

**OREGON  
ENVIRONMENTAL QUALITY  
COMMISSION MEETING  
MATERIALS 02/19/1998**



**State of Oregon  
Department of  
Environmental  
Quality**

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# **\*\*\*Revised\*\*\* A G E N D A**

## **ENVIRONMENTAL QUALITY COMMISSION MEETING**

February 19-20, 1998  
DEQ Conference Room 3A  
811 S. W. Sixth Avenue  
Portland, Oregon

**Notes:** Because of the uncertain length of time needed for each agenda item, the Commission may deal with any item at any time in the meeting. If a specific time is indicated for an agenda item, an effort will be made to consider that item as close to that time as possible. However, scheduled times may be modified if agreeable with participants. Anyone wishing to listen to the discussion on any item should arrive at the beginning of the meeting to avoid missing the item of interest.

**Public Forum:** The Commission will break the meeting at approximately 11:30 a.m. for the Public Forum if there are people signed up to speak. The Public Forum is an opportunity for citizens to speak to the Commission on environmental issues and concerns not a part of the agenda for this meeting. The public comment period has already closed for the Rule Adoption items and, in accordance with ORS 183.335(13), no comments can be presented to the Commission on those agenda items. 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.

### ***Thursday, February 19, Beginning at 10:00 am***

- |                         |   |
|-------------------------|---|
| <b>10:00 - 12:00 pm</b> | <b>Work Session:</b> Strategic Plan   |
| <b>1:00 - 2:00 pm</b>   | <b>Action Item:</b> Reconsideration of the Petition by Jeld-Wen, Inc for Declaratory Ruling Concerning Availability of Sewer as Defined in OAR 340-71-160(5)(f) |
| <b>2:00 - 3:30 pm</b>   | <b>Work Session:</b> 401 Certification for Livestock Grazing on Federal Lands Final Rules   |
| <b>3:30 - 4:30 pm</b>   | <b>Public Comment:</b> 401 Certification for Livestock Grazing on Federal Lands Final Rules   |

### ***Friday, February 20, Beginning at 9:00 am***

**A. Approval of Minutes**

**B. ~~Approval of Tax Credits~~**

***There will be no Tax Credits Presented at this Meeting***

**EQC Work Session**  
February 19, 1998  
**Report on Strategic Planning Process**

**Outline**

1. Introduction (Lang Marsh)
2. How it Fits Together (Helen Lottridge)
3. Air Quality (Greg Green)
- Waste Management (Mary Wahl)
- Water Quality (Mike Llewelyn)

(Each program will review goals, direction, major strategies, changes, challenges)

4. Cross-Media/Place-Based Approach (Lang)
5. Environmental Indicators (Lang)
6. Wrap-up (Lang)



STATE OF OREGON

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Department of Environmental Quality

# Strategic Planning Document - Part I

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Part II - Activity Matrices  
Cross Program Strategic Directions

*Under Development*

Air Quality Strategic Directions  
    Overview  
    Activity Matrix

Water Quality Strategic Directions  
    Overview  
    Activity Matrix

Waste Management and Cleanup Strategic Directions  
    Overview  
    Activity Matrix - Minimization/Prevention  
    Activity Matrix - Safe Management  
    Activity Matrix - Cleanup

## PART I: STRATEGIC PLAN SUMMARY

### INTRODUCTION

#### *Purpose*

Oregon DEQ has engaged in a comprehensive strategic planning process to accomplish three primary objectives:

1. to clearly communicate who we are, what we do, and what we expect to achieve in partnership with the people of Oregon
2. to help us measure the effects of our work and respond to information from a variety of sources in ways that will continuously improve our results
3. to prioritize our work in ways that will allow us to assign and shift resources to balance workload and expectation.

A single strategic planning process forms the basis of budget requests, grant applications, employee workplans, and environmental reporting. Our intention throughout this process is to clearly align our resources, our work, and our plans toward achieving environmental goals for Oregon.

#### *Not a Plan, but a Process*

The document called The Strategic Plan is only useful as a reference for a dynamic process designed to flex and shift in response to information from many sources. Strategic planning should become the conscious discipline of looking up, down, backwards, forwards and sideways at the strengths, weaknesses, opportunities and threats we must manage as partners in creating a healthy, sustainable environment.

#### *Mission and Vision*

We began its strategic planning process by re-defining its mission, vision, and value statements. This action signaled a major cultural shift within a “regulatory” agency that had heretofore been focused on making certain that regulatory processes were followed while the environmental outcome remained uncertain.

This shift began with a single word. Our mission had previously stated that the agency was an “active force in restoring, maintaining and enhancing the quality of Oregon’s air, water and land.” After careful consideration, “force” was changed to “leader” and the new focus was set. Following the adoption of this mission statement, senior management



crafted a vision statement which articulates our vision “to work with all Oregonians for a healthy, sustainable environment.”

### *Values and Values in Practice*

Our values statements guide the work that we do. The values form the basis for prioritization of our strategies and activities. They steer process improvements, so that each step in our processes embody the values in practice. Our values include:

#### **Environmental Results:**

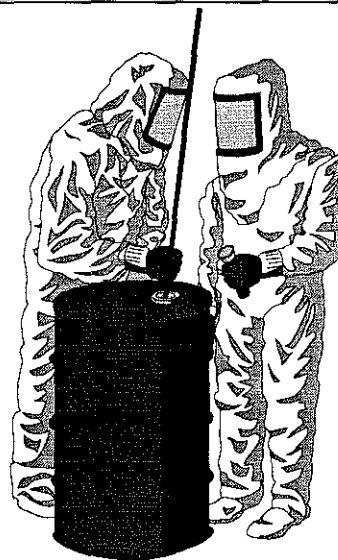
We focus on the environmental outcome. We integrate pollution prevention across all media, balance resources among compliance, technical assistance and education, and focus resources and problem-solving on specific geographic areas.

#### *Values in Practice: Measurable results*

Our Western Region Hazardous Waste program recently conducted a “Generator Assistance Project” or GAP for 139 facilities which provided compliance and reduction on-site assistance to small quantity generators in the region. As a result of evaluating the 1995 GAP data, the Western Region came up with a new (more accurate and streamlined) measurement tool, the “Action Form.” A study where the action form was used has shown that:

- 80% of the recommended improvements regarding waste management were made,
- 82% of the recommendations regarding P-2/waste reduction were actually implemented,
- 100% of the referrals made to other regulatory programs and local governments were contacted as recommended.

We are currently monitoring for changes in water quality data as a results of this effort.



#### **Customer Service**

We establish and implement environmental policy through public forums and open participation, seek public involvement, and implement responsible business practices which are timely, transparent, and equitable.

#### **Partnership**

Within our agency, among agencies, and with other public jurisdictions, the private sector, and our community, we foster trust, teamwork, collaboration, and equity in our efforts to create a healthy environment for all Oregonians.

***Values in Practice: Environmental Partnerships for Oregon Communities (EPOC)***  
DEQ and the Oregon Health Division created the EPOC program as a new partnership approach to assist small communities faced with many new and more stringent state and federal regulations. The EPOC program can help communities find reasonable solutions for local environmental and health needs while meeting requirements for wastewater treatment, safe drinking water, solid and hazardous waste management and air quality. In addition, the program provides coordination on confusing regulations originating from different government agencies. To help small communities finance needed projects, EPOC coordinates with DEQ, the Oregon Economic Development Department and the Rural Utilities Service, formerly the Farmers Home Administration.

### **Excellence and Integrity**

We are proud to provide services in a manner that demonstrates the importance of our mission. We make decisions based on facts and science. Excellence, leadership, integrity, a responsible innovation, and continuous improvement are our standards.

### ***Values in Practice: One Stop***

We are seeking to better leverage our information management resources by integrating its data management systems. Existing systems have largely been developed to support individual media programs and transfer of information to EPA stakeholders. To pursue our vision of an increasingly cross-media and geographically focused approach to environmental management, we will need data management systems to provide useful, meaningful data in a more integrated fashion. Through EPA's One Stop grant, we will take first steps toward integrating data across media and make that information more accessible to the public.

### **Employee Growth**

We are committed to providing the tools, resources, and experiences necessary to help employees develop new skills and to enhance their capabilities and quality of work life.

### **Teamwork**

We support our team members through mutual respect and constructive feedback, celebrating our successes while learning from our mistakes. We encourage team participation and decision-making whenever appropriate and provide the tools necessary for teams to be successful.

***Values in Practice: Basin teams***

The water quality program in Western Region has organized a portion of its staff into Basin Teams for the Rogue and Umpqua basins to help implement the Healthy Streams Partnership. The advantage of a team approach within regional water quality staff is to enable a watershed (ridgetop to ridgetop) approach to identifying, planning, and formulating grass-roots level water quality management plans. These plans are the roadmap to improving water quality, meeting and protecting beneficial uses, and achieving public outreach and education. Members of the team are specialists in point-source compliance, non-point source impact assessments, public affairs and education, data analysis, monitoring and funding of improvements within the watershed.

**Diversity**

In a state with a growing global role, a varied constituency, and increasingly complex challenges, we value the dignity of all people and strive for a diverse workplace that develops equitable, integrative solutions.

***Guiding Principles***

For this iteration of strategic planning, we have adopted seven guiding principles to direct the activities of its three major program areas (Air Quality, Water Quality, and Waste Management and Cleanup) and support functions. They provide areas of emphasis and priority for programs in developing their strategic directions. These guiding principles are:

- partnership
- cross-media coordination
- place-based or geographic problem-solving
- pollution prevention
- balanced approach among compliance, technical assistance, and community outreach
- stabilized, equitable funding
- continuous improvement



***Measuring Progress***

Current reporting methodologies rely on counting the number of activities we engage in and complete to achieve environmental protection. Nationally, environmental protection agencies recognize that while these activity counts can provide some perspective on what is being done for the environment, we all need more comprehensive measures of the effectiveness of these activities. Through the strategic planning process, we will develop environmental indicators and program outcome measures to gauge program performance

and to reduce the need for numerous program output measures. This process is the beginning of a transition in the shift of emphasis to outcome-based measures.

The states and the U.S. Environmental Protection Agency (EPA) are working cooperatively to develop Core Performance Measures (CPMs) which will reduce the number of core program activity measures in favor of outcome measures and environmental indicators.

Over time, these efforts should reduce unnecessary reporting and activity counting, and streamline necessary reporting so that time is spent sharing information and working on Oregon's environmental and pollution problems.

### *Long Term Funding*

We have been developing financing principles to help revise its current funding structure and evaluate revenue options for currently unfunded work. We plan to evaluate our overall funding structure over the next few years and engage stakeholders in a discussion about financing options using these principles.

#### Environmental Incentives

The financing method should encourage pollution prevention and recover the cost of pollution.

#### Fairness

The financing method should treat similar sources in a like manner and relate to the level of pollution or the benefit received.

#### Administrative feasibility and efficiency

The financing method should be simple to administer and have relatively low overhead.

#### Revenue stability

The revenue level should adjust itself over the long run to trends in operating costs and avoid disruptions in the short-run.

#### Revenue size and flexibility

The revenue level should support an efficiently administered program and be available to fund priority work.

## AGENCY GOALS

Through this strategic planning process, we have identified long-term goals for each of our major media programs: Air Quality, Water Quality, and Waste Management and Cleanup.

### **Air Quality**

Clean, healthy air for all Oregonians.

No degradation of Oregon air quality.

### **Water Quality**

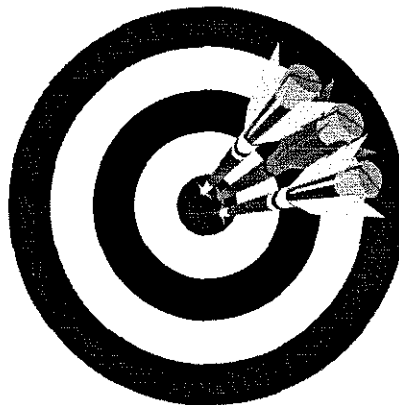
All waters of the state meet designated beneficial uses for fishing, swimming, drinking, etc.

### **Waste Management and Cleanup**

To reduce the use of toxic chemicals or generation of hazardous substances, and hazardous and solid wastes. (Minimization/Prevention)

To minimize exposures and releases through appropriate management of toxic chemicals, hazardous substances, and hazardous and solid wastes. (Safe Management)

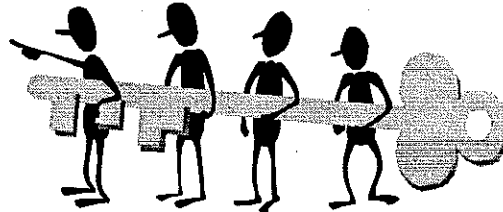
To protect human health and the environment from the dangers associated with toxic chemicals, hazardous substances, and hazardous and solid waste that have been released to the environment and are uncontrolled. (Cleanup/Remediation)



## DEVELOPING THE STRATEGIC PLAN

### *Methodology*

While a holistic understanding of natural science emphasizes the interconnections of air, water and land, the history of policy and legislation has tended to divide our approaches toward environmental results rather than unite them. The legal and fiscal requirements of federal and state versions of the Clean Air Act, Clean Water Act, and the Resource Conservation and Recovery Act (RCRA) often divide activities and accountabilities all into Air Quality, Water Quality, and Waste Management (Land) programs.



In as much as cross-program coordination is one of our guiding principles, our intention to have this strategic planning process serve our budgeting, grant application and reporting processes has driven a program-by-program approach for this iteration. The strategic planning process has, however, contributed to a great deal of cross-program interaction especially toward the development of common language, common goals, and increased understanding of each other's programs.

#### **Bottom-up approach**

Oregon DEQ's strategic planning process has been designed in a reverse funnel approach. We have invited brainstorming and prioritization input on a large scale from all staff in the form of smaller, regional meetings and large, program-wide meetings. For much of the finer wordsmithing and organization processes, most programs chose one of two approaches. Hazardous Waste and the Water Quality program chartered Strategic Planning Advisory Teams. Air Quality, Solid Waste, and the Tanks program managers each selected one staff representative to work with them as a team through the entire process. Regardless of the approach employed, the large scale input on the front end was prioritized, assigned current Level of Effort and directionally shifted by the program manager group. This bottom-up approach has encouraged a much broader view of programs as a whole. Strategic planning for Oregon DEQ was facilitated by two internal staff members over an 12 month period to date.

#### **Goals, Objectives, Strategies and Activities**

Program staff captured the intentions of their program's mission into no more than three goal statements. Goals express the long term environmental intention that any of our programs are trying to reach. The strategic planning groups were then encouraged to develop between five and seven Specific, Measurable, Achievable, Realistic, Timed (SMART) objectives which would focus their program's efforts over the next 5-7 years. These objectives act as targets which can be achieved by different strategies. If the objectives stand for the "what" we are doing, the strategies act as the "how." DEQ is a public service agency which achieves its goals through education, outreach, technical

assistance and compliance assurance activities. All of these activities, plus the many administrative and other functions needed to support us are reflected in the strategic plan.

### *Prioritization and Level of Effort*

Workload balance has acted as one of the primary drivers of this strategic planning process. Our intention to focus resources on the most important work means that less important work must stop or at least diminish. Our means of ranking more importance to less importance has been guided by our agency values. Each prioritization criteria can be mapped back to our efforts toward Environmental Results, Customer Service, Excellence and Integrity, Partnership, Teamwork, Employee Growth and Diversity.

Even so, work that ranks low on the prioritization scheme usually still serves a purpose and stopping it may require a change in statute or policy. That change may require an up front investment which in and of itself must be rated against other activities. The legal and funding drivers mentioned above may also thwart efforts to move resources up the priority chart. Assigning Level of Effort then, is not simply a task of matching dollars or employees to the highest priority tasks. We must be vigilant in our efforts to move resources where they can be moved over time, making sure not to add tasks to already overfull plates without adding resources or taking other work away.

### *Public Involvement*

As noted earlier – this is a process, not a product. Diverse perspectives from outside DEQ are key to successful decision making both now and as the plan evolves over time. We have also tried to make this process efficient as well as effective. Public participation in the strategic planning process will open access to other decision processes as well.



EPA has recognized the value of integrated planning, and therefore has agreed to incorporate the Performance Partnership Agreement into our overall agency planning effort this year. This alignment of state and federal resources and priorities also will cover two years, not just one. DEQ's budget proposals for 1999-2001 also should look familiar since those too will be based on the plan interested Oregonians helped shape.

The public involvement process will also be multi-layered; allowing interested parties to track at the goal and objective level across media, or learn more about and contribute to program strategy development.

## *Best Practices in Strategic Planning*

Our strategic planning process is a home-grown model based on clear intentions and without many external directives. While the product format has varied from program to program, the substance is still consistent enough to meet intended purposes. Along the way, some practices have seemed to add more value than others and will be highlighted here.

### **1 (manager) to 1(staff) Strategic Planning Teams**

Since program managers are by definition responsible for prioritizing, organizing, communicating and measuring performance, early ownership of the strategic planning process has engendered a greater sense of commitment to its use. Having all managers “play together” with one member of their staff created a more complete sense of the program overall. Staff members also cited their participation as an opportunity to expand their view of the program saying they appreciated the investment in employee growth.

### **Big Meetings**

Several programs hosted program-wide meetings to make certain their list of brainstormed elements of the program were complete and to invite input on prioritization. In addition to achieving these two objectives, participants also cited the value in talking to each other about the possibilities, issues and challenges faced by fellow workers in other parts of the state.

### **Consensus decision-making**

Consensus decision-making assisted strategic planning teams toward the intention of taking a whole program view. Not everyone had to like the result of our processes, but no one was allowed to move past the significant heartburn of a team member. The heartburn test often led to more collaborative and constructive compromises.

### **Values-based prioritization**

In an ideal world, any organization’s best investment of resources takes place within its highest priority activities. But in the pragmatic world, we often wind up spending time and money on activities which add less direct value than we would like to see. Basing our prioritization criteria on agency values has helped us define a constancy of purpose which leads to better transparency (ease in seeing the inner workings) throughout.

### **Multi-level prioritization**

We recognized the dynamic nature of the strategic planning process by prioritizing at each level, objective against objective, strategy against strategy, and activity against activity in order to respond to changes in information (funding levels, new legislation, new environmental threat, etc.) at all points. The multi-level prioritization allows us to see the context of shifts in resources and results so we do not wind up over-committing or under-utilizing any resource at our disposal.



### **Strategic Planning into work plans**

As we continue our efforts to combine and align all planning activities into one process, the question most often posed by staff is, "Why does this matter to me?" For our process, the answers have hit home from the start. "This process is going to determine what your program is going to get done, what gets funded and what doesn't, and how your own work will be assigned and measured." The level of commitment to incorporate this one planning process as the basis for all others has raised the level of participation accordingly.

## *Lessons Learned*

While each of the programs engaged in a strategic planning process of their own, the common vision and facilitation of the process, and a staggered timeline allowed many of the lessons learned in one process to be transferred to other programs, and should aid future iterations.

### **Consistency and variation**

The similarity in process, where each program develops goals, objectives, strategies, and activities, and then conducts prioritization, highlights consistency over variation. Thus where historically many programs would focus solely on what distinguished their program from another, they now had tools for coordination and partnering.

### **Learning takes time**

Yet despite the similarities and consistencies found, we realized that everybody has to find the value in the process themselves. This fundamental process of learning could not be transferred. Furthermore, this learning takes time and the process must allow time for the strategic planning groups to revisit discussions and decisions. This is particularly true early on, when the group is first beginning to work with new language, concepts and personalities.

### **Measures come later**

Our process design, and current practices suggests that measures be developed only after prioritization has occurred and level of effort is assigned. In this way we can ensure that we are developing true environmental measures and indicators for the activities and strategies we know we will employ. At the end of the process, however, we found the groups had tired of planning and were ready to move into implementation. This was particularly difficult since the development of environmental indicators is likely to be as challenging as the strategic planning process itself.

### **How to stop work**

In as much as a goal of the process was to identify the actions we would no longer engage in, we still haven't figured out how to stop major pieces of work. While we're making

progress on disinvesting, we still need to clear the way for certain work to stop or be transferred to another agency or to other entities. We need to make better practice of shifting, not just assigning work on top of other work.

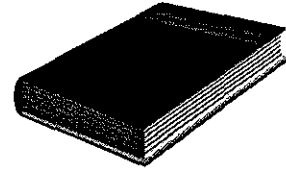
**More public involvement**

Finally, the public involvement in this iteration of strategic planning has been limited to those with existing interest in DEQ activities. In so doing, we lose the opportunity for expanding that interest group and forming more partnerships with other agencies. Future iterations of the strategic planning process will emphasize these partnership opportunities.

## Guide to the Strategic Plan

### *Organization of document*

This document is organized into two parts. Part I provides an explanation of why and how DEQ prepared its strategic plan. This part explains DEQ's major goals and objectives and what indicators and measures it will use to determine if it is making progress toward those goals. Part II provides more detail on the specific activities DEQ will engage in to achieve its goals and objectives. Output measures from these activities and actual level of effort invested into each of the activities is included.



### *Definition of terms*

#### **Goal**

The overall long-range agency purpose; the condition of the environment we are trying to achieve.

#### **Objective**

Specific, Measurable, Achievable, Realistic and Time (SMART) components of a goal; describes what is to be accomplished, expressed in measurable terms or levels of performance within a specified time frame or by a targeted deadline.

#### **Strategy**

Means or methods to achieve objectives which combine and employ a group of actions or activities to achieve goals and objectives

#### **Activity**

Specific activities, tasks, or steps which enable strategies that will be used to achieve objectives.

#### **Prioritization Criteria**

Criteria used to select and prioritize objectives, strategies, and activities; based on agency values and agreed to by each program's strategic planning group.

**Performance measures:**

Measures of progress of strategic plan implementation and success that come in three forms: output measures, outcome measures, and environmental indicators.

**Output Measure:** immediate products of actions; short term results

**Outcome Measure:** the longer-term result or outcome of the action outputs; information that measures progress toward meeting goals and objectives

**Environmental Indicator:** a measure (or group of measures) which indicates trends in the environment overall

**Core Performance Measure (CPM):** measures developed and agreed to by EPA and ECOS

**Level of Effort (LOE)**

The actual staff time dedicated to specific activities.

## CROSS-PROGRAM STRATEGIC DIRECTIONS

### *Cross-Program Priorities*

One of our guiding principles is to increase cross-media and cross-program coordination where such activity will result in a better environmental result or in increased efficiency within the agency. There are several ways we can go about improving cross-media coordination:

- by issue (i.e., multiple programs looking at a given environmental problem)
- by process or function (i.e., changing our work practices to incorporate cross-media considerations), or
- by geography (i.e., identifying environmental conditions in a geographic region and responding accordingly)



We plan to implement cross-media projects on a limited basis during the next two years. At the conclusion of projects in each of the following areas, we will evaluate and implement changes in policy and work practices.

#### Sediments (issue)

We are looking at wastes from process washwaters and run-off waters as they settle into waterway sediments and the cumulative affect of sediments on riparian areas and aquatic species health. We are looking at preventing deposition, and appropriate management and disposal options for contaminated sediments.

#### Information and Data Systems (function)

We are integrating our existing data systems into a single data system that will make integrated information from all programs available to the public. Through integrated systems, we will be able to make better environmental decisions.

#### Public Involvement in Permits (function and geographic)

Existing public involvement procedures notify the public after a draft of the permit has already been developed with consultation with the regulated facility. We are currently examining this process to identify points where public involvement or comment can be considered along with input from the regulated facility.

Environmental Justice (geographic)

Environmental equity, or justice, entails the fair treatment and meaningful involvement of all people regardless of race, age, gender, national origin, education, or income level in the development, implementation, and enforcement of environmental laws, regulations, and policies. We are working on ways to eliminate disproportionate environmental impacts on low income and minority populations.

Pollution Prevention (issue and function)

We believe pollution prevention should be a part of all the work it does. We are constantly seeking new information and research on methods to prevent pollution that can be shared with the regulated community. Using a "grass-roots" approach, a cross-functional team of permit-writers, inspectors, and policy-writers has been working together for over a year to raise awareness and knowledge of pollution prevention.

Green Permits/Environmental Management System Incentives Project (function)

We also desire to provide incentives to regulated facilities who demonstrate environmental excellence and achieve environmental results that are significantly better than otherwise provided by law. Such experiments were authorized through the Green Permits legislation of the 1997 legislative session. Through the Environmental Management System Incentives Project, we are exploring one approach that we believe will achieve superior environmental results. This approach is based on the use of environmental management systems such as ISO 14001.

*Other cross-media work to be determined with stakeholder input.*

*Indicators/Outcome Measures*

*To be developed with stakeholder input*

## PROGRAM STRATEGIC DIRECTIONS

Through its primary functions of compliance assurance, technical assistance, education and enforcement, we are responsible for protecting and enhancing Oregon's water and air quality and for managing the proper disposal of solid and hazardous wastes. We rely on several advisory committees of citizens and government officials to help guide its decision-making.

DEQ consists of 675 scientists, engineers, technicians, administrators, clerks and environmental specialists. Our headquarters are in Portland with regional administrative offices in Bend, Eugene, and Portland; and field offices in Baker City, Coos Bay, Grants Pass, Medford, Pendleton, Roseburg, Salem, and The Dalles. A pollution-control laboratory operates on the Portland State University campus.

The **Air Quality Program** regulates some 1,000 sources of industrial air pollution through permits. We operate a vehicle inspection program in the Portland area and in the Rogue Valley; develops control strategies to reduce pollutants in cities that do not meet clean air standards; and protects the public from asbestos in buildings that are being demolished or remodeled.

The **Water Quality Program** sets and enforces water quality standards and monitors 19 river basins for water quality. We also monitor and assess groundwater and implement strategies to protect this valuable resource. Oregon law prohibits discharging pollution into Oregon water without a DEQ permit. More than 360 waste discharges from city sewage treatment plants and industrial facilities are regulated by permits. We develop strategies to reduce pollution carried by stormwater runoff from urban areas, agriculture, forest practices and construction. The program provides loans to local governments for sewage treatment systems.

Through our **Hazardous Waste Program**, we oversee Oregon's only hazardous waste landfill located at Arlington and regulate hazardous waste disposal from the point of origin until final disposal. The program emphasizes pollution prevention techniques and offers technical assistance to businesses to minimize the amount of hazardous waste generated. Our **Solid Waste Program** promotes solid waste reduction education and implements a statewide recycling law that requires cities to provide curbside recycling collection and reduce garbage volume going into landfills. Solid waste landfills are regulated by DEQ permits, which set requirements for design, operation and monitoring. The **Tanks Program** regulates underground storage tanks, a major threat to the environment because of the potential for tank contents to leak and pollute groundwater. The **Environmental Cleanup Program** maintains an inventory of all sites in the state with a confirmed release of hazardous material into the environment. We assess these sites for potential threats to human health and the environment, and, where appropriate, supervises development and implementation of cleanup strategies.

## SUMMARY OF AIR QUALITY STRATEGIC DIRECTIONS

In the Air Quality program, we have used the strategic planning process to establish goals and objectives, strategies and activities for achieving those objectives. The process enabled us to identify the challenges we face in achieving those goals, and to make changes to overcome those challenges.



### Challenges

- **Maintaining clean air:** We have made a lot of progress in improving air quality over the last 20 years and are now meeting the federal standards in all areas of the state. The challenge now is to ensure that these areas remain clean in the face of tremendous population growth.
- **Keeping clean areas clean:** Growth is also chipping away at clean air in places that have not violated federal standards. We are working with communities to develop prevention plans and take voluntary actions now to prevent deterioration of air quality.
- **Addressing new federal standards:** We have a major challenge ahead to deploy new monitors to find out how we fare against EPA's new standards for ozone and very fine particulates. We must also take steps now to prevent violations of these new standards.
- **Addressing hazardous air pollutants:** We are making progress in implementing the federal hazardous air pollutant (HAP) program which requires stringent technology-based controls on major sources. However, we now need to turn our attention to possible health impacts from HAP emissions that are not subject to the federal program, and develop place-based approaches to addressing HAP risk.
- **Improving visibility:** The ability to see the mountains and enjoy our national parks and forests is consistently ranked high by Oregonians. With population growth and open burning, this value is under more pressure than ever before.

### Changes Ahead

- **Area and mobile sources:** Greater emphasis and resources focused on reducing emissions from area sources and mobile sources within statutory and funding constraints, while maintaining an effective point source control program.
- **New approaches to reducing emissions:** Supplement regulatory programs by promoting and providing education, technical assistance, pollution prevention, and other innovative reduction and prevention efforts designed to reduce or prevent the impacts of air pollution.
- **Better science:** Continue to enhance the scientific basis of our programs through monitoring, modeling and other tools that improve our understanding of Oregon's air quality, emphasizing new federal ambient air quality standards, toxic air emissions, and visibility impacts.



- **Better service:** Continue to improve customer service by providing information to the public, effectively responding to complaints, improving technical assistance and compliance assurance. We also need to work together with local governments, business, citizens and other arms of DEQ to prevent pollution and find place-based solutions to environmental problems.

### *Goals*

Clean, healthy air for all Oregonians.

No degradation of Oregon air quality.

### *Environmental Indicators*

Number of Oregonians living in areas that meet the National Ambient Air Quality Standards.

Trends in emissions of Hazardous Air Pollutants

Trends in emissions of criteria pollutants and visibility

Degree of equity in air quality protection afforded to all classes of Oregonians

*Others to be developed with public participation*

### *Objectives*

By 2003, identify non-attainment areas in the state and achieve compliance with NAAQS.

By 2003, make progress toward identifying areas of the state with potential AQ problems and undertake preventive and corrective measures.

By 2003, increase public involvement in and public awareness of Air Quality programs.

By 2003, reduce emissions and public health risk from non-criteria pollutants (demonstrate decreasing trend in emissions).

Maintain and enhance (current baseline or better) aesthetic value of air quality.

Reduce emissions wherever and whenever possible.

By 2000, ensure system support for all AQ program objectives.

## *Draft Outcome Measures*

By 2003, identify non-attainment areas in the state and achieve compliance with NAAQS.

- Number of areas of the state, and associated population, where AQ problems have been identified.
- Number of areas of the state, and associated population, where AQ problems have been identified and a determination has been made of attainment/nonattainment status

By 2003, make progress toward identifying areas of the state with potential AQ problems and undertake preventive and corrective measures.

- Number of areas in the state:
  1. surveyed to determine air quality problems
  2. identified as having air quality problems
  3. for which preventive and corrective measures have been developed

By 2003, increase public involvement in and public awareness of Air Quality programs.

- Public attitude about AQ after implementation of advertising and outreach about air quality values.

By 2003, reduce emissions and public health risk from non-criteria pollutants (demonstrate decreasing trend in emissions).

- Trend in air quality for non-criteria pollutants
- Number of sources with operational controls in place

Maintain and enhance (current baseline or better) aesthetic value of air quality.

- Trend in visibility in Oregon's 12 Class One Wilderness Areas and the Columbia Gorge

Reduce emissions wherever and whenever possible.

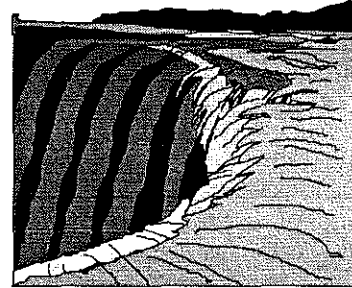
- *to be developed*

By 2000, ensure system support for all AQ program objectives.

- *to be developed*

## SUMMARY OF WATER QUALITY STRATEGIC DIRECTIONS

In the Water Quality program, we have used the strategic planning process to establish goals and objectives, strategies and activities for achieving those objectives. The process enabled us to identify the challenges we face in achieving those goals, and to make changes to overcome those challenges.



Oregon DEQ's Water Quality Program focuses on protecting the designated beneficial uses of waterbodies. These beneficial uses are actual, identified uses established for each basin by the state's Water Resources Commission. Major beneficial use categories include: domestic and industrial water supplies; fisheries; aquatic life; wildlife; agriculture; navigation; hydroelectric power; recreation and aesthetics.

### Challenges

- **Putting new people to work:** The Healthy Streams Partnership calls for establishing TMDLs (Total Maximum Daily Loads) for streams as identified by the 303(d) list of water quality limited waterbodies. Effective and efficient use of new staff to meet this commitment will be a top agency and Water Quality Division priority.
- **Non-point source impacts:** The agency must deal with many issues at the same time to implement measures protective of water quality standards. These responsibilities range from stormwater management to 401 certification of Forest Service grazing permits.
- **Protecting water supplies:** Managing groundwater and drinking water protection efforts will get increasing emphasis as DEQ becomes more involved with drinking water concerns..
- **Endangered Species:** Continuing progress on agency commitments contained in the Oregon Plan for Salmon and Watersheds will be of critical importance to salmon, and now steelhead, recovery.

### Changes Ahead

- **Focus on water quality:** The emphasis of the Water Quality program is shifting from technology-based controls, i.e. predetermined wastewater quality achievable through application of treatment technology, to water quality-based controls, wherein individual point and non-point source discharges are managed based on how they effect the receiving waters. This shift in emphasis is supported by making specific evaluations and assessment of water quality and designating those waters not meeting standards or protecting beneficial uses.
- **Geographic-based work:** DEQ's reorganization a few years ago began the process of moving staff closer to communities and their work. The Oregon Plan provided yet

another opportunity through the formation of basin work teams focused on salmon recovery. In the future, the watershed, the basin and the sub-basin will define the borders for many agency water-quality efforts.

- **Partnerships prevail:** Reaching the goal of protecting all water quality beneficial uses will not be accomplished by DEQ alone, but in conjunction with other public agencies, communities and involved Oregonians.

### *Goal*

All waters of the state meet designated beneficial uses for fishing, swimming, drinking, etc.

### *Environmental Indicators*

Percent of assessed waterbodies that protect public health and the environment by supporting: a) fish and shellfish consumption b) safe recreation, and c) healthy aquatic life use designations. (CPM)

Percent of assessed rivers and estuaries with healthy aquatic communities. (CPM)

Percent change of selected substances found in surface water. (CPM)

Trends in pesticide residues in groundwater at several representative locations. (CPM)

*Others to be developed with public participation.*

### *Objectives*

By 2005, measurably reduce pollutant loading or demonstrate improving water quality in x percent of assessed groundwater and surface waters that need to be improved.

By 2005, protective actions will be initiated in at least \_\_\_ percent of known clean groundwater and surface waters.

By 2003, active programs of community participation and leadership will be in place in all basins to meet water quality objectives.

By 2005, characterize and where possible determine trends in water quality for 10% of groundwater and surface waters for which inadequate information currently exists.

By 2000, administrative systems and funding will be in place to effectively and efficiently support achievement of environmental objectives.

## *Draft Outcome Measures*

By 2005, measurably reduce pollutant loading or demonstrate improving water quality in x percent of assessed groundwater and surface waters that need to be improved.

- % of watersheds with toxic pollutant loadings at or less than permitted limits. (CPM)
- % of facilities implementing wet weather control measures. Where available, report the annual pollutant loadings of key parameters associated with wet weather sources. (CPM)
- # of stream segments showing water quality benefits as a result of clean water state revolving fund investments. (CPM)
- Change over time in pesticide residue levels at selected representative points. (CPM)

By 2005, protective actions will be initiated in at least x percent of known, clean groundwater and surface waters.

- % of assessed waterbodies that protect public health and the environment by supporting: a) fish and shellfish consumption b) safe recreation, and c) healthy aquatic life use designations. (The states and tribes designate uses for the waterbodies within their jurisdiction.)
- % of assessed rivers and estuaries with healthy aquatic communities
- % change of selected substances found in surface waters

By 2003, active programs of community participation and leadership will be in place in all basins to meet water quality objectives.

- *to be developed*

By 2005, characterize and where possible determine trends in water quality for 10% of groundwater and surface waters for which inadequate information currently exists.

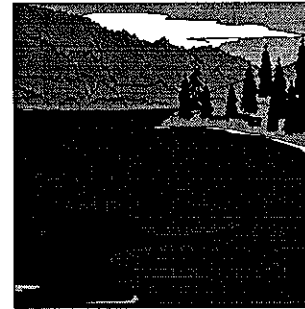
- *to be developed*

By 2000, administrative systems and funding will be in place to effectively and efficiently support achievement of environmental objectives.

- *to be developed*

## SUMMARY OF WASTE MANAGEMENT AND CLEANUP STRATEGIC DIRECTIONS

In the Waste Management and Cleanup programs, we have used the strategic planning process to establish goals and objectives, strategies and activities for achieving those objectives. The process enabled us to identify the challenges we face in achieving those goals, and to make changes to overcome those challenges.



### Challenges

- **Reaching the next level of gains:** Many of the “easy” gains have been achieved through regulatory controls based along administrative program lines (e.g., solid waste, hazardous waste, tanks, and cleanup). However, the next level of environmental gain will be achieved through the recognition that actions of the varied waste programs often have simultaneous impact on the same environmental goals. To reflect this, the waste programs have organized their strategic plan by three main environmental goal areas: minimizing/preventing waste and toxics generation, managing wastes and toxics safely, and cleaning up releases.
- **Cross-media implementation:** More attention must focus on streamlining overlapping regulations and reporting requirements; addressing issues of cross media transfer of pollutants (e.g., through wastewater generation, sewer dumping), and coordination with programs that have overlapping regulatory universes (e.g., conditionally exempt small quantity generators).
- **Measuring success:** Extensive effort will be made during the implementation of this plan to develop reasonable methods for reflecting the impact that prevention actions have on preventing environmental degradation, including prevention of waste generation and toxics use.
- **Program transitions:** Facilities now requiring corrective action oversight by the HW Program will be shifted to oversight by the Cleanup Program. This will encourage a better use of agency resources and consistency in application of cleanup standards statewide.
- **Preventing waste generation:** The Solid Waste Program recycling efforts are now focused on commercial generators, and organics reuse (composting). Specific key challenges include: Current “entombed waste technology” ensures waste will be present for generations; the varied nature of commercial generators make targeted outreach and education efforts more difficult; and waste tires continue to pile up in parts of the state without a reliable system to utilize them.
- **Tank upgrade deadline:** The Underground Storage Tank program has incorporated the clear objectives associated with the requirement to upgrade, replace or close most commercial tanks by the December 22, 1998 deadline.
- **Contaminated site management:** The main challenges for the Cleanup Program remain the number of sites that pose significant risk to human health and the

environment due to contamination, and the number of properties that are underutilized due to perceived or real contamination. Efforts to address these issues include a continued focus on cleaning up sites in order of rough priority based on human health and environmental exposures to contamination. To address the desire to place properties back into commercial or residential use, the Cleanup Program will increase the opportunities available to expedite remediation at Brownfield sites and enhance redevelopment.

### Changes Ahead

- **Minimization will be job 1:** Over the longer term, as cleanups progress, the waste programs will work to shift the balance more towards minimization efforts, thereby, focusing on preventing future waste management and cleanup issues.
- **Managing small generators:** Large numbers of generators create small quantities of hazardous waste that may not be handled in the best manner for the environment. Additional emphasis will be placed on increasing the availability and use of technical assistance provided by the program, focusing on key geographic areas, or high priority industries or pollutants.
- **Proper tank operation:** This planning process also addresses related cleanup projects that will continue beyond 2005 and helps focus attention on the need for increased emphasis of proper operation of tanks post-1998. The strategic plan will be a critical part of an evaluation of the long-term responsibilities and funding for the tank program that is expected to be completed in 1999.
- **Help from our friends:** Greater emphasis will be placed on education, outreach and partnering efforts to leverage other publics for their assistance in achieving the environmental goals. Partnering with local governments, other state and federal agencies, the general public, and the regulated community is an area in which major gains are expected. Coordinated efforts in all areas with these entities will ensure better coverage of the issues of concern, without duplication of effort or conflicting messages.

### *Goals*

1. **Minimization/Prevention:** To reduce the use of toxic chemicals or generation of hazardous substances, and hazardous and solid wastes.
2. **Safe Management:** To minimize exposures and releases through appropriate management of toxic chemicals, hazardous substances, and hazardous and solid wastes.
3. **Cleanup:** To remedy the danger associated with toxic chemicals, hazardous substances, and hazardous and solid waste that have been released to the environment and are uncontrolled.

## *Environmental Indicators*

*To be developed in coordination with the other program offices and with public participation.*

### *Programs Included*

The Waste Management and Cleanup Division includes the Hazardous Waste, Solid Waste, Tanks, and Cleanup programs.

### *Objectives*

Each WMC program has organized their environmental objectives around the three WMC goals listed above, except for the following foundation objective which is applicable to all WMC programs. See attached diagram for a graphical representation of the programs' interrelationships.

#### Foundation Objective

By 2000, align WMC foundation to support achievement of the environmental objectives by addressing issues of employee growth and development, workplace atmosphere, diversity, long term and stable funding and equipment needs.

#### Minimization/Prevention Goal

*HW:* By 2003, decrease hazardous waste generation using baseline year 1993.

*HW:* By 2003, decrease toxics use, using baseline year 1993.

*SW:* By 2005, reduce the amount of per capita solid waste generated.

*SW:* By 2000, achieve a 50% recovery rate.

*Tanks:* By 12/22/98, reduce the potential for releases from all existing, active, regulated USTs through replacement, upgrade, or temporary closure.

*Tanks:* Reduce the potential for releases from new UST installations by meeting UST technical requirements.

*Tanks:* Reduce the potential for new releases from inactive regulated and non-regulated USTs through proper decommissioning.

*Tanks:* Reduce the amount of waste generated from UST cleanup activities.

*Cleanup:* By 2003, decrease the incidence of spills/releases which impact human health and the environment.



### Safe Management Goal

*HW:* By 2003, increase compliance with RCRA.

*HW:* By 2003, increase implementation of safe management practices beyond RCRA requirements.

*SW:* By 2003, 100% of solid waste entering the SW system will be managed in compliant facilities.

*SW:* As of 1/98, no groundwater contamination will be detected from the deposition of waste in new solid waste disposal facilities.

*SW:* By 2003, reduce the risk posed by entombed waste technology.

*Tanks:* All regulated USTs will be operated in compliance with technical and financial responsibility requirements as of 12/22/98.

*Tanks:* All UST related wastes generated will be managed in compliance with regulations.

### Cleanup Goal

*Overarching Cleanup Objective:* To align cleanup approaches overtime to encourage consistency and to create efficiencies.

*HW:* By 1999, facilitate and implement the transition of Corrective Action (CA) sites from the Hazardous Waste Program to the Cleanup Program, at all appropriate sites.

*HW:* Ensure appropriate cleanup of all newly discovered releases.

*SW:* Within 5 years of a confirmed release, environmentally proactive strategies will be in place and operational.

*SW:* Ensure cleanup of significant unauthorized disposal sites within 1 year of identification.

*Tanks:* By 2005, effectively reduce overall risk from UST release sites.

*Tanks:* Cleanups will be initiated and reported on \_\_\_% of the projected \_\_\_ regulated UST release sites by \_\_\_\_.

*Tanks:* By \_\_\_ complete corrective action protective of human health and the environment for all pre- 1/1/98 high risk UST release sites.

*Tanks:* By \_\_\_ or within \_\_\_ years of discovery, complete corrective action protective of human health and the environment for all post - 1/1/98 high risk UST release sites.

*Tanks:* Initiate oversight within \_\_\_ months and complete corrective action protective of human health and the environment within \_\_\_ years for all voluntary/brownfield UST cleanups.

*Cleanup:* By 2003, identify all known sites that could substantially impact sensitive environments.

*Cleanup:* By 2003, remediate all high-priority sites known as of 1/1/98.

*Cleanup:* After 1/1/98, implement remedial actions at high-priority sites within four years of discovering them.

*Cleanup:* Each year, beginning in 1999, use partnership agreements such as Voluntary Cleanups and Prospective Purchaser Agreements to reduce the backlog of ECSI sites requiring further action.

Goal Statement	<p align="center"><b>Minimization/Prevention</b></p> <p>To reduce the use or toxic chemicals or generation of hazardous substances, and hazardous and solid wastes.</p>	<p align="center"><b>Safe Management</b></p> <p>To minimize exposures and releases through appropriate management of toxic chemicals, hazardous substances, and hazardous and solid wastes.</p>	<p align="center"><b>Cleanup</b></p> <p>To remedy the danger associated with toxic chemicals, hazardous substances, and hazardous and solid waste that have been released to the environment and are uncontrolled.</p>
<b>Objectives</b>	<p>• By 2000, align WMC foundation to support achievement of the environmental objectives by addressing issues of employee growth and development, workplace atmosphere, diversity, long term and stable funding and equipment needs.</p>		
			<p>• To align cleanup approaches over time to encourage consistency and to create efficiencies.</p>
HW	<ul style="list-style-type: none"> <li>• By 2003, decrease toxics use, using baseline year 1993.</li> <li>• By 2003, decrease hazardous waste generation using baseline year 1993.</li> </ul>	<ul style="list-style-type: none"> <li>• By 2005, increase compliance with RCRA.</li> <li>• By 2003, increase implementation of safe management practices beyond RCRA requirements.</li> </ul>	<ul style="list-style-type: none"> <li>• By 1999, facilitate and implement the transition of corrective action sites from the Hazardous Waste Program to the Cleanup Program, at all appropriate facilities.</li> <li>• Ensure appropriate cleanup of all newly discovered releases.</li> </ul>
SW	<ul style="list-style-type: none"> <li>• By 2005, reduce the amount of per capita solid waste generated.</li> <li>• By 2000, achieve a 50% recovery rate.</li> </ul>	<ul style="list-style-type: none"> <li>• As of 1/98, no groundwater contamination will be detected from the deposition of waste in new solid waste management facilities.</li> <li>• By 2003, 100% of solid waste entering the SW system will be managed in compliant facilities.</li> <li>• By 2003, reduce the risk posed by entombed waste technology.</li> </ul>	<ul style="list-style-type: none"> <li>• Within 5 years of a confirmed release, environmentally protective strategies will be in place and operational.</li> <li>• Ensure cleanup of significant unauthorized disposal sites within 1 year of identification.</li> </ul>
Tanks	<ul style="list-style-type: none"> <li>• By 12/22/98, reduce the potential for releases from all existing, active, regulated USTs through replacement, upgrade, or temporary closure.</li> <li>• Reduce the potential for releases from new UST installations by meeting UST technical requirements.</li> <li>• Reduce the potential for new releases from inactive regulated and non-regulated USTs through proper decommissioning.</li> <li>• Reduce the amount of waste generated from UST cleanup activities.</li> </ul>	<ul style="list-style-type: none"> <li>• All regulated tanks will be operated in compliance with technical and financial requirements as of 12/22/98.</li> <li>• All UST related wastes generated will be managed in compliance with regulations.</li> </ul>	<ul style="list-style-type: none"> <li>• By 2005, reduce overall risk from UST release sites.</li> <li>• Cleanups will be initiated and reported on ___ % of the projected ___ regulated UST releases sites by ___.</li> <li>• By ___ complete corrective action protective of human health and the environment for all pre-1998 high risk UST release sites.</li> <li>• By ___ or within ___ years of discovery, complete corrective action protective of human health and the environment for all post- 1998 high-risk UST release sites. Initiative oversight within ___ months and complete corrective action protective of human health and the environment within ___ years for all voluntary/brownfield UST cleanups.</li> </ul>
CU	<ul style="list-style-type: none"> <li>• By the year 2003, decrease the incidence of spills/releases which impact human health and the environment.</li> </ul>		<ul style="list-style-type: none"> <li>• By 2003, identify all known sites that could substantially impact sensitive environments.</li> <li>• By 2003, remediate all high-priority sites known as of 1/1/98.</li> <li>• After 1/1/98, implement remedial actions at high-priority sites within four years of discovering them.</li> <li>• Each year, beginning in 1999, use partnership agreements such as Voluntary Cleanups and Prospective Purchaser Agreements to reduce the backlog of ECSI sites requiring further action.</li> </ul>

## SUMMARY OF HAZARDOUS WASTE PROGRAM STRATEGIC DIRECTIONS

### *Objectives*

#### Minimization/Prevention

By 2003, decrease hazardous waste generation using baseline year 1993.

By 2003, decrease toxics use, using baseline year 1993.

#### Safe Management

By 2003, increase compliance with RCRA.

By 2003, increase implementation of safe management practices beyond RCRA requirements.

#### Cleanup

By 1999, facilitate and implement the transition of Corrective Action (CA) sites from the Hazardous Waste Program to the Cleanup Program, at all appropriate sites.

Ensure appropriate cleanup of all newly discovered releases.

### *Draft Outcome Measures*

#### Minimization/Prevention

By 2003, decrease hazardous waste generation using baseline year 1993.

- Number of hazardous waste reduction recommendations implemented due to a compliance inspection, relative to the degree of implementation difficulty and size of the facility.
- Number of hazardous waste reduction recommendations implemented due to a Waste Reduction Assistance Program ("WRAP") site visit, relative to the degree of implementation difficulty and size of the facility.
- Percent change in quantity of hazardous waste generated by Large Quantity Generators ("LQGs") and Small Quantity Generators ("SQGs") since 1993.
- Percentage of large and small quantity hazardous waste generators who have reduced their status in the subsequent year.
- Percentage of hazardous waste generated by LQGs and SQGs, by management method, since 1993.

- Number of registered generators in voluntary “beyond RCRA” programs.

By 2003, decrease toxics use, using baseline year 1993.

- Number of toxics use reduction recommendations implemented due to a compliance inspection relative to the degree of implementation difficulty and size of the facility.
- Number of toxics use reduction recommendations implemented due to a WRAP site visit relative to the degree of implementation difficulty and size of the facility.
- Percent change in quantity of toxics used over time since 1993.
- Percentage of facilities that have exited the Toxics Use Reduction (“TUR”) program annually since 1993.
- Change in quantity of toxics used each year by facilities subject to TUR planning requirements.
- Percentage of TUR planners who have received an on-site visit, developed a TUR plan, and implemented a toxics use reduction or hazardous waste reduction opportunity identified in their plan that was not recommended during a site visit.

#### Safe Management

By 2003, increase compliance with RCRA.

- Of the hazardous waste generators that receive compliance inspections during a calendar year, the percentage that correct all severe RCRA violations, documented as a result of those inspections, within 3, 6, 12, or 18 months from the date of the inspection.
- Of the hazardous waste generators that receive WRAP/Technical Assistance (“TA”) site visits during a calendar year, the percentage that implement all severe RCRA compliance recommendations made as a result of those visits, within 3, 6, 12, or 18 months from the date of the site visit.
- Percentage of severe violations, documented during compliance inspections, corrected within 3, 6, 12, and 18 months from the date of the inspection.
- Percentage of severe violations, documented during WRAP/TA site visits, corrected within 3, 6, 12 and 18 months from the date of the site visit.
- The percentage of inspections and complaints, on an annual basis, where at least one or more “severe” violations were observed.

- The percentage of WRAP site visits, on an annual basis, where at least one or more “severe” violations were observed.
- Annual number of reported hazardous waste and used oil spills and releases and quantity of waste spilled by generator type, facility (industry) type, and waste type.
- Percentage of hazardous waste, used oil, and universal waste facilities that have been inspected, and are operating in significant compliance, per year.
- Number of controls at permitted facilities that are put in place to prevent releases to air, soil and groundwater annually.
- Quantity of hazardous waste, universal waste and used oil diverted, per year, from unsafe, noncompliant management practices, as a result of an inspection/TA site visit.

By 2003, increase implementation of safe management practices “beyond RCRA”.

- Percentage of hazardous waste generators annually that implement “beyond RCRA” safe management recommendations received as a result of an inspection or complaint investigation.
- Percentage of hazardous waste generators annually that implement “beyond RCRA” safe management recommendations received as a result of a WRAP site visit.
- Percentage of Conditionally Exempt Generators (“CEGs”) annually that implement at least one “beyond RCRA” safe management recommendation received as a result of an inspection or a complaint investigation.
- Percentage of CEGs annually that implement at least one “beyond RCRA” safe management recommendation received as a result of a WRAP/TA site visit.
- Quantity of hazardous waste per year collected at non-commercial CEG/UW collection events and facilities that would otherwise be disposed of as MSW.
- Number of referrals from hazardous waste program to other DEQ media programs and other agencies, and number of referrals from other programs and agencies to hazardous waste program.

## Cleanup

By 1999, facilitate and implement the transition of Corrective Action ("CA") sites from the Hazardous Waste Program to the Cleanup Program, at all appropriate sites.

- Percentage of RCRA corrective action sites, identified as of 1/1/98, transferred to the Cleanup Program annually.

Ensure appropriate cleanup of all newly discovered releases.

- Percentage of new releases, discovered by Hazardous Waste Program on-site activities, that are referred to the most appropriate cleanup alternative per year.

*Foundation Objective:* By 2000, align WMC foundation to support achievement of the environmental objectives, by addressing issues of employee growth and development, workplace atmosphere, diversity, long term and stable funding and equipment needs.

*HW Program Foundation Sub-Objective:* By 2000, improve communication of hazardous waste program activities, responsibilities and regulatory information that provides on-going input, feedback, and education regarding minimization, safe management and cleanup

- Annually increase communication opportunities and their effectiveness with the regulated community.
- Annually increase communication opportunities and their effectiveness with the general public.
- Annually increase communication opportunities and their effectiveness with DEQ staff and other agencies.

*HW Program Foundation Sub-Objective:* By 2000, establish a continuous improvement infrastructure that supports continuous improvement to achieve minimization, safe management and cleanup.

- Continuously review and improve the hazardous waste program.

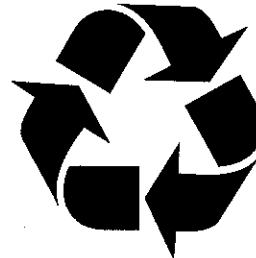
## SUMMARY OF SOLID WASTE PROGRAM STRATEGIC DIRECTIONS

### *Objectives*

#### Minimization/Prevention

By 2005, reduce the amount of per capita solid waste generated.

By 2000, achieve a 50% recovery rate.



#### Safe Management

By 2003, 100% of solid waste entering the SW system will be managed in compliant facilities.

