsection (b):

- Contaminated soils: 2,400 pounds per cubic yard.

- Construction, demolition and landclearing wastes: 1,000 pounds per cubic yard.

- Asbestos: 500 pounds per cubic yard.

Furthermore, we propose that the word "wet" be deleted before "sludge" in proposed subsection (b)(C) to avoid confusion, and that "grits, screenings, and other wet wastes" be added after "septage".

d. We believe that a tonnage-based system will be most effective if scales are encouraged and used. Therefore, we propose the following additional changes to subsection (b):

Permit Fee Comments (cont.)

- Add the following sentence after the heading "Industrial sites" on the first line: "Annual tonnage of waste received at industrial sites receiving 50,000 or more tons annually shall be based on weight from certified scales after January 1, 1994".

- Add the following phrase after "Department" on the last lines of subsections (b)(F) and (b)(G): "provided, however, that the Department will consider the feasibility of the permittee's installation or use of a certified scale prior to considering such a request for approval".

5. Letter Authorization: We suggest that the term "letter authorization" be defined in 340-61-120(1) as a one-time only or emergency authorization.

6. Tonnage-based annual permit fee: In section 340-61-120(4) we propose that the $0.09 per ton fee be referred to as the "tonnage-based flat fee" or the "base solid waste fee" to avoid confusion with the similarly-worded annual solid waste permit fee.

7. Expansions: ORS 459.235 directs the Department to establish a permit fee schedule "based on the anticipated cost of filing and investigating the application, of issuing or denying the requested permit and of an inspection program to determine compliance." There is no question that proposals to expand existing landfills, either horizontally or vertically, currently represent and will continue to represent a substantial component of DEQ's workload in investigating, issuing or denying applications or requested permits. We believe it not only equitable but also statutorily mandated that this be reflected in the new fee program. Therefore, we propose that 340-61-120(1)(a) read as follows: "(a) A "new facility" means a facility or disposal capacity at a location or in a space not previously used or permitted by the Department, and includes horizontal and/or vertical expansions to previously-permitted facilities."

8. Payment Schedule and Logistics: There appears to be at least four different sections of the proposed rules that address when and how payments should be made for the various fees, and some terms appear to be internally inconsistent. Furthermore, the payment terms for some fees are not addressed. We recommend that the payment terms for the various fees be addressed in new section (7) within 340-61-115. If statutorily allowed, we suggest that all fees based on tons received be billed and/or paid simultaneously.

Klamath County ~ Public Works Department

VETERANS MEMORIAL BUILDING – 334 MAIN STREET – 503-883-4696 – KLAMATH FALLS, OREGON 97601
ROAD DEPARTMENT – PARK DIVISION – SOLID WASTE DIVISION – WEED CONTROL DIVISION – FAX 503-882-3046

March 9, 1992

Department of Environmental Quality
Solid Waste Permits and Compliance Section
811 S.W. Sixth Avenue
Portland, Oregon 97204

Dear Sirs:

This letter will serve as written comment regarding your proposed increases in solid waste permit fees.

Your proposed increases will amount to a total of $84,000.00+ burden to be borne by the local rate payer. This is compared to the current amount of slightly less than $40,000.00 annual fees paid to the Dept. of Environmental Quality by Klamath County Solid Waste Division. This is an increase of over 100% for services of which we are not receiving value.

In my opinion, this increase is simply too much. How can Klamath County justify, to the public, that over 12% of our Solid Waste Division budget goes to the State of Oregon for permit fees? We have worked hard over the years to establish and keep our solid waste program in compliance with Federal and State rules and still keep our accessibility to the public and our rates within reason. This type of excessive rake off, in the form of fees, erodes a solid waste program designed to serve the public. It is my opinion that these fees will not be returned to the public in the form of service from the State.

Regarding the Certified Scale Requirements. This requirement would add costs to our Klamath Falls Landfill operation which are not justified. It appears that this requirement is proposed only for the gratification of the Dept. of Environmental Quality tonnage based fee program; sort of an aid to tax collecting.

In addition, I do not believe the Dept. of Environmental Quality has the authority to impose such a requirement upon landfill operators. Such authority could be stretched into other requirements for specialized high cost equipment for landfilling, or composting, when current equipment and methods yield adequate results.

Yours truly,

Keith Read
Solid Waste Division Supervisor

KR/sp

DESCHUTES COUNTY

Department of
Public Works

61150 S.E. 27th St. / Bend, OR 97702 / (503) 388-6581
FAX (503) 388-2719

March 4, 1992

Department of Environmental Quality
Solid Waste Permits and Compliance Section
811 SW 6th Avenue
Portland, OR 97204

Re: Proposed increases in solid waste permit fees

Deschutes County is strongly opposed to the proposed increase in the annual solid waste fee to begin in Fiscal Year 1993. We are still recovering from the shock of the quarterly tonnage fees which started out as a 50 cent-per-ton surcharge on July 1, 1990. The quarterly tonnage fee is now 85 cents a ton and will increase to one dollar per ton on July 1 of this year. Deschutes County will be paying an estimated $60,000 to $70,000 in quarterly tonnage fees to the DEQ in the 1992-93 Fiscal Year. These tonnage fees are more than sufficient to cover the services that we receive from your department.

The annual solid waste permit fees and solid waste permit processing fees should be kept at their current nominal rates. Better yet, these charges should be taken out of the quarterly tonnage fees that you charge. Why create more paper work for your department and local government?

The proposed $.10 per ton or minimum of $300 per year, whichever is more, fee for composting facilities is counterproductive. Isn't the whole purpose of composting and recycling to reduce the volume of material going into the ground and to protect the environment and better use valuable resources? Why penalize local composting programs that we are already having to subsidize at the local level?

The bottom line is that DEQ's increased charges are having to be passed on to the public in the form of higher tipping and recycling fees. We are getting the heat from the public and the Forest Service, BLM, and private rural land owners are getting additional illegal dumping of garbage on their lands.

The best thing the DEQ could do for local governments and the citizens of Oregon is to keep fees at their present rates and help us market the rapidly growing volumes of recyclables and compost material we're pulling out of the waste stream.

Deschutes County hopes to have a representative at the March 16, 1992 hearing at Klamath Falls on the proposed annual solid waste permit fee increase. We trust that DEQ will listen and respond to the concerns raised by local governments. We've nearly doubled our tipping this past year, largely as a result of increasing State fees and regulations. It is time for the State to look at the negative impact that changing regulations and fees are having on the solid waste management program in the state.

Sincerely,

Dick Johnson

Dick Johnson, Management Analyst and Waste Shed Manager

c Keith Reed, Klamath County
Ken Sandusky, Lane County
Don Bramhall, Bend DEQ office

Marion County
OREGON
DEPARTMENT OF
SOLID WASTE MANAGEMENT

DIRECTOR
James V. Sears

(503) 588-5169

BOARD OF COMMISSIONERS
Randall Franke
Gary Heer
Mary Pearmine

ADMINISTRATIVE OFFICER
Ken Roudybush

March 13, 1992

Department of Environmental Quality
Solid Waste Permits and Compliance Section
811 SW Sixth Avenue
Portland, Oregon 97204

Re: Proposed Solid Waste Permit Fees

The Marion County Department of Solid Waste Management has reviewed DEQ's proposed solid waste permit fee schedule, and have the following comments and concerns.

It appears that municipalities which dispose of their waste through a waste-to-energy facility (WTEF) are being penalized, primarily due to having to pay a fee ($0.15/ton) for the material at the WTEF, and then having to pay a fee to landfill the ash (@ $0.21/ton) in an ash monofill. This means that Counties such as ours would be paying fees twice for the same garbage.

Based upon calculations made by this department using fiscal year 1990-1991 tonnage values at our facilities, our county would have ended up paying approximately 6.12% more in fees for energy recovery and ash filling than if all of this refuse had been landfilled directly without incineration. This is definitely not in line with the state's hierarchy for waste disposal options as outlined in Senate Bill 66.

In order to make energy recovery permit fees in line with the above mentioned state disposal hierarchy, and in order to not charge twice for the same refuse, it is the opinion of this department that DEQ should revise the rate schedule to exclude ash disposal from permit fees.

Sincerely,

James V. Sears, Director
Solid Waste Management

JAB
\wp\permfee1.deq

Capitol Center • 388 State Street • Suite 735 • Salem, Oregon 97301-3670

COMMENTS OF THE NORTHWEST PULP AND PAPER ASSOCIATION

DOUGLAS S. MORRISON

MARCH 20, 1992

Proposed DEQ Rule Revisions to Implement Solid Waste Fee Increases (OAR 340-61)

1. We question DEQ's statutory authority to adopt a tonnage-based fee in place of the present annual compliance determination fee. For facilities such as woodwaste landfills, tonnage is not a reasonable indicator of the level of effort required to inspect and determine compliance. We believe that it is possible for DEQ to assess a fee that is directly attributable and billable to a specific facility on a fee-for-service basis.

   For example, a state-of-the-art woodwaste landfill, if doubled in size, would result in only minimal additional efforts for inspection and compliance determination, and there would not be additional site visits nor an increase in the number of monitoring reports submitted.

   The tonnage fee of $0.21 proposed in 340-61-120(3)(a) should not apply to landfills except those receiving domestic waste. Instead, DEQ should cover their estimated costs through extension of the present Industrial Waste facility annual compliance determination fees.

   There is no policy reason for extending the tonnage fee to industrial sites because industrial facilities generally cannot reduce their production of solid wastes. The costs of reduction are very often much higher than the incentive provided by any reasonable tonnage fee, or the wastes produced are a function of production. This policy applies only to domestic wastes, as was made clear in SB 66.

2. The tonnage fee of $0.09 proposed on 340-61-120(4) applies only to domestic waste. SB 66-13 (ORS 459.294) clearly provides only this limited authority.

Thank you for your consideration.

City of Prairie City

133 Bridge Street - P.O. Box 577
Prairie City, Oregon 97869
Phone (503) 820-3605

March 18, 1992

Charles Donaldson
Department of Environmental Quality
Solid Waste Permits and Compliance Section
811 SW 6th Avenue
Portland, Oregon 97204

Dear Mr. Donaldson,

It is the position of the City of Prairie City that the proposed Solid Waste Permit Fees are inequitable. The establishment of the $.21 per ton permit fee for land fills appears to spread the costs equally among permittees throughout the state, but on closer examination we see that a minimum permit fee of $300.00 is also included in the package. To meet this minimum fee if based on tonnage, as we are being told that this permit fee is, a landfill would have to receive 1430 tons per year. According to D.E.Q. staff, there are about 50 (maybe more) small landfills throughout the state and nearly all of these receive less than 1000 tons per year. There are less than 45 (closures continue to shrink this number) landfills that will actually be paying the "Annual Solid Waste Permit Fee" based on tonnage received. It is easy to see that the smaller landfills are going to pay substantially more proportionately than the larger facilities. This unfairly places the burden on those less likely to be able to afford it.

The $.85 per ton "Solid Waste Disposal Fee" imposed by SB66 saddles Rural Oregon with another mandatory state fee and little chance, because of the competition, of seeing any of the benefits this fee is designed to give. Rural Oregon and Eastern Oregon in particular, are faced with an insurmountable hurdle when forced to comply with SB66. The costs to deal with this bill, in regards to recycling, are astronomical and yet we face now another mandatory fee which will further deplete the revenue that is needed to get recyclables to the markets.

The "Tonnage Based Permit Fee" of $.09 per ton also mandated by SB66 could, if administered with Rural Oregon in mind, lead to better understanding of the problems of solid waste management and help bring change in the attitudes of some Rural Oregonians.

In closing we ask only that you stop and take a good look at how these increased fees are going to effect Rural Oregon and Eastern Oregon in particular. We don't want to see garbage dumped along country roads or in the forests, but if permit fees continue to increase and we are forced to pass these costs on to the users while at the same time limiting the materials they may dispose of in landfills, illicit dumping will most certainly increase.

Sincerely,

Donald R. Welch

Donald Welch

Public Works Director
Prairie City, Oregon

ATTACHMENT I

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY **INTEROFFICE MEMORANDUM**

DATE: April 3, 1992

TO: Environmental Quality Commission

FROM: Deanna Mueller-Crispin

SUBJECT: Response to Public Comments

Both oral and written comments were received by the Department in response to a request for public comment on proposed revisions to solid waste rules to implement increases in solid waste permit fees.

The Department makes the following responses to the public comments.

Comment 1: Ash/Energy Recovery Facilities

Ash from the Marion County energy recovery facility should be exempt from calculation of the annual solid waste permit fee. Otherwise, solid waste going to the facility is charged twice, resulting in a higher "charge" than if the waste were simply landfilled (when the additional $.09 per-ton annual tonnage-based permit fee is taken into account). An alternative would be to reduce the proposed $.15 per-ton rate for energy recovery facilities to $.12 or $.13 per ton. Another alternative would be to create a rate of less than $.21 per ton for ash disposal.

Response: The Department did not intend for waste going to energy recovery facilities to be charged more than waste received at landfills. The Department's recommended solution is to reduce the per-ton rate for energy recovery facilities to $.13 per ton. Based on the information received from Marion County (178,000 tons of solid waste received at the Brooks energy recovery facility last year, and 46,500 tons of ash landfilled), a $.13/ton rate would result in an overall annual solid waste fee cost of $290 less than if the waste were landfilled. This gives a slight advantage to energy recovery over landfilling.

Comment 2: $300 Minimum Fee Inequitable

The annual solid waste permit fee (with the proposed minimum of $300) is not the only fee small sites would have to pay. They would also be subject to the $.09/ton ("tonnage-based annual permit fee") and the $.85 per ton solid waste disposal fee. Calculated only on tonnage received, the total of the three fee would amount to less than $300 for the smallest sites. The proposal would make them responsible for paying the $300 and then paying the other two fees in addition. Moreover, based on tonnage, a landfill would have to receive about 1430 tons a year to reach the $300 fee. The 50 small landfills which receive less than that annually would pay a proportionately higher per-ton rate than the $.21/ton paid by larger landfills. This is not equitable, and would cause a severe hardship.

Response: As stated above, the Department and the SWAC believe that the proposed fee structure is the most equitable way of allocating the approved costs of the program. Within that framework, both the Solid Waste Permit Fee Work Group and the SWAC supported having a minimum annual permit fee of $300 to cover the Department's costs of at least one site visit per year. This proposal was in the draft rule put forward for public comment.

The Department realizes that the originally proposed minimum $300 fee for all permittees regardless of the amount of solid waste received may cause a hardship on very small sites. This fee schedule would result in users of small sites paying considerably more per ton than users of sites receiving over 1,400 tons of solid waste. (See Addendum A) The Department concurs with the comment that the small sites should not have such a heavy per-capita fee burden. Therefore, the Department is proposing to reduce the proposed the "minimum" per-ton annual solid waste permit fee to $200.

Comment 3: Tonnage-based Fee Shouldn't Apply to Industrial Sites

DEQ may not have statutory authority to adopt a tonnage-based annual solid waste permit fee. For some facilities such as a state-of-the-art woodwaste

landfill, tonnage is not a reasonable indicator of DEQ's costs of determining compliance. Moreover, industrial sites generally can't reduce their production of wastes. This was recognized in Senate Bill 66, which applies waste reduction policies only to domestic wastes. The per-ton fee should apply only to landfills receiving domestic wastes; the present fee schedule should be extended for industrial sites.

Response: It is accurate that the Department's oversight and compliance costs do not increase in direct proportion to increased tonnage received at a solid waste disposal site. This is true for domestic waste sites as well as industrial. However, it is not possible to develop a solid waste fee schedule on a strictly "fee for service" basis. This was recognized by the Work Group in its examination of the proposed fee schedule (see discussion in Comment 5 below). The Attorney General's Office has said that tonnage received is not an unreasonable basis for the fee schedule.

Although the waste reduction goals established in SB 66 apply only to domestic solid waste, the state policy for solid waste management (to encourage waste reduction, recycling, etc. in preference to landfilling) applies to all waste, including industrial. Industrial sites may have limited ability to reduce their production of solid waste, but they often have considerable opportunity to reduce the amount of wastes landfilled. This may be particularly true of woodwaste. The Department continues to believe that it is appropriate to base the annual solid waste disposal fee on tonnage received.

Comment 4: The $.09 Per Ton Fee Should Not Apply to Industrial Sites

The tonnage-based fee proposed in OAR 340-61-120(4) applies only to domestic waste. SB 66 (ORS 459.294, renumbered ORS 459A.110) clearly provides only this limited authority.

Response: The comment refers to the "tonnage-based annual permit fee" as proposed in OAR 340-61-120(4) at $.09 per ton, to be assessed on solid waste received in the previous calendar year. This fee was not created

by ORS 459.294 (renumbered ORS 459A.110). ORS 459A.110 established a per-ton solid waste disposal fee on domestic solid waste. That fee was established by statute and rule at $.85 per ton. As the comment says, the $.85 per ton solid waste disposal fee only applies to domestic solid waste and solid waste generated out-of-state.

The "tonnage-based annual fee" (or SB 66 annual fee) was established by ORS 459.235(3), which directs the Commission to establish "a schedule of annual permit fees" which are to "be assessed annually and...be based on the amount of solid waste received at the disposal site in the previous calendar year." The statute does not specify that this fee apply only to domestic solid waste. However, it was conceived by the Legislature's Joint Ways and Means Committee as a "replacement" for part of the proposed increase in the per-ton solid waste disposal fee on domestic solid waste to fund an enhanced program to upgrade solid waste landfills. The Department believes that solid waste received at off-site industrial facilities should be subject to the tonnage-based annual fee, since that waste could alternatively be disposed of at municipal solid waste sites. But it is reasonable for solid waste disposed of at captive industrial facilities to be exempt from the fee. The Department is accepting the comment with that modification.

Comment 5: Fee Schedule Too High

The proposed fee schedule is too high; local governments are not receiving commensurate services from the Department for the fee increases.

Response: The Department is basing the proposed fee increases on its Legislatively Approved Budget for the biennium. A specific amount of revenue from permit fees (including the existing permit processing fees, annual permit compliance determination fee, and recycling implementation fees) is foreseen to fund the Department's operations. These include base solid waste permitting and compliance activities, and enhanced abilities to upgrade existing landfills, as well as some recycling activities. An additional amount was determined by the Legislature for a new "annual tonnage-based solid waste permit fee," funding new activities required by the 1991 Oregon

Recycling Act (Senate Bill 66). A number of the Department's activities cannot be assigned directly as "services" to individual sites, but still must be supported by solid waste fees. Such general responsibilities include investigation of complaints, assistance to the public needing to dispose of various problem wastes, development and maintenance of laws and rules for environmentally acceptable solid waste management, compliance with new federal solid waste regulations, and technical assistance to site operators and to persons considering establishing a new site. The Department does not have discretion to stop performing activities approved and funded by the Legislature, and therefore must collect the funds approved by the Legislature to support those activities. There is a fixed amount of money to be collected from a fixed number of permittees.

The Department, and its Solid Waste Advisory Committee (SWAC), believe that the current tonnage-based proposal is the most equitable way of allocating the approved costs of the program.

Comment 6: Scale Requirement

Unjustified costs would be created by the requirement for landfills receiving over 50,000 tons of waste annually to base their tonnage reporting on certified scales. Current methods yield adequate results. The Department may not have the authority to impose this requirement.

Response: State law requires a solid waste disposal fee of $.85 per ton. The proposed annual solid waste permit fee schedule is also based on solid waste tonnage received. In order for the fee structure to operate equitably, accurate reporting of solid waste tonnages is crucial. It becomes even more crucial for larger sites. Although current rule makes provision for conversion factors (cubic yards of solid waste to tonnage), the Department does not believe this method provides sufficiently accurate results.

The Department contacted several scale vendors as well as several landfill operators in Washington State concerning scale costs. The installation of a scale could cost from $24,000 (for a 25' scale) to $60,000 or more for a 70' scale. Annual fees,

maintenance and calibration could cost an additional $400 to $700. Anticipated useful life of a scale is from 10 to 20 years, depending on the type of scale and traffic. Some operators noted that more accurate tonnage reporting allowed by scaling resulted in increased revenues to the landfill. The requirement is proposed to take effect on January 1, 1994, allowing landfills to budget for it. Accurate reporting of tonnage is also crucial in determining if each county is meeting its SB 66 recovery goal from the solid waste stream by the year 1995. Requiring scaling for solid waste going to all landfills receiving over 50,000 tons of waste would capture 87 percent of the State's wastestream (at municipal sites).

The Department's current rules allow the Department to require scales. OAR 340-61-040(24) "Weighing. The Department may require that landfill permittees provide scales and weigh incoming loads of solid waste, to facilitate solid waste management planning and decision making." The proposed rule would specifically require scaling for larger landfills.

The Department believes the requirement is justified, and not an undue burden.

Comment 7: Composting Facilities

The proposed $.10 per ton rate for determining annual solid waste permit fees for composting facilities is "counterproductive." Composting should be encouraged.

Response: The Department intended the rate to apply only to mixed solid waste composting facilities. At present, only those composting facilities that accept putrescibles or mixed waste are required to obtain a solid waste disposal site permit. The current annual permit compliance determination fee is $2,000 to $8,000 (plus a 122% surcharge for FY 92), depending on the amount of solid waste received. Under the proposed schedule, the annual solid waste permit fee would be $.10/ton. A site would also pay the annual tonnage-based permit fee of $.09/ton. A facility receiving 110,000 tons would pay $8,000 under the old schedule (plus a surcharge of $9,790 for FY 92 for a total of $17,790), and $20,900 under the proposed schedule.

The Department agrees that source-separated composting should be encouraged. Source-separated composting in general does not require a solid waste disposal site permit. Such an operation may sometimes be carried out in conjunction with a material recovery facility. In that case, the source-separated composting operation would be considered a part of the material recovery and would fall under the annual permit fee schedule for transfer stations and material recovery facilities. However, the Department believes composted mixed solid waste has limited markets because of its nature (potentially high levels of heavy metals). Experience to date has been that such compost has few uses other than landfill daily cover.

The Department has changed its proposed rule language to clarify that the $.10 per ton rate applies only to facilities composting mixed solid waste (compostables together with non-compostables), and that material recovery facilities fall under the same fee schedule as transfer stations.

The Department believes that the proposed fee schedule for mixed solid waste composting facilities is in line with the rest of the fee schedule, and supports the solid waste management hierarchy by charging those facilities less than energy recovery facilities or landfills.

Comment 8: "Sliding" Per-ton Rate

The Department's proposed "flat" $.21 per-ton rate structure for determining the annual solid waste permit fee for landfills is not equitable for the larger sites. This structure does not take into account that the Department's oversight costs do not increase proportionately with the amount of waste received at the facility. It is particularly unfair to Oregon's largest landfill, which would be required to pay about 43% of the total tonnage-based compliance fees received from all domestic waste landfills in the state. Instead, the Department should consider a "sliding" per-ton rate where the per-ton rate decreases as the tonnage of solid waste received at the site increases. A "sliding" rate structure would better recognize the actual distri-

bution of costs incurred by DEQ in administering the solid waste program. The notion of a "capped" fee as currently being considered for DEQ's Hazardous Waste Generator Fee schedule lends credence to the "sliding" per-ton rate structure.

Response: The Department has evaluated the type of rate structure proposed in the above comment. The commenter suggested a rate system with several "fee tiers." He used a hypothetical example with five tonnage "tiers" where a landfill would pay $.31/ton for the first "tier" of 1,000 tons received; $.265 for the next 9,000 tons; $.22 for the next 90,000 tons; $.175 for the next 400,000 tons; and $.13/ton for all tonnage over 500,000.

Addendum B shows the affects of DEQ's proposed fee schedule ("Alternative 3"[1]), of a "sliding" fee schedule ("Alternative 4"), and of adding a "cap" (maximum fee per site) to DEQ's proposed schedule ("Alternative 5"). Approximately the same amount of revenue is generated by the hypothetical "sliding" fee schedule as the Department's "flat" proposal ($607,000 vs. $624,000). The difference is that in the "sliding" rate Alternative, the fee burden is shifted from larger site categories to smaller site categories. The difference is greatest for the largest site category. The one landfill in this category receives about 32% of the solid waste disposed of in the State. Under the "sliding" rate scenario, this large landfill would pay 25% of the revenue generated by the annual solid waste permit fee. Under DEQ's proposed Alternative 3, it would pay about 33% of the revenue generated by this fee.

Adding a $150,000 "cap" to DEQ's proposed permit fee schedule has an effect similar to the "sliding" rate. It reduces the effective per-ton rate for the largest landfill to $.15. In addition, it creates a revenue shortfall of $32,000. The shortfall could be made up by raising the per-ton rate for all other permittees by $.02/ton, so that they paid $.23/ton.

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[1] The "Alternative" numbers correspond to the Alternatives Considered by the Department, described in the EQC Staff Report on pages 7 and 8.

It is generally the case that the costs of DEQ oversight do not increase in direct proportion to the amount of waste accepted at a solid waste disposal site. However, as discussed in the Response to Comment 2 above, the Department is not able to "bill for services" provided to solid waste disposal sites. The issue of larger landfills subsidizing smaller ones was discussed in the Solid Waste Permit Fee Work Group, and by the SWAC. It was acknowledged by the Work Group and the SWAC that some "subsidy" from the larger sites is inevitable, since some smaller sites are not able to pay all costs associated with DEQ's efforts in monitoring those sites. The issue is what amount is equitable.

The Department believes that a "flat" per-ton rate is most defensible. A flat rate has the advantage that the effect of the fee is distributed equally among solid waste ratepayers throughout the state.[2] The effective per-ton rate would be the same for a ratepayer living in LaGrande and a ratepayer in Portland: $.21/ton. The "sliding" rate creates an effective rate ranging from $.27 per ton for ratepayers using smaller sites, to $.16 per ton for ratepayers using the largest site.

Comment 9: Scale Requirement Should Also Apply to Industrial Sites

A tonnage-based system will be most effective if scales are encouraged. The requirement for scaling should be extended to industrial sites receiving over 50,000 tons a year.

Response: The Department in general agrees with the comment, and is proposing that scaling be required at demolition and off-site industrial landfills receiving over 50,000 tons of solid waste annually. However, the Department does not believe scales should be required at industrial sites that receive waste generated on-site by the permit holder.

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[2] Except for sites receiving less than 1400 tons of solid waste a year, which would be subject to the $200 minimum permit fee. See discussion in Comment 2 above.

Comment 10: Application Fee for "New Sites" Should Include Site Expansions

Proposals to expand existing landfills represent a substantial part of DEQ's workload. DEQ's costs in reviewing expansions should be reflected in the fee schedule, as directed by ORS 459.235. "New facilities" are subject to an application fee. Horizontal and/or vertical expansions to existing facilities should be included in this definition, and be subject to the application fee.

Response: It is true that review of site expansions constitutes a considerable part of the Department's solid waste workload. The proposed rules would delete the existing processing fee for permit modifications and renewals, keeping a processing fee for new sites. The rationale for this structure is that existing sites which would request site expansions are "paying their way" through the $.85 per-ton solid waste disposal fee. New sites obviously do not yet pay this per-ton fee, so the Department's costs in reviewing applications for new sites need to be captured through a permit processing fee.

Requiring a permit processing fee for significant site expansions was discussed by the Work Group and the SWAC, and was not supported. The Department is not proposing to add a fee for site expansions.

Comment 11: Technical Comments

Several technical comments were submitted by Oregon Waste Systems, Inc. They included clarification of applicability of the definition of "domestic solid waste" (should apply only to OAR 340-120, not OAR 340-115); fee payment deadlines; and factors for converting additional types of solid waste from cubic yards to tonnage (contaminated soils, construction debris, and asbestos) and requiring that the various specified conversion factors should be used at domestic solid waste sites for waste other than domestic.

Response: The Department believes that the above comments are reasonable and will improve the clarity of the rule and the accuracy of reported tonnage. The Department is incorporating the proposed comments into the rule.

Comment 12: Fees Are Too Low

Solid waste fees in general are too low; they don't cover the long-term cost of disposal. Higher fees would encourage recycling, and should be used to encourage markets. They should be tied to inflation.

Response: The Department is structuring the permit fees to generate the amount of revenue in its Legislatively Approved Budget. The Department will review annually the revenue generated and adjust accordingly the per-ton rate so that neither more nor less revenue is collected than provided for in our Budget.

Comment 13: Overregulation

Requirements (including the new Federal Subtitle D) are being imposed that local governments can't comply with and don't have financial resources for. Recycling is making land disposal more expensive. What is really needed is additional market development (for recycling). The regulations are not designed for small towns.

Response: SB 66 sets different recovery rate targets and establishes different recycling standards for different sections of the state. The Department's solid waste planning and recycling grant program attempts to assist communities in complying with new requirements. The proposed fee schedule encourages the establishment of transfer stations which may be a more economic alternative to expensive upgrades of existing landfills in some communities.

Comment 14: Out-of-state Waste

Oregon should not become a dump for out-of-state solid waste. Concern was expressed that there may be a cost differential between disposal in a state of origin (of solid waste) and disposal in Oregon.

Response: A previous rule established a surcharge on solid waste generated out-of-state and disposed of in Oregon. That surcharge incorporated the costs to the State of accepting the out-of-state waste that were not otherwise captured. The surcharge is being challenged in court. SB 66 established that out-of-

state waste is subject to the same per-ton disposal fee as domestic solid waste, pending resolution of the court challenge.

Attachments:
Addendum A: Fee Impact on Small Sites
Addendum B: Solid Waste Permit Fee Schedule Alternatives

pubresp.fee

ADDENDUM A

SMALL LANDFILLS:
EFFECT OF PROPOSED SOLID WASTE PERMIT FEE
3/24/92

This paper analyzes how the solid waste permit fee (in the DEQ draft rule put out for public comment) might affect small landfills.

I. Fee Schedule in Draft Rule

A. Small landfills pay:

- Annual Solid Waste Permit Fee:	$.21/ton OR $300 min.
- Tonnage-based Permit Fee:	$.09/ton
- Per-ton solid waste disposal fee:	$.85/ton

(Eventually: Orphan site fee)

B. Examples:

1. Landfill accepting 200 tons (~28, e.g. Jordan Valley)

- Annual Solid Waste Permit Fee (200 x $.21 = $42)	$300
- Tonnage-based Permit Fee (200 x $.09)	18
- Per-ton solid waste disposal fee (200 x $.85)	170
Total:	$488

Per-ton cost: $2.44

2. Landfill accepting 500 tons (~14, e.g. Christmas Valley)

- Annual Solid Waste Permit Fee (500 x $.21 = $105)	$300
- Tonnage-based Permit Fee (500 x $.09)	45
- Per-ton solid waste disposal fee (500 x $.85)	425
Total:	$770

Per-ton cost: $1.54

3. Landfill accepting 1000 tons (~5, e.g. Bly)

- Annual Solid Waste Permit Fee (1000 x $.21 = $210)	$300
- Tonnage-based Permit Fee (1000 x $.09)	90
- Per-ton solid waste disposal fee (1000 x $.85)	850
Total:	$1,240

Per-ton cost: $1.24

4. Landfill accepting 1400 tons (~3, e.g. Pilot Rock)

- Annual Solid Waste Permit Fee (1400 x $.21 = $294)	$300
- Tonnage-based Permit Fee (1400 x $.09)	126
- Per-ton solid waste disposal fee (1400 x $.85	1,190
Total:	$1,616

Per-ton cost: $1.15

5. All landfills accepting >1,450 tons (~40)

- Annual fees: tonnage in prev. cal yr. x $.30
- Quarterly fee: gate tonnage x $.85

Per-ton cost: $1.15

II. Proposed Alternative (in Final Rule)

1. Reduce the $300 minimum annual solid waste permit fee to $200.

Under this alternative, the per-ton discrepancy between small sites and large sites would be reduced.

Examples:	Total Fees	Per-ton Costs
- Jordan Valley (200 tons):	$388	$1.94
- Christmas Valley (500 tons):	$670	1.34
- Bly (1000 tons):	$1,150	1.15
- Pilot Rock (1400 tons):	$1,610	1.15

smallsit

ADDENDUM B

SOLID WASTE PERMIT FEE SCHEDULE ALTERNATIVES CONSIDERED BY DEQ

(Municipal Permittees only)

Revenue needed (muni sites): $600,000

DEQ REVENUE (000)

ALTERNATIVE 3, DEQ PROPOSAL: $.21/ton; $.13/ton; $.10/ton

Annual Tonnage Tier	Ave. Tonnage Per Site	No. of Sites	Total Tonnage (000)	Total DEQ Revenue	Ave Cost per Site	%DEQ Revenue Per Site	%total State sol. waste* per site	Effective overall per-ton rate (ave. site)
I. 0-1000 ($200)	204	49	10.00	$9,800	$200	0.03%	0.01%	0.98
II. 1000-10,000	4760	16	76.16	$15,994	$1,000	0.16%	0.16%	0.21
III. 10,000-100,000	37600	21	789.60	$165,816	$7,896	1.27%	1.23%	0.21
IV. 100,000-500,000	185400	5	927.00	$194,670	$38,934	6.24%	6.07%	0.21
V. >500,000	980000	1	980.00	$205,800	$205,800	32.99%	32.10%	0.21
En. recovery ($.13)	160000	1	160.00	$20,800	$20,800	3.33%	5.24%	0.13
Compost ($.10)	110000	1	110.00	$11,000	$11,000	1.76%	3.60%	0.10
		94	3052.76	$623,880				

ALTERNATIVE 4: "SLIDING" FEE SCHEDULE

Annual Tonnage Tier	Ave. Tonnage Per Site	No. of Sites	Total Tonnage (000)	Tier I $0.31 per ton	Tier II $0.27 per ton	Tier III $0.22 per ton	Tier IV $0.18 per ton	Tier V $0.13 per ton	Total DEQ Revenue	Ave cost per Site	%DEQ Revenue Per Site	%total State sol. waste* per site	Effective overall per-ton rate (ave. site)
I. 0-1000	204	49	10.00	3.1	0.0	0.0	0.0	0.0	$3,099	$63	0.01%	0.01%	0.31
II. 100-10,000	4760	16	76.16	5.0	15.9	0.0	0.0	0.0	$20,902	$1,306	0.22%	0.16%	0.27
III. 10,000-100,000	37600	21	789.60	6.5	50.1	127.5	0.0	0.0	$184,107	$8,767	1.44%	1.23%	0.23
IV. 100,000-500,000	171000	7	1197.00	2.2	16.7	138.6	87.0	0.0	$244,440	$34,920	5.75%	5.60%	0.20
V. >500,000	980000	1	980.00	0.3	2.4	19.8	70.0	62.4	$154,895	$154,895	25.50%	32.10%	0.16
		94	3052.76	17.05	85.11	285.91	156.975	62.4	$607,443				

ALTERNATIVE 5: "CAP" OF $150,000/SITE ADDED TO DEQ PROPOSAL

Annual Tonnage Tier	Ave. Tonnage Per Site	No. of Sites	Total Tonnage (000)	Total DEQ Revenue	Ave Cost per Site	%DEQ Revenue Per Site	%total State sol. waste* per site	Effective overall per-ton rate (ave. site)
I. 0-1000 ($200)	204	49	10.00	$9,800	$200	0.04%	0.01%	0.21
II. 1000-10,000	4760	16	76.16	$15,994	$1,000	0.18%	0.16%	0.21
III. 10,000-100,000	37600	21	789.60	$165,816	$7,896	1.39%	1.23%	0.21
IV. 100,000-500,000	185400	5	927.00	$194,670	$38,934	6.85%	6.07%	0.21
V. >500,000	980000	1	980.00	$150,000	$150,000	26.40%	32.10%	0.15
En. recovery ($.13)	160000	1	160.00	$20,800	$20,800	3.66%	5.24%	0.13
Compost ($.10)	110000	1	110.00	$11,000	$11,000	1.94%	3.60%	0.10
		94	3052.76	$568,080				

Revenue Shortfall: <$32,000>

* Excluding industrial & sludge

feealts

4/3/92

Revise quarterly reporting forms and send to permittees by August, 1992 to incorporate the new solid waste conversion factors.

Approved:

Section: _____

Division: _____

Director: _____

Report Prepared By: Deanna Mueller-Crispin

Phone: 229-5808

Date Prepared: 4/6/92

dmc
eqc.423
4/6/92

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY

DATE: February 19, 1992

TO: Interested Persons

FROM: Deanna Mueller-Crispin, Solid Waste Permits and Compliance Section

SUBJECT: Solid Waste Permit Fees: Proposed Rule Revisions to Implement Fee Increases (OAR 340-61)

Purpose: The purpose of the proposed rule change is to implement increases in solid waste permit fees required by 1991 Senate Bill 66 (SB 66), and the DEQ budget authorized by the 1991 Legislature. An additional purpose is to simplify the solid waste permit processing fee schedule.

Overview: The proposed rules change and simplify the annual solid waste permit fee schedule (currently based on tonnage categories) to a system using a per-ton rate. They simplify the solid waste permit processing fee schedule, eliminating most fees but substantially raising application fees for new solid waste sites.

> The annual *solid waste permit fee ("permit fee")* is NOT the same as the per-ton *solid waste disposal fee* which increased from $.50 to $.85 in January, 1992. The *permit fee* funds the Department's solid waste permit processing and compliance activities. The $.85 per-ton *solid waste disposal fee* funds programs to reduce environmental risks at waste disposal sites and to reduce the amount of solid waste generated in Oregon.

These rules change the *permit fee* in two ways: 1) they increase it, and 2) the fee will now be calculated on a per-ton rate. These rules do not have any effect on the $.85 per-ton *solid waste disposal fee*.

Background: On July 24, 1991, the Environmental Quality Commission (EQC, Commission) adopted a temporary rule establishing a one-year increase in the *permit fee* for FY 92 of 122 percent. The revenue generated from the billings in 1991 under this temporary rule will equal about half of the "solid waste permitting" revenue approved for the biennium by the Legislature. Rather than requesting that the 122 percent increase be made permanent, the

Department, aided by an advisory committee, examined the entire permit fee schedule with an eye toward restructuring and simplification.

A rule change in the *permit fee* schedule is required to generate the other half of the "solid waste permitting" revenue approved in the Department's budget. The rule change must be in place before June when the Department sends the annual billing for FY 93 to permittees. This will require rule adoption by the EQC at its April meeting. To meet this schedule, public hearings on the proposed rule are being held in mid-March.

Summary: Overall Solid Waste Permit Fee Structure:

The new fee schedule does the following:

- Eliminates recycling fee, monitoring well fee, permit renewal and modification fees, and permit filing fee. The hazardous substance authorization fee would be eliminated on July 1, 1994.

- Changes the permit processing fee for new facilities (other than transfer stations) from a range of $300 - $2,000 to a range of $1,000 - $10,000.

- Reduces the permit processing fee for new transfer stations from a range of $300 - $2,000 to a range of $100 - $500.

- Changes the Letter Authorization fee from $100 to $500.

- Creates a new upper category of annual *permit fee* ($1,000) for transfer stations receiving over 50,000 tons of solid waste per year.

- Changes the annual *permit fee* for closed landfills from 10% of the fee which would be required if the facility was still in operation, to a range of $150 - $2,500 based on $.025 per ton of solid waste received annually when the site was active.

- Raises the minimum annual *permit fee* for solid waste permittees (other than transfer stations and closed sites) from $100 to $300.

- Changes the calculation of annual *permit fees* from tonnage "brackets" (for example, an annual fee of $3,000 for a domestic landfill receiving at least 25,000 but less than 50,000 tons of solid waste per year), to a per-ton rate reflecting the State's solid waste management hierarchy: landfills and incinerators: $.21/ton; energy recovery facilities: $.15/ton; and composting facilities: $.10/ton. The rate is applied to the solid waste received in the preceding calendar year.

- Requires domestic landfills receiving over 50,000 tons of solid waste annually to base the annual tonnage on weight from certified scales (effective January

1, 1994).

- Establishes factors to convert cubic yards of various types of industrial waste to pounds (e.g. wood waste: 1,200 pounds per cubic yard).

Input from Regulated Community:

A *Solid Waste Permit Fee Work Group* was formed to discuss the fee structure revision. The Work Group included representatives from public and private landfills, county government, public interest groups, etc., and included several members of the Solid Waste Advisory Committee (SWAC). The majority of the Work Group supported a tonnage-based annual solid waste *permit fee*, with a minimum fee of $300 for small sites. The Work Group felt even small sites should pay a fee sufficient to support one annual DEQ on-site inspection. One member of the Work Group strongly disagreed with the proposal, stressing that the Department's costs to administer the program are not directly proportionate to the amount of tons of solid waste received at the site. That member also expressed concern about the wisdom of relying heavily on out-of-state solid waste to fund a basic Department program. Other Work Group members also stressed that the fee structure should be stable and predictable for permittees. They also recognized that the fee level may change from biennium to biennium, as the Department's solid waste budget becomes increasingly fee-based, and as solid waste volumes change.

ORS 459.235 directs the Department to establish a permit fee schedule "based on the anticipated cost of filing and investigating the application, of issuing or denying the requested permit and of an inspection program to determine compliance." Although the Department's costs of administering a compliance program do not necessarily rise in direct proportion to the amount of solid waste received at a site, tonnage is a reasonable indicator of the overall amount of effort the Department must devote to a site. It is not possible for the Department to assess permit fees based on a "fee-for-service" basis. Many of the Department's responsibilities in administering the solid waste program -- and which must be supported by the solid waste fee -- are not directly billable to sites. Such general responsibilities include investigation of complaints, assistance to the public needing to dispose of various problem wastes, development and maintenance of rules for environmentally acceptable solid waste management, technical assistance to site operators and to persons considering establishing a site, and various other activities benefitting the public, disposal site operators and local government.

The full SWAC considered the Work Group's proposal at its January 23, 1992 meeting.

The majority of SWAC members joined the Work Group in supporting a simple fee structure,

and in keeping a high "entry fee" for new sites. SWAC members pointed out that this fee structure presents a clear policy choice, and would discourage creation of new smaller landfills. Low application fees for transfer stations would support transition to transfer stations. Some Committee members had concerns that the high application fee would inappropriately discourage the formation of new, small landfills that were environmentally acceptable.

The Department concurs with the SWAC and supports simplification of the processing fee structure. The fee schedule in the proposed rule incorporates the Work Group's recommendations. The major exception is that the Department proposes a two-tiered application fee structure for new facilities ($10,000 and $5,000 respectively for "large" and "small," with the break point at 7,500 tons of solid waste a year). The Department believes it is important to not place an unreasonable burden on small landfills which need to move to a new site.

Fiscal Impacts: The proposed regulations will create fiscal and economic impacts for generators of solid waste and ratepayers. See Attachment C, Fiscal and Economic Impact Statement, for a complete discussion.

The Department analyzed the effects of the proposed *permit fee* schedule on eleven representative solid waste permittees. For these facilities, the percentage increase ranges from 5 to 110 percent. For representative medium-sized and large industrial sites the increase was 75 percent and 98 percent respectively.

Program Considerations: The proposed *permit fee* structure discourages the formation of new landfills and encourages the establishment of transfer stations. This should have the effect of diverting solid waste from some smaller landfills not meeting current environmental standards, to larger, better constructed facilities through the use of transfer stations (which are environmentally benign). The Department believes this action will benefit the environment by reducing the likelihood of future groundwater contamination from smaller landfills which do not have modern liner systems.

The proposed *permit fee* structure bases revenue on the tonnage of solid waste received in the previous calendar year. Use of a per-ton rate to calculate the *permit fee* makes it essential to accurately determine the tonnage of solid waste received. A per-ton rate is proposed that would generate the revenue approved in the Department's budget for the 91-93 biennium based on the Department's best estimate of solid waste tonnages received in calendar year 1991. The per-ton rate is derived by dividing the tonnage of solid waste received in the preceding calendar year at all solid waste disposal sites, by the amount of revenue authorized. The rate will have to be adjusted for future fiscal years depending both on the amount of solid

waste received, and on the level of the Department's legislatively approved budget. For example, if more waste is received in subsequent years but the approved amount of revenue stays the same, the per-ton rate should decrease. In order to avoid collecting more revenue than authorized in the budget, the rate will be reviewed annually.

The Department's legislatively approved budget for the 91-93 biennium included the following revenue from permit fees to fund solid waste permitting and compliance activities:

Fee	Source	
Solid waste permitting	ORS 459.235	$1,505,500
New "tonnage-based" fee	Senate Bill 66	$ 287,500
Recycling implementation	ORS 459.170	$ 175,000
Total (from permit fees)		$1,968,000

All three of these revenue sources are included in the permit fee schedule proposed in these rules.

This budget included five new positions for core technical support in the solid waste program to address landfill upgrades, closures and cleanups, and to ensure that landfills do not cause pollution in the future. The Legislature approved the increased solid waste permit fees for these purposes, and also to cover part of the cost of implementing SB 66, the comprehensive solid waste recycling and planning bill.

Alternatives Considered by the Department: Alternatives considered for revising the solid waste permit fee schedule were:

1. "Base case" alternative: Keep the existing permit fee structure, and simply add a surcharge of 122% on annual permit compliance determination fees, as was done for the fiscal year July 91-June 92.

2. "Existing fee structure doubled" alternative: Double the permit fee for existing permittee categories, keeping existing size categories which represent a range of solid waste accepted annually. Double all existing permit processing fees.

3. "Volume-based" alternative: Simplify the solid waste permit processing and annual permit fees as described in this report. Incorporate existing permit processing fees and annual solid waste and recycling fees into the "*permit fee*," based on the volume (tonnage) of solid waste received at the site in the previous calendar year.

Each Alternative includes the new "tonnage-based" annual fee required by SB 66, to be assessed based on $.09 per ton for waste received in the previous calendar year. This is added to the per-ton permit fee rate mentioned in each Alternative.

Department's Recommendation and Rationale: The Department's proposed rule incorporates Alternative 3 as the solid waste permit fee schedule. This alternative implements the statute. It simplifies and consolidates the solid waste fees which permittees must pay. It treats all classes of permittee equitably, as their *permit fee* is based directly (instead of approximately) on the tonnage of solid waste received at the site. It supports the State's statutory "hierarchy" for managing solid waste. In establishing a minimum fee of $300 for all sites, it takes service-related costs into account. It encourages the establishment of transfer stations. It includes a two-tiered application fee for new facilities, which will make establishment of a new landfill less onerous for small permittees.

The proposed fee structure follows direction from the 1991 Legislature, and is consistent with Department policy and the Solid Waste Permits and Compliance Section's Operating Plan. It is consistent with the statute.

Next Steps:

Hold public hearings to receive comment on the proposed rule on March 16 through 18.

Receive written comment on the proposed rule until March 20, 1992.

Have a final permit fee schedule adopted by the EQC by April 23, 1992.

Notify all permittees of the new fee schedule in late April.

Bill permittees for FY 93 using the new fee schedule, in early June, 1992.

Attachments:
A - Proposed Rule
B - Rulemaking Statements
C - Fiscal and Economic Impact Statement

permfee.mem
2/19/92

Attachment K

SOLID WASTE PERMIT FEE WORK GROUP

Fall 1991

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Commissioner Rick Allen
Jefferson County Courthouse
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SW\LTR\SK3765L (1/92)

ATTACHMENT L

DEQ LAND USE EVALUATION STATEMENT

1. Explain the purpose of the proposed program/rules. To implement increases in solid waste permit fees required by 1991 Senate Bill 66, and in accordance with the DEQ's legislatively authorized budget.

2. Does the proposed program/rules affect existing rules/programs/activities that have been determined land use programs in the DEQ State Agency Coordination(SAC) Program?

yes X no____

If yes, identify existing program/rule/activity Issuance of solid waste permits.