As of 1/98, no groundwater contamination will be detected from the deposition of waste in new solid waste disposal facilities.

By 2003, reduce the risk posed by entombed waste technology.

#### Cleanup

Within 5 years of a confirmed release, environmentally proactive strategies will be in place and operational.

Ensure cleanup of significant unauthorized disposal sites within 1 year of identification.

### *Draft Outcome Measures*

#### Minimization/Prevention

By 2005, reduce the amount of per capita solid waste generated.

- *to be developed*

By 2000, achieve a 50% recovery rate.

- *to be developed*

#### Safe Management

By 2003, 100% of solid waste entering the SW system will be managed in compliant facilities.

- *to be developed*



As of 1/98, no groundwater contamination will be detected from the deposition of waste in new solid waste disposal facilities.

- *to be developed*

By 2003, reduce the risk posed by entombed waste technology.

- *to be developed*

#### Cleanup

Within 5 years of a confirmed release, environmentally proactive strategies will be in place and operational.

- *to be developed*

Ensure cleanup of significant unauthorized disposal sites within one year of identification.

- *to be developed*

## SUMMARY OF TANKS PROGRAM STRATEGIC DIRECTIONS

### *Objectives*

#### Minimization/Prevention

By 12/22/98, reduce the potential for releases from all existing, active, regulated USTs through replacement, upgrade, or temporary closure.

Reduce the potential for releases from new UST installations by meeting UST technical requirements.

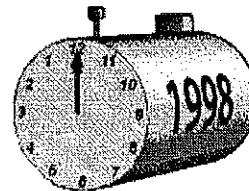
Reduce the potential for new releases from inactive regulated and non-regulated USTs through proper decommissioning.

Reduce the amount of waste generated from UST cleanup activities.

#### Safe Management

All regulated USTs will be operated in compliance with technical and financial responsibility requirements as of 12/22/98.

All UST related wastes generated will be managed in compliance with regulations.



#### Cleanup

By 2005, effectively reduce overall risk from UST release sites.

Cleanups will be initiated and reported on \_\_\_% of the projected \_\_\_ regulated UST release sites by \_\_\_\_\_.

By \_\_\_ complete corrective action protective of human health and the environment for all pre- 1/1/98 high risk UST release sites.

By \_\_\_ or within \_\_\_ years of discovery, complete corrective action protective of human health and the environment for all post - 1/1/98 high risk UST release sites.

Initiate oversight within \_\_\_ months and complete corrective action protective of human health and the environment within \_\_\_ years for all voluntary/brownfield UST cleanups.

## *Draft Outcome Measures*

### Minimization/Prevention

By 12/22/98, reduce the potential for releases from all existing, active, regulated USTs through replacement, upgrade, or temporary closure.

- *to be developed*

Reduce the potential for releases from new UST installations by meeting UST technical requirements.

- *to be developed*

Reduce the potential for new releases from inactive regulated and non-regulated USTs through proper decommissioning.

- *to be developed*

Reduce the amount of waste generated from UST cleanup activities.

- *to be developed*

### Safe Management

All regulated USTs will be operated in compliance with technical and financial responsibility requirements as of 12/22/98.

- *to be developed*

All UST related wastes generated will be managed in compliance with regulations.

- *to be developed*

### Cleanup

By 2005, effectively reduce overall risk from UST release sites.

- *to be developed*

Cleanups will be initiated and reported on \_\_\_% of the projected \_\_\_ regulated UST release sites by \_\_\_\_\_.

- *to be developed*

By \_\_\_\_ complete corrective action protective of human health and the environment for all pre- 1/1/98 high risk UST release sites.

- *to be developed*

By \_\_\_\_ or within \_\_\_\_ years of discovery, complete corrective action protective of human health and the environment for all post - 1/1/98 high risk UST release sites.

- *to be developed*

Initiate oversight within \_\_\_\_ months and complete corrective action protective of human health and the environment within \_\_\_\_ years for all voluntary/brownfield UST cleanups.

## SUMMARY OF CLEANUP PROGRAM STRATEGIC DIRECTIONS

### *Objectives*

#### Minimization/Prevention

By 2003, decrease the incidence of spills/releases which impact human health and the environment.

#### Cleanup

By 2003, identify all known sites that could substantially impact sensitive environments.

By 2003, remediate all high-priority sites known as of 1/1/98.

After 1/1/98, implement remedial actions at high-priority sites within four years of discovering them.



Each year, beginning in 1999, use partnership agreements such as Voluntary Cleanups and Prospective Purchaser Agreements to reduce the backlog of ECSI sites requiring further action.

### *Draft Outcome Measures*

#### Minimization/Prevention

By 2003, decrease the incidence of spills/releases which impact human health and the environment

- *to be developed*

#### Cleanup

By 2003, decrease the incidence of spills/releases which impact human health and the environment

- *to be developed*

By 2003, identify all known sites that could substantially impact sensitive environments.

- *to be developed*

By 2003, remediate all high-priority sites known as of 1/1/98.

- *to be developed*

After 1/1/98, implement remedial actions at high-priority sites within four years of discovering them.

- *to be developed*

Each year, beginning in 1999, use partnership agreements such as Voluntary Cleanups and Prospective Purchaser Agreements to reduce the backlog of ECSI sites requiring further action.

- *to be developed*

## KEY CONTACTS

For more information about this document, please contact:

### Strategic Planning Process

Helen Lottridge 503/229-6725  
Jennifer Yocum 503/229-5714  
Holly Schroeder 503/229-6785

### Air Quality

Andy Ginsburg 503/229-6480

### Water Quality

Jan Renfroe 503/229-5589

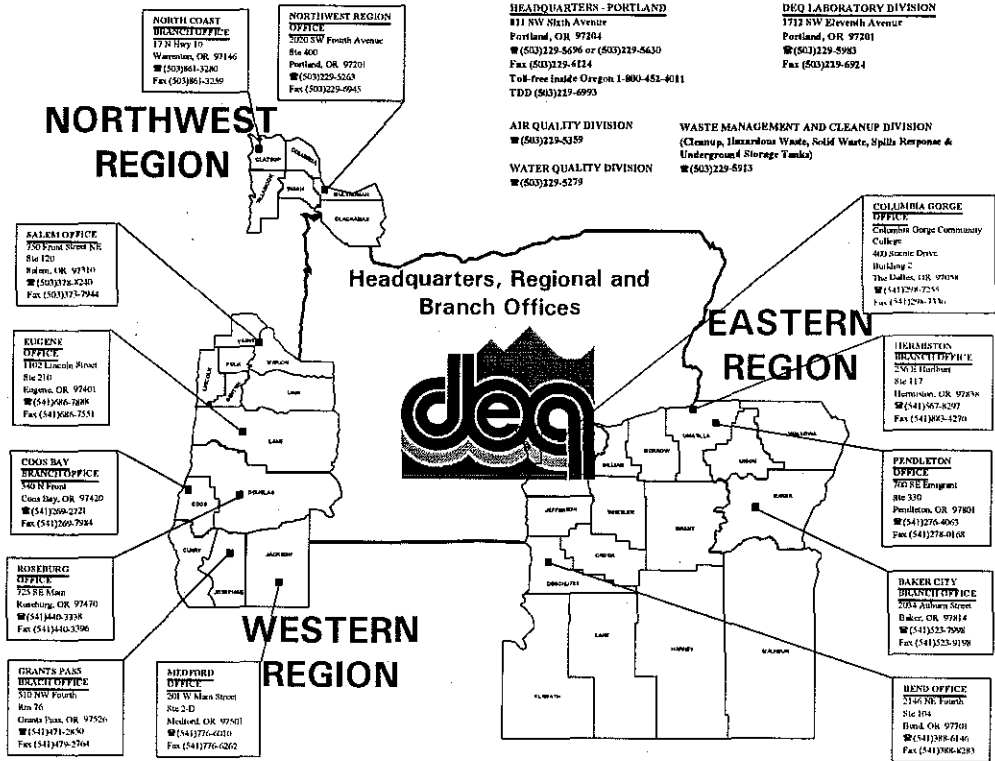
### Waste Management and Cleanup

Anne Price 503/229-6585

### Public Involvement

Jim Gladson 503/229-6271

**DEQ OFFICES**





HARDY MYERS  
ATTORNEY GENERAL



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DAVID SCHUMAN  
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE  
PORTLAND OFFICE

MEMORANDUM

DATE: February 6, 1998

TO: Environmental Quality Commissioners  
Langdon Marsh, Director, DEQ

FROM: Larry Knudsen   
Assistant Attorney General

SUBJECT: JELD-WEN Petition for Declaratory Ruling

BACKGROUND

On January 9, 1998, the Environmental Quality Commission heard oral arguments on a petition for a declaratory ruling filed by JELD-WEN, Inc. The petition asks the Commission to interpret the phrase "legally available" as it is used in OAR 340-71-160(5)(f).

The rule in question implements ORS 454.655(4). This section of the statute states that DEQ shall not issue a permit for a subsurface sewage disposal system "if a community or area-wide system is available which will satisfactorily accommodate the proposed sewage discharge." EQC's rule, in turn, states that a community or area-wide system is available if it is both physically and legally available. OAR 340-71-160(5)(f)

The rule provides that a system is "deemed legally available if the system is not under a Department connection permit moratorium and the sewerage system owner is willing and obligated to provide sewer service." OAR 340-71-160(5)(f)(B). JELD-WEN asks the Commission to conclude that a city sewage system owner is not willing to provide service if the owner requires annexation as a condition of service.

After hearing oral arguments and considering the memoranda of authorities provided by JELD-WEN and the Department, the Commission set this matter over for further discussion at its February meeting.<sup>1</sup> The Commission also requested that I provide written

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<sup>1</sup> JELD-WEN expressly agreed to this setover.

advice addressing the issue of whether the Commission has legal authority to require the City of Klamath Falls to provide sewer service to the JELD-WEN property without annexation.<sup>2</sup>

## LEGAL ANALYSIS

There are a number of legal provisions that allow the Commission or Department to require the construction of an area-wide sewage treatment system (including collectors). However, with the exception of the so-called "Threat to Drinking Water" statutes,<sup>3</sup> none of these statutes or rules appear to contemplate an order<sup>4</sup> that would require a city to provide sewage service outside of its territorial boundary without annexation.

### On-Site Program

As discussed in the oral arguments and briefs in this matter, ORS 454.655 and rules governing the on-site program specify that permits will not be issued for new subsurface sewage disposal systems if an area-wide system is available. Nothing in these statutes or the Commission's implementing rules purports to give the Commission authority to order an area-wide system to provide service, with or without annexation. Similarly, I found no record of a discussion of the annexation issue in the legislative history of this particular statute.<sup>5</sup>

### Health Hazard Abatement Law

In 1967, years before the adoption of the connection provisions in ORS 454.655, the legislature adopted the Health Hazard Abatement Law. ORS 222.840 to 222.915. These statutes provide a means to annex territory to a city without a vote or other consent of the affected residents when connection to a public sewer system is deemed necessary to remove

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<sup>2</sup> This question arose, in part, because the Commission was informed that it had previously ordered the City of Portland to provide sewer service to residents in the mid-Multnomah County area, and under that order, Portland was not permitted to require annexation as a condition of service.

<sup>3</sup> ORS 454.275 to ORS 454.380. These were statutes that were used in the Mid-Multnomah County proceedings discussed in footnote 2 above.

<sup>4</sup> This memorandum does not address the issue of whether local government or a prospective sewer service customer would have authority to seek a court order requiring service under other laws including the provisions of the state's land use laws in local ordinances, charters, or intergovernmental service agreements.

<sup>5</sup> It is worth noting, however, that ORS 454.655 was adopted in 1973 as part of a large bill (115 pages) addressing numerous environmental issues. Or Laws 1973, ch 835. Consequently, the absence of any relevant discussion in the legislative history is probably not remarkable.

or alleviate a danger to public health. ORS 222.855. The danger may be the result of a number of factors including inadequate subsurface sewage treatment facilities. ORS 222.850.

The Health Hazard Abatement law does not authorize the Commission to order sewer system connections. Rather, the statutes authorize annexation without a vote or property owner consent<sup>6</sup> if a health hazard is found and if construction of sewage treatment facilities or collection lines would remove or alleviate the hazard. ORS 220.900. The underlying assumption appears to be that, after annexation, the City can and will require property owners to connect to the system.

### **Threat to Drinking Water**

In 1981, the legislature adopted a group of statutes that are unofficially referred to as the "Threat to Drinking Water" laws. ORS 454.275 to 454.380. Under these statutes, the governing body of a city or county may propose to construct sewage treatment facilities to address a threat to drinking water.<sup>7</sup> ORS 454.285. If the proposal is made by a city, the "affected area" need not be within the city limits. The conditions that create such a threat are specifically defined in the statutes. ORS 454.275(6). Included is an area where more than 50 percent of the sewage is discharged to septic tanks or other on-site systems.

Once the Commission receives a copy of the proposal, it must investigate and conduct a hearing. ORS 454.295 and 454.300. If the Commission finds that a threat exists and that treatment works would remove or alleviate the threat, the Commission must order the local government to proceed with construction. ORS 454.305.<sup>8</sup> If the Commission orders the construction of sewage treatment facilities under this statute, the local government has the express statutory authority to require property owners to connect to the system. ORS 454.310.

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<sup>6</sup> The statutes establish provisions that must be followed before annexation is allowed. The City's governing body must propose annexation. ORS 226.860, 222.905. The Oregon Health Division must investigate, hold a hearing and prepare findings of fact. ORS 222.870 to 222.875. The Health Division's findings are then certified to the EQC. If a determination is made that the health hazard conditions will be removed or alleviated by connection to the sewer system, annexation may proceed. ORS 222.898 and 222.900. There are also provisions allowing area residents to propose an alternative plan for remedying the health hazard. ORS 222.885 and 222.890.

<sup>7</sup> By definition, the Threat to Drinking Water laws apply only "in any county with a population exceeding 400,000 according to the latest federal decennial census." ORS 454.275(4). As of the last census, only Multnomah County meets this definition.

<sup>8</sup> If this occurs, the local government may finance the treatment works with bonds or assessments against the benefitted property without a vote or other remonstrance proceedings. ORS 454.280.

In 1987, however, the legislature amended the Threat to Drinking Water laws to expressly limit local government's authority over fees charged for connections and service. Under ORS 454.375, the local government must provide the Commission with "documentation" establishing that connection and service fees are based on upon the actual costs using "reasonable cost-of-service sewer utility ratemaking principles." *Id.* Similarly, a city may not impose higher fees on connections outside the city boundary unless "there are documented cost causative factors to justify the differential." *Id.*<sup>9</sup> These statutory provisions could be construed to preclude forced annexation to the extent that annexation would significantly increase tax liabilities. But, of course, it is also possible to argue that these additional liabilities are not connection or service fees.

### Other Provisions

I believe that a court is likely to conclude that the EQC has statutory authority to adopt rules requiring a municipality to install sewers systems, including collection lines, when necessary to protect water quality. *See* ORS 224.232, ORS 454.235, ORS 468B.010 to 468B.025; *cf. Ochoco Const. v. DLCD*, 295 Or 422, 426 (1983) (an agency has powers necessarily implied from express powers). These statutes, though, remain largely untested.<sup>10</sup>

It is far from clear, however, that any of these authorities would extend to Commission orders requiring a municipality to provide service outside of its corporate boundaries. More importantly, the Commission generally has not adopted rules interpreting or implementing these powers. One notable exception is OAR 340-40-070 authorizing area-wide management orders for on-site sewage disposal in areas where groundwater is being degraded. But even here, the rule does not expressly address required connections to municipal systems, with or without annexation.

In 1991, the legislature adopted ORS 222.115. It expressly authorizes annexation contracts, i.e. agreements by which a city agrees to provide sewer or water service in exchange for a landowner's agreement to annex.<sup>11</sup> While this statute recognizes a right to require annexation in exchange for sewer services, it does not otherwise address the question

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<sup>9</sup> The Commission's Threat to Drinking Water order covering the mid-Multnomah County area was issued in 1986 prior to the adoption of this statute.

<sup>10</sup> In addition, any order directing a local government to construct and finance sewage treatment works would also raise issues under Measures 30 and 50.

<sup>11</sup> Petitioner questions the validity of this statute in light of subsequent decision in *Hussey v. City of Portland*, 64 F.3d 1260 (9th Cir 1260).

Langdon Marsh  
February 6, 1998  
Page 5

of whether the Commission or any other body can order connection in the absence of annexation.

### CONCLUSION

With the possible exception of orders issued under the Threat to Drinking Water laws, the Commission has no clear authority to require a city to provide sewer service to property outside its corporate boundaries. And, in this instance, the authority provided in the Threat to Drinking Water laws is not available. Arguably, the Commission might have the underlying statutory authority to create such a requirement under the general statutes regulating water pollution and sewage treatment systems. At present, however, the Commission has not adopted rules that would implement this authority.

c: Michael Huston  
Jay Waldron  
Susan Greco

LK:kv/LJK0783.MEM

**RESOLUTION  
OF THE  
MAPLEWOOD NEIGHBORHOOD ASSOCIATION**

February 15, 1998

**WHEREAS:** Vermont Creek, north and south forks, runs through the Maplewood Neighborhood;

**WHEREAS:** Vermont Creek is a tributary of Fanno Creek and is part of the Tualatin River system, designated a Water Quality Limited river by the federal Environmental Protection Agency;

**WHEREAS:** Serious pollution of both forks of Vermont Creek from the S.W. Community Center (SWCC) construction project has been repeatedly documented by citizen activists, Maplewood residents and the Oregon Department of Environmental Quality (DEQ) at sources that are readily visible during and after rains;

**WHEREAS:** The SWCC construction project and its site, Gabriel Park, are under direct management and control of the Portland Parks Bureau;

**WHEREAS:** Sediment-laden discharges of water have left the SWCC site to pollute both forks of Vermont Creek on numerous occasions in the winter of '97-'98 as recently as February 12 in spite of repeated public assurances by the Portland Parks Bureau that they are addressing the problems and have upgraded their efforts;

**WHEREAS:** The DEQ has issued to the city of Portland two letters of noncompliance with environmental laws and has statutory authority to issue an enforcement order and levy fines, and take other measures;

**WHEREAS:** Some sediment-laden waters exiting the SWCC site run overland through the Gabriel Park off-leash area picking up dog feces and additional silt on its way to the south fork of Vermont Creek within the park;

**WHEREAS:** The water pollution is a serious violation of Oregon Environmental Law, the federal Clean Water Act and standards of public health;

**WHEREAS:** The north fork of Vermont Creek is dependent on groundwater resources during the summer and is a perennial stream;

**WHEREAS:** The north fork of Vermont Creek formerly ran through the north-west corner of Gabriel Park under the SWCC building site and formerly was culverted and filled over, and the former stream channel collects and delivers groundwaters to the north fork of Vermont Creek;

**WHEREAS:** The Parks Bureau plans to relocate a storm drain through the intersection of SW 45th Ave. and SW Vermont St. which formerly hosted two gasoline stations and it is unknown if there is underground pollution from their tanks;

**WHEREAS:** Ponds have been installed on the SWCC site which gather storm and ground waters which are being pumped off site to Portland Bureau of Environmental Services (BES) facilities;

**WHEREAS:** Portland Parks and Recreation has a state-issued water right on Fanno Creek and therefore interest to protect the quantity and quality of the waters of Vermont Creek, and is responsible for having large quantities of water removed from the SWCC construction site thereby preventing the waters from recharging groundwater supplies and feeding Vermont Creek;

**WHEREAS:** The design of the SWCC increases the potential for future pollution of Vermont Creek;

**WHEREAS:** A group of 24 citizens, including Maplewood residents, has filed a Notice of Intent to Sue the Portland Parks Bureau if this pollution persists past March 8, 1998;

**WHEREAS:** The Maplewood Neighborhood Association desires immediate cessation of current and the potential for future water pollution to Vermont Creek from the SWCC construction project and waters entering Vermont Creek from the off-leash area; and

**WHEREAS:** The Maplewood Neighborhood Association desires the SWCC be designed, built and operated so that it does not ever negatively impinge on the quantity or quality of the waters of Vermont Creek.

**THEREFORE BE IT RESOLVED:** That the Maplewood Neighborhood Association:

1. Recognizes and applauds the efforts of the 24 citizens who have filed the Notice of Intent to Sue and commends those citizens for their extraordinary efforts to protect the environment of our neighborhood.
2. Urges the DEQ to undertake the following measures:
  - A. Issue a third letter of noncompliance to the Portland Parks Bureau;
  - B. Issue an enforcement order to cease and desist in all illegal pollution and levy stiff fines;
  - C. Do whatever is necessary to assure that there is no potential for pollution from underground gasoline tanks before the storm drain is relocated;

D. Review the SWCC design and operations, and make recommendations which, if implemented, would assure the SWCC's potential to pollute Vermont Creek is zero; and

E. Require and impose the execution of appropriate mitigation as provided for by the NPDES permit. The draft mitigation plan should be open to public comments and interested citizens notified.

3. Urges all applicable federal, state, regional and city agencies to strictly enforce all applicable environmental quality, water and public health laws, and that these agencies closely monitor progress toward on-going compliance.

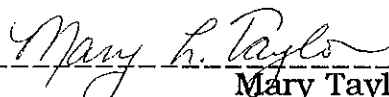
4. Urges the Portland Parks Bureau redesign and operate the SWCC as necessary to assure that the potential for future pollution of Vermont Creek is zero.

5. Urges the state Water Resources Department (WRD) to not permit removal of groundwater from the site at any time that could reduce summer flows of the north fork of Vermont Creek and to take any and all other measures as necessary to assure the quantity of waters in Vermont Creek.

6. That the DEQ, BES and public health agencies take any and all necessary measures to assure the current and ongoing quality of waters in Vermont Creek.

7. That the DEQ, WRD or BES implement a streamflow monitoring program in the north fork of Vermont Creek.

Passed this day of 02/15, 1998



-----  
Mary Taylor, Chair

Maplewood Neighborhood Association



Don Bain  
6935 SW 45th Ave.  
Portland, OR 97219-1506

2/14/98

Ms. Elinor Hall  
Administrator  
Oregon Health Division  
800 NE Oregon St.  
Portland, OR 97232

Dr. Gary Oxman  
Health Officer  
Multnomah County  
426 SW Stark St.  
Portland ,OR 97204

Dear Ms. Hall and Dr. Oxman:

We want to inform you of a public health hazard and to ask that you take corrective action. The hazard's source is the off-leash area in Southwest Portland's Gabriel Park where many people come from around the city to exercise their dogs. The off-leash area is located adjacent to the south fork of Vermont Creek and it's drainage flows into the creek. As you might imagine, dog feces and urine are present in great abundance in the off-leash area. When it rains there is a significant amount of runoff from the off-leash area which carries the urine and dissolved feces to the creek.

The sanitation problem is two-fold. First, the stream is being polluted. Just across the street from Gabriel Park and for miles downstream, Vermont Creek runs through residential neighborhoods where children playing in back yards risk serious illness. Moreover, Fanno Creek, which Vermont Creek empties into, is a trout bearing stream and efforts are underway to restore the natural range of this fishery. Pollution negates these efforts.

Second, the muddy off-leash area itself has become a public health hazard. Feces and urine have become mixed with mud. The dogs running through the mud become contaminated and in turn contaminate their owners, children and others who come into contact with this contaminated mud. It is carried on the dogs' fur and feet as well as the rags used to clean the dogs. Because there is no dog cleaning facility exists in the park other than the creek, owners often allow their dogs to enter the creek, thus further polluting the creek. The mud problem has become so bad that many dog owners are taking their pets elsewhere in the park, and Parks personnel have dumped sand on some of the muddy off-leash area.

The off-leash area is overused to the point that much of the grass is gone. The extreme muddiness aggravates the sanitary issues with pollution in the form of sediment-laden waters in utter disregard to the designation of the Tualatin River drainage as Water Quality Limited. Also in the off-leash area, upwelling water from a broken storm drain has existed since last summer. This additional water runs across the off-leash area picking up dissolved feces, urine and silt on its way to Vermont Creek.

Park users are supposed to obey pooper scooper rules, and Portland Parks and Recreation is responsible for enforcement. However, there is no evidence of either enforcement or sufficient compliance to avoid sanitation problems both in the off-leash area and elsewhere in the park. This is one of the reasons the Hayhurst Neighborhood Association withdrew their conditional support for the off-leash area. (See attachment 1.) The Maplewood Neighborhood Association also passed a resolution calling for clean up of the pollution emanating from the off-leash area. (See attachment 2.)

We urge your prompt investigation and action to eliminate the current and potential future health hazard. The pollution of Vermont Creek must be stopped. The creek must be safe for children's use.

Sincerely,

Joseph L. Griffin  
Portland, OR 97221

Gounnie E. Weber  
Portland, OR 97221

Don Bain  
Portland 97219

Wesley C. Fisher  
Portland OR 97209

Jeff Wang  
Portland OR 97221

Juan King  
ec: Portland 97219-1637

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Muhoko Kato 97219

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W. J. ...  
7005 SW 34th Ave  
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Paul M. ...  
3932 SW Nevada Ct  
Portland, OR 97219

Frank Schindl  
4307 SW IDAHO Dr

Juan King

Langdon Marsh, Department of Environmental Quality  
Charles Jordan, Portland Parks and Recreation  
Dean Marriott, Bureau of Environmental Services

**RESOLUTION  
OF THE  
HAYHURST NEIGHBORHOOD ASSOCIATION**

February 15, 1998

**WHEREAS:** Vermont Creek runs through the Hayhurst Neighborhood;

**WHEREAS:** Vermont Creek is a tributary of Fanno Creek and is part of the Tualatin River system, designated a Water Quality Limited river by the federal Environmental Protection Agency;

**WHEREAS:** Serious pollution of both forks of Vermont Creek from the S.W. Community Center (SWCC) construction project has been repeatedly documented by citizen activists, Hayhurst residents and the Oregon Department of Environmental Quality (DEQ) at sources that are readily visible during and after rains;

**WHEREAS:** The SWCC construction project and it's site, Gabriel Park, are under direct management and control of the Portland Parks Bureau;

**WHEREAS:** Sediment-laden discharges of water have left the SWCC site to pollute both forks of Vermont Creek on numerous occasions in the winter of '97-'98 as recently as February 12 in spite of repeated public assurances by the Portland Parks Bureau that they are addressing the problems and have upgraded their efforts;

**WHEREAS:** The DEQ has issued to the city of Portland two letters of noncompliance with environmental laws and has statutory authority to issue an enforcement order and levy fines, and take other measures;

**WHEREAS:** Some sediment-laden waters exiting the SWCC site run overland through the Gabriel Park off-leash area picking up dog feces and additional silt on its way to the south fork of Vermont Creek within the park;

**WHEREAS:** The water pollution is a serious violation of Oregon Environmental Law, the federal Clean Water Act and standards of public health;

**WHEREAS:** The north fork of Vermont Creek is dependent on groundwater resources during the summer and is a perennial stream;

**WHEREAS:** The north fork of Vermont Creek formerly ran through the north-west corner of Gabriel Park under the SWCC building site and formerly was culverted and filled over, and the former stream channel collects and delivers groundwaters to the north fork of Vermont Creek;

**WHEREAS:** The Parks Bureau plans to relocate a storm drain through the intersection of SW 45th Ave. and SW Vermont St. which formerly hosted two gasoline stations and it is unknown if there is underground pollution from their tanks;

**WHEREAS:** Ponds have been installed on the SWCC site which gather storm and ground waters which are being pumped off site to Portland Bureau of Environmental Services (BES) facilities;

**WHEREAS:** Portland Parks and Recreation has state-issued water rights on Fanno Creek and therefore interest to protect the quantity and quality of the waters of Vermont Creek, and is responsible for having large quantities of water removed from the SWCC construction site thereby preventing the waters from recharging groundwater supplies and feeding Vermont Creek;

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**WHEREAS:** A group of 24 citizens, including Hayhurst residents, has filed a Notice of Intent to Sue the Portland Parks Bureau if this pollution persists past March 8, 1998;

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**WHEREAS:** The Hayhurst Neighborhood Association desires the SWCC be designed, built and operated so that it does not ever negatively impinge on the quantity or quality of the waters of Vermont Creek.

**THEREFORE BE IT RESOLVED:** That the Hayhurst Neighborhood Association:

1. Recognizes and applauds the efforts of the 24 citizens who have filed the Notice of Intent to Sue and commends those citizens for their extraordinary efforts to protect the environment of our neighborhood.
2. Urges the DEQ to undertake the following measures:
  - A. Issue a third letter of noncompliance to the Portland Parks Bureau;
  - B. Issue an enforcement order to cease and desist in all illegal pollution and levy stiff fines;
  - C. Do whatever is necessary to assure that there is no potential for pollution from underground gasoline tanks before the storm drain is relocated;

D. Review the SWCC design and operations, and make recommendations which, if implemented, would assure the SWCC's potential to pollute Vermont Creek is zero; and

E. Require and impose the execution of appropriate mitigation as provided for by the NPDES permit. The draft mitigation plan should be open to public comments and interested citizens notified.

3. Urges all applicable federal, state, regional and city agencies to strictly enforce all applicable environmental quality, water and public health laws, and that these agencies closely monitor progress toward on-going compliance.


4. Urges the Portland Parks Bureau redesign and operate the SWCC as necessary to assure that the potential for future pollution of Vermont Creek is zero.

5. Urges the state Water Resources Department (WRD) to not permit removal of groundwater from the site at any time that could reduce summer flows of the north fork of Vermont Creek and to take any and all other measures as necessary to assure the quantity of waters in Vermont Creek.

6. That the DEQ, BES and public health agencies take any and all necessary measures to assure the current and ongoing quality of waters in Vermont Creek.

7. That the DEQ, WRD or BES implement a streamflow monitoring program in the north fork of Vermont Creek.

Passed this day of Feb 19, 1998

  
-----  
Susan King, Chair  
Hayhurst Neighborhood Association

Approved \_\_\_\_\_  
Approved with Corrections \_\_\_\_\_

Minutes are not final until approved by the EQC

## **Environmental Quality Commission Minutes of the Two Hundred and Sixth-Sixth Meeting**

**January 9, 1998  
Regular Meeting**

The Environmental Quality Commission regular meeting was convened at 9:00 a.m. on Friday, January 9, 1998, at the Department of Environmental Headquarters, 811 SW Sixth, Portland, Oregon. The following members were present:

Henry Lorenzen, Chair  
Carol Whipple, Vice-Chair  
Linda McMahan, Member  
Melinda Eden, Member  
Tony Van Vliet, Member

Also present were Larry Knudsen, Assistant Attorney General, Oregon Department of Justice; Langdon Marsh, Director, Department of Environmental Quality; and other staff.

Note: Staff reports presented at this meeting, which contain the Department's recommendations, are on file in the Office of the Director, 811 SW Sixth Avenue, Portland, Oregon 97204. Written material submitted at this meeting is made a part of the record and is on file at the above address. These written materials are incorporated in the minutes of the meeting by reference.

Agenda items were taken in the following order:

### **B. Reconsideration of the Petition by JELD-WEN, INC for Declaratory Ruling Concerning Availability of Sewer as Defined in OAR 340-71-160(5)(9f)**

On June 27, 1997 Jeld-Wen Inc. petitioned the EQC for a declaratory ruling interpreting OAR 340-071-0160(5)(f). The EQC agreed to accept the petition and appointed Lawrence Smith to act as the presiding officer in the matter. A hearing was held on November 24, 1997 and a Proposed Declaratory Ruling was issued on December 11, 1997. The purpose of this agenda item was for the EQC to adopt a final Declaratory Ruling.

Jeld-Wen was represented by Jay Waldron and the Department was represented by Michael Huston. Each was allowed 10 minutes to make their arguments and the EQC followed up with questions to both the petitioner and the Department. Commissioner Lorenzen expressed concerns with regards to requiring annexation and hoped an agreement could be reached between the City and Jeld-Wen under which Jeld-Wen could pay for the services it receives at a fair market value. Other EQC members expressed concern that requiring annexation and land use issues were beyond their authority. Other EQC members expressed concern that the facts presented in this matter limited what remedy they could fashion.

A motion was made by Commissioner Eden and seconded by Tony Van Vliet, for counsel to research what remedies the EQC had available limit the City's ability to require annexation before allowing sewer hookup. It was carried by five "yes" votes. The matter was deferred until the February meeting pending this information.

**F. Approval of Tax Credits**

The Department presented two Pollution Control Facility Tax Credits for approval that were deferred by the Commission at the December 30, 1997, EQC meeting. The Commission asked the Department to clarify the following information regarding pollution control tax credit applications number 4890 and number 4091.

1. The claimed cost of each facility is just under \$250,000. The cost was substantiated by invoices and were not been adjusted to avoid the Department's independent accountant's review.
2. The applicant's names are Dean McKay Farms, Inc., and Mark McKay Farms, Inc. Their addresses are 19172 and 19393; both on French Prairie Road NE in St. Paul. They are a sixth-generation agricultural family in the Willamette Valley. Each of the McKay brothers inherited equal acreage from their father and therefore, the 1000 acres owned by each is identical, they did not claim the same acreage and their businesses are completely separate.
3. Both applicants purchased Ford 4430 tractors and various implements that are similar. No piece of equipment is claimed twice. The tractors have separate identification numbers as shown on the invoices.
4. Both applicants provided a written statement of the use of their implements to show that the equipment claimed was not excessive for the purpose of removing acreage from field burning. The usage is reflected in the Annual Operating Hours section of the Review Report.

Commissioner Eden moved that the Commission approve the following tax credits. Commissioner McMahan seconded the motion and it carried with five "yes" votes.

<b>Applications for Pollution Control Facilities Tax Credit</b>					
<b>App. #</b>	<b>Applicant</b>	<b>Description of Facility</b>	<b>Certified Cost</b>	<b>Percent Allocable</b>	<b>Certificate Value</b>
<b>Field Burning</b>					
<b>4890</b>	Dean McKay Farms, Inc.	New Farm equipment, 8870 John Deere Tractor, John Deere 995 HC 8 Bottom Plow, 4430 Ford Tractor, Two 515 Holland Baler, 14' rear Flail & 15' rear Flail.	\$249,836	86%	\$ 107,429
<b>4891</b>	Mark McKay Farms, Inc.	New Farm Equipment, 8400 John Deere Tractor, John Deere Chisel Plow, 4430 Ford Tractor, Allen Rakes, 585 Holland Baler, 1095 Holland Stacker.	\$248,496	88%	\$ 109,338
<b>2</b>		<b>Field Burning</b>	<b>\$498,332</b>		<b>\$216,768</b>
<b>2</b>		<b>Pollution Control</b>	<b>\$498,332</b>		<b>\$216,768</b>

#### **D. Report from Fish and Wildlife Regarding Total Dissolved Gas**

Mark Schneider with the National Marine Fisheries Service (NMFS) and Margaret Filardo with the Fish Passage Center (FPC) presented information to the EQC regarding the upcoming spill program for the Columbia and Snake River Endangered Salmon Biological Opinion. Information on the types of monitoring and research to be performed was given to the Commission. The EQC asked questions about what we have learned from past research and spill activities. Information has been developed from the past spill seasons regarding the effects of TDG on salmonids and is contained in the NMFS report to the EQC. The NMFS' request for spill for the upcoming salmonid migration season was given to the EQC. The request for spill, physical and biological monitoring, and TDG research is similar to past years.

#### **A. Approval of Minutes**

The minutes of the November 21, 1997, meeting were presented and reviewed. On page 9, Item E, under Advisory Committee Process, line three, it should read, "specifically asked the advisory committee to identify processing *inefficiencies*...." That correction being made, Commissioner McMahan made a motion to approve the minutes as corrected; Commissioner Eden seconded the motion. The motion was carried with three "yes" votes. The minutes for the December 30, 1997, meeting were then reviewed. Commissioner Van Vliet moved that the minutes be approved as written. The motion was seconded by Vice-Chair Whipple and carried with five "yes" votes.

#### **E. Petition of Rulemaking to Designation 10 Waterbodies as "Outstanding Resource Waters" under OAR 340-41-026**

Geoff Pampush of Oregon Trout, Peter Frost of National Wildlife Federation, and Nina Bell of Northwest Environmental Advocates filed a petition for rulemaking to designate 10 Oregon waterbodies as Outstanding Resource Waters (ORW) on December 15, 1997. As a petition for rulemaking, the law required a decision from the EQC within 30 days of the filing date. The staff report recommended denial of the petition for several reasons. The petition requested designation of ten waterbodies, yet it did not identify outstanding values or a process for protecting those values as required in the ORW rule (340-41-026). In addition, four of the ten sites are water quality limited for temperature. In the supporting documentation, fish habitat was identified as an outstanding value for all of these. The rule language indicates that high quality waters may be designated as outstanding, so there is some confusion over the desire or ability to designate water quality limited waters as an ORW. The Department is currently addressing these questions, and has plans to open a public nomination period this Spring, once the policy and legal questions are addressed. The Department recommended denial of the petition in order to work with petitioners to resolve some of the issues, and proceed with ORW nominations later in the year.

On Friday, January 9, Peter Frost, representing all three petitioners, withdrew the petition with a written request, a copy of which has been put into the record. Mr. Frost told the EQC they were withdrawing the petition and planned to work with the Department to modify the petition, and to submit it again in the Spring. Mr. Frost indicated although the rule allowing designation of Outstanding Resource Waters had been in existence for seven years, no waters have yet been designated. In preparing the petition, they had intended to complete the necessary background work for the Department, hoping to speed up the designation process. The petitioners have given a lot of thought to the conflict presented by 303(d) status and ORW designation, and would like to work with DEQ to resolve these legal questions. Mr. Frost closed his comments by saying he felt public input was important to the process and the Department should open the nomination process to the public as planned.

Mr. David Bartz, attorney for Roaring Springs Ranch, provided public comment, expressing his hopes that Mr. Frost's comments become part of the public record, and the schedule mentioned by Mr. Frost be followed.



Commissioner McMahan thanked Mr. Frost and the other petitioners for bringing the topic forward, and reminding the Commission the Department is somewhat behind in nominating and designating Outstanding Resource Waters.

### **C. Umatilla Chemical Depot Permit Modification**

Commissioner Eden made the motion and was seconded by Commissioner Van Vliet that the Commission approve the permit modification request by the U.S. Army and Raytheon Demilitarization Company (Raytheon) to add Raytheon as a Co-Permittee and Co-Operator of the Umatilla Chemical Disposal Facility (UMCDF) located near Hermiston, Oregon (Permit Number OR6 213 820 917). It was passed with five "yes" votes. In accordance with the criteria listed in Oregon Revised Statute (ORS) 466.060, the Commission found Raytheon has adequate financial and technical capability to properly construct and operate the facility; and Raytheon has indicated an ability and willingness to operate the facility in compliance with the permit and conditions imposed on the Permittees by the Commission.

The Commission instructed the Department to prepare a final order, which was to be signed by Chairman Lorenzen. The permit modification will not go into effect until such time as the U.S. Army and Raytheon enter into an "Advance Agreement" clarifying the allowability of certain costs and the definition of some terms that are used in Raytheon's contract with the U.S. Government. The Advance Agreement must be submitted to the Department no later than March 15, 1998.

### **G. Commissioners' Reports**

Commissioner McMahan reported she was at a dinner where the Superintendent of the Canby School District was in attendance. He had met with DEQ about a school in his district which had a problem with underground tanks and he found the Department extremely helpful. She wanted to pass the compliment along.

### **H. Director's Report**

Agency staff have followed up with Lincoln County about on-site sewage treatment problems within the Carmel Foulweather Sanitary District north of Newport between Yaquina Head and Cape Foulweather. Lincoln County puts current system failure rate at about 11 percent. The remainder of the on-site systems are considered in compliance. The County does have the authority to require repairs. DEQ discussed our concerns with Lincoln County officials, and are working with them to resolve the issue. DEQ does not have authority to compel sewer hook-ups. While such hookups may be the best long term solution to the problem, our focus now is working with the county, district and other interested parties to repair or replace existing, failed systems. Martin Loring, Water Quality Committee Assistance Manager, and Kerri Nelson, Acting Regional Administrator for Western Region, also answered questions regarding this matter.

The Governor's Office is making "quality development" and better coordination of state activities related to growth a key initiative. Five agencies - EDD, ODOT, HCS, DLCD and DEQ - are working together on several efforts related to this objective. The directors of these agencies have been working together as the "Community Solutions Team" for several years, and have demonstrated the effectiveness of close planning on several projects. Current efforts are intended to "institutionalize" practices found to be most effective. A workshop in December brought together regional representatives from all agencies to allow them to meet and prepare strategies for better coordination. The agencies plan to give aid preferentially to local governments which show the best approaches to balancing housing, jobs, transportation and environmental considerations

The clean-up program has completed, as required by statute, its 9<sup>th</sup> annual environmental clean-up report to the Commission, the Governor and the Legislature. This year's report looks back at 10 years of hazardous substance and UST clean-ups since the passage of the state's clean-up law in 1987. Clean-ups have changed significantly over the years and are now done increasingly on a voluntary basis with our

clean-up decisions being more risk-based. The report includes clean-up accomplishments of the 1997 fiscal year and describes goals for the current year.

Last month Lang Marsh, Oregon DEQ Director; Chuck Clarke, Region 10 EPA; and Tom Fitzsimmons, Washington Dept. of Ecology, co-signed a letter to General Griffin, Commander of the Corps of Engineers division office in Portland. They asked the Corps to submit plans for dealing with Columbia and Snake River water quality problems related to temperature and dissolved gas.

Specific information sought:

- Actions at dams to ensure compliance with standards for total dissolved gas;
- Actions to eliminate, to the extent possible, dam impacts on water temperature;
- Milestones for completion of related operational and structural modifications;
- A compliance schedule with intermediate milestone dates and;
- Budgetary needs to make alterations to comply with the Clean Water Act.

Governor Kitzhaber also recognizes the importance of the Columbia Basin and the Corps role in river management. To enhance Oregon's effectiveness in this complex arena, he has appointed Joyce Cohen to help coordinate Columbia Basin water quality activities. Her enormous experience with State, Regional and National issues will be of great help in resolving some of the long standing institutional problems affecting water quality in the basin.

Two, back-to-back events in mid December led by Governor Kitzhaber focused public attention on key water quality issues and the role of DEQ in dealing with those issues.

On December 17, the Governor received the report of the Willamette River Taskforce. He appointed this 22-member group in June, 1996, and DEQ has provided staff support for Taskforce activities. The report identified several issues related to water quality, such as impacts of non-point source runoff, and made recommendations for follow-up action. The Governor has handed the advisory report to his natural resource agencies to review the Taskforce work and determine what actions we can take to implement the recommendations. The process has started within DEQ and will accelerate over the next several weeks.

On December 18, the Governor held a news conference to formally hand over the Oregon Plan Steelhead Supplement to the National Marine Fisheries Service Regional Director. Our commitments are similar to those already contained in the original Oregon Plan for Coho salmon restoration except expanded geographically to reflect the broader Steelhead range. NMFS is expected to make a final listing decision for several population groups of Steelhead in February. There have been initial discussions about funding this additional work, but no decisions yet on how much money might be available within this budget period.

With the retirement of Tom Bispham as NW Regional Administrator at the end of February, Neil Mullane has been named as his successor. Neil's skills with people, both as manager and communicator, are outstanding. He will bring continuity to the leadership transition at NW Region while contributing his own special abilities and range of experience. Neil has been the Water Quality Source Control Section manager at NWR since 1994, and has manager experience that dates back to 1986 when he started as Water Quality Planning Section manager. He also has worked extensively on groundwater issues, including groundwater assessment for siting of the Arlington Hazardous Waste Disposal facility; and non-point source issues such as assessing Forest Practice Act rules compliance with the Clean Water Act.

Neil Mullane will also be the Administrator for agency enforcement work. The Department is now recruiting to fill the Enforcement Manager position, as Van Kollias is also retiring in February.

The regular meeting was adjourned at 12:13 p.m.

**Work Session: Pollution Control Facility and Plastics Recycling Tax Credit Rules**

The January 9, 1998, work session regarding the Division 340, Chapter 16 rule-making (Pollution Control Tax Credit rules) was a continuation of the November 21, 1997, work session.

At the November work session, the Commission asked the Department to explore some middle ground between eliminating the Department's ability to obtain an independent certified public accountant's review and the two independent accounting reviews that are currently in practice. The Department presented the following independent accountant's proposal to the Commission on January 9, 1998.

**Accounting Review**

	<u>Current Rule</u>	<u>Proposed Rule</u>
No independent CPA review required.	<= \$20,000	<= \$50,000
Applicant required to submit independent CPA review with the application. Applicant pays their CPA firm for this review.	Between \$20,000 and \$250,000	Between \$50,000 and \$500,000
Department selects and pays for the independent accounting review.	=> \$250,000	=> \$500,000
Applicant may be asked to reimburse the Department for a second accounting review to be performed by a firm selected by the Department.	=> \$250,000	Eliminated
Waiver from independent CPA review available.	No	Yes

In November, staff presented a proposal that would reduce but not eliminate the program's fee deficit. The Commission acknowledged the Department's goal of implementing program efficiencies to further reduce the tax credit programs' reliance on general fund to cover the cost of administering the program. However, the Commission was clear that these efficiencies should not be at the expense of a thorough review. The Commission asked the Department to explore removing the maximum fee charged or at least raise the maximum fee to a point where the program would be certain to support itself.

Staff presented the following fee schedules:

**Fee Schedules**

	<u>Current/Actual</u>	<u>Proposed Rule</u>	<u>No Limits</u>
<b>Minimum</b>	\$50	\$50	\$11*
<b>Maximum</b>	\$5,050	\$15,000	\$328,000*
<b>Refund</b>	100% of processing fee	50% of fee paid	50% of fee paid
<b>Preliminary Fee</b>	1995 legislation	½ of 1% of estimated facility cost.	½ of 1% of estimated facility cost.
<b>Final Filing Fee</b>	\$50	Eliminated	Eliminated
<b>Final Processing Fee</b>	½ of 1% of facility cost	1% of facility cost minus any preliminary fee paid.	1% of facility cost
<b>Fee Surplus (Deficit)</b>	(\$395,461)	\$55,359*	\$1,400,804*

\* As applied to applications received during study period 6/30/93 to 7/1/96.

The Department shared their plan to remove any substantive amendments to the rule regarding the "determination of the percentage of the facility cost allocable to pollution control" from the rule making package that will be presented for adoption in April, 1998. The return on investment considerations and "facilities that are integral to the operation of an applicant's business" methods will not change. Though the Department will make several clarifying and formatting amendments to this rule, the Department does consider the rule in its current form or in its clarified form represents the future direction of the tax credit program. A much broader group would need to be involved to determine the direction of a rule that so greatly impacts tax revenues.

The Department presented examples of how the return on investment considerations and the integral facility rule impact the amount of relief available to a certificate holder. The example made several assumptions: 1) Eligible cost of each facility is \$1,000,000 2) Each has a 10 year useful life 3) Each business operates at profit margins near the national average.

Example Facility	Integral ?	Annual Facility Income	Percent Allocable	Tax Credit	Present Facility Value	Notes
<b>Examples Addressing ROI</b>						
Stack Scrubber	No	-0-	100%	\$500,000	\$391,782	Industrial control is required by law, but it returns no income
Pre-treatment system	No	\$50,000	100%	\$500,000	\$783,548	Some required facilities return income to the owner
		\$100,000	100%	\$500,000	\$1,175,322	This is the point at which the facility returns its full cost
		\$110,000	62%	\$310,000	\$916,006	
		\$127,625	0%	-0-	1,000,000	A normally profitable investment based on national average
<b>Examples Addressing The Integral Facility Rule</b>						
Solid Waste Landfill Liner	Yes	\$50,000	0%	-0-	\$391,774	ROI Calculation considers only the profitability of the overall business
Recycling collection bins—applicant is a recycler	Yes	\$100,000	0%	-0-	\$783,548	
Recycling collection bins—applicant is a garbage hauler	No	\$100,000	100%	\$500,000	\$1,175,322	Since the primary line of business is not recycling, the ROI calculation treats the facility separately

**Public Comment:** David Hinterreiter and Dani Wilke representing the H2O&S Sanitary Treatment Facility, Otter Rock, Oregon were present to discuss the first item under the director's report involving the Carmel Foulweather Sanitary District. The Commission directed the Department to continue researching this matter in conjunction with the County and H2O&S Sanitary Treatment Facility; and to bring a report back to the Commission at a later date.

**PURSER Kitty**

**From:** BACHMAN Jeff

**Sent:** Wednesday, February 11, 1998 1:46 PM

**To:** MARSH Langdon; TAYLOR Lydia; GRECO Susan

**Cc:** BUSSEY Daphne L; PURSER Kitty

**Subject:** Settlement of Kehoe Case


We have settled the case that was to appear before the commission on Friday, February 20, Case No. WQSW-NWR-97-19, the Kehoe Company. To have the case removed from the agenda, Daphne advised that I should e-mail you all.

State of Oregon  
Department of Environmental Quality

Memorandum

Date: February 2, 1998

To: Environmental Quality Commission

From: Langdon Marsh, Director 

Subject: Agenda Item C, Appeal of Hearing Order Regarding Assessment of Civil Penalty, Case No. WQSW-NWR-97-019, The Kehoe Company; EQC Meeting: February 20, 1998

**Statement of Purpose**

The Department, on March 19, 1997, issued an Assessment of Civil Penalty against The Kehoe Company (Kehoe) for violations of ORS 468B.050. Kehoe appealed the Assessment and a hearings officer found that they had violated ORS 468.050 by discharging wastes into the waters of the state without a permit, and was liable for the \$4200 civil penalty. Kehoe has appealed the Hearing Order Regarding Assessment of Civil Penalty.

**Background**

Kehoe held a Erosion Control Joint Permit for a property called Scholls Meadows Subdivision, located at Scholls Ferry and Sunrise Roads in Washington County. The permit required Kehoe to: inspect all erosion control facilities at least once every seven days and within 24 hours after any rain more than one-half inch; inspect all erosion control facilities during stormy periods; and monitor effectiveness of pollution control facilities and practices and take action to reduce discharge of sediments if measurable quantities of sediment leave the property. Visible or measurable erosion is prohibited under the permit. Based on a citizen complaint, a Department stormwater inspector visited the property on November 22, 1996. He noted that the only erosion control for the road leading into the site was a silt fence, which was overwhelmed by runoff. He returned several days later and noticed that no new erosion control measures had been taken. He informed the foreman that additional erosion control measures needed to be taken.

He returned the following day and saw no new erosion control measures. He also noticed considerable water flowing into a ditch that flowed to a tributary of Fanno Creek. The inspector visited the site again on December 18, 1996 and observed more erosion and sedimentary runoff. A new but ineffective silt fence had been placed across the road but no other measures had been taken. The erosion gullies on the road were up to five feet deep and three feet wide.

A Notice of Noncompliance was issued to Kehoe on December 23, 1996. The inspector stated that all construction sites had some sedimentary runoff due to high quantities of rain but that he issued a Notice of Noncompliance to Kehoe due to the large amount of runoff from the site. After Kehoe received this notice, it took considerable measures to reduce the runoff and erosion

Memo To: Environmental Quality Commission

**Agenda Item C**, Appeal of Hearing Order Regarding Assessment of Civil Penalty, Case No. QSW-NWR-97-019, The Kehoe Company; EQC Meeting: February 20, 1998

Page 2

including silt fencing, laying straw, applying rock and digging new ditches. On March 19, 1997, the Department issued a Notice of Assessment of Civil Penalty for \$4200 in civil penalties against Kehoe.

A hearing was held on August 14, 1997 and a Hearing Order Regarding Assessment of Civil Penalty was issued on August 29, 1997. The hearings officer held that Kehoe had violated ORS 468B.050 by discharging wastes in the waters of the state without a permit allowing them to do so.

Kehoe filed a Notice of Appeal on September 10, 1997 and its exceptions and brief on October 9, 1997. Kehoe takes exception to the decision in the following manner:

1. The Department has denied Kehoe due process of law by failing to issue a Notice of Permit Violation prior to assessing a civil penalty. Kehoe argues that OAR 340-12-040 requires the Department to "provide a Notice of Permit Violation to the permittee "prior to an assessment of civil penalty. The failure of the Department to provide the notice violated Kehoe's due process rights.

2. Kehoe is entitled to compulsory joinder of all potentially responsible parties in this matter. Oregon Rules of Civil Procedure (ORCP) requires joinder of all persons or entities which actually caused the alleged violation if complete relief cannot otherwise be granted.

3. The Department's enforcement actions against Kehoe and not against all potentially responsible parties violated Kehoe's constitutional rights. The Department's failure to assess civil penalties against all persons or entities engaged in conduct which resulted in the violation and failure to assess civil penalties against other land owners who were also in violation of the statute is selective enforcement and violates Kehoe's right of equal protection.

Based on these inadequacies, Kehoe recommends that the Commission summarily dismiss the civil penalty assessment.

The Department responded that first OAR 340-011-0132 states that "matters not raised before the Hearing Officer shall not be considered except when necessary to prevent manifest justice."

Kehoe did not raise the three issues in its brief during the hearing and has not explained why consideration of those issues is necessary to "prevent manifest justice." For that reason, the Commission should not consider the issues and adopt order as written. If the Commission determines that consideration is necessary, then the Department recommends that the Commission adopt the order for the following reasons:

- (1) The Department has no duty to issue a Notice of Permit Violation since the civil penalty was not assessed for a permit violation but instead for a statutory violation. Even if the penalty has been assessed for a permit violation, two exceptions in OAR 340-012-0040 would apply.

- (2) Administrative proceedings of the Department are covered by ORS chapter 183, the Attorney General's Model Rules and OAR Chapter 340, Division 11. The ORCP applies to circuit and



Memo To: Environmental Quality Commission

**Agenda Item C**, Appeal of Hearing Order Regarding Assessment of Civil Penalty, Case No. WQSW-NWR-97-019, The Kehoe Company; EQC Meeting: February 20, 1998

Page 3

district court proceedings. Furthermore, ORS 468B.050 imposes strict liability for violations. Thus compulsory joinder is not required.