If yes, do the existing statewide goal compliance and local plan compatibility procedures adequately cover the proposed program/rule? yes X no_____ if no, explain_____

If no, apply criteria 1. and 2., from the other side of this form and from Section III Subsection 2 of the SAC program document, to the proposed program/rules. In the space below, state if the proposed rules/programs are considered programs affecting land use. Be specific in citing the criteria and reasons for the determination._____

3. If the proposed program/rules have been determined a land use program, under 2. above, and are not subject to existing land use compliance and compatibility procedures, explain the new procedures that will be used to ensure compliance and compatibility.

Deanna Mueller-Crispin — SWPC, Hazardous and Solid Waste

DEQ staff signature — Section, Division — Date

Oregon Department of Environmental Quality
DETERMINATION OF PROGRAMS/RULES AFFECTING LAND USE

ORS 197.180 requires that state agencies maintain a program of coordination to assure that actions that affect land use are in compliance with the statewide goals and compatible with city and county comprehensive plans. DEQ's program addressing land use is called the State Agency Coordination Program(SAC). The program was approved by the Environmental Quality Commission August 10, 1990 and certified by the Land Conservation and Development Commission on December 13, 1990.

To ensure that the SAC program is kept current, a land use evaluation is required of new rules and programs (except temporary rules). An evaluation statement is to be attached to rulemaking public notices. Staff must refer to OAR 340 Division 18 and the SAC document in conducting a land use evaluation.

Staff is to specifically refer to Section III, subsection 2 of the SAC document in completing the other side of this form. In summary, Statewide Goal 6 - Air, Water and Land Resources is the primary goal that relates to DEQ authorities. However, other goals may relate such as Goal 5 - Open Spaces, Scenic and Historic Areas, and Natural Resources; Goal 11 - Public Facilities and Services; Goal 16 - Estuarine Resources; and Goal 19 - Ocean Resources. DEQ programs or rules that relate to statewide land use goals are considered land use programs if they are:

1. Specifically referenced in the statewide planning goals; or
2. Reasonably expected to have significant effects on
   a. resources, objectives or areas identified in the statewide planning goals, or
   b. present or future land uses identified in acknowledged comprehensive plans.

DEQ responsibilities relating to health hazard annexations have been determined not to be a program affecting land use based on Attorney General Opinion 6826. A land use evaluation is not required for evaluating an alternative plan to annexation.

In applying criterion 2. above, two guidelines have been developed to assist in assessing significance:

- The land use responsibilities of a program/rule/action that involves more than one agency, are considered the responsibilities of the agency with primary authority.

- A determination of land use significance must consider the Department's mandate to protect public health and safety and the environment.

Attachment M

EFFECTS OF PROPOSED ANNUAL SW PERMIT FEE SCHEDULE
ON REPRESENTATIVE SOLID WASTE PERMITTEES
4/6/92

The effects of the proposed annual solid waste permit fee schedule are compared with a "base case" (estimated permit fees for FY 92) for several different categories of solid waste permittee. The following assumptions are based on estimated solid waste received in calendar year 1991:

1. Municipal
   a. Regional (Columbia Ridge, Arlington: 980,000 tons/yr)
   b. Large (Short Mountain, Eugene: 270,000 tons/yr)
   c. Intermediate (Southstage, Jackson Co.: 85,000 tons/yr)
   d. Klamath Falls (57,500 tons/yr)
   e. N. Wasco Co. (45,300 tons/yr)
   f. Fox Hill (16,400 tons/yr)
   g. Foothill (12,950 tons/yr)
   h. Baker (9,000 tons/yr)
   i. Small (Ant Flat, Wallowa Co.: 7,000 tons/yr)
   j. Box Canyon (5,000 tons/yr)
   k. Burns-Hines (2,000 tons/yr)
   l. Very small (McDermitt: <1,000 tons/yr)

2. Industrial
   a. Large (Pope & Talbot, Halsey: 22,000 tons/yr)
   b. Small (Green Veneer: 1,950 tons/yr)

3. Energy Recovery (Brooks Energy Fac.: 160,000 tons/yr)

4. Compost (Riedel: 110,000 tons/yr)

5. Transfer stations/material recovery
   a. Large (Forest Grove: 80,000 tons/yr)
   b. Intermediate (Astoria: 14,000 tons/yr)

Calculations:

1. "Base Case:" Existing Fee Schedule (FY 92). Includes the effect of the 122% "supplementary" annual compliance determination fee billing, as well as monitoring well fees and the recycling implementation fee.

2. Proposed Annual Solid Waste Site Permit Fee. All categories of permittee (except transfer stations) are charged an annual disposal site permit fee based on volume of solid waste received for the preceding calendar year. The per-ton rate is as follows: $.21/ton for landfills, incineration and all industrial sites; $.13/ton for energy recovery; and $.10/ton for composting. The recycling implementation fee is included in rate. Monitoring well fees are eliminated. Transfer stations and small landfills are charged on a minimum "per site" basis. Includes $.09/ton on all solid waste received in calendar year 1991 for new SB 66 annual fee (except for captive industrial sites).

TABLE 1: Existing SW Permit Fee Schedule (FY 92 Fees)

	Regular Ann Comp	Mon Wells	Recycl	Sub Total	Suppl Ann comp	Total	Equiv P/Ton
1. Municipal							
a. Col Ridge	60,000	3,920	20,000	83,920	73,440	157,360	$.157
b. Short Mt.	24,000	6,160	9,000	39,160	29,380	68,540	$.286
c. So. Stage	6,000	2,240	2,300	10,540	8,580	19,120	$.210
d. Klamath Fall	6,000	-	2,300	8,300	7,340	15,640	$.272
e. N. Wasco Co.	3,000	-	1,200	4,200	3,670	7,870	$.170
f. Fox Hill	1,500	-	450	1,950	1,840	3,790	$.230
g. Foothill	1,500	-	450	1,950	1,840	3,790	$.290
h. Baker	750	-	225	975	920	1,895	$.210
i. Ant Flat	750	-	225	975	920	1,895	$.271
j. Box Canyon	750	-	225	975	920	1,895	$.380
k. Burns-Hines	200	-	75	275	245	520	$.260
l. McDermitt	100	-	50	150	120	270	$.270
2. Industrial							
a. Pope/Tal.	1,500	-	NA	1,500	1,840	3,340	$.152
b. Green Ven.	150	-	NA	150	185	335	$.172
3. En Rec (Bro)	8,000	-	4,600	12,600	9,790	22,390	$.140
4. Comp (Ried)	8,000	-	4,600	12,600	9,790	22,390	$.172
5. Transfer stations/material recovery							
a. Forest Grove	500	NA	NA	500	610	1,110	$.014
b. Astoria	500	NA	NA	500	610	1,110	$.079

TABLE 2: Proposed Annual Solid Waste Permit Fee Schedule (FY 93)

	Annual Permit Fee ($.21/ton)	"SB 66 An. Fee"	Total	Equiv. Per Ton	% Increase
1. Municipal					
a. Col Ridge	205,800	97,000	302,800	$.30	92%*
b. Short Mt.	56,700	24,300	81,000	$.30	18%
c. So. Stage	17,850	7,650	25,550	$.30	43%*
d. Klamath Falls	12,075	5,175	17,250	$.30	10%
e. N. Wasco Co.	9,513	4,077	13,590	$.30	73%*
f. Fox Hill	3,444	1,476	4,920	$.30	30%
g. Foothill	2,720	1,166	3,885	$.30	3%
h. Baker	1,890	810	2,700	$.30	42%*
i. Ant Flat	1,470	630	2,100	$.30	11%
j. Box Canyon	1,050	450	1,500	$.30	<20%>**
k. Burns-Hines	420	180	600	$.30	15%
l. McDermitt	200	81	281	$.31	4%
2. Industrial					
a. Pope/Tal.	4,620	NA	4,620	$.21	38%
b. Green Ven.	410	NA	410	$.21	22%
3. En Rec (Brooks)($.13)	20,800	14,400	35,200	$.22	57%
4. Comp (Riedel)($.10)	11,000	9,900	20,900	$.19	<7%>
5. Transfer stations/material recovery					
a. Forest Grove	1,000	NA	1,000	$.01	<10%>
b. Astoria	500	NA	500	$.01	<54%>

* Currently towards high end of permit fee range.

** Currently at low end of permit fee range.

Note: Neither Table includes the effect of the $.85 per ton solid waste disposal fee, applicable to domestic and out-of-state solid waste, nor the effects of permit processing fees paid in FY 92.

4. "Sliding fee" alternative: Same as Alternative 3, but uses a "sliding" rather than a flat per-ton rate. The per-ton rate decreases as the tonnage of solid waste received at the site increases, and could range from $.13 to $.31 per ton. (See discussion in Attachment I, Comment 8)

5. "Capped fee" alternative: Places a maximum fee cap on top of a base per-ton fee to determine the annual permit fee. For example, a cap might be set at $150,000. The "cap" would take into account that the Department's costs of regulating larger landfills are not directly proportionate to the amount of waste received. With such a cap, a landfill receiving 1 million tons of waste a year would pay $150,000 instead of $210,000 under Alternative 3. However, this would require the base rate for all smaller sites to be increased to $.23/ton to replace the lost revenue.

The SB 66 annual fee of $.09 per ton for waste received in the previous calendar year is proposed to take effect regardless of which Alternative is selected, i.e. the Department recommends Alternative 3, which would be $.21/ton plus $.09/ton in most cases.

DEPARTMENT RECOMMENDATION FOR ACTION, WITH RATIONALE:

The Department's proposed rule incorporates Alternative 3 (with the modifications discussed above) as the solid waste permit fee schedule. It treats all classes of permittee equitably, as their permit fee is based directly (instead of approximately) on the tonnage of solid waste received at the site. It supports the State's statutory "hierarchy" for managing solid waste. In establishing a minimum permit fee of $200 for all sites, it takes service-related costs into account. It encourages the establishment of transfer stations. It includes a two-tiered application fee for new facilities, which will make establishment of a new landfill less onerous for small permittees. It equalizes the per-ton fee charges for landfills throughout the state (with the exception of landfills subject to the service-related $200 "minimum charge").

CONSISTENCY WITH STRATEGIC PLAN, AGENCY POLICY, LEGISLATIVE POLICY:

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY INTEROFFICE MEMORANDUM

DATE: January 22, 1992

TO: Solid Waste Advisory Committee

FROM: Charles W. Donaldson

SUBJECT: Department's Proposal for Adjustments to Solid Waste Fee Schedule Recommendation

Solid waste staff have further discussed and analyzed the effects of the recommendations from the Solid Waste Permit Fee Work Group, included in your January 23, 1992 meeting agenda packet. This outlines our recommendations for further refinement of the new permit fee schedule, principally to the permit processing fee schedule. (The revenue generated under the fee schedule with the Department's changes is shown in Attachment A.)

1. PERMIT PROCESSING FEES. DEQ proposes to retain permit processing fees for permit renewals/closures, and to establish a category for large and small sites, using 7,500 tons per year as the break line. There would be no separate fee category for industrial sites. DEQ also proposes to keep a fee for "preliminary review" for potential new sites. The processing fees would in general be reduced from the levels put forward by the Work Group, except the fee structure for transfer sites would not change. DEQ's proposal:

a. Application Fee, New Permits:

A. New sites (domestic landfills, incineration, energy recovery, compost, industrial):

Sites receiving >7,500 tons/yr	$10,000
" " <7,500 tons/yr	5,000

B. Preliminary review 2,500

C. Letter authorization 500

D. New transfer sta. [no change fm Group recommend.]

>50,000 tons/yr	500
10 - 50,000 tons/yr	200
<10,000 tons/yr	100

b. Permit Renewal/Closure Fee

A. All sites (except trans. sta.):

Sites receiving >7,500 tons/yr	2,000
" " <7,500 tons/yr	500

B. Transfer sta/material recov facilities:

>50,000 tons/yr	250
10 - 50,000 tons/yr	150
<10,000 tons/yr	100

DEQ Rationale[1]:

- Lower permit application fees: The Department believes that a flat $20,000 application fee for new sites would cause a hardship, especially for smaller communities which must site new landfills. We propose two size categories: sites which want to receive over 7,500 tons of solid waste a year, and sites with less than that. The separate fee category for industrial sites is eliminated; new smaller industrial sites would be subject to the same application fee as other types of disposal sites. The fee for Letter Authorizations would be reduced; in some cases, Letter Authorizations facilitate a solid waste management action (such as landspreading) which is preferable to landfilling.

- Preliminary review fee. DEQ proposes to keep a fee for preliminary review; the Department intends to continue this service for proposals for new sites. This fee may be deducted from the full application fee when formal application is made.

- Permit renewal fees. Expansions of an existing site and permit changes to implement site closure are often handled under permit renewals. Such permit actions often require as much effort from the Department as applications for new sites. DEQ believes that a permit renewal fee should be retained to help offset the Department's costs in issuing permit renewals. The same two size categories are proposed as for new sites. A lower permit renewal fee schedule is proposed for transfer stations.

2. ANNUAL SOLID WASTE PERMIT FEES. The Department presents one recommendation for change, and a proposal for conversion factors for industrial sites:

a. Closed Sites.

Work Group recommendation: $1,000 year; monitoring well fees eliminated.

---

[1] "Rationale:" DEQ's reasons for proposing changes from the Work Group's recommendation.

Sites receiving >7,500 tons/yr	2,000
" " <7,500 tons/yr	500

B. Transfer sta/material recov facilities:

>50,000 tons/yr	250
10 - 50,000 tons/yr	150
<10,000 tons/yr	100

DEQ Rationale[1]:

- Lower permit application fees: The Department believes that a flat $20,000 application fee for new sites would cause a hardship, especially for smaller communities which must site new landfills. We propose two size categories: sites which want to receive over 7,500 tons of solid waste a year, and sites with less than that. The separate fee category for industrial sites is eliminated; new smaller industrial sites would be subject to the same application fee as other types of disposal sites. The fee for Letter Authorizations would be reduced; in some cases, Letter Authorizations facilitate a solid waste management action (such as landspreading) which is preferable to landfilling.

- Preliminary review fee. DEQ proposes to keep a fee for preliminary review; the Department intends to continue this service for proposals for new sites. This fee may be deducted from the full application fee when formal application is made.

- Permit renewal fees. Expansions of an existing site and permit changes to implement site closure are often handled under permit renewals. Such permit actions often require as much effort from the Department as applications for new sites. DEQ believes that a permit renewal fee should be retained to help offset the Department's costs in issuing permit renewals. The same two size categories are proposed as for new sites. A lower permit renewal fee schedule is proposed for transfer stations.

2. ANNUAL SOLID WASTE PERMIT FEES. The Department presents one recommendation for change, and a proposal for conversion factors for industrial sites:

a. Closed Sites.

Work Group recommendation: $1,000 year; monitoring well fees eliminated.

---

[1] "Rationale:" DEQ's reasons for proposing changes from the Work Group's recommendation.

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY INTEROFFICE MEMORANDUM

DATE: January 22, 1992

TO: Solid Waste Advisory Committee

FROM: Charles W. Donaldson

SUBJECT: Department's Proposal for Adjustments to Solid Waste Fee Schedule Recommendation

Solid waste staff have further discussed and analyzed the effects of the recommendations from the Solid Waste Permit Fee Work Group, included in your January 23, 1992 meeting agenda packet. This outlines our recommendations for further refinement of the new permit fee schedule, principally to the permit processing fee schedule. (The revenue generated under the fee schedule with the Department's changes is shown in Attachment A.)

1. PERMIT PROCESSING FEES. DEQ proposes to retain permit processing fees for permit renewals/closures, and to establish a category for large and small sites, using 7,500 tons per year as the break line. There would be no separate fee category for industrial sites. DEQ also proposes to keep a fee for "preliminary review" for potential new sites. The processing fees would in general be reduced from the levels put forward by the Work Group, except the fee structure for transfer sites would not change. DEQ's proposal:

a. Application Fee, New Permits:

A. New sites (domestic landfills, incineration, energy recovery, compost, industrial):

Sites receiving >7,500 tons/yr	$10,000
" " <7,500 tons/yr	5,000

B. Preliminary review 2,500

C. Letter authorization 500

D. New transfer sta. [no change fm Group recommend.]

>50,000 tons/yr	500
10 - 50,000 tons/yr	200
<10,000 tons/yr	100

b. Permit Renewal/Closure Fee

A. All sites (except trans. sta.):

DEQ recommendation: Sites pay $.025/ton for the average tonnage of solid waste received in the 3 most active years of site operation, with min. of $250 to max $2,500. No monitoring well fees.

DEQ rationale: Current annual fees for closed sites range from $50/yr ($110 in FY92) to $15,000/yr ($33,500 in FY92), including monitoring well fees. While a fee increase for the smallest sites appears justified to cover the Department's monitoring costs, a jump to $1,000/year for all sites seems excessive. Likewise, on larger sites with several monitoring wells DEQ's annual oversight costs are likely to considerably exceed $1,000 a site. The proposed range appears more equitable.

b. Conversion factors, industrial sites. (Pounds per cubic yard)

Asphalt, mining & milling wastes, foundry sand, silica:	2500 lbs
Ash & slag:	2000 lbs
Food waste, manure, wet sludge, septage:	1600 lbs
Wood waste:	1200 lbs
Pulp & paper waste other than sludge:	1000 lbs

For waste other than the above, the permittee must determine the density of the wastes, subject to DEQ approval.

As an alternative, the permittee may determine the density of their own waste, subject to DEQ approval.

Overall. Even with the Department's proposed changes, the permit processing fee schedule is much simplified. By keeping a permit renewal fee, it generates more revenue annually than the Work Group's proposal ($54,000 vs. $12,000). This in turn affects the level of the annual solid waste permit fee; the per-ton rate for most solid waste facilities is reduced from $.21/ton to $.20/ton.

deqrec.fee
1/21/92

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY **INTEROFFICE MEMORANDUM**

DATE: April 15, 1992

TO: Environmental Quality Commission

FROM: Fred Hansen

SUBJECT: Agenda Item E: Solid Waste Permit Fees. Additional Comments and Recommendations From Solid Waste Permit Fee Work Group, and Department's Response

As a result of public comment on the draft Solid Waste Permit Fee rule changes, the Department of Environmental Quality (DEQ, Department) proposed a number of changes in its final rule (see staff report, Agenda Item E). Because the Department had worked closely with a Solid Waste Permit Fee Work Group in developing the draft rule, we reconvened the Work Group to receive their comments on the Department's proposed changes.

The Solid Waste Permit Fee Work Group met on April 7. They considered the five areas of change identified in the attached March 31, 1992 memo from the Department, in addition to other issues raised in public comments.

I. Work Group's Reactions to Department's Changes.

The Work Group had the following reactions to the Department's proposed rule changes as discussed in the Department's March 31 memo:

1. Reduce per-ton rate for energy recovery facilities to $.13/ton. The Group's consensus was to support the staff recommendation to reduce the proposed $.15/ton rate to $.13/ton.

2. Reduce "minimum" annual permit fee from $300 to $200. The Group disagreed with this change, and supported keeping the $300 minimum annual permit fee for the smallest disposal sites as proposed in the draft rule.

Group members pointed out that the $300 minimum fee does not cover the Department's costs of administering these small sites. Even with a minimum $300 annual permit fee, revenue from larger sites subsidizes the Department's oversight of small sites. It was pointed out that the Group's small county representative (although unable to attend the April 7 meeting) had not considered $300 to be unreasonable during the Group's development of the proposal. There was widespread feeling that even small sites should be able to pay the $300 minimum permit fee. The Group's view was the SB 66 Annual Fee (based on $.09

per ton) and the $.85 per ton solid waste disposal fee that all sites also have to pay are for different purposes, and are not a justification for reducing the $300 minimum permit fee, even though the total cost per ton for solid waste disposal would be as much as $2.44 for many small sites while only $1.15 per ton for large sites. The Group stated their belief that lowering the permit fee would signal that the Department was not going to require smaller sites to come into compliance with landfill operating criteria.

The Group's consensus was that the $300 minimum permit fee should be retained.

> Department's Response: Retain the $200 for reasons stated in the Staff Report, Agenda Item E, 4/23/92 EQC meeting. While the $300 considered in isolation is not onerous, combined with an additional $.94 per ton for solid waste disposal fees ($.85 per-ton fee and $.09 for the SB 66 annual fee), it results in small sites like Jordan Valley paying a total of $2.44 per ton, while larger landfills pay $1.15 per ton. This is unfair and serves no visible purpose. Small, remote sites will close as the economies of increased regulation make them too expensive to operate. The Department will have to work with rural counties to develop reasonable alternatives. The additional push of paying twice the per-ton rate of Western Oregon metropolitan counties is not needed.

3. Exempt "On-site" (or Captive) Industrial Facilities from the $.09/ton SB 66 Annual Fee. The Group's consensus was to approve the Department's recommendation, as the draft proposal was incorrect in the first place.

4. Establish additional solid waste conversion factors for industrial wastes. The Group's consensus was to add the three conversion factors, and also raise the factor for "construction, demolition and landclearing wastes" to 1,100 pounds per cubic yard (rather than 1,000 as proposed by the Department).

The Group felt that the Department's proposal was too light, noting that demolition wastes may range from 800 to 1,200 pounds per cubic yard. The Group felt that 1,100 pounds was a reasonable factor.

> Department's Response: Accept the recommended change.

A representative of the pulp and paper industry was present at the April 7 meeting, and asked the Group to consider an additional concern related to industrial waste conversion factors. He noted that pulp and paper clarifier solids are composed of 50 percent water, and constitute a principal waste disposed of at pulp and paper industrial waste facilities. He said that his industry objected to paying a $.21 per ton fee based largely on water, and perceived this as a fairness issue. It is possible to further de-water the clarifier solids, but it requires use of energy and is an additional expense. The Group felt that the moisture content issue should be kept out of the rate basis. Operators of municipal landfills also experience heavier garbage in the winter because of the moisture content. The Group's consensus was that the annual permit fee should be based on the tonnage that goes across the scale, regardless of the water content.

This raised additional discussion on the wording of OAR 340-61-115(3)(b) specifying how annual tonnages are to be calculated for industrial facilities. To clarify the Department's intent for scales to be used in all cases where they are available, the Group supported a change in the second full sentence, to read as follows:

> If certified scales are not required, or AT THOSE SITES RECEIVING LESS THAN 50,000 TONS A YEAR IF SCALES ARE NOT AVAILABLE, industrial sites shall use the following conversion factors to determine tonnage of solid waste disposed of: [Addition in caps was proposed by the Work Group.]
>
> Department's Response: Accept the recommended change.

5. Other Changes/Clarifications. The Group had no objections to the clarifications listed in paragraph 5.

II. Additional Issues

The Work Group also considered other public comments that the Department did not recommend incorporating into the rule. The most significant of these was a proposal for a "sliding" per-ton rate. The following summarizes the Group's discussion of additional issues.

1. Use of "sliding" per-ton rate to determine annual permit fee. (See discussion in the Staff Report.) This concept would use a decreasing per-ton rate based on "tier"

blocks of tonnage received by solid waste disposal sites. The first several thousand tons of waste received would be assessed at a higher per-ton rate than succeeding "tiers" of solid waste. The proponents of this concept stated that the Department is required by statute to base the permit fee on the anticipated cost of regulating the site. The "sliding" rate takes the Department's regulatory "economy of scale" into account, by recognizing that the Department's costs of regulating a site do not necessarily double as the amount of waste received doubles. It was recalled that the Work Group had agreed in the past that large sites would have to subsidize the regulation of small sites to some degree. The permit fee also incorporates the recycling implementation fee, which funds activities not benefitting from regulatory economies of scale. There was discussion that most categories of permittee likely believe the rate structure does not treat them fairly. However, the Department must use some rational basis for fee determination. Since it is impossible for the Department to charge a direct "fee for service," a tonnage-based fee is not an unreasonable basis on which to calculate permit fees. The Group felt there were advantages to the simplicity of a "flat" rate. There was no Group consensus that a "sliding" rate structure should be adopted.

2. Rate treatment of industrial sites. The representative of the pulp and paper industry suggested that it was unfair to have the rate for industrial sites depend on the amount of solid waste received at domestic sites (since the rate is determined by dividing the amount of permit fee revenue the Department is authorized to collect, by the total tonnage of solid waste received in the state). He argued that industrial waste sites require less regulation than municipal sites, and create a lesser degree of environmental concern. The permit fee structure for industrial sites should reflect this. Captive industrial sites should be divorced in the fee structure from municipal sites, at least by having their rate on a different line item. This would make it easier to consider rates for these industrial sites separately in the future. The Group chair pointed out that the Group had already considered the issue, and had felt that industrial facilities should be treated similarly to other solid waste disposal facilities.

A straw poll of the Group found that the Group would not object to having the per-ton rate for captive industrial sites listed on a separate line.

Department's Response: The Department does not object to a separate listing for the rate for

industrial facilities, and is incorporating this recommendation into its proposed rules.

3. Modification of submittal schedule for per-ton solid waste disposal fees. One member of the Group mentioned that it was difficult to submit quarterly reports by the 15th day of the month following the end of the calendar quarter. Two weeks' time is insufficient to calculate the amount of waste (both domestic and out-of-state) received at the site during the previous quarter, and submit payment to the Department for the per-ton solid waste disposal fee. Work Group consensus was to extend the submittal date to the 30th day of the month following the end of the calendar quarter.

Department's Response: This is a reasonable recommendation, and the Department is incorporating it into the proposed rule.

III. Summary of Department's Recommendations

Following is a summary of the Department's proposed additional changes to the rule for Solid Waste Permit Fees (OAR 340-61) which the Commission has before it in Agenda Item E, pursuant to the Solid Waste Permit Fee Work Group's recommendations.

1. Change the conversion factor for demolition waste from 1,000 to 1,100 pounds per cubic yard. (OAR 340-61-115 (3)(b)(C))

2. Change the wording in OAR 340-61-115(3)(b) to specify when certified scales are to be used for industrial facilities.

3. List on a separate line the $.21 per-ton rate used to calculate the permit fee for captive industrial facilities. (OAR 340-61-120(3)(a)(B)(ii))

4. Extend the submittal date for the per-ton solid waste disposal fees to the 30th day of the month following the end of the calendar quarter. (OAR 340-61-115(6)(c), 340-61-120(6)(c) and 340-61-120(7)(c))

A revised copy of the proposed rule is attached, incorporating the above changes.

Attachments: March 31, 1992 memo from Deanna Mueller-Crispin to the Solid Waste Permit Fee Work Group
Proposed Rules

Oregon

DEPARTMENT OF ENVIRONMENTAL QUALITY

March 31, 1992

TO: Solid Waste Permit Fee Work Group

FROM: Deanna Mueller-Crispin

SUBJECT: Permit Fee Rules: Changes Recommended From Draft Rule

As a result of public comment received on the draft Solid Waste Permit Fee Rule revisions, the Department is recommending the following changes to go forward to the Environmental Quality Commission at their April 23 meeting. A copy of the revised rule is attached for your reference. (Note: other changes may be made before a "final" rule is sent to the Environmental Quality Commission for adoption, as DEQ in-house review has not yet been completed.) Major changes include:

1. Change in per-ton rate for energy recovery: $.13/ton.

   The draft rule proposed $.15/ton as the rate to determine the annual solid waste permit fee ("permit fee") for energy recovery facilities. Ash from such facilities would also pay the proposed $.21/ton rate. Both types of waste would be subject to the new $.09/ton "tonnage-based permit fee" (from SB 66). Marion County pointed out that this results in "double charging" of solid waste received at its energy recovery facility, and a higher overall charge for such waste than if it were simply landfilled. Marion County proposed that their burner's ash be exempt from the $.21/ton fee; or that a lower rate be established for waste going to the energy recovery facility.

   The Department did not intend for energy recovery facilities to pay an overall higher rate than landfills, and proposes to change the recommended rate for waste received by energy recovery facilities to $.13/ton. This gives a slight advantage ($290) to energy recovery over landfilling. Calculations for the Brooks energy recovery facility are as follows:

   Annual solid waste accepted: 178,000 tons
   Ash generated (landfilled): 46,500 tons

   If all the waste were landfilled, the fee would be as follows:

178,000 tons	x	$.21/ton (landfill rate)	= $37,380
"	x	.09 (SB 66 fee)	= 16,020
		Total annual fee	$53,400

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696
TDD (503) 229-6993

Original proposal ($.15/ton):			Revised proposal ($.13/ton):		
178,000	x $.15 =	$26,700	178,000	x $.13 =	$23,140
"	x .09 =	16,020	"	x .09 =	16,020
46,500	x .21 =	9,765	46,500	x .21 =	9,765
"	x .09 =	4,185	"	x .09 =	4,185
Total fee		$56,670	Total fee		$53,110

2. Change in "Minimum" Annual Permit Fee: $200.

The draft rule bases the permit fee on $.21/ton for solid waste collected in the previous calendar year, with a proposed minimum annual permit fee of $300. Small communities commented that this was unfair to small localities. With a $300 minimum fee, small municipal sites would pay a higher per-ton fee than larger sites. For the smallest sites, the per-ton difference is significant (see Addendum A). Small municipal sites serve small communities which are hard-pressed to pay this fee as well as the other fee increases they are subject to, including the new tonnage-based annual fee of $.09/ton and the $.85/ton solid waste disposal fee. They also commented that for the smallest sites the annual total of these three fee categories, based only on the per-ton rates, would amount to less than $300. (This would be true for any landfill receiving less than 300 tons of solid waste a year; there are approximately 28 such landfills in the State.)

Upon further review of the per-ton fiscal impact of the $300 minimum fee, the Department believes it would be overly burdensome on small sites, and proposes to lower it to $200. This would cover an annual site visit to some sites, although not the most remote ones. The very smallest sites would still pay a higher per-ton rate, but the difference is reduced.

3. "On-site" Industrial Facilities Exempt from $.09/ton Fee.

Comment was received that the $.09 per-ton tonnage-based annual fee (created by SB 66) should apply only to domestic waste. The statute (ORS 459.235(3)) specifies that the Commission "shall establish a schedule of annual permit fees...The fees shall be assessed annually and shall be based on the amount of solid waste received at the disposal site in the previous calendar year." The Department believes that legislative intent was that "on-site" (or "captive") industrial facilities were not to be subject to this permit fee. (An "on-site" industrial facility is one where the permittee is the generator of all solid waste received at the site.) However, "off-site" industrial facilities (all industrial facilities other than "on-site") should be subject to this fee, as the waste received could alternatively go to a municipal site. It is equitable that "off-site" industrial facilities be subject to this fee.

The Department is proposing to exempt on-site, but not off-site, industrial facilities from the new SB 66 tonnage-based annual fee of $.09.

4. Establish additional solid waste conversion factors to be used at industrial facilities and at those municipal facilities without certified scales.

The draft rule proposed factors to convert several types of industrial solid waste from cubic yards to tons. A proposal was received to establish three additional conversion factors, as follows:

Contaminated soils:	2,400 lbs per cubic yard
Construction, demolition and landclearing wastes:	1,000 lbs per cubic yard
Asbestos:	500 lbs per cubic yard

The proposal also recommended that municipal facilities use these factors (instead of the existing standards for "compacted" and "uncompacted" wastes) when they receive those types of waste. The Department agrees that this would improve the accuracy of reporting tonnages, and is incorporating the above changes into the proposed final rule.

5. Other Changes/Clarifications.

A number of clarifications to the draft rule language were made, including the following:

a. Clarification of the calculation for annual permit fees for sites either beginning or ending operations.

b. The requirement for use of certified scales was clearly stated to include off-site industrial facilities receiving over 50,000 tons of solid waste a year.

c. The annual permit fee ($.10/ton) for composting facilities was clearly stated to apply to mixed solid waste. (Concern was expressed that yard debris composting sites would be subject to this fee.)

Attachments

ADDENDUM A

SMALL LANDFILLS:
EFFECT OF PROPOSED SOLID WASTE PERMIT FEE
3/24/92

This paper analyzes how the solid waste permit fee (in the DEQ draft rule put out for public comment) might affect small landfills.

I. Fee Schedule in Draft Rule

A. Small landfills pay:

- Annual Solid Waste Permit Fee:	$.21/ton OR $300 min.
- Tonnage-based Permit Fee:	$.09/ton
- Per-ton solid waste disposal fee:	$.85/ton

(Eventually: Orphan site fee)

B. Examples:

1. Landfill accepting 200 tons (~28, e.g. Jordan Valley)

- Annual Solid Waste Permit Fee (200 x $.21 = $42)	$300
- Tonnage-based Permit Fee (200 x $.09)	18
- Per-ton solid waste disposal fee (200 x $.85)	170
Total:	$488

Per-ton cost: $2.44

2. Landfill accepting 500 tons (~14, e.g. Christmas Valley)

- Annual Solid Waste Permit Fee (500 x $.21 = $105)	$300
- Tonnage-based Permit Fee (500 x $.09)	45
- Per-ton solid waste disposal fee (500 x $.85)	425
Total:	$770

Per-ton cost: $1.54

3. Landfill accepting 1000 tons (~5, e.g. Bly)

- Annual Solid Waste Permit Fee (1000 x $.21 = $210)	$300
- Tonnage-based Permit Fee (1000 x $.09)	90
- Per-ton solid waste disposal fee (1000 x $.85)	850
Total:	$1,240

Per-ton cost: $1.24

4. Landfill accepting 1400 tons (~3, e.g. Pilot Rock)

- Annual Solid Waste Permit Fee (1400 x $.21 = $294)	$300
- Tonnage-based Permit Fee (1400 x $.09)	126
- Per-ton solid waste disposal fee (1400 x $.85	1,190
Total:	$1,616

Per-ton cost: $1.15

5. All landfills accepting >1,450 tons (~40)

- Annual fees: tonnage in prev. cal yr. x $.30
- Quarterly fee: gate tonnage x $.85

Per-ton cost: $1.15

II. Proposed Alternative (in Final Rule)

1. Reduce the $300 minimum annual solid waste permit fee to $200.

Under this alternative, the per-ton discrepancy between small sites and large sites would be reduced.

Examples:	Total Fees	Per-ton Costs
- Jordan Valley (200 tons):	$388	$1.94
- Christmas Valley (500 tons):	$670	1.34
- Bly (1000 tons):	$1,150	1.15
- Pilot Rock (1400 tons):	$1,610	1.15

smallsit

4. Landfill accepting 1400 tons (~3, e.g. Pilot Rock)

- Annual Solid Waste Permit Fee (1400 x $.21 = $294)	$300
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smallsit

ADDENDUM A

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EFFECT OF PROPOSED SOLID WASTE PERMIT FEE
3/24/92

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I. Fee Schedule in Draft Rule

A. Small landfills pay:

- Annual Solid Waste Permit Fee: $.21/ton OR $300 min.
- Tonnage-based Permit Fee: $.09/ton
- Per-ton solid waste disposal fee: $.85/ton

(Eventually: Orphan site fee)

B. Examples:

1. Landfill accepting 200 tons (~28, e.g. Jordan Valley)

- Annual Solid Waste Permit Fee (200 x $.21 = $42)	$300
- Tonnage-based Permit Fee (200 x $.09)	18
- Per-ton solid waste disposal fee (200 x $.85)	170
Total:	$488

Per-ton cost: $2.44

2. Landfill accepting 500 tons (~14, e.g. Christmas Valley)

- Annual Solid Waste Permit Fee (500 x $.21 = $105)	$300
- Tonnage-based Permit Fee (500 x $.09)	45
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Total:	$770

Per-ton cost: $1.54

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- Annual Solid Waste Permit Fee (1000 x $.21 = $210)	$300
- Tonnage-based Permit Fee (1000 x $.09)	90
- Per-ton solid waste disposal fee (1000 x $.85)	850
Total:	$1,240

Per-ton cost: $1.24

Attachment A - Revised

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY
ADMINISTRATIVE RULES
SOLID WASTE MANAGEMENT
DIVISION 61
Proposed Revisions
4/10/92

Proposed deletions are in brackets [ ].
Proposed additions are underlined.

PERMIT FEES

340-61-115

(1) Each person required to have a Solid Waste Disposal Permit shall be subject to a three-part fee consisting of [a filing fee,] an application processing fee, [and] an annual [compliance determination] solid waste permit fee as listed in OAR 340-61-120[.] and the SB 66 annual fee as listed in OAR 340-61-120(4). In addition, each disposal site receiving domestic solid waste shall be subject to [an annual recycling program implementation fee as listed in OAR 340-61-120, and] a per-ton solid waste disposal fee on domestic solid waste as specified in Section 5 of OAR 340-61-120. In addition, each disposal site or regional disposal site receiving solid waste generated out-of-state shall pay a per-ton solid waste disposal fee as specified in Section 6 of OAR 340-61-120 or a surcharge as specified in Section 7 [6] of OAR 340-61-120. The amount equal to the [filing fee,] application processing fee[, the first year's annual compliance determination fee and, if applicable, the first year's recycling program implementation fee] shall be submitted as a required part of any application for a new permit. [The amount equal to the filing fee and application processing fee shall be submitted as a required part of any application for renewal or modification of an existing permit.]

[(2) As used in this rule unless otherwise specified, the term "domestic solid waste" includes, but is not limited to, residential, commercial and institutional wastes; but the term does not include:]

[(a) Sewage sludge or septic tank and cesspool pumpings;]

[(b) Building demolition or construction wastes and land clearing debris, if delivered to disposal sites that are not open to the general public;]

[(c) Yard debris, if delivered to disposal sites that receive no other residential wastes.]

(2) [(3)] The annual [compliance determination] solid waste permit fee and, if applicable, the SB 66 annual fee [fee and, if applicable, the annual recycling program implementation fee] must be paid for each year a disposal site is in operation or under permit. The fee period shall be the state's fiscal year (July 1 through June 30) and shall be paid annually by July 1. [Any annual compliance determination fee and, if applicable, any recycling program implementation fee submitted as part of an application for a new permit shall apply to the fiscal year the permitted disposal site is put into operation. For the first year's operation, the full fee(s) shall apply if the disposal site is placed into operation on or before April 1.] Any new disposal site placed into operation after January 1 [April 1] shall not owe [a compliance determination fee and, if applicable, a recycling program implementation fee] an annual solid waste permit fee or a SB 66 annual fee until July 1 of the following year. Any existing disposal site that receives solid waste in a calendar year must pay the annual solid waste permit fee and SB 66 annual fee, if applicable, as specified in OAR 340-61-120(3)(a) and 340-61-120(4) for the fiscal year which begins on July 1 of the following calendar year. If no solid waste was received in the previous calendar year and the site is closed, a solid waste permittee shall pay the annual solid waste permit fee for closed sites as specified in OAR 340-61-120(3)(c). The Director may alter the due date for the annual [compliance determination fee and, if applicable, the recycling program implementation] solid waste permit fee and, if applicable, the SB 66 annual fee upon receipt of a justifiable request from a permittee.

(3) [(4) For the purpose of determining appropriate fees, each disposal site shall be assigned to a category in OAR 340-61-120 based upon the amount of solid waste received and upon the complexity of each disposal site. Each disposal site which falls into more than one category shall pay whichever fee is higher. The Department shall assign a site to a category on the basis of estimated annual tonnage or gallonage of solid waste received unless the actual amount received is known.] Permittees are responsible for accurate calculation of solid waste tonnages. For purposes of determining appropriate fees under OAR 340-61-120(3) through (7), annual tonnage of solid waste received shall be calculated as follows:

(a) Municipal solid waste facilities. Annual tonnage of solid waste received at municipal solid waste facilities, including demolition sites, receiving 50,000 or more tons annually shall be based on weight from certified scales after January 1, 1994. If certified scales are not required or not available, [E]estimated annual tonnage for [domestic waste disposal sites] municipal solid waste will be based upon 300 pounds per cubic yard of uncompacted waste received, 700 pounds per cubic yard of compacted waste

received, or, if yardage is not known, one ton per resident in the service area of the disposal site, unless the permittee demonstrates a more accurate estimate. For other types of wastes received at municipal solid waste sites and where certified scales are not required or not available, the conversions and provisions in subsection (b) of this Section shall be used. [Loads of solid waste consisting exclusively of soil, rock, concrete, rubble or asphalt shall not be included when calculating the annual amount of solid waste received.]

(b) Industrial facilities. Annual tonnage of solid waste received at off-site industrial facilities receiving 50,000 or more tons annually shall be based on weight from certified scales after January 1, 1994. If certified scales are not required, or at those sites receiving less than 50,000 tons a year if scales are not available, industrial sites shall use the following conversion factors to determine tonnage of solid waste disposed of:

(A) Asbestos: 500 pounds per cubic yard.

(B) Pulp and paper waste other than sludge: 1,000 pounds per cubic yard.

(C) Construction, demolition and landclearing wastes: 1,100 pounds per cubic yard.

(D) Wood waste: 1,200 pounds per cubic yard.

(E) Food waste, manure, sludge, septage, grits, screenings and other wet wastes: 1,600 pounds per cubic yard.

(F) Ash and slag: 2,000 pounds per cubic yard.

(G) Contaminated soils: 2,400 pounds per cubic yard.

(H) Asphalt, mining and milling wastes, foundry sand, silica: 2,500 pounds per cubic yard.

(I) For wastes other than the above, the permittee shall determine the density of the wastes subject to approval by the Department.

(J) As an alternative to the above conversion factors, the permittee may determine the density of their own waste, subject to approval by the Department.

[(5) Modifications of existing, unexpired permits which are instituted by the Department due to changing conditions or standards, receipt of additional information or any other reason pursuant to applicable statutes and do not require refiling or review of an application or plans and specifications shall not require submission of the filing fee or the application processing fee.]

[(6) Upon the Department accepting an application for filing, the filing fee shall be non-refundable.]

(4) [(7)] The application processing fee may be refunded in whole or in part, after taking into consideration any costs the Department may have incurred in processing the application, when submitted with an application if either of the following conditions exist:

(a) The Department determines that no permit will be required;

(b) The applicant withdraws the application before the Department has granted or denied preliminary approval or, if no preliminary approval has been granted or denied, the Department has approved or denied the application.

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

(6) Submittal schedule.

(a) The annual solid waste permit fee shall be billed to the permittee by the Department, and is due by July 1 of each year.

(b) The SB 66 annual fee shall be billed to the permittee by the Department, and is due by July 1 of each year.

(c) The per-ton solid waste disposal fees on domestic and out-of-state solid waste are not billed by the Department. They are due on the following schedule:

(A) Quarterly, on the 30th day of the month following the end of the calendar quarter; or

(B) On the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent.

(d) The surcharge on disposal of solid waste generated out-of-state is not billed by the Department. It is due on the same schedule as the per-ton solid waste disposal fees above.

PERMIT FEE SCHEDULE

340-61-120

[(1) Filing Fee. A filing fee of $50 shall accompany each application for issuance, renewal, modification, or transfer of a Solid Waste Disposal Permit. This fee is non-refundable and is in addition to any application processing fee or annual compliance determination fee which might be imposed.]

(1) For purposes of this rule:

(a) A "new facility" means a facility at a location not previously used or permitted, and does not include an expansion to an existing permitted site.

(b) An "off-site industrial facility" means all industrial solid waste disposal sites other than a "captive industrial disposal site."

(c) A "captive industrial facility" means an industrial solid waste disposal site where the permittee is the owner and operator of the site and is the generator of all the solid waste received at the site.

(2) Application Processing Fee. An application processing fee [varying between $50 and $2,000] shall be submitted with each application for a new facility. The amount of the fee shall depend on the type of facility and the required action as follows:

(a) A new municipal solid waste landfill facility, incinerator, energy recovery facility, composting facility for mixed solid waste, off-site industrial facility or sludge disposal facility: [(including substantial expansion of an existing facility:)]

(A) Designed to receive over 7,500 tons of solid waste per year:	$10,000
(B) Designed to receive less than 7,500 tons of solid waste per year:	$5,000
[(A) Major facility[1]	$ 2,000]
[(B) Intermediate facility[2]	$ 1,000]
[(C) Minor facility[3]	$ 300]

[[1]**Major Facility Qualifying Factors:**]

[-a- Received more than 25,000 tons of solid waste per year; or]

[-b- Has a collection/treatment system which, if not properly constructed, operated and maintained, could have a significant adverse impact on the environment as determined by the Department.]

[[2]**Intermediate Facility Qualifying Factors:**]

[-a- Received at least 5,000 but not more than 25,000 tons of solid waste per year; or]

[-b- Received less than 5,000 tons of solid waste and more than 25,000 gallons of sludge per month.]

[[3]**Minor Facility Qualifying Factors:**]

[-a- Received less than 5,000 tons of solid waste per year; and]

[-b- Received less than 25,000 gallons of sludge per month.]

[All tonnages based on amount received in the immediately preceding fiscal year, or in a new facility the amount to be received the first fiscal year of operation.]

[(b) Preliminary feasibility only (Note: the amount of this fee may be deducted from the complete application fee listed above):]

[(A)	Major facility	$ 1,200]
[(B)	Intermediate facility	$ 600]
[(C)	Minor facility	$ 200]

[(c) Permit renewal (including new operational plan, closure plan or improvements):]

[(A)	Major facility	$ 500]
[(B)	Intermediate facility	$ 250]
[(C)	Minor facility	$ 125]

[(d) Permit renewal (without significant change):]

[(A)	Major facility	$ 250]
[(B)	Intermediate facility	$ 150]
[(C)	Minor facility	$ 100]

[(e) Permit modification (including new operational plan, closure plan or improvements):]

[(A)	Major facility	$ 500]
[(B)	Intermediate facility	$ 250]
[(C)	Minor facility	$ 100]

[(f) Permit modification (without significant change in facility design or operation):]

[All categories $ 50]

[(g) Permit modification (Department initiated):]

[All categories No fee]

(b) A new captive industrial facility: $1,000

(c) A new transfer station or material recovery facility -

(A) Receiving over 50,000 tons of solid waste per year: $500

(B) Receiving between 10,000 and 50,000 tons of solid waste per year: $200

(C) Receiving less than 10,000 tons of solid waste per year: $100

(d) [(h)] Letter authorizations (pursuant to OAR 340-61-027) [, new or renewal: $ 100]: $500

(e)[(i)] Before June 30, 1994: Hazardous substance authorization (Any permit or plan review application which seeks new, renewed, or significant modification in authorization to landfill cleanup materials contaminated by hazardous substances):

(A) Authorization to receive 100,000 tons or more of designated cleanup waste per year $50,000

(B) Authorization to receive at least 50,000 but less than 100,000 tons of designated cleanup material per year $25,000

(C) Authorization to receive at least 25,000 but less than 50,000 tons of designated cleanup material per year $12,500

(D) Authorization to receive at least 10,000 but less than 25,000 tons of designated cleanup material per year $ 5,000

(E) Authorization to receive at least 5,000 but less than 10,000 tons of designated cleanup material per year $ 1,000

(F) Authorization to receive at least 1,000 but less than 5,000 tons of designated cleanup material per year $ 250

(3) Annual [Compliance Determination] Solid Waste Permit Fee. The Commission establishes the following fee schedule including base per-ton rates to be used to determine the annual solid waste permit fee beginning with fiscal year 1993. The per-ton rates are based on the estimated solid waste received at all permitted solid waste disposal sites and on the Department's Legislatively Approved Budget. The Department will review annually the amount of revenue generated by this fee schedule. To determine the annual solid waste permit fee, the Department may use the base per-ton rates, or any lower rates if the rates would generate more revenue than provided in the Department's Legislatively Approved Budget. Any increase in the base rates must be fixed by rule by the Commission. (In any case where a facility fits into more than one category, the permittee shall pay only the highest fee):

[(a) Domestic Waste Facility:]

[(A) A landfill which received 500,000 tons or more of solid waste per year: $60,000]

[(B) A landfill which received at least 400,000 but less than 500,000 tons of solid waste per year: $48,000]

[(C) A landfill which received at least 300,000 but less than 400,000 tons of solid waste per year: $36,000]

[(D) A landfill which received at least 200,000 but less than 300,000 tons of solid waste per year: $24,000]

[(E) A landfill which received at least 100,000 but less than 200,000 tons of solid waste per year: $12,000]

[(F) A landfill which received at least 50,000 but less than 100,000 tons of solid waste per year: $ 6,000]

[(G) A landfill which received at least 25,000 but less than 50,000 tons of solid waste per year: $ 3,000]

[(H) A landfill which received at least 10,000 but less than 25,000 tons of solid waste per year: $ 1,500]

[(I) A landfill which received at least 5,000 but not more than 10,000 tons of solid waste per year: $ 750]

[(J) A landfill which received at least 1,000 but not more than 5,000 tons of solid waste per year: $ 200]

[(K) A landfill which received less than 1,000 tons of solid waste per year: $ 100]

[(L) A transfer station which received more than 10,000 tons of solid waste per year: $ 500]

[(M) A transfer station which received less than 10,000 tons of solid waste per year: $ 50]

[(N) An incinerator, resource recovery facility, composting facility and each other facility not specifically classified above which receives more than 100,000 tons of solid waste per year: $ 8,000]

[(O) An incinerator, resource recovery facility, composting facility and each other facility not specifically classified above which receives at least 50,000 tons but less than 100,000 tons of solid waste per year: $ 4,000]

[(P) An incinerator, resource recovery facility, composting facility and each other facility not specifically classified above which receives less than 50,000 tons of solid waste per year: $ 2,000]

[(Q) A landfill which has permit provisions to store over 100 waste tires -- the above fee or $250 whichever is highest.]