(3) Selective enforcement does not apply to the facts of this case. The concept requires that the prosecuting entity singled out the person based on membership in a constitutionally protected group or the exercise of a constitutionally protected right. Neither applies in this instance.

Kehoe responded that the notice issued by the Department referenced two possible violations including failure to comply with a permit condition. It also included the details of the notice of permit violation process, thus it was reasonable for Kehoe to believe it was entitled to participate in this process and a civil penalty would not be assessed if they followed the Department's recommendations. Furthermore, the ORCP has been applied to administrative proceedings and in this matter, it would further assist the Department in penalizing the actual entities responsible for environmental problems.

#### **Authority of the Commission with Respect to the Issue**

The Commission has the authority to hear appeals from hearing officer's final orders under OAR 340-011-0132.

#### **Alternatives and Evaluation**

The Commission may either:

- (1) adopt the Hearing Order Regarding Assessment of Civil Penalty as recommended by the Department or
- (2) dismiss the civil penalty assessment as recommended by Kehoe.

#### **Attachments**

1. Letter dated January 28, 1998 from Susan M. Greco to Patrick Baffaro, Shelley McIntyre and Judith Anderson
2. Appellant's Reply to Department's Response to Appellant's Exceptions to Hearing Decision and Brief, dated October 9, 1997
3. Department's Response to Appellant's Exceptions to Hearing Decision and Brief, November 12, 1997
4. Appellant's Exceptions to Hearing Decision and Brief, dated December 4, 1997
5. Letter dated September 11, 1997 from Susan M. Greco to Patrick Baffaro
6. Notice of Appeal, dated September 10, 1997
7. Hearing Order Regarding Assessment of Civil Penalty
8. Hearing Exhibits 1 through 11

Memo To: Environmental Quality Commission

**Agenda Item C**, Appeal of Hearing Order Regarding Assessment of Civil Penalty, Case No. WQSW-NWR-97-019, The Kehoe Company; EQC Meeting: February 20, 1998

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Exhibit 1 - Letter Regarding Notice of Assessment of Civil Penalty, dated March 19, 1997

Exhibit 2 - Notice of Assessment of Civil Penalty

Exhibit 3 - Letter to Judith Anderson from The Kehoe Company, dated March 24, 1997

Exhibit 4 - Notice of Hearing, dated July 28, 1997

Exhibit 5 - Hearing Memorandum, dated August 12, 1997

Exhibit 6 - Erosion Control Joint Permit, dated September 10, 1996

Exhibit 7 - Sanitary Surface Water Permit, dated November 11, 1996

Exhibit 8 - Erosion Control Inspection Report, dated March 10, 1997

Exhibit 9 - NPDES General Stormwater Discharge Permit, dated September 25, 1991

Exhibit 10 - Pictures of Construction Site

Exhibit 11 - Notice of Noncompliance, dated December 23, 1996

**Reference Documents (available upon request)**

1. ORS 468B.005 and 468B.050
2. OAR Divisions 11 and 12
3. ORCP 29

Report Prepared By: Susan M. Greco

Phone: (503) 229-5213

Date Prepared: January 26, 1998

January 28, 1998

DEPARTMENT OF  
ENVIRONMENTAL  
QUALITY

Via Certified Mail

Patrick Baffaro  
Attorney at Law  
6501 S.W. Macadam Avenue  
Portland OR 97201

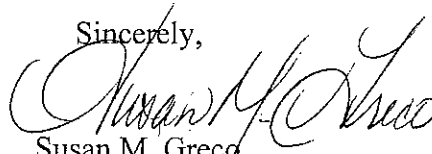
The Kehoe Company  
c/o Martin Kehoe  
P.O. Box 69501  
Portland OR 97201-0501

RE: The Kehoe Company  
Case No WQSW-NWR-97-019

The appeal by The Kehoe Company in the above referenced matter has been set for the regularly scheduled Environmental Quality Commission meeting on Friday, February 20, 1998. The meeting will convene at 9:00 a.m. and this matter will be heard in the regular course of the meeting. The meeting will be held at the Department's headquarters at 811 S.W. 6th Avenue, Room 3A, Portland, Oregon. Attached you will find an agenda for the meeting. As soon as the record is available, I will forward the same to you.

If you should have any questions or should need special accommodations, please feel free to call me at (503) 229-5213 or (800) 452-4011 ex. 5213 within the state of Oregon.

Sincerely,

  
Susan M. Greco  
Rules Coordinator

cc: Judith Anderson, NWR  
Shelley McIntyre, DOJ



811 SW Sixth Avenue  
Portland, OR 97204-1390  
(503) 229-5696  
TDD (503) 229-6993  
DEQ-1

*Attachment 1 - 1 page*



# PATRICK J. BAFFARO

ATTORNEY AT LAW  
6501 S.W. MACADAM AVENUE  
PORTLAND, OREGON 97201  
EMAIL: [patrickb@teleport.com](mailto:patrickb@teleport.com)

TELEPHONE: (503) 246-9927

Department of Environmental Quality  
FACSIMILE: (503) 246-7725

DEC 03 1997

December 4, 1997

OFFICE OF THE DIRECTOR

Ms. Susan Greco  
Environmental Quality Commission  
811 SW Sixth Ave.  
Portland, OR 97204

Re: The Kehoe Company;  
Hearings Case No.: 96-DEQ-006

Dear Ms. Greco,

Enclosed, please find Appellant's Reply to Department's Response to Appellant's Exceptions to Hearing Decision and Brief for the above-referenced matter. Thank you.

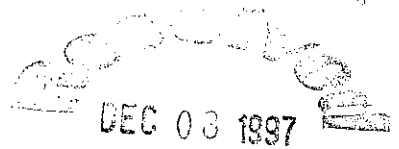
Sincerely,

  
Patrick Baffaro

Enclosure

cc: The Kehoe Company  
Judith Anderson, DEQ  
Ms. Shelley McIntyre

*Attachment 2 - 7 pages*



OFFICE OF THE DIRECTOR

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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION  
OF THE STATE OF OREGON

IN THE MATTER OF:	)
	) AGENCY CASE No.: WQSW-NWR-97-019
	) HEARINGS CASE NO.: 96-DEQ-006
	) WASHINGTON COUNTY
	)
THE KEHOE COMPANY,	) APPELLANT'S REPLY TO
an Oregon corporation,	) DEPARTMENT'S RESPONSE TO
Respondent.	) APPELLANT'S EXCEPTIONS TO
	) HEARING DECISION AND BRIEF
	)

The Kehoe Company ("Appellant") respectfully submits this Reply to Department's Response to Appellant's Exceptions to Hearing Decision and Brief.

**FACTS**

A DEQ inspector believed environmental violations existed on Appellant's construction site as early as November 22, 1996. The Notice of Noncompliance (the "Notice") eventually issued to Appellant on December 23, 1996, also noted that this DEQ agent

1 visited Appellant's construction site on November 26, 27, and  
2 December 18 of 1996. For reasons unknown, the DEQ agent did not  
3 provide Appellant with actual notice of the existence of the  
4 environmental infractions until the Notice was issued.  
5 Immediately thereafter, Appellant took corrective action to  
6 remedy the reported violations.

7  
8 **ARGUMENT**

9 **1. Appellant was entitled to the procedural safeguards of  
the Notice of Permit Violation process.**

10 The Department concedes that its agent believed Appellant's  
11 construction site was in violation of environmental laws for at  
12 least a full month before the Department issued the Notice.  
13 Nonetheless, the Department contends, it had no duty to inform  
14 Appellant that it was in violation of these environmental laws  
15 before assessing a civil penalty. This position is in direct  
16 contravention with the Department's stated mission, which is to  
17 "...be an active force to restore, enhance, and maintain the  
18 quality of Oregon's air, water and land."

19 The Notice referenced two possible violations: 1)  
20 468B.050(a) (a Class I violation) and 2) Failure to comply with a  
21 condition of Appellant's NPDES Permit (a Class II violation).  
22 Only a violation of the NPDES permit, the Department argues,  
23 would necessitate the issuance of a NPV. Unfortunately, the  
24 Notice does not alert Appellant as to which regulation the

1 Department is seeking to enforce. It does, however, describe the  
2 NPV process in detail, including the following language:

3       The purpose of the NPV is to ensure that the  
4       permitted facility is operating in compliance  
5       with all conditions and limitations of the  
6       permit, or to bring the permitted facility  
7       into compliance. **We recommend that you begin  
8       preparations now to respond to the NPV.** If  
9       you fail to respond to the NPV in the 5 day  
10      time frame, you will be assessed a civil  
11      penalty for the violation cited in the NPV.  
12      [emphasis added]

13       Under the circumstances, it was reasonable of Appellant to  
14      believe that it was entitled to the procedural safeguards granted  
15      by the NPV process, and that a civil penalty would not be  
16      assessed if it complied with the Department's recommendations.  
17      It is undisputed that after Appellant received the Notice, it  
18      took appropriate measures to remedy the violations.

19       The Department's arguments regarding exceptions to their  
20      obligation to issue a NPV are simply nonsensical. First of all,  
21      although Appellant concedes that the level of rainfall during the  
22      winter of 1996 was unusually high, Appellant also finds it  
23      difficult to accept the Department's contention that rainfall  
24      during the winter months in Oregon, even heavy rainfall, does not  
25      regularly occur for more than five consecutive days.

26       Secondly, participation in the NPV process does not preclude  
27      the Department from issuing a civil penalty. On the contrary, it  
28      is a prerequisite for issuing a civil penalty. Unlike the

1 Department's conduct in these matters, the NPV process is  
2 entirely consistent with the Department's dual obligations to  
3 monitor and remedy possible environmental infractions and to  
4 assess penalties when those infractions are not promptly cured.

5  
6 **2. The Oregon Rules of Civil Procedure have been applied**  
7 **to administrative proceedings in the past, and it is appropriate**  
8 **to apply them to the current proceedings.**

9 The Attorney General routinely resists the application of  
10 the Oregon Rules of Civil Procedure (ORCP) in administrative  
11 proceedings. Nonetheless, Oregon courts have on occasion applied  
12 these rules to administrative hearings. See, e.g., *Ogden v.*  
13 *Bureau of Labor and Industries*, 68 Or App 235, 250, 682 P2d 802,  
14 *aff'd in part, rev'd in part*, 299 Or 98, 107, 699 P2d 189 (1985).  
15 [In which the Court of Appeals wrote that "ordinary rules of  
16 discovery" should be applied in administrative proceedings. The  
17 ORCP provides the framework for discovery in court proceedings.]

18 The application of these rules of procedure to the present  
19 proceedings would not prohibit the Department from enforcing its  
20 regulations, or interfere with the Department's statutory  
21 authority. Rather, it would further assist the Department in  
22 meeting its objectives by identifying and penalizing the actual  
23 entities responsible for environmental violations.

24 / / /




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**CONCLUSION**

The Department had the opportunity to notify Appellant of the environmental violations existing on its construction site, yet chose not to do so for more than a month. Had Appellant been given the opportunity to cure these violations when the Department first became aware of them, the violations could have been remedied promptly. Not only would Appellant then not have been liable for a "continuing" violation, but the Department would have successfully satisfied its obligation to the citizens of the state of Oregon to "...maintain the quality of Oregon's air, water, and land."

Dated: December 4, 1997.

  
\_\_\_\_\_  
Patrick Baffaro, OSB# 93202  
Attorney for Appellant  
6501 SW Macadam Ave.  
Portland, OR 97201  
(503) 246-9927

1 CERTIFICATE OF SERVICE

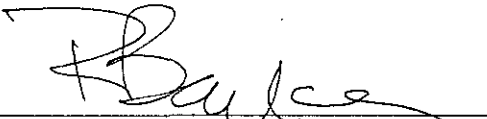
2 I hereby certify that I served the foregoing APPELLANT'S  
3 REPLY TO DEPARTMENT'S RESPONSE TO APPELLANT'S EXCPETIONS TO  
4 HEARING DECISION AND BRIEF on the following parties on the 4th  
5 day of December, 1997, by depositing the same with the United  
6 States Postal Service, postage prepaid, addressed as follows:

7  
8 Susan Greco  
Environmental Quality Commission  
811 SW Sixth Ave.  
Portland, OR 97204

Judith Anderson  
Department of Environmental Quality  
2020 SW Fourth Ave., Suite 400  
Portland, OR 97201-4987

10  
11 Ms. Shelley McIntyre  
Assistant Attorney General  
Oregon Department of Justice  
12 1515 SW Fifth Ave., Suite 410  
Portland, OR 97201

13  
14 DATED: December 4, 1997.

15  
16  
17   
18 Patrick Baffaro, OSB# 93202  
Attorney for Appellant

19 6501 S.W. Macadam Ave.  
Portland, OR 97201  
20 (503) 246-9927  
21  
22  
23  
24

NOV 12 1997  
OFFICE OF THE DIRECTOR

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION  
OF THE STATE OF OREGON

IN THE MATTER OF: ) DEPARTMENT'S RESPONSE TO  
THE KEHOE COMPANY, an Oregon ) APPELLANT'S EXCEPTIONS TO  
Corporation, ) HEARING DECISION AND BRIEF  
Respondent. )

INTRODUCTION

This matter comes to the Commission pursuant to OAR 340-011-0132, which allows parties to appeal a hearing officer's final order in contested cases resulting in a civil penalty. The Kehoe Company (Kehoe) appeals the hearing officer's decision dated August 29, 1997 finding Kehoe in violation of ORS 465B.050(1) for discharging wastes into waters of the state, specifically, discharging sediment into a storm water drainage ditch that flows into Fanno Creek, and liable for a civil penalty of \$4,200.

Kehoe's exceptions to the hearing officer's decision appear to be entirely legal and not factual. That is, Kehoe did not challenge or take exception to any specific factual findings; it only proposed alternative findings based on its legal arguments.

The stated exceptions are that (1) the Department denied Kehoe due process of law by failing to issue a Notice of Permit Violation (NPV) before issuing the Notice of Noncompliance (NON) and subsequent Notice of Assessment of Civil Penalty; (2) Kehoe is entitled to compulsory joinder of all interested parties, *i.e.*, all persons or entities that actually caused the alleged violation; and (3) the Department selectively enforced the statute in violation of the Equal Protection clause of the U.S. Constitution.

Although we discuss these exceptions below, we want to point out first that OAR 340-011-0132(4)(a) states that "[m]atters not raised before the Hearing Officer shall not be considered except when necessary to prevent manifest injustice." Kehoe did not raise these issues at the hearing, nor has it explained why it did not or why consideration by the

Attachment 3-9 pages

1 Commission is "necessary to prevent manifest injustice." Although Kehoe was represented  
2 by its president, Martin Kehoe, the Notice of Assessment advises respondents that they are  
3 entitled to be represented by an attorney. Therefore, the Commission has authority to refuse  
4 to hear Kehoe's arguments and instate the hearing officer's decision.

5 If the Commission chooses to decide these issues on their merits, the hearing officer's  
6 order should be instated for the reasons stated below.

#### 7 **FACTUAL BACKGROUND**

8 The undisputed facts are set forth in the Hearing Order on pages 1 and 2. Kehoe is  
9 the owner and developer of a construction site in Washington County called the Scholls  
10 Meadows Subdivision. In response to a complaint after heavy rains in mid-November of  
11 1996, on November 22, 1996, a DEQ inspector visited Kehoe's site and noted evidence of  
12 heavy sedimentary runoff from the development. The site was under construction at the time  
13 of the violation and had areas of exposed soil. The only erosion control for the main road  
14 leading into the site was a silt fence, which had been completely overwhelmed by  
15 sedimentary runoff.

16 At a subsequent visit on November 26, the inspector noted that no new erosion  
17 control measures had been installed. He discussed the problem and possible solutions with  
18 the site foreman, who said that control measures that would have significantly reduced the  
19 runoff had not been taken because the road was scheduled to be dug up to lay utility lines.

20 Follow-up inspections showed considerable erosion and sedimentary runoff flowing  
21 into a storm water drainage ditch that flows into a tributary of Fanno Creek, which  
22 discharges into the Tualatin River. There were no new erosion control measures. On  
23 December 23, 1996, DEQ sent Kehoe a Notice of Non-Compliance. After receiving this  
24 Notice, Kehoe did finally take considerable measures to reduce the runoff.

25 ///

26 ///

1                   **THE DEPARTMENT'S STORM WATER PERMIT PROGRAM**

2                   In November of 1990, the U.S. Environmental Protection Agency (EPA) adopted  
3 regulations requiring National Pollutant Discharge Elimination System (NPDES) permits for  
4 discharges of storm water to surface waters from certain categories of industrial activities,  
5 including construction activities. 40 CFR § 122.26, As EPA's delegated authority, the  
6 Department is responsible for implementing these regulations and issuing NPDES permits.

7                   In response to EPA's rules, the Department adopted a series of 14 NPDES General  
8 Storm Water Discharge Permits. A "general permit" is a waste discharge permit issued to  
9 certain categories of qualifying sources in lieu of individual NPDES permits for each source.  
10 OAR 340-045-0010(7). They are issued when individual NPDES or Water Pollution Control  
11 Facility permits are unnecessary in order to adequately protect the environment. OAR 340-  
12 045-0033.

13                  The 1200-C General Permit is an NPDES storm water permit for construction  
14 activities, including clearing, grading and excavation activities that disturb five or more acres  
15 of land. 40 CFR § 122.26(b)(14)(x).

16                  Through an intergovernmental Memorandum of Agreement (MOA), the Unified  
17 Sewerage Agency of Washington County (USA) acts as the Department's agent in controlling  
18 and monitoring erosion in this area and issues the NPDES storm water permits on behalf of  
19 the Department. In September 1996, Kehoe applied to USA for a 1200-C General Storm  
20 Water Discharge Permit, also referred to by USA as an "Erosion Control Joint Permit."

21                  Pursuant to EPA's rules and the Department's permit application requirements,  
22 Kehoe's application included a plan indicating the construction activity and proposed  
23 measures that would be used to control sediment runoff. It includes monitoring and  
24 reporting requirements, and specifically requires that Kehoe inspect all erosion control  
25 facilities at least once every seven days and within 24 hours after any storm event resulting  
26 in more than one-half inch of rain per 24-hour period. It states that "[i]f any measurable

1 quantities of sediment are leaving the property, corrective action shall be taken to reduce the  
2 discharge of sediments."

3 USA issued the permit to Kehoe in November 1996, with the above requirements.  
4 The permit does not allow the discharge of any wastes into waters of the state.

5 **DISCUSSION**

6 1. **The Department had no duty to issue an NPV under the undisputed facts**  
7 **of this case, and there was no due process violation.**

8 Kehoe complains that DEQ failed to contact it or its president directly to advise or  
9 alert Kehoe of the violations before issuing the Notice of Civil Penalty Assessment, citing  
10 OAR 340-012-0040. Kehoe's reliance on that rule is misplaced, and DEQ had no duty to  
11 inform the company that it was in violation of the statute before issuing a notice of civil  
12 penalty assessment.

13 The rule Kehoe relies on reads in pertinent part as follows:

14 "(1) Prior to assessment of a civil penalty *for a violation of the terms or*  
15 *conditions of an [NPDES permit], the Department shall provide a Notice of*  
*Permit Violation to the permittee.*

16 \* \* \*

17 "(2) No advance notice prior to assessment of a civil penalty shall be required  
18 under section (1) of this rule and the Department may issue a Notice of Civil  
19 Penalty Assessment if:

- 18 (a) the violation is intentional;  
19 (b) the water or air violation would not normally occur for five consecutive  
20 days; or \* \* \*  
(g) the requirement to provide such notice would disqualify a state program  
from federal approval or delegation.

21 The rule also provides a procedure for permittees to respond in writing to an NPV with a  
22 proposal for bringing the facility into compliance with the permit.

23 This rule is based on ORS 468.126, which contains substantially similar language.

24 However, it is inapplicable to this case for several reasons. First, DEQ did not cite Kehoe  
25 for a *permit* violation; the civil penalty assessment is based on a *statutory* violation, *i.e.*,  
26 violation of ORS 468B.050(1)(a) by discharging wastes into waters of the state without a

1 permit. There is no requirement for a notice of a statutory violation before assessing a civil  
2 penalty.

3 Second, even if the penalty had been assessed for a permit violation, two of the notice  
4 exceptions in OAR 340-012-0040(2) would apply. EPA's water quality regulations require  
5 that any state agency administering an NPDES program *must* have available certain remedies  
6 for violations of state program requirements, including the ability to recover civil penalties  
7 for violations of any NPDES permit condition or any regulation. 40 CFR §123.27(a)(3)(i).  
8 Thus, the NPV requirement most likely is inapplicable to NPDES permits under OAR 340-  
9 012-0040(2)(g). The exemption contained in OAR 340-012-0040(2)(b) also would apply  
10 because the violation, sedimentary runoff from heavy rainfall, normally would not occur for  
11 five consecutive days.

12 Moreover, the permit required Kehoe to monitor the site after significant rainfall  
13 events and take corrective actions. Kehoe does not deny that it knew about the heavy rains  
14 and the erosion problems. In fact, its defense rests primarily on the fact that during the time  
15 of the violation, Oregon received unusually high levels of rainfall. Therefore, it is  
16 nonsensical for Kehoe to say that it was unaware of any violations. The company knew  
17 there were heavy rains, and it knew there were erosion problems. However, it chose not to  
18 take appropriate control measures until after the Department issued the NON.

19 Because Kehoe was not entitled to an NPV for this violation, the source was not  
20 entitled to the compliance certification or correction procedures. Whatever due process  
21 rights Kehoe has are satisfied by the contested case hearing process provided by ORS chapter  
22 183 and the Department's rules contained in OAR 340 Division 12 for assessing civil  
23 penalties.

24 **2. The Oregon Rules of Civil Procedure (ORCP) do not apply to**  
25 **administrative hearings, and Kehoe is not entitled to compulsory joinder of all interested**  
26 **parties.**

1 Kehoe argues that ORCP 29 compels the Department to join *all* persons who caused  
2 the violation to participate in this proceeding. This is incorrect. The ORCP "govern  
3 procedure and practice in all circuit and district courts of this state \* \* \* for all civil actions  
4 and special proceedings \* \* \* ." ORCP 1A. A contested case hearing under ORS chapter  
5 183 is not in a circuit or district court of the state, nor is it a civil action or "special  
6 proceeding" as that term is used in the rule.

7 The provisions governing procedure and practice in administrative contested case  
8 hearings are contained in ORS chapter 183, the Attorney General's Model Rules found in  
9 OAR 137-003-0001 to 137-004-0010, and procedural rules adopted by the agency. The  
10 Department's procedural rules for contested case hearings are contained in OAR 340,  
11 Division 11. Nothing in those provisions requires compulsory joinder of additional parties.

12 Furthermore, most of the environmental statutes, including ORS 465B.050(1),  
13 establish strict liability for violations. This is not a matter of determining damages that  
14 should be apportioned between various tortfeasors. The statute applies to any person who  
15 violates it, and the remedies range from compliance orders to civil penalties. There is no  
16 need to join additional parties when civil penalties are at issue. The civil penalty is assessed  
17 against the violator on an individual basis for purposes of obtaining and maintaining  
18 compliance with the Department's statutes and to deter future violators and violations, among  
19 other things. OAR 340-012-0026(1).

20 **3. The Department's enforcement of the environmental statutes is not an**  
21 **equal protection violation.**

22 Kehoe asserts that the Department's failure to take enforcement actions against the  
23 person's or entities "actually responsible for the discharge of the waste" and other land  
24 owners or permit holders who also were in violation of the statute violates Kehoe's right of

25 ///

26 ///



1 equal protection under the law.<sup>1</sup> Kehoe also seems to contend that the Department must  
2 prove that Kehoe itself "actively engaged in conduct which effectively caused waste to be  
3 discharged into the waters of the State." The company provides no authority for either of  
4 these contentions.

5 A regulatory agency's exercise of its prosecutorial discretion is not unlawful *per se*.  
6 It clearly is impossible for enforcement agencies to take enforcement actions against every  
7 person who violates any law, and Kehoe's reference to "selective enforcement" is misplaced.

8  
9 That term, like "selective prosecution," refers to a defense based on proof that the  
10 prosecutor or investigator intentionally singled out the defendant for punishment because of  
11 membership in a constitutionally protected group or the exercise of a constitutionally  
12 protected right. *Futernick v. Sumpter Tp.*, 78 F.3d 1051, 1056 (6th Cir. 1996), *cert. denied*  
13 117 S. Ct. 296. There must be a discriminatory intent or other impermissible motive. *Id.*  
14 The court explained as follows:

15 There is no right under the Constitution to have the law go unenforced  
16 against you, even if you are the first person against whom it is enforced, and  
17 even if you think (or can prove) that you are not as culpable as some others  
18 who have gone unpunished. The law does not need to be enforced everywhere  
19 to be legitimately enforced somewhere; and prosecutors have broad discretion  
20 in deciding whom to prosecute.

21 *Id.* Kehoe does not claim to be a member of any constitutionally protected group, nor does  
22 he claim that the Department is punishing him for exercising a constitutionally protected  
23 right. Instead, he claims that the Department selectively enforced the statute because it  
24 neglected to assess civil penalties against the persons or entities actually doing the

---

24 <sup>1</sup> Kehoe is referring either to the Equal Protection Clause of the Fourteenth Amendment to the  
25 U.S. Constitution, which provides that no state may "deny to any person within its jurisdiction the  
26 equal protection of the laws," or to the Privileges and Immunities Clause of Section 10, Article I of  
the Oregon Constitution, which provides that "[n]o 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." The Oregon provision arguably applies to a state agency's decision to enforce or not  
enforce a state law, agency rule, or permit limitation.

1 construction work and against other land owners or permit holders who also violated the  
2 statute. This simply does not meet the test for a "selective enforcement" defense.

3 Furthermore, it is absurd to argue that the owner/developer company has no  
4 responsibility for waste discharge from activities actually conducted by other individuals but  
5 under the owner/developer's control and direction. As owner, developer and permit holder,  
6 Kehoe was responsible for complying with the statutes, as well as the terms of its permit.

7 **CONCLUSION**


8 Kehoe had a responsibility to be out there at the site, monitoring the site conditions  
9 during this period of unusually heavy rain, and taking the necessary measures to prevent the  
10 erosion and sediment runoff that occurred.

11 The Department did not fail to follow established compliance procedures because it  
12 did not cite Kehoe for a permit violation but, instead, for a statutory violation caused by  
13 activities not allowed in the permit. Finally, Kehoe has offered no evidence in support of its  
14 selective prosecution defense. For these reasons, the hearing officer's order should be  
15 entered and the civil penalty affirmed.

16 DATED: November 7th 1997.

17 Respectfully submitted,

18 HARDY MYERS  
19 Attorney General

20   
21 \_\_\_\_\_  
22 Shelley K. McIntyre #84401  
23 Assistant Attorney General  
24 Department of Justice  
25 1515 SW Fifth Avenue, Suite 410  
26 Portland, Oregon 97201  
Telephone: (503) 229-5725

SM:sm:kt/SKM0525.MIS

CERTIFICATE OF SERVICE

I certify that on November 7, 1997, I served a true and correct copy of the DEPARTMENT'S RESPONSE TO APPELLANT'S EXCEPTIONS TO HEARING DECISION AND BRIEF upon the following persons by the method(s) indicated below:

Patrick J. Baffaro  
Attorney at Law  
6501 SW Macadam Avenue  
Portland, Oregon 97201

Hand Deliver   
First Class U.S. Mail   
Registered U.S. Mail   
Overnight Mail   
Telecopy (FAX)

Susan Greco  
DEQ — Director's Office  
811 SW Sixth Avenue  
Portland, Oregon 97204

Hand Deliver   
First Class U.S. Mail   
Registered U.S. Mail   
Overnight Mail   
Telecopy (FAX)

Judith Anderson  
DEQ — Northwest Region  
Suite 400  
2020 SW Fourth Avenue  
Portland, Oregon 97201-4987

Hand Deliver   
First Class U.S. Mail   
Registered U.S. Mail   
Overnight Mail   
Telecopy (FAX)

DATED this 7th day of November, 1997.



Kurt Burkholder #80465  
Assistant Attorney General

SM:k/SKM0525.MIS

# PATRICK J. BAFFARO

ATTORNEY AT LAW  
6501 S.W. MACADAM AVENUE  
PORTLAND, OREGON 97201  
EMAIL: [patrickb@teleport.com](mailto:patrickb@teleport.com)

TELEPHONE: (503) 246-9927

FACSIMILE: (503) 246-7725

October 9, 1997

State of Oregon  
Department of Environmental Quality

RECEIVED

OCT 10 1997

OFFICE OF THE DEPUTY DIRECTOR

Susan Greco  
Environmental Quality Commission  
811 SW Sixth Ave.  
Portland, OR 97204

State of Oregon  
Department of Environmental Quality

RECEIVED

OCT 10 1997

OFFICE OF THE DEPUTY DIRECTOR

Re: The Kehoe Company;  
Hearings Case No.: 96-DEQ-006

Dear Ms. Greco,

Enclosed, please find Appellant's Exceptions to Hearing Decision and Brief for the above-referenced matter. If you have any questions, please call.

Thank you.

Sincerely,



Patrick Baffaro

Enclosure

cc: The Kehoe Company  
Judith Anderson, DEQ

*Attachment 4-8 pages*

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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION  
OF THE STATE OF OREGON

IN THE MATTER OF: )  
                          ) AGENCY CASE No.: WQSW-NWR-97-019  
                          ) HEARINGS CASE NO.: 96-DEQ-006  
                          ) WASHINGTON COUNTY  
THE KEHOE COMPANY, )  
an Oregon corporation, ) APPELLANT'S EXCEPTIONS TO HEARING  
Respondent. ) DECISION AND BRIEF  
                          )

Procedural Background

This is an appeal of a Hearing Decision dated August 29, 1997, in which Hearings Officer Lawrence S. Smith found Appellant THE KEHOE COMPANY (hereinafter the "Appellant") in violation of ORS 465B.050(1), and liable for a civil penalty of \$4,200.00. Timely Notice of Appeal was served on the Environmental Quality Commission on September 11, 1997 by and through Appellant's attorney, Patrick Baffaro.

1 Facts

2 This matter arises out of an alleged violation of ORS  
3 465B.050(1), which prohibits a person from discharging waste into  
4 the waters of the State of Oregon without a valid permit.  
5 Appellant owns real property in the county of Washington commonly  
6 referred to as Scholls Meadows Subdivision (the "Site").  
7 Appellant also holds an Erosion Control Joint Permit relating to  
8 the Site.

9 During the winter of 1996, the State of Oregon experienced  
10 unusually high levels of rainfall. This large volume of rainfall  
11 resulted in an indeterminable amount of sediment runoff wherever  
12 dirt or other material was exposed. Appellant's Site did include  
13 areas of exposed dirt or other material.

14 A representative of the Department of Environmental Quality  
15 (the "Department") allegedly inspected the Appellant's Site  
16 during the winter of 1996, beginning on or about November 22,  
17 1996. At this time, Appellant's name, the name of Appellant's  
18 President, and Appellant's address and telephone number were all  
19 a matter of public record. **Not once, prior to the assessment of**  
20 **a Notice of Noncompliance, did the Department directly contact**  
21 **Appellant to advise or alert Appellant to the existence of any**  
22 **alleged violations.** In fact, the Department's first contact with  
23 Appellant was when it served Appellant with the Notice of  
24 Noncompliance on December 23, 1996. Appellant immediately took

1 action to assess the alleged violations and bring the Site into  
2 full compliance.

3 **Exceptions to Hearing Decision**

4 1. The Department denied Appellant due process of law.

5 OAR 340-12-040 provides that, prior to the assessment of a  
6 civil penalty, the Department "...shall provide a Notice of Permit  
7 Violation to the permittee [emphasis added]." The Department did  
8 not provide a Notice of Permit Violation ("NPV") to Appellant.

9 The above rule provides a framework for compliance  
10 certification of alleged environmental infractions. It also  
11 includes procedural safeguards to ensure that alleged violations  
12 are addressed by the individual or entities responsible for the  
13 alleged violation. See OAR 340-12-040(1)(d).

14 The Department's failure to provide Appellant with a NPV  
15 deprived Appellant of due process by denying Appellant the right  
16 to participate in the compliance certification program created by  
17 the rule. Consequently, the procedural safeguards which exist  
18 under the compliance certification program (e.g., requiring a  
19 Responsible Official to sign the certification) were not  
20 followed.

21 Appellant agrees that the Department has an obligation to  
22 the citizens of the State of Oregon to enforce compliance with  
23 environmental regulations. While this mandate includes the  
24 ability to assess a civil penalties, the primary objective of the

1 Department is not to collect money or penalize landowners, but  
2 rather to ensure compliance. The NPV process promotes the  
3 advancement of this objective. Failure to follow this procedure  
4 not only denies a person due process but is counter-productive to  
5 the Department's goals and objectives.

6  
7 2. Appellant is entitled to compulsory joinder of all  
8 interested parties.

9 ORS 465B.050(1) does not prohibit just a "permit holder"  
10 from discharging waste into the waters of the state of Oregon.  
11 Rather, it prohibits any "person" from doing so. The  
12 Department's obligation to enforce this statute did not stop with  
13 Appellant simply because Appellant owned the land on which the  
14 activity causing the alleged violations occurred.

15 Appellant is entitled to have those persons or entities  
16 which actually caused the alleged violation to participate in  
17 these proceedings. Complete and effective relief cannot be  
18 granted unless these indispensable parties are joined in this  
19 dispute. ORCP 29.

20 3. The Department's selective enforcement of ORS  
21 465B.050(1) against Appellant violated Appellant's constitutional  
22 rights.

23 The Department failed to introduce any evidence that  
24 Appellant itself actively engaged in conduct which effectively  
caused waste to be discharged into the waters of the State, in



1 violation of ORS 465B.050(1). In order to appropriately enforce  
2 the statute, the Department has the obligation to seek compliance  
3 not only with the permit holder but with the persons or entities  
4 actually responsible for the discharge of the waste. The  
5 Department allegedly visited the Site on three occasions, and was  
6 (or should have been) aware of the persons or entities actually  
7 engaged in the conduct which resulted in the alleged violations.  
8 Also, the Department neglected to assess civil penalties against  
9 other land owners or permit holders who also were in violation of  
10 the statute. The Department's selective enforcement of this  
11 statute violates Appellants right of equal protection under the  
12 law.

13 **ALTERNATIVE PROPOSED FINDINGS**

14 1. The Department failed to issue a Notice of Permit  
15 Violation, and there was not a legitimate or reasonable cause for  
16 not doing so. The failure to issue a NPV prohibits the  
17 Department from assessing a civil penalty. The civil penalty  
18 previously assessed should therefore be summarily dismissed.

19 2. The Department failed to join indispensable parties to  
20 this dispute. The Department had knowledge of those persons or  
21 entities participating in the conduct which caused the alleged  
22 violations, but chose not to include those persons or entities in  
23 these proceedings. The failure to join all indispensable parties  
24 precludes the Department and Appellant from complete and

1 effective relief. The civil penalty previously assessed should  
2 therefore be summarily dismissed.


3 3. The Department's selective enforcement of the statutes  
4 and their rules and regulations prejudiced Appellant and denied  
5 Appellant its right of equal protection under the law. The civil  
6 penalty previously assessed should therefore be summarily  
7 dismissed.

8 CONCLUSION

9 The Department at all times was aware of the existence of  
10 Appellant. The name of Appellant's president and the telephone  
11 number of Appellant were a matter of public record. Nonetheless,  
12 the Department failed to notify Appellant of the possibility that  
13 environmental violations were occurring on Appellant's property.

14 The Department also failed to follow established compliance  
15 procedures, and selectively penalized Appellant. An assessment  
16 of the civil penalty under the circumstances was inappropriate.  
17 The civil penalty should be repealed.

18 Dated: October 9, 1997.

19  
20   
Patrick Baffaro, OSB# 93202  
Attorney for Appellant  
6501 SW Macadam Ave.  
Portland, OR 97201  
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22 (503) 246-9927  
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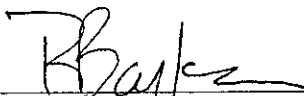
CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing APPELLANT'S  
EXCPECTIONS, TO HEARING DECISION AND BRIEF on the following parties  
on the 9th day of October, 1997, by depositing the same with the  
United States Postal Service, postage prepaid, addressed as  
follows:

Susan Greco  
Environmental Quality Commission  
811 SW Sixth Ave.  
Portland, OR 97204

Judith Anderson  
Department of Environmental Quality  
2020 SW Fourth Ave., Suite 400  
Portland, OR 97201-4987

DATED: October 9, 1997.

  
Patrick Barkaro, OSB# 93202  
Attorney for Appellant  
6501 S.W. Macadam Ave.  
Portland, OR 97201  
(503) 246-9927

September 11, 1997

DEPARTMENT OF  
ENVIRONMENTAL  
QUALITY

Patrick Baffaro  
Attorney at Law  
6501 S.W. Macadam Avenue  
Portland OR 97201

RE: Appeal to Environmental Quality Commission

Dear Mr. Baffaro:


On September 11, 1997, the Environmental Quality Commission received The Kehoe Company's timely request for administrative review by the Commission in DEQ Case No. WQSW-NWR-97-019.

Pursuant to OAR 340-11-132(4)(a), you must file exceptions and brief within thirty days from the filing of the Notice of Appeal (October 11, 1997). The exceptions must specify those findings and conclusions that you object to and include alternative proposed findings. Once your exceptions have been received, the Department may file an answer brief. I have enclosed a copy of the applicable administrative rules.

To file exceptions and brief, please send to Susan Greco, on behalf of the Environmental Quality Commission, at 811 S.W. 6th Avenue, Portland, Oregon, 97204, with a copy to Judith Anderson, Department of Environmental Quality, 2020 S.W. 4th Avenue, Suite 400, Portland, Oregon, 97201.

After the parties file exceptions and briefs, this item will be set for Commission consideration at a regularly scheduled Commission meeting, and the parties will be notified of the date and location. If you have any questions on this process, or need additional time to file exceptions and briefs, please call me at 229-5213 or (800) 452-4011 ext. 5213 within the state of Oregon.

Sincerely,

  
Susan M. Greco  
Rules Coordinator

cc: Judith Anderson, Enforcement Section



811 SW Sixth Avenue  
Portland, OR 97204-1390  
(503) 229-5696  
TDD (503) 229-6993

DEQ-1



*Attachment 5-1 page*

# PATRICK J. BAFFARO

ATTORNEY AT LAW  
6501 S.W. MACADAM AVENUE  
PORTLAND, OREGON 97201  
EMAIL: *patrickb@teleport.com*

TELEPHONE: (503) 246-9927

FACSIMILE: (503) 246-7725

State of Oregon  
Department of Environmental Quality

RECEIVED

SEP 11 1997

September 10, 1997

OFFICE OF THE DEPUTY DIRECTOR

Ms. Susan Greco  
Environmental Quality Commission  
811 SW Sixth Ave.  
Portland, OR 97204

Re: The Kehoe Company;  
Hearings Case No.: 96-DEQ-006

Dear Ms. Greco,

I represent The Kehoe Company, an Oregon corporation. I have been advised by telephone call to your office that service of a Notice of Appeal should be made to you at the above address. Enclosed, therefore, please find one original Notice of Appeal for the above-referenced Hearings Case, and a Certificate of Service.

Thank you.

Sincerely,

  
Patrick Baffaro

cc: The Kehoe Company

*Attachment 6-3 pages*


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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION  
OF THE STATE OF OREGON

IN THE MATTER OF: )  
 ) AGENCY CASE No.: WQSW-NWR-97-019  
 ) HEARINGS CASE NO.: 96-DEQ-006  
 THE KEHOE COMPANY, ) WASHINGTON COUNTY  
 an Oregon corporation, )  
 Respondent. ) RESPONDENT'S NOTICE OF APPEAL

Respondent THE KEHOE COMPANY, by and through its attorney,  
Patrick Baffaro, hereby gives notice of its intent to appeal the  
Hearing Order Regarding Assessment of Civil Penalty dated August  
29<sup>th</sup>, 1997, signed by Lawrence S. Smith, Hearings Officer (the  
"Order"), and requests, pursuant to OAR 340-011-0132, that the  
Environmental Quality Commission review the Order.

DATED: September 10, 1997.

  
Patrick Baffaro, OSB# 93202  
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing RESPONDENT'S  
NOTICE OF APPEAL on the following parties on the 10<sup>th</sup> day of  
September, 1997, by depositing the same with the United States  
Postal Service, postage prepaid, addressed as follows:

Susan Greco  
Environmental Quality Commission  
811 SW Sixth Ave.  
Portland, OR 97204

Judith Anderson  
Department of Environmental Quality  
2020 SW Fourth Ave., Suite 400  
Portland, OR 97201-4987

DATED: September 10, 1997.

  
Patrick Barfaro, OSB# 93202  
Attorney for Respodent

6501 S.W. Macadam Ave.  
Portland, OR 97201  
(503) 246-9927

**BEFORE THE ENVIRONMENTAL QUALITY COMMISSION  
OF THE STATE OF OREGON**

<b>IN THE MATTER OF:</b>	)	<b>HEARING ORDER REGARDING</b>
	)	<b>ASSESSMENT OF</b>
<b>The Kehoe Company,</b>	)	<b>CIVIL PENALTY</b>
<b>an Oregon Corporation,</b>	)	<b>NO. WQSW-NWR-97-019</b>
<b>Respondent</b>	)	<b>WASHINGTON COUNTY</b>

**BACKGROUND**

A Notice of Assessment of Civil Penalty was issued March 19, 1997, under Oregon Revised Statutes (ORS) Chapter 183 and ORS 468.126 through 468.140, and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12. On April 1, 1997, respondent The Kehoe Company, Inc., (hereinafter, Kehoe) requested a hearing.

A hearing was held on August 14, 1997, in the Department of Environmental Quality (DEQ) offices in Portland, Oregon, before hearings officer Lawrence S. Smith. Respondent Kehoe was represented by Martin Kehoe, president. Judith Anderson, environmental law specialist, represented DEQ, with one witness.

**ISSUES**

Did respondent violate ORS 468B.050(1)(a) by discharging wastes in waters of the state without a permit?

**FINDINGS OF FACT**

1. On September 10, 1996, respondent The Kehoe Company (Kehoe) submitted an application to the Unified Sewerage Agency (USA) for an Erosion Control Joint Permit (1200-C General Permit) for its property called the Scholls Meadows Subdivision, located at Scholls Ferry and Sunrise Roads, Washington County, Oregon (Exhibit 6). USA acted as an agent for the Department of Environmental Quality (DEQ) in monitoring erosion in that area. In its application, respondent Kehoe submitted a plan indicating, among other things, the construction activity and proposed measures to be used to control sediment runoff. Respondent Kehoe's subcontractor, Land Development Consultants, Inc., (LDC) developed the plan for respondent Kehoe. The application also said that respondent Kehoe would: inspect all erosion control facilities at least once every seven days and within 24 hours after any rain more than one-half inch; inspect all erosion control facilities during stormy periods; and monitor effectiveness of pollution control facilities and practices and take action to reduce discharge of sediments if measurable quantities of sediment leave the property. The application also stated the general requirement that all general conditions and penalties for noncompliance under the DEQ 1200-C permit shall apply (Exhibit 9). An employee for LDC received the Surface Water Permit on November 11, 1996 (Exhibit 5).



2. On November 22, 1996, a stormwater inspector for DEQ visited respondent Kehoe's subdivision in response to a complaint after record rains during the past four days. The inspector noted the only erosion control for the main road leading into the site was a silt fence, which had been completely overwhelmed by sedimentary runoff. He came back on November 26, 1996, and saw no new erosion control measures had been installed. He talked to the foreman at the job and told him that such measures should be taken. The foreman explained that measures such as laying rock on the cleared road, which would have significantly reduced the runoff, were put off because the road was scheduled to be dug up to lay utility lines.

3. The inspector came back on November 27, 1996, and saw no new erosion control measures that had been installed (Exhibit 10). He saw considerable water flowing into a ditch that flowed to a tributary of Fanno Creek. He notified USA of the problem.

4. The inspector next visited the site on December 18, 1996, and saw considerably more erosion and sedimentary runoff. He noted one new silt fence across the road, which was ineffective, and no other measures. He understood USA had set up the silt fence. Erosion gullies on the road were much deeper during this later inspection, up to five feet deep and three feet wide. The gullies would not have been nearly that deep if respondent Kehoe or USA had taken some or all of the following erosion control measures back around November 23, 1996, after the heaviest rain: blocked the gullies with hay, bio-bags, compost, or some other material; cut water bars to reduce the erosion; lay rock over the roadway to preserve the integrity of the road.

5. Because the inspector saw only very minimal erosion control measures had been implemented, he sent respondent Kehoe a Notice of Non-Compliance on December 23, 1996 (Exhibit 11). After respondent Kehoe received this Notice, it took considerable measures to reduce the runoff, such as more silt fencing, laying straw, rocking some parts, and digging new ditches. The president for respondent Kehoe met with DEQ representatives to deal with the runoff. The inspector for DEQ did not deny that all construction sites had some soil runoff during that time because of the unusually heavy rains, but he noted a much deeper level of mud left besides the ditch, which indicated there was considerable amount of soil and sediment carried by the water eventually into a tributary of Fanno Creek.

6. Respondent Kehoe had received no permit to discharge sediment into a tributary of Fanno Creek. It had never before been fined for a violation.

### ULTIMATE FINDINGS

Respondent Kehoe discharged waste into the waters of the state without a valid NPDES permit.

## APPLICABLE LAW

ORS 468B.050(1) states in part:

- \* \* \* [W]ithout first obtaining a permit from the director, \* \* \*, no person shall:
- (a) Discharge any wastes into the waters of the state from any industrial or commercial establishment or activity or any disposal system.

ORS 468B.005(7) states:

“Wastes” means sewage, industrial wastes, and all other liquid, gaseous, solid, radioactive or other substances which will or may cause pollution or tend to cause pollution of any waters of this state.

ORS 468B.005(3) states:

“Pollution” or “water pollution” means such alteration of the physical, chemical or biological properties of any waters of the state, including change in temperature, taste, color, turbidity, silt or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive or other substance into any waters of the state, which will or tends to, either by itself or in connection with any other substance, create a public nuisance or which will or tends to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational or other legitimate beneficial uses or to livestock, wildlife, fish, or other aquatic life or the habitat thereof.

ORS 468B.055(8) states:

“Water” or “the waters of the state” include lakes, bays, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Pacific Ocean within the territorial limits of the State of Oregon and all other bodies of surface or underground waters, natural or artificial, inland or coastal, fresh or salt, public or private \* \* \* which are wholly or partially within or bordering the state or within its jurisdiction.

## CONCLUSIONS AND REASONS

DEQ has the burden of establishing a violation by a preponderance of the evidence. Water containing a large amount of sediment ran off the property into a ditch and eventually into a tributary of Fanno Creek. The definition of “the waters of the state” is broad and clearly includes tributaries of Fanno Creek. The sediment caused turbidity, which is pollution as defined above. Respondent Kehoe violated the above law because it was permit holder that agreed in the permit to reduce or eliminate sedimentary runoff and it did not do so from November 22, 1996 until December 18, 1996, a very wet period of time and a period of time when considerable sediment flowed off the property in question. No worksite during that time prevented all sedimentary

runoff because it rained so much. Respondent Kehoe was cited because it took little or no erosion control measures during that period.

The president for respondent Kehoe testified emphatically at great length regarding the measures taken, but these measures were taken later, after the Notice of Non-Compliance was sent and after the heaviest rains had already caused significant erosion. His later attempts at erosion control are laudable, but do not detract from the conclusion that respondent Kehoe violated the above law during the period in issue, November 22, 1996 until December 18, 1996. Respondent Kehoe could have done more by implementing the erosion control measures much earlier, when they were needed.

Respondent Kehoe alleged that all other contractors at that time were also in violation. DEQ's inspector conceded that to be true, but testified that he cited respondent Kehoe because little or no measures were taken over a period of three weeks, when the permit required immediate steps.

### CIVIL PENALTY

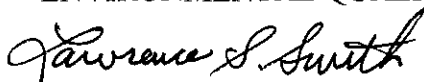
The civil penalty for the violation is determined under OAR 340-12-045. The DEQ's calculation of the civil penalty (Exhibit 1 of the Notice of Assessment of Civil Penalty (Exhibit 2)) is adopted as correct and incorporated in this decision (see Exhibit 1, attached). The amount of the penalty was correctly determined. The violation was repeated because it continued over 21 days. It was due to negligence because in its permit, respondent Kehoe agreed to take certain steps during stormy periods, such as daily inspection and implementation of erosion control measures. These were not done during at least 21 days, right after heavy rains. Respondent Kehoe was negligent.

### ORDER

Respondent The Kehoe Company, Inc., violated ORS 468B.050(1), and is liable for a civil penalty of \$4,200.

Dated this 29th day of August, 1997.

ENVIRONMENTAL QUALITY COMMISSION



Lawrence S. Smith  
Hearings Officer

### APPEAL RIGHTS

If you are not satisfied with this decision, you have 30 days to appeal it to the Environmental Quality Commission. See Oregon Administrative Rule (OAR) 340-11-132. If you wish to appeal the Commission's decision, you have 60 days to file a petition for review with the Oregon Court of Appeals from the date of service of the order by the Environmental Quality Commission. See, ORS 183.480 et seq.

**STATEMENT OF MAILING**

**AGENCY CASE NO. WQSW-NWR-96-009A  
HEARINGS CASE NO. 96-DEQ-006**

I certify that the attached Order was served through the mail to the following parties in envelopes addressed to each at their respective addresses, with postage fully prepaid:

Martin Kehoe, president  
The Kehoe Company  
P.O. Box 69501  
Portland, OR 97201

Judith Anderson  
Enforcement Section, DEQ  
2020 SW Fourth Avenue, Suite 400  
Portland, OR 97201-4987

Susan Greco  
DEQ  
811 SW Sixth Avenue  
Portland, OR 97204

Mailing/Delivery Date: *08-29-97*  
Hearings Clerk: *JL*

EXHIBIT 1

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

VIOLATION: Discharging wastes into waters of the state without a permit.

CLASSIFICATION: The violation is a Class I violation pursuant to OAR 340-12-055(1)(b).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-12-045(1)(a)(ii), because there is no selected magnitude for this violation.

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

"BP" is the base penalty which is \$3,000 for a Class I moderate magnitude violation in the matrix listed in OAR 340-12-042(1).

"P" is Respondent's prior significant action(s) and receives a value of 0 because the Respondent has no prior significant action as defined in OAR 340-12-030.

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant action(s) and receives a value of 0 because the Respondent has no prior significant actions.

"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 2 because this violation was documented on at least two occasions.

"R" is the cause of the violation and receives a value of 2 as Respondent's actions were negligent. Respondent failed to take reasonable care to implement Respondent's erosion and sediment control measures to ensure that sediment laden water did not discharge into waters of the state.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 because there is insufficient information to make a finding.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of 0 as there is insufficient information upon which to base a finding of other than 0.

PENALTY CALCULATION:

Penalty = BP +  $[(.1 \times BP) (P + H + O + R + C)] + EB$   
= \$3,000 +  $[(.1 \times 3,000) (0 + 0 + 2 + 2 + 0)] + 0$   
= \$3,000 +  $[(300)(4)] + 0$   
= \$3,000 + 1,200 + 0  
= \$4,200

MAR 19 1997

CERTIFIED MAIL P 335 735 706

Kehoe Company  
Martin Kehoe, Registered Agent  
11426 SW Riverwood Road  
Portland, Oregon 97219

Re: **Notice of Assessment of  
Civil Penalty**  
No. WQSW-NWR-97-019  
Washington County

On November 26, 27, and December 18, 1996, Paul Keiran, a Department Stormwater Inspector, visited Kehoe Company's Scholls Meadow construction site located in Washington County, Oregon in response to a citizen complaint. During his inspections, Mr. Keiran documented violations of Oregon's environmental laws.

On December 23, 1996, the Department issued Kehoe Company a Notice of Noncompliance (NON) to notify you that the discharges of sediment laden water from the construction site were unauthorized and violated Oregon law.

During his inspections on November 26 and 26, Mr. Keiran observed that erosion control measures were insufficient to control the stormwater runoff at the construction site. He also documented evidence that sediment laden or turbid water had been flowing off the construction site and entering Fanno Creek, and eventually the Tualatin River, for several weeks.

On December 18, 1996, Mr. Keiran inspected the site again and observed that the site's erosion control had not been improved on the site and that sediment laden flows were still discharging into Fanno Creek, waters of the state as defined by Oregon Revised Statute (ORS) 468B.005(8).

Mr. Keiran noted that some erosion control measures were implemented between December 18 and December 23, but additional erosion control measures were needed to prevent sediment laden flows from discharging into Fanno Creek.

Ex. 1



811 SW Sixth Avenue  
Portland, OR 97204-1390  
(503) 229-5696  
TDD (503) 229-6993

DEQ-1



Attachment 8-32 pages.

Kehoe Company  
WQSW-NWR-97-019  
Page 2

Visible or measurable erosion which leaves the construction site is specifically prohibited under the terms of the National Pollutant Discharge Elimination System (NPDES) Permit No. 1200-C. Unified Sewerage Agency (USA) issued a NPDES Permit No. 1200-C to Kehoe Company pursuant to an agreement between the Department and USA. In addition, ORS 468B.050(1)(a) prohibits the discharging of wastes into waters of the state without first obtaining a NPDES Permit from the Department which would authorize the such a discharge.

The Department regulates stormwater discharges as part of its Stormwater Pollution Control Plan. Stormwater discharges are one of the largest sources of water pollution in the state. The sediments which enter streams through stormwater discharges such as the one described above adversely impact aquatic wildlife in many ways. Sediments discharged into the stream may cover up wildlife food sources, cause abrasion of fish gills, smother fish eggs, and impair vision, making it more difficult for the fish to feed and avoid predators. Additionally, these sediments may carry substances into the streams which are toxic to various aquatic species.

Because you violated the above referenced statute, you are liable for a civil penalty assessment. In the enclosed Notice, I have assessed a total civil penalty of \$4,200. In determining the amount of the penalty, I used the procedures set forth in Oregon Administrative Rule (OAR) 340-12-045. The Department's findings and civil penalty determinations are attached to the Notice as Exhibit 1.

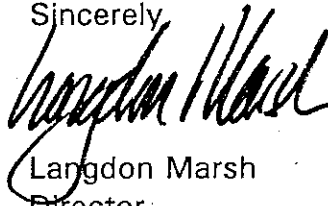
Appeal procedures are outlined in the Notice. If you fail to either pay or appeal the penalty within twenty (20) days, a Default Order will be entered against you. If you wish to discuss this matter, or if you believe there are mitigating factors which the Department might not have considered in assessing the civil penalty, you may request an informal discussion by attaching a request to the appeal. A request to discuss this matter with the Department will not waive any right to a contested case hearing.

The Department appreciates the efforts Kehoe Company has taken since receiving the NON to prevent additional sediment from leaving the construction site. I look forward to your continued cooperation in complying with Oregon's environmental laws in the future. However, if any additional violations occur, additional civil penalties may be assessed.

Kehoe Company  
WQSW-NWR-97-019  
Page 3

Copies of referenced rules are enclosed. Also enclosed is a copy of the Department's internal management directive regarding civil penalty mitigation for Supplemental Environmental Projects (SEP). If you have any questions about these actions, please contact Judith Anderson with the Department's Enforcement Section in Portland at 229-5152.

Sincerely,



Langdon Marsh  
Director

Enclosures

cc: Northwest Region, Portland Office, DEQ  
Water Quality Division, DEQ  
Department of Justice  
Environmental Protection Agency  
Environmental Quality Commission  
Washington County District Attorney  
Unified Sewerage Agency



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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION  
OF THE STATE OF OREGON

IN THE MATTER OF:	)	
KEHOE COMPANY,	)	NOTICE OF ASSESSMENT
an OREGON CORPORATION,	)	OF CIVIL PENALTY
Respondent.	)	WQSW-NWR-97-019
	)	WASHINGTON COUNTY

I. AUTHORITY

This Notice of Assessment of Civil Penalty (Notice) is issued to Respondent, Kehoe Company, an Oregon Corporation, by the Department of Environmental Quality (Department) pursuant to Oregon Revised Statutes (ORS) 468.126 through 468.140, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12.

II. VIOLATION

On or about November 26, 27, and December 18, 1996, Respondent violated ORS 468B.050(1)(a) by discharging wastes into waters of the state as defined by ORS 468B.005(8), without first receiving a National Pollutant Discharge Elimination System (NPDES) Permit from the Department authorizing such discharge. Specifically, Respondent caused or allowed wastes (turbid water) from Respondent's construction site, Scholls Meadows Subdivision, located at Scholls Ferry and Sunrise Road, Washington County, Oregon, to enter Fanno Creek, waters of the state pursuant to ORS 468B.005(8). This is a Class I violation pursuant to OAR 340-12-055(1)(b).

III. ASSESSMENT OF CIVIL PENALTIES

The Department imposes a \$4,200 civil penalty for the violation cited in Section II above. The findings and determination of Respondent's civil penalty pursuant to OAR 340-12-045 are attached and incorporated as Exhibit No. 1.

///

*Ex. 2*

1 IV. OPPORTUNITY FOR CONTESTED CASE HEARING

2 Respondent has the right to have a formal contested case hearing before the  
3 Environmental Quality Commission (Commission) or its hearings officer regarding the  
4 matters set out above, at which time Respondent may be represented by an attorney  
5 and subpoena and cross-examine witnesses. **The request for hearing must be made in**  
6 **writing, must be received by the Department's Rules Coordinator within twenty (20)**  
7 **days from the date of service of this Notice, and must be accompanied by a written**  
8 **"Answer" to the charges contained in this Notice.**

9 In the written Answer, Respondent shall admit or deny each allegation of fact  
10 contained in this Notice, and shall affirmatively allege any and all affirmative claims or  
11 defenses to the assessment of this civil penalty that Respondent may have and the  
12 reasoning in support thereof. Except for good cause shown:

- 13 1. Factual matters not controverted shall be presumed admitted;
- 14 2. Failure to raise a claim or defense shall be presumed to be a waiver of  
15 such claim or defense;
- 16 3. New matters alleged in the Answer shall be presumed to be denied  
17 unless admitted in subsequent pleading or stipulation by the Department or  
18 Commission.

19 Send the request for hearing and Answer to: **DEQ Rules Coordinator,**  
20 **Management Services Division, 811 S.W. Sixth Avenue, Portland, Oregon 97204.**

21 Following receipt of a request for hearing and an Answer, Respondent will be notified  
22 of the date, time and place of the hearing.

23 Failure to file a timely request for hearing and Answer may result in the entry of  
24 a Default Order for the relief sought in this Notice.

25 Failure to appear at a scheduled hearing or meet a required deadline may result  
26 in a dismissal of the request for hearing and also an entry of a Default Order.

27 ///

1 The Department's case file at the time this Notice was issued may serve as the  
2 record for purposes of entering the Default Order.

3 V. OPPORTUNITY FOR INFORMAL DISCUSSION

4 In addition to filing a request for a contested case hearing, Respondent may  
5 also request an informal discussion with the Department by attaching a written  
6 request to the hearing request and Answer.

7 VI. PAYMENT OF CIVIL PENALTY

8 The civil penalty is due and payable ten (10) days after an Order imposing the  
9 civil penalty becomes final by operation of law or on appeal. Respondent may pay the  
10 penalty before that time. Respondent's check or money order in the amount of  
11 \$4,200 should be made payable to "State Treasurer, State of Oregon" and sent to the  
12 Business Office, Department of Environmental Quality, 811 S.W. Sixth Avenue,  
13 Portland, Oregon 97204.

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17 Date

3/19/97

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Langdon Marsh, Director



## EXHIBIT 1

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

VIOLATION: Discharging wastes into waters of the state without a permit.

CLASSIFICATION: The violation is a Class I violation pursuant to OAR 340-12-055(1)(b).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-12-045(1)(a)(ii), because there is no selected magnitude for this violation.

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

"BP" is the base penalty which is \$3,000 for a Class I moderate magnitude violation in the matrix listed in OAR 340-12-042(1).

"P" is Respondent's prior significant action(s) and receives a value of 0 because the Respondent has no prior significant action as defined in OAR 340-12-030.

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant action(s) and receives a value of 0 because the Respondent has no prior significant actions.

"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 2 because this violation was documented on at least two occasions.

"R" is the cause of the violation and receives a value of 2 as Respondent's actions were negligent. Respondent failed to take reasonable care to implement Respondent's erosion and sediment control measures to ensure that sediment laden water did not discharge into waters of the state.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 because there is insufficient information to make a finding.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of 0 as there is insufficient information upon which to base a finding of other than 0.

#### PENALTY CALCULATION:

$$\begin{aligned} \text{Penalty} &= BP + [(.1 \times BP) (P + H + O + R + C)] + EB \\ &= \$3,000 + [(.1 \times 3,000) (0 + 0 + 2 + 2 + 0)] + 0 \\ &= \$3,000 + [(300)(4)] + 0 \\ &= \$3,000 + 1,200 + 0 \\ &= \$4,200 \end{aligned}$$

# THE KEHOE COMPANY

Quality Homes

P.O. Box 69501 • Portland, Oregon 97201 • Telephone 503/ 244-9776

*Tom Bingham - NWR*  
*Van* → *Sudit*

## COPY

Oregon Department of Environmental Quality  
Dept Enforcement Section  
Judith Anderson  
811 SW 6th avenue  
Portland, Or 97204

State of Oregon  
Department of Environmental Quality

**Received**  
APR 01 1997

Re: No. WQSW-NWR-97-019

OFFICE OF THE DIRECTOR

March 24, 1997

Dear Judith,

I am in receipt of your letter dated March 19, 1997 in regards to the Scholls Meadows subdivision. I've never had any contact with Mr. Keiran regarding any violation, nor have I been made aware of any violation other than a call that I received in February from an employee at Unified Sewerage Agency. After I was informed that we had small amounts of muddy water running off of our property, I spent several thousand dollars on straw as well as \$2500.00 on additional silt fencing in order to minimize ground water runoff. I've also spent thousands of dollars removing mud from the site over a three month period of time.

I've done everything practical and everything possible to minimize the ground water runoff. If Mr. Keiran was so concerned about the damage to the environment, then why didn't he call me immediately? My employees and I have done everything anyone could possibly do to keep a clean construction site. Unfortunately, we live in Oregon and as a sixth generation Oregonian, I can tell you, it rains a little here. Last winter it rained non-stop for five months and there is not construction site in Oregon that would've been able to keep a 100% perfect record regarding ground water runoff.

Based on my experience, we have done better than any other construction site I have seen in the past two years by any other builders. Therefore, I must disallow your \$4200.00 penalty. Furthermore, I would like to request a formal hearing of this matter and state that for the record that there is not a construction company in all the Oregon that cares more for the environment than The Kehoe Company.

EX. 3



**THE  
KEHOE COMPANY**

*Quality Homes*

---

P.O. Box 69501 • Portland, Oregon 97201 • Telephone 503/ 244-9776

After all that I have done to protect the environment, it is with deep regret that I am writing this letter.

Sincerely,



Martin T. Kehoe  
President  
The Kehoe Company

cc: Langdon Marsh - DEQ Director  
cc: John Kitzhaber - Governor of Oregon

Issued By PORTLAND  
Hearings Section  
Telephone: (503) 731-4041  
Mailed By: JHL

Date Mailed: 07/28/97  
Case Type: DEQ  
Ref No: G60030  
Agency Case No: WQSWNWR97019

STATE OF OREGON

**NOTICE OF HEARING**

MARTIN KEHOE  
PO BOX 69501  
PORTLAND OR 97201 0501

DEPARTMENT OF ENVIRONMENTAL QUALITY  
811 SW 6TH AVE  
PORTLAND OR 97204 1334

JUDITH ANDERSON  
DEQ ENFORCEMENT SECTION  
2020 SW 4TH AVE STE 400  
PORTLAND OR 97201 0000

HEARING DATE AND TIME

HEARING PLACE

ADMINISTRATIVE LAW JUDGE

THURSDAY, AUGUST 14, 1997  
1:30 PM PDT

DEQ ENFORCEMENT SECTION  
2020 SW 4TH, 4TH FLOOR  
PORTLAND OREGON

SMITH

*If you have questions prior to your hearing, call: (503) 731-4041.*

*BE PROMPT AT TIME OF HEARING. INQUIRE IN LOCATION'S LOBBY AREA REGARDING HEARING ROOM. If you need directions, call: (503) 731-4041.*

The issue(s) to be considered are:

Did respondent violate ORS 468B.050(1)(a) by discharging wastes into waters of the state without a permit?

EX. 4

Held by: Employment Department Hearings Section  
875 Union Street NE  
Salem, OR 97311

# Oregon

Sent via Fax

DEPARTMENT OF  
ENVIRONMENTAL  
QUALITY

August 12, 1997

ENFORCEMENT SECTION

Lawrence Smith, Hearings Officer  
Oregon Employment Department  
800 NE Oregon Street, #6  
Portland, OR 97232

Re: Contested Case Hearing for  
The Kehoe Company  
Case No. WQSW-NWR-97-019

Dear Mr. Smith:

Enclosed is the Hearing Memorandum which I have prepared for the August 14, 1997 contested case hearing in the Kehoe Company case. The hearing will be held on the fourth floor in conference room E. I anticipate that the hearing will take approximately 90 minutes. Please call me at 229-5152 if you have any questions.

Sincerely,



Judith Anderson  
Environmental Law Specialist  
Enforcement Section

Enclosures

cc: Martin Kehoe, The Kehoe Company  
Paul Keiran, Northwest Region, Portland Office, DEQ

EX. 5  
(7 pages)



2020 SW Fourth Avenue  
Suite 400  
Portland, OR 97201-4987  
(503) 229-5528  
TTY (503) 229-5471  
DEQ-1



BEFORE THE ENVIRONMENTAL QUALITY COMMISSION  
OF THE STATE OF OREGON

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IN THE MATTER OF:  
THE KEHOE COMPANY,  
an Oregon Corporation,  
  
Respondent.

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HEARING MEMORANDUM  
No. WQSW-NWR-97-019  
WASHINGTON COUNTY

This Hearing Memorandum is offered in support to the Notice of Assessment of Civil Penalty, dated March 19, 1997, issued to Respondent The Kehoe Company, an Oregon Corporation, by the Department of Environmental Quality (Department).

FACTS AND EVIDENCE

During the months of November and December, 1996, Kehoe Co. caused or allowed sediment laden, or turbid storm water to discharge from the Scholls Meadow subdivision construction project in Washington County, Oregon. The turbid storm water discharging from the site entered Fanno Creek, and then the Tualatin River. At the time of the discharge, Kehoe Co. was not permitted by the Department to discharge sediment to Fanno Creek.

1. At all times material hereto, The Kehoe Co. was an active Oregon corporation.

2. The Kehoe Company is the owner and developer responsible for construction activities at the Scholls Meadow subdivision construction site located at Scholls Ferry and Sunrise Road, in Washington County, Oregon.

3. The Unified Sewerage Agency (USA) of Washington County, has been authorized to issue 1200-C General Permits (Permit) through an intergovernmental agreement between the Department and USA. The Permit is required for construction activities that result in the disturbance of five or more acres of land area. The Permit incorporates by reference all of the compliance requirements found in Schedules A

1 and B of the Department's National Pollutant Discharge Elimination System (NPDES)  
2 1200-C Storm Water Discharge permit.

3 4. On or about September 10, 1996, The Kehoe Company submitted an  
4 application to USA for a 1200-C Erosion Control Permit.

5 5. On or about November 11, 1996, USA issued The Kehoe Company a  
6 1200-C Permit, authorizing the discharge of adequately treated storm water from the  
7 Scholls Meadow subdivision. The General Requirements Section of the 1200-C Permit  
8 states that all general conditions and penalties for noncompliance shown in Schedules  
9 A and B of the Department's 1200-C permit apply to USA's 1200-C Permit. Schedule  
10 A, Paragraph 4, of the Department's 1200-C Permit prohibits visible or measurable  
11 quantities of sediment from leaving the construction site.

12 6. The storm water discharging from the Scholls Meadow site flows into a  
13 roadside ditch which empties into a tributary of Fanno Creek. Fanno Creek discharges  
14 to the Tualatin River.

15 7. On November 26 and 27, in response to a complaint, Department Storm  
16 Water Inspector Paul Keiran inspected the Scholls Meadow construction site. Mr.  
17 Keiran observed that the site lacked adequate erosion control measures sufficient to  
18 prevent turbid storm water from leaving the site. Mr. Keiran observed evidence that  
19 turbid storm water had been discharging from the site. On November 27, 1996, Mr.  
20 Keiran spoke with an equipment operator at the site and informed him that the site  
21 lacked adequate erosion control structures. Mr. Keiran also notified USA Storm Water  
22 inspector Steve Rivett of the problems at the site.

23 8. On December 18, 1997, Mr. Keiran again inspected the site and  
24 observed that the site still lacked adequate erosion controls and that turbid storm  
25 water was discharging from the site into the roadside ditches and entering a tributary  
26 of Fanno Creek, waters of the state, as defined in ORS 468B.005(8).

1 9. On December 23, 1996, the Department issued The Kehoe Co. a Notice  
2 of Noncompliance (NON) describing the violations documented on November 26, 27  
3 and December 18, 1996.

4 10. On March 19, 1997, the Department issued Notice of Civil Penalty  
5 Assessment (Notice) to the Kehoe Company in which the Department assessed a  
6 \$4,200 civil penalty for the Violation cited in the Notice.

## 7 II. APPLICABLE STATUTES

8 11. ORS 468B.050(1)(a) states that:

9 "...[W]ithout first obtaining a permit from the director...no person shall:  
10 discharge any wastes into waters of the state from any industrial or commercial  
11 establishment or activity or any disposal system."

12 ORS 468B.005(7) states that:

13 "'Wastes' means sewage, industrial wastes, and all other liquid,  
14 gaseous, solid, radioactive or other substances which will or may cause pollution or  
15 tend to cause pollution of any waters of the state."

16 ORS 468B.005(8) states that:

17 "'Water' or 'waters of the state' include lakes, bays, ponds, impounding  
18 reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals,  
19 the Pacific Ocean within the territorial limits of the state of Oregon, and all other  
20 bodies of surface or underground waters, natural or artificial, inland or coastal, fresh  
21 or salt, public or private ... which are wholly or partially within or bordering the state  
22 or within its jurisdiction."

## 23 III. VIOLATION

24 12. On or about November 26, 27, and December 18, 1996, The Kehoe  
25 Company caused or allowed sediment-laden or turbid storm water to discharge from  
26 the Scholls Meadow subdivision construction site to a storm water drainage ditch and  
27

1 from there to a tributary of Fanno Creek, without a permit authorizing such a  
2 discharge. This is a violation of ORS 468B.050(1)(a).

#### 3 IV. CIVIL PENALTY CALCULATION

4 13. Using the procedures set forth in OAR Chapter 340, Division 12, the  
5 Department has calculated a penalty in the amount of \$4,200 for the Violation.  
6 Specifically, the Respondent's civil penalty is calculated as follows:

7 The Violation is a Class I violation pursuant to OAR 340-12-055(1)(b) which states  
8 that any discharge of waste that enters waters of the state that is not authorized by a  
9 waste discharge permit is a Class I violation

10 14. The magnitude of the violation is moderate pursuant to OAR 340-12-  
11 045(1)(a)(ii)(B) because there is no selected magnitude category for this violation.

12 15. The base penalty for a Class I, moderate magnitude water quality  
13 violation is \$3,000 pursuant to OAR 340-12-042(1)

14 16. The civil penalty was aggravated for two factors.

15 The "O" or occurrence factor: The Department alleges the violation occurred  
16 for more than one day and therefore applied an aggravating factor of 2 to the civil  
17 penalty calculation. On November 26, 1996, Department Inspector Paul Keiran  
18 inspected the Scholls Meadow construction site. On that day Mr. Keiran observed  
19 that the site lacked any effective erosion controls and he observed evidence that  
20 turbid water had discharged into the storm drainage ditch. On November 27, 1996,  
21 Mr. Keiran again inspected the site and observed that turbid water was discharging  
22 from the site due to a lack of any erosion controls. On December 18, 1996, Mr.  
23 Keiran inspected the site one more time and observed muddy discharges leaving the  
24 site and entering a drainage ditch which drains to Fanno Creek and the Tualatin River.

25 Causation or "R" factor: The Department alleges that The Kehoe Company was  
26 negligent and therefore applied an aggravating factor of 2 to the civil penalty  
27 calculation. OAR 340-12-030(11) defines negligence as the "failure to take

1 reasonable care to avoid a foreseeable risk of committing an act or omission  
2 constituting a violation".

3 On September 10, 1996, The Kehoe Company was issued a 1200-C Erosion  
4 Control Joint Permit by USA authorizing it to discharge adequately treated storm  
5 water from the Scholls Meadow site. In applying for and obtaining the permit, The  
6 Kehoe company knew or should have known storm water flows are regulated by the  
7 Department, as well as USA, pursuant to state law, to prevent or reduce pollution of  
8 state waters. In order to receive the permit, The Kehoe Company was required to  
9 submit for USA approval, an erosion control plan detailing the erosion control  
10 structures it would employ to prevent measurable or visible amounts of sediment from  
11 leaving the construction site. Furthermore, the General Requirements section of The  
12 Kehoe Company's 1200-C Permit incorporates by reference Schedule A, Paragraph 4  
13 of the 1200-C Permit issued by the Department, which states that measurable or  
14 visible discharge of sediment from the site is prohibited.

15 The Kehoe Company failed to exercise reasonable care to avoid a foreseeable  
16 risk of discharging turbid storm water into waters of the state, a violation of Oregon  
17 law, by failing to erect either the specific erosion control structures described in its  
18 erosion control plan or any other structures that prevented discharges of turbid storm  
19 water from the Scholls Meadow site to Fanno Creek. Therefore The Kehoe Company  
20 was negligent.

21 17. Penalty Calculation: Base penalty of \$3,000 + \$200 (factor of 2  
22 for occurrence) + \$200 (factor of 2 for negligence) = total civil penalty of \$4,200.

23 V. WITNESSES

24 18. The Department intends to call the following witness whose testimony  
25 will support the facts relating to the violation: Paul Keiran, Storm Water inspector for  
26 the Department.

27 ///

## VI. CONCLUSION

19. At the contested case hearing, the Department will put on evidence that the Respondents, The Kehoe Company, discharged wastes in the form of sediment into waters of the state without a permit authorizing such discharge in violation of ORS 468B.050(1) on at least two occasions.

By choosing to do business in the state of Oregon, The Kehoe Company obligated itself to comply with state law, including ORS 468B.050(1)(a). ORS 468B.050(1)(a) imposes an affirmative duty on persons to ensure that their activities do not result in discharge of wastes to state waters unless they are permitted to do so. To meet this duty, The Kehoe Company had a choice to either construct adequate erosion controls or refrain from activities that exposed soil to erosion, particularly during the rainy season. The Kehoe Company chose to do neither and as a result discharge d substantial amounts of sediment from the Scholls Meadow site to Fanno Creek and the Tualatin River. Consequently, The Kehoe Company is liable for a civil penalty assessment of \$4,200 as outlined above.

Aug 12, 1997  
Date

Judith Anderson  
Judith Anderson  
Environmental Law Specialist  
Department of Environmental Quality

# EROSION CONTROL JOINT PERMIT

## PURPOSE

This Permit is a 1200-C General Permit issued by the Unified Sewerage Agency through the authority of an intergovernmental agreement on behalf of the Department of Environmental Quality. The Permit is issued pursuant to ORS 468.740 and the Federal Clean Water Act. This permit is required for properties with construction activity including clearing, grading and excavation activities, except for properties with operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale.

This Permit is also a Unified Sewerage Agency Erosion Control Permit issued in accordance with Section 5.02 of Resolution and Order 91-47, and also meets the requirements of the Tualatin Basin Erosion Control program specified in OAR 340-41-455(3).

Whenever the rules of the erosion control programs are in conflict, the most restrictive rules shall apply.

## APPLICATION

1. Name and Address of Owner or Contractor

MARTIN KEHDE

P.O. BOX 69501

PORTLAND, OR 97201

2. Location of Construction Site if Different than 1.

SOUTH SIDE OF SCHOLLS FERRY ROAD

EAST OF MAYVIEW SUBD.

EX. 6

3. Attach a plan or written description indicating:

- a. The nature of the construction activity
- b. A site map showing the area that will undergo excavation or other soil disturbance during the life of the project, indicating cut and fill areas, approximate slopes anticipated after grading, areas used for storage of soils or wastes, the location of impervious structures after construction is completed, springs, wetlands and other surface waters, and the boundaries of the 100-year flood plain, if determined
- c. An estimate of the total area of the site, and all other sites if a phased development project, and the area of the site that is expected to undergo clearing, excavation and/or grading



# SANITARY SURFACE WATER Permit

## SITE PERMIT

ISSUE DATE 111196 EXPIRATION DATE 111198 PERMIT 111440  
 STRUCTURE ADDRESS PROJECT 4713  
 STRUCTURE STREET SCHOLLS/SUNRISE  
 TYPE OCCUPANCY- (1.) SINGLE FAMILY PARCEL 2S1 5 1600  
 SCHOLLS MEADOWS SUBDIVISION  
 OWNER THE KEHDE COMPANY  
 ADDRESS PO BOX 69501  
 PORTLAND OR 97201 PHONE 244-9776

### SITE FEES

IMPERVIOUS AREA 79884.00  
 ACREAGE 11.00  
 PLAN CHECK-SANI 5898.35  
 PLAN CHECK-SWM 7448.30

### SYSTEM DEVELOPEMENT FEES

WATER QUALITY 5454.00  
 LESS CREDIT < 5454.00 >  
 WATER QUANTITY 160.00  
 LESS CREDIT < 0.00 >

### EROSION CONTROL

INSPECTION 280.00  
 PLAN CHECK 182.00

TOTAL 13968.65

# SITE PERMIT ONLY NOT FOR CONNECTION PERMITS

APPL NAME HASSAN PHONE \_\_\_\_\_

AFFILIATION REP \_\_\_\_\_

REMARKS SCHOLLS MEADOWS SUBD PROJECT 4713 ON SCHOLLS FERRY AND SUNRISE

\*24 HOUR NOTICE FOR EROSION CONTROL INSPECTION REQUIRED

\*\*\*\*\* Number to call for INSPECTION---844-8444 \*\*\*\*\*

CREDIT AVAILABLE-IF PERMIT ISSUED-CREDIT DISTRIBUTED EQUALLY AMONG LOTS

SIGNATURE [Signature]

ISSUED BY ANDERSONL

EX-7

Permit Conditions: The applicant agrees to comply with all rules and regulations of the Unified Sewerage Agency, including those regarding erosion control.

A 24-hour notice is required for erosion control inspections. The inspection request number is 844-8444. When calling for an inspection, please refer to the permit, project and lot numbers.

The permit expires one hundred eighty (180) days from the date of issuance. The Agency does not guarantee the accuracy of the location of side sewer lateral.



# EROSION CONTROL INSPECTION REPORT



DATE 3-10-97 INSPECTOR Steve Rivett   
 OWNER/PERMITEE The Kehoe Company  N/A  
 SUBDIVISION Scholls Meadows LOT  
 SITE ADDRESS Scholls Ferry Rd.

# NOT APPROVED

SITE NOT IN COMPLIANCE WITH EXISTING USA RESOLUTION & ORDER

## EROSION CONTROL DEFICIENCIES NOTED:

- EROSION CONTROL MEASURES ARE NOT IN PLACE OR INADEQUATE TO PREVENT EROSION OF SOIL MATERIALS FROM SITE.
- EROSION CONTROL MEASURES CURRENTLY IN PLACE REQUIRE MAINTENANCE, REPLACEMENT OR REINSTALLATION TO MEET U.S.A. STANDARDS.
- VISIBLE AND MEASURABLE AMOUNT OF DIRT, GRAVEL, DEBRIS, OR OTHER ERODABLE MATERIALS IN STREET (INCLUDING GRAVEL RAMPS).
- GRAVEL CONSTRUCTION ENTRANCE IS SUBSTANDARD OR REQUIRES MAINTENANCE OR REPLACEMENT.
- STORM DRAIN FACILITIES ASSOCIATED WITH THIS SITE REQUIRES THE INSTALLATION, MAINTENANCE OR REPLACEMENT OF SEDIMENTATION BARRIERS/FILTERS.
- VEHICLES "TRACKING" MATERIALS ONTO STREET. Ex. 8
- OTHER: Erosion Control Measures need to be installed per approved plans (Sheet 4). See Technical Guidance Handbook for details.

PLEASE BRING SITE INTO COMPLIANCE BY 3-11-97 TO AVOID ENFORCEMENT ACTION UNDER USA RESOLUTION & ORDER 90-63 WHICH PROVIDES FOR THE ISSUANCE OF STOP WORK ORDERS, CIVIL CITATIONS, OR SUSPENSION OF PERMITS.

**NOTE: ADDITIONAL EROSION CONTROL FEES ARE REQUIRED PRIOR TO REINSPECTION.**

DATE/TIME 3-10-97 10:50 INSPECTOR Steve Rivett PHONE 844-8910

COPY

Permit Number: 1200-C  
Expiration Date: 9-30-96  
Page 1 of 7 Pages

GENERAL PERMIT  
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM  
STORM WATER DISCHARGE PERMIT

Department of Environmental Quality  
811 Southwest Sixth Avenue, Portland, OR  
Telephone: (503) 229-5696

Issued pursuant to ORS 468.740 and The Federal Clean Water Act

ISSUED TO:

All Owners or Operators of Storm  
Water Point Source Discharges  
Which are Covered by This Permit

SOURCES COVERED BY THIS PERMIT:

Construction activities including clearing, grading, and excavating activities  
which will result in the disturbance of a total of five or more acres.

*Lydia Taylor*  
Lydia Taylor, Administrator

SEP 25 1991  
Date

PERMITTED ACTIVITIES

Until this permit expires or is modified or revoked, the permittee is authorized  
to construct water pollution control facilities and to discharge to public waters  
adequately treated storm water in accordance with an erosion control plan which  
has been prepared for the construction project. All discharges shall be in  
accordance with the prepared plan and the attached schedules:

	<u>Page</u>
Schedule A - Waste Discharge Limitations not to be Exceeded..	2-4
Schedule B - Minimum Monitoring and Reporting Requirements...	5
General Conditions.....	6-7

Each other direct and indirect waste discharge to public waters is prohibited  
unless covered by another NPDES permit.

This permit does not relieve the permittee from responsibility for compliance  
with any other applicable federal, state, or local law, rule, standard,  
ordinance, order, judgment, or decree.

Ex. 9

- (4) A description of the nature of fill material to be used, the soils on the site, and the erosion potential of such soils; and
- (5) The names of the receiving water(s) and the size, type and location of each outfall or, if the discharge is to a municipal separate storm sewer, a letter of approval from the municipality which authorizes use of the storm sewer and the location of any storm sewer discharge to public waters.

b. Controls. Each operator covered by this permit shall develop, as part of the erosion control plan, a description of controls appropriate for the site and shall implement such controls. The following minimum components shall be addressed along with a schedule for implementation, unless approved otherwise in writing by the permit issuing agency:

- (1) A description, including a schedule of implementation, of vegetative practices designed to preserve existing vegetation where practicable and re-vegetate open areas as soon as practicable after grading or construction. In developing vegetative practices, the operator shall consider: temporary seeding, permanent seeding, mulching, sod stabilization, vegetative buffer strips, and protection of trees with protective construction fences.
- (2) A description of structural practices which indicates how, to the degree practicable, the permittee will divert flows from exposed soil, store flows, or otherwise limit runoff from exposed areas of the site. In developing structural practices, the operator shall consider the appropriateness of: straw bale dikes, silt fences, earth dikes, brush barriers, drainage swales, check dams, subsurface drains, pipe slope drains, rock outlet protection, sediment traps, and temporary sediment basins. All temporary control structures, including silt fences and straw pile dikes, shall not be removed until completion of permanent vegetation stabilization.
- (3) Each site shall have graveled access entrance and exit drives and parking areas to reduce the tracking of sediment onto public or private roads. All unpaved roads on the site carrying more than 25 vehicle trips per day shall be graveled.
- (4) When trucking saturated soils from the site, either tight trucks shall be used or loads shall be required to drain until drippage has been reduced to less than 1 gallon per hour before leaving the site.
- (5) Each plan shall include a description of procedures for prompt maintenance and repair or restoration of all grade surfaces, walls, dams and structures, vegetation, erosion and sediment control measures and other protective devices identified in the plan.

SCHEDULE B

Minimum Monitoring and Reporting Requirements

(unless otherwise approved in writing by the Department or the Department's authorized representative)

1. All erosion control facilities shall be inspected by or under the direction of the permittee at least once every seven calendar days and within 24 hours after any storm event of greater than 0.5 inches of rain per 24 hours period.
2. During stormy periods or periods of snow melt when runoff occurs daily, all erosion control facilities shall be inspected by or under the direction of the permittee daily.
3. Storm water runoff discharges shall be visually monitored at the above frequency to evaluate the effectiveness of the pollution control facilities or practices. If any measurable quantities of sediment are leaving the property, corrective action shall be taken to reduce the discharge of sediments.
4. The operator shall keep a record of inspections. Uncontrolled releases of mud or muddy water or measurable quantities of sediment found off the site shall be recorded with a brief explanation as to the measures taken to prevent future releases as well as any measures taken to clean up the sediment that has left the site. This record shall be made available to the DEQ or local planning agency upon request. If the construction activity lasts more than 12 months, a copy of the record shall be sent to the DEQ or authorized agent by July 1 of each year.

SECTION B. OPERATION AND MAINTENANCE OF POLLUTION CONTROLS

1. Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit.

2. Duty to Halt or Reduce Activity

Upon reduction, loss, or failure of the treatment facility, the permittee shall, to the extent necessary to maintain compliance with its permit, control all discharges until the facility is restored or an alternative method of treatment is provided.

3. Removed Substances

Solids, sludges, or other pollutants removed in the course of treatment or control of wastewaters shall be disposed of in a manner such as to prevent any pollutant from such materials from entering public waters, creating a nuisance or creating a health hazard.

GEN\WC9011 (4-9-92)

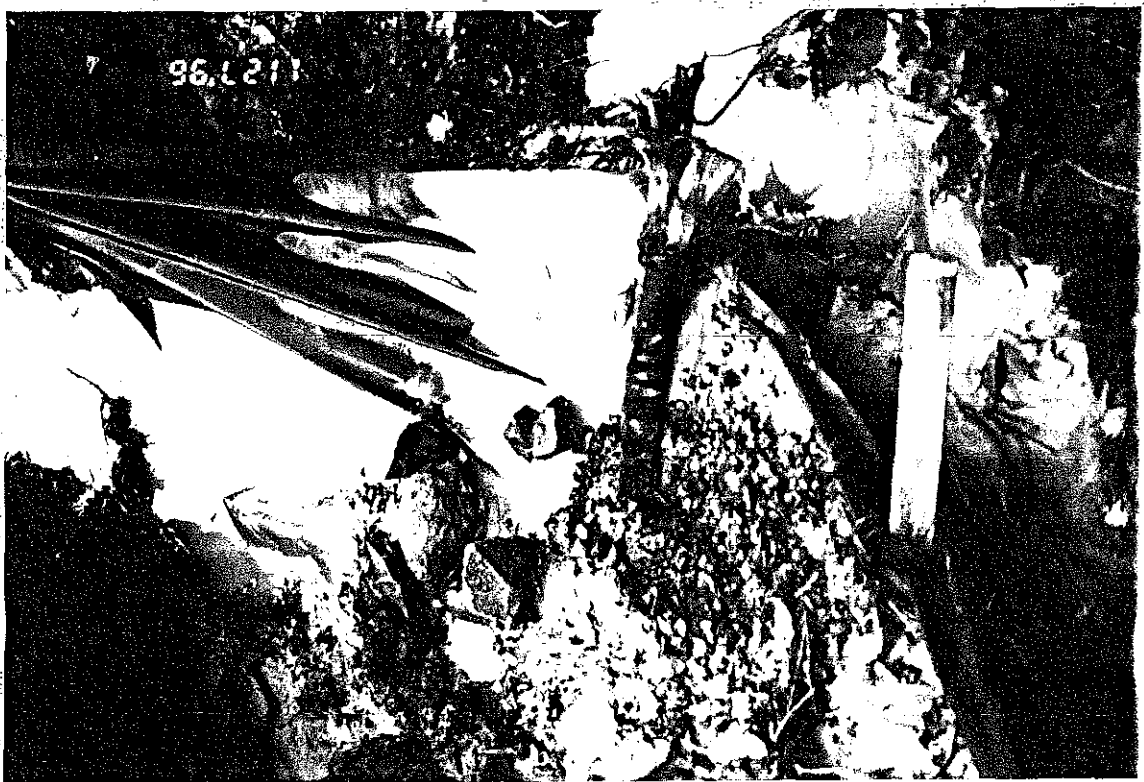
11/27/96

Photo demonstrates high velocity of run off from Skolls Meadows adjacent to entrance of culvert which empties into creek.



11/27/96

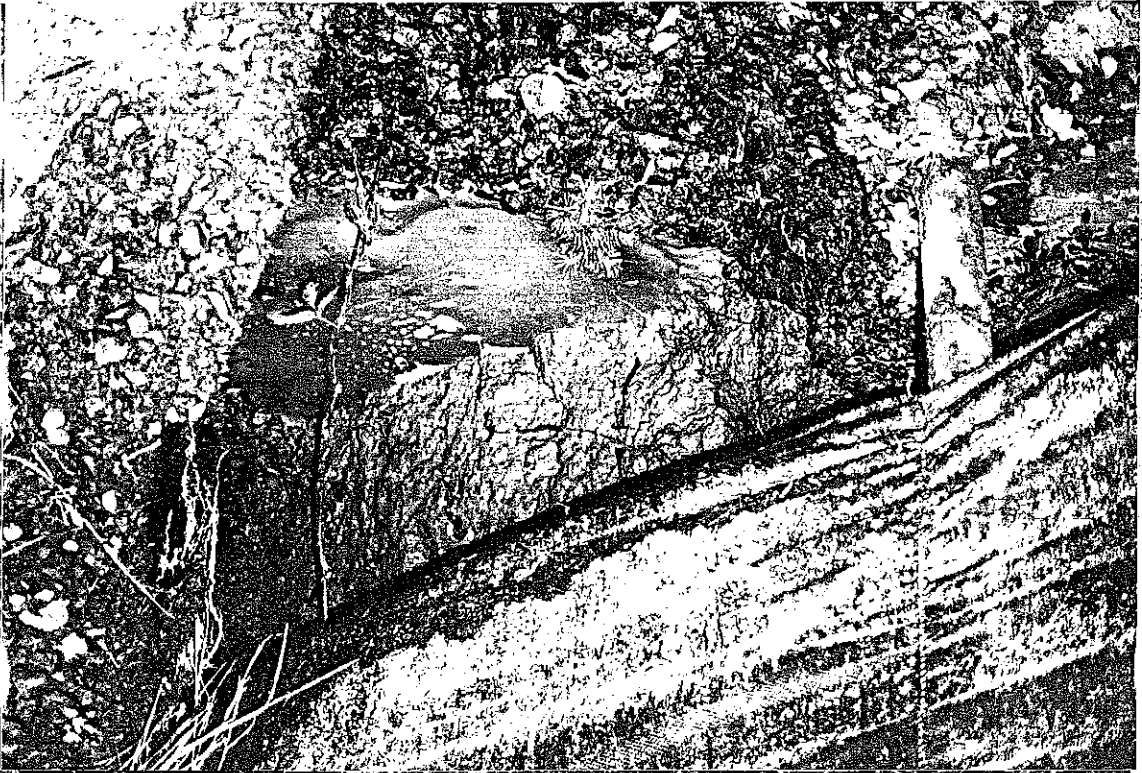
Muddy water discharging into roadside ditch from Skolls Meadows



11/27/96  
Mud flows going over sediment  
fencing and into roadside ditch.

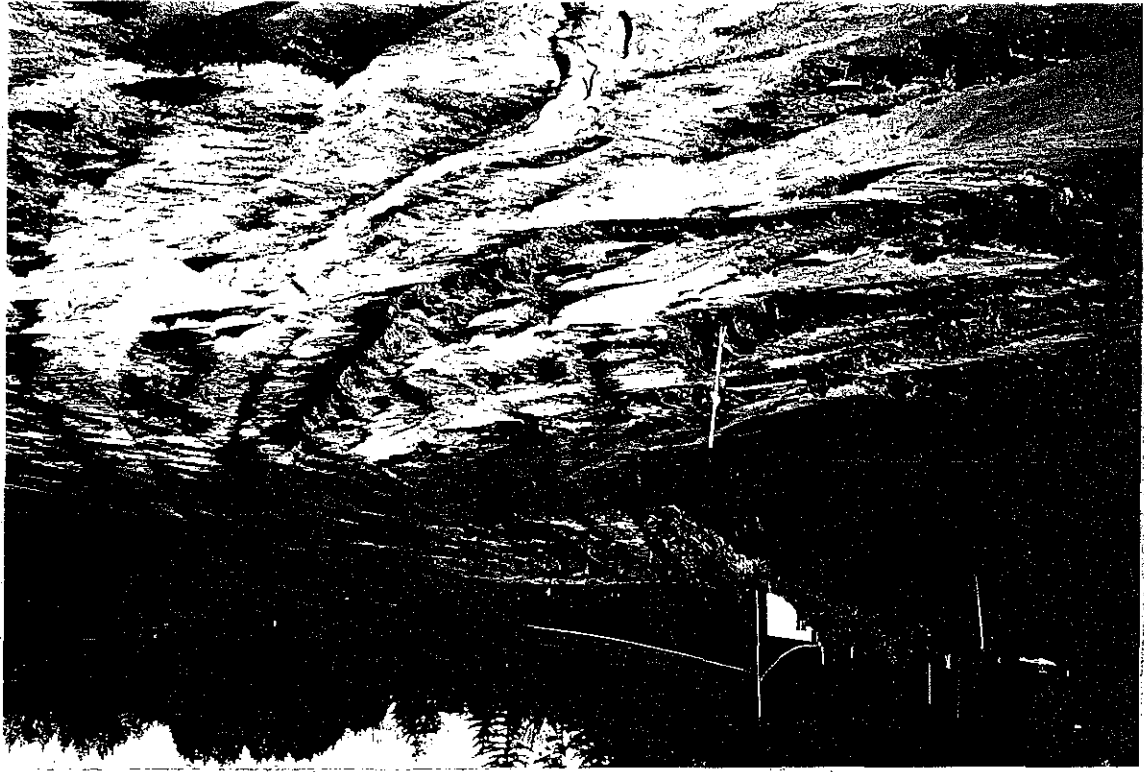


11/27/96  
Muddy water discharging  
from  
Scholls Meadows site into roadside ditch



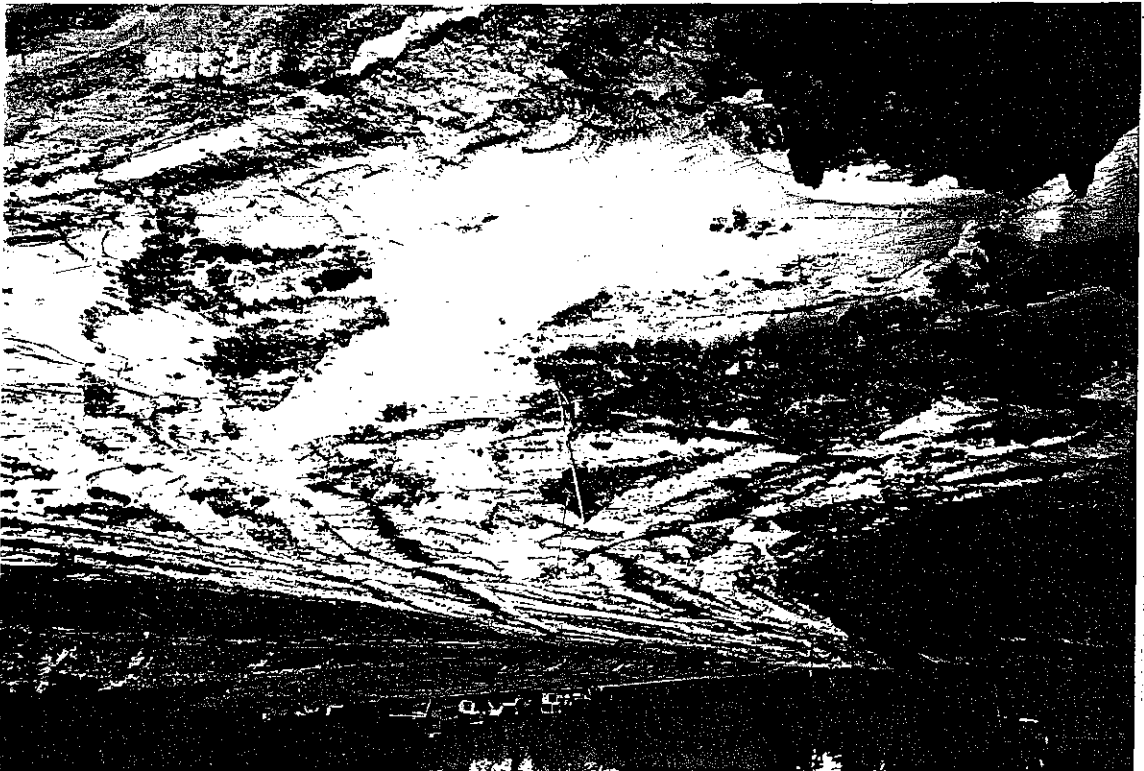
12/18/94

Same road as above. Gullies indicate wash out of sediment from storm water run off.



11/27/94

Road at Scholls Meadow used as construction entrance. No gravel or other erosion control. Storm water collected here





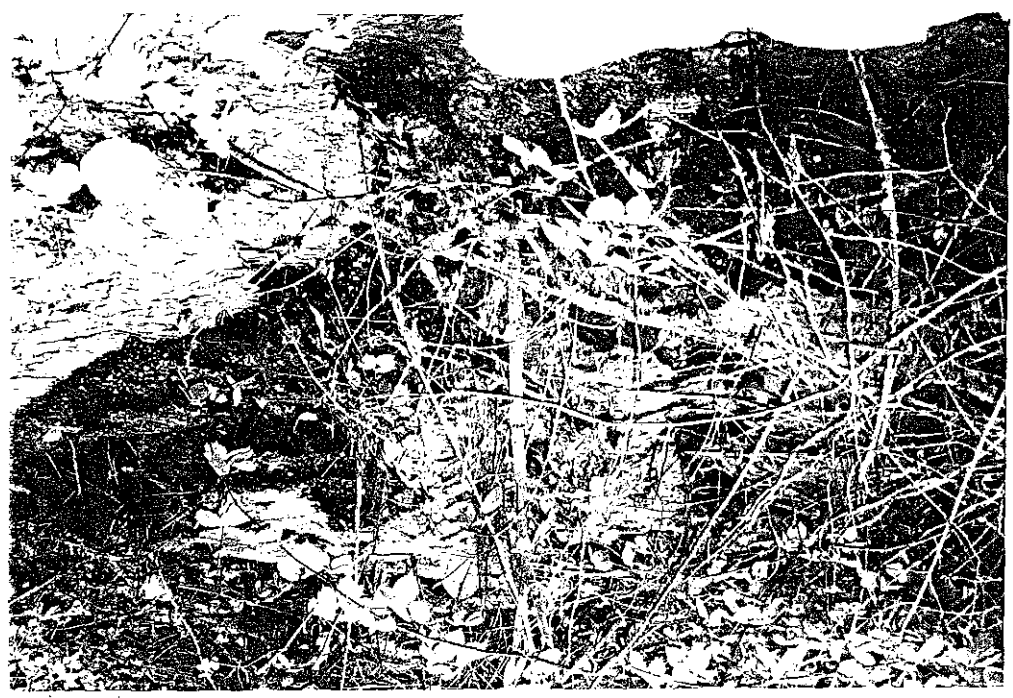
12/18

Sediment deposits from Scholls  
Meadows site as they enter  
Creek.



12/18/96

Sediment / Mud flows from  
Scholls Meadows on bank of creek -  
tributary of Fanno Creek.



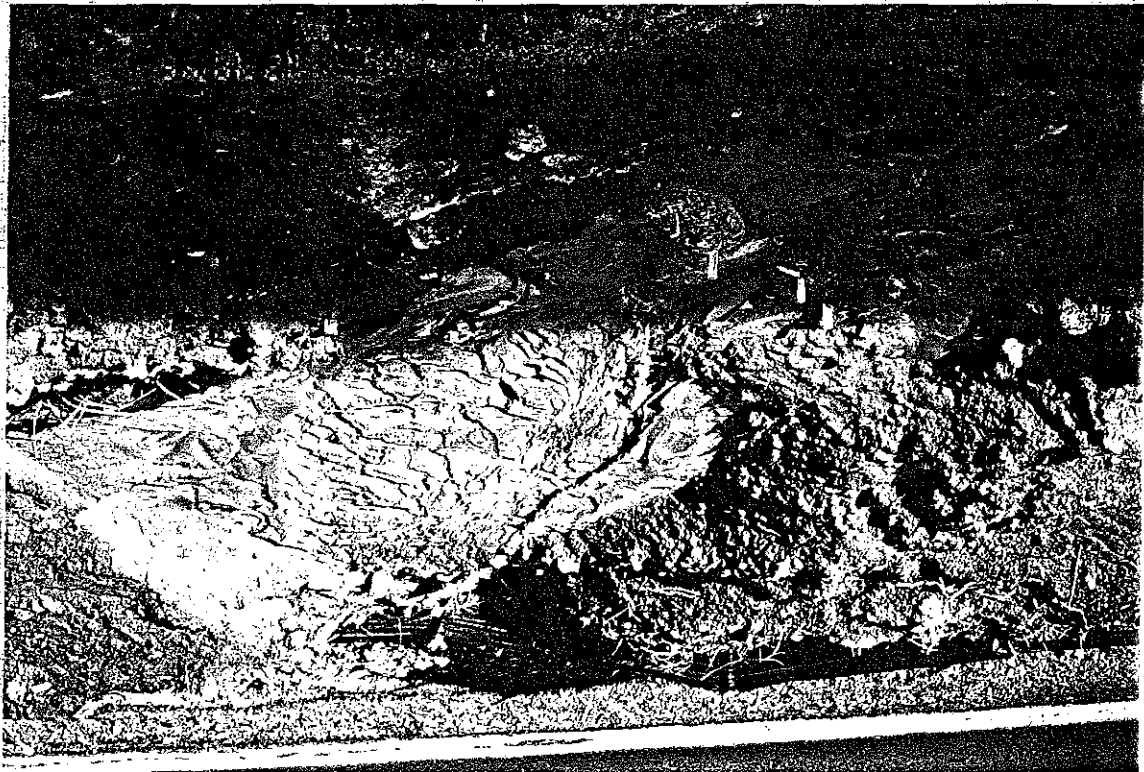
12/18/96

Mud flows entering tributary of Fanno Creek. Sediment deposits came from Scholls Meadows subdivision.



12/18/96

Mud flow/sediment deposit indicating one point where storm water discharged into roadside ditch at Scholls Meadows



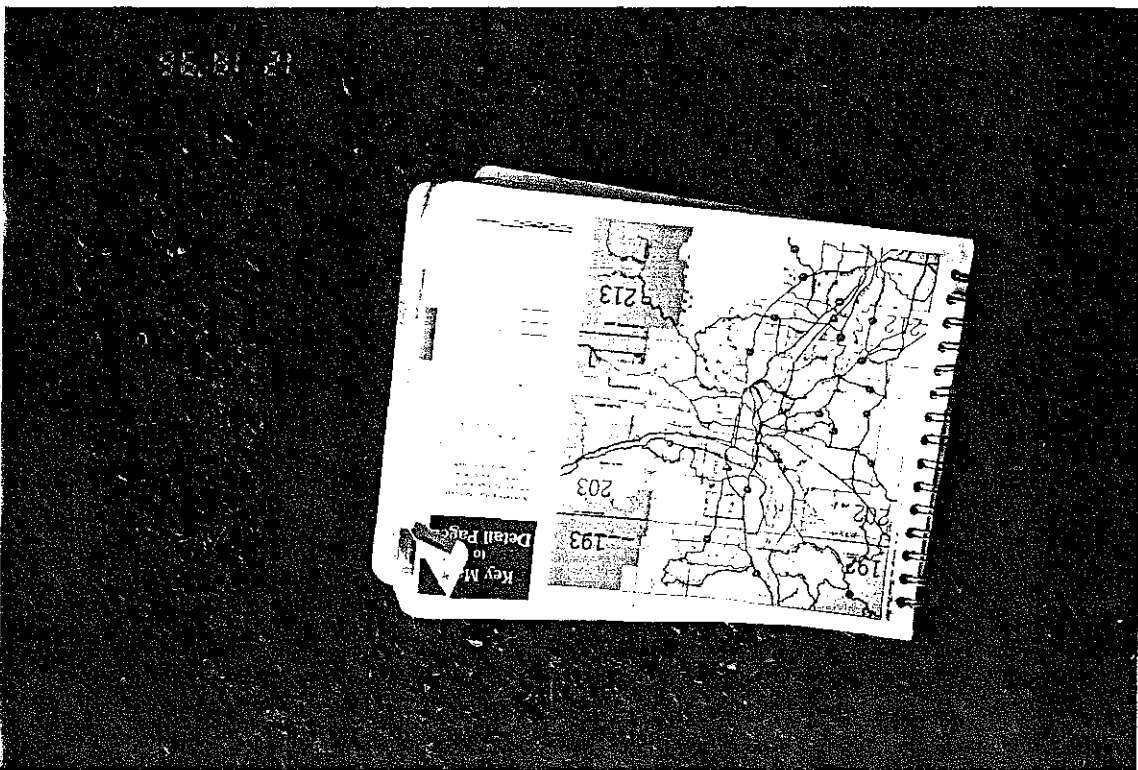
4/21/97

Sediment deposits from Scholls  
Meadows at creek bed.



12/18/96

Stick indicating depth of sediment  
which disappeared from Scholls Meadows  
and was deposited at creek.





Road - no erosion control

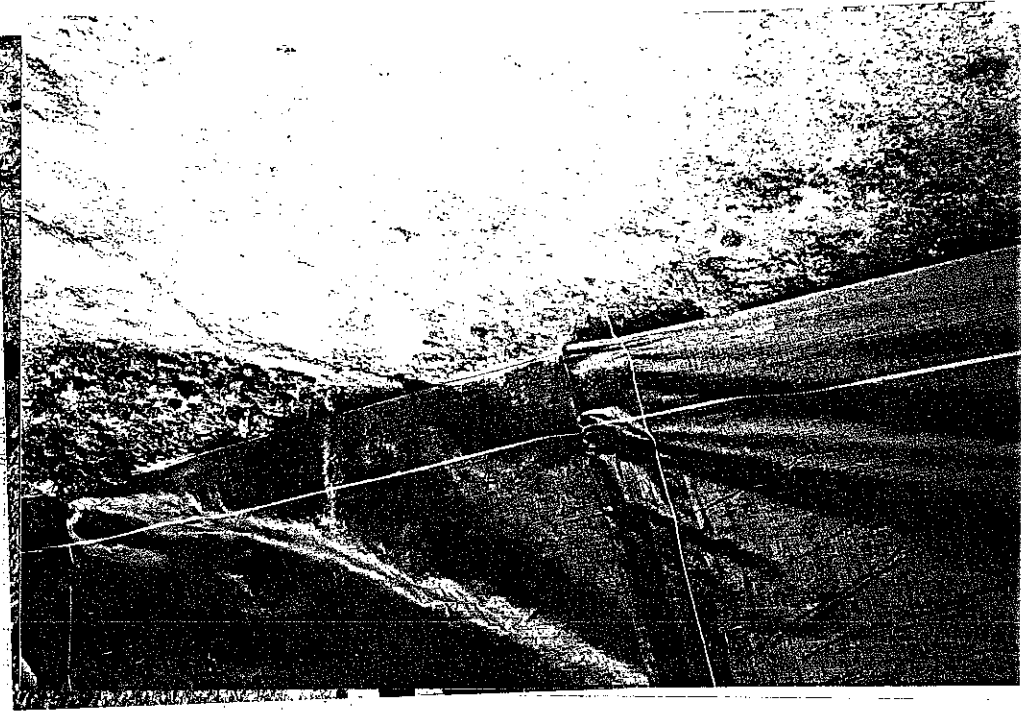
1/6/97  
Same road with improper application of silt fencing. Notice deep gullies created by ~~storm~~ stormwater runoff.