[(b) Industrial Waste Facility:]

[(A) A facility which received 10,000 tons or more of solid waste per year: $ 1,500]

[(B) A facility which received at least 5,000 tons but less than 10,000 tons of solid waste per year: $ 750]

[(C) A facility which received less than 5,000 tons of solid waste per year: $ 150]

[(c) Sludge Disposal Facility:]

[(A) A facility which received 25,000 gallons or more of sludge per month: $ 150]

[(B) A facility which received less than 25,000 gallons of sludge per month: $ 100]

(a) All facilities accepting solid waste except transfer stations and material recovery facilities:

(A) $200; or

(B) An annual solid waste permit fee based on the total amount of solid waste received at the facility in the previous calendar year, at the following rate:

(i) All municipal landfills, demolition landfills, off-site industrial facilities, sludge disposal facilities, and incinerators: $.21 per ton.

(ii) Captive industrial facilities: $.21 per ton.

(iii) Energy recovery facilities: $.13 per ton.

(iv) Composting facilities receiving mixed solid waste: $.10 per ton.

(C) If a disposal site (other than a municipal solid waste facility) is not required by the Department to monitor and report volumes of solid waste collected, the annual solid waste permit fee may be based on the estimated tonnage received in the previous year.

(b) Transfer stations and material recovery facilities:

(A) Facilities accepting over 50,000 tons of solid waste per year: $1,000

(B) Facilities accepting between 10,000 and 50,000 tons of solid waste per year: $500

(C) Facilities accepting less than 10,000 tons of solid waste per year: $50

(c)[(d)] Closed Disposal Sites: Each landfill which closes after July 1, 1984:. . . . . .[10% of fee which would be required, in accordance with subsections (3)(a), (3)(b), and (3)(c) above, if the facility was still in operation or $50 whichever is greater.] $150, or the average tonnage of solid waste received in the 3 most active years of site operation multiplied by $.025 per ton, whichever is greater; but the maximum annual permit fee shall not exceed $2,500.

[(e) Facility with Monitoring Wells: In addition to the fees described above, each facility with one or more wells for monitoring groundwater or methane, surface water sampling points, or any other structures or locations requiring the collection and analysis of samples by the Department, shall be assessed a fee. The amount of the fee shall depend on the number of wells (each well in a multiple completion well is considered to be a separate well) or sampling points as follows:. . . . . .$ 250 for each well or sampling point.]

[(4) Annual Recycling Program Implementation Fee. An annual recycling program implementation fee shall be submitted by each domestic waste disposal site, except transfer stations and closed landfills. This fee is in addition to any other permit fee which

may be assessed by the Department. The amount of the fee shall depend on the amount of solid waste received as follows:]

[(a) A disposal site which received 500,000 tons or more of solid waste per year: $20,000]

[(b) A disposal site which received at least 400,000 but less than 500,000 tons of solid waste per year: $18,000]

[(c) A disposal site which received at least 300,000 but less than 400,000 tons of solid waste per year: $14,000]

[(d) A disposal site which received at least 200,000 but less than 300,000 tons of solid waste per year: $ 9,000]

[(e) A disposal site which received at least 100,000 but less than 200,000 tons of solid waste per year: $ 4,600]

[(f) A disposal site which received at least 50,000 but less than 100,000 tons of solid waste per year: $ 2,300]

[(g) A disposal site which received at least 25,000 but less than 50,000 tons of solid waste per year: $ 1,200]

[(h) A disposal site which received at least 10,000 but less than 25,000 tons of solid waste per year: $ 450]

[(i) A disposal site which received at least 5,000 but less than 10,000 tons of solid waste per year: $ 225]

[(j) A disposal site which received at least 1,000 but less than 5,000 tons of solid waste per year: $ 75]

[(k) A disposal site which received less than 1,000 tons of solid waste per year: $ 50]

(4) Senate Bill 66 (SB 66) annual fee.

(a) A SB 66 annual fee shall be submitted by each solid waste permittee which received solid waste in the previous calendar year, except transfer stations, material recovery facilities and captive industrial facilities. The Commission establishes the SB 66 annual fee as $.09 per ton for each ton of solid waste received in the subject calendar year.

(b) The $.09 per-ton rate is based on the estimated solid waste received at all permitted solid waste disposal sites in the previous calendar year and on the Department's Legislatively Approved Budget. The Department will review annually the amount of revenue generated by this rate. To determine the SB 66 annual fee, the Department may use this rate, or any lower rate if the rate would generate more

revenue than provided in the Department's Legislatively Approved Budget. Any increase in the rate must be fixed by rule by the Commission.

(c) The Department shall bill the permittee for the amount of this fee together with the annual solid waste permit fee in Section 3 of this rule. This fee is in addition to any other permit fee and per-ton fee which may be assessed by the Department.

(5) Per-ton solid waste disposal fees on domestic solid waste. Each solid waste disposal site that receives domestic solid waste, except transfer stations, shall submit to the Department of Environmental Quality the following fees for each ton of domestic solid waste received at the disposal site:

(a) A per-ton fee of 50 cents.

(b) From January 1, 1992, to December 31, 1993, an additional per-ton fee of 35 cents.

(c) Beginning January 1, 1994 the additional per-ton fee established in subsection (5)(b) of this rule shall be reduced to 31 cents.

(d) Submittal schedule:

(A) These per-ton fees shall be submitted to the Department quarterly, or on the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent. Quarterly remittals shall be due on the 30th [15th] day of the month following the end of the calendar quarter.

(B) Disposal sites receiving less than 1,000 tons of solid waste per year shall submit the fees annually on July 1, beginning in 1991. If the disposal site is not required by the Department to monitor and report volumes of solid waste collected, the fees shall be accompanied by an estimate of the population served by the disposal site.

(e) As used in this rule, [section,] the term "domestic solid waste" includes, but is not limited to, residential, commercial and institutional wastes; but the term does not include:

(A) Sewage sludge or septic tank and cesspool pumpings;

(B) Building demolition or construction wastes and land clearing debris, if delivered to a disposal site that is limited to those purposes;

(C) Source separated recyclable material, or material recovered at the disposal site;

(D) Waste going to an industrial waste facility;

(E) Waste received at an ash monofill from an energy [resource] recovery facility; or

(F) Domestic solid waste which is not generated within this state.

(f) For solid waste delivered to disposal facilities owned or operated by a metropolitan service district, the fees established in this section shall be levied on the district, not on the disposal site.

(6) Per-ton solid waste disposal fee on solid waste generated out-of-state. Each solid waste disposal site or regional disposal site that receives solid waste generated out-of-state shall submit to the Department a per-ton solid waste disposal fee. The per-ton solid waste disposal fee shall be the sum of the per-ton fees established for domestic solid waste in subsections (5)(a), (5)(b) and (5)(c) of this rule.

(a) The per-ton fee solid waste disposal fee shall become effective on the dates specified in section (5) of this rule and shall apply to all solid waste received after July 1, 1991.

(b) This per-ton solid waste disposal fee shall apply to each ton of out-of-state solid waste received at the disposal site, but shall not include source separated recyclable materials, or material recovered at the disposal site.

(c) Submittal schedule: This per-ton solid waste disposal fee shall be submitted to the Department quarterly, or on the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent. Quarterly remittals shall be due on the 30th [15th] day of the month following the end of the calendar quarter.

(d) This per-ton solid waste disposal fee on out-of-state solid waste shall be collected at the first disposal facility in Oregon receiving the waste, including but not limited to a solid waste land disposal site, transfer station or incinerator, and remitted directly to the Department on the schedule specified in this rule.

(e) [(d)] If, after final appeal, the surcharge established in section (7) of this rule is held to be valid and the state is able to collect the surcharge, the per-ton fee on solid waste generated out-of-state established in this section shall no longer apply, and the person responsible for

payment of the surcharge may deduct from the amount due any fees paid to the Department on solid waste generated out-of-state under section (6) of this rule.

(7) Surcharge on disposal of solid waste generated out-of-state. Each solid waste disposal site or regional solid waste disposal site that receives solid waste generated out-of-state shall submit to the Department of Environmental Quality a per-ton surcharge of $2.25. This surcharge shall apply to each ton of out-of-state solid waste received at the disposal site.

(a) This per-ton surcharge shall apply to all solid waste received after January 1, 1991.

(b) Submittal schedule: This per-ton surcharge shall be submitted to the Department quarterly, or on the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent. Quarterly remittals shall be due on the 30th [15th] day of the month following the end of the calendar quarter.

(c) This surcharge shall be in addition to any other fee charged for disposal of solid waste at the site.

(d) This surcharge on out-of-state solid waste shall be collected at the first disposal facility in Oregon receiving the waste, including but not limited to a solid waste land disposal site, transfer station or incinerator, and remitted directly to the Department on the schedule specified in this rule.

OAR61.rev

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY **INTEROFFICE MEMORANDUM**

DATE: April 15, 1992

TO: Environmental Quality Commission

FROM: Fred Hansen

SUBJECT: Agenda Item E: Solid Waste Permit Fees. Additional Comments and Recommendations From Solid Waste Permit Fee Work Group, and Department's Response

As a result of public comment on the draft Solid Waste Permit Fee rule changes, the Department of Environmental Quality (DEQ, Department) proposed a number of changes in its final rule (see staff report, Agenda Item E). Because the Department had worked closely with a Solid Waste Permit Fee Work Group in developing the draft rule, we reconvened the Work Group to receive their comments on the Department's proposed changes.

The Solid Waste Permit Fee Work Group met on April 7. They considered the five areas of change identified in the attached March 31, 1992 memo from the Department, in addition to other issues raised in public comments.

I. Work Group's Reactions to Department's Changes.

The Work Group had the following reactions to the Department's proposed rule changes as discussed in the Department's March 31 memo:

1. Reduce per-ton rate for energy recovery facilities to $.13/ton. The Group's consensus was to support the staff recommendation to reduce the proposed $.15/ton rate to $.13/ton.

2. Reduce "minimum" annual permit fee from $300 to $200. The Group disagreed with this change, and supported keeping the $300 minimum annual permit fee for the smallest disposal sites as proposed in the draft rule.

Group members pointed out that the $300 minimum fee does not cover the Department's costs of administering these small sites. Even with a minimum $300 annual permit fee, revenue from larger sites subsidizes the Department's oversight of small sites. It was pointed out that the Group's small county representative (although unable to attend the April 7 meeting) had not considered $300 to be unreasonable during the Group's development of the proposal. There was widespread feeling that even small sites should be able to pay the $300 minimum permit fee. The Group's view was the SB 66 Annual Fee (based on $.09

per ton) and the $.85 per ton solid waste disposal fee that all sites also have to pay are for different purposes, and are not a justification for reducing the $300 minimum permit fee, even though the total cost per ton for solid waste disposal would be as much as $2.44 for many small sites while only $1.15 per ton for large sites. The Group stated their belief that lowering the permit fee would signal that the Department was not going to require smaller sites to come into compliance with landfill operating criteria.

The Group's consensus was that the $300 minimum permit fee should be retained.

> Department's Response: Retain the $200 for reasons stated in the Staff Report, Agenda Item E, 4/23/92 EQC meeting. While the $300 considered in isolation is not onerous, combined with an additional $.94 per ton for solid waste disposal fees ($.85 per-ton fee and $.09 for the SB 66 annual fee), it results in small sites like Jordan Valley paying a total of $2.44 per ton, while larger landfills pay $1.15 per ton. This is unfair and serves no visible purpose. Small, remote sites will close as the economies of increased regulation make them too expensive to operate. The Department will have to work with rural counties to develop reasonable alternatives. The additional push of paying twice the per-ton rate of Western Oregon metropolitan counties is not needed.

3. Exempt "On-site" (or Captive) Industrial Facilities from the $.09/ton SB 66 Annual Fee. The Group's consensus was to approve the Department's recommendation, as the draft proposal was incorrect in the first place.

4. Establish additional solid waste conversion factors for industrial wastes. The Group's consensus was to add the three conversion factors, and also raise the factor for "construction, demolition and landclearing wastes" to 1,100 pounds per cubic yard (rather than 1,000 as proposed by the Department).

The Group felt that the Department's proposal was too light, noting that demolition wastes may range from 800 to 1,200 pounds per cubic yard. The Group felt that 1,100 pounds was a reasonable factor.

> Department's Response: Accept the recommended change.

A representative of the pulp and paper industry was present at the April 7 meeting, and asked the Group to consider an additional concern related to industrial waste conversion factors. He noted that pulp and paper clarifier solids are composed of 50 percent water, and constitute a principal waste disposed of at pulp and paper industrial waste facilities. He said that his industry objected to paying a $.21 per ton fee based largely on water, and perceived this as a fairness issue. It is possible to further de-water the clarifier solids, but it requires use of energy and is an additional expense. The Group felt that the moisture content issue should be kept out of the rate basis. Operators of municipal landfills also experience heavier garbage in the winter because of the moisture content. The Group's consensus was that the annual permit fee should be based on the tonnage that goes across the scale, regardless of the water content.

This raised additional discussion on the wording of OAR 340-61-115(3)(b) specifying how annual tonnages are to be calculated for industrial facilities. To clarify the Department's intent for scales to be used in all cases where they are available, the Group supported a change in the second full sentence, to read as follows:

> If certified scales are not required, or AT THOSE SITES RECEIVING LESS THAN 50,000 TONS A YEAR IF SCALES ARE NOT AVAILABLE, industrial sites shall use the following conversion factors to determine tonnage of solid waste disposed of: [Addition in caps was proposed by the Work Group.]
>
> Department's Response: Accept the recommended change.

5. Other Changes/Clarifications. The Group had no objections to the clarifications listed in paragraph 5.

II. Additional Issues

The Work Group also considered other public comments that the Department did not recommend incorporating into the rule. The most significant of these was a proposal for a "sliding" per-ton rate. The following summarizes the Group's discussion of additional issues.

1. Use of "sliding" per-ton rate to determine annual permit fee. (See discussion in the Staff Report.) This concept would use a decreasing per-ton rate based on "tier"

blocks of tonnage received by solid waste disposal sites. The first several thousand tons of waste received would be assessed at a higher per-ton rate than succeeding "tiers" of solid waste. The proponents of this concept stated that the Department is required by statute to base the permit fee on the anticipated cost of regulating the site. The "sliding" rate takes the Department's regulatory "economy of scale" into account, by recognizing that the Department's costs of regulating a site do not necessarily double as the amount of waste received doubles. It was recalled that the Work Group had agreed in the past that large sites would have to subsidize the regulation of small sites to some degree. The permit fee also incorporates the recycling implementation fee, which funds activities not benefitting from regulatory economies of scale. There was discussion that most categories of permittee likely believe the rate structure does not treat them fairly. However, the Department must use some rational basis for fee determination. Since it is impossible for the Department to charge a direct "fee for service," a tonnage-based fee is not an unreasonable basis on which to calculate permit fees. The Group felt there were advantages to the simplicity of a "flat" rate. There was no Group consensus that a "sliding" rate structure should be adopted.

2. Rate treatment of industrial sites. The representative of the pulp and paper industry suggested that it was unfair to have the rate for industrial sites depend on the amount of solid waste received at domestic sites (since the rate is determined by dividing the amount of permit fee revenue the Department is authorized to collect, by the total tonnage of solid waste received in the state). He argued that industrial waste sites require less regulation than municipal sites, and create a lesser degree of environmental concern. The permit fee structure for industrial sites should reflect this. Captive industrial sites should be divorced in the fee structure from municipal sites, at least by having their rate on a different line item. This would make it easier to consider rates for these industrial sites separately in the future. The Group chair pointed out that the Group had already considered the issue, and had felt that industrial facilities should be treated similarly to other solid waste disposal facilities.

A straw poll of the Group found that the Group would not object to having the per-ton rate for captive industrial sites listed on a separate line.

Department's Response: The Department does not object to a separate listing for the rate for

industrial facilities, and is incorporating this recommendation into its proposed rules.

3. Modification of submittal schedule for per-ton solid waste disposal fees. One member of the Group mentioned that it was difficult to submit quarterly reports by the 15th day of the month following the end of the calendar quarter. Two weeks' time is insufficient to calculate the amount of waste (both domestic and out-of-state) received at the site during the previous quarter, and submit payment to the Department for the per-ton solid waste disposal fee. Work Group consensus was to extend the submittal date to the 30th day of the month following the end of the calendar quarter.

Department's Response: This is a reasonable recommendation, and the Department is incorporating it into the proposed rule.

III. Summary of Department's Recommendations

Following is a summary of the Department's proposed additional changes to the rule for Solid Waste Permit Fees (OAR 340-61) which the Commission has before it in Agenda Item E, pursuant to the Solid Waste Permit Fee Work Group's recommendations.

1. Change the conversion factor for demolition waste from 1,000 to 1,100 pounds per cubic yard. (OAR 340-61-115 (3)(b)(C))

2. Change the wording in OAR 340-61-115(3)(b) to specify when certified scales are to be used for industrial facilities.

3. List on a separate line the $.21 per-ton rate used to calculate the permit fee for captive industrial facilities. (OAR 340-61-120(3)(a)(B)(ii))

4. Extend the submittal date for the per-ton solid waste disposal fees to the 30th day of the month following the end of the calendar quarter. (OAR 340-61-115(6)(c), 340-61-120(6)(c) and 340-61-120(7)(c))

A revised copy of the proposed rule is attached, incorporating the above changes.

Attachments: March 31, 1992 memo from Deanna Mueller-Crispin to the Solid Waste Permit Fee Work Group
Proposed Rules

Oregon

DEPARTMENT OF ENVIRONMENTAL QUALITY

March 31, 1992

TO: Solid Waste Permit Fee Work Group

FROM: Deanna Mueller-Crispin

SUBJECT: Permit Fee Rules: Changes Recommended From Draft Rule

As a result of public comment received on the draft Solid Waste Permit Fee Rule revisions, the Department is recommending the following changes to go forward to the Environmental Quality Commission at their April 23 meeting. A copy of the revised rule is attached for your reference. (Note: other changes may be made before a "final" rule is sent to the Environmental Quality Commission for adoption, as DEQ in-house review has not yet been completed.) Major changes include:

1. Change in per-ton rate for energy recovery: $.13/ton.

   The draft rule proposed $.15/ton as the rate to determine the annual solid waste permit fee ("permit fee") for energy recovery facilities. Ash from such facilities would also pay the proposed $.21/ton rate. Both types of waste would be subject to the new $.09/ton "tonnage-based permit fee" (from SB 66). Marion County pointed out that this results in "double charging" of solid waste received at its energy recovery facility, and a higher overall charge for such waste than if it were simply landfilled. Marion County proposed that their burner's ash be exempt from the $.21/ton fee; or that a lower rate be established for waste going to the energy recovery facility.

   The Department did not intend for energy recovery facilities to pay an overall higher rate than landfills, and proposes to change the recommended rate for waste received by energy recovery facilities to $.13/ton. This gives a slight advantage ($290) to energy recovery over landfilling. Calculations for the Brooks energy recovery facility are as follows:

   Annual solid waste accepted: 178,000 tons
   Ash generated (landfilled): 46,500 tons

   If all the waste were landfilled, the fee would be as follows:

178,000 tons x $.21/ton (landfill rate)	=	$37,380
" x .09 (SB 66 fee)	=	16,020
Total annual fee		$53,400

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DEQ-1

Original proposal ($.15/ton):		Revised proposal ($.13/ton):	
178,000 x $.15 =	$26,700	178,000 x $.13 =	$23,140
" x .09 =	16,020	" x .09 =	16,020
46,500 x .21 =	9,765	46,500 x .21 =	9,765
" x .09 =	4,185	" x .09 =	4,185
Total fee	$56,670	Total fee	$53,110

2. Change in "Minimum" Annual Permit Fee: $200.

The draft rule bases the permit fee on $.21/ton for solid waste collected in the previous calendar year, with a proposed minimum annual permit fee of $300. Small communities commented that this was unfair to small localities. With a $300 minimum fee, small municipal sites would pay a higher per-ton fee than larger sites. For the smallest sites, the per-ton difference is significant (see Addendum A). Small municipal sites serve small communities which are hard-pressed to pay this fee as well as the other fee increases they are subject to, including the new tonnage-based annual fee of $.09/ton and the $.85/ton solid waste disposal fee. They also commented that for the smallest sites the annual total of these three fee categories, based only on the per-ton rates, would amount to less than $300. (This would be true for any landfill receiving less than 300 tons of solid waste a year; there are approximately 28 such landfills in the State.)

Upon further review of the per-ton fiscal impact of the $300 minimum fee, the Department believes it would be overly burdensome on small sites, and proposes to lower it to $200. This would cover an annual site visit to some sites, although not the most remote ones. The very smallest sites would still pay a higher per-ton rate, but the difference is reduced.

3. "On-site" Industrial Facilities Exempt from $.09/ton Fee.

Comment was received that the $.09 per-ton tonnage-based annual fee (created by SB 66) should apply only to domestic waste. The statute (ORS 459.235(3)) specifies that the Commission "shall establish a schedule of annual permit fees...The fees shall be assessed annually and shall be based on the amount of solid waste received at the disposal site in the previous calendar year." The Department believes that legislative intent was that "on-site" (or "captive") industrial facilities were not to be subject to this permit fee. (An "on-site" industrial facility is one where the permittee is the generator of all solid waste received at the site.) However, "off-site" industrial facilities (all industrial facilities other than "on-site") should be subject to this fee, as the waste received could alternatively go to a municipal site. It is equitable that "off-site" industrial facilities be subject to this fee.

The Department is proposing to exempt on-site, but not off-site, industrial facilities from the new SB 66 tonnage-based annual fee of $.09.

4. Establish additional solid waste conversion factors to be used at industrial facilities and at those municipal facilities without certified scales.

The draft rule proposed factors to convert several types of industrial solid waste from cubic yards to tons. A proposal was received to establish three additional conversion factors, as follows:

Contaminated soils:	2,400 lbs per cubic yard
Construction, demolition and landclearing wastes:	1,000 lbs per cubic yard
Asbestos:	500 lbs per cubic yard

The proposal also recommended that municipal facilities use these factors (instead of the existing standards for "compacted" and "uncompacted" wastes) when they receive those types of waste. The Department agrees that this would improve the accuracy of reporting tonnages, and is incorporating the above changes into the proposed final rule.

5. Other Changes/Clarifications.

A number of clarifications to the draft rule language were made, including the following:

a. Clarification of the calculation for annual permit fees for sites either beginning or ending operations.

b. The requirement for use of certified scales was clearly stated to include off-site industrial facilities receiving over 50,000 tons of solid waste a year.

c. The annual permit fee ($.10/ton) for composting facilities was clearly stated to apply to mixed solid waste. (Concern was expressed that yard debris composting sites would be subject to this fee.)

Attachments

ADDENDUM A

SMALL LANDFILLS:
EFFECT OF PROPOSED SOLID WASTE PERMIT FEE
3/24/92

This paper analyzes how the solid waste permit fee (in the DEQ draft rule put out for public comment) might affect small landfills.

I. Fee Schedule in Draft Rule

A. Small landfills pay:

- Annual Solid Waste Permit Fee:	$.21/ton OR $300 min.
- Tonnage-based Permit Fee:	$.09/ton
- Per-ton solid waste disposal fee:	$.85/ton

(Eventually: Orphan site fee)

B. Examples:

1. Landfill accepting 200 tons (~28, e.g. Jordan Valley)

- Annual Solid Waste Permit Fee (200 x $.21 = $42)	$300
- Tonnage-based Permit Fee (200 x $.09)	18
- Per-ton solid waste disposal fee (200 x $.85)	170
Total:	$488

Per-ton cost: $2.44

2. Landfill accepting 500 tons (~14, e.g. Christmas Valley)

- Annual Solid Waste Permit Fee (500 x $.21 = $105)	$300
- Tonnage-based Permit Fee (500 x $.09)	45
- Per-ton solid waste disposal fee (500 x $.85)	425
Total:	$770

Per-ton cost: $1.54

3. Landfill accepting 1000 tons (~5, e.g. Bly)

- Annual Solid Waste Permit Fee (1000 x $.21 = $210)	$300
- Tonnage-based Permit Fee (1000 x $.09)	90
- Per-ton solid waste disposal fee (1000 x $.85)	850
Total:	$1,240

Per-ton cost: $1.24

4. Landfill accepting 1400 tons (~3, e.g. Pilot Rock)

- Annual Solid Waste Permit Fee (1400 x $.21 = $294)	$300
- Tonnage-based Permit Fee (1400 x $.09)	126
- Per-ton solid waste disposal fee (1400 x $.85	1,190
Total:	$1,616

Per-ton cost: $1.15

5. All landfills accepting >1,450 tons (~40)

- Annual fees: tonnage in prev. cal yr. x $.30
- Quarterly fee: gate tonnage x $.85

Per-ton cost: $1.15

II. Proposed Alternative (in Final Rule)

1. Reduce the $300 minimum annual solid waste permit fee to $200.

Under this alternative, the per-ton discrepancy between small sites and large sites would be reduced.

Examples:	Total Fees	Per-ton Costs
- Jordan Valley (200 tons):	$388	$1.94
- Christmas Valley (500 tons):	$670	1.34
- Bly (1000 tons):	$1,150	1.15
- Pilot Rock (1400 tons):	$1,610	1.15

smallsit

Attachment A - Revised

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY
ADMINISTRATIVE RULES
SOLID WASTE MANAGEMENT
DIVISION 61
Proposed Revisions
4/10/92

Proposed deletions are in brackets [ ].
Proposed additions are underlined.

PERMIT FEES

340-61-115

(1) Each person required to have a Solid Waste Disposal Permit shall be subject to a three-part fee consisting of [a filing fee,] an application processing fee, [and] an annual [compliance determination] solid waste permit fee as listed in OAR 340-61-120[.] and the SB 66 annual fee as listed in OAR 340-61-120(4). In addition, each disposal site receiving domestic solid waste shall be subject to [an annual recycling program implementation fee as listed in OAR 340-61-120, and] a per-ton solid waste disposal fee on domestic solid waste as specified in Section 5 of OAR 340-61-120. In addition, each disposal site or regional disposal site receiving solid waste generated out-of-state shall pay a per-ton solid waste disposal fee as specified in Section 6 of OAR 340-61-120 or a surcharge as specified in Section 7 [6] of OAR 340-61-120. The amount equal to the [filing fee,] application processing fee[, the first year's annual compliance determination fee and, if applicable, the first year's recycling program implementation fee] shall be submitted as a required part of any application for a new permit. [The amount equal to the filing fee and application processing fee shall be submitted as a required part of any application for renewal or modification of an existing permit.]

[(2) As used in this rule unless otherwise specified, the term "domestic solid waste" includes, but is not limited to, residential, commercial and institutional wastes; but the term does not include:]

[(a) Sewage sludge or septic tank and cesspool pumpings;]

[(b) Building demolition or construction wastes and land clearing debris, if delivered to disposal sites that are not open to the general public;]

[(c) Yard debris, if delivered to disposal sites that receive no other residential wastes.]

(2) [(3)] The annual [compliance determination] solid waste permit fee and, if applicable, the SB 66 annual fee [fee and, if applicable, the annual recycling program implementation fee] must be paid for each year a disposal site is in operation or under permit. The fee period shall be the state's fiscal year (July 1 through June 30) and shall be paid annually by July 1. [Any annual compliance determination fee and, if applicable, any recycling program implementation fee submitted as part of an application for a new permit shall apply to the fiscal year the permitted disposal site is put into operation. For the first year's operation, the full fee(s) shall apply if the disposal site is placed into operation on or before April 1.] Any new disposal site placed into operation after January 1 [April 1] shall not owe [a compliance determination fee and, if applicable, a recycling program implementation fee] an annual solid waste permit fee or a SB 66 annual fee until July 1 of the following year. Any existing disposal site that receives solid waste in a calendar year must pay the annual solid waste permit fee and SB 66 annual fee, if applicable, as specified in OAR 340-61-120(3)(a) and 340-61-120(4) for the fiscal year which begins on July 1 of the following calendar year. If no solid waste was received in the previous calendar year and the site is closed, a solid waste permittee shall pay the annual solid waste permit fee for closed sites as specified in OAR 340-61-120(3)(c). The Director may alter the due date for the annual [compliance determination fee and, if applicable, the recycling program implementation] solid waste permit fee and, if applicable, the SB 66 annual fee upon receipt of a justifiable request from a permittee.

(3) [(4) For the purpose of determining appropriate fees, each disposal site shall be assigned to a category in OAR 340-61-120 based upon the amount of solid waste received and upon the complexity of each disposal site. Each disposal site which falls into more than one category shall pay whichever fee is higher. The Department shall assign a site to a category on the basis of estimated annual tonnage or gallonage of solid waste received unless the actual amount received is known.] Permittees are responsible for accurate calculation of solid waste tonnages. For purposes of determining appropriate fees under OAR 340-61-120(3) through (7), annual tonnage of solid waste received shall be calculated as follows:

(a) Municipal solid waste facilities. Annual tonnage of solid waste received at municipal solid waste facilities, including demolition sites, receiving 50,000 or more tons annually shall be based on weight from certified scales after January 1, 1994. If certified scales are not required or not available, [E]estimated annual tonnage for [domestic waste disposal sites] municipal solid waste will be based upon 300 pounds per cubic yard of uncompacted waste received, 700 pounds per cubic yard of compacted waste

received, or, if yardage is not known, one ton per resident in the service area of the disposal site, unless the permittee demonstrates a more accurate estimate. For other types of wastes received at municipal solid waste sites and where certified scales are not required or not available, the conversions and provisions in subsection (b) of this Section shall be used. [Loads of solid waste consisting exclusively of soil, rock, concrete, rubble or asphalt shall not be included when calculating the annual amount of solid waste received.]

(b) Industrial facilities. Annual tonnage of solid waste received at off-site industrial facilities receiving 50,000 or more tons annually shall be based on weight from certified scales after January 1, 1994. If certified scales are not required, or at those sites receiving less than 50,000 tons a year if scales are not available, industrial sites shall use the following conversion factors to determine tonnage of solid waste disposed of:

(A) Asbestos: 500 pounds per cubic yard.

(B) Pulp and paper waste other than sludge: 1,000 pounds per cubic yard.

(C) Construction, demolition and landclearing wastes: 1,100 pounds per cubic yard.

(D) Wood waste: 1,200 pounds per cubic yard.

(E) Food waste, manure, sludge, septage, grits, screenings and other wet wastes: 1,600 pounds per cubic yard.

(F) Ash and slag: 2,000 pounds per cubic yard.

(G) Contaminated soils: 2,400 pounds per cubic yard.

(H) Asphalt, mining and milling wastes, foundry sand, silica: 2,500 pounds per cubic yard.

(I) For wastes other than the above, the permittee shall determine the density of the wastes subject to approval by the Department.

(J) As an alternative to the above conversion factors, the permittee may determine the density of their own waste, subject to approval by the Department.

[(5) Modifications of existing, unexpired permits which are instituted by the Department due to changing conditions or standards, receipt of additional information or any other reason pursuant to applicable statutes and do not require refiling or review of an application or plans and specifications shall not require submission of the filing fee or the application processing fee.]

[(6) Upon the Department accepting an application for filing, the filing fee shall be non-refundable.]

(4) [(7)] The application processing fee may be refunded in whole or in part, after taking into consideration any costs the Department may have incurred in processing the application, when submitted with an application if either of the following conditions exist:

(a) The Department determines that no permit will be required;

(b) The applicant withdraws the application before the Department has granted or denied preliminary approval or, if no preliminary approval has been granted or denied, the Department has approved or denied the application.

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

(6) Submittal schedule.

(a) The annual solid waste permit fee shall be billed to the permittee by the Department, and is due by July 1 of each year.

(b) The SB 66 annual fee shall be billed to the permittee by the Department, and is due by July 1 of each year.

(c) The per-ton solid waste disposal fees on domestic and out-of-state solid waste are not billed by the Department. They are due on the following schedule:

(A) Quarterly, on the 30th day of the month following the end of the calendar quarter; or

(B) On the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent.

(d) The surcharge on disposal of solid waste generated out-of-state is not billed by the Department. It is due on the same schedule as the per-ton solid waste disposal fees above.

PERMIT FEE SCHEDULE

340-61-120

[(1) Filing Fee. A filing fee of $50 shall accompany each application for issuance, renewal, modification, or transfer of a Solid Waste Disposal Permit. This fee is non-refundable and is in addition to any application processing fee or annual compliance determination fee which might be imposed.]

(1) For purposes of this rule:

(a) A "new facility" means a facility at a location not previously used or permitted, and does not include an expansion to an existing permitted site.

(b) An "off-site industrial facility" means all industrial solid waste disposal sites other than a "captive industrial disposal site."

(c) A "captive industrial facility" means an industrial solid waste disposal site where the permittee is the owner and operator of the site and is the generator of all the solid waste received at the site.

(2) Application Processing Fee. An application processing fee [varying between $50 and $2,000] shall be submitted with each application for a new facility. The amount of the fee shall depend on the type of facility and the required action as follows:

(a) A new municipal solid waste landfill facility, incinerator, energy recovery facility, composting facility for mixed solid waste, off-site industrial facility or sludge disposal facility: [(including substantial expansion of an existing facility:)]

(A) Designed to receive over 7,500 tons of solid waste per year:	$10,000
(B) Designed to receive less than 7,500 tons of solid waste per year:	$5,000
[(A) Major facility[1]	$ 2,000]
[(B) Intermediate facility[2]	$ 1,000]
[(C) Minor facility[3]	$ 300]

[[1]**Major Facility Qualifying Factors:**]

[-a- Received more than 25,000 tons of solid waste per year; or]

[-b- Has a collection/treatment system which, if not properly constructed, operated and maintained, could have a significant adverse impact on the environment as determined by the Department.]

[[2]**Intermediate Facility Qualifying Factors:**]

[-a- Received at least 5,000 but not more than 25,000 tons of solid waste per year; or]

[-b- Received less than 5,000 tons of solid waste and more than 25,000 gallons of sludge per month.]

[[3]**Minor Facility Qualifying Factors:**]

[-a- Received less than 5,000 tons of solid waste per year; and]

[-b- Received less than 25,000 gallons of sludge per month.]

[All tonnages based on amount received in the immediately preceding fiscal year, or in a new facility the amount to be received the first fiscal year of operation.]

[(b) Preliminary feasibility only (Note: the amount of this fee may be deducted from the complete application fee listed above):]

[(A) Major facility $ 1,200]

[(B) Intermediate facility $ 600]

[(C) Minor facility $ 200]

[(c) Permit renewal (including new operational plan, closure plan or improvements):]

[(A) Major facility $ 500]

[(B) Intermediate facility $ 250]

[(C) Minor facility $ 125]

[(d) Permit renewal (without significant change):]

[(A) Major facility $ 250]

[(B) Intermediate facility $ 150]

[(C) Minor facility $ 100]

[(e) Permit modification (including new operational plan, closure plan or improvements):]

[(A) Major facility $ 500]

[(B) Intermediate facility $ 250]

[(C) Minor facility $ 100]

[(f) Permit modification (without significant change in facility design or operation):]

[All categories $ 50]

[(g) Permit modification (Department initiated):]

[All categories No fee]

(b) A new captive industrial facility: $1,000

(c) A new transfer station or material recovery facility -

(A) Receiving over 50,000 tons of solid waste per year: $500

(B) Receiving between 10,000 and 50,000 tons of solid waste per year: $200

(C) Receiving less than 10,000 tons of solid waste per year: $100

(d) [(h)] Letter authorizations (pursuant to OAR 340-61-027) [, new or renewal: $ 100]: $500

(e)[(i)] Before June 30, 1994: Hazardous substance authorization (Any permit or plan review application which seeks new, renewed, or significant modification in authorization to landfill cleanup materials contaminated by hazardous substances):

(A) Authorization to receive 100,000 tons or more of designated cleanup waste per year $50,000

(B) Authorization to receive at least 50,000 but less than 100,000 tons of designated cleanup material per year $25,000

(C) Authorization to receive at least 25,000 but less than 50,000 tons of designated cleanup material per year $12,500

(D) Authorization to receive at least 10,000 but less than 25,000 tons of designated cleanup material per year $ 5,000

(E) Authorization to receive at least 5,000 but less than 10,000 tons of designated cleanup material per year $ 1,000

(F) Authorization to receive at least 1,000 but less than 5,000 tons of designated cleanup material per year $ 250

(3) Annual [Compliance Determination] Solid Waste Permit Fee. The Commission establishes the following fee schedule including base per-ton rates to be used to determine the annual solid waste permit fee beginning with fiscal year 1993. The per-ton rates are based on the estimated solid waste received at all permitted solid waste disposal sites and on the Department's Legislatively Approved Budget. The Department will review annually the amount of revenue generated by this fee schedule. To determine the annual solid waste permit fee, the Department may use the base per-ton rates, or any lower rates if the rates would generate more revenue than provided in the Department's Legislatively Approved Budget. Any increase in the base rates must be fixed by rule by the Commission. (In any case where a facility fits into more than one category, the permittee shall pay only the highest fee):

[(a) Domestic Waste Facility:]

[(A) A landfill which received 500,000 tons or more of solid waste per year: $60,000]

[(B) A landfill which received at least 400,000 but less than 500,000 tons of solid waste per year: $48,000]

[(C) A landfill which received at least 300,000 but less than 400,000 tons of solid waste per year: $36,000]

[(D) A landfill which received at least 200,000 but less than 300,000 tons of solid waste per year: $24,000]

[(E) A landfill which received at least 100,000 but less than 200,000 tons of solid waste per year: $12,000]

[(F) A landfill which received at least 50,000 but less than 100,000 tons of solid waste per year: $ 6,000]

[(G) A landfill which received at least 25,000 but less than 50,000 tons of solid waste per year: $ 3,000]

[(H) A landfill which received at least 10,000 but less than 25,000 tons of solid waste per year: $ 1,500]

[(I) A landfill which received at least 5,000 but not more than 10,000 tons of solid waste per year: $ 750]

[(J) A landfill which received at least 1,000 but not more than 5,000 tons of solid waste per year: $ 200]

[(K) A landfill which received less than 1,000 tons of solid waste per year: $ 100]

[(L) A transfer station which received more than 10,000 tons of solid waste per year: $ 500]

[(M) A transfer station which received less than 10,000 tons of solid waste per year: $ 50]

[(N) An incinerator, resource recovery facility, composting facility and each other facility not specifically classified above which receives more than 100,000 tons of solid waste per year: $ 8,000]

[(O) An incinerator, resource recovery facility, composting facility and each other facility not specifically classified above which receives at least 50,000 tons but less than 100,000 tons of solid waste per year: $ 4,000]

[(P) An incinerator, resource recovery facility, composting facility and each other facility not specifically classified above which receives less than 50,000 tons of solid waste per year: $ 2,000]

[(Q) A landfill which has permit provisions to store over 100 waste tires -- the above fee or $250 whichever is highest.]

[(b) Industrial Waste Facility:]

[(A) A facility which received 10,000 tons or more of solid waste per year: $ 1,500]

[(B) A facility which received at least 5,000 tons but less than 10,000 tons of solid waste per year: $ 750]

[(C) A facility which received less than 5,000 tons of solid waste per year: $ 150]

[(c) Sludge Disposal Facility:]

[(A) A facility which received 25,000 gallons or more of sludge per month: $ 150]

[(B) A facility which received less than 25,000 gallons of sludge per month: $ 100]

(a) All facilities accepting solid waste except transfer stations and material recovery facilities:

(A) $200; or

(B) An annual solid waste permit fee based on the total amount of solid waste received at the facility in the previous calendar year, at the following rate:

(i) All municipal landfills, demolition landfills, off-site industrial facilities, sludge disposal facilities, and incinerators: $.21 per ton.

(ii) Captive industrial facilities: $.21 per ton.

(iii) Energy recovery facilities: $.13 per ton.

(iv) Composting facilities receiving mixed solid waste: $.10 per ton.

(C) If a disposal site (other than a municipal solid waste facility) is not required by the Department to monitor and report volumes of solid waste collected, the annual solid waste permit fee may be based on the estimated tonnage received in the previous year.

(b) Transfer stations and material recovery facilities:

(A) Facilities accepting over 50,000 tons of solid waste per year: $1,000

(B) Facilities accepting between 10,000 and 50,000 tons of solid waste per year: $500

(C) Facilities accepting less than 10,000 tons of solid waste per year: $50

(c)[(d)] Closed Disposal Sites: Each landfill which closes after July 1, 1984:. . . . . .[10% of fee which would be required, in accordance with subsections (3)(a), (3)(b), and (3)(c) above, if the facility was still in operation or $50 whichever is greater.] $150, or the average tonnage of solid waste received in the 3 most active years of site operation multiplied by $.025 per ton, whichever is greater; but the maximum annual permit fee shall not exceed $2,500.

[(e) Facility with Monitoring Wells: In addition to the fees described above, each facility with one or more wells for monitoring groundwater or methane, surface water sampling points, or any other structures or locations requiring the collection and analysis of samples by the Department, shall be assessed a fee. The amount of the fee shall depend on the number of wells (each well in a multiple completion well is considered to be a separate well) or sampling points as follows:. . . . . .$ 250 for each well or sampling point.]

[(4) Annual Recycling Program Implementation Fee. An annual recycling program implementation fee shall be submitted by each domestic waste disposal site, except transfer stations and closed landfills. This fee is in addition to any other permit fee which

may be assessed by the Department. The amount of the fee shall depend on the amount of solid waste received as follows:]

[(a) A disposal site which received 500,000 tons or more of solid waste per year: $20,000]

[(b) A disposal site which received at least 400,000 but less than 500,000 tons of solid waste per year: $18,000]

[(c) A disposal site which received at least 300,000 but less than 400,000 tons of solid waste per year: $14,000]

[(d) A disposal site which received at least 200,000 but less than 300,000 tons of solid waste per year: $ 9,000]

[(e) A disposal site which received at least 100,000 but less than 200,000 tons of solid waste per year: $ 4,600]

[(f) A disposal site which received at least 50,000 but less than 100,000 tons of solid waste per year: $ 2,300]

[(g) A disposal site which received at least 25,000 but less than 50,000 tons of solid waste per year: $ 1,200]

[(h) A disposal site which received at least 10,000 but less than 25,000 tons of solid waste per year: $ 450]

[(i) A disposal site which received at least 5,000 but less than 10,000 tons of solid waste per year: $ 225]

[(j) A disposal site which received at least 1,000 but less than 5,000 tons of solid waste per year: $ 75]

[(k) A disposal site which received less than 1,000 tons of solid waste per year: $ 50]

(4) Senate Bill 66 (SB 66) annual fee.

(a) A SB 66 annual fee shall be submitted by each solid waste permittee which received solid waste in the previous calendar year, except transfer stations, material recovery facilities and captive industrial facilities. The Commission establishes the SB 66 annual fee as $.09 per ton for each ton of solid waste received in the subject calendar year.

(b) The $.09 per-ton rate is based on the estimated solid waste received at all permitted solid waste disposal sites in the previous calendar year and on the Department's Legislatively Approved Budget. The Department will review annually the amount of revenue generated by this rate. To determine the SB 66 annual fee, the Department may use this rate, or any lower rate if the rate would generate more

revenue than provided in the Department's Legislatively Approved Budget. Any increase in the rate must be fixed by rule by the Commission.

(c) The Department shall bill the permittee for the amount of this fee together with the annual solid waste permit fee in Section 3 of this rule. This fee is in addition to any other permit fee and per-ton fee which may be assessed by the Department.

(5) Per-ton solid waste disposal fees on domestic solid waste. Each solid waste disposal site that receives domestic solid waste, except transfer stations, shall submit to the Department of Environmental Quality the following fees for each ton of domestic solid waste received at the disposal site:

(a) A per-ton fee of 50 cents.

(b) From January 1, 1992, to December 31, 1993, an additional per-ton fee of 35 cents.

(c) Beginning January 1, 1994 the additional per-ton fee established in subsection (5)(b) of this rule shall be reduced to 31 cents.

(d) Submittal schedule:

(A) These per-ton fees shall be submitted to the Department quarterly, or on the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent. Quarterly remittals shall be due on the 30th [15th] day of the month following the end of the calendar quarter.

(B) Disposal sites receiving less than 1,000 tons of solid waste per year shall submit the fees annually on July 1, beginning in 1991. If the disposal site is not required by the Department to monitor and report volumes of solid waste collected, the fees shall be accompanied by an estimate of the population served by the disposal site.

(e) As used in this rule, [section,] the term "domestic solid waste" includes, but is not limited to, residential, commercial and institutional wastes; but the term does not include:

(A) Sewage sludge or septic tank and cesspool pumpings;

(B) Building demolition or construction wastes and land clearing debris, if delivered to a disposal site that is limited to those purposes;

(C) Source separated recyclable material, or material recovered at the disposal site;

(D) Waste going to an industrial waste facility;

(E) Waste received at an ash monofill from an energy [resource] recovery facility; or

(F) Domestic solid waste which is not generated within this state.

(f) For solid waste delivered to disposal facilities owned or operated by a metropolitan service district, the fees established in this section shall be levied on the district, not on the disposal site.

(6) Per-ton solid waste disposal fee on solid waste generated out-of-state. Each solid waste disposal site or regional disposal site that receives solid waste generated out-of-state shall submit to the Department a per-ton solid waste disposal fee. The per-ton solid waste disposal fee shall be the sum of the per-ton fees established for domestic solid waste in subsections (5)(a), (5)(b) and (5)(c) of this rule.

(a) The per-ton fee solid waste disposal fee shall become effective on the dates specified in section (5) of this rule and shall apply to all solid waste received after July 1, 1991.

(b) This per-ton solid waste disposal fee shall apply to each ton of out-of-state solid waste received at the disposal site, but shall not include source separated recyclable materials, or material recovered at the disposal site.