12/19/96  
Same road as it slopes to roadway ditch where storm water discharges.

4/21/97

Improper placement of silt  
fencing at Scholl's Meadows site.



4/21/97

Accumulation of sediment  
discharged from Scholl's Meadows  
at creek.



December 23, 1996

H HASSAN  
THE KEHOE COMPANY  
PO BOX 69501  
PORTLAND OR 97201

DEPARTMENT OF  
ENVIRONMENTAL  
QUALITY

NORTHWEST REGION

RE:Scholls Meadows Subdivision  
WQ-NWR-96-130  
Washington County  
USA Permit # 111440  
**NOTICE OF NONCOMPLIANCE**

Dear Mr Hassan:

On November 26, 27 and December 18, 1996, in response to a complaint, Paul Keiran, the Department's erosion control inspector, inspected the Scholls Meadows subdivision in Tigard. During these inspections Mr. Keiran noted evidence that turbid stormwater runoff had been entering the small creek that drains this site. Significant gullies exist that have cut through the site, sending mud laden runoff down into the roadside ditch on Scholls Ferry Road and into the creek. Up to 10 inches of sediment from this development are in evidence in and around the creekbed. The erosion controls in place during these inspections were wholly inadequate at preventing these turbid discharges.

High turbidity, interferes with recreational use and aesthetic enjoyment of water. It also has adverse effects on fish and other aquatic life by killing them or reducing their growth rate, by modifying natural movements and migrations of fish and by reducing the abundance of food available to aquatic life.

Discharging wastes into waters of the state without an approved waste discharge permit is prohibited by Oregon Revised Statute 468.B050(a). These discharges constitute a Class I violation which is considered to be a serious violation of Oregon environmental law. Due to the severity of discharges that have occurred onsite, and the duration of time over which they have occurred without any serious attempt to control erosion, your file is being referred to the Department's Enforcement Section with a recommendation to initiate a formal enforcement action. Discharging wastewater into waters of the state without obtaining a wastewater discharge may include a civil penalty assessment for each day of violation. Failure to comply with a condition of the National Pollutant Discharge Elimination System (NPDES) Stormwater Discharge Permit No. 1200-C is a Class II violation and

Ex. 11

John A. Kitzhaber  
Governor



2020 SW Fourth Avenue  
Suite 400  
Portland, OR 97201-4987  
(503) 229-5263 Voice  
TTY (503) 229-5471

DEQ-1

may include a Notice of Permit Violation (NPV), which will require that you submit one of the following to the Department within 5 working days of its receipt:

1. A written response certifying that the permitted facility is complying with all terms and conditions of the permit. This certification shall include a sufficient description of the information on which you are certifying compliance; or
2. If the permitted facility is not operating in compliance with the permit, you will be required to submit a written proposal to bring the facility into compliance with the permit and all applicable regulations which shall include at least the following:
  - a. A detailed plan and time schedule for achieving compliance in the shortest practicable time;
  - b. A description of the interim steps that will be taken to reduce the impact of the permit violation until the permitted facility is in compliance with the permit; and
  - c. A statement that you have reviewed all other conditions and limitations of the permit and no other violations of the permit were discovered.

The purpose of the NPV is to ensure that the permitted facility is operating in compliance with all conditions and limitations of the permit, or to bring the permitted facility into compliance. We recommend that you begin preparations now to respond to the NPV. If you fail to respond to the NPV in the 5 day time frame, you will be assessed a civil penalty for the violation cited in the NPV.

The Department recommends that you install sufficient erosion controls on the lower portions of this site in order to arrest the erosion that is presently occurring. If you plan to install sewers in the main road that is presently causing much of the erosion problems, then you must remove erosion controls prior to trenching and replace them daily, if necessary. Watch the weather and plan accordingly. Your cooperation in ensuring that these issues are addressed is greatly appreciated. Mr Keiran will perform a follow-up inspection during the next significant rain period to inspect the operation of your erosion control system.

December 23, 1996

Page 3

If you have any questions, feel free to call Paul Keiran at 229-5937.

Sincerely,

*Elliot J. Fois*  
for Neil J. Mullane, Manager  
Water Quality Source Control  
Northwest Region

Cc: Enforcement Section: DEQ

Fred Wright  
Unified Sewerage Agency

Steve Rivett  
Unified Sewerage Agency



**EXECUTIVE SUMMARY**

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**CITY OF WOODBURN  
WASTEWATER TREATMENT PLANT**



**POPLAR TREE EFFLUENT  
AND BIOSOLIDS REUSE SYSTEM  
PRELIMINARY DESIGN REPORT**

**'1ST IN THE NATION'**

**CH2MHILL**

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**F E B R U A R Y 1 9 9 8**

# Woodburn Poplar Tree System Predesign

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## Introduction

The City of Woodburn is the first municipality in the nation to irrigate poplars with wastewater treatment plant (WWTP) effluent. As in the case of the City-patented Transpirator®, the City continues to be a leader in the development and implementation of natural treatment system solutions.

During July and August of each year, the WWTP will discharge a sizable portion of its effluent to the poplar plantation instead of to the Pudding River, which is usually reduced to very low flows at that time of the year. This will make it possible to meet the total maximum daily load restrictions for the river, which require the most stringent level of ammonia control in the Pacific Northwest.

Biosolids generated at the plant will be combined with leaves, and possibly yard debris, collected from the community to provide nutrients and soil conditioners for the plantation. Periodically, the trees will be harvested and sold to help defray some of the costs of the reuse system.

## Implementation Plan

In preparation for this project, the City has operated a poplar tree reuse demonstration site at the Woodburn WWTP from 1995 through 1997. Development and evaluation of the demonstration site has involved consultants in wastewater and biosolids reuse, poplar tree cultivation, and irrigation systems, and staff from the Oregon State University Bioresources Department. The demonstration project has produced valuable information for the design of the full-scale system. Preliminary design for the project is nearly completed.

The poplar tree system will be implemented in keeping with the phased improvements and expansions of the WWTP so as to meet regulatory requirements and accommodate projected growth in the area. Initially, a plantation of approximately 85 acres will be developed in 1999 for the years 2001 through 2003. In 2004, an additional 70 acres of land will be developed. These lands, which total 155 acres, will provide the treatment capacity needed until 2010, the end of Phase I. The City will continue to develop the plantation in 5-year increments during Phase II until a total of 338 acres, including buffers, are dedicated to the reuse system in 2020.

## Preliminary Design Description

The initial full-scale poplar plantation (Development No. 1) will be located on property adjacent to the WWTP. The irrigated poplar trees will be surrounded by a perimeter buffer of 35 feet. Additional buffers will be established around domestic wells. The existing demonstration site will become a part of the full-scale system.

The field management units were designed based on (1) daily and seasonal variations in irrigation flows, (2) irrigation system design constraints, (3) effects of tree spacing on growth and water use, and (4) the harvesting strategy.

The site for Development No. 1 is shown in Figure ES-1. The trees will be planted on a 13 foot by 6.5 foot spacing. The resulting density will be approximately 515 trees per acre. Design criteria used for the irrigation system included application of effluent at 32 inches per year for trees 3 years and older at agronomic rates. Micro-spray sprinkler heads rated at 0.1 inch per hour will be used. Each management unit will be delivered water through a manifold system. From the manifolds, effluent will be transmitted by buried polyvinyl chloride submains to high-density polyethylene tubing laid on the field surface.

Development No. 1 will have three aboveground distribution manifolds. Programmable logic controllers (PLCs) at the manifolds will control irrigation events, monitor soil moisture conditions, monitor system pressures, and record system flows and run times.

An 18-inch-diameter polyvinyl chloride pipeline will connect to the yard piping from the WWTP. A filtration system and occasional injection of sodium hypochlorite will be used to prevent clogging of the micro-spray heads. Irrigation pumps will be used to pump effluent to the pressurized management units for distribution.

Liquid biosolids will be applied by the combination of a hard-hose-reel system and a single small tractor-pulled trailer spreader at agronomic rates. Rapid recycle times for both the hose reel and liquid spreader will be facilitated by a pipeline system with a number of turnouts. To maximize the application window and minimize soil compaction for the hose reel system, a winch system will be used to extend the hose reel under wet soil conditions. The existing truck spreader will continue to be used for biosolids from the existing drying beds.

Portions of the plantation will have public education accessibility, but other portions of the site will have limited access. Because of the innovative nature of the project, a ground-level viewing platform will be constructed, and interpretive signs will be posted to be used for educational programs by the schools and interested citizens.

## Preliminary Cost Estimates

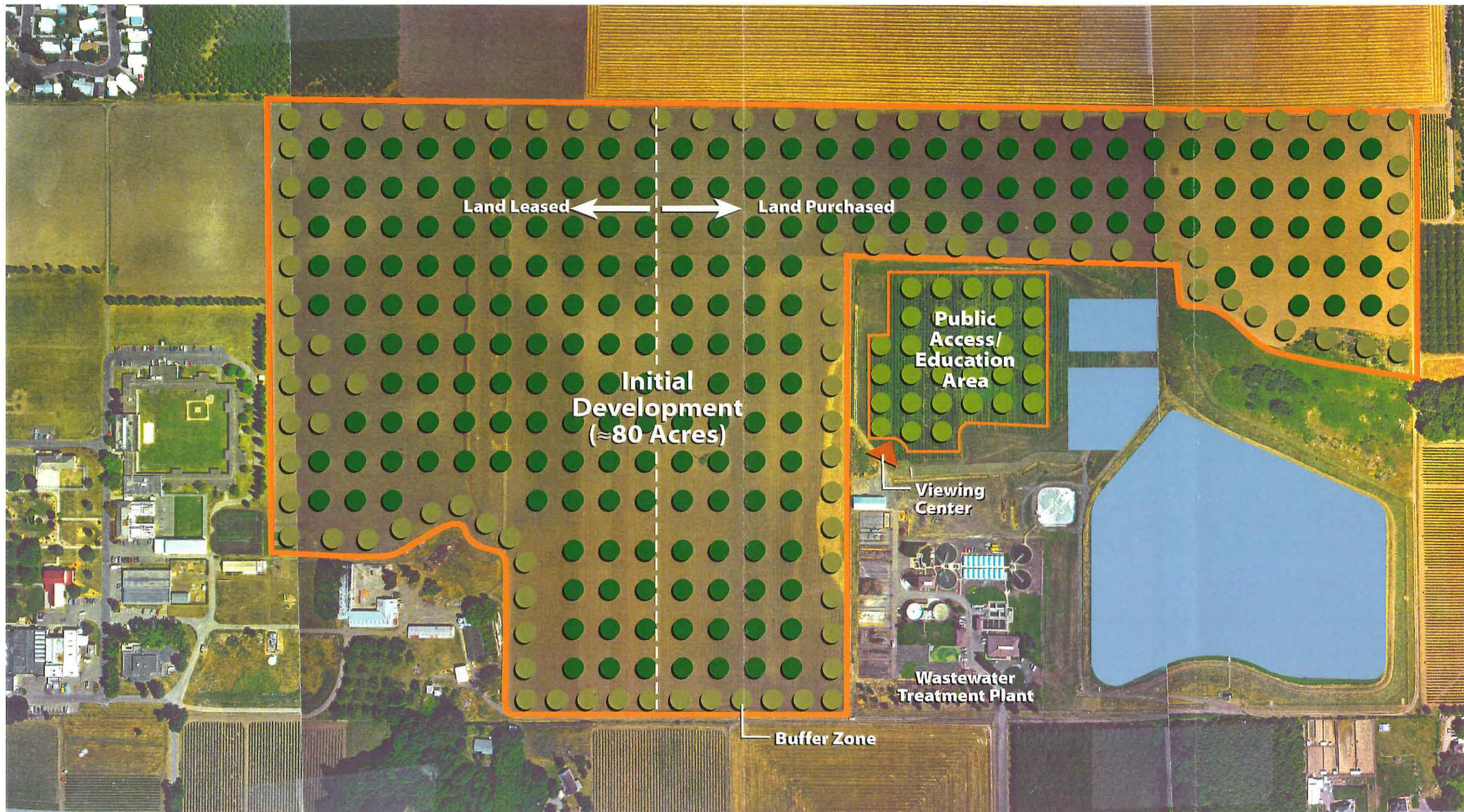
The capital cost estimates for Phase I are shown in Table ES-1. The operations and maintenance cost estimate for the first year (1999) is shown in Table ES-2. Although the operational cost of \$120,900, shown below, will vary according to harvest and replant cycles, it is a good estimate for budgeting purposes.

**TABLE ES-1**  
Preliminary Capital Cost Estimates for Phase I  
*Does not include Demonstration Site and Phase II.*

	<b>Effluent Reuse</b>	<b>Biosolids Reuse</b>	<b>Total</b>
Predesign	\$469,000	\$50,000	\$519,000
Development No. 1 (1998/99 Dollars)	\$1,618,300	\$583,600	\$2,201,900
Development No. 2 (2004 Dollars)	\$1,281,300	\$139,000	\$1,420,300
<b>Total</b>	<b>\$3,368,600</b>	<b>\$772,600</b>	<b>\$4,141,200</b>

**TABLE ES-2**  
Operations and Maintenance Cost Estimates  
*Annual costs vary with harvest/replant cycles.*

	<b>Effluent Reuse</b>	<b>Biosolids Reuse</b>	<b>Total</b>
Year 1999	\$84,300	\$36,600	\$120,900

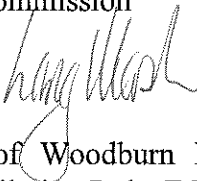


**FIGURE ES-1**  
**The Poplar Reuse Plantation**  
CITY OF WOODBURN  
POPLAR TREE REUSE SYSTEM

State of Oregon  
Department of Environmental Quality

Memorandum

Date: January 13, 1998

To: Environmental Quality Commission  
From: Langdon Marsh, Director   
Subject: Agenda Item D, City of Woodburn Request for Mass Load Increase and Exception to Minimum Dilution Rule, EQC Meeting February 20, 1998

**Statement of Purpose**

The City of Woodburn is proposing to expand and upgrade the wastewater treatment plant serving the City. They have proposed to provide a very high level of treatment, and to continue discharging to the Pudding River during the entire year. A portion will be irrigated on a new hybrid poplar plantation during the months of lowest stream flow. Because of the very low stream flows that occur in the summer, the proposed facility cannot meet the current mass load limits and minimum design criteria without action by the Commission. This agenda item requests that the Commission grant the two waivers or exceptions needed for the City to proceed with the project.

**Background**

The City's existing wastewater treatment plant needs to be expanded and upgraded to address the following issues:

- The treatment plant is operating at organic capacity during some summer months, and needs to be expanded in order to provide service to the residents and businesses. The treatment plant cannot consistently meet all effluent limits.
- The Pudding River is water quality limited for dissolved oxygen. A Total Maximum Daily Load for ammonia has been established for the river. A Waste Load Allocation has been assigned to the City's discharge, to bring the river back into compliance with the water quality standard. The existing treatment plant is not able to achieve the assigned load.
- The discharge contains ammonia and chlorine at levels that are many times the acute toxicity level during low flow times.

The City has completed facility planning, where all reasonable alternatives for correcting the above problems were explored. The alternative chosen and approved by the Department (pending approval by the Commission in this agenda item) includes the following:

Phase 1, to be completed by early in year 2001 - Major plant and collection system upgrade and planting of a portion of the poplar plantation. This phase will be constructed under multiple contracts and will result in meeting all permit limits and the waste load

allocations. The permit is written for the eventual Phase 2 facility and the two waivers or exceptions will authorize the City to proceed with the Phase 2 improvements.

Phase 2 is not required to be completed by any particular date and will depend upon future growth. It is anticipated that Phase 2 will be constructed about 5 to 10 years after Phase 1 is complete. Phase 2 will expand the treatment facility and poplar plantation to provide additional capacity. Since Phase 1 will result in meeting all permit limits and the waste load allocations, no further improvements in effluent quality are required in this phase. The treatment and irrigation capacity will be increased from 3.5 to 5.0 MGD during Phase 2 to keep the facility in full compliance with all requirements as the population increases.

The Department is proposing this EQC action at this time because the City of Woodburn cannot proceed with Phase 1 construction unless it is known whether the two waivers or exceptions needed for Phase 2 will be approved. If the approvals are not granted, Phase 1 will be significantly different than currently proposed.

Because of the lack of a nearby large receiving stream, this will be a very expensive project since a very high level of treatment will be required. The project costs for Phase 1 are estimated at about \$38 million. Woodburn has a current population of about 16,000. The phasing of the project is required to accommodate the high cost of the project.

Tables 1 shows a comparison of key pollutants, between the levels currently being discharged, and the projected pollutant levels for the summer period at the end of Phase 1 and at the end of Phase 2. Pollutant levels will be similar after Phase 1 and 2 except that the CBOD<sub>5</sub> and TSS mass loads discharged will be different (based on 3.5 and 5.0 MGD, respectively). These figures show that the new treatment plant will greatly improve the quality of the effluent discharged to the Pudding River. The new plant and other system improvements will: 1) significantly reduce the oxygen demanding discharges (as a result of the reduction in ammonia, which more than offsets the increase in CBOD<sub>5</sub>); 2) significantly reduce the amount of ammonia to below toxic concentrations: and, 3) eliminate the discharge of chlorine entirely.

**TABLE 1**

**Comparison of Average Summer Discharges of Selected Pollutants**

**1997 Discharges Versus Expected Discharges After Completion of Phase 1 and 2**

Pollutant	May - Oct 1997	After Phase 1	After Phase 2
CBOD <sub>5</sub>	180 #/day	146 #/day	208 #/day
TSS	144 #/day	146 #/day	208 #/day
Ammonia (see note 1)	7.3 mg/L	0.5 mg/L	0.5 mg/L
Chlorine (see note 2)	0.650 mg/L	0 mg/L	0 mg/L

Note 1 The acute toxicity level for ammonia is dependent on temperature and pH. At expected conditions, the acute toxicity level will be 5.6 mg/L in summer and 12.2 mg/L in winter. At completion of Phase 1, the effluent will be in compliance with the toxicity limit at the edge of the assigned zone of immediate dilution.

Note 2 The acute toxicity level for chlorine is 0.019 mg/L.

### **Action # 1 - Mass Load Limit Increase Request**

**Summary** - The City has requested a mass load increase for CBOD<sub>5</sub> and TSS for the summer discharge period. However, these increases are offset by the reductions in ammonia discharged. Even with the proposed mass load increases, the impact on the receiving stream will be less with the proposed treatment plant and system upgrades. Tables 2 shows a comparison of current summer mass load permit limits and the proposed summer mass load permit limits (for Phase 2) for CBOD<sub>5</sub> and TSS.

**TABLE 2**

#### **Comparison of Summer Mass Load Discharge Limits**

##### **Current Permit Limits Versus Proposed Permit Limits after Phase 2**

Pollutant	Current Permit	Proposed Permit After Phase 2
CBOD <sub>5</sub>	260 #/day	420 #/day
TSS	260 #/day	420 #/day

**Discussion** - The increase in summer mass loads is being requested for the following reasons:

1. With the expansion of capacity, the **volume discharged will be much greater** than it currently is (5 million gallons per day average versus 3.1 million gallons per day currently). A much higher volume of discharge will mean a much higher mass load discharge unless there is much better treatment efficiency. The new treatment plant will provide somewhat better treatment efficiency, however the better removal of pollutants will not entirely make up for the increased volume of discharge.
2. The **Department now calculates mass load limits higher** than in the past. The past method of calculating resulted in periodic violations in the last few years of a treatment plant's design. The Department now allows higher mass load limits in permits, to avoid the violations. **THIS CHANGE MEANS HIGHER PERMIT LIMITS** but will not change the actual mass loads discharged.

The impact from the proposed increased mass loads is mitigated and offset by the following:

1. **Ammonia will be treated and removed.** The reduction in ammonia will more than offset the increase in CBOD, resulting in an **IMPROVEMENT** in dissolved oxygen in the receiving stream.



2. **During low flow stream conditions**, when the stream is more sensitive to discharges, the **effluent discharged will be limited**. The City will instead use some of the effluent beneficially on a poplar tree plantation. This will result in much better instream water quality during low stream flows.

The existing and proposed mass load limits for CBOD and TSS are listed in Table 1. Also listed are the current and proposed ammonia concentration limits.

Allowing mass load increases - It is the general policy in Oregon that treatment facilities should increase treatment efficiency so that growth and development will not result in increases in mass loads. Oregon Administrative Rules (OAR) 340-41-026(3) does allow exceptions to this general policy, providing that specified findings can be made and that other criteria are considered, as described below.

The proposed wasteload must not cause water quality standard violations - The proposed wasteloads have been evaluated by computer simulations. Dissolved oxygen is the only water quality standard of concern with the CBOD<sub>5</sub> and TSS wasteloads proposed. While there will be a slight increase in oxygen demand from the CBOD<sub>5</sub>, this is offset by the much lower ammonia discharges and associated oxygen demand projected after both Phase 1 and 2.

The increased wasteload must not impair any recognized beneficial use - As discussed in the rule, if a discharge meets the applicable instream water quality standards, then the Commission may consider that beneficial uses are considered. The proposed discharge (after both Phase 1 and 2) will meet the dissolved oxygen instream water quality standards, and therefore will not impair any beneficial use.

If the receiving stream is water quality limited, the TMDL and waste load allocations have been made, and the increased wasteload must be consistent with the assigned allocation - The proposed Phase 2 waste loads are within the assigned load allocation.

The activity associated with the waste load increase must be consistent with acknowledged local land use plans - The activity in question is serving existing customers within the City of Woodburn, and providing for additional growth in the area. The activity is consistent with the adopted and approved comprehensive plan for the City.

The Commission shall consider the possible negative impact of taking the discharge out of the stream - A portion of the treated wastewater will be irrigated on the poplar plantation. The remaining volume discharged will meet all water quality standards at the edge of the mixing zone. If all water quality standards are met with that portion of the effluent in the stream, then it is assumed that for fisheries resources the creek would be better off with the effluent since it will result in higher stream flows during critical summer low flow periods.

The Commission shall consider the instream effects, for example if the increased discharge is offset by other decreases - The proposed discharge will result in small increases in CBOD<sub>5</sub> and TSS during some periods, however the impacts of these increased pollutants will be more than offset by the reductions of ammonia discharges.

The Commission shall consider the possible beneficial use of the effluent in non-discharge alternatives - A portion of the effluent will be beneficially used as irrigation water by the City in the summer. The winter flows could not be beneficially used without very costly storage, as the application for irrigation must be done in the summer.

The Commission shall consider the economic value of the assimilative capacity - The proposed waste load increases in CBOD<sub>5</sub> and TSS will not result in a reduction of assimilative capacity. Assimilative capacity for those pollutants is based on oxygen demand. Although the CBOD<sub>5</sub> loads will be somewhat higher, the overall oxygen demand (related to CBOD<sub>5</sub> plus the much reduced levels of ammonia) will result in improvements in dissolved oxygen in the Pudding River and compliance with WQ standards. There currently is no assimilative capacity since the stream does not meet the dissolved oxygen standard. If the proposed wasteload increases are granted, there will be a small remaining reserve assimilative capacity.

The Commission shall consider the cost of treatment technology to remain within the assigned mass loads - In order to remain within the currently permitted mass load limits, the City would have to significantly expand the poplar plantation in order to irrigate a portion of the treated effluent all summer long. The additional cost of the expanded poplar plantation is estimated at \$2.0 million.

The City of Woodburn has elected to retain the winter mass load limits that will be in effect on the existing treatment facility rather than request higher mass load limits that would be based on the expected plant performance at peak month flows at the end of the design life. The City reserves the right to request these higher winter mass load limits at a later date.

Because the proposed mass limits are slightly less (both summer and winter) than limits based on the expected plant performance at peak month flows, it is possible that the discharge may not be in consistent compliance with the permit limits towards the end of the life of the treatment plant.

Recommendation regarding request for mass load increase - Based on the above findings and considerations, the Department recommends that the Commission approve the requested mass load increase.

## **Action # 2 - Request for Dilution Rule Waiver**

**Summary** - The dilution rule is an older rule intended to prevent the violation of water quality standards from a discharge. The Department now has much more sophisticated tools available

for predicting the impact of a proposed discharge on stream water quality. The proposed discharge has been evaluated, and the Department concludes that the proposed discharge can be safely allowed without violating water quality standards. The Department recommends that the dilution rule be waived.

**Discussion** - Oregon rules include minimum design criteria for wastewater treatment facilities in the state. One of the minimum design criteria that applies in the Willamette basin (which includes the Pudding River) is OAR 340-41-455(1)(f), the minimum dilution requirement. This rule requires that domestic wastewater treatment effluent must have a minimum dilution ratio, based on the level of treatment provided. The rule applies to facilities that have been built or expanded after 1976. For the proposed expanded treatment plant, the minimum receiving stream flows would be 10 times the effluent flow in the summer, and 30 times the effluent flow in the winter. The rule does allow the Commission to waive this requirement.

The minimum dilution rule is over 20 years old, and was adopted for the purpose of preventing discharges to very small receiving streams where the effluent could cause violations of instream water quality standards. It was adopted at a time when few tools were available to predict the impact of a discharge, and has served well as a “rule of thumb” to help better locate outfalls to larger and more acceptable receiving streams.

In the last five to ten years, there have been significant improvements in our ability to predict the impact of a proposed discharge. As described in previous sections, the proposed discharges have been evaluated using computer models. The Department expects that the proposed discharge can be allowed without causing any violation of instream water quality standards.

For the City of Woodburn, the available dilution will vary depending upon the month and the receiving stream and effluent flows. During extreme low stream flow summer conditions, the volume that can be discharged to the Pudding River will be limited by very stringent ammonia limitations regardless of the design flow. At critical conditions, the City will only be able to discharge about 2.0 MGD to the Pudding River. According to the charts below, the lowest dilution factor (using these realistic discharge volumes) will occur in September when river flows are less than 30 cfs. The lowest dilution factor will be 3.4 to one.

June

Stream Flow	Design Discharge Flow	Dilution Ratio	Flow Limited by Ammonia	Dilution Ratio
(CFS)	(MGD)		(MGD)	
150	5	20.5	Not Limited	NA
100	5	14.0	Not Limited	NA
50	5	7.5	Not Limited	NA
42	5	6.5	Not Limited	NA

July through August

Stream Flow	Design Discharge Flow	Dilution Ratio	Flow Limited by Ammonia	Dilution Ratio
(CFS)	(MGD)		(MGD)	
100	5	14.0	Not Limited	NA
60	5	8.8	Not Limited	NA
30	5	4.9	Not Limited	NA
12.78	5	2.7	2	5.1

September

Stream Flow	Design Discharge Flow	Dilution Ratio	Flow Limited by Ammonia	Dilution Ratio
(CFS)	(MGD)		(MGD)	
100	5	14.0	Not Limited	NA
60	5	8.8	Not Limited	NA
30	5	4.9	Not Limited	NA
12.78	5	2.7	2	3.4

October

Stream Flow	Design Discharge Flow	Dilution Ratio	Flow Limited by Ammonia	Dilution Ratio
(CFS)	(MGD)		(MGD)	
100	5	14.0	Not Limited	NA
60	5	8.8	Not Limited	NA
28	5	4.6	Not Limited	NA

During extreme low stream flow winter conditions, the wet weather flow volume discharged to the Pudding River could be as high as 7.3. According to the chart below, the lowest dilution factor will occur in November when critical low river flows are 75 cfs. The lowest dilution factor will be 7.7 to one.

November - May

Stream Flow	Design Discharge Flow	Dilution Ratio
(CFS)	(MGD)	
75	7.3	7.7

The City is proposing to compensate for the lack of dilution by providing a very high level of treatment. In order to meet the dilution rule, the facility would have to comply with 3.4 mg/l CBOD<sub>5</sub> on a consistent basis in the summer and 7.7 mg/l CBOD<sub>5</sub> on a consistent basis in the winter when the above conditions occur. The proposed facility is not able to meet these very stringent limits.

Based on the expected ability of the proposed treatment plant to meet all water quality standards, the Department recommends that the Commission waive the minimum dilution rule for the proposed Woodburn treatment plant.

#### **Authority of the Commission with Respect to the Issue**

The authority for the three actions above are included in OAR 340-41-026(3) for the mass load increase request; and OAR 340-41-455(1)(f) for the waiver of the minimum dilution rule.

#### **Alternatives and Evaluation**

The EQC could approve both requests and the Department would issue the NPDES permit as proposed. All water quality standards in the Pudding River would be met as a result of the discharge from the new facility. The overall impact of the discharge on the receiving stream would be reduced significantly. This is already a very expensive project for a city the size of Woodburn and denial of either request would entail additional facilities at higher costs.

The EQC could approve the dilution waiver but not the mass load increase. This would require the City to significantly expand the poplar plantation and irrigate at least a portion of the treated effluent all summer long in order to remain within the currently permitted mass load limits. The additional cost of the expanded poplar plantation is estimated at \$2.0 million.

The EQC could approve the mass load increase but not the dilution waiver. This would require the City to both increase the size of the poplar plantation and provide storage capacity at an estimated cost of at least \$9.3 million.

The EQC could deny both requests. The additional improvements necessary to comply with the dilution rule would also be sufficient for the mass load. Therefore, the estimated increased cost of \$9.3 million for improvements would be necessary should both requests be denied.

### **Summary of Public Input Opportunity**

The City conducted a number of meetings and hearings as part of the facilities plan development process, prior to adopting the facilities plan at a City Council meeting. Public testimony was solicited by the City. In addition, the Department has placed the proposed permit and permit evaluation report out for public comment. The proposed permit and report includes a discussion of the two actions brought forth in this report. A public hearing was held on January 12, 1998, to receive verbal testimony. The comments received were generally supportive. Most of the issues raised were technical refinements. Attachment B includes the summary of comments received during the Department's permit review process, and the Department's response to those comments.

### **Conclusions**

The City of Woodburn is proposing to build an expanded and upgraded wastewater treatment plant. The new treatment plant plus other system improvements will substantially decrease the discharges of a number of pollutants of concern, including oxygen demanding pollutants, ammonia and chlorine. The proposed discharge to the Pudding River will meet all water quality standards. Overall, the proposed treatment plant will significantly improve the discharge to the Pudding River.

In order for the project to move forward, two actions are required by the Commission. These actions are a mass load increase and a waiver of the minimum dilution rule. The Department believes that both waivers can be granted under the terms of the applicable rules, and that it is appropriate to do so in this case.

### **Intended Future Actions**

Provided the Commission approves this request, the next steps for the Department will be:

- Revise the Total Maximum Daily Load for the Pudding River.
- Issuance of the NPDES permit for the proposed new plant.
- Approval of the engineering plans and specifications for Phase 1.
- Modify the Stipulation and Final Order to reflect changes needed as a result of the proposed project.

### **Department Recommendation**

It is recommended that the Commission accept this report, discuss the matter, and provide advice and guidance to the Department as appropriate. Specifically, the Department recommends the following:

1. That the mass load increases be approved as requested.
2. That the dilution rule be waived.

**Attachments**

Attachment 1 - Proposed NPDES permit for the City of Woodburn

Attachment 2 - Summary of Comments Received, and the Department's Response

**Reference Documents (available upon request)**

NPDES permit evaluation report and fact sheet

City of Woodburn Wastewater Facilities Plan and associated technical documents

Approved:

Section:

Barbara A. Burton

Division:

[Signature]

Report Prepared By: Mark E. Hamlin

Phone: (503) 378-8240, extension 239

Date Prepared: January 28, 1998

MEH:meh  
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10/13/95

# DRAFT

Expiration Date: 2/28/03  
Permit Number:  
File Number: 98815  
Page 1 of 29 Pages

## NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM WASTE DISCHARGE PERMIT

Department of Environmental Quality  
Western Region - Eugene Office  
1102 Lincoln St., Suite 210, Eugene, OR 97401  
Telephone: (503) 686-7838

Issued pursuant to ORS 468B.050 and The Federal Clean Water Act

### ISSUED TO:

City of Woodburn  
2815 Molalla Road  
Woodburn, OR 97071

### SOURCES COVERED BY THIS PERMIT:

Type of Waste	Outfall Number	Outfall Location
Domestic Sewage	001A	R.M. 21.5
Domestic Sewage	001B	R.M. 21.5
Poplar Tree Reuse	002A	Level III Reuse
Poplar Tree Reuse	002B	Level II Reuse
Emergency Overflows:		
Lift Station #2 - Jansen Way	003	Mill Creek
Lift Station #6 - Santiam Dr.	004	Storm Sewer to ditch to Mill Creek
Mill Creek Pump Station	005	Mill Creek

### FACILITY TYPE AND LOCATION:

isting RBC/Sand Filter STP  
New Anoxic Selector/Activated Sludge STP  
2815 Molalla Road  
Woodburn, Oregon  
Treatment System Class: IV  
Collection System Class: III

### RECEIVING SYSTEM INFORMATION:

Basin: Willamette River  
Sub-Basin: Molalla/ pudding  
Receiving Stream: Pudding River  
Hydro Code: 22K-PUDD 21.5 D  
County: Marion

### EPA REFERENCE NO: OR-002000-1

Issued in response to Application No. 993193 received September 12, 1996.

This permit is issued based on the land use findings in the permit record.

Steve Greenwood, Administrator  
Western Region

Date

### PERMITTED ACTIVITIES

Until this permit expires or is modified or revoked, the permittee is authorized to construct, install, modify, or operate a wastewater collection, treatment, control and disposal system and discharge to public waters adequately treated wastewaters only from the authorized discharge point or points established in Schedule A and only in conformance with all the requirements, limitations, and conditions set forth in the attached schedules as follows:

	Page
Schedule A - Waste Discharge Limitations not to be Exceeded.....	2-7
Schedule B - Minimum Monitoring and Reporting Requirements.....	8-13
Schedule C - Compliance Conditions and Schedules.....	14
Schedule D - Special Conditions.....	15-17
Schedule E - Pretreatment Activities.....	18-19
Schedule F - General Conditions .....	20-29

Unless authorized by another NPDES permit, each other direct and indirect discharge to public waters is prohibited.



**SCHEDULE A**

**1. Waste Discharge Limitations not to be exceeded after permit issuance during operation of the existing Rotating Biological Contactor plant.**

a. Outfall Number 001A and B (Wastewater Treatment Plant Discharge)

(1) May 1 - October 31:

Parameter	Average Effluent Concentrations		Monthly* Average lb/day	Weekly* Average lb/day	Daily* Maximum lbs
	Monthly	Weekly			
CBOD <sub>5</sub> ***	10 mg/l	15 mg/l	260	390	520
TSS	10 mg/l	15 mg/l	260	390	520

(2) November 1 - April 30:

Parameter	Average Effluent Concentrations		Monthly** Average lb/day	Weekly** Average lb/day	Daily** Maximum lbs
	Monthly	Weekly			
CBOD <sub>5</sub> ***	25 mg/l	40 mg/l	940	1400	1900
TSS	30 mg/l	45 mg/l	1100	1700	2200

\* Effluent loadings are based on average dry weather design flow to the facility of 3.1 MGD.

\*\* Effluent loadings are based on average wet weather design flow to the facility of 4.5 MGD. Daily mass load limits are suspended on any day when the total flow to the treatment facility exceeds 6.2 MG per 24 hours (twice the design average dry weather flow).

\*\*\* The CBOD<sub>5</sub> concentration limit are considered equivalent to the minimum design criteria for BOD<sub>5</sub> specified in Oregon Administrative Rules (OAR) 340-41. These limits and CBOD<sub>5</sub> mass limits may be adjusted (up or down) by permit action if more accurate information regarding CBOD<sub>5</sub>/BOD<sub>5</sub> becomes available.

(3)

Other parameters (year-round)	Limitations
<i>E. coli</i> Bacteria	Shall not exceed 126 organisms per 100 ml monthly geometric mean. No single sample shall exceed 406 organisms per 100 ml. (See Note 1/)
pH	Shall be within the range of 6.0 - 9.0
CBOD <sub>5</sub> and TSS Removal Efficiency	Shall not be less than 85% monthly average
Total Chlorine Residual	Shall not exceed a 0.03 mg/l daily average

(4)

Other parameters (June - October)	Limitations
CBOD <sub>5</sub>	Shall not exceed 20 mg/l daily maximum.****
TSS	Shall not exceed 20 mg/l daily maximum.****
Dissolved Oxygen	Shall not be less than 6.5 mg/l as a daily average.
Ammonia - N	Monthly average effluent concentration shall not exceed the values listed in the tables below:

\*\*\*\* During any month that the monthly average ammonia limitation is 10 mg/l the daily maximum concentration limitation for CBOD<sub>5</sub> and TSS shall not apply.

(A) June 1 - June 30

Monthly Average Ammonia-N Concentrations Not to be Exceed (mg/l)

Pudding River Monthly Avg. Flow (cfs)	Monthly Avg. Effluent Flow 0 to 1.0 MGD	Monthly Avg. Effluent Flow > 1.0 up to 2.0 MGD	Monthly Avg. Effluent Flow > 2.0 up to 3.0 MGD	Monthly Avg. Effluent Flow: > 3.0 up to 3.5 MGD	Monthly Avg. Effluent Flow > 3.5 up to 4.0 MGD	Monthly Avg. Effluent Flow > 4.0 MGD
> 150	10	10	9.6	8.3	7.4	6.0
100 - 150	10	9.0	5.8	4.8	4.2	3.2
50 - 100	7.2	3.4	2.2	1.8	1.5	1.2
< 50	6.0	2.9	1.8	1.5	1.2	1.0

(B) July 1 - August 31

Monthly Average Ammonia-N Concentrations Not to be Exceed (mg/l)

Pudding River Monthly Avg. Flow (cfs)	Monthly Avg. Effluent Flow 0 to 1.0 MGD	Monthly Avg. Effluent Flow > 1.0 up to 2.0 MGD	Monthly Avg. Effluent Flow > 2.0 up to 3.0 MGD	Monthly Avg. Effluent Flow > 3.0 up to 3.5 MGD	Monthly Avg. Effluent Flow > 3.5 up to 4.0 MGD	Monthly Avg. Effluent Flow > 4.0 MGD
> 100	10	7.0	5.0	4.0	3.0	2.5
60 - 100	8.0	4.0	2.5	2.0	1.5	1.0
30 - 60	5.0	2.5	1.5	1.0	1.0	0.7
< 30	1.5	0.5	0.1	0.1	0.1	0.1

(C) September 1 - September 30

Monthly Average Ammonia-N Concentrations Not to be Exceed (mg/l)

Pudding River Monthly Avg. Flow (cfs)	Monthly Avg. Effluent Flow 0 to 1.0 MGD	Monthly Avg. Effluent Flow > 1.0 up to 2.0 MGD	Monthly Avg. Effluent Flow > 2.0 up to 3.0 MGD	Monthly Avg. Effluent Flow > 3.0 up to 3.5 MGD	Monthly Avg. Effluent Flow > 3.5 up to 4.0 MGD	Monthly Avg. Effluent Flow > 4.0 MGD
> 100	10	10	10	9.0	7.8	6.2
60 - 100	10	8.0	5.0	4.2	3.7	3.1
30 - 60	10	5.6	3.5	2.9	2.6	2.0
< 30	2.4	1.3	0.7	0.5	0.4	0.3

(D) October 1 - October 31

Monthly Average Ammonia-N Concentrations Not to be Exceed (mg/l)

Pudding River Monthly Avg. Flow (cfs)	Monthly Avg. Effluent Flow 0 to 1.0 MGD	Monthly Avg. Effluent Flow > 1.0 up to 2.0 MGD	Monthly Avg. Effluent Flow > 2.0 up to 3.0 MGD	Monthly Avg. Effluent Flow > 3.0 up to 3.5 MGD	Monthly Avg. Effluent Flow > 3.5 up to 4.0 MGD	Monthly Avg. Effluent Flow > 4.0 MGD
> 100	10	10	10	9.0	7.8	6.2
60 - 100	10	8.0	5.0	4.2	3.7	3.1
< 60	10	6.4	4.2	3.6	3.1	2.4

- (5) Notwithstanding the effluent limitations established by this permit, except as provided for in OAR 340-45-080, no wastes shall be discharged and no activities shall be conducted which violate Water Quality Standards as adopted in OAR 340-41-445 except in the following defined mixing zone:

The allowable mixing zone is that portion of the Pudding River beginning ten (10) feet upstream and extending three hundred (300) feet downstream from the point of discharge. The Zone of Immediate Dilution (ZID) shall be defined as that portion of the mixing zone that is within thirty (30) feet of the point of discharge.

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b. Outfall Number 002 B (Poplar Tree Reuse Site)

- (1) No discharge to state waters is permitted unless otherwise authorized. All reclaimed water shall be distributed on land for dissipation by evapotranspiration and controlled seepage by following sound irrigation practices so as to prevent:
  - (a) Prolonged ponding of treated reclaimed water on the ground surface;
  - (b) Surface runoff or uncontrolled subsurface drainage through drainage tile;
  - (c) The creation of odors, fly and mosquito breeding or other nuisance conditions;
  - (d) The overloading of land with nutrients, organics, or other pollutant parameters; and,
  - (e) Impairment of existing or potential beneficial uses of groundwater.
- (2) Prior to land application of the reclaimed water to Reuse site 002B, it shall receive at least Level II treatment as defined in OAR 340-55 to:
 

Reduce Total Coliform to 240 organisms per 100 ml in two consecutive samples, and a 7-day median of 23 organisms per 100 mls.
- (3) Irrigation shall conform to the Reclaimed Water Use Plan approved by the Department.

c. Outfall Number 003 through 005 (Emergency Overflows)

No waste shall be discharged from these outfalls and no activities shall be conducted which violate Water Quality Standards as adopted in OAR 340-41-445, unless the cause of the discharge is an upset as defined in Condition B4 and B6 of the attached General Conditions or is due to storm events as allowed under OAR 340-41-120(13) and (14) as follows:

Raw sewage discharges are prohibited to waters of the State from November 1 through May 21, except during a storm event greater than the one-in-five-year, 24-hour duration storm, and from May 22 through October 31, except during a storm event greater than the one-in-ten-year, 24-hour duration storm. If an overflow occurs between May 22 and June 1, and if the permittee demonstrates to the Department's satisfaction that no increase in risk to beneficial uses occurred because of the overflow, no violation shall be triggered if the storm associated with the overflow was greater than the one-in-five-year, 24-hour duration storm.

2. Waste Discharge Limitations not to be exceeded 60 days after the permittee has completed construction of Phase I treatment and disposal system improvements necessary to meet permit requirements listed in SCHEDULE A.2.

a. Outfall Number 001A and B (Wastewater Treatment Plant Discharge)

- (1) May 1 - October 31:

Parameter	Average Effluent Concentrations		Monthly* Average lb/day	Weekly* Average lb/day	Daily* Maximum lbs
	Monthly	Weekly			
CBOD <sub>5</sub> <sup>***</sup>	10 mg/l	15 mg/l	420	630	830
TSS	10 mg/l	15 mg/l	420	630	830

- (2) November 1 - April 30:

Parameter	Average Effluent Concentrations		Monthly** Average lb/day	Weekly** Average lb/day	Daily** Maximum lbs
	Monthly	Weekly			
CBOD <sub>5</sub> <sup>***</sup>	25 mg/l	40 mg/l	940	1400	1900
TSS	30 mg/l	45 mg/l	1100	1700	2200

Effluent loadings are based on average dry weather design flow to the facility of 5.0 MGD and the waste load allocations contained in the Pudding River Total Maximum Daily Load.

\*\* Effluent loadings are based on average wet weather design flow to the previous facility of 4.5 MGD. Daily mass load limits are suspended on any day when the total flow to the treatment facility exceeds 10 MG in 24 hours (twice the design average dry weather flow). (See Note 2/)

\*\*\* The CBOD<sub>5</sub> concentration limit are considered equivalent to the minimum design criteria for BOD<sub>5</sub> specified in Oregon Administrative Rules (OAR) 340-41. These limits and CBOD<sub>5</sub> mass limits may be adjusted (up or down) by permit action if more accurate information regarding CBOD<sub>5</sub>/BOD<sub>5</sub> becomes available.

(3) Other parameters (year-round)	Limitations
<i>E. coli</i> Bacteria	Shall not exceed 126 organisms per 100 ml monthly geometric mean. No single sample shall exceed 406 organisms per 100 ml. (See Note 1/)
pH	Shall not be outside the range of 6.0 - 9.0 for more than a total of 7 hours and 26 minutes in any calendar month; and no individual excursion from this range shall exceed 60 minutes.
CBOD <sub>5</sub> and TSS Removal Efficiency	Shall not be less than 85% monthly average

(4) Other parameters (June - October)	Limitations
CBOD <sub>5</sub>	Shall not exceed 20 mg/l daily maximum. ****
TSS	Shall not exceed 20 mg/l daily maximum. ****
Dissolved Oxygen	Shall not be less than 6.5 mg/l as a daily average.
Ammonia - N	Monthly average effluent concentration shall not exceed the values listed in the tables below

\*\*\*\* During any month that the monthly average ammonia limitation is 10 mg/l the daily maximum concentration limitation for CBOD<sub>5</sub> and TSS shall not apply.

(A) June 1 - June 30

Monthly Average Ammonia-N Concentrations Not to be Exceed (mg/l)

Pudding River Monthly Avg. Flow (cfs)	Monthly Avg. Effluent Flow 0 to 1.0 MGD	Monthly Avg. Effluent Flow > 1.0 up to 2.0 MGD	Monthly Avg. Effluent Flow > 2.0 up to 3.0 MGD	Monthly Avg. Effluent Flow: > 3.0 up to 3.5 MGD	Monthly Avg. Effluent Flow > 3.5 up to 4.0 MGD	Monthly Avg. Effluent Flow > 4.0 MGD
> 150	10	10	9.6	8.3	7.4	6.0
100 - 150	10	9.0	5.8	4.8	4.2	3.2
50 - 100	7.2	3.4	2.2	1.8	1.5	1.2
< 50	6.0	2.9	1.8	1.5	1.2	1.0

(B) July 1 - August 31

Monthly Average Ammonia-N Concentrations Not to be Exceed (mg/l)

Pudding River Monthly Avg. Flow (cfs)	Monthly Avg. Effluent Flow 0 to 1.0 MGD	Monthly Avg. Effluent Flow > 1.0 up to 2.0 MGD	Monthly Avg. Effluent Flow > 2.0 up to 3.0 MGD	Monthly Avg. Effluent Flow > 3.0 up to 3.5 MGD	Monthly Avg. Effluent Flow > 3.5 up to 4.0 MGD	Monthly Avg. Effluent Flow > 4.0 MGD
> 100	10	7.0	5.0	4.0	3.0	2.5
60 - 100	8.0	4.0	2.5	2.0	1.5	1.0
30 - 60	5.0	2.5	1.5	1.0	1.0	0.7
< 30	1.5	0.5	0.1	0.1	0.1	0.1

(C) September 1 - September 30

Monthly Average Ammonia-N Concentrations Not to be Exceed (mg/l)

Pudding River Monthly Avg. Flow (cfs)	Monthly Avg. Effluent Flow 0 to 1.0 MGD	Monthly Avg. Effluent Flow > 1.0 up to 2.0 MGD	Monthly Avg. Effluent Flow > 2.0 up to 3.0 MGD	Monthly Avg. Effluent Flow > 3.0 up to 3.5 MGD	Monthly Avg. Effluent Flow > 3.5 up to 4.0 MGD	Monthly Avg. Effluent Flow > 4.0 MGD
> 100	10	10	10	9.0	7.8	6.2
60 - 100	10	8.0	5.0	4.2	3.7	3.1
30 - 60	10	5.6	3.5	2.9	2.6	2.0
< 30	2.4	1.3	0.7	0.5	0.4	0.3

(D) October 1 - October 31

Monthly Average Ammonia-N Concentrations Not to be Exceed (mg/l)

Pudding River Monthly Avg. Flow (cfs)	Monthly Avg. Effluent Flow 0 to 1.0 MGD	Monthly Avg. Effluent Flow > 1.0 up to 2.0 MGD	Monthly Avg. Effluent Flow > 2.0 up to 3.0 MGD	Monthly Avg. Effluent Flow > 3.0 up to 3.5 MGD	Monthly Avg. Effluent Flow > 3.5 up to 4.0 MGD	Monthly Avg. Effluent Flow > 4.0 MGD
> 100	10	10	10	9.0	7.8	6.2
60 - 100	10	8.0	5.0	4.2	3.7	3.1
< 60	10	6.4	4.2	3.6	3.1	2.4

- (5) Notwithstanding the effluent limitations established by this permit, except as provided for in OAR 340-45-080, no wastes shall be discharged and no activities shall be conducted which violate Water Quality Standards as adopted in OAR 340-41-445 except in the following defined mixing zone:

The allowable mixing zone is that portion of the Pudding River beginning ten (10) feet upstream and extending three hundred (300) feet downstream from the point of discharge. The Zone of Immediate Dilution (ZID) shall be defined as that portion of the mixing zone that is within thirty (30) feet of the point of discharge.

- (6) No chlorine or chlorine compounds shall be used for disinfection purposes and no chlorine residual shall be allowed in the discharged effluent due to chlorine used for maintenance purposes.

b. Outfall Number 002A and B (Poplar Tree Reuse Site)

- (1) No discharge to state waters is permitted unless otherwise authorized. All reclaimed water shall be distributed on land for dissipation by evapotranspiration and controlled seepage by following sound irrigation practices so as to prevent:
- (a) Prolonged ponding of treated reclaimed water on the ground surface;
  - (b) Surface runoff or uncontrolled subsurface drainage through drainage tile;
  - (c) The creation of odors, fly and mosquito breeding or other nuisance conditions;
  - (d) The overloading of land with nutrients, organics, or other pollutant parameters; and,
  - (e) Impairment of existing or potential beneficial uses of groundwater.
- (2) Prior to land application of the reclaimed water to Reuse site 002A, it shall receive at least Level III treatment as defined in OAR 340-55 to:

Reduce Total Coliform to a seven day median of 2.2 organisms per 100 mls and a maximum of 23 organisms per 100 mls.

- (3) Prior to land application of the reclaimed water to Reuse site 002B, it shall receive at least Level II treatment as defined in OAR 340-55 to:

Reduce Total Coliform to 240 organisms per 100 ml in two consecutive samples, and a 7-day median of 23 organisms per 100 mls.

- (4) Irrigation shall conform to the Reclaimed Water Use Plan approved by the Department.

c. Outfall Number 003 through 005 (Emergency Overflows)

No waste shall be discharged from these outfalls and no activities shall be conducted which violate Water Quality Standards as adopted in OAR 340-41-445, unless the cause of the discharge is an upset as defined in Condition B4 and B6 of the attached General Conditions or is due to storm events as allowed under OAR 340-41-120(13) and (14) as follows:

Raw sewage discharges are prohibited to waters of the State from November 1 through May 21, except during a storm event greater than the one-in-five-year, 24-hour duration storm, and from May 22 through October 31, except during a storm event greater than the one-in-ten-year, 24-hour duration storm. If an overflow occurs between May 22 and June 1, and if the permittee demonstrates to the Department's satisfaction that no increase in risk to beneficial uses occurred because of the overflow, no violation shall be triggered if the storm associated with the overflow was greater than the one-in-five-year, 24-hour duration storm.

**NOTES:**

- 1/. If a single sample exceeds 406 organisms per 100 ml, then five consecutive re-samples may be taken at four hour intervals beginning within 28 hours after the original sample was taken. If the log mean of the five re-samples is less than or equal to 126 organisms per 100 ml, a violation shall not be triggered.
- 2/. The average wet weather flow of 4.5 MGD is based on an engineering study of the previous wastewater treatment facility. The City may request increased wintertime mass load limits for BOD and/or TSS based on the capability of the new wastewater treatment facility in accordance with OAR 340-41-026(3).

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**SCHEDULE B**

**1. Quality Assurance/Quality Control**

The permittee shall monitor the parameters as specified below at the locations indicated. The laboratory used by the permittee to analyze samples shall have a quality assurance/quality control (QA/QC) program to verify the accuracy of sample analysis. If QA/QC requirements are not met for any analysis, the results shall be included in the report, but not used in calculations required by this permit. When possible, the permittee shall re-sample in a timely manner for parameters failing the QA/QC requirements, analyze the samples, and report the results.