(c) Submittal schedule: This per-ton solid waste disposal fee shall be submitted to the Department quarterly, or on the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent. Quarterly remittals shall be due on the 30th [15th] day of the month following the end of the calendar quarter.

(d) This per-ton solid waste disposal fee on out-of-state solid waste shall be collected at the first disposal facility in Oregon receiving the waste, including but not limited to a solid waste land disposal site, transfer station or incinerator, and remitted directly to the Department on the schedule specified in this rule.

(e) [(d)] If, after final appeal, the surcharge established in section (7) of this rule is held to be valid and the state is able to collect the surcharge, the per-ton fee on solid waste generated out-of-state established in this section shall no longer apply, and the person responsible for

payment of the surcharge may deduct from the amount due any fees paid to the Department on solid waste generated out-of-state under section (6) of this rule.

(7) Surcharge on disposal of solid waste generated out-of-state. Each solid waste disposal site or regional solid waste disposal site that receives solid waste generated out-of-state shall submit to the Department of Environmental Quality a per-ton surcharge of $2.25. This surcharge shall apply to each ton of out-of-state solid waste received at the disposal site.

(a) This per-ton surcharge shall apply to all solid waste received after January 1, 1991.

(b) Submittal schedule: This per-ton surcharge shall be submitted to the Department quarterly, or on the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent. Quarterly remittals shall be due on the 30th [15th] day of the month following the end of the calendar quarter.

(c) This surcharge shall be in addition to any other fee charged for disposal of solid waste at the site.

(d) This surcharge on out-of-state solid waste shall be collected at the first disposal facility in Oregon receiving the waste, including but not limited to a solid waste land disposal site, transfer station or incinerator, and remitted directly to the Department on the schedule specified in this rule.

OAR61.rev

State of Oregon
Department of Environmental Quality Memorandum

Date: April 13, 1992

To: Environmental Quality Commission

From: Fred Hansen, Director

Subject: Discussion of Tax Credit Program Issues
April 23, 1992 Work Session

The objective of this work session discussion is to have the Commission give the Department direction on any changes it would like made to the Tax Credit Program, whether they be administrative, rulemaking or legislative in nature. However, since legislative concepts are required to be submitted to the Executive Department by May 1st it would be particularly helpful if the Commission were to focus on potential legislative issues.

This memorandum is designed to assist the Commission in its discussion of Tax Credit Program issues, and is organized to provide a menu of options for the Commission to consider in its deliberations. The options include potential administrative, rulemaking and legislative changes to the program, and are organized into program-wide issues and issues specific to each of the types of facilities currently eligible for tax credits: air, water and noise pollution control facilities; alternatives to field burning; solid and hazardous waste recycling/resource recovery facilities; hazardous waste treatment/reduction facilities; and reclaimed plastics facilities.

It is hoped the Commission will discuss the various options presented and pick the ones it would like the Department to pursue, or add its own options and direct the Department accordingly. In order to keep this work session paper to a manageable size very little discussion and analysis of the various options is provided. Several background papers are attached to this memorandum to provide the Commission additional information and a historical perspective of the program.

Program-wide Issues

Obviously the Commission has a myriad of options at its disposal for changing the way the Tax Credit Program functions, from no changes at all to total elimination of the program. In undertaking its deliberations, it might be helpful if the Commission first determined what an ideal financial incentive program would accomplish and whether tax credits are the appropriate medium to accomplish the desired objectives. In other words, should the program be retained, and if so, what is its purpose?

Is it an incentive for business to install pollution control facilities?

Is it a subsidy for business that must install pollution control facilities?

Is it a state economic development tool?

Is it to encourage voluntary compliance, reduce enforcement costs and result in a more cooperative working relationship with industry?

Is it to help offset any competitive disadvantage to Oregon businesses where Oregon's environmental requirements are more stringent than neighboring states?

Is it to help keep Oregon's business climate on an equal footing with other states that provide pollution control incentives?

Is it to encourage the installation of the best pollution control facilities regardless of the environmental requirements?

Is it to assist in control of existing pollution or prevention of future pollution?

Is it all of the above?

If any or all of these are the purposes of the Tax Credit Program, do tax credits accomplish the desired results?

Some options for the Commission to consider that are program-wide in nature include:

1. Leave the program as it is, unchanged.

2. Eliminate the entire program.

3. Eliminate eligibility for certain types of facilities; e.g. noise pollution control facilities, or material recovery facilities.

4. Eliminate eligibility for facilities associated with new businesses or expansion of existing businesses.

5. Option 4. plus narrow eligibility to only those facilities that are installed at existing businesses to meet a new environmental requirement.

6. Option 5. plus allow eligibility only for those facilities that are installed by the compliance deadline.

7. Restrict eligibility to only those facilities installed at small businesses.

8. Eliminate eligibility for facilities installed to meet an environmental requirement (principal purpose). Retain eligibility for facilities installed voluntarily, or that exceed environmental requirements.

9. Eliminate allocable cost determination and ROI analysis. Replace with a flat tax credit benefit if meet eligibility criteria.

10. Eliminate tax credits for facilities that are an integral part of an operating business; e.g. landfill liners, material recovery facilities, etc. (The definition of "integral part of an operating business" may prove difficult.)

11. Provide eligibility only for facilities installed at companies that can demonstrate an economic hardship. May need to provide property tax relief for these companies. (Again, it will be difficult to establish objective criteria for a determination of "economic hardship".)

12. Place a dollar cap or limitation on available tax credits similar to the limitation on tax credits under the Department of Energy Small Scale Energy Loan Program.

13. Alter the percentage and/or length of the available tax credit.

14. Establish procedures to revoke prior tax credits if violations are discovered.

15. Provide for Director to administratively approve/deny tax credit applications with appeal rights to the Commission.

16. Establish specific statutory eligibility criteria for each type of facility that will qualify for tax credit.

17. Clarify whether the definition of sole purpose excludes or includes facilities that have other minor purposes or benefits in addition to pollution control.

Air, Water and Noise Pollution Control Facilities

Legislative Policy:

To assist in the prevention, control and reduction of air, water and noise pollution by providing tax relief for facilities constructed to accomplish such prevention, control or reduction.

Eligibility:

Air or water facility must be constructed on or after January 1, 1967.

Noise facility must be constructed on or after January 1, 1977.

Principal purpose of facility must be to comply with an environmental requirement to prevent, control or reduce air, water or noise pollution; or

Sole purpose of facility must be to prevent, control or reduce a substantial quantity of air, water or noise pollution.

Facility must prevent, control or reduce:

Air contaminants or air pollution as defined in ORS 468A.005;

Industrial waste as defined in ORS 468B.005; or

Noise pollution as defined by rule of the Commission.

Issues:

1. Should the Department assign resources to inspect facilities at time of certification, or afterwards, to verify they are actually used as claimed by the applicant?

2. Should the application/certification process be streamlined for low cost facilities such as CFC recycling, underground storage tank systems, and Stage I, II vapor recovery facilities?

3. Should facilities that are built to prevent, control or reduce air, water or noise pollution from non-point source activities be eligible for tax relief?

4. Since the Department no longer has staff resources to implement the Noise Control Program, should tax credits for noise control facilities be retained?

Options:

1. Instruct the Department to inspect facilities costing more than $_____ before tax credit certification.

2. Instruct the Department to develop streamlined tax credit certification process for facilities costing less than $_____.

3. Provide tax relief for facilities that are built to implement a best management practice or approved plan for farming practices that prevent, control or reduce groundwater or surface water pollution.

4. Eliminate tax credit eligibility for noise pollution control facilities.

Hazardous Waste Treatment, Reduction or Elimination Facilities

Legislative Policy:

To assist in the prevention, control and reduction of hazardous wastes by providing tax relief for facilities constructed to accomplish such prevention, control or reduction.

Eligibility:

Facility must be constructed on or after January 1, 1984.

Principal purpose of facility must be to comply with an environmental requirement to prevent, control or reduce hazardous waste; or

Sole purpose of facility must be to prevent, control or reduce a substantial quantity of hazardous waste.

Facility must treat, substantially reduce or eliminate hazardous waste as defined by ORS 466.005.

Issues:

1. There have been only 5 hazardous waste facilities approved costing a total of $473,291 in the 8 year history of the program. This low level of activity may indicate the program is not needed.

Options:

1. Amend the statute to remove eligibility for hazardous waste facilities.

Alternative Methods to Open Field Burning

Legislative Policy:

To assist grass seed farmers in the Willamette Valley transition from open burning to more environmentally acceptable agricultural practices.

Eligibility:

Facility must be an approved alternative method of field sanitation or straw utilization and disposal. Currently approved alternatives are:

Facilities for gathering, densifying, processing, handling, storing, transporting and incorporating grass straw or straw based products which will result in a reduction of open field burning.

Propane flamers or mobile field sanitizers which are alternatives to open field burning and reduce air quality impacts.

Drainage tile installations which will result in a reduction of grass seed acreage under production.

Facility must be constructed or installed on or after January 1, 1967.

Facility must prevent, control or reduce air contaminants or air pollution as defined in ORS 468A.005.

Issues:

1. Facilities that recover and reuse grass straw do not fit well under either the principal purpose or sole purpose eligibility criteria (e.g. custom balers). Nor do drainage tile installations fit well under these criteria. How should this be fixed?

2. There is no link between the tax credit program and registration and burning of grass straw to ensure acreage that receives a tax credit is actually removed from the practice of field burning or, if removed, that a like amount is not added elsewhere possibly by the same grower.

3. Facilities that recycle or reuse grass straw are generally an integral part of a business operation rather than traditional add-on pollution control equipment. How should eligibility and allocable costs be determined for these types of facilities?

4. The rule definition for drainage tile installations requires an actual reduction in grass seed acreage under production to be eligible rather than just a reduction in open field burning.

5. Eligibility of equipment that has general farming uses (e.g. tractors and plows) is troubling because it can be converted to other farm uses when not needed to implement an alternative to field burning, and it is difficult to determine the appropriate capacity of the equipment. How should percent allocable be determined for these facilities?

6. Should alternative methods to open field burning outside the Willamette Valley be eligible for tax credits? (An informal opinion of the Attorney General advises that the current statute would allow eligibility for alternative methods applied outside the Willamette Valley, however there is no explicit program or requirement to limit open field burning outside the Willamette Valley)

7. Is the ROI process defined in the tax credit rules appropriate for use with farm businesses, or is there a more specific ROI process that should be applied in farm business situations?

8. Rule definition of alternative methods of straw utilization is very broad and vague.

Options:

1. Amend the statutes to make approved alternatives to field burning specifically eligible for tax relief without meeting the principal or sole purpose eligibility criteria.

2. Require tax credit applicants to provide specific information (e.g. coordinates and legal descriptions) on fields that will no longer be burned to allow DEQ inspectors to confirm cessation of burning on these fields.

3. Amend the statute to specifically identify the types of facilities that would be eligible for certification and provide a specific flat rate tax credit for each (i.e. no percent allocable determination).

4. Amend the tax credit rules to clarify that drainage tile installations are to result in a reduction in open field burning.

5. Provide for a flat rate tax credit for general farm equipment used as an alternative to field burning.

6. Instruct the Department to research return on investment processes used in the farming community and determine whether a more appropriate ROI process should be adopted for alternatives to open field burning.

7. Instruct the Department to develop rule amendments to specifically identify the types of straw utilization facilities that will be eligible for tax credit as alternatives to open field burning.

Solid Waste, Hazardous Waste, or Used Oil Material Recovery & Recycling Facilities

Legislative Policy:

To assist in the prevention, control and reduction of solid waste, hazardous waste and used oil by providing tax relief to facilities constructed to accomplish such prevention, control or reduction.

Eligibility:

Solid waste facility must be constructed on or after January 1, 1973.

Hazardous waste or used oil facility must be constructed on or after October 3, 1979.

Principal purpose of facility must be to comply with an environmental requirement to prevent, control or reduce solid or hazardous waste or to recycle or provide for the appropriate disposal of used oil; or

Sole purpose of facility must be to prevent, control or reduce a substantial quantity of solid or hazardous waste or to recycle or provide for the appropriate disposal of used oil.

Facility must use a material recovery process which obtains useful material from material that would otherwise be:

Solid waste as defined in ORS 459.005,

Hazardous waste as defined in ORS 466.005, or

Used oil as defined in ORS 468.850.

The end product of the utilization must be an item of real economic value, and be competitive with an end product produced in another state.

The Oregon law regulating solid waste must impose standards at least substantially equivalent to the federal law.

Issues:

1. Facilities that recover and reuse materials do not fit well under either the principal purpose or sole purpose eligibility criteria. How should this be fixed?

2. Facilities that recycle or reuse materials are generally an integral part of a business operation rather than traditional add-on pollution control equipment. How should eligibility and allocable costs be determined for these types of facilities?

3. ORS 279.630(6), enacted by the 1991 Legislature, requires that persons receiving tax credit for recycled materials must show they give preference to Oregon producers of the recycled materials used. How should this be determined?

4. Are the eligibility criteria that (1) require the end product to be competitive with an end product produced in another state, and (2) require Oregon solid waste law be substantially equivalent to federal law really relevant and necessary criteria for determining tax credit eligibility of material recovery facilities?

Options:

1. Amend the statute to clarify that facilities for disposal of used oil are not eligible for tax relief, or to provide tax relief for used oil energy recovery facilities.

2. Amend the statute to allow tax credit for material recovery facilities without meeting the principal or sole purpose eligibility criteria.

3. Amend the statute to specifically identify the types of facilities that would be eligible for certification and provide a specific flat rate tax credit for each (i.e. no percent allocable determination).

4. Amend the tax credit rules to require the showing of preference for Oregon producers of recycled plastics. (Will require standards for review).

5. Delete the statutory eligibility criteria in ORS 468.165(1)(c)(D) - competitive with a product in another state, and 468.165(1)(c)(E) since Oregon's law is substantially equivalent to federal law.

Reclaimed Plastic Product Facilities

Legislative Policy:

To assist in the prevention, control and reduction of solid waste by providing tax relief to Oregon businesses that make investments in order to collect, transport or process reclaimed plastic or manufacture a reclaimed plastic product.

Eligibility:

Facilities for collection, transportation or manufacture of reclaimed plastic products.

Plastic must have originated in Oregon.

Plastic must be from a separate recycler or industrial producer of plastic waste.

Investment must be made between January 1, 1986 and July 1, 1995.

Preliminary certification required (unlike the other tax credit programs for which preliminary certification was eliminated at the request of the Department).

Issues:

1. Under the Reclaimed Plastics Tax Credit Program, facilities that reuse waste plastic in the generator's business are not eligible for tax credit. However, such facilities are potentially eligible under the Pollution Control Facilities Tax Credit Program. Therefore, there is an apparent discrepancy between the two programs.

2. The statutory definition of "reclaimed plastic product" does not clearly state that the entire product must be manufactured from plastic. At present, the statute may be interpreted to mean that products of combined media (i.e., plastic/metal) are potentially entirely eligible, rather than the portion which is directly related to the plastics operation.

3. The requirement for preliminary certification is burdensome and not very effective.

4. ORS 279.630(6), enacted by the 1991 Legislature, requires that persons receiving tax credit for recycled materials must show they give preference to Oregon producers of the recycled materials used.

Options:

1. Amend the Pollution Control Facilities Tax Credit statute to remove eligibility for plastic recycling/reuse facilities that reuse waste plastic in the generator's business, making the programs consistent in terms of eligibility for tax credits.

2. Amend the definition of "reclaimed plastic product" in the Plastics Recycling Tax Credit rules to clarify that the entire product (or substantial portion) must be manufactured of plastic.

3. Amend the Reclaimed Plastic Product Tax Credit law to delete the requirement for preliminary certification.

4. Amend the Plastics Recycling Tax Credit rules to require the showing of preference for Oregon producers of recycled plastics.

Attachments:

Tax Credit Eligibility of Farm Tractors, Memo from Fred Hansen to EQC, September 4, 1990.

Tax Credit Review Report for November 2 EQC Meeting, Memo from Fred Hansen to EQC, October 26, 1990.

Background Discussion: Eligibility of Agricultural Practices for Pollution Control Tax Credit Certification, Memo from Fred Hansen to EQC, September 9, 1991.

Eligibility of Non-Point Source Related Facilities for Tax Relief, Memo from Fred Hansen to William Wessinger, December 9, 1991.

Pollution Control Tax Credit Issues, Memo from Fred Hansen to EQC, February 4, 1992.

Legal Issues Relating to the Pollution Control Tax Credit Program, Letter from Larry Knudsen and Arnold Silver to EQC, February 11, 1992.

Pollution Control Tax Credit Issues, Memo from Fred Hansen to EQC, March 16, 1992.

Tax Credit Rule Amendments, Memo from Larry Knudsen to Roberta Young and Noam Stampfer, March 25, 1992.

Pollution Control Facilities Tax Credit Program - A Historical Perspective, DEQ, April 13, 1992.

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY

DATE: September 4, 1990

TO: Environmental Quality Commission

FROM: Fred Hansen, Director

SUBJECT: Tax Credit Eligibility of Farm Tractors

At its August 10, 1990 meeting, the Commission expressed concern regarding the degree of tax credit eligibility for farm tractors as an alternative field burning method because of their other general farm applications. The Commission directed the Department to examine the issue and develop a process that will provide a consistent approach in evaluating applications that involve tractors. The purpose of this agenda item is to provide some background information and to present alternative approaches for the Commission's consideration. It is the Department's expectation that the Commission provide further direction based on the identified alternatives.

AUTHORITIES

The Oregon statute governing the Pollution Control Tax Credit Program states that field sanitation and straw utilization and disposal methods shall be eligible for tax credit benefits. The statute further directs the Department and Field Burning Advisory Committee to determine "approved methods".

Department administrative rule, Division 16, defines alternative methods through the following language:

340-16-025 (2) (f) Approved alternative field burning methods and facilities which shall be limited to:

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

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

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

NON-BURNING OPTIONS FOR GRASS SEED FARMERS

Based on information from the Oregon State University Linn-Benton County Extension Service office, there are a number of non-burning options available to grass seed growers for perennial and annual crops. The following is a summary of the options for removing straw after the seed is removed.

Perennial Crops - Straw and stubble residue removal steps:

1. Remove cut straw by baling or using push rakes to push the straw into piles.(the straw is sold, used or given away or burned)
2. The post-harvest residue (stubble) can be eliminated by propane flaming, or crew cutting which removes the stubble and collects it in a wagon. (machinery includes rear's pakstak, vacuum equipment,stackwagon or flail chopper)
3. The stubble may also be removed with just the flail chopper. This chops and deposits the residue on the ground.
4. The stubble can also be re-clipped, windrowed and collected in a stackwagon. This does a better job than crew cutting.

Annual Crops - Straw and stubble residue removal steps:

1. The primary option if there is no burn is to chop the straw and stubble with a flail chopper and plow or disc the residue into the soil.
2. If there is a market for annual ryegrass, the straw may be baled.
3. There is some experimenting with mixing the residue into the soil using no-till drilling

CURRENT PROCEDURE FOR EVALUATION

The Department has determined under its interpretation of Section (A) of the rule that tractors may be eligible for certification based on the information and justification contained in the application. Tractors are typically needed to pull other implements such as propane flamers, flail choppers, plows, balers, etc.

Initially, the applicant states whether the tractor is going to be solely engaged in activities related to alternative methods to field burning, or used as an alternative method and for other farm uses that do not relate to an alternative method. If the former is stated, the Department summarizes the

applicant's description of how the tractor is used as an alternative method. If the latter applies, the percentage of the tractor that is used for alternative method purposes is the portion that is eligible for tax credit certification. This information, along with other information in the application, is then used to determine the tax credit amount.

Through the application process, the applicant provides the following information; however,the extent and quality of the information varies considerably:

1. A technical description and explanation of the function of the equipment.
2. The conditions that existed prior to the use of the claimed equipment, and other methods that were previously used.
3. The conditions that exist as a result of use of the equipment.
4. The effectiveness of the equipment as an alternative method.
5. The equipment's principal or sole purpose, and any use or function of the equipment that is other than pollution control related.
6. A return on investment calculation, if the equipment generates any income, to determine the portion of the costs that are allocable to pollution control.
7. Alternative methods or equipment considered for achieving the same objective.
8. Any other factors that may be relevant in establishing the percent allocable to pollution control.

ISSUES WITH THE CURRENT PROCEDURES

In the Department's current process the following issues are unique to field burning facilities, which include tractors.

1. The applicant is not required to provide an overall plan on how a reduction in open burning will be accomplished. Since tax credit applications are submitted when individual or units of equipment or facilities are purchased, the information is specific to the application.

2. The rule definition of approved alternative methods is somewhat general, thereby allowing the farmers considerable latitude in determining which methods or combination of methods to apply for purposes of a tax credit. There are no expressed restrictions on equipment or facilities that also have uses which do not apply under

alternative methods. This is addressed under the "principal purpose" and "sole purpose" provisions.

3. Decisions for utilizing alternative methods and the investment decisions in equipment vary considerably among farm operations. There is a broad range of variables including equipment size, cost, used vs. new equipment.

PROPOSED ALTERNATIVE APPROACHES FOR EVALUATING APPLICATIONS

The Commission's concern regarding the establishment of the degree of eligibility for tractors, and the above identified issues may be addressed through the following:

1. Revision of Current Procedures

This approach primarily involves expansion of the staff effort to review the application, verify information on benefits and options, and include supplemental information provided in the application. (Attachment A is an application which serves as an example of provided information.) The staff report would be expanded to provide the Commission with more information substantiating eligibility. The information would include:

- Description of the applicant's overall plan to reduce open field burning, the equipment necessary for accomplishing the plan.
- Complete justification of the need for a tractor to carry out an alternative method to open field burning, including an assessment of currently owned tractors and their uses.
- Detailed explanation of the applicant's decision regarding the tractor size and model in terms of meeting the anticipated uses.
- A statement as to whether the same objective could be accomplished using a less expensive tractor or perhaps smaller tractor.
- A detailed breakdown of the estimated usage for field burning related and other unrelated farm uses.

If this option is selected, the eight tractors that were withheld at the August 10th meeting will be re-processed using the above information, and placed on the November agenda.

2. Develop of a Standard Eligibility Percentage for Tractors

The Commission may choose to establish a predetermined level of eligibility of a tractor. This would be established in relation to the identification of general farm needs and other uses of tractors that are not related to pollution control. If desired, provisions for exceptions could be developed.

This option would require rulemaking to revise the definition of alternative methods (Section (A) above). It may also be appropriate to establish an advisory committee to assist the Department in developing an agreed upon rationale for a standard percentage

This option will take approximately six months due to the need to revise the rules, and utilize input from an advisory committee. If this option is selected, a decision is needed regarding the pending tractors. The eight applicants have anticipated certification prior to the year's end so that they could apply the credit against 1990 taxes.

3. Development of Eligibility Methodology

There has been some interest in exploring whether eligibility could be determined through a methodology which would consider the number of acres subject to the alternative method, and the annual hours of tractor usage which would be converted into a percentage allocable. The Department believes this approach may be a more difficult one in terms of establishing what constitutes full utilization of a tractor. Development of this alternative may involve an advisory committee and constitutes at least a six month staff effort.

RECOMMENDATION

It is the Director's recommendation that alternative 2. be pursued on the basis that tractors have broad farm applications and do not appear to be exclusively utilized for pollution control. The Department further recommends that the new procedures be applied prospectively, and that the eight pending applications be acted upon by the Commission under the existing application process.

In pursuing this alternative, it would be the Department's intent to re-examine the application and staff report process in terms of completeness, and to assure that the application includes information on the applicant's overall plan to reduce burning.

All applicants with pending applications involving tractors have been notified of this issue. Consequently, if certification were granted to the eight applicants, no additional applications would be processed until the new procedures are in place.

eqcfb
Attachment

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY INTEROFFICE MEMORANDUM

DATE: October 26, 1990

TO: EQC Commission Members

FROM: Fred Hansen, Director

SUBJECT: Tax Credit Review Report for November 2 EQC Meeting

At the September 21 EQC meeting, the Commission provided the Department further direction in determining the percent allocable to pollution control of farm tractors. The Department was asked to develop a procedure, within statutory and administrative rule guidelines, which would better identify and define the portion of a tractor that is used for alternative methods to open field burning. This need is premised on the Commission's view that, as an essential general farm implement, only the portion of a tractor utilized as an alternative method should be certified for tax relief.

With assistance from the Department of Agriculture and OSU Agriculture Extension Service, Department staff has developed a methodology which uses a standard average annual operating hours for a farm tractor. This standard of 450 hours was determined based on information from the Extension Service. Using a calculation, the estimated annual hours of operation is determined for each implement used with the tractor as an alternative field sanitation practice. (A table is provided which states the average acres/hour use for various implements using tractors of different horsepower, identified as attachment A in this report.) The total annual use hours for each implement are summed and divided by the standard average annual total of 450 hours. This provides the percent of the tractor that is allocable to pollution control.

It is the Department's position that the new methodology accomplishes the Commission's objective to better document and certify the portion of a tractor that is actually used as an alternative method to open field burning. As a general farm implement, it is reasonable to expect occasional use of tractor to extend beyond the narrowly defined uses as alternative methods, regardless of the purpose for the investment. This approach provides greater accountability from a state budgetary perspective, and provides the farmer a more reasonable basis for obtaining maximum utilization from an investment.

Other changes have been made to the application procedure to facilitate the applicant in completing the application, and to provide the Commission with sufficient information on which to

base certification decisions (see attached application). The application has been tailored specifically for facilities used as alternative methods, which should provide greater ease for the applicant. Additional information is requested so that a description is provided of the applicant's overall plan to reduce open field burning, and to state the relationship of the facility to the plan. This information will also be included in staff review reports.

These new procedures have been applied to one of the eight tractor applications that were deferred at the August Commission meeting. The staff review for this report is attached for Commission action November 2. The remaining seven applications are scheduled for the December meeting.

In applying the new methodology to TC-3262, the percent allocable is 92%. The Department is recommending this percentage be certified by the Commission. In this situation, the applicant has stated that the tractor is solely used for alternative method application. Since the annual use does not constitute total maximization based on the standard annual use, the remaining 8% may be used for purposes unrelated to alternative method practices.

The Department of Agriculture does not concur with the Department's recommendation on TC-3262. When the investment in a tractor is solely for alternative method utilization, the Department of Agriculture believes a credit of 100% is appropriate regardless of the number of hours the tractor is used. In DEQ's view, this is counter to the Commission's intent to better justify the actual use of a tractor because of its broad application in general farming practices. The Department will be prepared to discuss this issue at the November 2 meeting.

TABLE A
Average Machinery Capacity by Tractor Size
(in acres/hour)

75 Horsepower Tractor		120 Horsepower Tractor		190 Horsepower Tractor		250 Horsepower Tractor	
Square Bales	4	Square Bales	4	Square Bales	4		
Stack Loader	3	Stack Loader	3	Stack Loader	3		
Flail Chop	5	Flail Chop	6	Flail Chop	7		
Harrow	7	Harrow	7	Harrow	7		
Propane Burn	10	Propane Burn	10	Propane Burn	10		
Fluff	7	Disc or Plow	6	Disc or Plow	7	Disc or Plow	8
Lely Thatcher	8	Flail & Loaf	5	Flail & Loaf	5		
		Round Bales	4				

State of Oregon

Department of Environmental Quality Memorandum

Date: September 9, 1991

To: Environmental Quality Commission

From: Fred Hansen

Subject: Agenda Item L., September 18, 1991, EQC Meeting

Background Discussion: Eligibility of Agricultural Practices for Pollution Control Tax Credit Certification

This memorandum provides background information on the eligibility of certain agricultural capital investments for Pollution Control Tax Credits. The Department requests EQC input and guidance on how to proceed with the issue.

OVERVIEW OF TAX CREDIT ELIGIBILITY

Since the program began in 1968, the Commission (EQC) has approved pollution control tax credit certification of facilities that prevent, reduce or control a substantial quantity of air, water or noise pollution. Tax credit is also available for solid wastes, hazardous wastes and used oil recycling; the treatment, reduction or elimination of hazardous wastes; or, to provide for the appropriate disposal of used oil.

Under current law, a facility must serve a "principal purpose" or "sole purpose" of pollution control to be considered eligible for certification. A principal purpose applies if the primary purpose is to comply with an EPA or DEQ regulatory requirement. A sole purpose applies if the exclusive function is for pollution control. (Prior to enactment of the principal purpose/sole purpose eligibility test, the statute used the term "substantial purpose".)

The majority of certified facilities fall under the "principal purpose" criterion. The "sole purpose" criteria has applied to investments such as material recovery/recycling facilities and noise control investments. Also, equipment such as a baghouse or wet scrubber may meet a sole purpose if installed as a non-requirement pollution control measure if there are no production benefits.

THE ISSUE WITH AGRICULTURAL PRACTICES AND TAX CREDITS

With some exceptions, most agricultural activities are or have been specifically exempted from regulation under Oregon's air pollution control, noise, or solid waste statutes. Agricultural operations are not exempt from regulation under the water quality statutes. However, specific rules to regulate agricultural activities (with the exception of Confined Animal Feeding Operations) have not been enacted by the Commission.

Since most agricultural activities have not been subject to environmental regulation, capital investments that would reduce pollutant discharges have historically not been considered to qualify for tax credit certification under the "principal purpose" criteria. Further, few agricultural capital investments that reduce pollutant discharges are likely to be "solely" for pollution control in that they provide other economic benefits for the agricultural operation (at least as the term "sole purpose" has been historically interpreted).

Current and Past Eligible Activities

The following agricultural activities are, or at one time were, eligible for pollution control tax credits:

Field Burning

In 1975, the Legislature granted specific eligibility to grass seed growers for employing "alternative methods" to open field burning. The capital investment in the "alternative methods" can also be considered to qualify for certification under the "principal purpose" criteria of the tax credit statutes. This is because there is specific statutory regulation of field burning in the Willamette Valley for the purpose of reducing the amount of open field burning.

Open field burning also occurs in other parts of the state. Alternative methods in all unregulated areas would have to meet the "sole purpose" criterion to qualify under the current program. The Department has applied the alternative method authority only to the Willamette Valley. However, the statute is silent on the applicability of alternative methods to other regions or areas of the state.

Orchard Frost Control

Prior to enactment of the principal purpose/sole purpose criteria, the EQC certified a number of alternatives to "smudge pots" for frost control in orchards. These alternatives included fans, propane heaters, and sprinkler systems. The alternatives also provided other benefits to the growers. The Commission chose to certify the facilities under the earlier "substantial purpose" criteria, even though it was possible to argue that the alternatives were not eligible because smudging could not legally be regulated as an air pollution source. Conversion to these alternatives reduced a substantial amount of "real" air pollution and the EQC considered it good public policy to encourage the voluntary control of "real pollution". Since the principal purpose/sole purpose criteria was enacted, alternatives to smudging have not been certified because they do not meet either the principal purpose or sole purpose criteria.

Animal Waste Control

Capital investments associated with control of animal waste to prevent water pollution have

been certified for tax credit since the beginning of the program. Facilities have been certified under the earlier "substantial purpose" criteria, and the current sole purpose criterion in that the investment was made exclusively for pollution control purposes. Any other possible benefits have been determined insignificant. Now that the water quality general discharge permit prohibits direct discharge of wastes into water bodies, this activity could be considered as meeting a principal purpose as well.

Current Issues

Efforts to regulate air and water pollution resulting from agricultural activities are increasing, but have not yet reached the level of regulation that is imposed on the typical industrial sources. Public pressures, local ordinances, and new DEQ control strategies are placing pressure on the agriculture community. As investments are made to reduce agriculture's contribution to pollution, questions on the availability of tax credits have been raised. Under current law and rules, few investments by agriculture to control pollution qualify under historic interpretations of principal purpose and sole purpose. Issues may also rise as we consider the range of pollution controls potentially required to deal with nonpoint pollution from a variety of sources.

The Department's practice of generally applying the principal purpose criterion to requirements associated with point sources poses a policy issue: How should nonpoint regulated activities be treated under the statutory term "requirements".

PROPOSED COURSE OF ACTION

It is the Department's view that an examination and definition of federal and state requirements, as applied to the "principal purpose" criterion, is necessary at this time.

Legal Counsel has advised that the pollution control tax credit statutes and rules do not prohibit certification of agricultural practices if the eligibility criteria are met. In consideration of increased regulation of nonpoint sources, the Department believes a clearer definition of "principal purpose" is necessary in determining whether agricultural practices may in fact qualify.

A review of the "principal purpose" criterion should consider:

1. Management planning for water quality restricted waterways: Management planning is required for designated waterways and may involve restrictions on certain practices and the use of BMP's to meet assigned load allocations. Examples of facility investments necessary for meeting management planning objectives may include equipment for erosion control, tillage practices and storm water controls.

2. Management planning for groundwater Areas of Concern and Groundwater Management Areas: Groundwater management plans are required for designated

areas and may be voluntarily implemented or mandated. Management strategies may also involve the use of BMP's such as fertilizer management or tillage practices.

3. City, county or special district requirements for addressing EPA/DEQ directives. The responsibility for meeting EPA/State requirements such as wastewater discharge standards may be passed on to local government. Consequently, sources may be subject to additional requirements at the local level. The argument can be made that these requirements meet the tax credit's definition of "EPA/DEQ requirement".

4. Entering into a cooperative agreement with the USDA Soil Conservation Service to assure that a comprehensive farm planning approach is applied as an eligibility condition for agricultural practices relating to groundwater pollution.

The second eligibility criterion, "sole purpose" should also be explored to determine its applicability to agriculture and other nonpoint source pollution control practices. As earlier stated, this criterion has mostly applied to recycling and noise activities. Recycling has been applied under the sole purpose criterion in that the activity clearly meets a specific statutory eligibility directive. Recycling businesses do have economic benefits in that the entire recycling facility may be a business, rather than a pollution control device necessary for production purposes. These benefits are not considered to conflict with the sole purpose definition. The amount of credit is primarily based on a determination of the return on investment calculation. Noise facilities are more straightforward in constituting a sole purpose in that there generally are no other benefits.

Agriculture practices should be examined under the sole purpose criterion in the same vein as recycling and animal waste facilities. If it is possible to conclude a practice is employed solely for pollution control, the credit amount would consider any significant unrelated benefits through the return on investment requirement.

The Department is currently processing an application for certification of straw mulching equipment to reduce water pollution in Malheur County. The requirement for meeting a principal or sole purpose will be examined based on the Commission's discussion of this issue.

agtc2

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY MEMORANDUM

DATE: December 9, 1991

TO: William W. Wessinger, Chair
Environmental Quality Commission

FROM: for Fred Hansen, Director

SUBJECT: Agenda Item J, December 13, 1991, EQC Meeting

Eligibility of Non-Point Source Related Facilities for Tax Relief

At the September EQC meeting, the issue of eligibility of facilities used in agricultural practices for pollution control tax credits was discussed. The Department agreed to consider the discussion, seek input from others, and return at a later Commission meeting for further discussion on the application of "sole purpose" and "principal purpose" to specific agricultural situations and measures.

BACKGROUND

The initial aim of the pollution control tax relief legislation was to ease the financial burden of compliance with new environmental regulations. The Legislature created the category of "principal purpose" as a way to describe the facilities which would be eligible for tax credits. At the time they also recognized that there would be some limited times when an individual or company would install facilities which would reduce or eliminate a pollution discharge without being required to do so. For a subset of these limited cases, when the essential or main purpose of the facility was to reduce or eliminate the pollution, tax credit eligibility would be available under the legislative determined category of "sole purpose".

In both instances, the Legislature requires that the percent of facility cost properly allocable to pollution control be determined. This is normally done through the use of a "return on investment" determination, with the amount of tax credit reduced as the return on investment increases.

The legislature has also declared two specific categories of facilities to be eligible for tax credit in any event: alternative practices to open field burning, and recycling facilities. These are eligible without regard to the principal or sole purpose criteria, but a determination of the percent of facility cost allocable to pollution control is still required. As a matter of practice, and according to existing rules, these facilities are evaluated under the principal purpose and sole purpose criteria, respectively.

In summary, the tax credit program as set in statute is aimed at taking at least part of the sting out of environmental regulations which individuals or companies must comply with or face enforcement. Consequently, consideration of a new set of facilities, such as those related to agriculture and other non-point related facilities, must fall within the existing categories of "principal purpose" or "sole purpose".

What follows is a description of various possible rule interpretations in regard to agricultural practices and the statutory framework for tax credits. A specific application pending before the Department is used as an example for these possible rule interpretations.

SUMMARY OF EXAMPLE APPLICATION

The Department has received an inquiry from Mr. Joe Hobson regarding tax relief eligibility for a machine he has invented to spread straw mulch between the rows in cultivated fields. The primary purpose of straw mulching is to reduce erosion. A tax credit application for the straw mulching equipment for use in Malheur County has been submitted by Mr. Louis Wettstein. The application claims that air pollution is prevented by use of straw that would otherwise be burned, and that the practice of mulching reduces phosphorus and nitrate from surface water runoff. The practice of straw mulching is a recognized Soil Conservation Service (SCS) Best Management Practice for general application which primarily has surface water pollution benefit. The application does not substantiate groundwater pollution control benefit in that there are no identified or planned reductions in water and fertilizer application rates.

Research study information provided by the applicant suggests that the practice of straw mulching provides benefits other than pollution control. This information identifies significant potential benefits from increased crop yield and the potential for reduced fertilizer application needs. In addition, reduction of the loss of valuable productive topsoil is a savings of the primary asset of any farming operation.

Attachments A and B present the Department's preliminary evaluation of the Wettstein application.

APPLICATION OF PRINCIPAL PURPOSE TO AGRICULTURAL FACILITIES

Historically, most agricultural activities have not been subject to environmental regulation. Under the current tax credit law and rules adopted by the Commission, agricultural facilities claimed to be pollution control facilities have been found eligible under the "principal purpose" criterion if the facility is installed in response to a state or federal requirement and

the facility owner is subject to enforcement action if the facility does not achieve the requirement. Waste management facilities for confined animal feeding operations (CAFO's) that are subject to permit requirements under current rules are an example of facilities that qualify.

The Department believes that agricultural and other non-point source facilities that are installed to meet the requirements of an adopted TMDL would be eligible under the current interpretation for "principal purpose". Storm water non-point source facilities that may be installed to meet new permit requirements or TMDL requirements may also be eligible.

Field burning applications have been processed under the principal purpose criteria, even though the alternative methods to open field burning are considered outright to be eligible by provision of law. The program to regulate open field burning in the Willamette Valley has provided the regulatory framework for consideration under principal purpose. To date, no claims to reduce field burning outside the Willamette Valley have been processed. Processing of such applications would not comfortably fit under the principal purpose criteria since there is no regulation program on field burning outside the Willamette Valley.

Facilities installed in response to a non-point source management plan that seeks to achieve a voluntary reduction in the discharge of pollutants would not be considered eligible under the present "principal purpose" criteria. This is because the installation of the facility is not the result of a "requirement" of state or federal law or rules. In the case of groundwater, it can be argued that planning is required, but the legislation stops short of establishing directly enforceable implementation requirements.

In the case of the Wettstein application, the Department has not identified an enforceable requirement that necessitated purchase and use of the claimed facility. Mr. Wettstein's farm is in the Malheur County Groundwater Management Area. The plan calls for voluntary action. Implementation is not required. In addition, reduction of pollutant discharge to groundwater by reducing water and fertilizer application rates is not substantiated. There is currently no plan or requirement for implementation of non-point source pollution control measures to protect surface water. Finally, there is no requirement to reduce open field burning in the area.

APPLICATION OF SOLE PURPOSE TO AGRICULTURAL FACILITIES

As previously noted, the legislature recognized that there may be instances where people install facilities that are not "required" by enforceable pollution control requirements, but provide pollution control benefits. The legislature determined that such facilities could be eligible for pollution control tax credits if the "sole purpose" was for pollution control. The

statute provides for a determination of the percent of the facility cost allocable to pollution control to effectively remove tax credit for the portion of a facility that serves other purposes. Commission rules define sole purpose in terms of a substantial pollution control benefit and an exclusive purpose of pollution control.

The Department has interpreted and used the "sole purpose" criteria in two different ways. Recycling facilities have been processed under the sole purpose criteria. The purpose of these facilities (exclusive purpose, main purpose, essential purpose) is to reduce the solid waste going into disposal sites. There also may be some return on the investment in these facilities. The legislature originally provided 100% tax credit for all recycling facilities. The law was subsequently changed to provide that the facilities are eligible, but the percent of the cost allocable to pollution control should be determined in a manner similar to other facilities. Since there is no "enforceable requirement" for installation of recycling facilities, they have been processed under the sole purpose criteria.

Other facilities have been determined to be eligible under sole purpose if they meet the definition in the rules; i.e. they serve an exclusive purpose of pollution control and the non-pollution benefits are very small. From a practical standpoint, for facilities other than recycling facilities, the current interpretation has almost limited the application of sole purpose to facilities that have no non-pollution benefits.

In the case of the Wettstein application, the Department concludes that under current interpretations and based on currently available information, it does not appear to qualify under sole purpose. Research information provided to the Department suggests that use of straw mulch can result in significant benefit from increases in crop yields for onions and potatoes. The applicant has not provided information to suggest that such benefits do not occur in his operation. Additionally, the information suggests that the erosion pollution control benefit diminishes with each successive application of water after the straw mulch is applied.

POTENTIAL ALTERNATIVES TO PRESENT ELIGIBILITY CRITERIA

Discussion at the September Commission meeting identified a concern that the existing eligibility criteria penalize voluntary pollution preventive practices and are inequitable. The Department understands the concern. However, the legislative determinations on eligibility seem clear -- the tax credit program was intended to reduce the sting of enforceable environmental regulations, and to support voluntary environmental actions only to the limited extent that a facility qualifies under sole purpose. The Department concludes that any substantially broadened use of the tax credit program as an incentive to implementation of voluntary pollution control measures would take a statutory change.

In response to the concern of the Commission, the Department has explored options that may be currently available through the rulemaking process to interpret and apply the principal and sole purpose criteria differently. Discussion of two options follows:

ALTERNATIVE 1: Declare through rulemaking that non-point source facilities voluntarily installed in response to and consistent with a DEQ/EQC approved area-wide non-point source management plan will be deemed to be eligible for tax credit consideration under the principal purpose criteria.

At this time the Malheur County Groundwater and the Tualatin Basin and Bear Creek Surface Water Management Plans are being developed. These plans are intended to be implemented voluntarily (at least in the initial phase). This option would allow the use of the tax credit program to encourage the implementation of these management plans. Legal counsel has informally indicated that such an interpretation of "principal purpose" may be within the scope of the Commission's authority. The Commission could, through rulemaking, specify the conditions or specific circumstances that would have to be met to qualify.

Potential Consequences:

- This option would direct additional incentives at the most significant or priority non-point source pollution problems in that a level of significance has been determined, an area has been designated and control strategies have been developed.

- This alternative differs substantially from the present interpretation of "principal purpose" in that a voluntary action in response to a management plan is presently not considered an enforceable requirement.

The Department is not comfortable with this alternative because it departs significantly from our understanding of the intent of the tax credit legislation, and would significantly broaden tax credit eligibility without legislative consideration. A written Attorney General's opinion should be obtained before this option is further pursued.

ALTERNATIVE 2: Declare through rulemaking that non-point source facilities voluntarily installed in response to and consistent with a DEQ/EQC approved area-wide non-point source management plan will be deemed to be eligible for tax credit consideration under the sole purpose criteria.

This alternative would be based on the assumption that installation of pollution control facilities called for in the approved management plan would be considered as evidence that the main or essential purpose was for pollution control. In other words, the applicant would not have made the investment but for the existence of a management plan. As such, other benefits could be identified and removed through the return on investment calculation. This concept could be expanded to include other Department/Commission approved plans or strategies.

Potential Consequences:

- Expanding "sole purpose" to include the "but for" concept could provide some additional incentive for preventative non-point source practices under a management plan.

- This alternative would treat voluntary non-point related facilities in a similar fashion as recycling facilities. The key difference is that there is specific statutory eligibility of recycling facilities.

- Application evaluation under this alternative may be complex unless eligibility is specifically addressed before management plans are approved.

Pursuit of an alternative similar to this would have to include elaboration in the rule on the "exclusive" or "main" or "essential" purpose so as to provide clear criteria for determining eligibility.

DEPARTMENT CONCLUSION

Should the Commission choose to provide broader tax relief for non-point source related facilities, the Department would support further development of Alternative 2.

The Department has purposely chosen not to recommend approval or denial of the Wettstein application, instead waiting for discussion and direction by the Commission. If the Commission gives no new direction or explicitly maintains the current direction, the Department would conclude that the Wettstein application should be denied. This is because there is no enforceable requirement, by DEQ, EPA, or Regional Air Authority, to utilize mulch or gain the benefit of runoff control achieved by the practice. Consequently, it is not eligible under the "principal purpose" criteria.

Under the "sole purpose" eligibility criteria, it appears to the Department that two review tests need to be met. First, the facility must result in a substantial reduction of pollution in Oregon. Second, its main or essential purpose must be for pollution control benefit. Information provided by the applicant, Joe Hobson, the SCS and Malheur Experiment Station offices was used in the Department's evaluation.

As to the first test, research information provided by the applicant concluded that pollution of surface water could be reduced during the first application of flood irrigation water. These benefits would be diminished, however, with each subsequent application of irrigation water. Although not claimed in this case, groundwater protection pursuant to a management plan could have been claimed as a benefit. If it had been, however, a reduction in irrigation water and fertilizer application would have to be demonstrated, and neither was demonstrated by the applicant.

As to the second test, the research information supplied by the applicant indicates that straw mulching as proposed for onions would provide substantial benefit in terms of increased crop yield. Either new information showing why this is not the case or that the results are different would have to be shown.

In any event, both tests would need to be met and in the Department's judgment, neither currently have been met.

Attachments

Oregon

DEPARTMENT OF ENVIRONMENTAL QUALITY

February 4, 1992

MEMORANDUM

TO: Environmental Quality Commission

FROM: Fred Hansen, Director

SUBJECT: Pollution Control Tax Credit Issues

Significant pollution control tax credit issues emerged from the December and January EQC meetings. Department staff also met with Commission Chair Wessinger and Commissioner Squier on January 13 to examine in depth the two main issues raised at the December EQC meeting: 1) tax credit eligibility for nonpoint sources; and 2) definition of alternative methods to open burning. At the January 23 EQC meeting, Chemical Waste Management's application for certification of a landfill liner raised additional issues related to tax credit eligibility. The Commission deferred action on the application until legal counsel provides further guidance on the Commission's eligibility authorities.

Over the past two months, Department staff and legal counsel have sought to define more clearly the tax credit issues the Commission needs to address. Staff and counsel plan to present the EQC with information and advice for the special EQC meeting on February 18. The Chemical Waste Management application will also be on the agenda for Commission action.

This memo summarizes the tax credit issues to be considered at the February meeting and frames specific questions and issues on which staff or counsel will prepare written responses.

The pollution control tax credit program has become more complex in recent years. Factors adding to the complexity include broader environmental regulations and related pollution control practices. The issues that the Commission will discuss on February 18 will assist in resolving some of the concerns arising from these factors. These include:

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- Facilities for agriculture and other nonpoint source pollution have not generally been eligible under the program. How does eligibility apply given recent regulations imposed in this area, e.g., Total Maximum Daily Loads, groundwater management areas?

- Solid and hazardous waste landfills elicit questions about the applicability of tax credit eligibility. On the one hand, EPA and DEQ impose numerous requirements on such activities, leading one to conclude that any "required facilities" should be eligible for tax credits. On the other hand, the very nature of some of these "required facilities," specifically liners, seems an integral part of the business operation rather than an added pollution control device. In this regard, such facilities raise the question of whether or not they should be eligible for tax credits.