**2. Minimum Monitoring and Reporting Requirements to be met after permit issuance during operation of the existing Rotating Biological Contactor plant. (unless otherwise approved in writing by the Department)**

a. Influent

Item or Parameter	Minimum Frequency	Type of Sample
Total Flow (MGD)	Daily	Measurement
Flow Meter Calibration	Semi-Annually	Verification
CBOD <sub>5</sub>	2/Week	24-hour Composite
TSS	2/Week	24-hour Composite
pH	3/Week	Grab
Metals: (Ag, As, Cd, Cr, Cu, Hg, Mo, Ni, Pb, Se, Zn) & Cyanide, measured as total is mg/l (See Note 1/)	Semi-Annually using 3 consecutive days between Monday and Friday, inclusive	24-hour daily composite (See Note 2/)

b. Outfall Number 001A and B (Sewage Treatment Plant Discharge)

Item or Parameter	Minimum Frequency	Type of Sample
Total Flow (MGD)	Daily	Measurement
Flow Meter Calibration	Semi-Annually	Verification
CBOD <sub>5</sub>	2/Week	24-hour Composite
Ammonia-N	2/Week	24-hour Composite
TSS	2/Week	24-hour Composite
pH	3/Week	Grab
Temperature	2/Week	Record
<i>E. coli</i>	2/Week	Grab (See Note 3/)
Quantity Chlorine Used	Daily	Measurement
Chlorine Residual	Daily	Grab
Pounds Discharged (CBOD <sub>5</sub> and TSS)	2/Week	Calculation
Average Percent Removed (CBOD <sub>5</sub> and TSS)	Monthly	Calculation
Nutrients: TKN, NO <sub>2</sub> -N+NO <sub>3</sub> -N, Total Phosphorus	1/Week May-Oct)	24-hour Composite
Toxics: Metals (Ag, As, Cd, Cr, Cu, Hg, Mo, Ni, Pb, Se, Zn) & Cyanide, measured as total is mg/l (See Note 1/)	Semi-Annually using 3 consecutive days between Monday and Friday, inclusive	24-hour daily composite (See Note 2/)
Bioassay (See Note 4/)	Quarterly	Acute & chronic bioassay

c. Outfall Number 002 B (Poplar Tree Reuse Site)

Item or Parameter	Minimum Frequency	Type of Sample
Quantity Irrigated (inches/acre)	Daily	Measurement
Flow Meter Calibration	Annually	Verification
Quantity Chlorine Used	Daily	Measurement
Chlorine Residual	Daily	Grab
pH	2/Week	Grab
Total Coliform	1/Week	Grab
Nutrients: (TKN, NO <sub>2</sub> -N+NO <sub>3</sub> -N, NH <sub>3</sub> , Total Phosphorus)	Quarterly	Grab

d. Outfalls 003 through 005 (Emergency Overflows)

Item or Parameter	Minimum Frequency	Type of Sample
Flow	Daily (during each occurrence)	Estimate duration and volume

e. Pudding River (See Note 8/)

Item or Parameter	Minimum Frequency	Type of Sample
Temperature (upstream)	1/Week (June-October)	Record

f. Biosolids Management

Item or Parameter	Minimum Frequency	Type of Sample
Sludge analysis including: Total Solids (% dry wt.) Volatile solids (% dry wt.) Biosolids nitrogen for: NH <sub>3</sub> -N; NO <sub>3</sub> -N; & TKN (% dry wt.) Phosphorus (% dry wt.) Potassium (% dry wt.) pH (standard units)	Quarterly	Composite sample to be representative of the product to be land applied from the sludge drying beds (See Note 5/)
Sludge metals content for: Ag, As, Cd, Cr, Cu, Hg, Mo, Ni, Pb, Se & Zn, measured as total in mg/kg	Semi-Annually	Composite sample to be representative of the product to be land applied from the sludge drying beds (See Note 5/)
Record of % volatile solids reduction accomplished through stabilization.	Monthly when land applying biosolids	Calculation (See Note 6/)
Record of locations where biosolids are applied on each DEQ approved site. (Site location maps to be maintained at treatment facility for review upon request by DEQ)	Each Occurrence	Date, volume & locations where sludges were applied recorded on site location map



3. Minimum Monitoring and Reporting Requirements to be met after the permittee has completed construction of treatment and disposal system improvements necessary to meet permit requirements listed in SCHEDULE A.2. (unless otherwise approved in writing by the Department)

a. Influent

Item or Parameter	Minimum Frequency	Type of Sample
Total Flow (MGD)	Daily	Measurement
Flow Meter Calibration	Semi-Annual	Verification
CBOD <sub>5</sub>	2/Week	24-hour Composite
TSS	2/Week	24-hour Composite
pH	3/Week	Grab
Toxics: Metals (Ag, As, Cd, Cr, Cu, Hg, Mo, Ni, Pb, Se, Zn) & Cyanide, measured as total is mg/l (See Note 1/)	Semi-Annually 3 consecutive days between Monday and Friday, inclusive	24-hour daily composite (See Note 2/)

b. Outfall Number 001A and B (Sewage Treatment Plant Discharge)

Item or Parameter	Minimum Frequency	Type of Sample
Total Flow (MGD)	Daily	Measurement
Flow Meter Calibration	Semi-Annual	Verification
CBOD <sub>5</sub>	2/Week	24-hour Composite
Ammonia-N	2/Week	4-hour Composite
TSS	2/Week	24-hour Composite
pH	Daily	Continuous
Dissolved Oxygen	2/Week	Grab
Temperature	2/Week	Record
<i>E. coli</i>	2/Week	Grab (See Note 3/)
UV Radiation Percent Intensity	Daily	Reading (See Note 7/)
Pounds Discharged (CBOD <sub>5</sub> and TSS)	2/Week	Calculation
Average Percent Removed (CBOD <sub>5</sub> and TSS)	Monthly	Calculation
Nutrients: TKN, NO <sub>2</sub> -N+NO <sub>3</sub> -N, Total Phosphate	1/Week (May-Oct)	24-hour Composite
Toxics: Metals (Ag, As, Cd, Cr, Cu, Hg, Mo, Ni, Pb, Se, Zn) & Cyanide measured as total is mg/l, (See Note 1/)	Semi-Annually using 3 consecutive days between Monday and Friday, inclusive	24-hour daily Composite (See Note 2/)
Bioassay (See Note 4/)	Quarterly	Acute & chronic bioassay

c. Outfall Number 002A and B (Poplar Tree Reuse Site)

Item or Parameter	Minimum Frequency	Type of Sample
Quantity Irrigated (inches/acre)	Daily	Measurement
Flow Meter Calibration	Annually	Verification
Quantity Chlorine Used	Daily	Measurement
Chlorine Residual	Daily	Grab
pH	2/Week	Grab
Total Coliform	3/Week	Grab for Outfall 002A
Total Coliform	1/Week	Grab for Outfall 002B
Nutrients: (TKN, NO <sub>2</sub> -N+NO <sub>3</sub> -N, NH <sub>3</sub> , Total Phosphorus)	Quarterly	Grab

d. Outfalls 003 through 005 (Emergency Overflows)

Item or Parameter	Minimum Frequency	Type of Sample
Flow	Daily (during each occurrence)	Estimate duration and volume

e. Pudding River (See Note 8/)

Item or Parameter	Minimum Frequency	Type of Sample
Flow (upstream)	2/Week (June-October)	Measurement
Temperature (upstream)	2/Week (June-October)	Record
Temperature (downstream)	2/Week (June-October)	Record

f. Biosolids Management

Item or Parameter	Minimum Frequency	Type of Sample
Sludge analysis including: Total Solids (% dry wt.) Volatile solids (% dry wt.) Biosolids nitrogen for: NH <sub>3</sub> -N; NO <sub>3</sub> -N; & TKN (% dry wt.) Phosphorus (% dry wt.) Potassium (% dry wt.) pH (standard units)	Quarterly	Composite sample to be representative of the product to be land applied from the facultative sludge lagoon and/or drying beds (See Note 5/)
Sludge metals content for: Ag, As, Cd, Cr, Cu, Hg, Mo, Ni, Pb, Se & Zn, measured as total in mg/kg	Semi-Annually	Composite sample to be representative of the product to be land applied from the facultative sludge lagoon and/or drying beds (See Note 5/)
Record of % volatile solids reduction accomplished through stabilization.	Monthly when land applying biosolids	Calculation (See Note 6/)
Record of locations where biosolids are applied on each DEQ approved site. (Site location maps to be maintained at treatment facility for review upon request by DEQ)	Each Occurrence	Date, volume & locations where sludges were applied recorded on site location map

#### 4. Reporting Procedures

- a. Monitoring results shall be reported on approved forms. The reporting period is the calendar month. Reports must be submitted to the Department's Western Region - Salem office by the 15th day of the following month.
- b. State monitoring reports shall identify the name, certificate classification and grade level of each principal operator designated by the permittee as responsible for supervising the wastewater collection and treatment systems during the reporting period. Monitoring reports shall also identify each system classification as found on page one of this permit.

- c. Monitoring reports shall also include a record of the quantity and method of use of all sludge removed from the treatment facility and a record of all applicable equipment breakdowns and bypassing.

**5. Report Submittals**

a. The permittee shall have in place a program to identify and reduce inflow and infiltration into the sewage collection system. An annual report shall be submitted to the Department by August 31 each year which details sewer collection maintenance activities that reduce inflow and infiltration. The report shall state those activities that have been done in the previous year and those activities planned for the following year.

b. For any year in which biosolids are land applied, a report shall be submitted to the Department by February 19 of the following year that describes solids handling activities for the previous year and includes, but is not limited to, the required information outlined in OAR 340-50-035(6)(a)-(e).

- c. By no later than January 15 of each year, the permittee shall submit to the Department an annual report describing the effectiveness of the reclaimed water system to comply with approved reclaimed water use plan, the rules of Division 55, and the limitations and conditions of this permit applicable to reuse of reclaimed water.

**NOTES:**

- 1/ For influent and effluent cyanide samples, at least six (6) discrete grab samples shall be collected over the operating day. Each aliquot shall not be less than 100 ml and shall be collected and composited into a larger container which has been preserved with sodium hydroxide for cyanide samples to insure sample integrity.
- 2/ Daily 24-hour composite samples shall be analyzed and reported separately. Toxic monitoring results and toxics removal efficiency calculations shall be tabulated and submitted with the Pretreatment Program Annual Report as required in Schedule E. Submittal of toxic monitoring results with the monthly Discharge Monitoring Report is not required.
- 3/ *E. coli* monitoring must be conducted according to any of the following test procedures as specified in **Standard Methods for the Examination of Water and Wastewater, 19th Edition**, or according to any test procedure that has been authorized and approved in writing by the Director or his authorized representative:

Method	Reference	Page	Method Number
mTEC agar, MF	Standard Methods, 19th Edition	9-28	9213 D
NA-MUG, MF	Standard Methods, 19th Edition	9-63	9222 G
Chromogenic Substrate, MPN	Standard Methods, 19th Edition	9-65	9223 B
Colilert QT	Idexx Laboratories, Inc.		

- 4/ Beginning no later than July 2001, the permittee shall conduct bioassay testing for a period of one (1) year in accordance with the frequency specified above. If the bioassay tests show that the effluent samples are not toxic at the dilutions determined to occur at the Zone of Immediate Dilution and the Mixing Zone, no further bioassay testing will be required during this permit cycle. Note that bioassay test results will be required along with the next NPDES permit renewal application.

- 5/ Composite samples from the drying bed and facultative sludge lagoon shall be taken from reference areas in the drying bed or facultative sludge lagoon pursuant to Test Methods for Evaluating Solid Waste, Volume 2; Field Manual, Physical/Chemical Methods, November 1986, Third Edition, Chapter 9.

Inorganic pollutant monitoring must be conducted according to Test Methods for Evaluating Solid Waste, Physical/Chemical Methods, Second Edition (1982) with Updates I and II and third Edition (1986) with Revision I.

- 6/ Calculation of the % volatile solids reduction is to be based on comparison of a representative grab sample of total and volatile solids entering each digester (a weighted blend of the primary and secondary clarifier solids) and a representative composite sample of sludge solids removed from the drying beds or facultative sludge lagoon for land application (as defined in note 5/)
- 7/ The intensity of radiation emitted by a bank of UV lamps will decrease over time. As intensity decreases, its ability to kill organisms will also decrease. To track the reduction in intensity, the UV disinfection system must include a UV intensity meter. This meter will measure the relative intensity of a bank of UV lamps as compared to a baseline. The baseline should be established after the first 100 hours of burn-in time on the lamps. At 100 hours, the meter should be set at 99.9%. The daily percent UV intensity would then be determined by reading the meter each day.
- 8/ Pudding River flow and temperature shall be obtained a reasonable distance upstream from the outfall location. The downstream Pudding River temperature shall be taken at or before the edge of the mixing zone and from within the effluent plume. All measurements shall be instantaneous or grab values measured within a one (1) hour period.

## SCHEDULE C

### Compliance Schedules and Conditions

1. By no later than ninety (90) days prior to irrigation of any new reclaimed water use sites, the permittee shall submit to the Department for approval a revised Reclaimed Water Use Plan. The management plan shall be in accordance with Oregon Administrative Rules, Chapter 340, Division 55, "Regulations Pertaining to the Use of Reclaimed Water (Treated Effluent) from Sewage Treatment Plants". Upon approval of the plan by the Department, the plan shall be implemented by the permittee. No substantial changes shall be made in the approved plan without written approval of the Department.
2. Within 90 days of permit issuance, the permittee shall submit to the Department for review and approval a report that describes procedures for handling, transporting, and disposal of rags, grit, scum and screenings generated at the treatment facility. Upon written approval from the Department, the permittee shall conform with the approved procedures. Modified procedures may be followed upon prior approval in writing by the Department.
3. By no later than ninety (90) days after permit issuance, the permittee shall submit to the Department a report which either identifies known sewage bypass locations and a plan for estimating the frequency, duration and quantity of sewage bypassing treatment, or confirms that there are no bypass points. The report shall also provide a schedule to eliminate the bypass(es), if any.
4. Within 180 days of permit issuance, the permittee shall submit to the Department for review and approval a time schedule for identifying and reducing inflow. Within 60 days of receiving written Department comments, the permittee shall submit a final approvable time schedule. The program shall consist of the following:
  - a. Identification of all overflow points and verification that sewer system overflows are not occurring up to a 24-hour, 5-year storm event or equivalent;
  - b. Monitoring of all pump station overflow points;
  - c. A program for identifying and removing all inflow sources into the permittee's sewer system over which the permittee has legal control; and
  - d. If the permittee does not have the necessary legal authority for all portions of the sewer system or treatment facility, a program and schedule for gaining legal authority to require inflow reduction and a program and schedule for removing inflow sources.
5. By no later than two (2) years after start-up of the new treatment facilities, the permittee shall submit to the Department for approval an evaluation of the impacts by the facility on the temperature in the Pudding River. The evaluation shall indicate whether discharges by the permittee may cause a measurable increase in temperature at those times when the stream is water quality limited for temperature. If the evaluation indicates the discharge may contribute to violations of the temperature water quality standard in the Pudding River, the report shall include a temperature management plan developed in accordance with the Department's guidance for implementing the temperature standard. Within two (2) years after approval of the temperature management plan, the permittee must implement the plan.
6. The permittee is expected to meet the compliance dates which have been established in this schedule. Either prior to or no later than 14 days following any lapsed compliance date, the permittee shall submit to the Department a notice of compliance or noncompliance with the established schedule. The Director may revise a schedule of compliance if he determines good and valid cause resulting from events over which the permittee has little or no control.

## SCHEDULE D

### Special Conditions

1. An adequate contingency plan for prevention and handling of spills and unplanned discharges shall be in force at all times. A continuing program of employee orientation and education shall be maintained to ensure awareness of the necessity of good inplant control and quick and proper action in the event of a spill or accident.
2. All biosolids or septage shall be managed in accordance with the current biosolids or septage management plan approved by the Department and the site authorization letters issued by the Department. The biosolids or septage management plan shall be kept current and remain on file with the permit. No substantial changes shall be made in solids management activities which significantly differ from operations specified under the approved plan without the prior written approval of the Department.

This permit may be modified to incorporate any applicable standard for biosolids use or disposal promulgated under section 405(d) of the Clean Water Act, if the standard for biosolids use or disposal is more stringent than any requirements for biosolids use or disposal in the permit, or controls a pollutant or practice not limited in this permit.

3. The permittee shall comply with Oregon Administrative Rules (OAR), Chapter 340, Division 49, "Regulations Pertaining To Certification of Wastewater System Operator Personnel" and accordingly:
  - a. The permittee shall have its wastewater system supervised by one or more operators who are certified in a classification and grade level (equal to or greater) that corresponds with the classification (collection and/or treatment) of the system to be supervised as specified on page one of this permit.

**te: A "supervisor" is defined as the person exercising authority for establishing and executing the specific practice and procedures of operating the system in accordance with the policies of the permittee and requirements of the waste discharge permit. "Supervise" means responsible for the technical operation of a system, which may affect its performance or the quality of the effluent produced. Supervisors are not required to be on-site at all times.**

- b. The permittee's wastewater system may not be without supervision (as required by Special Condition 3.a. above) for more than thirty (30) days. During this period, and at any time that the supervisor is not available to respond on-site (i.e. vacation, sick leave or off-call), the permittee must make available another person who is certified at no less than one grade lower than the system classification.
- c. If the wastewater system has more than one daily shift, the permittee shall have the shift supervisor, if any, certified at no less than one grade lower than the system classification.
- d. The permittee is responsible for ensuring the wastewater system has a properly certified supervisor available at all times to respond on-site at the request of the permittee and to any other operator.
- e. The permittee shall notify the Department of Environmental Quality in writing within thirty (30) days of replacement or redesignation of certified operators responsible for supervising wastewater system operation. The notice shall be filed with the Water Quality Division, Operator Certification Program, 811 SW 6th Ave., Portland, OR 97204. This requirement is in addition to the reporting requirements contained under Schedule B of this permit.
- f. Upon written request, the Department may grant the permittee reasonable time, not to exceed 120 days, to obtain the services of a qualified person to supervise the wastewater system. The written request must include justification for the time needed, a schedule for recruiting and hiring, the date the system supervisor availability ceased and the name of the alternate system supervisor(s) as required by 3.b. above.

1. The Permittee shall not be required to perform a formal hydrogeologic characterization or preliminary groundwater monitoring during the term of this permit provided:
  - a. The facilities are operated in accordance with the permit conditions; and,
  - b. There are no apparent adverse groundwater quality impacts (complaints or other indirect evidence) resulting from the facility's operation.
  
5. Bioassay
  - a. The permittee shall conduct chronic whole effluent toxicity bioassay tests of outfall 001A and B in accordance with the frequency specified in Schedule B with Ceriodaphnia dubia (water flea), Pimephales promelas (fathead minnow) and Selanastrum capricornutum (green alga).
  - b. Bioassay tests may be dual end-point tests in which both acute and chronic end-points can be determined from the results of a single chronic test (the acute end-point shall be based upon a 48-hour time period).
  - c. Bioassay shall be conducted in accordance with Short-Term Methods for Estimating the Chronic Toxicity of Effluent and Receiving Waters to Freshwater Organisms, Third Edition, EPA-600-4-91-002, July 1994 and Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms, Fourth Edition, EPA/600/4-90/027F. Quality assurance criteria, statistical analyses and data reporting for the bioassays shall be in accordance with the EPA document and Department requirements for chronic testing referenced above.
  - d. The permittee shall make available to the Department, on request, the written standard operating procedures they, or the laboratory performing the bioassays, are using for all toxicity tests required by the Department.
  - e. An acute bioassay test shall be considered to show toxicity if there is statistically significant difference in survival between the control and 100 percent effluent, unless the permit specifically provides for a Zone of Immediate Dilution (ZID) for biotoxicity. If the permit specifies such a ZID, acute toxicity shall be indicated when a statistically significant difference in survival occurs at dilutions greater than that which is found to occur at the edge of the ZID.
  - f. A chronic bioassay test shall be considered to show toxicity if a statistically significant difference in survival occurs at dilutions greater than that which is known to occur at the edge of the mixing zone. If there is no dilution data for the edge of the mixing zone, any chronic bioassay test that shows a statistically significant effect in 100 percent effluent as compared to the control shall be considered to show toxicity.
  - g. If toxicity is shown, as defined in sections (e) or (f) of this permit condition, another toxicity test using the same species and Department approved methodology shall be conducted within two weeks of receipt of results, unless otherwise approved by the Department. If the second test also indicates toxicity, the permittee shall follow the procedure described in section (h) of this permit condition.
  - h. If two consecutive bioassay test results indicate acute and/or chronic toxicity, as defined in sections (e) or (f) of this permit condition, the permittee shall evaluate the source of the toxicity and submit a plan and time schedule for demonstrating compliance with water quality standards. Upon approval by the Department, the permittee shall implement the plan until compliance has been achieved. Evaluations shall be completed and plans submitted to the Department within 6 months unless otherwise approved in writing by the Department.
  - i. If bioassay testing indicates acute and/or chronic toxicity, the Department may reopen and modify this permit to include new limitations and/or conditions as determined by the Department to be appropriate, and in accordance with procedures outlined in Oregon Administrative Rules, Chapter 340, Division 45.

Unless otherwise approved in writing by the Department, a deep-rooted, permanent grass cover shall be maintained on the land irrigation area at all times. Grass shall be periodically cut and removed to ensure maximum evapotranspiration and nutrient capture.

7. The permittee shall meet the requirements for use of reclaimed water under Division 55, including the following:
  - a. All reclaimed water shall be managed in accordance with the approved Reclaimed Water Use Plan. No substantial changes shall be made in the approved plan without written approval of the Department.
  - b. No reclaimed water shall be released by the permittee to another person, as defined in Oregon Revised Statute (ORS) 468.005, for use unless there is a valid contract between the permittee and that person that meets the requirements of OAR 340-55-015(9).
  - c. The permittee shall notify the Department within 24 hours if it is determined that the treated effluent is being used in a manner not in compliance with OAR 340-55. When the Department offices are not open, the permittee shall report the incident of noncompliance to the Oregon Emergency Response System (Telephone Number 1-800-452-0311).
  - d. No reclaimed water shall be made available to a person proposing to recycle unless that person certifies in writing that they have read and understand the provisions in these rules. This written certification shall be kept on file by the sewage treatment system owner and be made available to the Department for inspection.
8. Prior to increasing thermal load from the facility (Phase II design flow or temperature), the Permittee shall notify the Department in writing and obtain necessary approval.
9. In order to meet summer effluent limits for CBOD<sub>5</sub> and TSS, the permittee will use a filtration system for polishing the effluent prior to discharge. This system will be sized to handle summer flows. Removing these facilities from service when plant flows exceed the design flows (generally during the winter months) does not constitute a bypass.
10. The permittee shall notify the DEQ Western Region - Salem Office (phone: 378-8240) in accordance with the response times noted in the General Conditions of this permit, of any malfunction so that corrective action can be coordinated between the permittee and the Department.



## SCHEDULE E

### Pretreatment Activities

The permittee shall implement the following pretreatment activities:

1. The permittee shall conduct and enforce its Pretreatment Program, as approved by the Department, and comply with the General Pretreatment Regulations (40 CFR Part 403). The permittee shall secure and maintain sufficient resources and qualified personnel to carry out the program implementation procedures described in this permit.
2. The permittee shall adopt all legal authority necessary to fully implement its approved pretreatment program and to comply with all applicable State and Federal pretreatment regulations. The permittee must also establish, where necessary, contracts or agreements with contributing jurisdictions to ensure compliance with pretreatment requirements by industrial users within these jurisdictions. These contracts or agreements shall identify the agency responsible for all implementation and enforcement activities to be performed in the contributing jurisdictions. Regardless of jurisdictional situation, the permittee is responsible for ensuring that all aspects of the pretreatment program are fully implemented and enforced.
3. The permittee shall update its inventory of industrial users at a frequency and diligence adequate to ensure proper identification of industrial users subject to pretreatment standards, but no less than once per year. The permittee shall notify these industrial users of applicable pretreatment standards in accordance with 40 CFR § 403.8(f)(2)(iii).
4. The permittee shall enforce categorical pretreatment standards promulgated pursuant to Section 307(b) and (c) of the Act, prohibited discharge standards as set forth in 40 CFR § 403.5(a) and (b), or local limitations developed by the permittee in accordance with 40 CFR § 403.5(c), whichever are more stringent, or are applicable to nondomestic users discharging wastewater to the collection system. Locally derived discharge limitations shall be defined as pretreatment standards under Section 307(d) of the Act.

A technical evaluation of the need to revise local limits shall be performed at least once during the term of this permit and must be submitted to the Department as part of the Permittee's NPDES permit application, unless the Department requires in writing that it be submitted sooner. Limits development will be in accordance with the procedures established by the Department.

5. The permittee shall issue individual discharge permits to all Significant Industrial Users in a timely manner. The permittee shall also reissue and/or modify permits, where necessary, in a timely manner. Discharge permits must contain, at a minimum, the conditions identified in 40 CFR § 403.8(f)(1)(iii). Unless a more stringent definition has been adopted by the permittee, the definition of Significant Industrial User shall be as stated in 40 CFR § 403.3(t).
6. The permittee shall randomly sample and analyze industrial user effluents at a frequency commensurate with the character, consistency, and volume of the discharge. At a minimum, the permittee shall sample all Significant Industrial Users for all regulated pollutants twice per year, and shall conduct a complete facility inspection once per year. Additionally, at least once every two years the permittee shall evaluate the need for each Significant Industrial User to develop a slug control plan. Where a plan is deemed necessary, it shall conform to the requirements of 40 CFR § 403.8(f)(2)(v).

Where the permittee elects to conduct all industrial user monitoring in lieu of requiring self-monitoring by the user, the permittee shall gather all information which would otherwise have been submitted by the user. The permittee shall also perform the sampling and analyses in accordance with the protocols established for the user.

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Sample collection and analysis, and the gathering of other compliance data, shall be performed with sufficient care to produce evidence admissible in enforcement proceedings or in judicial actions. Unless specified otherwise by the Director in writing, all sampling and analyses shall be performed in accordance with 40 CFR Part 136.

7. The permittee shall review reports submitted by industrial users and identify all violations of the user's permit or the Permittee's local ordinance.
8. The permittee shall investigate all instances of industrial user noncompliance and shall take all necessary steps to return users to compliance. The Permittee's enforcement actions shall track its approved Enforcement Response Plan, developed in accordance with 40 CFR § 403.8(f)(5). If the permittee has not developed an approved Enforcement Response Plan, it shall develop and submit a draft to the Department for review within 90 days of the issuance of this permit.
9. The permittee shall publish, at least annually in the largest daily newspaper published in the Permittee's service area, a list of all industrial users which, at any time in the previous 12 months, were in Significant Noncompliance with applicable pretreatment requirements. For the purposes of this requirement, an industrial user is in Significant Noncompliance if it meets one or more of the criteria listed in 40 CFR 403.8(f)(2)(vii).
10. The permittee must develop and maintain a data management system designed to track the status of the industrial user inventory, discharge characteristics, and compliance. In accordance with 40 CFR § 403.12(o), the permittee shall retain all records relating to pretreatment program activities for a minimum of three years, and shall make such records available to the Department and USEPA upon request. The permittee shall also provide public access to information considered effluent data under 40 CFR Part 2.

The permittee shall submit by March 1 of each year, a report that describes the Permittee's pretreatment program during the previous calendar year. The content and format of this report shall be as established by the Department.

12. The permittee shall submit in writing to the Department a statement of the basis for any proposed modification of its approved program and a description of the proposed modification in accordance with 40 CFR § 403.18(b). No substantial program modifications may be implemented by the permittee prior to receiving written authorization from the Department.

**NPDES GENERAL CONDITIONS  
(SCHEDULE F)**

**SECTION A. STANDARD CONDITIONS**

1. Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of Oregon Revised Statutes (ORS) 468B.025 and is grounds for enforcement action; for permit termination, suspension, or modification; or for denial of a permit renewal application.

2. Penalties for Water Pollution and Permit Condition Violations

Oregon Law (ORS 468.140) allows the Director to impose civil penalties up to \$10,000 per day for violation of a term, condition, or requirement of a permit.

Under ORS 468.943, unlawful water pollution, if committed by a person with criminal negligence, is punishable by a fine of up to \$25,000 or by imprisonment for not more than one year, or by both. Each day on which a violation occurs or continues is a separately punishable offense.

Under ORS 468.946, a person who knowingly discharges, places or causes to be placed any waste into the waters of the state or in a location where the waste is likely to escape into the waters of the state, is subject to a Class B felony punishable by a fine not to exceed \$200,000 and up to 10 years in prison.

3. Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment. In addition, upon request of the Department, the permittee shall correct any adverse impact on the environment or human health resulting from noncompliance with this permit, including such accelerated or additional monitoring as necessary to determine the nature and impact of the noncomplying discharge.

4. Duty to Reapply

If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and have the permit renewed. The application shall be submitted at least 180 days before the expiration date of this permit.

The Director may grant permission to submit an application less than 180 days in advance but no later than the permit expiration date.

5. Permit Actions

This permit may be modified, suspended, revoked and reissued, or terminated for cause including, but not limited to, the following:

- a. Violation of any term, condition, or requirement of this permit, a rule, or a statute;
- b. Obtaining this permit by misrepresentation or failure to disclose fully all material facts; or
- c. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge.

The filing of a request by the permittee for a permit modification or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

6. Toxic Pollutants

The permittee shall comply with any applicable effluent standards or prohibitions established under Section 307(a) of the Clean Water Act for toxic pollutants within the time provided in the regulations that establish those standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

7. Property Rights

The issuance of this permit does not convey any property rights of any sort, or any exclusive privilege.

8. Permit References

Except for effluent standards or prohibitions established under Section 307(a) of the Clean Water Act for toxic pollutants and standards for sewage sludge use or disposal established under Section 405(d) of the Clean Water Act, all rules and statutes referred to in this permit are those in effect on the date this permit is issued.

## SECTION B. OPERATION AND MAINTENANCE OF POLLUTION CONTROLS

1. Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls, and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

2. Duty to Halt or Reduce Activity

For industrial or commercial facilities, upon reduction, loss, or failure of the treatment facility, the permittee shall, to the extent necessary to maintain compliance with its permit, control production or all discharges or both until the facility is restored or an alternative method of treatment is provided. This requirement applies, for example, when the primary source of power of the treatment facility fails or is reduced or lost. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

3. Bypass of Treatment Facilities

a. Definitions

- (1) "Bypass" means intentional diversion of waste streams from any portion of the treatment facility. The term "bypass" does not include nonuse of singular or multiple units or processes of a treatment works when the nonuse is insignificant to the quality and/or quantity of the effluent produced by the treatment works. The term "bypass" does not

apply if the diversion does not cause effluent limitations to be exceeded, provided the diversion is to allow essential maintenance to assure efficient operation.

- (2) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities or treatment processes which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

b. Prohibition of bypass.

- (1) Bypass is prohibited unless:

- (a) Bypass was necessary to prevent loss of life, personal injury, or severe property damage;
- (b) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate backup equipment should have been installed in the exercise of reasonable engineering judgement to prevent a bypass which occurred during normal periods of equipment downtime or preventative maintenance; and
- (c) The permittee submitted notices and requests as required under General Condition B.3.c.

- (2) The Director may approve an anticipated bypass, after considering its adverse effects and any alternatives to bypassing, when the Director determines that it will meet the three conditions listed above in General Condition B.3.b.(1).

c. Notice and request for bypass.

- (1) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior written notice, if possible at least ten days before the date of the bypass.
- (2) Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in General Condition D.5.

4. Upset

- a. Definition. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operation error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation.
- b. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology based permit effluent limitations if the requirements of General Condition B.4.c are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

- c. Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:
- (1) An upset occurred and that the permittee can identify the cause(s) of the upset;
  - (2) The permitted facility was at the time being properly operated;
  - (3) The permittee submitted notice of the upset as required in General Condition D.5, hereof (24-hour notice); and
  - (4) The permittee complied with any remedial measures required under General Condition A.3 hereof.
- d. Burden of proof. In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

## 5. Treatment of Single Operational Event

For purposes of this permit, A Single Operational Event which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation. A single operational event is an exceptional incident which causes simultaneous, unintentional, unknowing (not the result of a knowing act or omission), temporary noncompliance with more than one Clean Water Act effluent discharge pollutant parameter. A single operational event does not include Clean Water Act violations involving discharge without a NPDES permit or noncompliance to the extent caused by improperly designed or inadequate treatment facilities. Each day of a single operational event is a violation.

## 6. Overflows from Wastewater Conveyance Systems and Associated Pump Stations

### a. Definitions

- (1) "Overflow" means the diversion and discharge of waste streams from any portion of the wastewater conveyance system including pump stations, through a designed overflow device or structure, other than discharges to the wastewater treatment facility.
- (2) "Severe property damage" means substantial physical damage to property, damage to the conveyance system or pump station which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of an overflow.
- (3) "Uncontrolled overflow" means the diversion of waste streams other than through a designed overflow device or structure, for example to overflowing manholes or overflowing into residences, commercial establishments, or industries that may be connected to a conveyance system.

### b. Prohibition of overflows. Overflows are prohibited unless:

- (1) Overflows were unavoidable to prevent an uncontrolled overflow, loss of life, personal injury, or severe property damage;
- (2) There were no feasible alternatives to the overflows, such as the use of auxiliary pumping or conveyance systems, or maximization of conveyance system storage; and

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(3) The overflows are the result of an upset as defined in General Condition B.4. and meeting all requirements of this condition.

c. Uncontrolled overflows are prohibited where wastewater is likely to escape or be carried into the waters of the State by any means.

d. Reporting required. Unless otherwise specified in writing by the Department, all overflows and uncontrolled overflows must be reported orally to the Department within 24 hours from the time the permittee becomes aware of the overflow. Reporting procedures are described in more detail in General Condition D.5.

7. Public Notification of Effluent Violation or Overflow

If effluent limitations specified in this permit are exceeded or an overflow occurs, upon request by the Department, the permittee shall take such steps as are necessary to alert the public about the extent and nature of the discharge. Such steps may include, but are not limited to, posting of the river at access points and other places, news releases, and paid announcements on radio and television.

8. Removed Substances

Solids, sludges, filter backwash, or other pollutants removed in the course of treatment or control of wastewaters shall be disposed of in such a manner as to prevent any pollutant from such materials from entering public waters, causing nuisance conditions, or creating a public health hazard.

SECTION C. MONITORING AND RECORDS

1. Representative Sampling

Sampling and measurements taken as required herein shall be representative of the volume and nature of the monitored discharge. All samples shall be taken at the monitoring points specified in this permit and shall be taken, unless otherwise specified, before the effluent joins or is diluted by any other waste stream, body of water, or substance. Monitoring points shall not be changed without notification to and the approval of the Director.

2. Flow Measurements

Appropriate flow measurement devices and methods consistent with accepted scientific practices shall be selected and used to ensure the accuracy and reliability of measurements of the volume of monitored discharges. The devices shall be installed, calibrated and maintained to insure that the accuracy of the measurements is consistent with the accepted capability of that type of device. Devices selected shall be capable of measuring flows with a maximum deviation of less than  $\pm 10$  percent from true discharge rates throughout the range of expected discharge volumes.

3. Monitoring Procedures

Monitoring must be conducted according to test procedures approved under 40 CFR Part 136, unless other test procedures have been specified in this permit.

4. Penalties of Tampering

The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate, any monitoring device or method required to be maintained under this permit shall, upon

conviction, be punished by a fine of not more than \$10,000 per violation, or by imprisonment for not more than two years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person, punishment is a fine not more than \$20,000 per day of violation, or by imprisonment of not more than four years or both.

5. Reporting of Monitoring Results

Monitoring results shall be summarized each month on a Discharge Monitoring Report form approved by the Department. The reports shall be submitted monthly and are to be mailed, delivered or otherwise transmitted by the 15th day of the following month unless specifically approved otherwise in Schedule B of this permit.

6. Additional Monitoring by the Permittee

If the permittee monitors any pollutant more frequently than required by this permit, using test procedures approved under 40 CFR 136 or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the Discharge Monitoring Report. Such increased frequency shall also be indicated. For a pollutant parameter that may be sampled more than once per day (e.g., Total Chlorine Residual), only the average daily value shall be recorded unless otherwise specified in this permit.

7. Averaging of Measurements

Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean, except for bacteria which shall be averaged as specified in this permit.

8. Retention of Records

Except for records of monitoring information required by this permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years (or longer as required by 40 CFR part 503), the permittee shall retain records of all monitoring information, including all calibration and maintenance records of all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.

9. Records Contents

Records of monitoring information shall include:

- a. The date, exact place, time and methods of sampling or measurements;
- b. The individual(s) who performed the sampling or measurements;
- c. The date(s) analyses were performed;
- d. The individual(s) who performed the analyses;
- e. The analytical techniques or methods used; and
- f. The results of such analyses.



10. Inspection and Entry

The permittee shall allow the Director, or an authorized representative upon the presentation of credentials to:

- a. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
- b. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
- c. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit, and
- d. Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by state law, any substances or parameters at any location.

**SECTION D. REPORTING REQUIREMENTS**

1. Planned Changes

The permittee shall comply with Oregon Administrative Rules (OAR) 340, Division 52, "Review of Plans and Specifications". Except where exempted under OAR 340-52, no construction, installation, or modification involving disposal systems, treatment works, sewerage systems, or common sewers shall be commenced until the plans and specifications are submitted to and approved by the Department. The permittee shall give notice to the Department as soon as possible of any planned physical alternations or additions to the permitted facility.

2. Anticipated Noncompliance

The permittee shall give advance notice to the Director of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

3. Transfers

This permit may be transferred to a new permittee provided the transferee acquires a property interest in the permitted activity and agrees in writing to fully comply with all the terms and conditions of the permit and the rules of the Commission. No permit shall be transferred to a third party without prior written approval from the Director. The permittee shall notify the Department when a transfer of property interest takes place.

4. Compliance Schedule

Reports of compliance or noncompliance with, or any progress reports on interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date. Any reports of noncompliance shall include the cause of noncompliance, any remedial actions taken, and the probability of meeting the next scheduled requirements.

5. Twenty-Four Hour Reporting

The permittee shall report any noncompliance which may endanger health or the environment. Any information shall be provided orally (by telephone) within 24 hours, unless otherwise specified in this

permit, from the time the permittee becomes aware of the circumstances. During normal business hours, the Department's Regional office shall be called. Outside of normal business hours, the Department shall be contacted at 1-800-452-0311 (Oregon Emergency Response System).

A written submission shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. If the permittee is establishing an affirmative defense of upset or bypass to any offense under ORS 468.922 to 468.946, and in which case if the original reporting notice was oral, delivered written notice must be made to the Department or other agency with regulatory jurisdiction within 4 (four) calendar days. The written submission shall contain:

- a. A description of the noncompliance and its cause;
- b. The period of noncompliance, including exact dates and times;
- c. The estimated time noncompliance is expected to continue if it has not been corrected;
- d. Steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance; and
- e. Public notification steps taken, pursuant to General Condition B.7.

The following shall be included as information which must be reported within 24 hours under this paragraph:

- a. Any unanticipated bypass which exceeds any effluent limitation in this permit.
- b. Any upset which exceeds any effluent limitation in this permit.
- c. Violation of maximum daily discharge limitation for any of the pollutants listed by the Director in this permit.

The Department may waive the written report on a case-by-case basis if the oral report has been received within 24 hours.

## 6. Other Noncompliance

The permittee shall report all instances of noncompliance not reported under General Condition D.4 or D.5, at the time monitoring reports are submitted. The reports shall contain:

- a. A description of the noncompliance and its cause;
- b. The period of noncompliance, including exact dates and times;
- c. The estimated time noncompliance is expected to continue if it has not been corrected; and
- d. Steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

## 7. Duty to Provide Information

The permittee shall furnish to the Department, within a reasonable time, any information which the Department may request to determine compliance with this permit. The permittee shall also furnish to the Department, upon request, copies of records required to be kept by this permit.

Other Information: When the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or any report to the Department, it shall promptly submit such facts or information.

8. Signatory Requirements

All applications, reports or information submitted to the Department shall be signed and certified in accordance with 40 CFR 122.22.

9. Falsification of Reports

Under ORS 468.953, any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance, is subject to a Class C felony punishable by a fine not to exceed \$100,000 per violation and up to 5 years in prison.

10. Changes to Indirect Dischargers - [Applicable to Publicly Owned Treatment Works (POTW) only]

The permittee must provide adequate notice to the Department of the following:

- a. Any new introduction of pollutants into the POTW from an indirect discharger which would be subject to section 301 or 306 of the Clean Water Act if it were directly discharging those pollutants and;
- b. Any substantial change in the volume or character of pollutants being introduced into the POTW by a source introducing pollutants into the POTW at the time of issuance of the permit.
- c. For the purposes of this paragraph, adequate notice shall include information on (i) the quality and quantity of effluent introduced into the POTW, and (ii) any anticipated impact of the change on the quantity or quality of effluent to be discharged from the POTW.

11. Changes to Discharges of Toxic Pollutant - [Applicable to existing manufacturing, commercial, mining, and silvicultural dischargers only]

The permittee must notify the Department as soon as they know or have reason to believe of the following:

- a. That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":
  - (1) One hundred micrograms per liter (100 µg/l);
  - (2) Two hundred micrograms per liter (200 µg/l) for acrolein and acrylonitrile; five hundred micrograms per liter (500 µg/l) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one milligram per liter (1 mg/l) for antimony;
  - (3) Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21(g)(7); or
  - (4) The level established by the Department in accordance with 40 CFR 122.44(f).

- b. That any activity has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":
- (1) Five hundred micrograms per liter (500 µg/l);
  - (2) One milligram per liter (1 mg/l) for antimony;
  - (3) Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21(g)(7); or
  - (4) The level established by the Department in accordance with 40 CFR 122.44(f).

## SECTION E. DEFINITIONS

1. BOD means five-day biochemical oxygen demand.
2. TSS means total suspended solids.
3. mg/l means milligrams per liter.
4. kg means kilograms.
5. m<sup>3</sup>/d means cubic meters per day.
6. MGD means million gallons per day.
7. Composite sample means a sample formed by collecting and mixing discrete samples taken periodically and based on time or flow.
8. FC means fecal coliform bacteria.
9. Technology based permit effluent limitations means technology-based treatment requirements as defined in 40 CFR 125.3, and concentration and mass load effluent limitations that are based on minimum design criteria specified in OAR 340-41.
10. CBOD means five day carbonaceous biochemical oxygen demand.
11. Grab sample means an individual discrete sample collected over a period of time not to exceed 15 minutes.
12. Quarter means January through March, April through June, July through September, or October through December.
13. Month means calendar month.
14. Week means a calendar week of Sunday through Saturday.
15. Total residual chlorine means combined chlorine forms plus free residual chlorine.
16. The term "bacteria" includes but is not limited to fecal coliform bacteria, total coliform bacteria, and E. coli bacteria.
17. POTW means a publicly owned treatment works.

## Attachment 2

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State of Oregon  
Department of Environmental Quality

Memorandum

Date: January 15, 1998

**To:** Environmental Quality Commission  
**From:** Mark Hamlin  
**Subject:** Woodburn NPDES Permit  
Summary of Comments Received and Department Response

A public comment period was open to receive written comments relating to the City of Woodburn proposed NPDES permit, proposed modification of the TMDL, and proposed modification of the Stipulation and Final Order. A public hearing was held to receive verbal testimony. The Department received two written comments by the deadline specified in the chance to comment public notice, and one person testified at the hearing. The following summarizes the main comments made by the commenters, and the Department's response.

**Comment:** The City Public Works Director wanted to note that the City will be the first in the nation to use municipal wastewater and biosolids on hybrid poplars and wanted to express his appreciation to the Department for our combined efforts to protect the environment.

**Response:** The Department thanks the Director for his acknowledgment. No changes to the documents were requested.

**Comment:** The City would like slight modifications to the wording on the proposed compliance schedule including changing the first proposed compliance date from November 30, 1998 to nine months after the NPDES permit is issued.

**Response:** The suggestions made by the City are acceptable to the Department. The proposed SFO amendment has been modified to incorporate the changes.

**Comment:** The City requested that we reconsider our previous determination that the maximum day CBOD<sub>5</sub> and TSS could not be deleted from the permit limitations.

**Response:** The City's argument is that the daily maximum limits on CBOD<sub>5</sub> and TSS are water quality based in accordance with the TMDL while the 10 mg/l ammonia limit is a more stringent technology based limit. Therefore, the Department is willing to modify the permit to suspend the daily maximum limits on CBOD<sub>5</sub> and TSS for any month that a 10 mg/l ammonia limit applies.

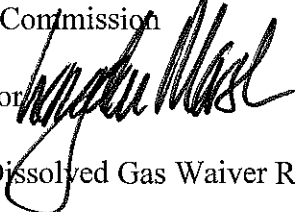
**Comment:** The City requested than minor clarifications be made to page 4 of the fact sheet, Schedule C, Condition 4 of the NPDES permit and page 2 of the SFO amendment.

**Response:** All three clarifications are acceptable to the Department and the changes have been made.

**Comment:** Barbara Lucas of Woodburn recommends that the Department accept the City's plan to use poplars in the new wastewater treatment project.

**Response:** The Department applauds the City's efforts to experiment with poplars and reclaimed municipal wastewater. The Department will continue to support the use of hybrid poplars for environmental benefit. No changes to the documents are needed.

Date: February 20, 1998

To: Environmental Quality Commission  
From: Langdon Marsh, Director   
Subject: Agenda Item E, Total Dissolved Gas Waiver Request, EQC Meeting February 20, 1998

**Statement of Purpose**

The National Marine Fisheries Service (NMFS) has petitioned the Commission for a variance to the state's total dissolved gas standard to enable spill over Columbia River hydroelectric dams to assist outmigrating salmon smolts.

The petition falls into two distinct parts:

1. the period from March 13 to March 23, 1998 during which spill over Bonneville Dam is requested for outmigrating Spring Creek Hatchery smolts; and
2. the period from April 10 to August 31, 1998 during which spill over the four Columbia River projects is requested for outmigrating threatened and endangered Snake and Columbia River salmon smolts.

The Spring Creek hatchery is charged with producing fish as mitigation for human caused losses due to Federal water projects, specifically anadromous fish losses as a result of The Dalles and John Day dams. The hatchery will release 7.5 million fish, but a large number of these will be caught as a result of Canadian-US treaty allocations. Capture of these fish reduces the potential for harvesting of endangered species. The US Fish and Wildlife Service estimates increased survival due to spill with a dissolved gas level of 120 percent at four percent. This translates to 262,500 fish.

The variance requested is from the standard of 110 percent saturation to 115 percent saturation in the forebays of the spilling dam and 120 percent in the tailrace. The petition seeks a "period" average at these levels, *i.e.* a twelve hour average. No maximum saturation level is sought in the petition. The request for 1998, as in previous years, is based on NMFS' 1994-98 *Federal Columbia River Power System Biological Opinion* in which spill is a component of salmon recovery.

NMFS has accompanied its waiver request with a physical gas monitoring and biological monitoring program designed to ensure compliance with the waiver and to ensure that harm is not done either to migrating juveniles, or to returning or resident adult fish. Physical monitoring will be conducted through a network of 35 primary dissolved gas monitoring sites, including the forebays and tailraces of all spilling projects. Biological monitoring will be conducted seven sites, including McNary, John Day and Bonneville on the Lower Columbia.

## **Background**

### **Review of 1997 Actions**

#### **Operational Environment**

##### **Water Year**

The hydrosystem is comprised of a series of headwater reservoirs and downstream electric generating projects. Historically, high flows occurred after the spring melt. The natural hydrograph has been altered so flows are moderated throughout the year to a more even distribution. The ability to regulate flow throughout the year is a function of the storage capacity of headwater reservoirs and the amount of runoff volume that is available. Snowpack and stream flow reflect the precipitation and temperatures that occurred during the snow accumulation seasons. If precipitation during snow accumulation (November through March) is low, then the snowpack and stream flow will also be low and, conversely when high the resulting spring stream flows are high. Temperature affects both the form of the precipitation (rain or snow) as well as the rate of snow accumulation and melt (stream flow).

High levels of precipitation occurred during the fall of 1996 and the winter of 1997. The resulting April -July runoff volume at Lower Granite Dam was the fourth highest observed since 1928, while the April - September runoff volume at The Dalles Dam was the third highest observed since 1928. Reservoirs were primarily operated to meet flood control requirements during the spring and early summer.

##### **Voluntary Spill**

Voluntary spill is not a physical constraint, in that the spill can be terminated by the hydrosystem operators at any time. Flow and spill data was collected in 1997 by the U.S. Army Corps of Engineers (COE) and the Bonneville Power Authority (BPA) to allow for the distinction between voluntary and involuntary spill. Very little of the water spilled in 1997 was voluntary spill. In the Snake River a small amount of spring spill and some summer spill was



voluntary. In the lower Columbia River, some summer spill was voluntary at the John Day and The Dalles dams.

### Involuntary Spill

Involuntary spill is a physical constraint because it is caused by a project or system physical limitation. There are two primary causes of involuntary spill: flow levels exceed the hydraulic capacity of a hydroelectric project (excess hydraulic capacity), or spill from a water supply that exceeds the available power market (lack of market spill). The type of spill that occurred in the 1997 season was almost exclusively spill. All spill at McNary and Bonneville dams and the majority of spill at John Day and The Dalles dams were involuntary spill. Involuntary spill was primarily due to a high water year which resulted in an excess of hydraulic capacity but lack of market spill also occurred.

### Summary

The 1997 water year resulted in spill levels that were far greater than observed in recent past years. On average the goals of the Biological Opinion were met a greater percentage of the time. In summary the following points can be made:

1. Spill during the spring passage season was primarily involuntary and resulted from a high volume of natural runoff, lack of a power market, limited hydraulic capacity of hydroelectric plants and flood control operations.
2. The spill management objective during the spring and summer migration was directed toward meeting the total dissolved gas waiver granted by the state water quality agencies. However, conditions precluded achieving that objective most of the time.

### What We Learned

The following is a summary of what was learned during the 1997 fish migratory season.

### Monitoring Results

#### Physical Monitoring

The collection of total dissolved gas supersaturation (TDGS) was the responsibility of the US Army Corps of Engineers (COE) for meeting the requirements of the Oregon Environmental Quality Commission's (EQC's) 1997 waiver of the state's water quality standard for TDGS.

Monitoring sites for the collection of these data were located in the forebay and tailwater at each mainstem dam in the lower Snake and Columbia Rivers [Lower Granite (tailwater only), Little Goose, Lower Monumental, Ice Harbor, McNary (one each on the Washington and Oregon sides of the forebay), John Day, The Dalles, and Bonneville]. Additional monitoring sites were located downstream of Dworshak Dam, and at three locations below Bonneville Dam (Warrendale, Skamania, and Camas/Washougal). Data reporting commenced by mid-April in the lower Snake and in late March in the lower Columbia. Monitoring continued at all sites through the end of August.

These data were produced in conformity with the criteria specified in the EQC's ruling that approved the 1997 waiver. Data were collected daily through the Corps of Engineers' Columbia River Operational Hydromet Management System (CROHMS). The Fish Passage Center (FPC) downloaded and summarized these data daily for use by the states' water quality agencies, fish managers, and others. An automated data program, plus experience gained in working with the information are resulting in improved error checking, better identification of data anomalies, and the production of more reliable, real-time results. Data reported in-season by the FPC during 1997 were in reasonable agreement with the CROHMS final post-season database.

Due to the above average water conditions in the Northwest for 1997 TDGS levels were above the state water quality standard waiver of 115%/120% during most of the spring and early summer. TDGS levels above the state water quality waiver were due to involuntary spill from a lack of hydraulic capacity or lack of power market. Mid to late summer water levels were lower and water was voluntarily spilled in accordance with the Biological Opinion. During voluntary spill TDGS levels were within the state water quality standard waiver.

### Biological Monitoring

In 1997 the biological monitoring program, which is the responsibility of NMFS, included a quality assurance and quality control (QA/QC) program to (1) enhance data accuracy, (2) quantify biological observations, and (3) improve the reliability of program results. Other biological data collected on fish condition and survival, which do not provide real-time information and thus are not part of the NMFS' biological monitoring program, are addressed later in this report. Summarized below are key biological monitoring results, which were applied in the real-time management of controlled spill during 1996:

Juvenile salmonids: In general, the gas bubble trauma (GBT) Smolt Monitoring Program successfully detected increasing signs of GBT corresponding to during times of high levels of TDGS. A total of 50,719 juvenile salmon were examined for signs of GBT between April and August. Very few of the fish examined showed signs of GBT. Of the 50,719 juvenile salmonids sampled in 1997 2,497 (4.9%) showed signs of GBT. Based on the classification criteria

established by the NMFS there were 1,726 (3.4%) were rank 1 (1 to 5% of a fin covered with bubbles), 549 (1.1%) were rank 2 (5 to 25% of a fin covered with bubbles), and 220 (0.4%) were rank 3 or greater (>25% of a fin covered with bubbles). The incidence and severity of GBD signs for 1997 were similar to 1996 results.

Extensive observations conducted at several key locations revealed a very small percentage (<1%) of fish examined showed GBD signs that exceeded the action criteria stated in the NMFS' Gas Bubble Disease Monitoring Program, on only a few occasions, and then only at dams where fish were exposed to the highest TDGS levels (in the 130-141% range) recorded for the season. On a project-specific basis, when TDGS levels exceeded waiver conditions, the Fish Passage Center's (FPC's) Smolt Monitoring Program was successful in detecting increased incidences of GBD with increased TDGS above the state water quality standard waiver.

Adult salmon: The biological monitoring program was successful in detecting signs of GDB in adult salmon during periods of involuntary spill. Adult salmon were examined at Bonneville, Lower Granite, and Priest Rapids dams in 1997. The number of fish examined and the incidence of GBD signs at Bonneville were 1,042 adult Chinook examined with 5 (0.5%), 336 steelhead examined with 24 (7.1%), and 648 examined with 101 (15.6%) having signs of GBD. Lower Granite results were 6312 Chinook examined with 5 (0.1%) having GBD signs. Priest Rapids results were 280 Chinook examined with 9 (3.2%), 95 steelhead examined with 2 (2.1%), and 852 sockeye examined with 36 (4.2%) having signs of GBD. All signs of GBD were found during periods of high flows and involuntary spill.

### **Gas Bubble Research**

The following section is meant to update the EQC regarding the preliminary findings of research conducted during 1997. The research studies presented are part of the NMFS Research Plan and are designed to address the critical uncertainties identified by the NMFS 1996 Gas Expert Panel. The goal of the research is to assure that the biological monitoring for gas bubble disease represents in-river fish and is suitable for measuring TDGS induced GBT signs. The research studies are grouped according to the specific objective of the NMFS Research Plan that they are designed to address.