  It should be noted that while we certainly have had both solid and hazardous waste landfills in this state for a number of years, we have not faced applications for tax credits for such things as liners until December 1991.

  Does the law allow the Commission to make distinctions among different types of facilities required by federal or state law? If so, should the nature of these businesses, specifically the relationship of required pollution facilities to the business product, affect the eligibility or degree of eligibility?

- The law allows tax credit eligibility when the facility is not "required" if the facilities are installed voluntarily and solely for pollution benefit. Does "sole" mean, in the Webster dictionary definition, "only"? If there are de minimis or other benefits derived from the facility, does this eliminate eligibility under the "sole" provision of the law?

- Under ORS 468.150, alternatives to open field burning are eligible for tax credits. Historically, these have been used to assist in reducing open field burning in the Willamette Valley. Does the Commission have the authority to restrict eligibility by type of facility or by geography? If so, should the Commission do so and what guiding policy should be used?

Prior to the February 18 special EQC meeting, Commission members will receive a staff report which will consist of Department and Assistant Attorney General responses to the following:

1. Is there any statute or other legal regulation which mandates the EQC to grant tax credit certification for new business investment to meet existing environmental law and regulations?

   If the answer to the above is no, are there other factors that relate to the Chemical Waste Management application which would mandate the Commission to grant certification?

2. Has the Commission a legal basis to determine that certain required pollution facilities are integral components of a business such as waste disposal? Would the integral components be eligible for pollution control tax credit certification?

   If there is no discretion for this determination, what is the Commission's authority for determining the portion of the facility that is allocable to pollution control? On what basis does the return on investment apply?

3. One definition for whether a facility is being installed pursuant to a requirement (and, therefore, eligible for a tax credit under the principal purpose authority) is whether the Department may take formal enforcement action if the facility is not installed or properly functioning. Are there any legal constraints on the Commission's ability to define the range of enforcement authority to substantiate an environmental requirement?

4. Under the "sole purpose" definition, what are the legal and policy options for dealing with minor or de minimis benefits derived from the pollution control facility?

5. The purpose of authorizing alternatives to open field burning for tax credit eligibility is to reduce the amount of open field burning. What options are available to the Commission to ensure that approved tax credits will actually result in acreage removed from open burning?

6. What frameworks might provide a clearer definition of eligibility for alternative methods to open field burning, including definitions of specific types of facilities which are and are not eligible for tax credit relief? Are there statutory limits or legislative intent which would limit eligibility to the Willamette Valley?

Within the framework provided by the Department and legal counsel, it is my hope that the Commission will be able to give us policy direction on how you wish to have the current statutes applied. In addition, for any areas where the statutes limit what the Commission believes should be done, I would expect that we can prepare proposed legislation to be considered by the Governor for possible submission to the 1993 Legislature.

DEPARTMENT OF JUSTICE
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February 11, 1992

Environmental Quality Commission
811 SW Sixth Avenue
Portland, OR 97204

Re: Legal Issues Relating to the Pollution Control Tax Credit Program

This letter provides advice on a number of legal issues relating to the pollution control tax credit program. Each question is set out separately below along with a brief answer and the supporting analysis.

1. Are facilities erected, constructed or installed by a new business to comply with existing regulations eligible for tax credit certification under the "principal purpose" provisions of ORS 468.155 and 468.170 and the rules adopted by the Commission? If so, does the Commission have authority to exclude such businesses from eligibility?

Brief Answer

Facilities developed by new businesses to comply with new or existing rules are eligible for certification under the statutes. We conclude that the Commission does not have authority to adopt rules excluding such facilities from eligibility.

Analysis

A. Background

Historically, the Commission has found both new and existing businesses to be eligible for tax credits under the principal purpose test. Similarly, the Commission has certified facilities that were necessary to comply with pre-existing rules. These certifications were consistent with advice from the Attorney General's office.[1]

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[1] This advice generally has been oral and no formal opinions have been written on these issues.

This interpretation of eligibility is consistent with the literal language of the tax credit statutes. Under ORS 468.165(1), "any person" may apply for certification if (1) the facility in question meets the definition of "pollution control facility" in ORS 468.155 and (2) the facility was constructed or installed within the time period specified in ORS 468.165.[2] If these requirements are satisfied and proper application is made, then the facility is eligible, so long as the facility "is necessary to satisfy the intents and purposes" of the state statutes relating to treatment works, sewage disposal and treatment, solid waste, recycling, hazardous waste, noise control, used oil recycling, air quality, and water quality. ORS 468.170(4)(a).[3]

We have located no provisions in the statutes that show an intent to limit tax credit eligibility to existing businesses or to limit eligibility under the principal purpose test to facilities necessary to comply with requirements imposed after a business began operation.

B. Legislative History

The tax credit statutes were enacted in 1967 and they have been amended in almost every subsequent legislative session.[4] The legislative record provides clear evidence that new businesses were intended to be eligible for certification. Further, the legislature considered and then rejected statutory language that would have limited the ability of new businesses to use the tax benefits available for a certified facility. The various amendments in subsequent years do not indicate a change of legislative intent.

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[2] There are certain other requirements relating to solid waste, hazardous waste, and used oil facilities that are not at issue here.

[3] As discussed in the response to question 3, the Commission does exercise discretion with respect to the costs properly allocated to the facility.

[4] Attachment A to this letter provides a brief history of the tax credit statutes.

During the 1967 legislative session, three pollution control tax credit bills were introduced in Oregon. One measure (SB 272) apparently was sponsored on behalf of industry and another (SB 471) was sponsored on behalf of the Sanitary Authority (the Commission's predecessor). Eventually a compromise bill, SB 546, was drafted and, after numerous debates and amendments, enacted. Or Laws 1967, ch 592.

Each of the three bills shared the purpose of accelerating the installation of air and water pollution control equipment. "General Explanation of Tax Incentive Measure Based on SB 272 and SB 471," Exhibit (unnumbered), Senate Committee on Air and Water Quality Control, April 11, 1967. Tax benefits were intended to be available to both new and existing businesses. See, e.g., Testimony of Herb Hardy,[5] Senate Committee on Air and Water Quality Control, April 11, 1967. The bills varied, however, in their tax treatment of existing businesses that had already installed equipment or that might be required to retrofit existing plants. Id.

Under the compromise provisions in SB 546, the Sanitary Authority was required to issue a certificate if the principal purpose of the facility was the prevention, reduction or control of air or water pollution and if the facility would be effective to that end. A taxpayer with a certified facility could elect to take an income or corporate excise tax credit or, alternatively, to have the facility removed from the ad valorem property tax rolls.

Under the original version of the bill, a taxpayer could have taken a tax credit (as opposed to the exemption from ad valorem taxation) only in two circumstances. First, a taxpayer could have taken the credit if the certified facility was constructed within five years of the effective date of the act. (Sections 8(2)(a) and 11(2)(a).) The objective of this requirement was to create the incentive for accelerated installation of any new pollution control equipment and the credit was intended to be available to new or existing business ventures. Second, a taxpayer could have taken the credit if

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5 Mr. Hardy, a lobbyist for the canneries, was a principal figure in the drafting of the legislation.

the certified facility was constructed after December 31, 1957[6] and was used "in connection with a trade or business conducted by the taxpayer on the effective date of [the] Act. (Id. at Sections 8(2)(b) and 11(2)(b).) The objective of this provision was retroactive relief to existing businesses that had already installed equipment and relief for the costs of retrofitting existing plants.

The conditions in SB 546 for qualifying to use a certified facility for tax credit purposes were amended several times prior to enactment. First, the qualification period for any new facilities was enlarged to include the period from January 1, 1967 to December 31, 1978. Then, the provisions authorizing tax credits for facilities constructed between 1958 and 1967 and for retrofitting of existing businesses were deleted. Finally, tax credits were made available for new facilities. The intent and the effect of these amendments was to remove any distinction in the tax treatment of certified facilities operated by new or existing businesses.

This legislative history points out that the Legislature did not intend to distinguish between new and existing businesses when certifying a facility and that it considered and then rejected language that would have distinguished between new and existing business with respect to the type of tax benefits available from a certified facility.

C. Commission Authority

Agency rulemaking authority is generally divided into two categories: completion of an incompletely expressed legislative policy or the interpretation and application of an expressed legislative policy. See Springfield Education Ass'n. v. Springfield School District No. 19, 290 Or 217 (1980). The Commission's authority to define the standards for eligibility for tax credit certification generally falls in the latter category, because the statutes set out both the general policy

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[6] Apparently, 1957 was the effective date of the first statute requiring pollution control equipment. See Testimony of Herb Hardy, supra.

and specific requirements that must be satisfied.[7] ORS 468.155 to 468.170. In defining statutory terms, an agency must try to give effect to the legislature's intent. Fifth Avenue Corp. v. Washington County, 282 Or 591 (1978). Generally, the Commission's interpretation will be upheld if the definitions are reasonable and consistent with the statutory provisions and legislative purpose. In our opinion, a Commission rule excluding facilities constructed by new business ventures would be inconsistent with legislative intent.[8]

D. Conclusion

In light of the broadly stated eligibility provisions, past Commission interpretation, lack of any express or implied exclusion for new business and the relevant legislative history, we conclude that the Commission does not have the authority to limit eligibility for tax credits to existing business enterprises.

2. **Could the Commission determine that certain facilities that otherwise meet the statutory requirements are not eligible for certification because they are integral components of a waste disposal business or other environmental service enterprise?**

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7 This conclusion does not apply to provisions relating to alternative methods of field sanitation (ORS 468.150) and exclusion of portions of facilities that make insignificant contributions (ORS 468.155(2)(d)).

8 This conclusion is bolstered by the fact that the legislature has delegated the Commission significant substantive authority with respect to other aspects of the tax credit program. As discussed below, ORS 468.190(1) sets out an incomplete expression of legislative policy with respect to allocation of costs. There are four specific factors that the Commission must consider when determining cost allocation. The statute goes on to allow consideration of "any other factors which are relevant" to establishing the cost properly allocated to pollution control. The Commission is then given express authority to adopt rules establishing methods to be used to determine the portion of costs properly allocable." ORS 468.190(3).

Brief Answer

Probably not.

Analysis

The tax credit statutes do not include any express provisions that would allow the Commission to determine eligibility based upon whether the facility is a component of a business producing traditional goods or services as opposed to one providing waste disposal or other environmental services. This issue has been before the legislature. It was debated during the 1983 legislative session with respect to the eligibility of waste incinerators. Later, in 1989, the legislature amended the statutes to exclude waste-to-energy incinerators from the definition of eligible solid waste facilities, but it has not excluded otherwise eligible pollution control facilities merely because they are components of a waste disposal business. Or Laws 1989, ch 802.

This does not mean, of course, that all components of a waste disposal business are eligible for certification. Facilities must still satisfy the principal or sole purpose test. As early as 1967, the record indicates legislators were told that facilities necessary for the operation of the business per se would be treated differently from those that are necessary for the purpose of pollution control. See, e.g., Discussion between Rep. Jim Redden and Herb Hardy, House Taxation Committee, May 11, 1967, at 1159.[9]

Following the same reasoning used in question 1 above, we believe it is likely that a court would find that the Commission does not have authority to exclude facilities from eligibility merely because they are components of a waste disposal or other environmental service business.

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[9] In the case of a landfill, it would seem that the land and excavation would be necessary for the operation of the business per se, while liners and leachate collection and treatment systems ordinarily would not be required in the absence of environmental concerns.

3. If the answer to question 2 is no, what is the Commission's authority with respect to the determination of the portion of the facility allocable to pollution control?

Brief Answer

The Commission could determine that some portion of the cost of facilities integral to a waste disposal or similar environmental service business is not properly allocable to pollution control. However, if the determination is not based on the methodologies established by existing Commission rules, then the determination should be based on carefully articulated reasoning and supported by findings. There is some risk that such a determination would not be upheld by the courts.

Analysis

The Commission is responsible for determining the actual cost of a facility and the portion of such costs that is properly allocated to the pollution control or waste facility. ORS 468.190. In making this determination the Commission is required to consider four specific factors (recovery of usable commodities, return on investment, alternative methods or equipment, and increased or decreased costs). The Commission also must consider "any other factors which are relevant in establishing the portion of actual cost of the facility properly allocable" to pollution control. Id. These "other factors" must have the same general characteristics as those expressly stated by the legislature. See, e.g., Employment Div. v. Pelchat, 108 Or App 395 (1991).

In previous cases, the Commission has rejected the notion that disposal businesses should be treated differently for purposes of cost allocation. See, e.g., Minutes of Special Meeting of the Oregon Environmental Quality Commission, December 19, 1986 (Ogden-Marten waste incinerator). The Commission can change its position, of course, but if it does, it will need to explain its reasoning and make findings explaining how it will calculate the allocable costs for such components. ORS 468.170(3).[10]

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[10] It might be tempting to conclude that all pollution control facilities are integral to a landfill business or other environmental service industry and that no costs of facilities are properly allocable. The result would be the same as concluding that such facilities are ineligible for certification. As previously discussed, this interpretation appears to be contrary to legislative intent.

For example, the Commission might determine that some disposal businesses are essentially marketing compliance with environmental laws and that the pollution control facilities, in some sense, are of greater value to these businesses than it is to other businesses where a pollution control facility is merely incidental to production. Such a factor might be considered a factor similar to return on investment.

If the Commission were to determine that there is a reasonable basis for allocating costs differently for some pollution control facilities that are integral to waste disposal businesses, it would also need to develop a methodology for calculating the allocation costs. For example, the Commission has adopted a methodology for determining return on investment. OAR 340-16-030(5), but this rule does not treat facilities differently based upon the nature of relationship between the facility and the applicant for certification.

The likelihood that the courts would uphold an allocation determination based upon an "other factor" depends upon the persuasiveness of the reasoning supporting the distinction, the extent to which this "other factor" is similar to one of the four specific factors, and the logical nexus between the factor identified and the methodology used to reduce the cost allocation.

4. May the Commission defer action on the pending Chemical Waste Management application until after the Commission has amended the rules for the pollution control tax credit program and then apply the amended rules to the application?

Brief Answer

In theory, yes. However, the application is supposed to be approved or denied within 120 days. This time frame will make it difficult to complete amendments to the rule prior to taking action on the application.

Analysis

There is no general legal prohibition against retroactive application of an administrative rule. See Gooderham v. AFSD, 64 Or App 104, 108 (1983).[11] Retroactive application is not allowed, however, if it would be "unreasonable." The courts determine reasonability by applying a balancing test to determine whether retroactive application would be contrary to statutory design or recognized legal principles. Gooderham, supra. In performing this balancing test, the courts often look to whether the matter is a case of first impression and the rule merely attempts to fill a void or, to the contrary, whether the new rule represents an abrupt departure from well established practice. Id. at 109. The courts also will consider the extent to which an applicant has relied on the former rule and whether there is a statutory interest in applying the new rule despite reliance by the applicant. Id.

Thus, whether the Commission may retroactively apply an amendment to the tax credit rules will depend largely upon the nature of the amendment and the extent, if any, to which Chemical Waste Management has relied on the existing rules or past practice.

It should be noted, however, that ORS 468.170(2) requires the Commission to reach a decision within 120 days of the filing of the application. The Chemical Waste Management application was found to be complete on November 13, 1991. As a result, the 120 day deadline appears to be March 22, 1992.[12] It would be difficult to adopt a regular rule amendment by that date. Similarly, it might be difficult to justify the adoption of a temporary rule with an immediate effective date.

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11 The intent to apply a provision retroactively should be expressed in the rule. See Guerrero v. AFSD, 67 Or App 119 (1984).

12 Failure to certify within 120 days does not result in automatic certification. An applicant could seek a court order, though, requiring the Commission to act.

5. What is the Commission's authority to further define the term "requirement" as used in the principal purpose test in ORS 468.155?

Brief Answer

The Commission has relatively broad authority to define the term "requirement" so long as the definition is consistent with ordinary usage of the term and legislative intent. The Commission could limit the term to requirements specifically imposed by rules or permits and enforceable by actions for permit revocation, civil penalties or court order.

Analysis

The term "requirement" is not defined in the statute. It was added to the statutes as a part of the reformulation of the principal purpose test in 1983. Or Laws 1983, ch 637. There was very little discussion of the new language during the legislative committee hearings. (The discussion in 1983 centered around solid waste incinerators.)

When a word in a statute is not defined, the courts will usually give the term its ordinary and common meaning so long as that meaning is consistent with legislative intent. ORS 174.020; Fletcher v. SAIF, 48 Or App 777, 781 (1980). While not controlling, dictionary definitions can provide some guidance. Webster's defines "requirement" as something required, wanted, or needed or as an essential requisite or condition. See also City of Portland v. State Bank of Portland, 107 Or 267 (1923) (definition of "required by law"); Beakey v. Knutson, 90 Or 574 (1919) ("direct" means mandatory and synonymous with "require").

As discussed in the answer to question 1 above, the Commission has authority to define statutory provisions as part of its implementation of the tax credit program. So long as an interpretation is reasonable and is consistent with legislative intent, it will generally be upheld. Accordingly, we believe that the Commission could define the term "requirement" narrowly to include only those agency directives that are mandatory and that are enforceable against the taxpayer by virtue of a specific regulation or permit condition. Ordinarily, such enforcement authority would include civil penalties, permit revocation, or court order.

The Commission could also adopt a somewhat broader construction of the term that includes requirements imposed under areawide management plans even though such requirements are enforceable by another government entity. An example would be mandatory management practices imposed by the designated management agency in a basin in which TMDLs are in place. There is a risk that the courts would reject a Commission's definition of "requirement" that includes directives that are not enforceable by any means.

6. **What is the Commission's authority to further define the phrase "sole purpose" as used in ORS 468.155?**

Brief Answer

The Commission has authority to further define the phrase "sole purpose."

Analysis

The "sole purpose" test was also added by the 1983 legislation. As with the term "requirement," it is not defined in the statute and there is very little helpful legislative history. Again, we conclude that the Commission has authority to define the term, so long as the definition is consistent with the statutory scheme.

The present "principal purpose" and "sole purpose" tests replaced the "substantial purpose" test and the legislative history does indicate an intent to restrict eligibility for certification. See Testimony of Bill Young, Director of DEQ, (SB 112) Senate Committee on Energy and Environment, March 2, 1983 at 383. Accordingly, we assume that the phrase "sole purpose" should not be defined so broadly that it essentially duplicates the previous substantial purpose test.

The Commission presently defines the term narrowly as the "exclusive purpose." OAR 340-16-010(9). This definition is clearly consistent with the statutory scheme. A somewhat broader interpretation that overlooked incidental or de minimis purposes would probably be upheld as well.

7. What is the Commission's authority to adopt rules governing approval of "alternative methods" to open field burning under ORS 468.150 and could such rules limit approval of some or all alternative methods to those used in the Willamette Valley?

Brief Answer

The Commission has broad authority to approve or to refuse to approve alternative methods. So long as there is a rational basis for the classification, the Commission could limit approval of some or all alternative methods to the Willamette Valley. Similarly, the Commission could base approval on its estimation of whether the use of the alternative method would result in an actual decrease in acreage burned or increased air quality.

Analysis

In 1975, the legislature added "approved alternative methods for field sanitation" to list of facilities eligible for certification. ORS 468.150. Or Laws 1977, ch 559, section 15. We previously advised that "approved alternative methods" are eligible for certification. However, the legislature has delegated significant authority to the Commission[13] to approve or disapprove such methods in the first place.

The legislature has not provided express standards for approval. Accordingly, it falls upon the Commission to

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13 ORS 468.150 actually gives the authority to approve alternative methods to the department and to "the committee." The Commission, however, has general authority to adopt rules directing the Department's decisions with respect to approval of methods. ORS 468.015, 468.020. The exercise of this supervisory authority would not appear to be inconsistent with ORS 468.150.

The committee referred to in the statute is the Oregon Field Sanitation Committee. This committee was abolished and its duties transferred to the Department. Or Laws 1977, ch 650, section 6. See also Or Laws 1991, ch 920, section 24 (abolishing the 1977 advisory committee established to assist the Department).

complete the expression of legislative policy. See Springfield Education Assn., supra. Rules that are reasonable and consistent with the underlying statutes will ordinarily be upheld. (See discussion at page 5, supra.)

The record of the proceedings leading to the enactment of ORS 468.150, shows that the legislature wanted to create an incentive to develop practices and equipment that would reduce the need for open field burning in the Willamette Valley. See Comments of Sen. Betty Roberts, (SB 311) Senate Committee on Agriculture, March 18, 1975. Thus, rules that limit approval of some or all alternative methods to the Willamette Valley would be consistent with the statute. See also ORS 468A.005(6); 468A.025; 468A.035 (authorizing different air quality regulations for different areas of the state).[14]

Similarly, rules limiting approval to alternative methods that the Commission determines are likely to result in an overall reduction of air pollutants or the actual removal of acreage from open burning are consistent with legislative intent. These were objectives of the 1975 package of field burning statutes that included ORS 468.155. Or Laws 1975, ch 559.

Sincerely,

Larry Knudsen
Assistant Attorney General

Arnold B. Silver
Assistant Attorney General

LK:dld 0938N
cc: Fred Hansen
Peter Dalke
Roberta Young

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[14] Although we believe that approval could be limited to the Willamette Valley, such a limitation is not required. The statute itself contains no provision limiting eligibility to the Willamette Valley.

ATTACHMENT A

History of Pollution Control Tax Credit Statutes

Following is a brief history of the more important eligibility and cost allocation provisions of the tax credit statutes. Provisions relating to tax treatment of the certificate, fees and required dates for construction and application are not discussed.

The pollution control tax credit program was established by statute in 1967. Or Laws 1967, ch 592. Apparently, 23 states and the federal government already had pollution control tax credit programs at that time and Oregon may have borrowed some of its original provisions from these other jurisdictions. Testimony of Herby Hardy on SB 546, House Taxation Committee, May 11, 1967, at 1147, 1168. Always controversial, the tax credit statutes have been significantly amended during nearly every legislative session since 1967.

The original version of the statute was remarkably similar to the present law. There were a number of important differences, however. Facilities (defined essentially as they are today) were eligible for certification if the "principal purpose" of the facility was preventing, controlling, or reducing air or water pollution. The pollution control had to be by means of waste disposal, air pollutant disposal, elimination of air contaminant sources, or use of air-cleaning devices. There was no general mandate that the principal purpose be compliance with requirements imposed by the Sanitary Authority (the Commission's and department's predecessor) or Environmental Protection Agency. Similarly, there was no "sole purpose" provision. The Sanitary Authority was not given express authority to determine the allocation of costs.

In 1969, the legislature replaced the "principal purpose test" with a "substantial purpose test." Or Laws 1969, ch 340, section 4. The 1969 amendments also gave the Sanitary Authority the ability to determine the portion of cost properly allocable to pollution control. Id. at section 5. Allocation of costs was limited to increments of 20 percent, however. In addition, the Sanitary Authority was given express authority to adopt procedural rules for administering the tax credit program. Id. at section 8. A bill enacted later in 1969 transferred the responsibilities of the Sanitary Authority to the Commission and department. Or Laws 1969, ch 593.

Amendments in 1973 authorized a tax credit for certain solid waste facilities. Or Laws 1973, ch 831, section 4. The legislature also adopted standards for allocating actual cost

of the facility. Id. at section 6. See also Or Laws 1973, ch 835 (a different bill with several of the same provisions); Or Laws 1974 special session, ch 37 (resolving conflicts between the two 1973 bills).

In 1975, the tax credit statutes were recodified and placed in ORS chapter 468 and new provisions relating to solid waste were added. Or Laws 1975, ch 496. Provisions were adopted requiring preliminary certification by the department. Id. at section 5. The legislature also enacted ORS 468.150, which provides that approved alternative methods to open field burning are eligible for pollution control tax credits. Or Laws 1975, ch 559, section 15.

Amendments in 1977 made noise pollution control facilities eligible for tax credits and further refined the requirements for solid waste control facilities. Or Laws 1977, ch 795. Similar amendments in 1979 made hazardous waste and used oil facilities eligible. Or Laws 1979, ch 802. The 1979 amendments also excluded from eligibility of solid or hazardous waste facilities a list of items found to make an "insignificant contribution" (e.g., office buildings, cars and parking lots). Id. at section 1.

The next major revision in eligibility requirements occurred in 1983. Or Laws 1983, ch 637. The legislature repealed the substantial purpose test and reinstated the principal purpose test. Id. at section 1. Rather than readopt the specific list of purposes, however, the amendment stated that the principal purpose must be "to comply with a requirement imposed by the department, the federal Environmental Protection Agency, or regional air pollution authority. The legislature also added the sole purpose test. Id. In addition, recycling facilities were made eligible for certification.

The legislature also addressed the issue of replacement or reconstruction of facilities. Id. The legislature limited eligibility to replacements due to regulatory requirements and to costs greater than the "like for like" costs of replacement.

The legislature also replaced the Commission's authority to allocate costs based on 20 percent increments with authority to allocate costs from 1 to 100 percent. Id. at section 4. The Commission was given express authority to adopt rules establishing methods to be used for calculating such costs.

In 1987, the legislature excluded "property installed, constructed or used for clean up of emergency spills or unauthorized releases" from eligibility. Or Laws 1987, ch 596,

section 4. The legislature gave the Commission express authority to adopt rules further defining this particular exclusion. Id.

The 1989 legislature extended the exclusion for portions of facilities making "insignificant contribution" (office buildings, fences, parking lots, etc.) from solid waste and hazardous waste facilities to all facilities. Or Laws 1989, ch 802, section 4. Asbestos abatement facilities and solid waste incinerators were excluded. Id. In addition, the legislature continued to fine tune the provisions on cost allocation, this time by limiting actual cost of the taxpayer's own cash investment in the facility. Id. at section 6. The provisions for preliminary certification by the department were repealed. Id. at section 8.

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY INTEROFFICE MEMORANDUM

DATE: March 16, 1992

TO: Environmental Quality Commission

FROM: Fred Hansen, Director

SUBJECT: Pollution Control Tax Credit Issues

An Attorney General's opinion was requested in January on several pollution control tax credit program issues (see attachment). At its February meeting, the Commission only addressed the opinion issues that related to the Chemical Waste, Inc. application. The remaining issues, as summarized below, are scheduled for discussion at the April 23 meeting.

1. Legal constraints in defining environmental "requirement."

The issue of tax credit eligibility of nonpoint source practices has raised the question of what constitutes a requirement. Currently a requirement exists for tax credit purposes if failure to comply results in a formal enforcement action.

The Attorney General has advised that the Commission has considerable authority in defining what constitutes a requirement. The term could narrowly be tied to specific regulations or permit conditions. Alternatively, the term may be defined to apply to mandated areawide groundwater or water quality limited stream management plans where there may be a link, albeit weaker link, between the mandate and the enforcement entity.

The Commission has expressed a desire to provide tax credit eligibility to facilities for nonpoint source practices when carried out to comply with management plans. In the Department's view, this is an appropriate position which would provide point and nonpoint sources equal access to the tax credit program.

2. Legal authority to define the sole purpose eligibility criterion.

The Department has experienced difficulty in applying the sole purpose criterion. The Attorney General has advised that the criterion may be interpreted as totally exclusive, or may also

apply where there are insignificant or minor nonpollution-related benefits. It is the Department's preference that the term be applied as narrowly as possible. This would be consistent with the Legislature's intent to further restrict the previous "substantial purpose" criterion. This action would also be consistent with the current rule definition of "exclusive purpose."

3. Authority to base alternative methods to open field burning on verified decrease in acreage burned.

There are no specific statute or rule directives to base certification on a substantiation of reduced acreage burned. However, the Attorney General advises that the Commission has authority to condition certification in this manner if it so chooses. The Department and Department of Agriculture are supportive of requiring the verification of burned acreage as a condition for certification. Staff is currently comparing acreage registration records with certified tax credit application.

4. Authority regarding geographic area of eligibility for alternative methods to open field burning.

The Commission has authority to define geographically, the areas eligible for tax relief for field burning purposes. Historically, applications have only been received and certified from the Willamette Valley. It has been the Department's belief that eligibility was limited to the valley since the focus of the Legislature was on this area. The Attorney General, however, has advised that the statute does not specifically limit eligibility to the Valley.

It is the Department's view that eligibility should be extended beyond the valley. There are open burning air quality problems in Union and Jefferson counties where there is considerable grass seed farming. Union county has adopted an ordinance which requires burn fees and the registration of acreage to be burned. The tax credit program would be a potential incentive mechanism to reduce burning in these unregulated areas.

5. Facility cost evaluation by Department.

A final issue relates to the Commission's February 18 directive that the Department examine how a more complete documentation of costs can be provided.

Currently, the applicant is required to itemize all costs associated with the facility and submit an independent

certified public accountant (cpa) verification of these costs. In this review, the cpa does not verify any costs from total project costs that the applicant has assigned to the specific pollution control facility. This applies in cases where the pollution control facility is just one component of a larger project i.e. renovation of processing equipment which includes pollution control investment.

The Department believes it appropriate to expand the cpa role to include a review and verification of the allocation of facility costs for facilities with values that exceed $250,000. This can be accomplished two different ways:

1. Applicants for projects that exceed $250,000 would be required to have their independent cpa provide an analysis of the applicant's allocation methodology, including documentation of:

    a. all indirect costs associated with the facility or project which include the pollution control facility;

    b. all project costs assigned or prorated to the claimed pollution control facility.

2. Alternatively, the Department could itself contract with an independent cpa to review and document the cost allocations for facilities valued over $250,000 described in 1. a. & b..

It is the Department's view that the first option is the most appropriate and expedient way to provide improved documentation of costs. Written information would be added to the application which would explain the depth of cost review needed for facility costs over $250,000, which was the threshold suggested by the Commission. The Department sees no problem revising the cost documentation requirements under existing rules. OAR 340-16-030 (1) (c) state that...Certification of the actual cost of the claimed facility must be documented by a certified public accountant for facilities with a claimed facility cost over $20,000.

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MEMORANDUM

DATE: March 25, 1992

TO: Roberta Young, Coordinator
Intergovernmental Coordination Section
Department of Environmental Quality

Noam Stampfer, Manager
Finance Section
Department of Environmental Quality

FROM: Larry Knudsen
Assistant Attorney General
Natural Resources Section

SUBJECT: Tax Credit Rule Amendments
DOJ File No. 340-990-PO011-91

As requested, here are some additional thoughts on the tax credit issue.

It seems likely that the Commission will ask the 1993 Legislative Assembly to eliminate or at least substantially restrict eligibility for pollution control tax credits. If the latter, proposed restrictions might take the form of eliminating eligibility for alternatives to field burning and for facilities meeting the principal purpose test. Also, there might be a proposal to eliminate or reduce credits for facilities that in some way are tied to profitable pollution control enterprises. Of course, it is not at all clear how the legislature will react to these proposals.

Unless and until we have a "legislative solution," the Commission may want to "tighten up" the rules under the existing statutes. On one hand, it can be argued that this will be wasted effort if the tax credit program is repeal or substantially modified by the legislature. On the other hand, substantial general fund dollars may be lost in the interim, especially if there is a rush to file on existing or contemplated facilities in

anticipation of the legislative changes. If the Commission wants to consider rule revisions, it may want to consider the following:

1. Alternatives to field burning

Perhaps the most fertile ground (no pun intended) for amendments would be in the area of alternatives to field burning. At a minimum, the Commission might want to repeal OAR 340.16.025(2)(f) and adopt a new rule section that specifically address credits authorized under ORS 468.150. This section should set out those practices which are approved and state that such facilities are subject to other relevant provisions of ORS 468.155 to 468.190 and rules adopted thereunder.

In addition, the could Commission further restrict the eligibility of facilities under 468.150. This might be accomplished by adding an overlay of narrative requirements for existing approved alternatives or by removing some alternatives from the approved list. Obviously, the latter approach would be the easiest to administer.

2. Return on investment

The Commission has indicated a desire to do more with its authority to allocate costs to the facility under ORS 468.190 and the Department is pursuing this objective through its own administrative efforts. There are other approaches, however, that the Commission might want to consider, either to enhance analysis of the return on investment (ROI) factor or to allocate costs based upon "other relevant factors" as authorized by ORS 468.190(1)(e).

Traditional ROI

The standards provided in OAR 340-16-030 could be modified to decrease the amounts allocable to the facility. Similarly, the rule could be expanded to cast a broader net in terms of identifying and evaluating non-traditional income or cost savings associated with the facilities. To this end, an employee with expertise in valuations of this nature could be hired or an existing employee could be trained.

Other factors

Several commissioners have expressed a desire to allocate costs based upon the relationship between the facility and the business enterprise using the facility. As I have previously

noted, this may be difficult but not impossible. A court might well conclude, for example, that an other relevant factor includes that a facility represents the majority of capital investment for an extremely profitable enterprise. Similarly, whether an enterprise markets its goods or services based upon the qualities of its pollution control facilities might be found to be a relevant factor.

If we were to examine particular types of facilities, we could probably come up with standards for determining when the relationship constitutes an "other relevant factor." More difficult, but not impossible, would be establishing standards or a formula for reducing the allocable cost. Once again, it might be advantageous to seek the services of someone with expertise in making such valuations.

3. Recycling

The statutes can be construed in a manner that makes it relatively easy to establish eligibility for any recycling operation. Such an interpretation is not required, however. I understand that, as a matter of policy, the Department favors the more liberal interpretation; so I have not offered specific guidance on a more restrictive interpretation. If the Commission desires to change this policy, I can provide a number of options.

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POLLUTION CONTROL FACILITIES TAX CREDIT PROGRAM
A Historical Perspective
April 13, 1992

Historic Overview

The Oregon Pollution Control Tax Credit Program was established to help industry offset the cost of pollution control, and to create incentives to encourage better environmental practices in the state. The program has been in existence for over 24 years and its governing legislation has been amended many times during that period (see Table 1).

The initial legislation establishing DEQ's Pollution Control Tax Credit Program was approved in 1967 and limited eligibility to air and water related facilities. An industry could elect to apply the credit against property taxes over 20 years or against income taxes over a 10 year period. The credit could also be carried forward up to three years. In the following session, the Legislature provided for determination of the portion of a facility that was allocable to pollution control in ranges of 20% (percent). This concept was designed to limit the credit to only that portion of the facility considered to be utilized for pollution control.

Subsequent amendments in the 1970's and early 1980's added specific types of facilities as eligible for tax relief which included: mobile field incinerators; solid waste, hazardous waste and used oil facilities that recover useful products; hazardous waste treatment, reduction and elimination facilities; and noise control facilities. By the late 1970's the Legislature began taking steps to narrow the program. The property tax exemption was eliminated except for nonprofits and cooperatives. In 1983, the eligibility requirements were further restricted in that a facility had to be required by DEQ or EPA and be principally for pollution benefit, or else the facility must be constructed voluntarily for the sole purpose of pollution control. Provisions were added to require submittal of an application within two years of facility completion. The allocable range of 20 percent was revised to require certification in increments of one percent. Replacement pollution facilities were also determined as ineligible except under certain conditions where DEQ or EPA requirements apply, or when a facility is removed before the end of its useful life.

During the 1987 legislative session, the program was scheduled to sunset in 1990 and the amount of allowable credit reduced from 50% to 25% after June 1989. Tax relief was further restricted to exclude facilities that produce energy, or those facilities for the cleanup of hazardous waste spills. In 1989, the Legislature extended the sunset through 1995 and maintained the allowable credit at 50%. Asbestos abatement was determined not eligible for tax relief and energy recovery was reaffirmed as an ineligible facility.

Governor Roberts proposed a bill in the 1991 legislative session calling for a repeal of the tax credit program. However, the bill was not acted on.

Certification Provisions

To apply for a tax credit certificate, a taxpayer must submit an application within two years of the facility's completion. To be eligible the facility must prevent, control or reduce pollution from industrial wastewater, air pollution, or noise pollution; involve material recovery of solid waste, hazardous waste, or used oil; or involve the treatment, substantial reduction or elimination of hazardous waste. Secondly, a facility is eligible if: 1) it was constructed to comply with a requirement of the EPA/DEQ or Regional Air Authority; or, 2) it is a voluntary action with an exclusive function of pollution control.

The program provides an actual credit of 50% of the cost portion of a facility that is determined allocable to pollution control. For example, if a facility cost is $500,000 with 75% ($375,000) determined allocable to pollution control, the actual amount that could be applied against tax liability is 50% ($187,500) of the allocable cost. This amount is applied at 5% per year for ten years or over the life of the facility, whichever is the lessor. The credit may be carried forward for three years.

Eligible Facilities

Of total eligible facility costs, 45.3% has been claimed for air quality facilities, 31.2% for water quality facilities, 23.4% for solid waste facilities, and less than 1% for hazardous waste, noise and reclaimed plastics facilities (see Figure 1). The vast majority of applications are certified as meeting a principal purpose requirement. This means the facilities were constructed or installed because of an EPA/DEQ requirement, such as through an air emission or water discharge permit requirement.

Due to the "principal purpose" eligibility criteria, new pollution
control devices that are required of industry may be eligible for tax credit, which in effect, automatically expands the program as new environmental requirements are added by rule or statute. Recent inclusions are underground storage tank upgrades, Stage I and II vapor recovery devices, and machines to capture and recycle CFC's (Freon). Future EPA/DEQ requirements foreseen at this time that may involve eligible facilities include the dioxin control equipment for pulp mills, chemical mining control equipment, and requirements of the new Clean Air Act.

Program Costs To General Fund

As of September 13, 1991, the Environmental Quality Commission (EQC) has certified 2540 applications at a facility cost of $800,955,904. Of this, $384 million can potentially be directly applied against tax liability (see Table 2).

There have been dramatic swings in the level of program activity over its life. Figures 2 and 3 compare the average cost of facility applications with the number of certificates issued. There has been a significant drop in the average facility cost amounts, and dramatic increase in the number of submitted applications. The number of applications received in 1991 represents a four-fold increase over previous years (see Table 2).

Program Cost Projections

The projected cost of the program to the general fund is based on historic information and anticipated pollution control installation activity. The state of the economy, the types of EPA/DEQ requirements, and market factors all play into the level of industry participation in the program. In the near future, DEQ anticipates a continued increase in program activity due to new environmental requirements. Figure 4 shows future general fund impacts using the 1995 program sunset date.

Another factor to consider in determining future costs to the general fund, is the actual amount of credit that has been applied against taxes. Table 3 has been provided by the Department of Revenue which shows the number of certificates claimed yearly and the dollar amounts (returns are incomplete for 1990 and 1991).

Program Evaluations

In recent years, the Department has carried out various efforts for the purpose of improving and updating the pollution control tax credit program:

1. Significant revisions were made to the tax credit statutes in 1983. At the time the program was viewed as being instrumental in cleaning up the Willamette River and improving the ongoing efforts in working with industry. However, it was also believed that the program needed to be narrowed in scope and that administrative procedures needed to be improved. Senate Bill 112 contained the following provisions:

   - Revised 20% allocable ranges to percentages ranging from 1% to 100%.
   - Limited the property tax exemption to nonprofits and cooperatives.
   - Required application submittal within two years of facility completion.
   - Broadened eligibility of hazardous waste management facilities.

   Until 1983, the Department had administered the program through the statute provisions without the benefit of rules. In 1984, program rules were developed and adopted. The rules established an administrative procedure for tax credit certification and included provisions for the legislative revisions in SB 112.

2. In 1986, an advisory committee was established which consisted of representatives from the Departments of Revenue and Economic Development, AOI and industry. Although no formal recommendation came out of the committee, there were two areas of consensus:

   - Tax credits should be retained where DEQ standards are more stringent than other states, or where DEQ enforces more stringently than other states, i.e. BMPs for spill control, LUST, noise control and curbside recycling.

   - Tax credits should be retained for new programs and for monitoring and prevention, i.e. groundwater monitoring, spill control, LUST, asbestos control.

Other issues discussed by the committee included:

   - Elimination of preliminary certification.

   - Placing monetary ceilings on credits certified.

   - Include programs that DEQ encourages but does not require, i.e. small businesses that recycle HW/SW, woodstove retrofit, and control of pollution beyond minimum requirements.

3. In 1987, Governor Goldschmidt asked the DEQ to examine the substitution of a low interest loan program for the existing program. Department staff, industry and financial experts looked at a low interest loan process, a property tax credit and the present income tax credit. The Department concluded that:

   - A low interest loan program was not the best alternative because the loan method would still come off the top of state revenues, and this option would necessitate a large administrative system to manage such a program.

   - The property tax method was viewed as attractive but would require extensive selling to local government. The cost impact of a property tax credit would be spread over a smaller tax base.

   - The present income tax method was viewed as the best alternative in that program costs are spread statewide to all Oregonians.

4. As a consequence of the above program evaluations, 1989 legislative revisions were approved, which included:

   - The elimination of preliminary certification.

- Asbestos abatement determined not eligible.
- Limited the cost certified to taxpayers' own cash investment.
- Extended 50% tax credit through December 31, 1995.
- Required facility to be in compliance before being certified.

Current Program Issues

Because of the complexity of the program, the Department continues to be confronted with issues that result in costly processing delays.

Broad Program Issues:

1. What are the real benefits of the pollution control tax credit program? Is it resulting in compliance efficiencies, or pollution control investment that would not otherwise be considered?

2. Should the state subsidize environmental compliance or should compliance be viewed as the cost of doing business?

3. Should the program be structured as a state incentive mechanism for purposes of economic development?

4. Increased regulation has resulted in types of pollution control requirements that do not relate well to the established program procedures, i.e. alternatives to open field burning, UST upgrade, CFC equipment.

5. Should the program be available to nonpoint source related facilities because there is increasing regulation in this area?

6. The program has long been viewed as an overly complex and burdensome, particularly for small businesses.

7. The existing program procedures place significant responsibilities on staff, but tax credit work has been assigned a low priority. Areas of noted deficiencies include:
   - Facility inspections.
   - Compliance with 120 day processing timeframe.
   - Adequate division review of application review reports.

8. Generally vague and inconsistent statute and rule provisions result in considerable staff time devoted to interpretive issues.

9. The number of applications have dramatically increased in recent years, and staff have not been able to devote additional time to the program (64 applications in 1989 versus 424 applications submitted in 1991).

10. It has become more difficult to define the eligibility criterion "requirement" as it relates to new environmental regulations. The restrictive nature of the "sole purpose" criterion is also frequently questioned.

Several of the above issues can only be resolved by the State Legislature while others are within the Department's purview. The following are issues that relate more specifically to an environmental media:

11. Alternatives to open field burning:

- The alternative methods definition is worded broadly and is difficult to apply to individual investments that are only one aspect of a farmer's approach to straw removal. This is particularly a problem in determining the return on investment for these facilities.

- The statutes and rules are silent on geographic eligibility of alternative methods. Although, the Willamette Valley was the area of consideration when the law was revised.

- Certification of alternative method facilities has not been linked with the registration of acreage.

- Equipment necessary for carrying out alternative methods involves general farm equipment that has many other uses than for grass seed removal.

12. Used Oil

- Statue and rule provisions appear inconsistent in terms of whether recycling is a requirement of used oil eligibility. Staff has interpreted it as such, but rules should be revised. The statutory eligibility provision for used oil is equally vague in intent.

13. Air Quality

- The existing program procedures appear excessive when applied to Stage I and II vapor recovery equipment and CFC removal/recycling equipment. These

facilities are low value facilities and the degree of review and evaluation is considerably less than that required for more complex facilities.

- A greater presence and oversight in the division is needed for field burning application processing and policy issues.

14. UST Upgrade

- The same issue exists as with the CFC and vapor recovery facilities in that a streamlined review, processing and approval would be beneficial.

15. Plastics Recycling

- The statute does not specify what constitutes reclaimed plastic. Staff has interpreted the definition to mean that reclaimed plastic is a product that is 100% plastic. This issue needs to be addressed in the rules.

- "Personal property" is identified as an eligible cost but is not defined in statute or rule.

- SB 66, from the 1991 legislative session, requires that the Department show preference for Oregon generated materials. This needs to be addressed in the rules, however, there are no program restrictions that relate to this directive.

16. Solid Waste/Hazardous Waste Recycling

- These facilities do not fit well under the principal and sole purpose criteria.

- The ROI methodology may not be suited to the recycling industry.

Other State Tax Incentive Programs

In the examination of pollution control tax incentive programs in other states, only three states appear to provide for an income tax credit. However, eleven states have an income tax deduction, and at least thirty-two states offer pollution control tax incentives in the form of income tax deductions, property tax exemptions or sales and use tax exemptions. Overall, forty-plus states provide some sort of tax incentive for investments in pollution equipment.

Aside from Oregon, the states of Connecticut and Oklahoma have income tax credit programs. The Connecticut credit is equal to 5% of annual expenditures for air and water pollution equipment. The state also exempts pollution control equipment from sales and use taxes and property taxes. The Oklahoma credit is provided up to 20% of the cost of new air and water pollution equipment for each taxable tax year following installation.

No studies have been found which address the effectiveness of income tax credits for encouraging installation of pollution control equipment. However, two recent studies have been completed which examined tax incentives for recycling and minimization of hazardous waste. The state of Illinois conducted a feasibility study of tax credits for the purchase of recycling equipment or recycled products. This study concluded that tax credits are not cost effective or the most efficient way of promoting recycling and utilization of material from the waste stream. Although tax credits are not determined to be the way to go, it was felt that some sort of financial incentive would be appropriate for future investigation into market development. This study recognized some positive benefits of providing tax credits, but questioned whether the cost-to-benefit ratio was sufficiently low. The conclusions, which again relate to recycling, are summarized as follows:

- Financial subsidies may increase desired activity.
- Potential creditees are generally in favor of tax credits, but data cited show that often doesn't increase production or jobs.
- Tax credits may be politically workable because they are not direct expenditures.
- Tax credits may help the business climate and be a signal of state cooperativeness with business ventures.
- The cost-to-benefit ratio has not been documented.
- Tax credits may be an inefficient mechanism for reaching desired goals. Tax credits may be controversial in that new businesses may be viewed as gaining advantages not available to existing businesses.
- Tax credits do not help companies with weak profits and poor cash flow.

The University of Oklahoma conducted a study on state programs and policy options to promote minimization of hazardous waste. A survey of large generators found that only 19% felt tax credits would make a difference in their assessment of waste minimization options. It was concluded that tax concessions play a minor role in business investment decisions.

In researching other state tax incentive programs and studies there is no evidence of state efforts to examine the costs-to-benefit ratio of investment.

Attachments

Table 1

POLLUTION CONTROL TAX CREDIT PROGRAM LEGISLATIVE HISTORY

Initial Legislation - 1967

- Eligibility limited to air and water pollution control facilities
- Election for property tax exemption or income tax credit
  - 20 year property tax exemption
  - credit for 5% of cost for 10 year with 3 year carry forward
  - Set 1978 sunset date

Amendments - 1969

- Established 20% ranges allocable to pollution control
- Set an annual two year reduction in 20 year property tax allowance; program to phase out by 1979

Amendments - 1971

- Added mobile field incinerators if purchased by 1976
- Reset starting year to 1971 for property tax 20 minus two year phase out

Amendments - 1973

- Added requirement for preliminary certification
- Extended eligibility to facilities for solid waste utilization that produced energy or viable end product
- Again extended the property tax reduction to begin 1973

Amendments - 1975

- Extended eligibility to facilities that recover useful products from solid waste
- Allowed federal depreciation and amortization deductions for certifies facilities

Amendments -1977

- Extended eligibility to noise control facilities
- Limited property tax exemption to nonprofits and cooperatives
- Allowed credit taken over life of facility when less than 10 years
- Deleted reductions in depreciation and capital gains for tax credits taken
- Allowed credit for individual shareholders of small business corporations
- Extended sunset to 1988

Amendments - 1979

- Extended eligibility to facilities recovering products from hazardous waste and used oil

Amendments - 1981

- Allowed transfer of tax credits and provided for partnership credits

Amendments - 1983

- Narrowed the substantial purpose criterion to apply as sole purpose and principal purpose
- Revised eligibility of hazardous waste facilities to include waste reduction, neutralization, recycling or appropriate disposal of used oil
- Required application for tax credit be submitted within two years of facility completion
- Limited property tax relief to cooperatives and nonprofit corporations
- Allowed partnerships to apply credit to each partner's personal income tax
- Replaced the twenty percent range allocable to pollution control with percentages in single increments from 0 - 100
- Stipulated that maximum annual credit allowed be lesser of the holder's liability or that credit be spread over the life of the equipment or ten years, whichever the lesser

New Legislation - 1985

- established recycled plastics tax credit program

Amendments - 1987

- Established sunset of program in 1990
- Reduced tax credit by 50% for facilities constructed after 6/30/89
- Determined facilities that produced energy product and clean up of hazardous waste spills ineligible

Amendments - 1989

- Extended sunset of program to 12/31/95
- Removed requirement for preliminary certification
- Maintained 50% tax credit
- Allowed tax credit on investor's cash investment for federal cost share facilities
- Determined asbestos abatement ineligible
- Reaffirms energy recovery facilities as ineligible
- Stipulates that facilities must be in compliance before being certified
- re-established plastics program, expanded eligibility

Tax Credit Program Totals

Approved Tax Credit Applications

Table 2

Year	Total Applications Approved	Total Cost Certified	Total Cost Eligible	Average Eligible Cost
1968	40	$ 5,904,216	$ 2,952,108	$ 73,803
1969	37	5,212,055	2,606,028	70,433
1970	50	7,602,709	3,553,209	71,064
1971	65	17,213,754	8,566,588	131,794
1972	124	16,954,813	7,663,056	61,799
1973	142	25,858,037	12,720,643	89,582
1974	80	23,551,735	11,744,998	146,812
1975	94	34,685,070	17,339,494	184,463
1976	112	36,512,152	18,026,115	160,947
1977	96	20,257,581	10,104,534	105,256
1978	81	60,925,439	30,431,490	375,697
1979	85	35,899,699	17,714,066	208,401
1980	161	71,454,137	34,440,257	213,915
1981	142	96,466,937	47,810,981	336,697
1982	99	82,118,963	40,682,873	410,938
1983	79	68,966,510	33,871,933	428,759
1984	60	34,143,243	15,553,898	259,232
1985	48	6,948,762	3,420,580	71,262
1986	77	61,426,221	23,718,062	308,027
1987	70	3,939,778	1,839,775	26,283
1988	46	15,746,371	7,852,420	170,705
1989	64	14,246,913	5,000,586	78,134
1990	264	10,680,076	4,495,681	17,029
1991	424	45,240,733	21,586,001	50,910
Totals	2,540	800,955,904	383,695,373	

Corporate Excise Tax Claims

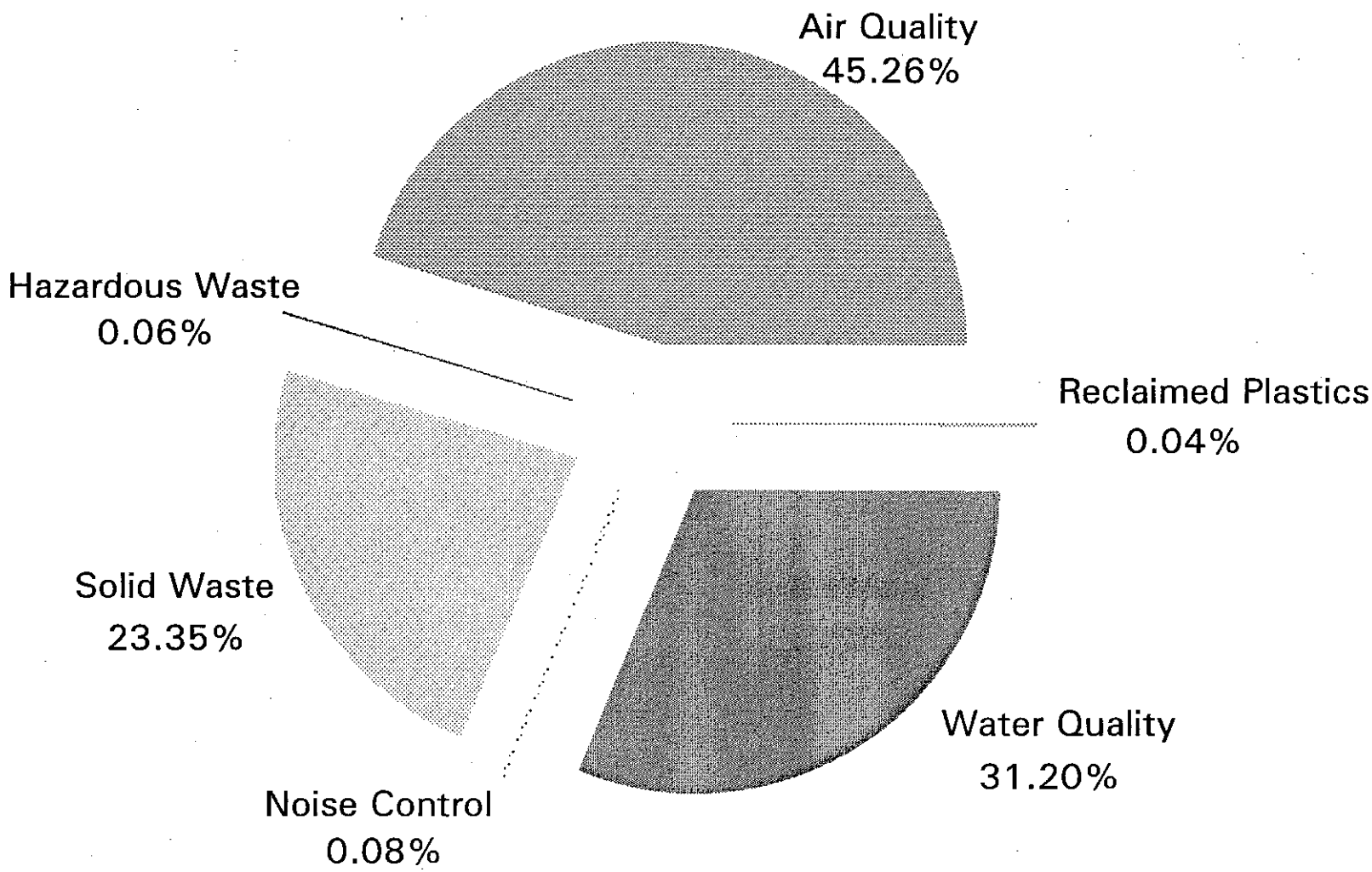
Through December 31, 1991

Table 3

Tax Year	Number of Taxpayers	No. Credits Claimed
1977	91	$ 6,336,109
1978	84	7,725,869
1979	84	9,256,119
1980	95	9,881,025
1981	88	7,612,911
1982	82	5,973,576
1983	78	8,748,539
1984	83	25,225,486
1985	92	17,182,030
1986	93	20,410,312
1987	80	19,211,197
1988	82	16,809,917
1989	87	14,566,016
1990	64	6,934,160

The filing and processing of 1990 returns is not complete as of 12/31/91

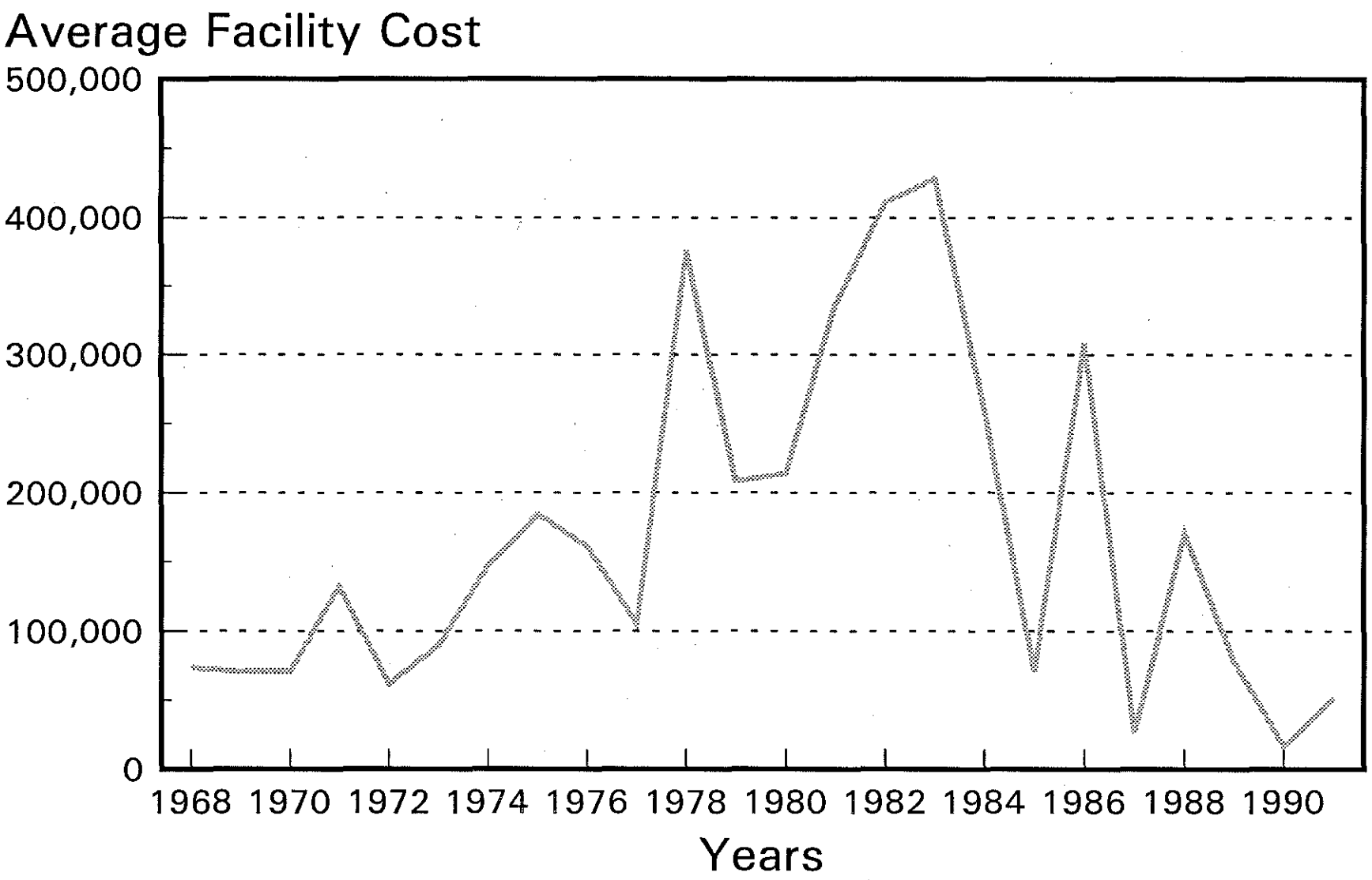
Figure 1
Tax Credit Certification Totals
Eligible Costs by Program 1968 - 1991



Tax Credit Program Applications

Average Cost of Approved Facilities

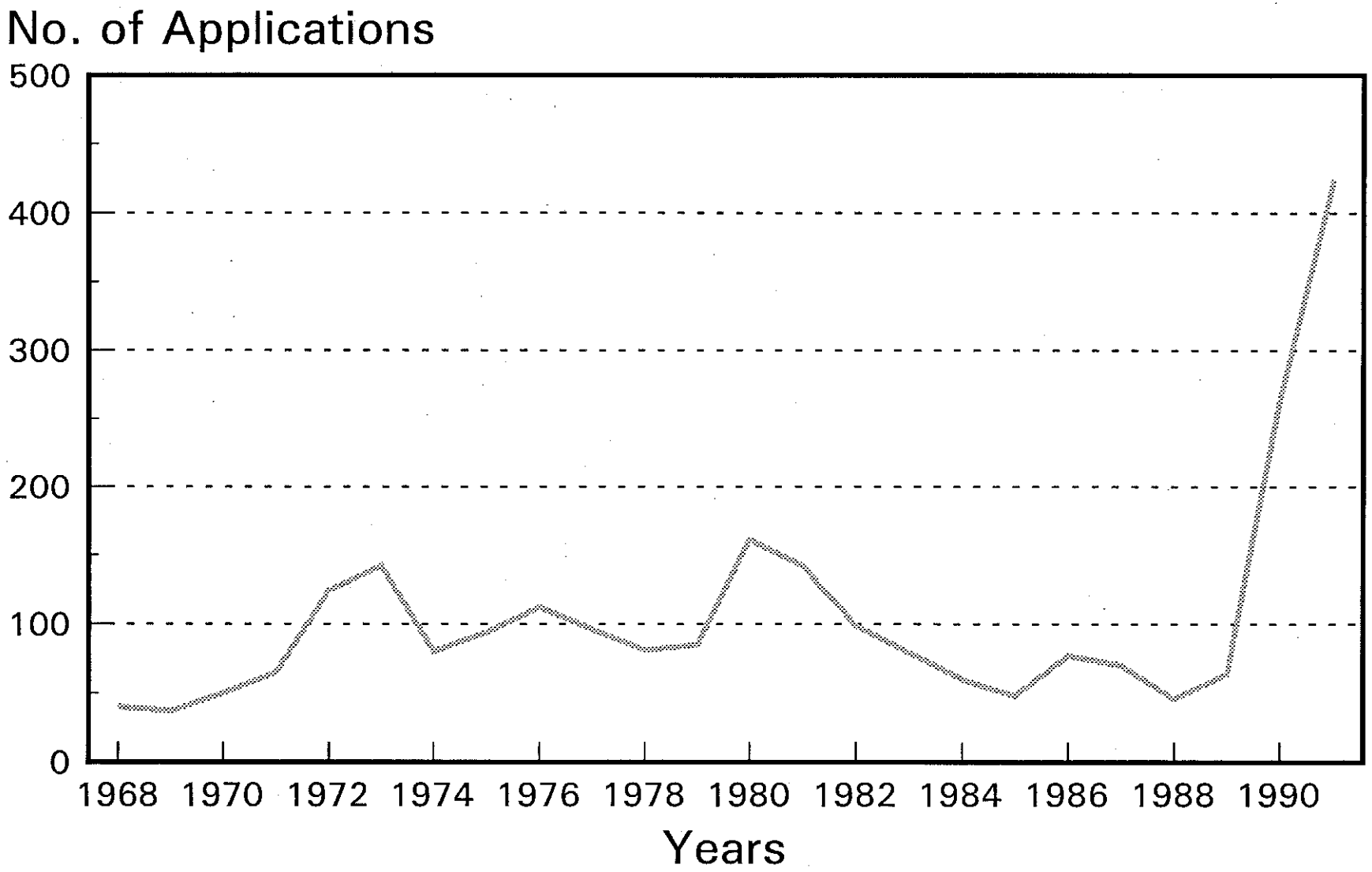
Figure 2



Tax Credit Program Applications

Number of Approved Facilities

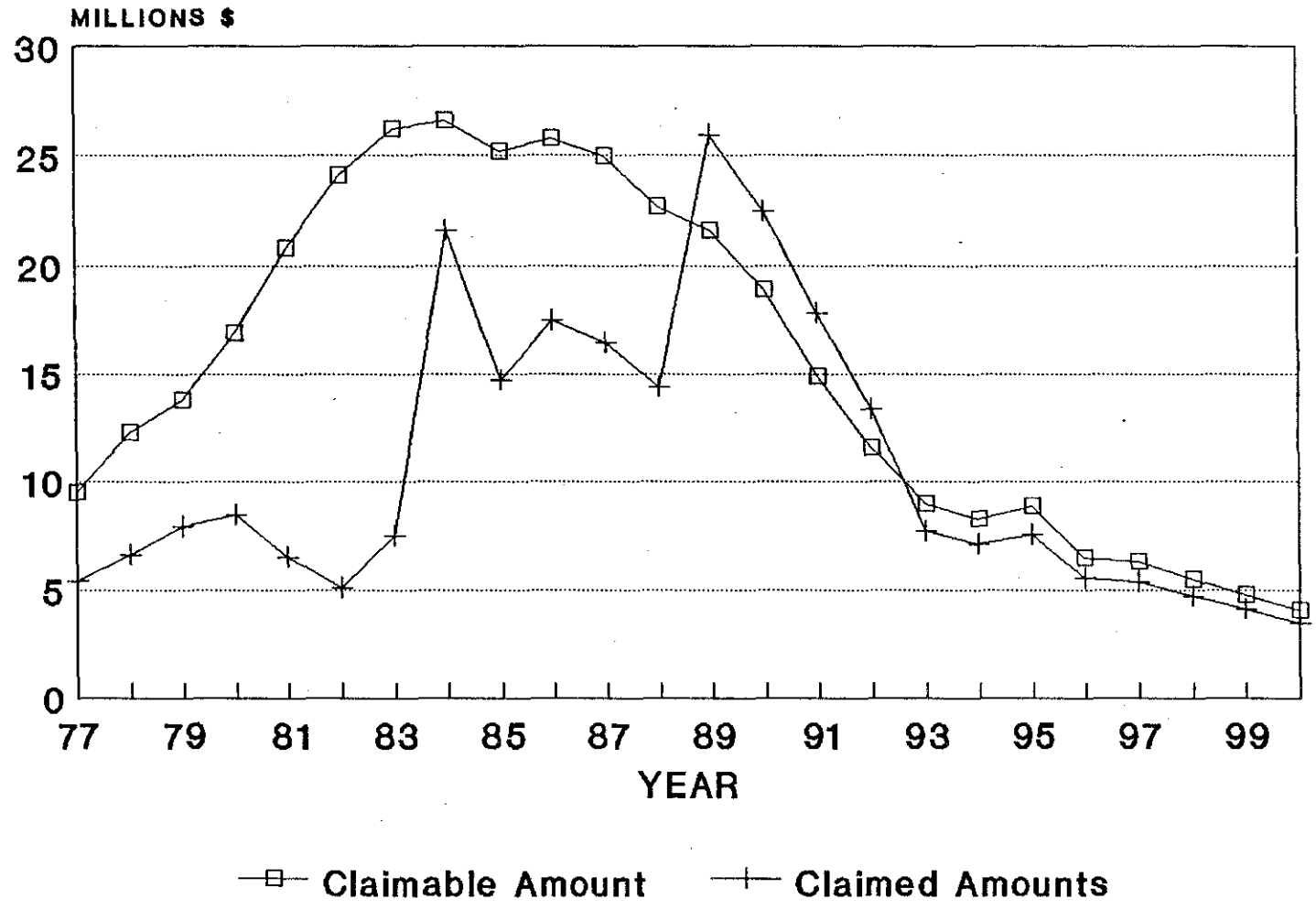
Figure 3



ANALYSIS OF FUTURE GENERAL FUND IMPACTS

1995 Sunset Date

Figure 4



STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY **INTEROFFICE MEMORANDUM**

DATE: April 15, 1992

TO: Environmental Quality Commission

FROM: Fred Hansen

SUBJECT: Agenda Item E: Solid Waste Permit Fees. Additional Comments and Recommendations From Solid Waste Permit Fee Work Group, and Department's Response

As a result of public comment on the draft Solid Waste Permit Fee rule changes, the Department of Environmental Quality (DEQ, Department) proposed a number of changes in its final rule (see staff report, Agenda Item E). Because the Department had worked closely with a Solid Waste Permit Fee Work Group in developing the draft rule, we reconvened the Work Group to receive their comments on the Department's proposed changes.

The Solid Waste Permit Fee Work Group met on April 7. They considered the five areas of change identified in the attached March 31, 1992 memo from the Department, in addition to other issues raised in public comments.

I. Work Group's Reactions to Department's Changes.

The Work Group had the following reactions to the Department's proposed rule changes as discussed in the Department's March 31 memo:

1. Reduce per-ton rate for energy recovery facilities to $.13/ton. The Group's consensus was to support the staff recommendation to reduce the proposed $.15/ton rate to $.13/ton.

2. Reduce "minimum" annual permit fee from $300 to $200. The Group disagreed with this change, and supported keeping the $300 minimum annual permit fee for the smallest disposal sites as proposed in the draft rule.

Group members pointed out that the $300 minimum fee does not cover the Department's costs of administering these small sites. Even with a minimum $300 annual permit fee, revenue from larger sites subsidizes the Department's oversight of small sites. It was pointed out that the Group's small county representative (although unable to attend the April 7 meeting) had not considered $300 to be unreasonable during the Group's development of the proposal. There was widespread feeling that even small sites should be able to pay the $300 minimum permit fee. The Group's view was the SB 66 Annual Fee (based on $.09

per ton) and the $.85 per ton solid waste disposal fee that all sites also have to pay are for different purposes, and are not a justification for reducing the $300 minimum permit fee, even though the total cost per ton for solid waste disposal would be as much as $2.44 for many small sites while only $1.15 per ton for large sites. The Group stated their belief that lowering the permit fee would signal that the Department was not going to require smaller sites to come into compliance with landfill operating criteria.

The Group's consensus was that the $300 minimum permit fee should be retained.

> Department's Response: Retain the $200 for reasons stated in the Staff Report, Agenda Item E, 4/23/92 EQC meeting. While the $300 considered in isolation is not onerous, combined with an additional $.94 per ton for solid waste disposal fees ($.85 per-ton fee and $.09 for the SB 66 annual fee), it results in small sites like Jordan Valley paying a total of $2.44 per ton, while larger landfills pay $1.15 per ton. This is unfair and serves no visible purpose. Small, remote sites will close as the economies of increased regulation make them too expensive to operate. The Department will have to work with rural counties to develop reasonable alternatives. The additional push of paying twice the per-ton rate of Western Oregon metropolitan counties is not needed.

3. Exempt "On-site" (or Captive) Industrial Facilities from the $.09/ton SB 66 Annual Fee. The Group's consensus was to approve the Department's recommendation, as the draft proposal was incorrect in the first place.

4. Establish additional solid waste conversion factors for industrial wastes. The Group's consensus was to add the three conversion factors, and also raise the factor for "construction, demolition and landclearing wastes" to 1,100 pounds per cubic yard (rather than 1,000 as proposed by the Department).

The Group felt that the Department's proposal was too light, noting that demolition wastes may range from 800 to 1,200 pounds per cubic yard. The Group felt that 1,100 pounds was a reasonable factor.

> Department's Response: Accept the recommended change.

A representative of the pulp and paper industry was present at the April 7 meeting, and asked the Group to consider an additional concern related to industrial waste conversion factors. He noted that pulp and paper clarifier solids are composed of 50 percent water, and constitute a principal waste disposed of at pulp and paper industrial waste facilities. He said that his industry objected to paying a $.21 per ton fee based largely on water, and perceived this as a fairness issue. It is possible to further de-water the clarifier solids, but it requires use of energy and is an additional expense. The Group felt that the moisture content issue should be kept out of the rate basis. Operators of municipal landfills also experience heavier garbage in the winter because of the moisture content. The Group's consensus was that the annual permit fee should be based on the tonnage that goes across the scale, regardless of the water content.

This raised additional discussion on the wording of OAR 340-61-115(3)(b) specifying how annual tonnages are to be calculated for industrial facilities. To clarify the Department's intent for scales to be used in all cases where they are available, the Group supported a change in the second full sentence, to read as follows:

> If certified scales are not required, or AT THOSE SITES RECEIVING LESS THAN 50,000 TONS A YEAR IF SCALES ARE NOT AVAILABLE, industrial sites shall use the following conversion factors to determine tonnage of solid waste disposed of: [Addition in caps was proposed by the Work Group.]
>
> Department's Response: Accept the recommended change.

5. Other Changes/Clarifications. The Group had no objections to the clarifications listed in paragraph 5.

II. Additional Issues

The Work Group also considered other public comments that the Department did not recommend incorporating into the rule. The most significant of these was a proposal for a "sliding" per-ton rate. The following summarizes the Group's discussion of additional issues.

1. Use of "sliding" per-ton rate to determine annual permit fee. (See discussion in the Staff Report.) This concept would use a decreasing per-ton rate based on "tier"

blocks of tonnage received by solid waste disposal sites. The first several thousand tons of waste received would be assessed at a higher per-ton rate than succeeding "tiers" of solid waste. The proponents of this concept stated that the Department is required by statute to base the permit fee on the anticipated cost of regulating the site. The "sliding" rate takes the Department's regulatory "economy of scale" into account, by recognizing that the Department's costs of regulating a site do not necessarily double as the amount of waste received doubles. It was recalled that the Work Group had agreed in the past that large sites would have to subsidize the regulation of small sites to some degree. The permit fee also incorporates the recycling implementation fee, which funds activities not benefitting from regulatory economies of scale. There was discussion that most categories of permittee likely believe the rate structure does not treat them fairly. However, the Department must use some rational basis for fee determination. Since it is impossible for the Department to charge a direct "fee for service," a tonnage-based fee is not an unreasonable basis on which to calculate permit fees. The Group felt there were advantages to the simplicity of a "flat" rate. There was no Group consensus that a "sliding" rate structure should be adopted.

2. Rate treatment of industrial sites. The representative of the pulp and paper industry suggested that it was unfair to have the rate for industrial sites depend on the amount of solid waste received at domestic sites (since the rate is determined by dividing the amount of permit fee revenue the Department is authorized to collect, by the total tonnage of solid waste received in the state). He argued that industrial waste sites require less regulation than municipal sites, and create a lesser degree of environmental concern. The permit fee structure for industrial sites should reflect this. Captive industrial sites should be divorced in the fee structure from municipal sites, at least by having their rate on a different line item. This would make it easier to consider rates for these industrial sites separately in the future. The Group chair pointed out that the Group had already considered the issue, and had felt that industrial facilities should be treated similarly to other solid waste disposal facilities.

A straw poll of the Group found that the Group would not object to having the per-ton rate for captive industrial sites listed on a separate line.

Department's Response: The Department does not object to a separate listing for the rate for

industrial facilities, and is incorporating this recommendation into its proposed rules.

3. Modification of submittal schedule for per-ton solid waste disposal fees. One member of the Group mentioned that it was difficult to submit quarterly reports by the 15th day of the month following the end of the calendar quarter. Two weeks' time is insufficient to calculate the amount of waste (both domestic and out-of-state) received at the site during the previous quarter, and submit payment to the Department for the per-ton solid waste disposal fee. Work Group consensus was to extend the submittal date to the 30th day of the month following the end of the calendar quarter.

Department's Response: This is a reasonable recommendation, and the Department is incorporating it into the proposed rule.

III. Summary of Department's Recommendations

Following is a summary of the Department's proposed additional changes to the rule for Solid Waste Permit Fees (OAR 340-61) which the Commission has before it in Agenda Item E, pursuant to the Solid Waste Permit Fee Work Group's recommendations.

1. Change the conversion factor for demolition waste from 1,000 to 1,100 pounds per cubic yard. (OAR 340-61-115 (3)(b)(C))

2. Change the wording in OAR 340-61-115(3)(b) to specify when certified scales are to be used for industrial facilities.

3. List on a separate line the $.21 per-ton rate used to calculate the permit fee for captive industrial facilities. (OAR 340-61-120(3)(a)(B)(ii))

4. Extend the submittal date for the per-ton solid waste disposal fees to the 30th day of the month following the end of the calendar quarter. (OAR 340-61-115(6)(c), 340-61-120(6)(c) and 340-61-120(7)(c))

A revised copy of the proposed rule is attached, incorporating the above changes.

Attachments: March 31, 1992 memo from Deanna Mueller-Crispin to the Solid Waste Permit Fee Work Group
Proposed Rules

Oregon

DEPARTMENT OF ENVIRONMENTAL QUALITY

March 31, 1992

TO: Solid Waste Permit Fee Work Group

FROM: Deanna Mueller-Crispin

SUBJECT: Permit Fee Rules: Changes Recommended From Draft Rule

As a result of public comment received on the draft Solid Waste Permit Fee Rule revisions, the Department is recommending the following changes to go forward to the Environmental Quality Commission at their April 23 meeting. A copy of the revised rule is attached for your reference. (Note: other changes may be made before a "final" rule is sent to the Environmental Quality Commission for adoption, as DEQ in-house review has not yet been completed.) Major changes include:

1. Change in per-ton rate for energy recovery: $.13/ton.
   The draft rule proposed $.15/ton as the rate to determine the annual solid waste permit fee ("permit fee") for energy recovery facilities. Ash from such facilities would also pay the proposed $.21/ton rate. Both types of waste would be subject to the new $.09/ton "tonnage-based permit fee" (from SB 66). Marion County pointed out that this results in "double charging" of solid waste received at its energy recovery facility, and a higher overall charge for such waste than if it were simply landfilled. Marion County proposed that their burner's ash be exempt from the $.21/ton fee; or that a lower rate be established for waste going to the energy recovery facility.

   The Department did not intend for energy recovery facilities to pay an overall higher rate than landfills, and proposes to change the recommended rate for waste received by energy recovery facilities to $.13/ton. This gives a slight advantage ($290) to energy recovery over landfilling. Calculations for the Brooks energy recovery facility are as follows:

   Annual solid waste accepted: 178,000 tons
   Ash generated (landfilled): 46,500 tons

   If all the waste were landfilled, the fee would be as follows:

178,000 tons	x $.21/ton (landfill rate)	=	$37,380
"	x .09 (SB 66 fee)	=	16,020
	Total annual fee		$53,400

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696
TDD (503) 229-6993
DEQ-1

Original proposal ($.15/ton):			Revised proposal ($.13/ton):		
178,000	x $.15 =	$26,700	178,000	x $.13 =	$23,140
"	x .09 =	16,020	"	x .09 =	16,020
46,500	x .21 =	9,765	46,500	x .21 =	9,765
"	x .09 =	4,185	"	x .09 =	4,185
Total fee		$56,670	Total fee		$53,110

2. Change in "Minimum" Annual Permit Fee: $200.

The draft rule bases the permit fee on $.21/ton for solid waste collected in the previous calendar year, with a proposed minimum annual permit fee of $300. Small communities commented that this was unfair to small localities. With a $300 minimum fee, small municipal sites would pay a higher per-ton fee than larger sites. For the smallest sites, the per-ton difference is significant (see Addendum A). Small municipal sites serve small communities which are hard-pressed to pay this fee as well as the other fee increases they are subject to, including the new tonnage-based annual fee of $.09/ton and the $.85/ton solid waste disposal fee. They also commented that for the smallest sites the annual total of these three fee categories, based only on the per-ton rates, would amount to less than $300. (This would be true for any landfill receiving less than 300 tons of solid waste a year; there are approximately 28 such landfills in the State.)

Upon further review of the per-ton fiscal impact of the $300 minimum fee, the Department believes it would be overly burdensome on small sites, and proposes to lower it to $200. This would cover an annual site visit to some sites, although not the most remote ones. The very smallest sites would still pay a higher per-ton rate, but the difference is reduced.

3. "On-site" Industrial Facilities Exempt from $.09/ton Fee.

Comment was received that the $.09 per-ton tonnage-based annual fee (created by SB 66) should apply only to domestic waste. The statute (ORS 459.235(3)) specifies that the Commission "shall establish a schedule of annual permit fees...The fees shall be assessed annually and shall be based on the amount of solid waste received at the disposal site in the previous calendar year." The Department believes that legislative intent was that "on-site" (or "captive") industrial facilities were not to be subject to this permit fee. (An "on-site" industrial facility is one where the permittee is the generator of all solid waste received at the site.) However, "off-site" industrial facilities (all industrial facilities other than "on-site") should be subject to this fee, as the waste received could alternatively go to a municipal site. It is equitable that "off-site" industrial facilities be subject to this fee.

The Department is proposing to exempt on-site, but not off-site, industrial facilities from the new SB 66 tonnage-based annual fee of $.09.

4. Establish additional solid waste conversion factors to be used at industrial facilities and at those municipal facilities without certified scales.

The draft rule proposed factors to convert several types of industrial solid waste from cubic yards to tons. A proposal was received to establish three additional conversion factors, as follows:

Contaminated soils:	2,400 lbs per cubic yard
Construction, demolition and landclearing wastes:	1,000 lbs per cubic yard
Asbestos:	500 lbs per cubic yard

The proposal also recommended that municipal facilities use these factors (instead of the existing standards for "compacted" and "uncompacted" wastes) when they receive those types of waste. The Department agrees that this would improve the accuracy of reporting tonnages, and is incorporating the above changes into the proposed final rule.

5. Other Changes/Clarifications.

A number of clarifications to the draft rule language were made, including the following:

a. Clarification of the calculation for annual permit fees for sites either beginning or ending operations.

b. The requirement for use of certified scales was clearly stated to include off-site industrial facilities receiving over 50,000 tons of solid waste a year.

c. The annual permit fee ($.10/ton) for composting facilities was clearly stated to apply to mixed solid waste. (Concern was expressed that yard debris composting sites would be subject to this fee.)

Attachments

ADDENDUM A

SMALL LANDFILLS:
EFFECT OF PROPOSED SOLID WASTE PERMIT FEE
3/24/92

This paper analyzes how the solid waste permit fee (in the DEQ draft rule put out for public comment) might affect small landfills.

I. Fee Schedule in Draft Rule

A. Small landfills pay:

- Annual Solid Waste Permit Fee:	$.21/ton OR $300 min.
- Tonnage-based Permit Fee:	$.09/ton
- Per-ton solid waste disposal fee:	$.85/ton

(Eventually: Orphan site fee)

B. Examples:

1. Landfill accepting 200 tons (~28, e.g. Jordan Valley)

- Annual Solid Waste Permit Fee (200 x $.21 = $42)	$300
- Tonnage-based Permit Fee (200 x $.09)	18
- Per-ton solid waste disposal fee (200 x $.85)	170
Total:	$488

Per-ton cost: $2.44

2. Landfill accepting 500 tons (~14, e.g. Christmas Valley)

- Annual Solid Waste Permit Fee (500 x $.21 = $105)	$300
- Tonnage-based Permit Fee (500 x $.09)	45
- Per-ton solid waste disposal fee (500 x $.85)	425
Total:	$770

Per-ton cost: $1.54

3. Landfill accepting 1000 tons (~5, e.g. Bly)

- Annual Solid Waste Permit Fee (1000 x $.21 = $210)	$300
- Tonnage-based Permit Fee (1000 x $.09)	90
- Per-ton solid waste disposal fee (1000 x $.85)	850
Total:	$1,240

Per-ton cost: $1.24

4. Landfill accepting 1400 tons (~3, e.g. Pilot Rock)

- Annual Solid Waste Permit Fee (1400 x $.21 = $294)	$300
- Tonnage-based Permit Fee (1400 x $.09)	126
- Per-ton solid waste disposal fee (1400 x $.85	1,190
Total:	$1,616

Per-ton cost: $1.15

5. All landfills accepting >1,450 tons (~40)

- Annual fees: tonnage in prev. cal yr. x $.30
- Quarterly fee: gate tonnage x $.85

Per-ton cost: $1.15

II. Proposed Alternative (in Final Rule)

1. Reduce the $300 minimum annual solid waste permit fee to $200.

Under this alternative, the per-ton discrepancy between small sites and large sites would be reduced.

Examples:	Total Fees	Per-ton Costs
- Jordan Valley (200 tons):	$388	$1.94
- Christmas Valley (500 tons):	$670	1.34
- Bly (1000 tons):	$1,150	1.15
- Pilot Rock (1400 tons):	$1,610	1.15

smallsit

Attachment A - Revised

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY
ADMINISTRATIVE RULES
SOLID WASTE MANAGEMENT
DIVISION 61
Proposed Revisions
4/10/92

Proposed deletions are in brackets [ ].
Proposed additions are underlined.

PERMIT FEES

340-61-115

(1) Each person required to have a Solid Waste Disposal Permit shall be subject to a three-part fee consisting of [a filing fee,] an application processing fee, [and] an annual [compliance determination] solid waste permit fee as listed in OAR 340-61-120[.] and the SB 66 annual fee as listed in OAR 340-61-120(4). In addition, each disposal site receiving domestic solid waste shall be subject to [an annual recycling program implementation fee as listed in OAR 340-61-120, and] a per-ton solid waste disposal fee on domestic solid waste as specified in Section 5 of OAR 340-61-120. In addition, each disposal site or regional disposal site receiving solid waste generated out-of-state shall pay a per-ton solid waste disposal fee as specified in Section 6 of OAR 340-61-120 or a surcharge as specified in Section 7 [6] of OAR 340-61-120. The amount equal to the [filing fee,] application processing fee[, the first year's annual compliance determination fee and, if applicable, the first year's recycling program implementation fee] shall be submitted as a required part of any application for a new permit. [The amount equal to the filing fee and application processing fee shall be submitted as a required part of any application for renewal or modification of an existing permit.]

[(2) As used in this rule unless otherwise specified, the term "domestic solid waste" includes, but is not limited to, residential, commercial and institutional wastes; but the term does not include:]

[(a) Sewage sludge or septic tank and cesspool pumpings;]

[(b) Building demolition or construction wastes and land clearing debris, if delivered to disposal sites that are not open to the general public;]

[(c) Yard debris, if delivered to disposal sites that receive no other residential wastes.]

(2) [(3)] The annual [compliance determination] solid waste permit fee and, if applicable, the SB 66 annual fee [fee and, if applicable, the annual recycling program implementation fee] must be paid for each year a disposal site is in operation or under permit. The fee period shall be the state's fiscal year (July 1 through June 30) and shall be paid annually by July 1. [Any annual compliance determination fee and, if applicable, any recycling program implementation fee submitted as part of an application for a new permit shall apply to the fiscal year the permitted disposal site is put into operation. For the first year's operation, the full fee(s) shall apply if the disposal site is placed into operation on or before April 1.] Any new disposal site placed into operation after January 1 [April 1] shall not owe [a compliance determination fee and, if applicable, a recycling program implementation fee] an annual solid waste permit fee or a SB 66 annual fee until July 1 of the following year. Any existing disposal site that receives solid waste in a calendar year must pay the annual solid waste permit fee and SB 66 annual fee, if applicable, as specified in OAR 340-61-120(3)(a) and 340-61-120(4) for the fiscal year which begins on July 1 of the following calendar year. If no solid waste was received in the previous calendar year and the site is closed, a solid waste permittee shall pay the annual solid waste permit fee for closed sites as specified in OAR 340-61-120(3)(c). The Director may alter the due date for the annual [compliance determination fee and, if applicable, the recycling program implementation] solid waste permit fee and, if applicable, the SB 66 annual fee upon receipt of a justifiable request from a permittee.

(3) [(4) For the purpose of determining appropriate fees, each disposal site shall be assigned to a category in OAR 340-61-120 based upon the amount of solid waste received and upon the complexity of each disposal site. Each disposal site which falls into more than one category shall pay whichever fee is higher. The Department shall assign a site to a category on the basis of estimated annual tonnage or gallonage of solid waste received unless the actual amount received is known.] Permittees are responsible for accurate calculation of solid waste tonnages. For purposes of determining appropriate fees under OAR 340-61-120(3) through (7), annual tonnage of solid waste received shall be calculated as follows:

(a) Municipal solid waste facilities. Annual tonnage of solid waste received at municipal solid waste facilities, including demolition sites, receiving 50,000 or more tons annually shall be based on weight from certified scales after January 1, 1994. If certified scales are not required or not available, [E]estimated annual tonnage for [domestic waste disposal sites] municipal solid waste will be based upon 300 pounds per cubic yard of uncompacted waste received, 700 pounds per cubic yard of compacted waste

received, or, if yardage is not known, one ton per resident in the service area of the disposal site, unless the permittee demonstrates a more accurate estimate. For other types of wastes received at municipal solid waste sites and where certified scales are not required or not available, the conversions and provisions in subsection (b) of this Section shall be used. [Loads of solid waste consisting exclusively of soil, rock, concrete, rubble or asphalt shall not be included when calculating the annual amount of solid waste received.]

(b) Industrial facilities. Annual tonnage of solid waste received at off-site industrial facilities receiving 50,000 or more tons annually shall be based on weight from certified scales after January 1, 1994. If certified scales are not required, or at those sites receiving less than 50,000 tons a year if scales are not available, industrial sites shall use the following conversion factors to determine tonnage of solid waste disposed of:

(A) Asbestos: 500 pounds per cubic yard.

(B) Pulp and paper waste other than sludge: 1,000 pounds per cubic yard.

(C) Construction, demolition and landclearing wastes: 1,100 pounds per cubic yard.

(D) Wood waste: 1,200 pounds per cubic yard.

(E) Food waste, manure, sludge, septage, grits, screenings and other wet wastes: 1,600 pounds per cubic yard.

(F) Ash and slag: 2,000 pounds per cubic yard.

(G) Contaminated soils: 2,400 pounds per cubic yard.

(H) Asphalt, mining and milling wastes, foundry sand, silica: 2,500 pounds per cubic yard.

(I) For wastes other than the above, the permittee shall determine the density of the wastes subject to approval by the Department.

(J) As an alternative to the above conversion factors, the permittee may determine the density of their own waste, subject to approval by the Department.

[(5) Modifications of existing, unexpired permits which are instituted by the Department due to changing conditions or standards, receipt of additional information or any other reason pursuant to applicable statutes and do not require refiling or review of an application or plans and specifications shall not require submission of the filing fee or the application processing fee.]

[(6) Upon the Department accepting an application for filing, the filing fee shall be non-refundable.]

(4) [(7)] The application processing fee may be refunded in whole or in part, after taking into consideration any costs the Department may have incurred in processing the application, when submitted with an application if either of the following conditions exist:

(a) The Department determines that no permit will be required;

(b) The applicant withdraws the application before the Department has granted or denied preliminary approval or, if no preliminary approval has been granted or denied, the Department has approved or denied the application.

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

(6) Submittal schedule.

(a) The annual solid waste permit fee shall be billed to the permittee by the Department, and is due by July 1 of each year.

(b) The SB 66 annual fee shall be billed to the permittee by the Department, and is due by July 1 of each year.

(c) The per-ton solid waste disposal fees on domestic and out-of-state solid waste are not billed by the Department. They are due on the following schedule:

(A) Quarterly, on the 30th day of the month following the end of the calendar quarter; or

(B) On the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent.

(d) The surcharge on disposal of solid waste generated out-of-state is not billed by the Department. It is due on the same schedule as the per-ton solid waste disposal fees above.

PERMIT FEE SCHEDULE

340-61-120

[(1) Filing Fee. A filing fee of $50 shall accompany each application for issuance, renewal, modification, or transfer of a Solid Waste Disposal Permit. This fee is non-refundable and is in addition to any application processing fee or annual compliance determination fee which might be imposed.]

(1) For purposes of this rule:

(a) A "new facility" means a facility at a location not previously used or permitted, and does not include an expansion to an existing permitted site.

(b) An "off-site industrial facility" means all industrial solid waste disposal sites other than a "captive industrial disposal site."

(c) A "captive industrial facility" means an industrial solid waste disposal site where the permittee is the owner and operator of the site and is the generator of all the solid waste received at the site.

(2) Application Processing Fee. An application processing fee [varying between $50 and $2,000] shall be submitted with each application for a new facility. The amount of the fee shall depend on the type of facility and the required action as follows:

(a) A new municipal solid waste landfill facility, incinerator, energy recovery facility, composting facility for mixed solid waste, off-site industrial facility or sludge disposal facility: [(including substantial expansion of an existing facility:)]

(A) Designed to receive over 7,500 tons of solid waste per year:	$10,000
(B) Designed to receive less than 7,500 tons of solid waste per year:	$5,000
[(A) Major facility[1]	$ 2,000]
[(B) Intermediate facility[2]	$ 1,000]
[(C) Minor facility[3]	$ 300]

[[1]**Major Facility Qualifying Factors:**]

[-a- Received more than 25,000 tons of solid waste per year; or]

[-b- Has a collection/treatment system which, if not properly constructed, operated and maintained, could have a significant adverse impact on the environment as determined by the Department.]

[[2]**Intermediate Facility Qualifying Factors:**]

[-a- Received at least 5,000 but not more than 25,000 tons of solid waste per year; or]

[-b- Received less than 5,000 tons of solid waste and more than 25,000 gallons of sludge per month.]

[[3]**Minor Facility Qualifying Factors:**]

[-a- Received less than 5,000 tons of solid waste per year; and]

[-b- Received less than 25,000 gallons of sludge per month.]

[All tonnages based on amount received in the immediately preceding fiscal year, or in a new facility the amount to be received the first fiscal year of operation.]

[(b) Preliminary feasibility only (Note: the amount of this fee may be deducted from the complete application fee listed above):]

[(A)	Major facility	$ 1,200]
[(B)	Intermediate facility	$ 600]
[(C)	Minor facility	$ 200]

[(c) Permit renewal (including new operational plan, closure plan or improvements):]

[(A)	Major facility	$ 500]
[(B)	Intermediate facility	$ 250]
[(C)	Minor facility	$ 125]

[(d) Permit renewal (without significant change):]

[(A)	Major facility	$ 250]
[(B)	Intermediate facility	$ 150]
[(C)	Minor facility	$ 100]

[(e) Permit modification (including new operational plan, closure plan or improvements):]

[(A)	Major facility	$ 500]
[(B)	Intermediate facility	$ 250]
[(C)	Minor facility	$ 100]

[(f) Permit modification (without significant change in facility design or operation):]

[All categories $ 50]

[(g) Permit modification (Department initiated):]

[All categories No fee]

(b) A new captive industrial facility: $1,000

(c) A new transfer station or material recovery facility -

(A) Receiving over 50,000 tons of solid waste per year: $500

(B) Receiving between 10,000 and 50,000 tons of solid waste per year: $200

(C) Receiving less than 10,000 tons of solid waste per year: $100

(d) [(h)] Letter authorizations (pursuant to OAR 340-61-027) [, new or renewal: $ 100]: $500

(e)[(i)] Before June 30, 1994: Hazardous substance authorization (Any permit or plan review application which seeks new, renewed, or significant modification in authorization to landfill cleanup materials contaminated by hazardous substances):

(A) Authorization to receive 100,000 tons or more of designated cleanup waste per year $50,000

(B) Authorization to receive at least 50,000 but less than 100,000 tons of designated cleanup material per year $25,000

(C) Authorization to receive at least 25,000 but less than 50,000 tons of designated cleanup material per year $12,500

(D) Authorization to receive at least 10,000 but less than 25,000 tons of designated cleanup material per year $ 5,000

(E) Authorization to receive at least 5,000 but less than 10,000 tons of designated cleanup material per year $ 1,000

(F) Authorization to receive at least 1,000 but less than 5,000 tons of designated cleanup material per year $ 250

(3) Annual [Compliance Determination] Solid Waste Permit Fee. The Commission establishes the following fee schedule including base per-ton rates to be used to determine the annual solid waste permit fee beginning with fiscal year 1993. The per-ton rates are based on the estimated solid waste received at all permitted solid waste disposal sites and on the Department's Legislatively Approved Budget. The Department will review annually the amount of revenue generated by this fee schedule. To determine the annual solid waste permit fee, the Department may use the base per-ton rates, or any lower rates if the rates would generate more revenue than provided in the Department's Legislatively Approved Budget. Any increase in the base rates must be fixed by rule by the Commission. (In any case where a facility fits into more than one category, the permittee shall pay only the highest fee):

[(a) Domestic Waste Facility:]

[(A) A landfill which received 500,000 tons or more of solid waste per year: $60,000]

[(B) A landfill which received at least 400,000 but less than 500,000 tons of solid waste per year: $48,000]

[(C) A landfill which received at least 300,000 but less than 400,000 tons of solid waste per year: $36,000]

[(D) A landfill which received at least 200,000 but less than 300,000 tons of solid waste per year: $24,000]

[(E) A landfill which received at least 100,000 but less than 200,000 tons of solid waste per year: $12,000]

[(F) A landfill which received at least 50,000 but less than 100,000 tons of solid waste per year: $ 6,000]

[(G) A landfill which received at least 25,000 but less than 50,000 tons of solid waste per year: $ 3,000]

[(H) A landfill which received at least 10,000 but less than 25,000 tons of solid waste per year: $ 1,500]

[(I) A landfill which received at least 5,000 but not more than 10,000 tons of solid waste per year: $ 750]

[(J) A landfill which received at least 1,000 but not more than 5,000 tons of solid waste per year: $ 200]

[(K) A landfill which received less than 1,000 tons of solid waste per year: $ 100]

[(L) A transfer station which received more than 10,000 tons of solid waste per year: $ 500]

[(M) A transfer station which received less than 10,000 tons of solid waste per year: $ 50]

[(N) An incinerator, resource recovery facility, composting facility and each other facility not specifically classified above which receives more than 100,000 tons of solid waste per year: $ 8,000]

[(O) An incinerator, resource recovery facility, composting facility and each other facility not specifically classified above which receives at least 50,000 tons but less than 100,000 tons of solid waste per year: $ 4,000]

[(P) An incinerator, resource recovery facility, composting facility and each other facility not specifically classified above which receives less than 50,000 tons of solid waste per year: $ 2,000]

[(Q) A landfill which has permit provisions to store over 100 waste tires -- the above fee or $250 whichever is highest.]