**Objective 1: Determine if there is a difference in the incidence and severity of signs of GBD between migratory fish in the reservoir and in the fish sampled through the Smolt Monitoring Program.**

**Research for Objective 1:**

**A. Field test juveniles exposed to TDGS. Expose juvenile salmonids to TDGS, release them upstream of the project, and recapture them in the smolt bypass system. Evaluate changes in incidence of GBD signs resulting from dam passage.**

This study was designed to answer the question of whether gas bubble disease (GBD) signs change as a result of the hydrostatic conditions juvenile salmonids encounter when they enter the turbine intake of hydroelectric projects in their downstream migration. This question needs to be answered to substantiate the effectiveness of the current monitoring of juvenile salmonids for GBD signs, and implications this would have for river managers.

The research objective was to determine whether juvenile coho salmon with laboratory-induced signs of GBD retain the same prevalence and severity of signs of GBD following passage through a turbine intake at John Day Dam.

Juvenile coho salmon were collected from the smolt monitoring facility at John Day Dam. Test fish were PIT-tagged for identification, exposed to TDGS for 48 hrs, incidence and severity of GBD recorded, and then released in front of turbine Slot B at the John Day Dam. Fish were then recaptured at the gateway Slot B by dipnetting and individual incidence and severity of GBD was recorded.

In the conduct of 12 tests replicated through time, we released 759 coho salmon in front of the turbine intake. At release, the mean prevalence of fish displaying GBD signs was 65% and the mean severity index was 1.7. From the gateway, we dip netted a total of 372 of those test fish. At recapture, the mean prevalence of fish displaying GBD signs was 64% and the mean severity index was 1.6.

There was no significant difference in prevalence or severity of GBD signs between fish released and fish recovered. Data analyses are continuing, and final conclusions from the two years of study are incomplete, but reports will be released upon completion.

**B. Compare incidence and severity of GBD signs in juvenile salmonids collected from the reservoir (In-river sample) and in the fish sampled through the Smolt Monitoring Program (Bypass sample). All data and/or results are preliminary.**

This study was designed to determine if in-river salmonids are different in their incidence or severity of GBD signs than fish collected from the Smolt Bypass System. In-river salmonids were collected by trawling. Comparisons between smolts sampled in-river and at the Smolt Monitoring Program are based on data collected from April 20 to July 28, 1997. Research on juvenile salmonids was conducted at Lower Monumental reservoir and McNary reservoir.

Preliminary information from the study indicate that:

1. In-river juveniles consistently had fewer signs of gas bubble trauma when compared to fish sampled at down river Smolt Monitoring sites. Often, these differences were statistically significant.

2. When TDGS levels increase the number of fish with signs of GBT increases in both samples.
3. Juveniles sampled in-river and at the Smolt Monitoring sites had similar GBT severity ranks.

We are currently developing new methods to analyze this years field data. Work is being conducted on a variety of physical measurements (TDGS,  $\Delta P$ , temperature, etc....) and biological measurements (species composition, travel time, exposure history, distribution, fork-length etc....) taken within the McNary and Lower Monumental reservoir.

**C. Continue laboratory research on GBD signs, hydrostatic pressure and TDGS body burden.**

No research has been conducted relative to this objective.

**Objective 2. Determine the progression of GBD signs as the result of exposure to TDGS and the relation between signs, health and survival of aquatic species indigenous to the Columbia and Snake Rivers.**

**Research for Objective 2:**

**A. Continue net pen field research correlating resident fish signs of GBD and mortality.**

The prevalence and severity of gas bubble disease was monitored by sampling resident fish in Ice Harbor reservoir and downstream from Ice Harbor and Bonneville Dams and salmonids below Ice Harbor and Bonneville Dams.

**Gas Bubble Disease Signs in Resident Fish**

Signs of GBD in resident fish were prevalent in Ice Harbor Reservoir, downstream from Ice Harbor Dam and downstream from Bonneville Dam. Twenty of the 27 species captured displayed signs of GBD. In Ice Harbor Reservoir GBD signs were observed in 8% of resident fish captured with 26% of those fish with severe signs of GBD. TDG did not exceed 130% and were in the mid-120% range for approximately 45 days ending in mid-June before dropping below 120%.

Downstream of Ice Harbor Dam GBD signs were observed in 3.4% of resident fish captured with approximately 28% of the fish with severe signs of GBD. TDGS levels reached 133% and remained near 130% for about two months before dropping to approximately 120% and remaining there for the rest of the season.

Downstream from Bonneville Dam GBD signs were observed in 7% of resident fish captured with approximately 33% with severe signs of GBD. TDGS levels reached 143.5% and remained near 130% for most of May and June before dropping to approximately 120%.

**Gas Bubble Disease in Juvenile Salmonids**

Downstream from Bonneville 1.5% of the juvenile salmonids captured had GBD signs. Fish were collected from March 14 to August 22, 1997 with most fish collected from March 14 to March 23, 1997 when TDGS levels did not exceed 117%. Downstream of Ice Harbor Dam signs of GBD were observed in 10.7% of the 738 juvenile salmonids examined.

#### Gas Bubble Disease in Captive Fish

The three species (smallmouth bass, yellow perch, and peamouth) of resident non-salmonid fish used for the net-pen studies were taken from the river and often had signs of GBD at introduction to the pens. After 4 days of holding, GBD signs among the captive fish usually persisted and generally showed an increase in prevalence.

#### Model of Gas Bubble Disease Impacts

Using 1994, 1995, and 1996 GBD signs and TDGS measurements from multiple locations a mathematical expression of the data was developed. A mathematical equivalence for TDGS exposure duration and level, termed the exposure index (EI) that correlated well with prevalence of GBD signs was developed. The relationship was best described by the second-order polynomial regression:

$$\% \text{GBD signs} = 0.05(\text{EI})^2 + 0.21(\text{EI}) + 0.62, R^2 = 0.79.$$

This model is a reasonably accurate predictor of external GBD signs given any specific 7 day dissolved gas exposure. Unfortunately our ability to predict mortality from 1994, 95, and 96 captive fish data was poor. There was no clear correlation between external GBD signs and mortality in captive fish.

#### **B. Laboratory studies correlating TDGS exposure and GBD signs with mortality of juvenile and adult salmonids and sublethal effects.**

Experiments were conducted to assess the progression of gas bubble trauma (GBT) and the relation of GBT signs to mortality. Sampling and examination procedures were the same as those of previous years, and consisted of assessing GBT in the lateral line, fins, gills, opercles, mouth and eyes. Juvenile spring chinook or juvenile steelhead were used in the experiment. The research shows that GBT is a progressive trauma; that is, many of the signs of GBT become progressively worse over time. However, there is not a definite correlation between GBT signs and the potential for mortality which could in part be due to the mechanism of bubble development in the gills and the extreme individual variation in susceptibility to GBT. But, both

prevalence and severity of GBT signs could be used to assess the relative severity of TDGS exposure and provide an "early warning" of potentially lethal exposures in the field.

**D. Investigate the cause of head burns.**

Head Burn and Gas Bubble Disease

Head burn was considered by the Gas Bubble Disease expert panel conducted by NMFS in 1995. While none of the panel members could explain the absence of other GBD signs in fish with head burn, they could not rule out the possibility that head burn was caused by gas bubble disease. When asked to rank the importance of investigating head burn as a result of GBD, many panelists rated it low (not believed to be related to gas bubble disease) (Summary Report, 1996). After consideration of review comments by these panelists and other regional fishery experts, the NMFS's Gas Bubble Disease Research Plan stated "Head burn studies were assessed as a low priority by most reviewers. This issue remains an important problem for adult salmonids, particularly during periods of high flow and spill. Individuals knowledgeable in the field of gas bubble disease research indicate that this trauma is likely not a sign of GBD. Its cause, however, remains unknown. This work will not be conducted under the GBD Research Plan." Therefore, efforts to address the cause of head burn were transferred to the Corps' Fish Passage Operations and Maintenance (FPOM) Coordination Team.

**Objective 3. Describe the migratory distribution of juvenile and adult salmonids, particularly with respect to vertical distribution in the reservoir and relate fish distribution to the distribution of TDGS.**

**Research for Objective 3:**

**A. Determine the lateral and vertical distribution of migrants in relation to plume and TDGS.**

Preliminary data from 1997 research indicate that tagged juvenile steelhead were below the compensation depth in most instances. The median depth of tagged juvenile chinook salmon released after 17 May was less than fish released earlier, resulting in a lower proportion of locations below the compensation depth. The combination of decreased depths and increased travel times of juvenile chinook salmon released after 17 May increased their risk of gas bubble disease by increasing the time and severity of exposure to water with high total dissolved gas.

## **Evaluation of Horizontal and Vertical Distribution of Juvenile Salmonids in the Lower Snake and Columbia Rivers In Relation To Total Dissolved Gas**

### **Summary of 1997 Research**

Hydroacoustic surveys were conducted in McNary Reservoir to assess the horizontal and vertical distribution of juvenile salmonids. Preliminary analyses of hydroacoustic revealed that fish detected during daytime surveys were distributed nearer the surface than fish detected during nighttime surveys. Generally, daytime surveys showed that >20% of the detected total fish abundance was at or above the compensation depth for prevailing TDGS levels (120-127%, 2-2.5m). However, during nighttime surveys, <20% of the detected total fish abundance was at or above the compensation depth for prevailing TDGS levels. Additional data showed similar results. During mobile daytime surveys, 13% of the detected total fish abundance was at or above the compensation depth for prevailing TDGS levels (121%, 2.0m). During mobile nighttime surveys, only 7% of the detected total fish abundance was at or above the compensation depth.

**Objective 4: Determine the physical characteristics of dissolved gas throughout the hydrosystem under specific spill and flow regimes.**

### **Research for Objective 4:**

**A. Determine the TDGS distribution downstream from spill.**

### **Summary for 1997 Field Sampling**

Water quality field sampling for the Dissolved Gas Abatement Study began in February for the 1997 sampling season and continued until late August. Near-field studies that were directed at evaluating operational and structural alternatives were conducted during February at Bonneville and McNary dams. Whole-pool studies began in April and continued through the fish spill season. The sampling schedule is shown below. This schedule resulted in approximately 375,000 observations of water temperature, total dissolved gas pressure, and dissolved oxygen concentration. Other parameters include depth of sample, specific conductance, and pH.

Initial data review revealed obvious variations in total dissolved gas (TDGS pressures for the different river reaches as well as time lags between stations that were related to water travel time. In general, the highest concentrations occurred immediately below the dams varying from 130% to 160% saturation in the tailwater areas depending upon project operation. Peak TDGS



values resulting from high spill volumes could be traced and the spill hydrographs recorded at stations distributed along the rivers. Degassing and mixing occurred rapidly in the first 1000 feet below the dams resulting in 100% to 142% in the downstream reaches. The downstream pool reaches were generally characterized by relatively slow degassing (approximately 0.1% per mile) and mixing processes. As noted in past years, extreme water quality gradients existed laterally and longitudinally with minimal changes vertically. TDGS dynamics were related to project operation, wind, temperature, and community metabolism. Daily diel fluctuations related to solar cycles were frequently evident as well as operational changes.

**Objective 5. Determine whether the protocol and the examination techniques used in the GBD monitoring program optimize the detection of GBD signs demonstrated to affect fish health and survival, while minimizing impacts to juveniles and populations.**

**Research for Objective 5:**

**A. Evaluation of monitoring protocols.**

The Gas Bubble Expert Panel identified several critical questions/assumptions related to the protocols of the GBT monitoring program. Those questions related to the examination protocol are listed below.

1. Do clinical signs change upon collection?
2. Are the collection sites representative?
3. Are the sample sizes adequate?
4. What is the relative significance of signs?

Additionally, within the framework of the NMFS research plan, these questions were framed as follows:

Determine whether the protocol and the examination techniques used in the GBT monitoring program optimize the detection of GBT signs demonstrated to affect fish health and survival, while minimizing impacts to juveniles and populations.

Much of the uncertainty related to these questions has been answered by recent research or has been addressed in the design of the sampling protocol.

**Fish Examination Protocol**

The GBT monitoring protocol was developed cooperatively by members of the GBT technical working group (presently the Dissolved Gas Team (DGT)). The examination protocol

was developed based upon USGS-BRD research where the relationship between external signs of GBT (e.g. bubbles in fins, eyes and lateral lines) and internal signs (gill emboli) and the onset of mortality in the study fish was studied. A summary of research conducted to date regarding the significance of GBT signs used for monitoring are presented as part of this document. Based upon their research, which showed a relationship between the development of fin signs and the onset of mortality, the monitoring program began to emphasize the examination of fish for fin signs in 1995. The relationship between the prevalence of any signs versus the point at which a group of fish would experience mortality was shown to be most clear when fin signs were correlated with the onset of mortality. In the monitoring program, other data has been collected, such as lateral line occlusion and the presence of other external bubbles. However, the NMFS action criteria and, therefore, the reporting of the data have emphasized the fin signs.

The use of gill lamellae bubbles were also considered for use in monitoring. Experimental examinations of gill lamellae were conducted at McNary Dam and Bonneville Dam in 1996 (Montgomery Watson 1996). The researchers examined 477 fish that had been previously examined by regular GBT monitoring personnel. Only two fish showed gill bubbles while 21 showed fin signs and three others showed lateral line signs. This study demonstrated that compared to gill bubbles fin signs were more prevalent in the population and therefore fin exams were more effective as a tool to detect fish with previous exposure to high TDGS. As stated in NMFS' research plan fin signs "optimize the detection of GBD signs". Furthermore, gill examinations are time consuming and lethal and, therefore, do not lend themselves to a monitoring program; especially when more than 50,000 fish have to be examined in the course of the season. Gill bubbles are usually the proximate cause of death in the fish and therefore are unlikely to be useful for monitoring because the role of monitoring is to warn managers when the fish population is at risk to mortality and gill bubbles would form at the point mortality is occurring.

### Sampling Site

Sampling occurs at dams in the Lower Columbia and Snake rivers in conjunction with the Smolt Monitoring Program (SMP). These sites and fish collection methods were used because of the existence of an on-going SMP. No other non-lethal method of capture can sample as large a portion of the migrating fish from across the river channel as the collection systems at dams. The use of all the Snake River dams as well as all lower Columbia River dams with collection systems assures adequate coverage of the lower river migrant juvenile salmonids. The greatest concern regarding dam sampling of juvenile salmon was whether the signs in fish would change as the fish passed through the collection facility. Research by NMFS (Dawley 1996) showed that fish did not lose signs as they passed through the bypass at Little Goose Dam and at John Day Dam (Dawley, 1997). In addition, fish sampled in the reservoirs and examined for GBT were compared to those collected at the dams. Fish sampled in the reservoir showed a similar level of signs to those at the dams in 1996, while in 1997 a similar if not higher percentage of fish

sampled at the dams showed signs than did those in the reservoir (Backman et al., summarized in this report). These data demonstrate that dam sampling for GBT signs is representative of fish in the river. To minimize the possibility of signs changing fish are captured from the separator at transportation and examined for GBT as soon as possible. This minimizes the chance that signs might change during holding prior to examination.

### Sample Size

The target number of fish examined is 100 of each species (usually chinook salmon and steelhead) during each sampling day. This sample size was determined based upon the objective to detect with 95% confidence, the occurrence of GBT in 10% of the population. Since the NMFS action criteria is reached when 15% of the population shows signs, the sample size is more than adequate to detect and accurately depict the presence of signs.

### Significance of Signs

Probably the most troubling aspect of monitoring is the relative significance of the signs in terms of the risk experienced by the population prior to being sampled. Laboratory results have been less than consistent regarding the onset of mortality versus the presence of signs. Also, using results from controlled laboratory exposures to monitor fish migrating in-river is risky. However, due to the conservative nature of the NMFS action criteria we believe sufficient flexibility is incorporated into the criteria to account for the uncertainty involved in the monitoring. The laboratory research has shown that at 120% TDGS approximately 60% of the fish will display signs of GBT in the fins before the first mortality occurs. With an action criteria of 15% prevalence of signs we are very confident that the population is not at risk when spill can be managed to maintain TDGS low enough to prevent the occurrence of a greater percentage of signs. Again, the goal is to protect the migrating fish and based upon the intentionally conservative action criteria, it appears that the monitoring program is meeting that goal.

## **6. Other Research**

### **Environmental Factors and Juvenile Salmonid Survival -- Evidence from PIT-Tagged Migrants in 1997**

There was exploratory data analyses on changes in survival estimates for PIT-tagged juvenile salmonids migrating in the Snake and Columbia Rivers throughout the spring 1997 migration season. We have investigated absolute survival estimates and associated changes in environmental factors that potentially affect survival. The analyses reported here are a

continuation of analyses of 1996 data reported in the 1996 NMFS Annual Report to the Environmental Quality Commission and of 1994 through 1996 data in our 1996 Annual Report to Bonneville Power Administration (currently available in draft form). We used the same methods described in those documents to estimate survival, to smooth daily survival estimates to clarify trends, and to calculate indices of environmental exposures for groups of PIT-tagged fish.

Overall, survival estimates between Lower Granite and Lower Monumental Dams were slightly higher in 1997 than in 1996, for both yearling chinook salmon and steelhead, and for steelhead between Lower Monumental and McNary Dams. For yearling chinook salmon between Lower Monumental and McNary Dams survival was higher in 1997 than in 1996, but lower than in 1995.

Correlations between environmental exposures and survival estimates were largely either nonexistent (steelhead) or contradictory between different reaches (yearling chinook salmon). Overall, survival of yearling chinook salmon between Lower Granite and McNary Dams was negatively correlated (though not significantly) with flow, spill percentage, and TDGS. However, conclusions based on these results must be tentative, as the correlations are not strong, and the release sizes are very small (only about 5,000 fish over 24 days). For steelhead, there were very weak positive correlations between flow, spill, and TDGS and survival estimates from Lower Granite Dam to McNary Dam, and a weak negative correlation between temperature and estimated survival in the same reach.

## **7. Evaluation of Spill Effects on Fish Passage Efficiency and Survivorship**

### **Fish Passage Efficiency**

Fish passage efficiency (FPE) is defined as the percentage of fish that pass a dam through non-turbine routes that generally provide higher passage survival than turbines. The minimum FPE required by the Federal Columbia River Power System Biological Opinion for the lower Columbia River dams is 80%. FPE at each dam primarily relates to the fish guidance efficiency (FGE) of the bypass or sluiceway system and the level of spill. Generally, as the season progresses from spring to summer, FGE drops in response to changing water temperatures and fish species composition. As this occurs, spill levels would be increased (within total dissolved gas limits) to maintain the FPE goals. In the case of the 1997 season, spill was uncontrollable at the lower Columbia River dams through much of the juvenile migration season and the resultant FPE levels were rarely the result of specific spill management efforts.

The estimated FPE level associated with a spill scenario that results in a particular tailrace total dissolved gas (TDG) level at any dam depends on total river flow and powerhouse hydraulic capacity. Once the spill level is capped by a particular TDG level, FPE will decrease with increasing river flow up to the capacity of the powerhouse. Once powerhouse capacity is met, increasing flow must be passed through the spillway and FPE and TDG will increase. The following example (Table 1) illustrates the difference between FPE levels at the four lower Columbia River dams under two river flows. The respective spill levels in thousand cubic feet

per second (kcfs) for 110 and 120 percent TDG at these dams for the 1997 spill season are: Bonneville 70, 120; The Dalles 80, 230; John Day 25, 50; and McNary 50, 150 (Corps of Engineers, May 1997 spill cap teletype). The fish to spill flow ratio was assumed to be 1:1.

**Smolt Survival.** The shortcomings of using a spreadsheet model such as SIMPAS for calculating point survival estimates was well documented in the NMFS 1996 annual report to the Oregon Department of Environmental Quality. In that report, the relative differences in survival estimates were more meaningful than absolute survival estimates. To illustrate this use NMFS demonstrated the difference in cumulative project survival (all eight mainstem dams) when spill levels were generating 110 and 120 percent TDG. These survival estimates are based on point estimates of passage route survival empirically derived from past studies at the various Columbia River dams. These estimates may be useful for predicting changes in survival under conditions similar to those present when the studies were conducted. Using the general passage route survival assumptions we used in SIMPAS, project survival for each dam (except Bonneville) can be simply derived from FPE by assuming that fish passed through non-turbine routes survive at 98% and fish passed through turbines survive at 90%. Therefore, 80% FPE equals 96.4% project survival ( $0.8 * .98 + 0.2 * .90$ ).

**Table 1.** Estimated spring chinook project survivals at two different river flows with tailrace TDG capped at two different levels for each of the lower Columbia River dams.

River Flow TDG	250 kcfs		300 kcfs	
	110%	120%	110%	120%
Bonneville	92.9	93.4	92.5	93.0
The Dalles	94.9	97.6	94.7	96.9
John Day	95.0	95.3	94.9	95.2
McNary*	96.9	97.4	97.1	97.2

Because spill and total dissolved gas levels in the Columbia River in 1997 were so much higher than those experienced during past survival studies, the spreadsheet model method of calculating survival is probably not useful or meaningful for estimating 1997 project passage survivals and therefore have not been included in this report. An example of how static parameter assumptions can mislead modeling efforts can be illustrated with data from The Dalles Dam. A two percent mortality factor was normally used for fish passing through a spillway because spillway mortality has been measured at 0-2 percent at the majority of spillways tested under normal spill conditions. In 1997, survival tests at The Dalles Dam indicated approximately 7-14% mortality for test fish passing through the spillway under the extremely high spill flow conditions prevalent during much of the spring and summer migration season. It is suspected that the high mortality

is, at least in part, due to physical injuries caused by the extremely high level of spill. It is unknown whether all fish passing this spillway or the spillways at other lower Columbia River Dams suffered this mortality. It is, however, safe to assume that using the conventional spillway survivals in a predictive model would be unwise in a flow year like 1997.

## **8. Update on Ongoing Processes**

Dissolved gas monitoring and research does not take place in a vacuum, but relates to other regional processes. There were two significant occurrences over the past year that have affected the dissolved gas program. First, based on a review of the proposed 1998 funding the NPPC put on hold any dissolved gas research proposed for 1998. This action was prompted by a recommendation from the NPPC's ISAB. The NPPC requested that the NMFS Dissolved Gas Team develop a Research Plan for Dissolved Gas. Secondly, the DGT received an assignment from NMFS Implementation Team. The IT requested that the DGT review the information collected relative to dissolved gas over the past four years and report on what has been learned. The IT then requests that the DGT develop a Research Plan. These two processes are on-going.

### **Assessment of the Independent Scientific Advisory Board (ISAB) Report**

The Independent Scientific Advisory Board (ISAB) is the peer review authority convened by the Northwest Power Planning Council to review scientific work in relation to salmon. The ISAB conducted a peer review of the draft NMFS waiver compliance report. Their comments focused on factual accuracy and openness of discussion, offered alternative scientific interpretations of the information, and the applicability of the information reported to the conditions placed on the 1997 waiver.

The ISAB commended the agencies for their efforts on the 1997 report. The ISAB comments were considered by NMFS and incorporated where appropriate

### **Retrospective Analysis**

#### **Predicted Outcomes of 1997 Waiver Conditions:**

Serious concerns have been repeatedly expressed in recent years that fish survival will decrease significantly as a result of exposure to any kind of spill conditions. Proof of this was analyses that documented apparent survival decreases downstream from Ice Harbor Dam in late May of 1995 which also projected that even greater mortalities would occur due to higher TDGS levels expected during 1996 and 1997.

Uncontrolled spill during periods of high runoff would compound mortalities resulting from exposure to TDGS levels resulting from the 1997 controlled spill program.

Recommendations were made favoring transportation over in-river migration in order to increase downstream survival during periods of either controlled or uncontrolled spill.

The risk assessment approach used to validate the controlled spill program was criticized as inadequate. The critique cited a model-based approach for predicting outcomes as more appropriate.

The smolt monitoring program was ineffective at detecting GBD in migrating smolts.

TDG would cause delayed adult salmonid passage and increased incidence of GBD in adult salmonids.

**Realized Outcomes:**

The physical and biological monitoring programs in 1997 did not indicate that a decrease in downstream migrant survival could be attributed to TDGS exposure, even during periods of extremely high uncontrolled spill in the lower Snake River.

The smolt monitoring program was effective at detecting increased incidence of GBD during times of high levels of TDG. The monitoring program indicated that GBD signs were present in migrating and resident fish during periods of highest spill, primarily mid-May through mid-June. Based on improved observation protocols, mortality specifically caused by GBD was not discernible in 1997.

Ongoing transportation studies have yet to reveal conclusive results in support of transportation that can be used with confidence to address mitigation issues.

Delays in adult passage, and associated mortalities, have been attributed to several causes, among which excessive spill and resulting elevated TDGS levels have been suggested. Adult spawning delay, like spill survival, can be affected by many environmental and human-caused variables. Identification of a specific cause (spill volume, river flow, temperature, turbidity, fish condition, etc.) is nearly impossible. Refined operating and maintenance criteria are being used to minimize adult fish passage delays to the greatest possible extent. Radio tracking is proving to be a reliable means of verifying passage criteria designed to reduce adult delay.

Examinations of greater than 9,500 adult salmon or steelhead ascending the Columbia and lower Snake rivers during spill periods revealed that only a very few (<2.0%) showed any GBD signs. Interestingly, sockeye salmon had a higher incidence of GBD signs than Chinook or steelhead. No adult mortalities were observed in 1997 with GBD signs, (compared to 1967 when both dead and alive adult salmon were observed with GBD signs below John Day Dam after being exposed to levels above 130%. The major contributing cause in that instance was passage delay.)

#### **Predicted versus Realized Outcomes:**

Past experiences with high levels of TDG and modeled effects of TDG on fish survival predicted that the NMFS spill program would increase smolt mortality causing a decrease in survivorship for smolts passing past the Snake and Columbia River Dams. Based on monitoring of GBD in salmonid adults and smolts, smolts counts at dams and other research there was no direct evidence of decreased survivorship of salmonid smolts due to the NMFS spill program. The increased mortality based on the predicted results from the CRiSP model did not occur based on the biological monitoring results. Results of week to week survivorship analysis using PIT-tagged smolts and the relation to TDG was equivocal due to statistical validity of the technique and the effects of other factors on smolt survival. The Department's own analysis (circa 1995) of increased smolt mortality with exposure to high levels of TDG indicated that there was minimal risk to down stream migrating salmonid smolts for TDG levels of 115% to 120%. This analysis indicated that as an interim measure the risk from the levels of TDG resulting from the NMFS spill program was less than the risk of not spilling water for fish passage.

Physical and biological monitoring (the smolt monitoring program) are used for real-time evaluation of in-river levels of TDG and real-time management of the NMFS spill program. Critical assumptions of the physical and biological monitoring were identified and studies were designed to test these assumptions. Refinements needed to improve current smolt monitoring methods and the understanding of biological signs encountered inseason are being addressed through this research.

#### **D. Outstanding Unknowns:**

Information is years away on some aspects of research designed to understand the survival risks of fish exposed to elevated TDGS levels. Some results can be obtained on a real-time basis, **providing** the research is designed to produce reliable, relevant information in the near term. The levels of acceptable risk associated with the present controlled spill program are provisional, subject to reexamination as new findings are revealed.



There is the potential for increased risk with exposure of adult and juvenile fish and other aquatic organisms to high TDGS levels (>125%). However, the quantitative risk associated with exposures to 125% TDGS and the benefits gained from increased spill to this level is not well understood.

Extensive research to evaluate transportation have so far failed to produce conclusive results that can be applied with confidence by regional fisheries managers.

Incremental survival cannot be empirically demonstrated.

The effects of TDGS on the survivorship of the early life history stages of resident fish, such as white sturgeon, is not well understood.

#### **Authority of the Commission with Respect to the Issue**

The authority of the Commission to address this issue is contained in Oregon Administrative Rules - OAR 340-41-205, 445, 485, and 525 (2)(n). A copy of the rule is attached at Appendix A.

At its meeting of February 16, 1995 and April 18, 1997, the Commission modified the Oregon Administrative Rules to enable it to modify the total dissolved gas standard for the Columbia River for the purpose of assisting juvenile in-river salmon migration.

If the Commission is to grant this variance, it is required to make four findings under the rules. These are:

- (i) that failure to act would result in greater harm to salmonid stock survival through in-river migration than would occur by increased spill;
- (ii) that the modified total dissolved gas criteria associated with the increased spill provides a reasonable balance of the risk of impairment due to elevated total dissolved gas to both resident biological communities and other migrating fish and to migrating adult and juvenile salmonids when compared to other options for in-river migration of salmon;
- (iii) that adequate data will exist to determine compliance with the standards; and
- (iv) that biological monitoring is occurring to document that the migratory salmonid and resident biological communities are being protected.

The rule also allows the Commission to consider alternative modes of migration at its discretion.

### Alternatives and Evaluation

There are four main methods of salmonid migration down the Columbia River. These are transportation, turbine passage, dam by-pass passage, and spill. In practice all four of these modes will be used in 1997 as they have been in the past. None of these passage routes is without risk. While studies on transportation are continuing, preliminary findings of adults straying upon returning to spawning, and temperature concerns at the collector projects pose a risk to fish by this method. Turbine passage has a level of mortality associated with it variously calculated at between 10 and 15 percent. By-pass facilities do not guide all smolts away from the turbines, and there are concerns at temperatures exceeding 68 degrees Fahrenheit in the by-pass structures. Temperatures at these levels are considerably above what is optimal for cold water fisheries. Finally, spill has associated with it the risk of elevated levels of dissolved gas which can result in mortalities from gas bubble disease. Mortalities from spill at the levels requested in the NMFS' request have been calculated at between 2 and 3 percent.

The issue before the Commission is one of balancing risk. To not approve the waiver to the state's dissolved gas standard will result in more fish either going through the turbines or through the by-pass systems. Neither of these alternatives is without risk. In earlier work conducted by the Department, the waiver at the level requested was determined to be a relatively conservative approach which would result in protection of beneficial uses. At the same time, it was determined that waivers at the level of 125 to 130 percent would pose increased risks to fish. Between 120 and 125 percent, the Department was unsure of the impacts, and elected to recommend that the Commission adopt the more conservative approach, at which the Department believed the risks of elevated dissolved gas were outweighed by the benefits, and that the risks inherent in spill were preferable to the risks inherent in other modes of migration.

The other aspect of this was brought out in the National Research Council's publication, *Upstream: Salmon and Society in the Pacific Northwest*, it was recommended that the risk be spread by facilitating alternative modes of migration. Clearly, spill is a part of this. To require additional transportation, with the uncertainties inherent in it, would be to place all the eggs in one basket.

In relation to the four findings required to be made under the total dissolved gas rule, the following are supported by the petition:

- (i) failure to act will result in more salmonid passage via hydroelectric dam turbines. Estimated mortalities from fish passing through turbines is between 10 and 15 percent. Fish passing over spillways as a result of spill experience 2 to 3 percent mortality. The Commission is, therefore able to make the first finding;

- (ii) the balance of risk of impairment to fish due to elevated dissolved gas levels needs to be balanced against mortality of turbine passage. Increased incidence of gas bubbles were detected in fish due to involuntary spill in 1997. Dissolved gas levels experienced at Ice Harbor were well above the range within which instream bioassays indicate mortalities will occur, and increased incidences of gas bubbles were detected in fish. Correspondence from Oregon Department of Fish and Wildlife (ODFW) and the Tribes from previous years equated the mortality from turbines with elevated dissolved gas at around 120 percent, although this is considered a conservative estimate. Given the conservative nature of this estimate, the balance of the risk of impairment at the levels sought in the petition is tipped in favor of granting the variance;
- (iii) NMFS has submitted a detailed physical monitoring plan. Physical monitoring will be conducted by the Army Corps of Engineers at 35 sites in the mainstem Columbia, lower Snake and lower Clearwater and Kootenai Rivers in the forebays and tailraces of all spilling dams. Hourly data will be posted electronically, as it was last year. Implementation of the physical monitoring plan will ensure that data will exist to determine compliance with the standards for the voluntary spill program;
- (iv) NMFS has submitted a detailed biological monitoring plan. Smolt monitoring will continue as it did last year with examination of smolts being undertaken with 10X to 40X dissecting microscopes. Signs of GBD will be sought on non-paired fins, eyes and lateral lines. The smolt monitoring program contains a number of critical uncertainties. Some of these were tested last year in the research program, and this assessment of the efficacy of the monitoring program continue in 1997. The research program has not been finalized by NMFS but the Department recommends the following items be undertaken:
  - 1. determination whether there are differences in the severity of gas bubble signs between migratory fish in the reservoir and fish sampled through the smolt monitoring program;
  - 2. determination of the progression of GBD signs as a result of exposure to elevated levels of dissolved gas, and the relationship between these signs and health and survival of salmonids from the Snake and Columbia Rivers;
  - 3. description of the migratory distribution of fish, particularly with respect to vertical distribution in the reservoir, and the relationship between vertical distribution and gas bubble signs;
  - 4. determination of the physical characteristics of dissolved gas throughout the hydrosystem under specific spill and flow regimes.

5. Investigate the effects of TDGS on the early life stage of resident fish, such as white sturgeon.

With these findings, the Commission is able to approve the variation to the total dissolved gas standard as sought by NMFS.

#### Alternative Commission Actions

The petition is such that the required findings are able to be made, and the waiver approved. Clearly, any level of action less than approval can also be undertaken by the Commission, including denying the petition or approving it with conditions.

#### Summary of Public Input Opportunity

##### Public Comment on the Waiver Request

Following receipt of the petition on January 9, 1998, the Department issued a public notice, advising receipt of the petition and inviting interested parties to submit either oral testimony at a public hearing that was held at 10:00 a.m. on February 12, 1998 in room 3A at DEQ Headquarters, or in writing by 5:00 p.m. on February 12, 1998.

A summary of public comment and written submissions is attached at Appendix A.

##### In-Season Opportunities for Public Participation

The Dissolved Gas Team (DGT) is a technical committee within the NMFS Executive Committee-Implementation Team structure. Its place in the decision hierarchy is equal to that of the System Configuration Team (SCT) and the Technical Management Team (TMT), all of which report to the Implementation Team (IT). The DGT provides technical support to these committees and works with NMFS in assuring implementation of the dissolved gas monitoring plan and developing research to improve the region's understanding of the effects of dissolved gas.

The DGT meets about once a month, and like all the NMFS committees, is open to the public and allows time for public comment, if any. The Team is co-chaired by the Council and NMFS; official participation is limited to the Corps, BPA, EPA, Bureau of Reclamation, the states, tribes and independent mainstem hydro-operators like Idaho Power and the Mid-Columbia PUD's. All meeting minutes and documents are available to the public through the Northwest Power Planning Council, and the team posts all information, including meeting dates and

agendas, on its web-site. It accepts and provides any and all public comments to all Team members.

The Team comes to decision by consensus; when consensus is not reached the issue is elevated to the IT, where there is another opportunity for public comment. The Team has received no complaints over public access. Initially groups such as the Columbia River Alliance attended but have not done so recently. NMFS has been very responsive to DGT recommendations, especially regarding research and adjustments to the monitoring plan.

The public can also provide input into the DGT through the Council. Spill and dissolved gas management, monitoring and research are also part of the Council's Fish & Wildlife Program, and as the Council reviews these items it provides regional feedback through its role of co-chair of the DGT. The Council has never received comments that it failed to provide an opportunity for public input, and has always made time available to encourage discussion of this issue.

### **Conclusions**

The Department concludes from the above that the variation from the state's dissolved gas standard of 110 percent to a level of 115 percent in the forebay and 120 percent in the tailrace is still a conservative approach to facilitating fish passage via hydroelectric dams. The risks associated with this waiver in terms of adverse impacts to fish due to elevated levels of dissolved gas need to be balanced against the risks inherent in other modes of passage.

There is a monitoring system in place, both for physical and biological monitoring, and that critical assumptions underlying the biological monitoring are being reviewed as part of a continuing research program.

The Department continues to support the waiver request.

### **Intended Future Actions**

The Department will continue its involvement in the Dissolved Gas Team convened by NMFS. The primary purpose of this team is to address dissolved gas issues not dealt with in either of the other two teams ( the Technical Management Team and the System Configuration Team), and to evaluate biological standards for dissolved gas and develop a framework for institutional and structural changes to met those biological standards. The committee operates in three phases, as does the Technical Management Team:

1. Pre-Season Planning consisting of development of an annual dissolved gas monitoring and management plan;

2. In-Season management. In this phase, the DGT supplies technical input to the other two committees, and is charged with making in-season decisions that will maximize fish passage consistent with state waivers and other constraints; and
3. Post-Season Review, including responsibility for coordination of monitoring and research data review, report development, and assistance to the SCT in development and prioritization of dissolved gas-related project improvements.

### Department Recommendation

The Department recommends that the Commission grant this petition by adopting the findings contained in the Draft Order attached at Appendix C, subject to implementation of the physical and biological monitoring regime as detailed in the monitoring plan accompanying the National Marine Fisheries Service request dated January 8, 1998, and:

- (i) Approve a revised total dissolved gas standard for the Columbia River for the period from midnight on March 13, 1998 to midnight on March 23, 1998, and midnight on April 10, 1998 to midnight on August 31, 1998;
- (ii) Approve a total dissolved gas standard for the Columbia River of a daily (12 highest hours) average of 115 percent as measured at established monitors at the forebay of the next dam downstream from the spilling dam during these times;
- (iii) Approve a further modification of the total dissolved gas standard for the Columbia River to allow for a daily (12 highest hours) average of 120 percent as measured at established tailrace monitors below the spilling dams during these times;
- (iv) Approve a cap on total dissolved gas for the Columbia River during the spill program of 125 percent, based on the highest two hours during the 12 highest hourly measurements per calendar day during these times; and
- (v) Require that if *either* 15 percent of the fish examined show signs of gas bubble disease in their non-paired fins, *or* five percent of the fish examined show signs of gas bubble trauma in their non-paired fins where more than 25 percent of the surface area of the fin is occluded by gas bubbles, whichever is the less, the Director will halt the spill program;
- (vi) Require NMFS to incorporate the following conditions into its program:

1. NMFS must provide written notice to the Department within 24 hours of any violations of the conditions in the variance as it relates to voluntary spill. Such notice shall include actions proposed to reduce TDG levels or the reason(s) for no action;
2. TDG data and incidence of GBD signs in smolts and adults will be reported to the Department daily. Hourly TDG levels collected from the forebays and downstream locations of McNary, John Day, The Dalles, and Bonneville Dams will be reported to the Department daily. Incidence of GBD signs in smolts collected from McNary, John Day, and Bonneville Dams and adults collected at Bonneville and Lower Granite Dams will be reported the Department daily. Signs of GBD in smolts will be measured by using a variable (10X to 40X) dissecting scope. Unpaired fins, eyes, and lateral line will be examined for the presence of bubbles;
3. that NMFS provide an annual report of the spill program for 1998 as it did last year. This report should be forwarded for public and ISAB review by December 1, 1998, and should arrive at DEQ by January 15, 1998, accompanied by any waiver request for 1999. NMFS should return to the Commission no later than June 30, 1998 with a detailed outline of the report. In particular, the Commission wishes to see progress made toward identifying the benefits of spill on salmonid survival.
4. that biological research be conducted in conjunction with the 1998 spill season to address critical assumptions inherent in the biological monitoring program. This research will address the five objectives detailed in the draft monitoring document that accompanied the waiver request.

### **Attachments**

- A. Summary of Public Comment
- B. Copy of EQC rule, OAR 340-41-205, 445, 485, and 525(2)(n)
- C. Draft Commission Order

### **Reference Documents (available upon request)**

National Marine Fisheries Service (1998) 1997 Annual Report to the Oregon Department of Environmental Quality, January, 1998.

National Marine Fisheries Service (1997) *1996 Annual Report to the Oregon Department of Environmental Quality*, January 24, 1997, and addendum dated February 7, 1997.

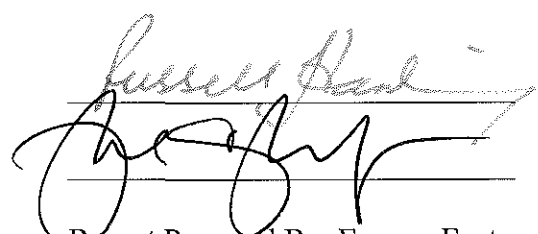
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National Research Council (1995) *Upstream: Salmon and Society in the Pacific Northwest*,  
National Academy Press, Washington D.C. (Prepublication copy).

Approved:

Section:

Division:

The image shows two handwritten signatures in black ink. The first signature is written over a horizontal line and appears to be 'Susan B...'. The second signature is written over another horizontal line and is more stylized, possibly 'Eugene Foster'.

Report Prepared By: Eugene Foster

Phone: (503) 229-5358

Date Prepared: February 13, 1998



Appendix A

State of Oregon

**Department of Environmental Quality Memorandum**

Date: February 13, 1998

To: Environmental Quality Commission

From: Eugene Foster

Subject: Presiding Officer's Report for the National Marine Fisheries Service's (NMFS) Total Dissolved Gas Waiver Request

Hearing Date & Time: February 12, 1998, beginning at 10:00 am

Hearing Location: Room 3A, DEQ Headquarters, 811 SW 6<sup>th</sup> Avenue, Portland, OR 97204

Title of Proposal: Request for a Waiver to the State's Total Dissolved Gas Standard on the Columbia River

The hearing on the proposal was convened at 10:10 am. People were asked to sign witness registration forms if they wished to present testimony. People were also advised that the hearing was being recorded and the procedures to be followed.

Five people were in attendance. Of these, one person signed up to testify.

Summary of Oral Testimony

Oral testimony was called for at 10:15 am. The following is a summary of the testimony.

1. Mr. James Buchal, Ball Janik Attorneys

Mr. Buchal is opposed to the request for a waiver to the total dissolved gas standard. Mr. Buchal cites several reasons for being against the request and states that the scientific evidence supports his position.

The scientific evidence suggests that salmon survival has been reduced every year since the program began. Reports have suggested that survival through the Lower Monumental to McNary reach was 85% in 1995, 73% in 1996, and 69% in 1997. In the survival of salmonid smolts is not the 98 to 100% as stated by the agencies but can be much lower as evidenced in the 1997 NMFS Report which states that spill survivorship at The Dalles was 86 to 93%.

The spill program not only adversely affects down stream migrating salmonids but also decreases the survivorship of returning adult salmon. There may have been 15,000 more adult salmon returning to the Snake River in 1997 if fisheries agencies had not required spill at the dams.

The spill program is supposed to produce 80% Fish Passage Efficiency (FPE) but this goal is routinely exceeded. FPE was approximately 95% at Lower Granite Dam in 1997. The information indicates that the one-to-one assumption for FPE is not accurate and more complex models should be used to more reliably predict FPE.

The Smolt Monitoring Program is not effective at detecting total dissolved gas effects to juvenile salmonids. The research that has been conducted to verify the Smolt Monitoring Program is faulty and poorly designed. Researchers are sampling symptoms of dissolved gas disease while relying on measurements of total dissolved gas taken miles away. It is also impossible to tell if the recommendations of the Expert Panel have been resolved. In addition, laboratory studies show that 120% kills significant numbers of juvenile chinook and steelhead.

The 1997 Annual Report repeatedly states that the majority of the spill was involuntary. However, the flows would not have been as high if there would not have been flow augmentation.

The Environmental Quality Commission should reject the requested waiver for spill of the Spring Creek Hatchery fish. These fish are not threatened or endangered and compete with threatened and endangered salmon. The requested waiver is to allow for spill for ten days but the vast majority of the fish are below the Bonneville Dam eighteen to twenty four hours after release.

### Summary of Written Testimony

#### 1. Wes Ebel, Fish and Wildlife Consultant

Mr. Ebel does not object to the waiver request as long as the conditions are adhered to. Every effort should be made to keep the total dissolved gas levels below 120%. This is based in part on the results of PIT-tag survivorship studies.

However, spilling large volumes of water at dams when fish can be collected and transported probably reduces the number of adult salmon returning to spawn. Transported fish have consistently achieved higher survival than those fish not transported.

2. Ron Boyce, Oregon Department of Environmental Quality

The Oregon Department of Fish & Wildlife (ODF&W) supports the requests made by NMFS and U.S. Fish & Wildlife Service for a waiver to the state water quality standard for total dissolved gas spill. The spill program for Spring Creek Hatchery fish is an important component of the US/Canada treaty ocean harvests and near shore fisheries off Oregon and Washington and the lower Columbia River. Spill has consistently been shown as an effective means for diverting fish away from turbines and provide immediate improvement of in survival of juvenile salmonids passing through the projects.

The PIT-tag studies have been designed to study annual indices of fish survival, primarily through the lower Snake River. Because the detection and recovery rates in late May are low these this method is inadequate to apply to short time frames but a valid measure of annual indices. Due to technical inadequacies of NMFS's method to derive statistically significant estimates of survival during periods of elevated total dissolved gas, little credence can be placed on these survival estimates and apparent relationships to total dissolved gas.

Data collected over the past four years through the Smolt Monitoring Program corroborates the assumptions and scientific basis originally used to request the total dissolved gas waiver of 115/120% in 1995. The high levels of spill observed in 1996 and 1997 were not a result of the spill for fish but a direct consequence of involuntary spill due to limited hydraulic capacity and high flows. Installation of gas abatement structures at Ice Harbor and John Day dams during 1997 and 1998 should reduce the total dissolved gas levels at these dams.

3. Jack Gackstatter, U.S. Environmental Protection Agency

The Environmental Protection Agency supports the granting of the waiver request. EPA believes the relative risks and benefits from granting the proposed waiver are being carefully monitored by NMFS and cooperating agencies. Although there are few certainties, EPA believes the spill program operated by NMFS will benefit salmon recovery efforts.

4. Bert Bowler, Idaho Fish & Game

Idaho Fish & Game recommends that the Environmental Quality Commission allow a waiver to the total dissolved gas standard of 120/125% instead of 115/120%. The Department bases its recommendation on a review of the scientific literature, some of which is contained in the document, Spill and 1995 Risk Management. Recent information indicates increased mortality due to the cumulative stress of varying methods of passage. The Department's position is

one of maximizing in-river passage by providing spill up the gas waiver. This would reduce the number of fish passing through the fish by-pass system and reduce cumulative stress and increase survivorship.

5. Steve Fick, Salmon for All

Salmon for All, a commercial fishermen's organization, supports the NMFS request for a waiver to the total dissolved gas standard. They advocate returning the river to a more natural system by doing drawdown at some dams to give the fish a better chance of survival.

6. James Buchal, Ball Janik Attorneys

This submission reflects the oral testimony given by James Buchal. See above Summary of Oral Testimony.

7. Robert Lohn, Bonneville Power Authority

The purpose of the BPA comments were to inform the Commission of pending regional discussions and analyses regarding potential levels of spill, and therefore the resultant level of dissolved gas supersaturation, in relation to the stated objective of 80% fish passage efficiency under the NMFS 1995 Biological Opinion (Bi-Op). The Bi-Op generally assumed that the proportion of juvenile fish passing through the spillway would be equal to the proportion of total project discharge that was spilled (i.e., 1:1 spill effectiveness). However, recent information on spill effectiveness from hydroacoustic and radio tracking studies and analysis of PIT-tag data has shown that under many conditions of fish spill, spill effectiveness may be greater than the conventional assumption of 1:1. However, it is uncertain at this time what effect the new analyses will have on the planned spill at federal projects, but less spill may be required to meet the NMFS Bi-Op.

8. Ted Strong, Columbia River Inter-Tribal Fish Commission

CRITFC provided testimony on the importance of spill and good water quality to their tribes' cultural and treaty reserved resources, recommendations regarding spill and dissolved gas, and provide a scientific rationale for the need for spill.

1. allow a daily average of 120-125 percent TGP as measured in the downstream forebay of each dam. Allow up to 125 percent in the appropriate tailrace stations.

2. allow the variance to extend from March 13, 1998 to September 30, 1998. In 1996 and 1997 significant numbers of fish remained in the river beyond the August 31 cessation of the voluntary spill program..

3. incorporate adaptive management into the spill program. In 1996 and 1997 DEQ recommended cessation of spill if biological or physical monitoring limits were exceeded. By doing this DEQ is condemning salmon to lethal turbine passage or screen passage without any scientific risk assessment. It is not, therefore, protecting the beneficial use.. A better operational approach is to ratchet spill down if physical or biological criteria are exceeded.
4. Biological monitoring as specified in the 1997 physical and biological monitoring plan submitted to the water quality agencies by NMFS should be the template for monitoring in 1998. However, the NMFS's proposed 1998 monitoring for 1998 is seriously lacking in biological monitoring.
5. swings in flow as a result of power peaking over a 24 hour period must be modified to create a more stable flow pattern. High flows through the system through the day result in higher levels of spill and elevated dissolved gas levels.
6. water quality agencies should require private and federal hydropower operators to lower TDG levels through increasing spill efficiency by converting to 24 hour spill, installation of hydroacoustic and other monitoring systems and expedited installation of gas abatement structures.
7. water quality agencies should require private and federal hydropower operators to undertake physical and biological monitoring year long. Dissolved gas levels should be monitored before and after the migration season so that appropriate mitigation and regulatory remedies can be evaluated.
8. water quality agencies along with federal agencies should expedite installation of gas abatement structures at dams. Discussions have been continuing, but DEQ has been reluctant to be a participant. DEQ should become fully engaged in this activity.
9. water quality agencies should require hydropower operators to utilize power in excess of grid demands so that turbines can be operated during high levels of flow to reduce elevated TDG levels.

CRITFC submitted a detailed rationale for their recommendations. These recommendations were based in part on the 1995 Spill and Risk Management Assessment document and reports in 1996 and 1997 submitted to NMFS on total dissolved gas and in-river research conducted under U.S. Army Corps of Engineers, BPA, and Mid-Columbia PUD funding.

Memo to: Environmental Quality Commission  
Presiding Officer's Report on NMFS' request for a Total Dissolved Gas Standard Waiver  
February 12, 1998 Public Hearing  
Page 6

Appendix B

OAR 340-41-205, 445, 485, and 525(2)(n)

(A) The concentration of total dissolved gas relative to atmospheric pressure at the point of sample collection shall not exceed 110 percent of saturation, except when stream flow exceeds the ten-year, seven-day average flood. However, for Hatchery receiving waters and waters less than two feet in depth, the concentration of total dissolved gas relative to atmospheric pressure at the point of sample collection shall not exceed 105 percent of saturation.

(B) The Commission may modify the total dissolved gas criteria in the Columbia River for the purpose of allowing increased spill for salmonid migration. The Commission must find that:

- (i) Failure to act would result in greater harm to salmonid stock survival through in-river migration than would occur by increased spill.
- (ii) The modified total dissolved gas criteria associated with the increased spill provides a reasonable balance of the risk of impairment due to elevated total dissolved gas to both resident biological communities and other migrating fish and to migrating adult and juvenile salmonids when compared to other options for in-river migration of salmon;
- (iii) Adequate biological data will exist to determine compliance with the standards; and,
- (iv) Biological monitoring is occurring to document that the migratory salmonid and resident biological communities are being protected.

(C) The Commission will give public notice and notify all known interested parties and will make provision for the for opportunity to be heard and comment on the evidence presented by others, except that the Director may modify the total dissolved gas criteria for emergencies for a period not exceeding 48 hours;

(D) The Commission may, at its discretion, consider alternative modes of migration.





Appendix C

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

In the matter of the National Marine Fisheries Service's request to spill water to assist out-migrating Snake and Columbia River salmon smolts ( DRAFT ORDER  
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(

WHEREAS the Department of Environmental Quality received a request from the National Marine Fisheries Service dated January 8, 1998, to adjust the Total Dissolved Gas Standard as necessary to spill over dams on the Columbia River to assist out-migrating Snake and Columbia River salmon smolts, at the following times:

1. the period from midnight on March 13 to midnight on March 23, 1998; and
2. the period from midnight on April 10 to midnight on August 31, 1998.

WHEREAS the public was notified of the request on January 15, 1998, and given the opportunity to provide testimony at 10:00 a.m. on February 12, 1998, and the opportunity to provide written comments until 5:00 p.m. on February 12, 1998.

WHEREAS the Environmental Quality Commission met on February 20, 1998 and considered the request, justification and public comment.