[(b) Industrial Waste Facility:]

[(A) A facility which received 10,000 tons or more of solid waste per year: $ 1,500]

[(B) A facility which received at least 5,000 tons but less than 10,000 tons of solid waste per year: $ 750]

[(C) A facility which received less than 5,000 tons of solid waste per year: $ 150]

[(c) Sludge Disposal Facility:]

[(A) A facility which received 25,000 gallons or more of sludge per month: $ 150]

[(B) A facility which received less than 25,000 gallons of sludge per month: $ 100]

<u>(a) All facilities accepting solid waste except transfer stations and material recovery facilities:</u>

<u>(A) $200; or</u>

<u>(B) An annual solid waste permit fee based on the total amount of solid waste received at the facility in the previous calendar year, at the following rate:</u>

(i) All municipal landfills, demolition landfills, off-site industrial facilities, sludge disposal facilities, and incinerators: $.21 per ton.

(ii) Captive industrial facilities: $.21 per ton.

(iii) Energy recovery facilities: $.13 per ton.

(iv) Composting facilities receiving mixed solid waste: $.10 per ton.

(C) If a disposal site (other than a municipal solid waste facility) is not required by the Department to monitor and report volumes of solid waste collected, the annual solid waste permit fee may be based on the estimated tonnage received in the previous year.

(b) Transfer stations and material recovery facilities:

(A) Facilities accepting over 50,000 tons of solid waste per year: $1,000

(B) Facilities accepting between 10,000 and 50,000 tons of solid waste per year: $500

(C) Facilities accepting less than 10,000 tons of solid waste per year: $50

(c)[(d)] Closed Disposal Sites: Each landfill which closes after July 1, 1984:. . . . . .[10% of fee which would be required, in accordance with subsections (3)(a), (3)(b), and (3)(c) above, if the facility was still in operation or $50 whichever is greater.] $150, or the average tonnage of solid waste received in the 3 most active years of site operation multiplied by $.025 per ton, whichever is greater; but the maximum annual permit fee shall not exceed $2,500.

[(e) Facility with Monitoring Wells: In addition to the fees described above, each facility with one or more wells for monitoring groundwater or methane, surface water sampling points, or any other structures or locations requiring the collection and analysis of samples by the Department, shall be assessed a fee. The amount of the fee shall depend on the number of wells (each well in a multiple completion well is considered to be a separate well) or sampling points as follows:. . . . . .$ 250 for each well or sampling point.]

[(4) Annual Recycling Program Implementation Fee. An annual recycling program implementation fee shall be submitted by each domestic waste disposal site, except transfer stations and closed landfills. This fee is in addition to any other permit fee which

may be assessed by the Department. The amount of the fee shall depend on the amount of solid waste received as follows:]

[(a) A disposal site which received 500,000 tons or more of solid waste per year: $20,000]

[(b) A disposal site which received at least 400,000 but less than 500,000 tons of solid waste per year: $18,000]

[(c) A disposal site which received at least 300,000 but less than 400,000 tons of solid waste per year: $14,000]

[(d) A disposal site which received at least 200,000 but less than 300,000 tons of solid waste per year: $ 9,000]

[(e) A disposal site which received at least 100,000 but less than 200,000 tons of solid waste per year: $ 4,600]

[(f) A disposal site which received at least 50,000 but less than 100,000 tons of solid waste per year: $ 2,300]

[(g) A disposal site which received at least 25,000 but less than 50,000 tons of solid waste per year: $ 1,200]

[(h) A disposal site which received at least 10,000 but less than 25,000 tons of solid waste per year: $ 450]

[(i) A disposal site which received at least 5,000 but less than 10,000 tons of solid waste per year: $ 225]

[(j) A disposal site which received at least 1,000 but less than 5,000 tons of solid waste per year: $ 75]

[(k) A disposal site which received less than 1,000 tons of solid waste per year: $ 50]

(4) Senate Bill 66 (SB 66) annual fee.

(a) A SB 66 annual fee shall be submitted by each solid waste permittee which received solid waste in the previous calendar year, except transfer stations, material recovery facilities and captive industrial facilities. The Commission establishes the SB 66 annual fee as $.09 per ton for each ton of solid waste received in the subject calendar year.

(b) The $.09 per-ton rate is based on the estimated solid waste received at all permitted solid waste disposal sites in the previous calendar year and on the Department's Legislatively Approved Budget. The Department will review annually the amount of revenue generated by this rate. To determine the SB 66 annual fee, the Department may use this rate, or any lower rate if the rate would generate more

revenue than provided in the Department's Legislatively Approved Budget. Any increase in the rate must be fixed by rule by the Commission.

(c) The Department shall bill the permittee for the amount of this fee together with the annual solid waste permit fee in Section 3 of this rule. This fee is in addition to any other permit fee and per-ton fee which may be assessed by the Department.

(5) Per-ton solid waste disposal fees on domestic solid waste. Each solid waste disposal site that receives domestic solid waste, except transfer stations, shall submit to the Department of Environmental Quality the following fees for each ton of domestic solid waste received at the disposal site:

(a) A per-ton fee of 50 cents.

(b) From January 1, 1992, to December 31, 1993, an additional per-ton fee of 35 cents.

(c) Beginning January 1, 1994 the additional per-ton fee established in subsection (5)(b) of this rule shall be reduced to 31 cents.

(d) Submittal schedule:

(A) These per-ton fees shall be submitted to the Department quarterly, or on the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent. Quarterly remittals shall be due on the 30th [15th] day of the month following the end of the calendar quarter.

(B) Disposal sites receiving less than 1,000 tons of solid waste per year shall submit the fees annually on July 1, beginning in 1991. If the disposal site is not required by the Department to monitor and report volumes of solid waste collected, the fees shall be accompanied by an estimate of the population served by the disposal site.

(e) As used in this rule, [section,] the term "domestic solid waste" includes, but is not limited to, residential, commercial and institutional wastes; but the term does not include:

(A) Sewage sludge or septic tank and cesspool pumpings;

(B) Building demolition or construction wastes and land clearing debris, if delivered to a disposal site that is limited to those purposes;

(C) Source separated recyclable material, or material recovered at the disposal site;

(D) Waste going to an industrial waste facility;

(E) Waste received at an ash monofill from an energy [resource] recovery facility; or

(F) Domestic solid waste which is not generated within this state.

(f) For solid waste delivered to disposal facilities owned or operated by a metropolitan service district, the fees established in this section shall be levied on the district, not on the disposal site.

(6) Per-ton solid waste disposal fee on solid waste generated out-of-state. Each solid waste disposal site or regional disposal site that receives solid waste generated out-of-state shall submit to the Department a per-ton solid waste disposal fee. The per-ton solid waste disposal fee shall be the sum of the per-ton fees established for domestic solid waste in subsections (5)(a), (5)(b) and (5)(c) of this rule.

(a) The per-ton fee solid waste disposal fee shall become effective on the dates specified in section (5) of this rule and shall apply to all solid waste received after July 1, 1991.

(b) This per-ton solid waste disposal fee shall apply to each ton of out-of-state solid waste received at the disposal site, but shall not include source separated recyclable materials, or material recovered at the disposal site.

(c) Submittal schedule: This per-ton solid waste disposal fee shall be submitted to the Department quarterly, or on the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent. Quarterly remittals shall be due on the 30th [15th] day of the month following the end of the calendar quarter.

(d) This per-ton solid waste disposal fee on out-of-state solid waste shall be collected at the first disposal facility in Oregon receiving the waste, including but not limited to a solid waste land disposal site, transfer station or incinerator, and remitted directly to the Department on the schedule specified in this rule.

(e) [(d)] If, after final appeal, the surcharge established in section (7) of this rule is held to be valid and the state is able to collect the surcharge, the per-ton fee on solid waste generated out-of-state established in this section shall no longer apply, and the person responsible for

payment of the surcharge may deduct from the amount due any fees paid to the Department on solid waste generated out-of-state under section (6) of this rule.

(7) Surcharge on disposal of solid waste generated out-of-state. Each solid waste disposal site or regional solid waste disposal site that receives solid waste generated out-of-state shall submit to the Department of Environmental Quality a per-ton surcharge of $2.25. This surcharge shall apply to each ton of out-of-state solid waste received at the disposal site.

(a) This per-ton surcharge shall apply to all solid waste received after January 1, 1991.

(b) Submittal schedule: This per-ton surcharge shall be submitted to the Department quarterly, or on the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent. Quarterly remittals shall be due on the 30th [15th] day of the month following the end of the calendar quarter.

(c) This surcharge shall be in addition to any other fee charged for disposal of solid waste at the site.

(d) This surcharge on out-of-state solid waste shall be collected at the first disposal facility in Oregon receiving the waste, including but not limited to a solid waste land disposal site, transfer station or incinerator, and remitted directly to the Department on the schedule specified in this rule.

OAR61.rev

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY **INTEROFFICE MEMORANDUM**

DATE: April 15, 1992

TO: Environmental Quality Commission

FROM: Fred Hansen

SUBJECT: Agenda Item E: Solid Waste Permit Fees. Additional Comments and Recommendations From Solid Waste Permit Fee Work Group, and Department's Response

As a result of public comment on the draft Solid Waste Permit Fee rule changes, the Department of Environmental Quality (DEQ, Department) proposed a number of changes in its final rule (see staff report, Agenda Item E). Because the Department had worked closely with a Solid Waste Permit Fee Work Group in developing the draft rule, we reconvened the Work Group to receive their comments on the Department's proposed changes.

The Solid Waste Permit Fee Work Group met on April 7. They considered the five areas of change identified in the attached March 31, 1992 memo from the Department, in addition to other issues raised in public comments.

I. Work Group's Reactions to Department's Changes.

The Work Group had the following reactions to the Department's proposed rule changes as discussed in the Department's March 31 memo:

1. Reduce per-ton rate for energy recovery facilities to $.13/ton. The Group's consensus was to support the staff recommendation to reduce the proposed $.15/ton rate to $.13/ton.

2. Reduce "minimum" annual permit fee from $300 to $200. The Group disagreed with this change, and supported keeping the $300 minimum annual permit fee for the smallest disposal sites as proposed in the draft rule.

Group members pointed out that the $300 minimum fee does not cover the Department's costs of administering these small sites. Even with a minimum $300 annual permit fee, revenue from larger sites subsidizes the Department's oversight of small sites. It was pointed out that the Group's small county representative (although unable to attend the April 7 meeting) had not considered $300 to be unreasonable during the Group's development of the proposal. There was widespread feeling that even small sites should be able to pay the $300 minimum permit fee. The Group's view was the SB 66 Annual Fee (based on $.09

per ton) and the $.85 per ton solid waste disposal fee that all sites also have to pay are for different purposes, and are not a justification for reducing the $300 minimum permit fee, even though the total cost per ton for solid waste disposal would be as much as $2.44 for many small sites while only $1.15 per ton for large sites. The Group stated their belief that lowering the permit fee would signal that the Department was not going to require smaller sites to come into compliance with landfill operating criteria.

The Group's consensus was that the $300 minimum permit fee should be retained.

> Department's Response: Retain the $200 for reasons stated in the Staff Report, Agenda Item E, 4/23/92 EQC meeting. While the $300 considered in isolation is not onerous, combined with an additional $.94 per ton for solid waste disposal fees ($.85 per-ton fee and $.09 for the SB 66 annual fee), it results in small sites like Jordan Valley paying a total of $2.44 per ton, while larger landfills pay $1.15 per ton. This is unfair and serves no visible purpose. Small, remote sites will close as the economies of increased regulation make them too expensive to operate. The Department will have to work with rural counties to develop reasonable alternatives. The additional push of paying twice the per-ton rate of Western Oregon metropolitan counties is not needed.

3. Exempt "On-site" (or Captive) Industrial Facilities from the $.09/ton SB 66 Annual Fee. The Group's consensus was to approve the Department's recommendation, as the draft proposal was incorrect in the first place.

4. Establish additional solid waste conversion factors for industrial wastes. The Group's consensus was to add the three conversion factors, and also raise the factor for "construction, demolition and landclearing wastes" to 1,100 pounds per cubic yard (rather than 1,000 as proposed by the Department).

The Group felt that the Department's proposal was too light, noting that demolition wastes may range from 800 to 1,200 pounds per cubic yard. The Group felt that 1,100 pounds was a reasonable factor.

> Department's Response: Accept the recommended change.

A representative of the pulp and paper industry was present at the April 7 meeting, and asked the Group to consider an additional concern related to industrial waste conversion factors. He noted that pulp and paper clarifier solids are composed of 50 percent water, and constitute a principal waste disposed of at pulp and paper industrial waste facilities. He said that his industry objected to paying a $.21 per ton fee based largely on water, and perceived this as a fairness issue. It is possible to further de-water the clarifier solids, but it requires use of energy and is an additional expense. The Group felt that the moisture content issue should be kept out of the rate basis. Operators of municipal landfills also experience heavier garbage in the winter because of the moisture content. The Group's consensus was that the annual permit fee should be based on the tonnage that goes across the scale, regardless of the water content.

This raised additional discussion on the wording of OAR 340-61-115(3)(b) specifying how annual tonnages are to be calculated for industrial facilities. To clarify the Department's intent for scales to be used in all cases where they are available, the Group supported a change in the second full sentence, to read as follows:

> If certified scales are not required, or AT THOSE SITES RECEIVING LESS THAN 50,000 TONS A YEAR IF SCALES ARE NOT AVAILABLE, industrial sites shall use the following conversion factors to determine tonnage of solid waste disposed of: [Addition in caps was proposed by the Work Group.]
>
> Department's Response: Accept the recommended change.

5. Other Changes/Clarifications. The Group had no objections to the clarifications listed in paragraph 5.

II. Additional Issues

The Work Group also considered other public comments that the Department did not recommend incorporating into the rule. The most significant of these was a proposal for a "sliding" per-ton rate. The following summarizes the Group's discussion of additional issues.

1. Use of "sliding" per-ton rate to determine annual permit fee. (See discussion in the Staff Report.) This concept would use a decreasing per-ton rate based on "tier"

blocks of tonnage received by solid waste disposal sites. The first several thousand tons of waste received would be assessed at a higher per-ton rate than succeeding "tiers" of solid waste. The proponents of this concept stated that the Department is required by statute to base the permit fee on the anticipated cost of regulating the site. The "sliding" rate takes the Department's regulatory "economy of scale" into account, by recognizing that the Department's costs of regulating a site do not necessarily double as the amount of waste received doubles. It was recalled that the Work Group had agreed in the past that large sites would have to subsidize the regulation of small sites to some degree. The permit fee also incorporates the recycling implementation fee, which funds activities not benefitting from regulatory economies of scale. There was discussion that most categories of permittee likely believe the rate structure does not treat them fairly. However, the Department must use some rational basis for fee determination. Since it is impossible for the Department to charge a direct "fee for service," a tonnage-based fee is not an unreasonable basis on which to calculate permit fees. The Group felt there were advantages to the simplicity of a "flat" rate. There was no Group consensus that a "sliding" rate structure should be adopted.

2. Rate treatment of industrial sites. The representative of the pulp and paper industry suggested that it was unfair to have the rate for industrial sites depend on the amount of solid waste received at domestic sites (since the rate is determined by dividing the amount of permit fee revenue the Department is authorized to collect, by the total tonnage of solid waste received in the state). He argued that industrial waste sites require less regulation than municipal sites, and create a lesser degree of environmental concern. The permit fee structure for industrial sites should reflect this. Captive industrial sites should be divorced in the fee structure from municipal sites, at least by having their rate on a different line item. This would make it easier to consider rates for these industrial sites separately in the future. The Group chair pointed out that the Group had already considered the issue, and had felt that industrial facilities should be treated similarly to other solid waste disposal facilities.

A straw poll of the Group found that the Group would not object to having the per-ton rate for captive industrial sites listed on a separate line.

Department's Response: The Department does not object to a separate listing for the rate for

industrial facilities, and is incorporating this recommendation into its proposed rules.

3. Modification of submittal schedule for per-ton solid waste disposal fees. One member of the Group mentioned that it was difficult to submit quarterly reports by the 15th day of the month following the end of the calendar quarter. Two weeks' time is insufficient to calculate the amount of waste (both domestic and out-of-state) received at the site during the previous quarter, and submit payment to the Department for the per-ton solid waste disposal fee. Work Group consensus was to extend the submittal date to the 30th day of the month following the end of the calendar quarter.

Department's Response: This is a reasonable recommendation, and the Department is incorporating it into the proposed rule.

III. Summary of Department's Recommendations

Following is a summary of the Department's proposed additional changes to the rule for Solid Waste Permit Fees (OAR 340-61) which the Commission has before it in Agenda Item E, pursuant to the Solid Waste Permit Fee Work Group's recommendations.

1. Change the conversion factor for demolition waste from 1,000 to 1,100 pounds per cubic yard. (OAR 340-61-115 (3)(b)(C))

2. Change the wording in OAR 340-61-115(3)(b) to specify when certified scales are to be used for industrial facilities.

3. List on a separate line the $.21 per-ton rate used to calculate the permit fee for captive industrial facilities. (OAR 340-61-120(3)(a)(B)(ii))

4. Extend the submittal date for the per-ton solid waste disposal fees to the 30th day of the month following the end of the calendar quarter. (OAR 340-61-115(6)(c), 340-61-120(6)(c) and 340-61-120(7)(c))

A revised copy of the proposed rule is attached, incorporating the above changes.

Attachments: March 31, 1992 memo from Deanna Mueller-Crispin to the Solid Waste Permit Fee Work Group
Proposed Rules

Oregon

DEPARTMENT OF ENVIRONMENTAL QUALITY

March 31, 1992

TO: Solid Waste Permit Fee Work Group

FROM: Deanna Mueller-Crispin

SUBJECT: Permit Fee Rules: Changes Recommended From Draft Rule

As a result of public comment received on the draft Solid Waste Permit Fee Rule revisions, the Department is recommending the following changes to go forward to the Environmental Quality Commission at their April 23 meeting. A copy of the revised rule is attached for your reference. (Note: other changes may be made before a "final" rule is sent to the Environmental Quality Commission for adoption, as DEQ in-house review has not yet been completed.) Major changes include:

1. Change in per-ton rate for energy recovery: $.13/ton.

   The draft rule proposed $.15/ton as the rate to determine the annual solid waste permit fee ("permit fee") for energy recovery facilities. Ash from such facilities would also pay the proposed $.21/ton rate. Both types of waste would be subject to the new $.09/ton "tonnage-based permit fee" (from SB 66). Marion County pointed out that this results in "double charging" of solid waste received at its energy recovery facility, and a higher overall charge for such waste than if it were simply landfilled. Marion County proposed that their burner's ash be exempt from the $.21/ton fee; or that a lower rate be established for waste going to the energy recovery facility.

   The Department did not intend for energy recovery facilities to pay an overall higher rate than landfills, and proposes to change the recommended rate for waste received by energy recovery facilities to $.13/ton. This gives a slight advantage ($290) to energy recovery over landfilling. Calculations for the Brooks energy recovery facility are as follows:

   Annual solid waste accepted: 178,000 tons
   Ash generated (landfilled): 46,500 tons

   If all the waste were landfilled, the fee would be as follows:

178,000 tons	x $.21/ton (landfill rate)	= $37,380
"	x .09 (SB 66 fee)	= 16,020
	Total annual fee	$53,400

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Portland, OR 97204-1390
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DEQ-1

Original proposal ($.15/ton):			Revised proposal ($.13/ton):		
178,000	x $.15 =	$26,700	178,000	x $.13 =	$23,140
"	x .09 =	16,020	"	x .09 =	16,020
46,500	x .21 =	9,765	46,500	x .21 =	9,765
"	x .09 =	4,185	"	x .09 =	4,185
Total fee		$56,670	Total fee		$53,110

2. Change in "Minimum" Annual Permit Fee: $200.

The draft rule bases the permit fee on $.21/ton for solid waste collected in the previous calendar year, with a proposed minimum annual permit fee of $300. Small communities commented that this was unfair to small localities. With a $300 minimum fee, small municipal sites would pay a higher per-ton fee than larger sites. For the smallest sites, the per-ton difference is significant (see Addendum A). Small municipal sites serve small communities which are hard-pressed to pay this fee as well as the other fee increases they are subject to, including the new tonnage-based annual fee of $.09/ton and the $.85/ton solid waste disposal fee. They also commented that for the smallest sites the annual total of these three fee categories, based only on the per-ton rates, would amount to less than $300. (This would be true for any landfill receiving less than 300 tons of solid waste a year; there are approximately 28 such landfills in the State.)

Upon further review of the per-ton fiscal impact of the $300 minimum fee, the Department believes it would be overly burdensome on small sites, and proposes to lower it to $200. This would cover an annual site visit to some sites, although not the most remote ones. The very smallest sites would still pay a higher per-ton rate, but the difference is reduced.

3. "On-site" Industrial Facilities Exempt from $.09/ton Fee.

Comment was received that the $.09 per-ton tonnage-based annual fee (created by SB 66) should apply only to domestic waste. The statute (ORS 459.235(3)) specifies that the Commission "shall establish a schedule of annual permit fees...The fees shall be assessed annually and shall be based on the amount of solid waste received at the disposal site in the previous calendar year." The Department believes that legislative intent was that "on-site" (or "captive") industrial facilities were not to be subject to this permit fee. (An "on-site" industrial facility is one where the permittee is the generator of all solid waste received at the site.) However, "off-site" industrial facilities (all industrial facilities other than "on-site") should be subject to this fee, as the waste received could alternatively go to a municipal site. It is equitable that "off-site" industrial facilities be subject to this fee.

The Department is proposing to exempt on-site, but not off-site, industrial facilities from the new SB 66 tonnage-based annual fee of $.09.

4. Establish additional solid waste conversion factors to be used at industrial facilities and at those municipal facilities without certified scales.

The draft rule proposed factors to convert several types of industrial solid waste from cubic yards to tons. A proposal was received to establish three additional conversion factors, as follows:

Contaminated soils:	2,400 lbs per cubic yard
Construction, demolition and landclearing wastes:	1,000 lbs per cubic yard
Asbestos:	500 lbs per cubic yard

The proposal also recommended that municipal facilities use these factors (instead of the existing standards for "compacted" and "uncompacted" wastes) when they receive those types of waste. The Department agrees that this would improve the accuracy of reporting tonnages, and is incorporating the above changes into the proposed final rule.

5. Other Changes/Clarifications.

A number of clarifications to the draft rule language were made, including the following:

a. Clarification of the calculation for annual permit fees for sites either beginning or ending operations.

b. The requirement for use of certified scales was clearly stated to include off-site industrial facilities receiving over 50,000 tons of solid waste a year.

c. The annual permit fee ($.10/ton) for composting facilities was clearly stated to apply to mixed solid waste. (Concern was expressed that yard debris composting sites would be subject to this fee.)

Attachments

ADDENDUM A

SMALL LANDFILLS:
EFFECT OF PROPOSED SOLID WASTE PERMIT FEE
3/24/92

This paper analyzes how the solid waste permit fee (in the DEQ draft rule put out for public comment) might affect small landfills.

I. Fee Schedule in Draft Rule

A. Small landfills pay:

- Annual Solid Waste Permit Fee:	$.21/ton OR $300 min.
- Tonnage-based Permit Fee:	$.09/ton
- Per-ton solid waste disposal fee:	$.85/ton

(Eventually: Orphan site fee)

B. Examples:

1. Landfill accepting 200 tons (~28, e.g. Jordan Valley)

- Annual Solid Waste Permit Fee (200 x $.21 = $42)	$300
- Tonnage-based Permit Fee (200 x $.09)	18
- Per-ton solid waste disposal fee (200 x $.85)	170
Total:	$488

Per-ton cost: $2.44

2. Landfill accepting 500 tons (~14, e.g. Christmas Valley)

- Annual Solid Waste Permit Fee (500 x $.21 = $105)	$300
- Tonnage-based Permit Fee (500 x $.09)	45
- Per-ton solid waste disposal fee (500 x $.85)	425
Total:	$770

Per-ton cost: $1.54

3. Landfill accepting 1000 tons (~5, e.g. Bly)

- Annual Solid Waste Permit Fee (1000 x $.21 = $210)	$300
- Tonnage-based Permit Fee (1000 x $.09)	90
- Per-ton solid waste disposal fee (1000 x $.85)	850
Total:	$1,240

Per-ton cost: $1.24

4. Landfill accepting 1400 tons (~3, e.g. Pilot Rock)

- Annual Solid Waste Permit Fee (1400 x $.21 = $294)	$300
- Tonnage-based Permit Fee (1400 x $.09)	126
- Per-ton solid waste disposal fee (1400 x $.85	1,190
Total:	$1,616

Per-ton cost: $1.15

5. All landfills accepting >1,450 tons (~40)

- Annual fees: tonnage in prev. cal yr. x $.30
- Quarterly fee: gate tonnage x $.85

Per-ton cost: $1.15

II. Proposed Alternative (in Final Rule)

1. Reduce the $300 minimum annual solid waste permit fee to $200.

Under this alternative, the per-ton discrepancy between small sites and large sites would be reduced.

Examples:	Total Fees	Per-ton Costs
- Jordan Valley (200 tons):	$388	$1.94
- Christmas Valley (500 tons):	$670	1.34
- Bly (1000 tons):	$1,150	1.15
- Pilot Rock (1400 tons):	$1,610	1.15

smallsit

Attachment A - Revised

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY
ADMINISTRATIVE RULES
SOLID WASTE MANAGEMENT
DIVISION 61
Proposed Revisions
4/10/92

Proposed deletions are in brackets [ ].
Proposed additions are underlined.

PERMIT FEES

340-61-115

(1) Each person required to have a Solid Waste Disposal Permit shall be subject to a three-part fee consisting of [a filing fee,] an application processing fee, [and] an annual [compliance determination] solid waste permit fee as listed in OAR 340-61-120[.] and the SB 66 annual fee as listed in OAR 340-61-120(4). In addition, each disposal site receiving domestic solid waste shall be subject to [an annual recycling program implementation fee as listed in OAR 340-61-120, and] a per-ton solid waste disposal fee on domestic solid waste as specified in Section 5 of OAR 340-61-120. In addition, each disposal site or regional disposal site receiving solid waste generated out-of-state shall pay a per-ton solid waste disposal fee as specified in Section 6 of OAR 340-61-120 or a surcharge as specified in Section 7 [6] of OAR 340-61-120. The amount equal to the [filing fee,] application processing fee[, the first year's annual compliance determination fee and, if applicable, the first year's recycling program implementation fee] shall be submitted as a required part of any application for a new permit. [The amount equal to the filing fee and application processing fee shall be submitted as a required part of any application for renewal or modification of an existing permit.]

[(2) As used in this rule unless otherwise specified, the term "domestic solid waste" includes, but is not limited to, residential, commercial and institutional wastes; but the term does not include:]

[(a) Sewage sludge or septic tank and cesspool pumpings;]

[(b) Building demolition or construction wastes and land clearing debris, if delivered to disposal sites that are not open to the general public;]

[(c) Yard debris, if delivered to disposal sites that receive no other residential wastes.]

(2) [(3)] The annual [compliance determination] solid waste permit fee and, if applicable, the SB 66 annual fee [fee and, if applicable, the annual recycling program implementation fee] must be paid for each year a disposal site is in operation or under permit. The fee period shall be the state's fiscal year (July 1 through June 30) and shall be paid annually by July 1. [Any annual compliance determination fee and, if applicable, any recycling program implementation fee submitted as part of an application for a new permit shall apply to the fiscal year the permitted disposal site is put into operation. For the first year's operation, the full fee(s) shall apply if the disposal site is placed into operation on or before April 1.] Any new disposal site placed into operation after January 1 [April 1] shall not owe [a compliance determination fee and, if applicable, a recycling program implementation fee] an annual solid waste permit fee or a SB 66 annual fee until July 1 of the following year. Any existing disposal site that receives solid waste in a calendar year must pay the annual solid waste permit fee and SB 66 annual fee, if applicable, as specified in OAR 340-61-120(3)(a) and 340-61-120(4) for the fiscal year which begins on July 1 of the following calendar year. If no solid waste was received in the previous calendar year and the site is closed, a solid waste permittee shall pay the annual solid waste permit fee for closed sites as specified in OAR 340-61-120(3)(c). The Director may alter the due date for the annual [compliance determination fee and, if applicable, the recycling program implementation] solid waste permit fee and, if applicable, the SB 66 annual fee upon receipt of a justifiable request from a permittee.

(3) [(4) For the purpose of determining appropriate fees, each disposal site shall be assigned to a category in OAR 340-61-120 based upon the amount of solid waste received and upon the complexity of each disposal site. Each disposal site which falls into more than one category shall pay whichever fee is higher. The Department shall assign a site to a category on the basis of estimated annual tonnage or gallonage of solid waste received unless the actual amount received is known.] Permittees are responsible for accurate calculation of solid waste tonnages. For purposes of determining appropriate fees under OAR 340-61-120(3) through (7), annual tonnage of solid waste received shall be calculated as follows:

(a) Municipal solid waste facilities. Annual tonnage of solid waste received at municipal solid waste facilities, including demolition sites, receiving 50,000 or more tons annually shall be based on weight from certified scales after January 1, 1994. If certified scales are not required or not available, [E]estimated annual tonnage for [domestic waste disposal sites] municipal solid waste will be based upon 300 pounds per cubic yard of uncompacted waste received, 700 pounds per cubic yard of compacted waste

received, or, if yardage is not known, one ton per resident in the service area of the disposal site, unless the permittee demonstrates a more accurate estimate. For other types of wastes received at municipal solid waste sites and where certified scales are not required or not available, the conversions and provisions in subsection (b) of this Section shall be used. [Loads of solid waste consisting exclusively of soil, rock, concrete, rubble or asphalt shall not be included when calculating the annual amount of solid waste received.]

(b) Industrial facilities. Annual tonnage of solid waste received at off-site industrial facilities receiving 50,000 or more tons annually shall be based on weight from certified scales after January 1, 1994. If certified scales are not required, or at those sites receiving less than 50,000 tons a year if scales are not available, industrial sites shall use the following conversion factors to determine tonnage of solid waste disposed of:

(A) Asbestos: 500 pounds per cubic yard.

(B) Pulp and paper waste other than sludge: 1,000 pounds per cubic yard.

(C) Construction, demolition and landclearing wastes: 1,100 pounds per cubic yard.

(D) Wood waste: 1,200 pounds per cubic yard.

(E) Food waste, manure, sludge, septage, grits, screenings and other wet wastes: 1,600 pounds per cubic yard.

(F) Ash and slag: 2,000 pounds per cubic yard.

(G) Contaminated soils: 2,400 pounds per cubic yard.

(H) Asphalt, mining and milling wastes, foundry sand, silica: 2,500 pounds per cubic yard.

(I) For wastes other than the above, the permittee shall determine the density of the wastes subject to approval by the Department.

(J) As an alternative to the above conversion factors, the permittee may determine the density of their own waste, subject to approval by the Department.

[(5) Modifications of existing, unexpired permits which are instituted by the Department due to changing conditions or standards, receipt of additional information or any other reason pursuant to applicable statutes and do not require refiling or review of an application or plans and specifications shall not require submission of the filing fee or the application processing fee.]

[(6) Upon the Department accepting an application for filing, the filing fee shall be non-refundable.]

(4) [(7)] The application processing fee may be refunded in whole or in part, after taking into consideration any costs the Department may have incurred in processing the application, when submitted with an application if either of the following conditions exist:

(a) The Department determines that no permit will be required;

(b) The applicant withdraws the application before the Department has granted or denied preliminary approval or, if no preliminary approval has been granted or denied, the Department has approved or denied the application.

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

(6) Submittal schedule.

(a) The annual solid waste permit fee shall be billed to the permittee by the Department, and is due by July 1 of each year.

(b) The SB 66 annual fee shall be billed to the permittee by the Department, and is due by July 1 of each year.

(c) The per-ton solid waste disposal fees on domestic and out-of-state solid waste are not billed by the Department. They are due on the following schedule:

(A) Quarterly, on the 30th day of the month following the end of the calendar quarter; or

(B) On the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent.

(d) The surcharge on disposal of solid waste generated out-of-state is not billed by the Department. It is due on the same schedule as the per-ton solid waste disposal fees above.

PERMIT FEE SCHEDULE

340-61-120

[(1) Filing Fee. A filing fee of $50 shall accompany each application for issuance, renewal, modification, or transfer of a Solid Waste Disposal Permit. This fee is non-refundable and is in addition to any application processing fee or annual compliance determination fee which might be imposed.]

(1) For purposes of this rule:

(a) A "new facility" means a facility at a location not previously used or permitted, and does not include an expansion to an existing permitted site.

(b) An "off-site industrial facility" means all industrial solid waste disposal sites other than a "captive industrial disposal site."

(c) A "captive industrial facility" means an industrial solid waste disposal site where the permittee is the owner and operator of the site and is the generator of all the solid waste received at the site.

(2) Application Processing Fee. An application processing fee [varying between $50 and $2,000] shall be submitted with each application for a new facility. The amount of the fee shall depend on the type of facility and the required action as follows:

(a) A new municipal solid waste landfill facility, incinerator, energy recovery facility, composting facility for mixed solid waste, off-site industrial facility or sludge disposal facility: [(including substantial expansion of an existing facility:)]

(A) Designed to receive over 7,500 tons of solid waste per year:	$10,000
(B) Designed to receive less than 7,500 tons of solid waste per year:	$5,000
[(A) Major facility[1]	$ 2,000]
[(B) Intermediate facility[2]	$ 1,000]
[(C) Minor facility[3]	$ 300]

[[1]**Major Facility Qualifying Factors:**]

[-a- Received more than 25,000 tons of solid waste per year; or]

[-b- Has a collection/treatment system which, if not properly constructed, operated and maintained, could have a significant adverse impact on the environment as determined by the Department.]

[[2]**Intermediate Facility Qualifying Factors:**]

[-a- Received at least 5,000 but not more than 25,000 tons of solid waste per year; or]

[-b- Received less than 5,000 tons of solid waste and more than 25,000 gallons of sludge per month.]

[[3]**Minor Facility Qualifying Factors:**]

[-a- Received less than 5,000 tons of solid waste per year; and]

[-b- Received less than 25,000 gallons of sludge per month.]

[All tonnages based on amount received in the immediately preceding fiscal year, or in a new facility the amount to be received the first fiscal year of operation.]

[(b) Preliminary feasibility only (Note: the amount of this fee may be deducted from the complete application fee listed above):]

[(A) Major facility $ 1,200]

[(B) Intermediate facility $ 600]

[(C) Minor facility $ 200]

[(c) Permit renewal (including new operational plan, closure plan or improvements):]

[(A) Major facility $ 500]

[(B) Intermediate facility $ 250]

[(C) Minor facility $ 125]

[(d) Permit renewal (without significant change):]

[(A) Major facility $ 250]

[(B) Intermediate facility $ 150]

[(C) Minor facility $ 100]

[(e) Permit modification (including new operational plan, closure plan or improvements):]

[(A) Major facility $ 500]

[(B) Intermediate facility $ 250]

[(C) Minor facility $ 100]

[(f) Permit modification (without significant change in facility design or operation):]

[All categories $ 50]

[(g) Permit modification (Department initiated):]

[All categories No fee]

(b) A new captive industrial facility: $1,000

(c) A new transfer station or material recovery facility -

(A) Receiving over 50,000 tons of solid waste per year: $500

(B) Receiving between 10,000 and 50,000 tons of solid waste per year: $200

(C) Receiving less than 10,000 tons of solid waste per year: $100

(d) [(h)] Letter authorizations (pursuant to OAR 340-61-027) [, new or renewal: $ 100]: $500

(e)[(i)] Before June 30, 1994: Hazardous substance authorization (Any permit or plan review application which seeks new, renewed, or significant modification in authorization to landfill cleanup materials contaminated by hazardous substances):

(A) Authorization to receive 100,000 tons or more of designated cleanup waste per year $50,000

(B) Authorization to receive at least 50,000 but less than 100,000 tons of designated cleanup material per year $25,000

(C) Authorization to receive at least 25,000 but less than 50,000 tons of designated cleanup material per year $12,500

(D) Authorization to receive at least 10,000 but less than 25,000 tons of designated cleanup material per year $ 5,000

(E) Authorization to receive at least 5,000 but less than 10,000 tons of designated cleanup material per year $ 1,000

(F) Authorization to receive at least 1,000 but less than 5,000 tons of designated cleanup material per year $ 250

(3) Annual [Compliance Determination] Solid Waste Permit Fee. The Commission establishes the following fee schedule including base per-ton rates to be used to determine the annual solid waste permit fee beginning with fiscal year 1993. The per-ton rates are based on the estimated solid waste received at all permitted solid waste disposal sites and on the Department's Legislatively Approved Budget. The Department will review annually the amount of revenue generated by this fee schedule. To determine the annual solid waste permit fee, the Department may use the base per-ton rates, or any lower rates if the rates would generate more revenue than provided in the Department's Legislatively Approved Budget. Any increase in the base rates must be fixed by rule by the Commission. (In any case where a facility fits into more than one category, the permittee shall pay only the highest fee):

[(a) Domestic Waste Facility:]

[(A) A landfill which received 500,000 tons or more of solid waste per year: $60,000]

[(B) A landfill which received at least 400,000 but less than 500,000 tons of solid waste per year: $48,000]

[(C) A landfill which received at least 300,000 but less than 400,000 tons of solid waste per year: $36,000]

[(D) A landfill which received at least 200,000 but less than 300,000 tons of solid waste per year: $24,000]

[(E) A landfill which received at least 100,000 but less than 200,000 tons of solid waste per year: $12,000]

[(F) A landfill which received at least 50,000 but less than 100,000 tons of solid waste per year: $ 6,000]

[(G) A landfill which received at least 25,000 but less than 50,000 tons of solid waste per year: $ 3,000]

[(H) A landfill which received at least 10,000 but less than 25,000 tons of solid waste per year: $ 1,500]

[(I) A landfill which received at least 5,000 but not more than 10,000 tons of solid waste per year: $ 750]

[(J) A landfill which received at least 1,000 but not more than 5,000 tons of solid waste per year: $ 200]

[(K) A landfill which received less than 1,000 tons of solid waste per year: $ 100]

[(L) A transfer station which received more than 10,000 tons of solid waste per year: $ 500]

[(M) A transfer station which received less than 10,000 tons of solid waste per year: $ 50]

[(N) An incinerator, resource recovery facility, composting facility and each other facility not specifically classified above which receives more than 100,000 tons of solid waste per year: $ 8,000]

[(O) An incinerator, resource recovery facility, composting facility and each other facility not specifically classified above which receives at least 50,000 tons but less than 100,000 tons of solid waste per year: $ 4,000]

[(P) An incinerator, resource recovery facility, composting facility and each other facility not specifically classified above which receives less than 50,000 tons of solid waste per year: $ 2,000]

[(Q) A landfill which has permit provisions to store over 100 waste tires -- the above fee or $250 whichever is highest.]

[(b) Industrial Waste Facility:]

[(A) A facility which received 10,000 tons or more of solid waste per year: $ 1,500]

[(B) A facility which received at least 5,000 tons but less than 10,000 tons of solid waste per year: $ 750]

[(C) A facility which received less than 5,000 tons of solid waste per year: $ 150]

[(c) Sludge Disposal Facility:]

[(A) A facility which received 25,000 gallons or more of sludge per month: $ 150]

[(B) A facility which received less than 25,000 gallons of sludge per month: $ 100]

(a) All facilities accepting solid waste except transfer stations and material recovery facilities:

(A) $200; or

(B) An annual solid waste permit fee based on the total amount of solid waste received at the facility in the previous calendar year, at the following rate:

(i) All municipal landfills, demolition landfills, off-site industrial facilities, sludge disposal facilities, and incinerators: $.21 per ton.

(ii) Captive industrial facilities: $.21 per ton.

(iii) Energy recovery facilities: $.13 per ton.

(iv) Composting facilities receiving mixed solid waste: $.10 per ton.

(C) If a disposal site (other than a municipal solid waste facility) is not required by the Department to monitor and report volumes of solid waste collected, the annual solid waste permit fee may be based on the estimated tonnage received in the previous year.

(b) Transfer stations and material recovery facilities:

(A) Facilities accepting over 50,000 tons of solid waste per year: $1,000

(B) Facilities accepting between 10,000 and 50,000 tons of solid waste per year: $500

(C) Facilities accepting less than 10,000 tons of solid waste per year: $50

(c)[(d)] Closed Disposal Sites: Each landfill which closes after July 1, 1984:. . . . . .[10% of fee which would be required, in accordance with subsections (3)(a), (3)(b), and (3)(c) above, if the facility was still in operation or $50 whichever is greater.] $150, or the average tonnage of solid waste received in the 3 most active years of site operation multiplied by $.025 per ton, whichever is greater; but the maximum annual permit fee shall not exceed $2,500.

[(e) Facility with Monitoring Wells: In addition to the fees described above, each facility with one or more wells for monitoring groundwater or methane, surface water sampling points, or any other structures or locations requiring the collection and analysis of samples by the Department, shall be assessed a fee. The amount of the fee shall depend on the number of wells (each well in a multiple completion well is considered to be a separate well) or sampling points as follows:. . . . . .$ 250 for each well or sampling point.]

[(4) Annual Recycling Program Implementation Fee. An annual recycling program implementation fee shall be submitted by each domestic waste disposal site, except transfer stations and closed landfills. This fee is in addition to any other permit fee which

may be assessed by the Department. The amount of the fee shall depend on the amount of solid waste received as follows:]

[(a) A disposal site which received 500,000 tons or more of solid waste per year: $20,000]

[(b) A disposal site which received at least 400,000 but less than 500,000 tons of solid waste per year: $18,000]

[(c) A disposal site which received at least 300,000 but less than 400,000 tons of solid waste per year: $14,000]

[(d) A disposal site which received at least 200,000 but less than 300,000 tons of solid waste per year: $ 9,000]

[(e) A disposal site which received at least 100,000 but less than 200,000 tons of solid waste per year: $ 4,600]

[(f) A disposal site which received at least 50,000 but less than 100,000 tons of solid waste per year: $ 2,300]

[(g) A disposal site which received at least 25,000 but less than 50,000 tons of solid waste per year: $ 1,200]

[(h) A disposal site which received at least 10,000 but less than 25,000 tons of solid waste per year: $ 450]

[(i) A disposal site which received at least 5,000 but less than 10,000 tons of solid waste per year: $ 225]

[(j) A disposal site which received at least 1,000 but less than 5,000 tons of solid waste per year: $ 75]

[(k) A disposal site which received less than 1,000 tons of solid waste per year: $ 50]

(4) Senate Bill 66 (SB 66) annual fee.

(a) A SB 66 annual fee shall be submitted by each solid waste permittee which received solid waste in the previous calendar year, except transfer stations, material recovery facilities and captive industrial facilities. The Commission establishes the SB 66 annual fee as $.09 per ton for each ton of solid waste received in the subject calendar year.

(b) The $.09 per-ton rate is based on the estimated solid waste received at all permitted solid waste disposal sites in the previous calendar year and on the Department's Legislatively Approved Budget. The Department will review annually the amount of revenue generated by this rate. To determine the SB 66 annual fee, the Department may use this rate, or any lower rate if the rate would generate more

revenue than provided in the Department's Legislatively Approved Budget. Any increase in the rate must be fixed by rule by the Commission.

(c) The Department shall bill the permittee for the amount of this fee together with the annual solid waste permit fee in Section 3 of this rule. This fee is in addition to any other permit fee and per-ton fee which may be assessed by the Department.

(5) Per-ton solid waste disposal fees on domestic solid waste. Each solid waste disposal site that receives domestic solid waste, except transfer stations, shall submit to the Department of Environmental Quality the following fees for each ton of domestic solid waste received at the disposal site:

(a) A per-ton fee of 50 cents.

(b) From January 1, 1992, to December 31, 1993, an additional per-ton fee of 35 cents.

(c) Beginning January 1, 1994 the additional per-ton fee established in subsection (5)(b) of this rule shall be reduced to 31 cents.

(d) Submittal schedule:

(A) These per-ton fees shall be submitted to the Department quarterly, or on the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent. Quarterly remittals shall be due on the 30th [15th] day of the month following the end of the calendar quarter.

(B) Disposal sites receiving less than 1,000 tons of solid waste per year shall submit the fees annually on July 1, beginning in 1991. If the disposal site is not required by the Department to monitor and report volumes of solid waste collected, the fees shall be accompanied by an estimate of the population served by the disposal site.

(e) As used in this rule, [section,] the term "domestic solid waste" includes, but is not limited to, residential, commercial and institutional wastes; but the term does not include:

(A) Sewage sludge or septic tank and cesspool pumpings;

(B) Building demolition or construction wastes and land clearing debris, if delivered to a disposal site that is limited to those purposes;

(C) Source separated recyclable material, or material recovered at the disposal site;

(D) Waste going to an industrial waste facility;

(E) Waste received at an ash monofill from an energy [resource] recovery facility; or

(F) Domestic solid waste which is not generated within this state.

(f) For solid waste delivered to disposal facilities owned or operated by a metropolitan service district, the fees established in this section shall be levied on the district, not on the disposal site.

(6) Per-ton solid waste disposal fee on solid waste generated out-of-state. Each solid waste disposal site or regional disposal site that receives solid waste generated out-of-state shall submit to the Department a per-ton solid waste disposal fee. The per-ton solid waste disposal fee shall be the sum of the per-ton fees established for domestic solid waste in subsections (5)(a), (5)(b) and (5)(c) of this rule.

(a) The per-ton fee solid waste disposal fee shall become effective on the dates specified in section (5) of this rule and shall apply to all solid waste received after July 1, 1991.

(b) This per-ton solid waste disposal fee shall apply to each ton of out-of-state solid waste received at the disposal site, but shall not include source separated recyclable materials, or material recovered at the disposal site.

(c) Submittal schedule: This per-ton solid waste disposal fee shall be submitted to the Department quarterly, or on the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent. Quarterly remittals shall be due on the 30th [15th] day of the month following the end of the calendar quarter.

(d) This per-ton solid waste disposal fee on out-of-state solid waste shall be collected at the first disposal facility in Oregon receiving the waste, including but not limited to a solid waste land disposal site, transfer station or incinerator, and remitted directly to the Department on the schedule specified in this rule.

(e) [(d)] If, after final appeal, the surcharge established in section (7) of this rule is held to be valid and the state is able to collect the surcharge, the per-ton fee on solid waste generated out-of-state established in this section shall no longer apply, and the person responsible for

payment of the surcharge may deduct from the amount due any fees paid to the Department on solid waste generated out-of-state under section (6) of this rule.

(7) Surcharge on disposal of solid waste generated out-of-state. Each solid waste disposal site or regional solid waste disposal site that receives solid waste generated out-of-state shall submit to the Department of Environmental Quality a per-ton surcharge of $2.25. This surcharge shall apply to each ton of out-of-state solid waste received at the disposal site.

(a) This per-ton surcharge shall apply to all solid waste received after January 1, 1991.

(b) Submittal schedule: This per-ton surcharge shall be submitted to the Department quarterly, or on the same schedule as the waste volume reports required in the disposal permit, whichever is less frequent. Quarterly remittals shall be due on the 30th [15th] day of the month following the end of the calendar quarter.

(c) This surcharge shall be in addition to any other fee charged for disposal of solid waste at the site.

(d) This surcharge on out-of-state solid waste shall be collected at the first disposal facility in Oregon receiving the waste, including but not limited to a solid waste land disposal site, transfer station or incinerator, and remitted directly to the Department on the schedule specified in this rule.

OAR61.rev

GRADUATE SCHOOL
University Graduate Faculty
of Economics

MEMORANDUM

DATE: April 24, 1992

TO: EQC Workshop

FROM: Emery Castle

SUBJECT: **Once only tax credits**

OREGON
STATE
UNIVERSITY

Ballard Extension Hall
Corvallis, Oregon
97331

The tax credit program could be simplified and limited by adherence to the following principles:

1. Confining tax credits to polluters in existence at the time an environmental regulation is passed.

2. Utilization of the concept of the least cost method of compliance. Once this cost has been established, it would apply to all polluters eligible for tax credits, regardless of their individual cost. Principal and sole purpose criteria would be abandoned unless an industry cost cannot be established.

3. Once only tax credits will be extended on the assumption that the polluter is expected to pay the long run cost inflicted on society by the polluting activity. The time period over which the tax credit can be claimed would be the life of the facility or the period during which the polluting activity is expected to cease (field burning). The tax credit is extended on the theory that assistance is being provided to help the polluter come into compliance with a regulation. This suggestion can be illustrated by a field burning example. Assume a farmer wishes to apply for tax credit. Currently she is burning 1000 acres and is willing to cease burning on 800 acres. She is allowed a once only tax credit of $45 per acre which applies to anyone who agrees to cease field burning. (This figure is based on a per acre cost of baling and storing straw, less the value of straw and assumes average straw yields per acre. However, the least cost alternative of straw disposal that is generally available to the industry should be used -- not necessarily baling and straw removal). The farmer would then be allowed a tax credit of $36,000 which could be claimed over (say) a five year period.

Even though the tax credit is based on baling and straw removal, the farmer could adopt any practice she wishes so long as she does not burn. This could include tiling, changing to a variety that does not require burning, or still other practices.

4. Tax credits would be limited to primary producers; waste management facilities would not be eligible for tax credits. If waste management facilities serve businesses, the business can claim tax credits under the principles outlined above. Such credits will reduce the cost of utilizing the waste management facilities. To then permit the facility to have tax credits would be to permit the tax credit twice. If waste management facilities serve consumers, rather than businesses, the cost of new environmental regulations can then be passed back to consumers. This creates the appropriate incentive to minimize waste generation.

dm021

Pending Tax Credit Application Over $250,000

Date	TC	Applicant	Cost
Air Quality			
3/9/92	3750	Willamette Industries	$ 568,712
7/29/91	2457	Or. Metallurgical Corp.	693,285
6/28/91	2382	Treasure Advertising Co.	575,182
4/1/91	3419	Fujitsu	2,563,013
2/21/92	2916	Fremont Sawmill	772,089
3/9/92	3750	Willamette Industries, Inc.	568,712
Field Burning			
5/21/91	3519	Patrick Sullivan	695,070
1/22/92	3716	Golden Valley Farms	454,887
Hazardous Waste			
12/27/90	2389	Precision Castparts	947,586
5/28/91	3573	Conrad Preserving Co.	606,468
Solid Waste Landfills			
12/20/91	2884	Oregon Waste Systems	3,093,686
4/29/91	3443	Finley Landfill Co.	7,194,329
Solid Waste Recycling			
12/28/90	2146	Portland General Electric	293,467
7/29/91	3598	Oregon Metallurgical Corp.	365,751
12/31/91	3696	Container Recovery	2,814,415
Water Quality			
7/3/90	2061	James River Corp.	943,253
12/1/91	2681	Georgia Pacific Corp.	461,191
5/6/91	3475	Boise Cascade Corp.	662,588
4/1/91	3420	Fujitsu	2,145,209

Boise Cascade

STATEMENT TO THE EQC

by
Allan Mick - Environmental Manager
Boise Cascade Corp.
St. Helens, OR 97051
April 23, 1992

Back during the era of the old Oregon State Sanitary Authority and during the early days of the DEQ, the agency, industries and municipalities rolled up their sleeves and went to work to clean up the Willamette River. This dramatic cooperative program received national attention for an environmental job well done. The staff at Boise Cascade in St. Helens takes particular pride in the proactive way we have continued to cooperate with the DEQ staff to often lead regulatory requirements by years. For instance, the mill is PCB free, we have eliminated all underground storage tanks, are essentially asbestos free, we have installed a new state of the art precipitator on an older recovery boiler, and many other projects. This cooperative and communicative spirit existed because we at St. Helens could visualize a better environment and we made it happen.

However, the dioxin/AOX regulatory program is an example of what happens when the system goes sour. In our view, responsive communication between the people in part of the pulp and paper industry and the DEQ water quality staff has all but ceased. For the first time ever, we at St. Helens have a major disagreement with the DEQ and that is why we appealed to the EQC board, to consider all scientific evidence before setting water quality standards for dioxin and AOX. We spent hundreds of hours assembling the top scientific minds in the country and compiling the latest data into meaningful reports for presentation to the EQC appointed hearings officer. From our perspective, his recommendations were brushed aside by EQC board members. We were also disturbed when a board member made comments such as "AOX is a witches brew" and paper mill effluents are a "toxic soup". We left last months EQC meeting in a state of shock, and it is still not clear as to how we are supposed to have meaningful communications with you. The following thoughts summarize our perception on events to date.

- The dioxin/AOX issue should never have reached the appeals stage. In contrast, Japan and European countries have systems in place where government works closely with industry, each communicating and relying on the other for the benefit of their country. The EQC, or someone, must provide the leadership to make this happen in Oregon.

- We do not understand how the system works in Oregon. We do know that it is inappropriate for the same people that passed the original rule to preside over the appeal process. It's like the fox guarding the hen house. We thought the EQC hired the hearings officer to hear all the evidence, to reach a decision, and to submit his findings for approval.

- The people that work in the St. Helens mill are not "witches" busy making an evil brew. We are dedicated, hard working Oregonians that are concerned about the environment. In fact, only this month we submitted a study to the DEQ which shows no measurable dioxin/AOX bioaccumulation in cray fish or in sediments of the Columbia River.

- There seems to be a lack of trust between the EQC and the people at St. Helens. We need to bridge this gap and build a constructive working relationship in the future.

The perception of the people at St. Helens is that there are many individuals in the state that would like to drive industry out of Oregon. Nevertheless, we believe that our mill is a value to our country and to this state; that we make a useful product, and at the same time have an outstanding program to not only protect but to improve the environment. We will continue to do our best with the expectation that we will still be running our mill by the year 2000. We need EQC's help to be a part of Oregon's future.

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY INTEROFFICE MEMORANDUM

DATE: April 23, 1992

TO: Environmental Quality Commission

FROM: Fred Hansen

SUBJECT: Director's Memo

E-BOARD

The E-Board approved three Department requests at it's meeting last week:

The Department was given the go ahead to proceed with the sale of bonds to finance the Orphan Site Account in July 1992. If the Attorney General concludes that the petroleum load fees may be used for Debt Service, the amount of the sale would be for $7,347,265. Should the Attorney General conclude the contrary, the sale would be for $3,673,633.

The Department also received approval to accept federal grants for asbestos control and Clean Air Act implementation, as well as for non-point source pollution control and clean lakes programs.

The Department received $200,000 to continue the lower Columbia River water quality study program.

TILLAMOOK ESTUARY

Governor Roberts has nominated Tillamook Bay for participation in the U.S. EPA's National Estuary Program. The program offers funding and other assistance to states and local governments to develop long-range management plans for major estuaries. If accepted, EPA would contribute $150,000 for the first year of the program and approximately $1.5 to $2.5 million over the full four-year project.

There are now 17 estuaries in the program, but only three - Puget Sound, San Francisco Bay and Santa Monica Bay - on the west coast. Tillamook Bay, which offers habitat for shellfish, salmon, trout and waterfowl, faces environmental concerns that are not extensively addressed in other estuary projects, but

Pacific Northwest coast. EPA is expected to select candidates by September 1992.

ROMAINE VILLAGE

The Department of Justice has issued a Notice of Intent to Revoke the Romaine Village wastewater facilities discharge permit. Romaine Village is a mobile home park near Bend which has serious problems with its subsurface wastewater treatment systems. The Department had previously issued an order to Romaine Village to hook-up to the treatment system of the City of Bend.

MUNICIPAL CONTESTED CASE

A settlement conference has been scheduled for the Municipal contested case for April 29, 1992.

GOLD MINING RULE REVIEW

A public meeting has been scheduled for May 5 on the contractor's review of the gold mining rules. The purpose of the meeting is to inform the interested public on the contractor's approach and schedule for addressing the questions posed on liners, leak detection and leak collection systems, tailings treatment to reduce the potential for release of toxics and closure of heap leach and tailings facilities.

STAGE II VAPOR RECOVERY

The Department will be kicking-off the official beginning of the stage II vapor recovery requirements at a news availability on April 30. Many of the larger service stations have already installed the systems.

A total of 71 service stations in the Portland area will be required to install vapor recovery systems. Along with the air pollution benefits, Stage II is expected to conserve close to a half million gallons of gasoline a year.

The Department is assisting the dealers to help their customers adjust to the changes. The Stage II systems will require customers to pull in on the right side of the pump and stop near the pump. DEQ will provide consumer information through the news media and is producing a handout for station operators to give to their customers.

HEARING AUTHORIZATIONS

The Director has authorized the Department to proceed with rulemaking hearings on the following:

Amendments to the Oregon Visibility Protection Plan

The proposed revisions will lead to visibility improvements in Class I Wilderness areas by 1) expanding the period during which restrictions to protect visibility apply by 19 days (from the July 4th weekend to Labor Day to July 1 to September 15th) 2) incorporating the Class I area visibility protection provisions of the Union and Jefferson County Field Burning Ordinances; 3) extend the frequency of formal program review from 3 to 5 years; 4) reduce the annual acreage allowed for research and hardwood conversion burning from 1200 to 600 acres per year and 5) revise the Willamette Valley field burning restriction emergency clause to allow hardship requests for visibility protection exemptions beyond august 10th of each year.

Amendments to the Slash Burning Smoke Management Plan

Establish Special Protection Zones within 20 miles of PM10 nonattainment areas in western Oregon between Nov. 15 and Feb. 15. Requirements would - prohibit zone burning if smoke intrusion into adjacent nonattainment area is likely; require burns be monitored for at least 3 days and fire extinguished to prevent smoke impacts in adjacent nonattainment areas from smoldering fires; prohibit new ignitions on "Red" woodburning curtailment days in adjacent nonattainment areas between December 1 and February 15th.

Establish contingency measures in the event a PM 10 nonattainment area fails to attain federal standards by the Clean Air Act deadline, and if slash smoke is found to be a significant contributor to PM10 nonattainment. These

Amendments to Crematory Incinerator Rules

Address concerns by crematory operators that DEQ rules were unnecessarily restrictive for afterburner residence times. The amendments should not result in any increase in air quality impacts from crematories.

United States
Environmental Protection
Agency

Office of Water
(WH-556F)

EPA/503/9-92/002
December 1991

The Watershed Protection Approach

An Overview

What Is the Watershed Protection Approach?

State and Federal water protection programs have been very successful in reversing or preventing degradation of water quality throughout the country during the last 20 years. Much of this progress is due to nationwide regulations limiting point source discharges by industrial and municipal facilities. Many significant water quality challenges remain, however, including difficult and controversial problems, such as pollutant runoff into waterways or seepage into groundwaters from nonpoint sources and the destruction of wetlands and other vital habitats.

What Is a Watershed?

The term *watershed*, as used in the United States, refers to a geographic area in which water, sediments, and dissolved materials drain to a common outlet — a point on a larger stream, a lake, an underlying aquifer, an estuary, or an ocean. This area is also called the *drainage basin* of the receiving water body.

The Watershed Protection Approach described in this booklet does not require a particular definition of watershed. Local decisions on the scale of geographic unit consider many factors, including the ecological structure of the basin, the hydrologic factors of underlying ground waters, the economic uses, the type and scope of pollution problems, and the level of resources available for protection and restoration projects.

Uniform Federal regulation of these problems would be vastly expensive and would impinge on traditional State and local prerogatives, such as land use and economic development. Governments at all levels, therefore, are broadening their outlook on water quality protection, seeking nonconventional, cost-effective ways to address the remaining problems. Experience and common sense both point toward approaches that get "the biggest bang for the buck" by singling out the most threatened locales for coordinated action by all interested parties.

This document describes efforts within the U.S. Environmental Protection Agency (EPA) and other State, Federal, and local agencies to refocus existing water pollution control programs to operate in a more comprehensive and coordinated manner. The concepts described in this document are not new and have been applied to a limited extent in the past. There is, however, a growing consensus that the pollution and habitat degradation problems now facing society can best be solved by following a basin-wide approach that takes into account the dynamic relationships that sustain natural resources and their beneficial uses. EPA uses the term Watershed Protection Approach to encompass these ideas.

Targeted, Cooperative, Integrated Action

The Watershed Protection Approach is built on three main principles. *First*, the target watersheds should be those where pollution poses the greatest risk to human health, ecological resources, desirable uses of the water, or a combination of these. *Second*, all parties with a stake in the specific local situation should participate in the analysis of problems and the creation of solutions. *Third*, the actions undertaken should draw on the full range of methods and tools available, integrating them into a coordinated, multiorganization attack on the problems.

The diagram on the next page illustrates the interconnection of these three key elements — risk-based targeting, stakeholder involvement, and integrated solutions.

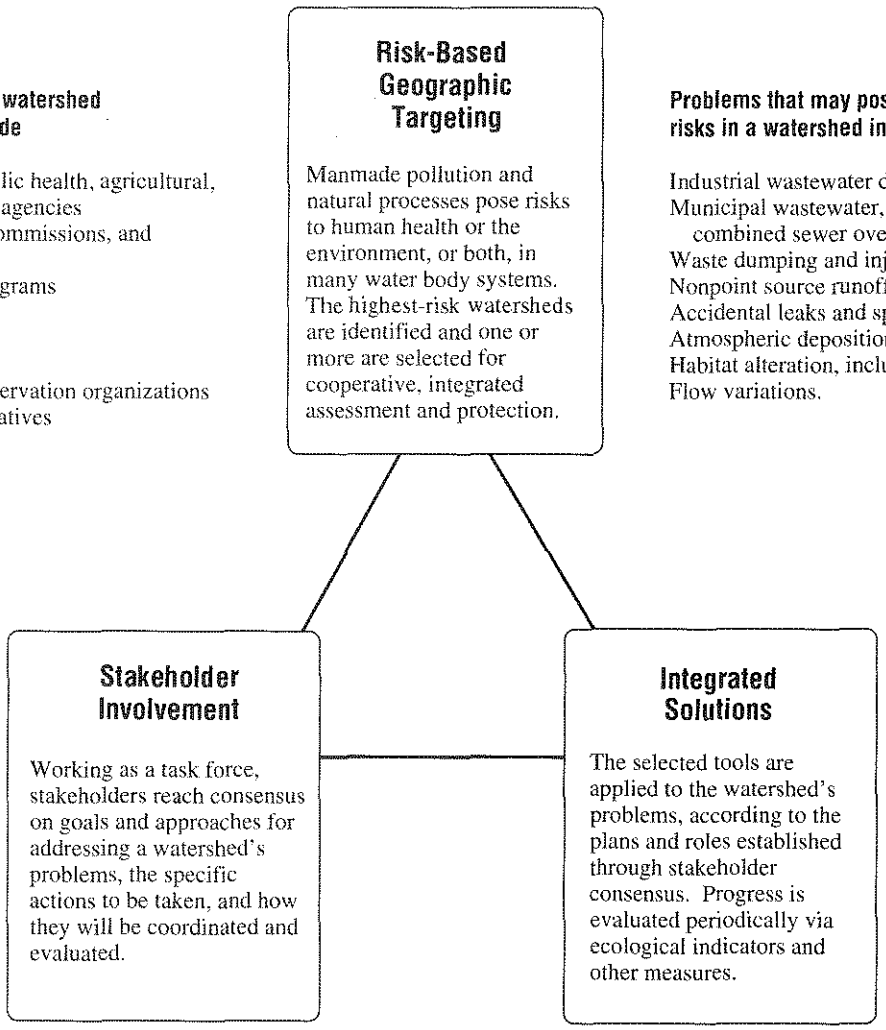
An Emerging Framework

The Watershed Protection Approach is not a new centralized government program that competes with or replaces existing programs. It is a flexible framework for focusing and integrating current efforts and for exploring innovative methods to achieve maximum efficiency and effect. This framework is derived from the experience gained over the last few years in many States and in collaborative activities, such as the National Estuary Program and the Clean Lakes Program. As experience grows and techniques evolve, this holistic, locally tailored approach gradually will become — indeed, *must* become — a routine process for protecting and restoring water quality.

Elements of the Watershed Protection Approach

Potential participants in watershed protection projects include

State environmental, public health, agricultural, and natural resources agencies
Local/regional boards, commissions, and agencies
EPA water and other programs
Other Federal agencies
Indian tribes
Public representatives
Private wildlife and conservation organizations
Industry sector representatives
Academic community.



Problems that may pose health or ecological risks in a watershed include

Industrial wastewater discharges
Municipal wastewater, stormwater, and combined sewer overflows
Waste dumping and injection
Nonpoint source runoff or seepage
Accidental leaks and spills of toxic substances
Atmospheric deposition
Habitat alteration, including wetlands loss
Flow variations.

Coordinated action may be taken in such areas as

Voluntary source reduction programs (e.g., waste minimization, BMPs)
Permit issuance and enforcement programs
Standard setting and enforcement programs (nonpermitting)
Direct financing
Economic incentives
Education and information dissemination
Technical assistance
Remediation of contaminated soil or water
Emergency response to accidental leaks or spills.

What Is a Watershed Protection Project?

Numerous projects using the Watershed Protection Approach have been implemented, and many more are in various stages of planning. These activities were not mandated by EPA or any other central agency; they have arisen spontaneously as the most effective way to address pressing local or regional problems. While they differ widely in their objectives and methods, watershed protection projects have several characteristics in common that distinguish them from conventional water quality initiatives.

- They are discrete activities, often structured as a task force or work group, spearheaded by a State agency, an EPA regional office, or another authoritative environmental management organization.
- They encompass all or most of the landscape in a well-defined watershed or other ecological, physiographic, or hydrologic unit, such as an embayment, an aquifer, or a mountain valley.
- They provide a well-structured opportunity for meaningful participation by State, Federal, tribal, county, municipal and other government agencies, as well as private landowners, industry representatives, other interested parties, as well as the general public.
- They identify the most significant threats to water quality, based on a comparative risk analysis of the human health, ecological, and economic impacts, and they target resources toward these high-risk problems.
- They establish well-defined goals and objectives for the watershed, including objectives for:
  - Chemical water quality ("conventional pollutants" and toxics)
  - Physical water quality (e.g., temperature, flow, circulation)
  - Habitat quality (e.g., channel morphology, composition, and health of biotic communities)
  - Biodiversity (e.g., species number, range).
- They devise and implement an integrated action agenda for achieving the objectives, incorporating all appropriate authorities and techniques (e.g., permit reissuance, education programs).

The box below and those on the next page describe some recent watershed protection projects, which were initiated at various levels of government.

The Merrimack River Watershed Protection Project

Federal and Interstate Commission

The Merrimack River is New England's largest river-based source of drinking water, serving more than a quarter million people. The watershed and river system face increasing multiuse demands for water supply, waste assimilation, hydropower generation, wildlife habitat, and flood control. Recreational use is also expected to increase dramatically during the 1990s. Wastewater discharges, toxic contaminants, and wetlands loss are among the threats to long-term water quality and ecological integrity.

In 1988, EPA's Region I office in Boston, the States of Massachusetts and New Hampshire, and the New England Interstate Water Pollution Control Commission began an initiative to improve and protect water quality in the Merrimack system, enabling it to support multiple uses. Joined by regional planning agencies, the U.S. Geological Survey, the U.S. Fish and Wildlife Service, the U.S. National Park Service, and the U.S. Army Corps of Engineers, the work group developed an action plan for collective, focused effort.

Accomplishments to date include greater emphasis on enforcement of water quality requirements and on targeting of river segments for concerted action. Planned activities for coming years include managing existing pollution sources, conducting water supply planning, and enhancing data management and transfer among agencies.

Watershed Protection Projects Initiated at Various Levels

The Stillaguamish Watershed Protection Project

Local

The Stillaguamish Watershed in Washington State is a significant source of nonpoint source pollution to Puget Sound. The principal pollutants are bacteria from livestock wastes and onsite sewage disposal systems and sediment runoff from forests, farms, and development sites. Partially because of these pollutants, shellfish beds in Port Susan have been declared unsafe for commercial harvest.

The Tulalip and Stillaguamish Tribes nominated the watershed to the Washington Department of Ecology for planning efforts. With a grant from the State agency, a Watershed Management Committee (WMC) was formed in 1988 to develop an action plan. The group contained representatives from the Tulalip and Stillaguamish Tribes, county and city governments, environmental and business interest groups, and homeowners and citizens' organizations. State and Federal environmental regulators participated via a technical advisory committee.

The Stillaguamish Watershed Action Plan, completed in 1989, consists of five source control programs, a public education program, and a monitoring program. WMC recommendations include developing farm conservation plans, reducing improper disposal of human waste, preventing urban runoff, and sampling on a regular basis to track water quality trends.

The Colorado River Watershed Salinity Control Project

Multistate

Salinity is recognized as the major water quality problem in the Colorado River Basin. Changes in salinity can result from both natural processes and human activities. Virtually any water or land use can affect the river's salinity, including irrigation return flows and land use disturbances, which cause salt loading, and diversion of high-quality water, which causes increased salt concentration. The salt adversely affects household, agricultural, and industrial uses of more than 18 million people and affects more than 1 million acres of irrigated farmland. Economic damages, primarily to California, Arizona, and Nevada, are estimated to average $311 million or more annually.

In 1972, the seven Basin States voluntarily formed the Colorado River Basin Salinity Control Forum to develop and oversee implementation of salinity control standards. EPA Regions VI, VIII, and IX are also involved.

This initiative has achieved signficant progress. The basin States, acting through the forum, developed and adopted salinity control standards in 1975, which EPA approved. The States were also successful in getting the Colorado River Basin Salinity Control Act passed in 1974 and amended in 1984. In addition, the forum has been effective in securing Federal funding for salinity control in the Colorado River Watershed.

The Canaan Valley Watershed Protection Project

Federal

The Canaan Valley in West Virginia, designated as a National Natural Landmark in 1975, encompasses a fragile wetlands complex containing a unique boreal ecosystem. The Blackwater River, originating in the wetlands at the valley's southern end, is an important source of drinking water and the largest stream complex in the State with a self-sustaining brown trout population.

The valley is subject to numerous threats from nonpoint source pollution, development, mining, and other sources. Recognizing that these mounting threats could harm the valley's ecological resources irrevocably, EPA's Region III office in Philadelphia organized the Canaan Valley Task Force in 1989 to develop and implement a protection strategy. The task force includes representatives from EPA, the U.S. Fish and Wildlife Service, the U.S. Army Corps of Engineers, the West Virginia Division of Natural Resources, county government bodies, landowner associations, environmental interest groups, development interest organizations, and the general public.

An early accomplishment of the Canaan Valley Task Force is the Corps of Engineers' suspension of Nationwide Permits for wetlands use in the valley. Work has begun on wetlands surveillance and enforcement, public outreach, and wetlands identification. The group has also provided a forum for discussing a National Wildlife Refuge proposal and the county commission's master plan for Tucker County.

What Is a Watershed Protection Program?

Several State agencies and EPA regional offices recently took steps to institutionalize the Watershed Protection Approach as a cornerstone of their water quality management activities. Anticipating that they will undertake more and more watershed protection projects, these organizations have devised well thought-out frameworks to guide them. Such frameworks provide essential structure for the systematic watershed protection programs emerging around the country.

Circumstances vary widely, of course, and there is no simple prescription for a program structure that will meet every organization's needs. The following three *components* are important to all frameworks, however:

- Well-defined *goals and objectives* for the ongoing program
- A set of *criteria* for selecting high-priority watersheds
- A flexible *process* for planning and implementing the watershed protection measures.

A closer look at two fledgling watershed protection programs — an EPA regional office program and a State program — illustrates how a detailed framework can be built on this foundation. Federal, State, and local agencies wishing to establish their own programs may find these examples to be useful models.

An EPA Regional Office Watershed Program

In 1990, EPA's Region IV office began the Savannah River Watershed Protection Project (see box). In designing the approach for this specific project, EPA regional staff also established the general process (the program basis) that they will use when applying the watershed protection approach more widely in the future. The program has the following six basic *objectives*:

- Identify critical watersheds, with EPA and State participation, based on known problems and use impairments
- Define clearly the problems, general causes, and specific sources of water body use impairment and risks to human and ecological health in each selected watershed
- Develop potential pollution prevention and control strategies, including determining total maximum daily loads where appropriate
- Implement point source and nonpoint source controls aggressively
- Develop scientifically valid indicators (i.e., practical measures for gauging the risks in a watershed and the progress in reducing them)
- Develop ecological criteria that States may use in formulating standards for ecology-based pollution prevention and control.

The Savannah River Watershed Protection Project

Federal

Numerous water quality problems have been detected in the Savannah River and its estuary, much of which forms the border between Georgia and South Carolina. For example, dioxin and PCBs have been found in fish in the river and the estuary. In addition, upstream wastewater discharges and a tide gate in the estuary are affecting salinity, toxicity, and dissolved oxygen levels.

In 1990, EPA's Region IV office in Atlanta initiated a project to examine all of the threats to the Savannah River and to develop an interagency action plan. Georgia and South Carolina State agencies, city and county representatives from Savannah, the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and local environmental action groups will probably participate in assessment and planning activities.

Several existing activities may be incorporated or expanded into an integrated watershed protection project, including State/EPA data collection and modeling to support development of total maximum daily loads, wetlands evaluation by the U.S. Corps of Engineers, and the environmental impact statement being prepared for the Corps' tide gate and harbor deepening projects.

Establishing watershed selection criteria is a prerequisite for accomplishing the first objective. The EPA Region IV office plans to use the following eight *criteria* to identify the highest-priority watersheds:

- Magnitude of risks to human and ecological health
- Possibility of additional environmental degradation if no action is taken
- Feasibility of implementing corrective or protective measures in the watershed
- Likelihood of achieving demonstrable results
- Value of the watershed to the public
- Extent of alliances needed between EPA, States, and other agencies to coordinate actions and resources
- Degree to which information on watershed conditions is readily available or can be obtained economically
- Level of EPA resources required.

When the decision is made to embark on a new watershed protection project, the Region IV office will follow a predefined series of steps to organize and conduct the initiative. Their generic *process*, which can be tailored to meet the needs of a particular project, is outlined below.

The EPA Region IV Watershed Protection Process

1. Designate a Coordinator for the project. The Coordinator is the project's "champion" within the regional office and its day-to-day facilitator.
2. Write a brief description of the watershed, including a preliminary list of environmental problems, based on available information.
3. Delineate the project's preliminary scope and goals clearly.
4. Form an EPA watershed team containing a representative from each program that has an active role in environmental management in the watershed. This team will coordinate EPA programs during the project.
5. Assemble and evaluate available information on the extent and causes of water body use impairment and the risks to human health and the environment.
6. Form an interagency watershed coordinating committee containing appropriate technical and management representatives from key government agencies (State, regional, and local), industries, and citizens groups. This committee will facilitate communication among the groups involved in watershed management and will help develop and implement the watershed protection plan.
7. Hold regular meetings of the EPA watershed team and the interagency coordinating committee to identify issues, discuss solutions, build consensus, and obtain commitments for action.
8. Identify all EPA and non-EPA activities and key participants that are involved with environmental problems in the watershed. Identify major milestones in each of these existing activities.
9. Develop a Watershed Management Plan that
   - Identifies the highest-priority problems, as determined by consensus of the participants
   - Specifies total maximum daily loads and other water quality-based control approaches
   - Describes specific actions to address problems and identifies who will take these actions
   - Specifies problems or issues that require additional data gathering and analysis
   - Identifies opportunities for cooperative efforts
   - Delineates ways to leverage resources
   - Sets priorities for the EPA programs with regard to the watershed.
10. Support further characterization of the watershed's problems or the potential solutions, as resources allow.
11. Implement the corrective actions identified in the strategy.
12. Develop environmental indicators that, through monitoring, will be used to measure the success of the corrective actions.

A State Watershed Protection Program

Some States also are moving rapidly toward integrated watershed management. North Carolina's Division of Environmental Management (NCDEM) Water Quality Section, for example, has outlined an ambitious plan to make basins, not stream reaches, the unit of water quality management in the State. NCDEM's Basinwide Water Quality Management Initiative *objectives* include the following:

- Identify priority problem areas and sources (both point and nonpoint) that merit particular pollutant control and enforcement efforts or modification of regulations or statutes
- Determine the optimal water quality management strategy and distribution of assimilative capacity for each of the 17 major river basins within the State
- Produce comprehensive basinwide management plans that communicate to policymakers and the general public NCDEM's rationale, approaches, and long-term management strategies for each basin
- Implement innovative management approaches that protect North Carolina's surface water quality, encourage the equitable distribution of assimilative capacity, and allow for sound economic planning and growth.

The whole-basin initiative is envisioned as a fully integrated approach to water quality assessment and management, incorporating monitoring, modeling, point source and nonpoint source controls, and enforcement. NCDEM has already rescheduled its NPDES permit activities so that renewals within a given basin will now occur simultaneously and will be repeated at 5-year intervals.

Because the program intends to address each of the 17 basins over the next 5 years, the targeting step involved prioritizing the full list of problem areas rather than identifying just the most critical cases. NCDEM's *criteria* for scheduling the basins included the nature and magnitude of known problems, a basin's importance in terms of human use, the availability of data providing a base for modeling, and staff workload balancing.

For each basin in turn, North Carolina will perform the 15-step *process* outlined at the right. Depending on the basin and its problems, other organizations will be invited to participate in problem identification and basin management planning. The NCDEM Water Quality Section has better coordinated staff duties for greater efficiency in whole-basin planning. In 1991, NCDEM assembled existing data for the first basin and began basin-level water quality modeling in preparation for permit renewals scheduled for 1993.

North Carolina's Whole-Basin Protection Process

1. Compile all existing relevant information on basin characteristics and water quality.
2. Define the water quality goals and objectives for water bodies within the basin. (Revise as necessary as more data are gathered and analyzed.)
3. Identify the critical issues (e.g., water supply protection) and current water quality problems within the basin and the major factors (point and non-point sources) that contribute to these problems or concerns.
4. Prioritize the basin's water quality concerns and critical issues, in consultation with other government agencies and appropriate nongovernment organizations.
5. Define the subbasin management units, considering basin hydrology, physiographic boundaries, problem areas, and critical issues.
6. Identify needs for additional data.
7. Collect additional data as appropriate.
8. Analyze, integrate, and interpret the data collected. Revisit Steps 2 through 5 in light of the new information.
9. Determine and evaluate the management options for each management unit in the basin.
10. Select final management approaches for the basin and targeted subbasins.
11. Complete the draft Whole-Basin Management Plan. Perform additional modeling analyses if necessary to finalize the wasteload allocations.
12. Distribute the draft plan for review and comment from the Environmental Management Commission (EMC) and arrange for a public hearing.
13. Revise the plan as appropriate in response to comments and obtain final EMC approval.
14. Implement the management approaches, including point and nonpoint source control strategies.
15. Monitor the program's success and update the plan every 5 years.

What Role Does EPA Headquarters Play?

EPA's Office of Water wishes to encourage and advance the Watershed Protection Approach at all levels of government. The Office of Wetlands, Oceans, and Watersheds (OWOW) is the Office of Water's focal point for promoting collaboration among EPA programs and for coordinating technical support to EPA regional offices and other organizations in pursuing their watershed protection objectives.

Technical Tools and Assistance

The Office of Water (OW) is continuing and reorienting its traditional role of developing water quality standards and techniques and guidance for their application. In addition to refining health-oriented criteria for point source controls, the office is placing more emphasis on ecological protection tools and on standards for nonpoint source control. As watershed protection programs evolve and mature, OW will initiate and coordinate tool development and technical assistance in many areas of direct use to the participating organizations, including the following:

- Numeric ecological criteria that States can use in adopting standards for ecology-based pollution prevention and control programs
- Assessment and problem diagnosis methods including models for calculating water quality-based controls
- Methods for watershed characterization
- Environmental indicators that best reflect the ecological integrity of ecosystems and the effectiveness of protection activities
- Technical assistance to States in implementing technology-based best management practices for nonpoint sources
- New or refined monitoring methods, including biological monitoring techniques.

Information Transfer

The success of the Watershed Protection Approach depends on the exchange of experiences, ideas, techniques, and results among Federal, State, and local agencies, as well as others involved in water quality management. OW seeks to foster this interchange by disseminating descriptive and technical information pertaining to the Watershed Protection Approach, facilitating technology transfer, conducting a public information campaign, providing liaison and high-level negotiation with other Federal agencies, and encouraging cross-program team building at EPA Headquarters.

Resources

Most resource support for watershed protection projects comes from budget reallocations in EPA regional offices and in State agencies, taking advantage of local efficiencies and national priority shifts. OW works within EPA's budgeting process to give the regional offices the flexibility to reorient a portion of their resources toward identifying and focusing on the watersheds of greatest concern. At the same time, OW is redirecting its own resources to devote a larger share to activities that support the Watershed Protection Approach. Some potential funding sources are listed in the box below.

Potential EPA Sources of Resources for Watershed Protection Projects

Section 106 Grants

Section 604(b) Grants

Section 314 Grants

Section 319 Grants

Wastewater Permits Program (NPDES)

Wetlands Protection Grants

State Revolving Funds

National Estuary Program

Near Coastal Waters Program

For more information on the Watershed Protection Approach, contact:

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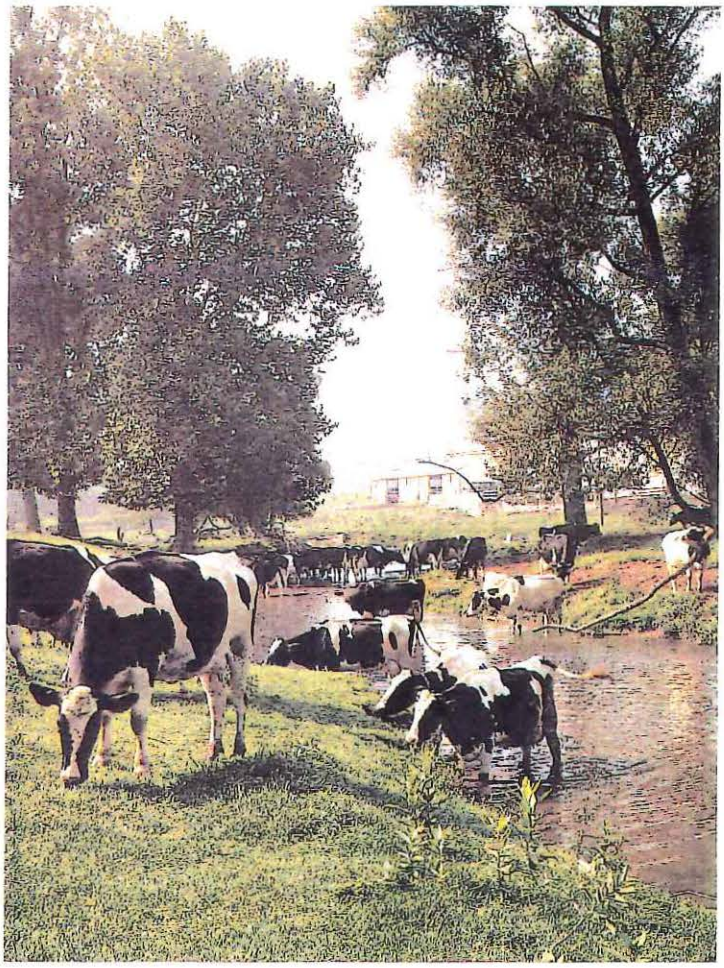

Figure 1. Un-restricted Access to Streams by Livestock.

Effect on Water Quality:

- Deposition of bacteria and nutrients in the stream.
- Removal of riparian vegetation which leads to increased water temperature and erosion.
- Break-down and trampling of banks which leads to streambank erosion.

This situation could be improved by:

- Restricting access of livestock to stream and riparian area.
- Providing out of stream watering.
- Re-vegetating the streambank.

Figure 2.

Figure 3.

Road Construction and Runoff

- Runoff delivers sediment, metals, oil and other petrochemicals as well as other toxics to streams.

Potential Solutions Include:

- Re-vegetate road cuts prior to wet weather.
- Cover exposed soil with erosion blankets or straw mulch.
- Divert runoff into detention basins or passive treatment facilities prior to discharge to stream.

Figure 4. Downstream Effects

Logging, over-grazing, and other land disturbing activities up-stream can cause increased turbidity at down-stream locations. Lack of streambank vegetation in foreground also increases erosion potential and can cause temperature problems.

Potential Solutions:

- Locate and correct up-stream erosion. Improve land management practices.
- Re-vegetate streambank.

Figure 5. A Channelized Urban Stream

Water Quality Effects:

- Natural stream processes disrupted. Aquatic biological community and streamside wildlife habitat severely altered or destroyed.
- Vegetation removal causes temperature increase which is detrimental to aquatic life and virtually eliminates natural "filtering" of runoff.
- Pesticides and fertilizers are carried in runoff directly to the stream without being filtered through riparian vegetation resulting in increased toxic and nutrient loads.

Potential Solution:

- Restore and maintain natural riparian vegetation and stream channel structure.

Figure 6. Cumulative Effects

- Extensive watershed modification resulting from forestry activities, or other landuse, can seriously affect watershed function.
- Effects include changes in stream temperature, hydrology, channel stability, and productivity.

Partial Solutions:

- Senate Bill 1125 directs the State Forester to evaluate the cumulative effects of timber harvest on air, soil, water, and fish and wildlife. It also amends forest practices rules to limit clear cuts to 120 acres or less.
- The Total Maximum Daily Load (TMDL) process encourages water quality management on a watershed basis balancing all point and nonpoint source pollutant loads.

Figure 7.

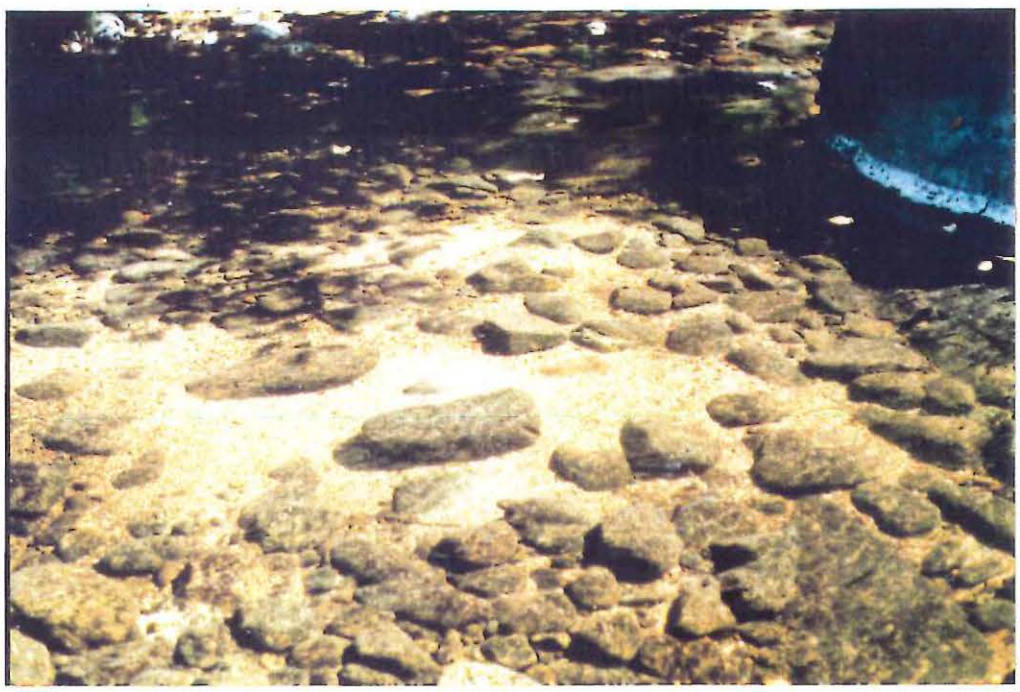

Figure 8.

Forest Roads and Sedimentation

- Forest roads are frequently the cause of management-related landslides and are often chronic sources of fine sediments.
- Fine sediments bury spawning gravels and rearing habitat for fish.
- Accelerated sedimentation can also decrease streambank and channel stability.
- Suspended sediments can adversely affect fish health and increase costs of municipal and industrial water treatment.

Figure 9.

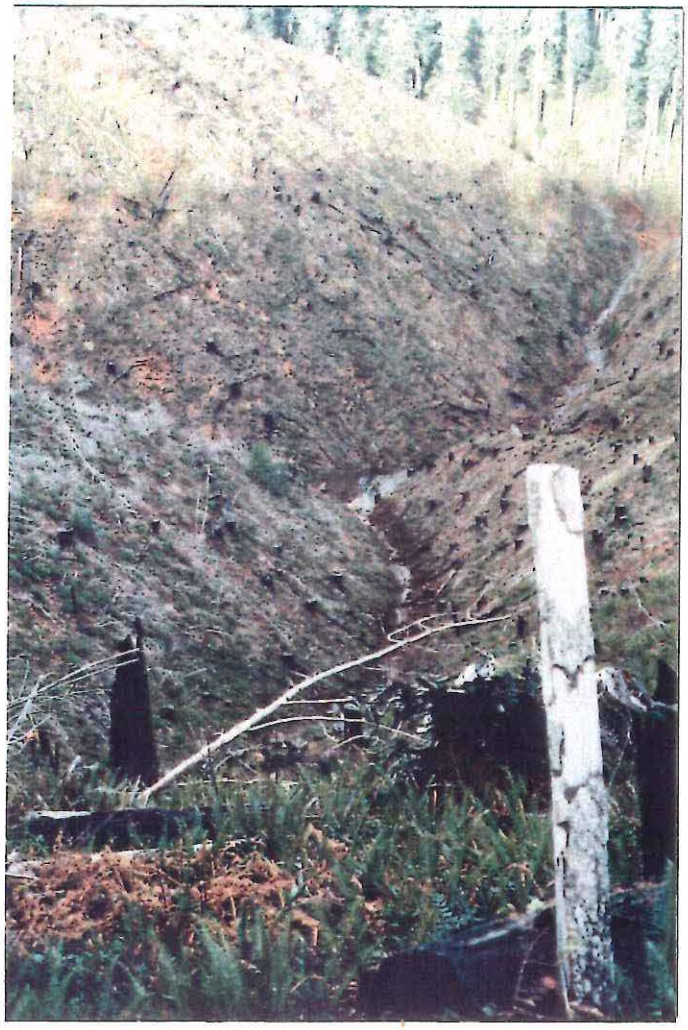

Figure 10.

Streamside Management

- Landslide frequency increases as a result of forest road construction and timber harvests. Slides may bury or scour the stream channel.

- Removal of streamside vegetation can increase water temperature and increase sediment inputs into the stream system.

- Streamside vegetation provides large wood and debris that contribute to the structural complexity of the channel.

Figure 11.

Figure 12.

Landslide

- This landslide originated at a road waste disposal site and buried a small stream with as much as 10,000 yards of sediment and debris.
- The stream channel was obliterated and habitat for fish, amphibians, and aquatic invertebrates was destroyed.
- Downstream areas will also be affected as sediment is flushed from the site during runoff events. Turbidity will degrade water quality and salmon and trout spawning and rearing areas may become embedded with fine sediment.

Figure 13.

Figure 14.

Construction Activities Disturb Soils

- Highly disturbed soils at urban constructions sites can erode rapidly during wet weather. Sediment and other contaminates in runoff enter storm drains and are delivered to the nearest stream.

Figure 15.

Figure 16.

Erosion from Subdivision Construction

- "Track-out" of soil on construction vehicles can move significant amounts of sediment off-site even if other controls are in place.
- Soil, fertilizers, and pesticides run off-site and into streams.
- Vegetation is removed and aquatic habitat is smothered by sediments.

Figure 17.

Figure 18.

Barriers Keep Disturbed Soils On Site

- Properly installed and maintained silt fencing prevents eroding soils from washing off site and into streams.
- Jute and straw matting filter runoff and retain soils until re-vegetation takes place.

Figure 19.

Figure 20.

Hydro-mulching Bare Soils

- A simple, economical, and effective procedure to stabilize exposed soil with straw mulch.
- Helps retain moisture for seed germination and slows or prevents soil movement until vegetation becomes established.

Figure 21.

Figure 22.

Confined Animals and Livestock Stream Crossings Can Cause:

- Increased nutrient and bacteria loads.
- Increased turbidity.
- Sedimentation.
- Streambank erosion and channel alteration.

The situation can be improved by providing bridges for livestock crossing or stabilizing the crossing with gravel or concrete.

Figure 23.

Figure 24.

Removal of Riparian Vegetation as a Result of Over Grazing

- Severe erosion and stream cutting.
- Downstream sedimentation and turbidity increases.
- Increased stream temperature.
- Loss of habitat for fish and wildlife.

Note placement of juniper rip-rap intended to dissipate energy and trap sediment to re-build the stream bed (Figure 24).

Figure 25. Runoff and Erosion from Fields and Roads

- Runoff and sediment collects in roadside ditches and is then transported directly to the nearest receiving stream.
- Increased turbidity and sedimentation.
- Contamination of stream with pesticides and fertilizers.

The Situation Can be Improved by:

- Providing permanent, vegetated buffer between field and ditch.
- Lining roadside ditch with grass or other vegetation.
- Adding check dams to ditches to slow the water down.