THEREFORE the Environmental Quality Commission orders as follows:

1. Acting under OAR 340-41-205(2)(n)(B), the Commission finds:
  - (i) failure to act will result in more salmonid passage via hydroelectric dam turbines. Estimated mortalities from fish passing through turbines is between 10 and 15 percent. Fish passing over spillways as a result of spill experience 2 to 3 percent mortality;
  - (ii) the balance of risk of impairment to fish due to elevated dissolved gas levels needs to be balanced against mortality of turbine passage. Increased incidence of gas bubbles were detected in fish due to involuntary spill in 1997. Dissolved gas levels experienced at Ice Harbor were well above the range within which instream bioassays indicate mortalities will occur, and increased incidences of gas bubbles were detected in fish. Correspondence from Oregon Department of Fish and Wildlife (ODFW) and the Tribes from previous years equated the mortality from turbines with elevated dissolved gas at around 120 percent, although this is considered a

conservative estimate. Given the conservative nature of this estimate, the balance of the risk of impairment at the levels sought in the petition is tipped in favor of granting the variance;

- (iii) NMFS has submitted a detailed physical monitoring plan. Physical monitoring will be conducted by the Army Corps of Engineers at 35 sites in the mainstem Columbia, lower Snake and lower Clearwater and Kootenai Rivers in the forebays and tailraces of all spilling dams. Hourly data will be posted electronically, as it was last year. Implementation of the physical monitoring plan will ensure that data will exist to determine compliance with the standards for the voluntary spill program;
  - (iv) NMFS has submitted a detailed biological monitoring plan. Smolt monitoring will continue as it did last year with examination of smolts being undertaken with 10X to 40X dissecting microscopes. Signs of GBD will be sought on non-paired fins, eyes and lateral lines. The smolt monitoring program contains a number of critical uncertainties. Some of these were tested last year in the research program, and this assessment of the efficacy of the monitoring program continue in 1998. Research will be undertaken in the following areas:
    - 1. determination whether there are differences in the severity of gas bubble signs between migratory fish in the reservoir and fish sampled through the smolt monitoring program;
    - 2. determination of the progression of GBD signs as a result of exposure to elevated levels of dissolved gas, and the relationship between these signs and health and survival of salmonids from the Snake and Columbia Rivers;
    - 3. description of the migratory distribution of fish, particularly with respect to vertical distribution in the reservoir, and the relationship between vertical distribution and gas bubble signs;
    - 4. determination of the physical characteristics of dissolved gas throughout the hydrosystem under specific spill and flow regimes.
    - 5. Investigate the effects of TDGS on the early life stage of resident fish, such as white sturgeon.
2. The Environmental Quality Commission approves a modification to the Total Dissolved Gas standard for spill over the Columbia River dams subject to the following conditions:

- (i) implementation of the physical and biological monitoring regime as detailed in the monitoring plan accompanying the National Marine Fisheries Service request dated January 8, 1998, and:
- (ii) a revised total dissolved gas standard for the Columbia River for the period from midnight on March 13, 1998 to midnight on March 23, 1998, and midnight on April 10, 1998 to midnight on August 31, 1998;
- (iii) a total dissolved gas standard for the Columbia River of a daily (12 highest hours) average of 115 percent as measured at established monitors at the forebay of the next dam downstream from the spilling dam during these times;
- (iv) a further modification of the total dissolved gas standard for the Columbia River to allow for a daily (12 highest hours) average of 120 percent as measured at established tailrace monitors below the spilling dams during these times;
- (v) a cap on total dissolved gas for the Columbia River during the spill program of 125 percent, based on the highest two hours during the 12 highest hourly measurements per calendar day during these times; and
- (vi) that if *either* 15 percent of the fish examined show signs of gas bubble disease in their non-paired fins, *or* five percent of the fish examined show signs of gas bubble trauma in their non-paired fins where more than 25 percent of the surface area of the fin is occluded by gas bubbles, whichever is the less, the Director will halt the spill program;
- (vii) NMFS will incorporate the following conditions into its program:
  1. NMFS must provide written notice to the Department within 24 hours of any violations of the conditions in the variance as it relates to voluntary spill. Such notice shall include actions proposed to reduce TDG levels or the reason(s) for no action;
  2. TDG data and incidence of GBD signs in smolts and adults will be reported to the Department daily. Hourly TDG levels collected from the forebays and downstream locations of McNary, John Day, The Dalles, and Bonneville Dams will be reported to the Department daily. Incidence of GBD signs in smolts collected from McNary, John Day, and Bonneville Dams and adults collected at Bonneville and Lower Granite Dams will be reported the Department daily. Signs of GBD in smolts will be measured by using a variable (10X to 40X) dissecting scope. Unpaired fins, eyes, and lateral line will be examined for the presence of bubbles;

3. that NMFS provide an annual report of the spill program for 1998 as it did last year. This report should be forwarded for public and ISAB review by December 1, 1998, and should arrive at DEQ by January 15, 1999, accompanied by any waiver request for 1999. NMFS should return to the Commission no later than June 30, 1998 with a detailed outline of the report. In particular, the Commission wishes to see progress made toward identifying the benefits of spill on salmonid survival.
4. that biological research be conducted in conjunction with the 1998 spill season to address critical assumptions inherent in the biological monitoring program. This research will address the five objectives detailed in the draft monitoring document that accompanied the waiver request.

Dated: \_\_\_\_\_

ON BEHALF OF THE COMMISSION

\_\_\_\_\_  
Director



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
HYDROPOWER PROGRAM  
525 NE Oregon Street  
PORTLAND, OREGON 97232-2737

F/NWO3

JAN - 8 1998

Mr. Langdon Marsh  
Director, Oregon Department of Environmental Quality  
811 S.W. Sixth Avenue  
Portland, Oregon 97204

State of Oregon  
Department of Environmental Quality

RECEIVED

JAN 09 1998

RE: Dissolved Gas Supersaturation Standards

OFFICE OF THE DEPUTY DIRECTOR

Dear Mr. Marsh:

On March 2, 1995, the National Marine Fisheries Service (NMFS) re-issued the 1994-98 Federal Columbia River Power System Biological Opinion (FCRPS) to the Corps of Engineers (COE), Bonneville Power Administration and Bureau of Reclamation as a result of the Endangered Species Act, Section 7 consultation on hydropower system operation. Also, in March of 1995, NMFS released its *Proposed Recovery Plan for Snake River Salmon*. Both documents state, in part, that when in-river flow conditions are adequate, prescribed spill may occur at all eight Columbia and Snake River Federal dams from April 10 through June 20 on the Snake River, and from April 20 through June 30 on the Columbia River. In addition, spill may occur at one dam on the Snake River from June 21 through August 31, and at three Columbia River dams from July 1 through August 31. Because this spill program would likely cause total dissolved gas (TDG) to exceed the Oregon State water quality standard of 110%, we are requesting a short term water quality standard modification for a period average of 115% TDG (for the 12 highest hours) at established forebay monitors at the next forebay downstream from each dam. To ensure that acute exposures are limited, we request that this forebay limit be accompanied by a further modification for a period average of 120% TDG (for the 12 highest hours each day) as measured at established tailwater monitors below the spilling dams.



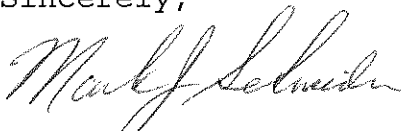
In addition, we request that this modification also cover a ten-day period beginning on March 16, and extending through March 26, 1997, so that spill passage can be provided for Spring Creek Hatchery subyearling fall chinook at Bonneville Dam. This part of the modification request is made in collaboration with the U.S. Fish and Wildlife Service (USFWS). The USFWS and NMFS have worked together to develop a biological rationale and biological and dissolved gas monitoring plan for this request. This documentation will be provided to your agency under separate cover by the USFWS by January 31, 1998.

The Biological Opinion and Proposed Recovery Plan incorporate the spill program in order to reduce the juvenile salmon mortality that results from operation of the hydropower system and, ultimately, to avoid jeopardizing the continued existence of Snake River chinook and sockeye salmon. As you are aware, controlled spill is an important means of passing fish through hydroelectric dams with relatively low mortality. We do realize though, that this activity is not without biological risks. For that reason, the Biological Opinion (Section VIII, pages 104-110) includes our rationale for accepting the risk of exceeding state water quality standards. Moreover, extensive monitoring and supportive research programs will be implemented again in 1998 to enhance our ability to assess and manage these risks. A draft of our 1998 Gas Bubble Disease Monitoring Program is enclosed. The monitoring program is currently undergoing peer review, as are the appended sections which are provided by other agencies. The final program will be provided to your agency as soon as this comprehensive review process is completed. We anticipate completing the final by the first week in March. As stated earlier, the monitoring plan for the March Spring Creek Hatchery release spill is included in the documentation provided to you by the USFWS prior to January 31.

Our 1997 Annual Report, required by your agency as a stipulation to the 1997 dissolved gas waiver, has been reviewed by the Independent Scientific Advisory Board (ISAB) and members of the Dissolved Gas Team. We will provide the final 1997 report to your office by January 15, 1998.

If you have any questions or require further information, please contact me at (503)231-2306.

Sincerely,



Mark J. Schneider, Ph.D.  
Chief, Facilities Branch

Enclosures

cc: Michael T. Llewelyn, Oregon Dept. of Environmental Quality  
Gene Foster, Oregon Dept. of Environmental Quality  
Tom Fitzsimmons, Washington Department of Ecology  
Eric Schlorff, Washington Department of Ecology  
Bill Maslen, Bonneville Power Administration  
Jim Athearn, U.S. Army Corps of Engineers  
Jim Nielsen, Washington Department of Fish and Wildlife  
Ron Boyce, Oregon Department of Fish and Wildlife  
Michele DeHart, Fish Passage Center  
Dr. Jack Gakstatter, U.S. Environmental Protection Agency  
Steve Pettit, Idaho Department of Fish and Game  
Jim Bellatty, Idaho Division of Environmental Quality

DRAFT January 7, 1998

Reviewers: Highlighted areas will require particular attention and will likely change before the final plan is printed.

**NATIONAL MARINE FISHERIES SERVICE**  
**GAS BUBBLE DISEASE MONITORING PROGRAM**

**1.0 Introduction**

The goal of this program is to continue a comprehensive biological and physical monitoring program which determines the prevalence of signs of gas bubble disease in migrating salmonids resulting from increased spill at lower Snake and lower Columbia River hydropower projects to achieve an 80% fish passage efficiency (80% of the fish pass through non-turbine routes) established in the 1995 Federal Columbia River Power System (FCRPS) Biological Opinion (for further information regarding this opinion see Appendix A), and to provide real-time information regarding the effects of spill on dissolved gas supersaturation (DGS) levels throughout these rivers. Biological (aquatic biota) and dissolved gas supersaturation monitoring is necessary to ensure that any potential adverse effects from providing controlled spill can be identified and evaluated against the expected increases in survival from spill.

This document is intended to provide a description of the activities and methods the National Marine Fisheries Service (NMFS) is employing in 1998 to manage FCRPS Biological Opinion spill and resulting total dissolved gas supersaturation levels. The activities described below are the culmination of numerous preseason meetings and working sessions involving the regional fish, water quality, and hydropower management agencies. Information collected as a result of these monitoring activities will be used to modify future gas monitoring and spill management activities.

Planning dates for the spring and summer spill operations contained in the 1995-1998 FCRPS Biological Opinion indicate that spill will be initiated in 1998 at selected lower Snake River hydropower projects on April 10 and selected lower Columbia River projects on April 20 and are scheduled to continue in both river reaches through August 31. The selection of spilling dams will differ between spring and summer migration periods and will depend on projected flow conditions. This is further explained in the FCRPS Biological Opinion, Reasonable and Prudent Alternative Measure 2 (Appendix A). A special ten day spill operation will also be requested at Bonneville Dam to protect subyearling fall chinook which are to be released on March 16, 1998, from the Spring Creek National Fish Hatchery. A separate biological and dissolved gas monitoring plan has been developed for this occasion and is available from the U.S. Fish and Wildlife Service's Vancouver, Washington, office (360/696-7888). The elements



of Spring Creek Release plan are essentially the same as the elements of the following plan that occur below Bonneville Dam.

Management of spill operations will be coordinated through a technical management team (TMT) consisting of representatives of the state, tribal and federal agencies responsible for hydrosystem operations and fish passage management. The total dissolved gas supersaturation management criteria they will use for guidance are further described in section 6 below.

### 1.1 1997 Monitoring Season

A review of the results of the 1997 monitoring season activities is included in the 1997 Annual Report to the Oregon Department of Environmental Quality available from the NMFS Portland Office (503/230-5414). Additional information is available from the U.S. Army Corps of Engineers (COE) (Corps of Engineers 1997) and Columbia Basin Fish and Wildlife Authority's Fish Passage Center (FPC) (Fish Passage Center 1998).

### 1.2 1998 Dissolved Gas and Biological Research

To gain a better appreciation of the degree of effort the regional fishery, water and hydropower management agencies are using to address DGS issues, it is necessary to touch briefly on work elements outside of the scope of the monitoring program per se. The following is a very brief treatment of the various investigative efforts that will be employed during the 1998 spill season to improve our knowledge of how DGS affects the physical and biological parameters of aquatic environments. Through these investigations, NMFS intends to validate and improve the monitoring program and ultimately reduce the scope and need for this currently cumbersome and costly monitoring effort.

#### 1.2.1 Dissolved Gas Research

##### 1.2.1.1 Transect Measurements

Both the Walla Walla and the Portland Districts of the COE ~~will continue conducting transect measurements in selected reaches of the lower Snake and lower Columbia Rivers in 1998.~~ These efforts are focused on developing a better understanding of how fixed monitoring site data relates to other locations in the river and how dissolved gas mixes and changes downstream from a spilling hydroelectric project. More detailed information, including transect locations and data collection protocol, is available from the two COE district offices.

##### 1.2.1.2 Gas Abatement Program

The COE is also conducting an extensive effort to determine and implement methods of reducing DGS caused by spill at FCRPS hydroelectric projects. This program includes completing the installation of spillway flow deflectors at selected projects, assessment of

spillway stilling basin modifications, and an analysis that may identify other potential DGS reducing modifications. Extensive dissolved gas data will be collected and used to develop tools such as predictive dissolved gas distribution models to assist in predicting and managing dissolved gas supersaturation in problem areas. Details were made available in the COE's Gas Abatement Study 30% and 60% reports.

### 1.2.2. Biological Research

Research necessary to address critical assumptions inherent to the biological element of this monitoring program will continue in 1998 under a separate program (see NMFS Gas Bubble Disease Research Plan; available from the NMFS Portland office). Projects included in this research effort relate to an overall goal "to assure that the gas bubble disease monitoring program accurately represents the condition of fish throughout the system and to enhance our understanding of the relation between exposure and increased levels of dissolved gas supersaturation and mortality". The five objectives are:

1. Determine if there is a difference in the incidence and severity of signs of GBD between migratory fish in the reservoir and in fish sampled through the Smolt Monitoring Program.
2. Determine the progression of GBD signs as the result of exposure to DGS and the relation between signs, health, and survival of aquatic species indigenous to the Columbia and Snake Rivers.
3. Describe the migratory distribution of juvenile and adult salmonids, particularly with respect to vertical distribution in the reservoir and relate fish distribution to the distribution of DGS.
4. Determine whether the protocol and examination techniques used in the GBD monitoring program optimize the detection of GBD signs demonstrated to affect fish health and survival, while minimizing impacts to individuals and populations.
5. Determine the physical characteristics of dissolved gas throughout the hydrosystem under specific spill and flow regimes.

The results of these projects will be thoroughly reviewed by a scientific review group and will be considered by NMFS for addition to future monitoring programs. In 1997, research activities took place under each objective. The results of these studies are included in the NMFS 1997 Annual Report to ODEQ. Activities that address objective five, physical characteristics of dissolved gas, are discussed in section 1.2.1 above. Detailed annual reports for each project will be available from the BPA (biological studies) or the COE (physical studies).

## **2.0 Dissolved Gas Monitoring**

The U.S. Army Corps of Engineers is responsible for measuring and reporting concentrations of DGS in water at selected locations on the Columbia and Snake rivers between April 1 (March 10 below Bonneville Dam) and September 15, as described in the Dissolved Gas Monitoring Program Plan of Action for 1998 included in the COE's updated Fish Passage Plan, and referenced in the FCRPS Biological Opinion. It is critical that the COE maintain monitoring instruments and telemetry equipment and that all available data be entered onto the Columbia River Operational Hydromet Management System (CROHMS) on a timely basis during this spill program. Dissolved gas monitoring instrumentation will be checked and calibrated regularly, as described in 2.3 below. The following is a brief overview of the COE's monitoring plan. For more information, see Appendix B.

### **2.1 Monitoring Locations**

For the 1998 monitoring season, the North Pacific Division (NPD) COE, has established a network of 35 primary dissolved gas monitoring sites in the mainstem Columbia, lower Snake and lower Clearwater and Kootenai Rivers. These monitors are located in the forebays and tailraces of all mainstem dams (except those dams above Wanupum Dam on the mid-Columbia). Twenty-six of these monitors were installed and maintained by the COE, two by the Bureau of Reclamation and seven by the mid-Columbia Public Utility Districts.

### **2.2 Measurement Technique and Frequency**

#### **2.2.1 Monitoring Sites Except COE Walla Walla District Sites**

Total dissolved gas pressure, total dissolved gas percent, barometric pressure, water temperature, and pertinent project operating data will be recorded hourly using state-of-the-art automated dissolved gas monitoring devices. These data will then be transmitted every four hours by satellite to the COE, NPD CROHMS data base in Portland, Oregon. Daily reports are available to authorized users through the CROHMS Automated Front End (CAFE) and through the COE's Technical Management Team Internet home page (<http://rcchp1.npd.usace.army.mil/report.htm>) on a real-time basis. These data will ultimately be available to all interested parties via Fish Passage Center daily reports as explained in section 5 below.

#### **2.2.2. Walla Walla District Monitoring Sites**

The COE Walla Walla District will employ a system linking their monitoring instruments to the COE Water Quality Laboratory in Walla Walla, Washington, and the CROHMS data base in Portland. Rather than relying on a direct satellite link from the monitoring instrument to Portland, this system utilizes remote computers and modems to link the monitoring instruments with the Water Quality Lab and ultimately to the CROHMS data base. This new system will

allow prescreening of the data sent for posting on the CROHMS data base and the bi-directional communication capability will allow a direct interrogation link between the Water Quality Lab and the remote monitors enabling real-time data inquiry and troubleshooting. The data collected and the final reporting process will be the same as for the other monitoring sites, as described in section 2.2.1. above.

### 2.3 Quality Assurance/Quality Control

Data accuracy and consistency are critical to successful spill management. Quality control of data collection and reporting is the responsibility of the COE.

Measurements will be made of barometric and DGS pressure, water temperature, and dissolved-oxygen concentration using a portable field instrument that has been previously calibrated to local conditions. If the monitoring instrument values are found to yield DGS values different than those provided by the calibrating equipment, the COE will make the necessary corrections to the data previously reported as soon as possible.

In past years, NMFS has recommended weekly, rather than the COE's bi-weekly, maintenance of the monitoring instruments. We continue to do so, however, we recognize that the COE has improved the quality of the instruments and the attention provided through acquisition of new equipment and new contractual arrangements. We intend to re-examine our recommendation after we receive the COE's 1996 annual dissolved gas monitoring report and any other documentation supporting the COE's current bi-weekly maintenance program.

In addition to instrument verification, data verification will be accomplished by the COE's NPD Reservoir Control Center (RCC) through comparison with expected model or empirical values. Raw data will be immediately posted on the CROHMS system upon receipt from the field. However, suspect data will be identified and, when possible, corrected by the RCC personnel as soon as the error is detected. These changes will be made real-time on the CROHMS and necessary corrective actions will be taken by the COE at the project in question. Significant and unexpected changes will be reported to the Fish Passage Center for their use in meeting the reporting requirements outlined in section 5 below.

Data continuity will be assured through rapid repair of faulty instruments. At least one backup monitor will be made available for deployment as necessary in each COE district. In any case, a malfunctioning monitor will be repaired within 24 hours, if DGS is expected to meet or exceed the current state standard at that site and within 48 hours at sites where DGS levels are expected to stay below state standards.

## 3.0 Biological Monitoring Program

### 3.1 Salmonid Gas Bubble Disease Monitoring

Juvenile salmonids will be routinely monitored for signs of GBD by the Smolt Monitoring Program and by NMFS in planned river reach resident monitoring efforts. Adult salmon will be monitored by selected agencies and/or their contractors for signs of GBD as they ascend fish ladders at selected Snake and Columbia River Dams.

### 3.1.1 Smolt Monitoring

#### 3.1.1.1. Fish Passage Center Monitoring

The Fish Passage Center (FPC) conducts a system-wide juvenile salmonid smolt monitoring program (SMP) on the Snake and Columbia Rivers. The FPC is responsible for maintaining extensive historical and real-time databases of dissolved gas and biological monitoring data pertaining to the juvenile outmigration. Under the direction of the FPC, GBD monitoring will be conducted at seven sites - Lower Granite, Little Goose, Lower Monumental, Ice Harbor Dams on the Snake River, Rock Island Dam on the mid-Columbia River, and McNary, John Day and Bonneville Dams on the lower Columbia River.

Specific information regarding smolt monitoring protocol is contained in Appendix C. Briefly, at all sites except Ice Harbor Dam sampling will occur on a three times-per-week basis when DGS levels measured at the dissolved gas monitoring sites are at or below the modified state water quality limits and on an every-other-day basis when DGS levels exceed these limits. Due to sampling constraints at Ice Harbor Dam, GBD examinations will occur here on a two times-per-week basis only. A daily maximum of 200 juvenile salmonids (100 each of the two predominate species) will be examined at each monitoring site (except at Rock Island where the maximum will be 100 chinook). This sample will consist of chinook and steelhead at all Snake River sites and will include other salmonid species at lower Columbia River sites. A sample size of 100 individuals of a given species will result in an estimate of the prevalence of GBD with a 95% confidence interval of  $\pm 6\%$ .

The sampled fish will be examined using a variable magnification (10X to 40X) dissecting scope. Unpaired fins, eyes, and lateral line will be examined for the presence of bubbles. Fish to be sampled will be taken from the separators at Snake River dams (except Ice Harbor) and at McNary Dam or the sampling device at Rock Island, John Day and Bonneville dams, held in water from the bypass system, and examined within 15 minutes. Due to sampling constraints at Ice Harbor Dam, the sampled fish will be collected from a sample holding tank. For each fish, time of day the fish was examined, species origin (hatchery, wild, etc.), fork length, rank of GBD in each fin, rank of GBD in the eye with the greatest rank, length of lateral line occluded, total length of lateral line (if occlusion is present), and comments on general fish condition will be recorded. These data will then be faxed and transmitted by modem to FPC's data center on a daily basis.

Research addressing relationships of bubbles in gill filaments to other signs of GBD and mortality will be conducted at a field location of high dissolved gas and in the laboratory. This

research will include evaluation of methods for non-invasive examination as well as evaluation of the power of magnification necessary for proper examinations. Details regarding this activity are available in the NMFS Gas Bubble Disease Research Program document referenced in section 1.2.2 above.

### 3.1.2 Adult Monitoring

Adult salmon migrating upstream will be sampled in the fish ladders at Bonneville and Lower Granite Dams. Additional sampling may occur at mid-Columbia sites depending upon the status of adult trapping activities in that reach. See Appendix D for further information on sampling and examination protocol.

#### 3.1.2.1 Bonneville Dam

The ongoing Pacific Salmon Treaty research of adult chinook and sockeye salmon stock identification and scale pattern analyses conducted by the Columbia River Inter-Tribal Fish Commission (CRITFC) will include an assessment of signs of GBD.

Evaluations will be conducted on adult salmonids entering the trap in the north shore fish ladder of Bonneville Dam. Intercepted fish will be anesthetized and examined visually for external signs of GBD. Following recovery, fish will be released back to the fish ladder.

Sampling will be conducted 3 days per week, 6 to 8 hours per day. Even with a fixed sampling rate, the percentage of the project passage of upstream migrating adults that is intercepted will depend largely on flow distribution between the powerhouses and spillway. It is expected that this percentage will be well under 5%.

If any signs of GBD are noted in adult salmonids at Bonneville Dam, the monitoring frequency will be increased to daily and CRITFC will notify NMFS and the FPC as soon as possible. The duration of daily monitoring will be determined by the TMT with consideration for the ESA directed take allowance for this activity.

#### 3.1.2.2 Lower Granite Dam

Adult fish passing Lower Granite Dam are routinely trapped, anesthetized, and examined for marks and to assess general physical condition. For the duration of the proposed 1998 spill program, trapped adult salmonids will be anesthetized and examined for external signs of GBD. After recovery from the anesthetic, adults will be returned to the ladder to continue their migration. The trap is operated about 8 hours per day and 7 days per week; overall sampling rate is about 10 percent of fish passing Lower Granite Dam.

#### 3.1.2.3 Supplemental Adult Monitoring Opportunities

Occasionally, opportunities for assessing the gas bubble disease signs in migrating adult salmonids will occur at sites in the mid and lower Columbia river and in the lower portions of tributaries. In each case, the sampled fish are collected for other fishery management, research or harvest purposes and the number of fish examined are limited by the needs of the particular project. For the 1998 season the following opportunities have been identified. In each case, the monitoring results will be reported in-season by the FPC through the process outlined in section 5 below.

Adult spring and summer chinook may be collected by Washington Department of Fish and Wildlife for broodstock at Wells Dam if the expected runsize is below 1000 fish and steelhead will be evaluated at Priest Rapids Dam.

Adult monitoring for signs of gas bubble disease will also occur at Three-mile Dam on the Umatilla River and at appropriate locations in the Native American fishery between Bonneville Dam and McNary Dam on the lower Columbia River. The Native American fishery, particularly the dip net fishery, offers the new opportunity of examining adults at locations between the dams. These opportunities will be coordinated by the CRITFC.

### 3.2 Monitoring of Resident Fish Species

During the 1997 spill season, NMFS will monitor for signs of GBD in resident fish species at three river reaches; Priest Rapids Reservoir, downstream from Ice Harbor Dam, and downstream from Bonneville Dam. Sampling will occur once each week from April through July or August (depending on site location). Up to 100 individuals of the predominant taxa will be collected and examined at each site. If DGS levels exceed 115% and/or signs of GBD are detected, sampling effort will be increased to include additional sites in the affected river reach. Data collected will include fish species, life-history stage, size, location of capture, macroscopic and microscopic external signs of GBD including examinations of lateral lines, fins, and eyes and dissolved gas supersaturation at the sample site.

For a more complete description of 1997 resident aquatic species monitoring and evaluation, see Appendix E.

### 3.3 Quality Assurance/Quality Control

Each biological monitoring agency will be responsible for an internal quality assurance/quality control function. These efforts are explained for each element of the monitoring program in the appendices at the end of this document.

Briefly, several quality assurance/quality control checks will be included in the salmon and resident fish monitoring efforts. In the early weeks of the spill program, a supervisory fishery biologist, with expertise in the GBD examination process will visit each monitoring site

on a weekly basis to assess the accuracy of the examinations and data recording process. Daily, throughout the spill season, data entered at the monitoring site will be checked by the person entering the data. Data faxed to the FPC will be checked by the person sending the fax against raw data to insure that the summary data are correct. Data summaries sent to the FPC data center will be faxed and sent in spreadsheet format via modem. The raw data will also be transmitted in spreadsheet format via E-Mail to the data center. This data will be checked against the summary data prior to transfer to the permanent database. Any errors will be corrected and documented.

#### **4.0 Program Quality Assurance/Quality Control**

Individuals knowledgeable in the field of dissolved gas supersaturation research and management were invited to participate in discussions regarding dissolved gas issues by NMFS in early 1995. This Dissolved Gas Team (DGT) (formerly Bubble Disease Technical Work Group) was recommended by the Gas Bubble Disease Working Group convened by NMFS in November, 1994. The DGT is co-chaired by NMFS and the Northwest Power Planning Council. It includes participation by the state and federal agencies and tribal governments that share responsibility for managing water quality and fisheries in the Pacific Northwest, and other interested parties. This working group will consider the monitoring program, the quality and interpretation of the monitoring data and short-term and long-term research needs.

In the past monitoring seasons, the DGT has established a monitoring oversight team to review the GBD monitoring program activities during the period of increased spill. This monitoring oversight team supplemented the quality control/quality assurance efforts implemented by the monitoring agencies. This guidance has led to capable stand alone efforts. The DGT will serve as a forum for inseason review and discussion of quality control/quality assurance activities. Monthly meetings will be scheduled throughout 1998, however, additional meetings may be held when necessary.

#### **5.0 Reporting**

The Fish Passage Center will serve as the central repository for information collected from GBD biological monitoring in the Columbia River Basin. The COE will continue to serve as the central repository for dissolved gas monitoring data.

Results of monitoring activities will be compiled daily by the FPC and COE; the FPC will then assemble these data sets into an agreed-upon format (see Appendix C) and provide the compiled information on a daily basis to the fisheries managers and all interested parties including the TMT, Oregon DEQ and Washington DOE.

Included in the compiled information will be 1) 12- and 24- hour average and maximum DGS levels for the forebay and tailrace of each mainstem dam, river locations downstream from



Bonneville Dam, and backup monitors and 2) sample size, prevalence and rank of external signs of GBD among juvenile and adult salmonids sampled at each sampling site and resident fish sampled in river reach monitoring. A cover memo will also be included which will include any caveats or other items of interest pertaining to the DGS monitoring program or report data. Monitoring information will also be posted on the Fish Passage Center's Internet website at <http://www.teleport.com/~fpc/>.

## **6.0 Action Levels**

### **6.1 Dissolved Gas Supersaturation**

#### **6.1.1 Lower Snake and Lower Columbia River**

Specific monitoring sites for the purposes of in-season dissolved gas management should be selected on the basis of data consistency and relationship to expected fish exposure. Until it can be determined how tailrace monitoring stations relate to the river reaches between monitoring sites and how DGS data collected at these sites relates to fish experience, NMFS recommends the use of forebay monitoring data for in-season management. Water quality agencies, however, have recommended that monitoring occur in the dam tailraces where the highest DGS occurs. While NMFS believes that tailrace monitors are of limited usefulness at this time, they probably best estimate maximum acute exposure, particularly for adults. In 1998, DGS management will utilize both monitoring locations as explained below.

The management action calls for spill levels necessary to meet the FCRPS Biological Opinion requirements of 80% fish passage efficiency at each spilling project below Lower Granite Dam on the lower Snake and lower Columbia Rivers. Regardless of spill requirement, spill will be reduced as necessary when the 12-hour average DGS exceeds 115% of saturation (or as limited by state water quality standard modifications) at the forebay monitor of any Snake or lower Columbia river dam or at the Camas/Washougal station below Bonneville Dam. Spill will also be reduced when 12 hour average DGS exceeds 120% of saturation (or as limited by state water quality standard modifications, including a maximum instantaneous value) at the tailrace monitor at any Snake or lower Columbia River dams. Average concentrations of dissolved gas will be calculated using the 12 highest hourly measurements per calendar day.

### **6.2 Prevalence of GBD**

Steps will be taken to reduce total dissolved gas levels in the river above the monitoring location(s) when external signs of GBD on juvenile salmon exceed the following action levels. If such a reduction becomes necessary, forebay and tailrace dissolved gas level readings should be adjusted through methods recommended by the TMT (see section 6.3 below).

#### **6.2.1. Action Levels Based on Monitoring of Juvenile Salmonids**

With the current level of scientific understanding, the biological signs of GBD observed at a particular level of DGS are difficult to correlate to in-river mortality of juvenile salmonids. Through 1997 the BRD continued experiments at the Columbia River Field Station to correlate signs of GBD and mortality levels with dissolved gas supersaturation exposure history. The preliminary results of these studies indicated that bubbles in the gill lamellae did not appear to be a reliable indicator of exposure history even though they are highly relevant to mortality. Bubbles in the lateral line and unpaired fins continue to show promise as an indicator of DGS exposure since the severity of these signs progress with exposure. Additionally, the researchers have been unable to develop a reliable non-lethal method of examining gill lamellae in salmonids while bubbles in unpaired fish are persistent and relatively easy to detect. Results to date suggest that unpaired fin bubble content continues to be the best GBD sign to use for determining the risk of mortality due to exposure to high levels of DGS.

Action to reduce the level of dissolved gas supersaturation should be taken if 15% of the fish examined exhibit any bubbles on unpaired fins or 5% of the fish examined exhibit bubbles covering 25% or more of the surface of any unpaired fin. These action levels are a conservative interpretation of previous BRD research results which indicated that significant mortality did not occur in the test fish until approximately 60% exhibited bubbles in the fins or 30% exhibited bubbles covering 25% or more of any unpaired fin. These levels were reduced primarily because the BRD test results thus far have indicated a substantial variation between fin bubble percentage and the onset of mortality. Further modification of these action levels may occur in-season as the BRD and other research efforts progress.

#### 6.2.2. Action Levels Based on Monitoring of Adult Salmonids

Very little information is currently available to help determine biological action levels for adult salmonids. Therefore, NMFS recommends that actions to reduce dissolved gas supersaturation levels be taken when any of the adult salmon examined at adult monitoring locations described in section 3.1.3. above exhibit external signs of gas bubble disease. To be certain an observation is not an anomaly, this action threshold will only be triggered with observations on two or more fish during the same day at the same sampling site or one fish on two or more successive sampling periods at the same sampling site OR a photograph of the fish, after expert review, verifies the presence of gas bubble disease signs.

Survival of upstream migrating adult salmon is especially critical. The above limit is based on a no-harm standard.

#### 6.3. Dissolved Gas Management

The Working Group of Gas Bubble Disease Experts assembled by NMFS in June, 1994 (NMFS panel on GBD 1994), advised that, based on our current level of understanding primary DGS management should occur on the basis of dissolved gas monitoring results. This expert

working group believed that current biological monitoring methods and our understanding of the biological signs were not sufficiently developed for inseason management purposes. Research programs conducted in 1995, 1996, 1997 and those scheduled for 1998 address these deficiencies. For the 1998 spill management season, however, dissolved gas measurements will again be used as the primary parameter for DGS management, as outlined in section 6.1.1 above. Biological indicators will serve a fail safe function, indicating a failure in our assumption that our chosen DGS limits are unlikely to cause harm greater than the benefits of spill, as indicated in the FCRPS Biological Opinion.

Dissolved gas and biological effects of spill will be evaluated in-season on a daily basis by members of the Technical Management Team. This team includes technical representatives from the National Marine Fisheries Service, U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers, Bureau of Reclamation, Bonneville Power Administration, Environmental Protection Agency, Northwest Power Planning Council and the regional state and tribal fishery management agencies. At weekly meetings (Wednesdays) or on an emergency basis, recommendations to continue or adjust spill will be reviewed by the TMT as identified in the FCRPS Biological Opinion. The TMT will forward operational recommendations to the COE for implementation. These recommendations will also be provided to the ODEQ and WDOE for their review. The recommendations to modify spill will be based on the results of dissolved gas and biological monitoring using the criteria described above. Disputes regarding action issues can be elevated to the Implementation Team (a policy level decision making body with the same agency composition as the TMT).

## REFERENCES

- Backman, T.W.H., A.F. Evans, M.A. Hawbecker. 1997. Symptoms of gas bubble trauma induced in salmon (*Oncorhynchus* spp.) by total dissolved gas supersaturation of the Snake and Columbia Rivers, USA. Draft 1996 annual report. Project #93-008-02. Prepared for Bonneville Power Administration, P.O. Box 3621, Portland, OR 97208.
- ~~Corps of Engineers. 1996. 1996 Dissolved Gas Monitoring - Columbia and Snake Rivers. Annual Report. Available from U.S. Army Corps of Engineers, North Pacific Division, Reservoir Control Center, Fish and Water Quality Section, Portland, OR.~~
- Fish Passage Center. 1998. 1997 Weekly Reports. (Available from Fish Passage Center, 2501 S.W. First Ave., Suite 230, Portland, OR 97201-4752.)
- Montgomery Watson. 1996. Examination of hatchery steelhead gills for gas emboli - 1996 and investigative examination of hatchery steelhead for additional signs of GBD. 3 pp. Summary Report Prepared for Bonneville Power Administration, P.O. Box 3621, Portland, OR 97208.

NMFS Panel on Gas Bubble Disease. 1994. Recommendations, June 1994. 10 p. (Available from Northwest Fisheries Science Center, 2725 Montlake Blvd. E., Seattle, WA 98112.)

**Endangered Species Act - Section 7  
Consultation**

**BIOLOGICAL  
OPINION**

**Reinitiation of Consultation on 1994-1998  
Operation of the Federal Columbia River  
Power System and Juvenile Transportation  
Program in 1995 and Future Years**

**Agencies: U.S. Army Corps of Engineers  
Bonneville Power Administration  
Bureau of Reclamation  
National Marine Fisheries Service**

**Consultation Conducted By: National Marine Fisheries Service,  
Northwest Region**

**Date Issued: March 2, 1995**

## **Reasonable and Prudent Alternative - Measure 2.**

### **2. The COE shall spill at the Snake and Columbia River projects in order to increase fish passage efficiency and survivals at the dams.**

The COE, during the juvenile spring/summer chinook migration season (April 10 - June 20 in the Snake River and April 20 - June 30 in the Columbia River), shall spill at all projects, including collector projects, to achieve a fish passage efficiency target of 80%, except under the following low flow conditions: During any week in which unregulated weekly average flows at Lower Granite Dam are projected to be less than 100 kcfs, no spill shall occur at Lower Granite Dam; during any week in which unregulated weekly average flows at Lower Granite Dam are projected to be less than 85 kcfs, no spill shall occur at Lower Granite, Little Goose, and Lower Monumental dams, unless the TMT recommends that spill occur. During the fall chinook migration season (June 21 to August 31 in the Snake River and July 1 to August 31 in the Columbia River) the COE shall spill at all non-collector projects to achieve a fish passage efficiency target of 80%.

It is NMFS' view that the best condition for an evaluation of the effects and efficacy of spill to improve inriver survival would be for a single spill regime to prevail throughout the spring migration season. NMFS' first draft of the biological opinion used a volume runoff forecast in the Snake River to trigger spill operations, which would then remain constant during the season. In making recommendations to spill at collector projects when flows are below target levels, the TMT should take into consideration the objective of having a credible evaluation of the spill program. Accordingly, TMT recommendations to spill at the above projects in the Snake and Columbia rivers at flows below the triggers specified should take into account past flow conditions and future flow projections, how close flows are to the trigger levels and how much augmentation is planned, the timing of the juvenile migration, and the need for a credible evaluation. If the use of weekly flow triggers compromises an evaluation, NMFS will consider returning to a volume runoff approach.

During low flow periods, spill at collector projects is reduced or eliminated in order to increase the proportion of fish transported. The discussion under measure 3 explains the rationale for increasing transportation under low flow conditions.

Spill levels calculated to obtain an 80 percent fish passage efficiency are listed below for each lower Snake and lower Columbia River dam. These levels are expressed in percent of instantaneous project flow during the spill period and were calculated with the best available information regarding spring and fall chinook salmon guidance efficiency, spill efficiency, fish passage diel and project operating conditions. Spill periods are 24 hours at Ice Harbor, The Dalles and Bonneville Dams and 12 hours (1800-0600) at all others.

DAM            LGR LGS LMN IHR MCN JDA TDA BON

% Flow, Spring 80 80 81 27 50 33 64 \*

% Flow, Summer \*\* \*\* \*\* 70 \*\* 86 64 \*

\* An 80% FPE level is not obtainable at Bonneville Dam given a day time spill cap of 75 kcfs and the current low fish guidance efficiency levels. This spill cap (in place to reduce adult fallback) limits obtainable spring FPE to 74% and summer FPE to 59% at 100 percent nighttime spill.

\*\* Spill is not recommended at these projects for summer migrants.

The spill levels necessary to obtain this FPE may be limited by total dissolved gas (TDG) in the river between each project. Specific monitoring sites for the purposes of in-season dissolved gas management should be selected on the basis of data consistency and relationship to fish exposure. Until it can be determined how tailrace monitoring stations relate to the river reaches between monitoring sites and how TDG data collected at these sites relate to fish experience, forebay monitoring data will be used for in-season management. Water quality and other fishery management agencies have recommended that monitoring sites be located below mixing areas, the forebay monitors are the only presently established monitors that consistently provide mixed flow data. Tailrace monitors are of limited usefulness at this time, however, they probably best estimate maximum acute exposure, particularly for adults.

Spill will be reduced as necessary when the 12 hour average TDG concentration exceeds 115% of saturation (or as limited by state water quality standard modifications) at the forebay monitor of any Snake or lower Columbia river dam or at the Camas/Washougal station below Bonneville Dam or another suitable location to measure accurately chronic exposure levels. Spill will also be reduced when 12 hour average TDG levels exceed 120% of saturation (or as limited by state water quality standard modifications) at the tailrace monitor at any Snake or lower Columbia River dams. Average concentrations of dissolved gas will be calculated using the 12 highest hourly measurements per calendar day. The use of 12-hour averages, rather than 24-hour averages, is an attempt to set a more conservative standard, and to relate the measured concentrations of dissolved gas to the 12-hour spill cycles. Spill will also be reduced when instantaneous TDG levels exceed 125% of saturation (or as limited by state water quality standard modifications) for any two hours during the 12 highest hourly measurements per calendar day at any Snake or lower Columbia River monitor.

The intent of these gas caps is to ensure that the long term exposure of adult and juvenile migrants is to TDG levels that do not exceed 115%. NMFS concludes this operation accomplishes that goal for several reasons. Radio telemetry studies indicate that juvenile salmonids tend to move out of tailrace areas within a few hours (Snelling and Schreck

unpublished) and that adults tend to move about laterally in tailraces prior to ascending ladders (Johnson et al. 1982, Turner et al. 1983). These movement patterns limit exposure to high spill basin TDG levels. As spilled water moves out of the tailrace the TDG level decreases at some point below the project (depending on ratio of these flows and river topography) because the spilled water mixes with water from the powerhouse. For instance, Blahm (1974) found that, given moderate spill levels, the river was well mixed within 2.5 miles of The Dalles Dam and 15 miles below Bonneville Dam. The requirement that TDG levels in the forebay be limited to 115% will help ensure that areas where migrating juveniles may spend long periods of time do not have TDG levels in excess of 115%. Radio tag studies have indicated that some spring migrating juvenile salmon may be delayed from several hours to several days in these areas (Snelling and Schreck unpublished, D. Rondorf, NBS, February 24, 1995, pers. comm.). Finally, the fact that spill is intermittent at many projects will help limit dissolved gas exposure of fish holding in the forebays and other areas between the projects. This is particularly true for adult migrants.

After reviewing available information on dissolved gas exposure as well as information and recommendations submitted by the parties during the IDFG v. NMFS discussions, NMFS concluded that 115% TDG measured in the forebays was a reasonable interim measure to adopt. Several commenters argued that the Environmental Protection Agency's recommended water quality limit of 110% represented an appropriate level and should not be varied. State and tribal entities developed a risk assessment that suggested that long term exposure to 120% did not pose significant risks to migrating fish and that the benefits of improved dam passage outweighed these minimal risks of TDG exposure at 120%. Still other commenters noted the spill at collector projects reduced the numbers of fish transported and that any risk assessment had to consider the benefits of transportation. The issue of transportation is addressed more fully in measure 3 below.

NMFS concluded that it was appropriate to seek an operation that would result in the EPA criteria of 110% being exceeded primarily because of: 1) the ability of fish in a river environment to compensate hydrostatically for the effects of dissolved gas supersaturation, and 2) the daily fluctuation in levels of dissolved gas throughout most of the river. In a river environment, depth of migration reduces TDG effects on migrants. Each meter of depth provides pressure compensation equal to a 10% reduction in TDG. Shew et al. (Undated) and Turner et al. (1984b) noted through tunnel studies that net entry rates through McNary and Bonneville dam ladder entrance tunnels were highest for the deepest (3.4m) tunnels. Other studies indicate that adult and juvenile salmon tend to spend most of their time at or below one meter of depth (Smith 1974). Blahm (1975) concluded that shallow water tests were "not representative of all river conditions that directly relate to mortality of juvenile salmon and trout in the Columbia River." In deep tank tests, salmonids exposed to 115% TDG levels did not experience significant mortality until exposure time exceeded approximately 60 days (Dawley et al. 1976).

NMFS also concluded that it was not appropriate as an initial interim level to seek an operation that would result in chronic exposure to TDG level of 120%, as recommended by the states and



tribes. In general, chronic exposure to TDG levels of 120% with hydrostatic compensation does not cause significant mortality until exposure time exceeds 40 days (Dawley et al. 1976). This is generally more time than it takes Snake River juvenile and adult migrants to travel between Lower Granite and Bonneville dam. Nevertheless, NMFS concluded that the more conservative level of 115% is appropriate because of concerns about the potential sublethal effects of gas bubble disease. The state and tribal report on "Spill and 1995 Risk Management" summarized the studies showing evidence that swimming performance, growth and blood chemistry are affected by high dissolved gas levels. The report correctly states that it is only inferential that these symptoms may result in susceptibility to predation, disease and delay. In fact, studies conducted in 1993 and 1994 by the National Biological Service indicated that juvenile chinook salmon that have been exposed for eight hours to high TDG (and exhibiting microscopic signs of gas bubble disease) are no more vulnerable to northern squawfish predation than control fish that had been held in equilibrated water (Mesa and Warren, in review). Ultimately the analysis in the state and tribal report did not assume any level of mortality as a result of these sublethal effects.

NMFS concludes that the impairments to migrating fish as a result of the sublethal effects of dissolved gas may be sufficiently grave to warrant caution in setting long term exposure levels above 110%. In particular, long term exposure to levels in excess of 110% decrease swimming ability (Dawley and Ebel, 1975); fish stressed with high levels of dissolved gas have been reported to have less swimming stamina (Dawley et al., 1975); and gas bubbles in the lateral line can impair sensory ability. In addition, although fish in deep tank studies are less affected by high levels of TDG than fish in shallow tanks, some mortalities still occur despite a water depth that is apparently adequate for protection. There is no evidence that fish can 'sense' TDG supersaturated water and deliberately sound to compensate.

At specific projects where specific levels of spill, particularly daytime spill have been shown to be detrimental to fish passage, timing and/or amounts of spill may have to be adjusted (for specific details see NMFS 1994b). Spill may also be limited at projects where it can be demonstrated that spill may be detrimental to system spill allocation. One such project is John Day Dam, where very low amounts of spill result in very high TDG levels. These high TDG levels then limit the amount of spill possible at dams downstream. For instance, by reducing spill by 10 to 20 kcfs at John Day Dam, it may be possible to increase spill at The Dalles or Bonneville dams by 20 to 40 kcfs. The exact relationship will need to be developed through in-season spill/TDG testing. The limitation of spill may also apply at The Dalles Dam to minimize the passage of spilled flow and fish over the high predation risk area in the shoals below the dam (see specific details in NMFS (1994b). The details regarding this limitation will be decided in-season through consultation with predation experts and will likely depend on ambient flow and the spill levels obtainable under the TDG limitations. In 1995, spill at Ice Harbor, The Dalles, and John Day Dams may be modified to accommodate research activities if NMFS determines that the spill modifications will not affect the validity of the transport vs. in-river survival study. These spill operations should be treated as interim until the effects of TDG on migrating salmonids are more fully evaluated and until a spill/transport rule curve can be developed. The rationale for flow targets associated with spill at collector projects is related to transportation

policy and discussed under measure 3 below.

Migration over the spillways or through the bypass systems are the safest routes of passage at the dams. Injury and mortality can occur through each route of passage (turbines, spillways, ice and trash sluiceways, juvenile fish bypass systems), but loss rates via the spillways and bypass systems are low relative to passage by the turbines. For both spring/summer and fall chinook salmon, mortality of fish passing over the spillways or through the bypass systems generally ranges from 0-3% (Schoeneman et al. 1961; Heinle 1981; Ledgerwood et al. 1990; Raymond and Sims 1980; Iwamoto et al. 1994). Direct turbine mortality can range from 8-19% for yearling chinook salmon and 5-15% for subyearling chinook salmon (Holmes 1952; Long 1968; Ledgerwood et al. 1990; Iwamoto et al. 1994). Values of turbine and spill mortality are not available for sockeye salmon. However, it is reasonable to assume that these values are similar to or greater than values for yearling chinook salmon due to size and timing of migration and due to the greater susceptibility of sockeye to physical injury and mortality in project passage and handling (Gessel et al. 1988; Johnsen et al. 1990; Koski et al. 1990; Parametrix 1990; Hawkes et al. 1991).

This spill program is experimental due to uncertainties about benefits of transportation of smolts relative to in-river migration, as well as uncertainties about the effect of nitrogen supersaturation on free-swimming fish in the river. Gas supersaturation is a negative effect of spill and the precise relationship between spill levels and gas bubble disease in juvenile and adult salmon migrating in the Columbia and Snake Rivers is not known. The spill program will be accompanied by an extensive physical and biological dissolved gas monitoring effort (see measure 16) as well as studies to assess reach survival and to compare survival of transported versus in-river migrants, as well as studies that compare adult returns from transported fish versus fish that migrate in-river under improved in-river migration conditions (i.e., improved flows and improved passage survival at dams through spill). Ideally a spill program, rather than setting a gas cap across all projects, would be based on a project-by-project analysis, with the benefits of spill passage balanced against the risks of gas bubble disease at each project. Such an analysis will require more information about the TDG levels that result at different levels of spill at each project, in relation to spill at other projects, and more information about the lethal and sublethal effects of creating supersaturated conditions through the river.

**APPENDIX B**

**DISSOLVED GAS MONITORING PROGRAM  
PLAN OF ACTION FOR 1998  
Draft/24 February/Final**

**APPENDIX C**

**1998 GBT Monitoring Program Protocol for Juvenile Salmonids**

**APPENDIX D**

**1998 GBT Monitoring Protocol for Signs of GBT in Adult Salmonids**

**APPENDIX E**

**PROTOCOLS FOR FISH HANDLING AND GAS BUBBLE DISEASE ASSESSMENT**


**FOR: Evaluation of the Effects of Dissolved Gas Supersaturation on Fish in the Mainstem Columbia and Snake Rivers, 1997**

**BY: National Marine Fisheries Service**

State of Oregon  
Department of Environmental Quality

Memorandum

Date: January 30, 1998

**To:** Environmental Quality Commission  
**From:** Langdon Marsh, Director   
**Subject:** Agenda Item F., Review of the 1998 Water Quality Limited Waterbodies (303 (d)) List, Process and Requirements, EQC Meeting February 20, 1998

**Statement of Purpose**

This is an informational item intended to familiarize the commission with the Water Quality Limited (303(d) List and the process and requirements associated with the development of the list.

**Background**

Section 303 (d) of the 1972 federal Clean Water Act requires each state to biennially identify streams, rivers, lakes and estuaries (waterbodies) that do not meet water quality standards. These waters are referred to as "water quality limited". In Oregon the Department of Environmental Quality (DEQ) is responsible for the development of this list. DEQ is required to submit this list to the U.S. Environmental Protection Agency (EPA) for its approval by April 1 of even numbered years. The list is used to identify those waterbodies where Total Maximum Daily Load (TMDL) are required to be developed by DEQ. Priorities for the development of TMDLs are developed as part of the listing process.

The list is only meant to identify the water quality problems of the waterbody and not the cause. The cause of a water quality problem is investigated later as Total Maximum Daily Loads are established and management plans are developed to correct water quality problems. The list includes both urban and rural waterbodies.

**Process** - The Department is expected to use, at a minimum, existing and readily available water quality data in preparing the Section 303(d) list. To that end a Public Notice was issued on September 22 requesting technical water quality data and reports from the public, government agencies, tribes, businesses and organizations to assist DEQ in evaluating the condition of streams, rivers, lakes and estuaries (waterbodies) in Oregon.

Over the last several months DEQ staff have evaluated the submitted information and data and made a determination about whether to list various segments of a waterbody based on the information. DEQ then compiled its determinations into a draft 303(d) Water Quality Limited Waterbodies list. The Department initiated a 60 day comment period on the draft 303(d) list

Memo To: Environmental Quality Commission

**Agenda Item F.**, Review of the 1998 Water Quality Limited Waterbodies (303 (d)) List, Process and Requirements, EQC Meeting February 20, 1998 Page 2

beginning February 17, 1998. The Public Comment Period will include several public hearings and workshops to be held between March 16 and April 3<sup>rd</sup>, 1998.

Once the comment period closes on April 17, 1998 DEQ will then review and consider all comments received as part of the Public Comment process. A Response to Public Comments document and a modified 303(d) list will be produced. It is then anticipated that the 303(d) list and related documents will be submitted to EPA in early May, 1998 for approval.

**History** - Before 1996 the 303(d) list was fairly small, with less than 50 segments. However, beginning in the early 1990's EPA revised its guidelines on what types of criteria should be used to list waterbodies under section 303(d). These required criteria expanded the types of data to be considered and included temperature and narrative standards which had not been considered in previous lists. The 1994/96 list expanded the listed segments to 869.

**TMDL's** - There is a direct relationship between the 303(d) list and TMDL's. Those waterbodies on the 303(d) list are required by the Clean Water Act to have TMDL's developed for them or an alternative management plan that will function as a TMDL. Since both point and non-point sources of pollution affect water quality, DEQ has developed TMDL methods to deal with both kinds of pollution. Additionally, DEQ will also be working with both the Department of Agriculture as they implement SB1010 for agricultural practices and the Department of Forestry as they implement the Forest Practices Act for water quality concerns. Waters on the 303(d) list will be addressed on a watershed basis and will be the focus for the Oregon Plan for Salmon and Watersheds.

**List Management** - The Department considered all data and information it received during the Call for Data Public Notice (September 22 to November 21, 1997). However, special effort was put into having as complete as possible listing of water quality limited waterbodies in the priority 1 basins that are targeted for TMDL's in the next few years. These basins include those targeted in the Oregon Plan for Salmon and Watersheds (Rogue, Umpqua, the coast basins and the Grande Ronde).

Waterbodies are removed from the list in one of four ways: (1) if current information indicates the waterbody is meeting water quality standards, (2) if a waterbody was placed on the list in error, (3) if the waters are violating water quality standards due only to natural conditions (meaning that there is no human-caused influence), or (4) a TMDL or alternative plan has been developed for the waterbody and approved by EPA.

DEQ will continue to track those waters removed from the 303(d) list as TMDLs are developed, as well as, the status of other waterbodies within the state, to assure that water quality standards continue to be met.



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**Prioritization** - As part of the listing process DEQ is required to prioritize the list and "target" waterbodies for work in the following two years. DEQ has prioritized the waterbodies on a sub-basin basis based on four (4) levels:

- Level 1 focuses on whether threatened or endangered species are present in the basin, a public health concern exists or drinking water supplies are threatened;
- Level 2 waters are those with candidate fish species, shellfish or dry weather water contact recreation concerns;
- level 3 waters have concerns with salmonid habitat, wet weather water contact recreation, wild & scenic rivers and industrial water supply concerns;
- level 4 waters include livestock watering, other resident fish and aquatic life and aesthetics.

Targeted sub-basins have been identified for the initiation of TMDL development on a biennial basis over the next ten years.

**List Update** - As DEQ updated the 1994/96 list for 1998, some waterbodies were added, others modified and some delisted. These changes occurred for several reasons:

- 1) data was received which demonstrated a portion of a larger segment met the established water quality standard. In this case DEQ delisted the portion confirmed, by data, as meeting the standard;
- 2) additional data was collected (or made available) which demonstrated that a segment listed, now met the water quality standard;
- 3) Conversely, additional data showed a segment not listed (either because of lack of data or limited data) could now be determined to be water quality limited and was listed.
- 4) A segment was listed for more or less parameters than it had been listed for in the previous list.
- 5) Water quality conditions had improved to the point where the waterbody now met the water quality standard or water quality had deteriorated to the point where it no longer met the standard;
- 6) a TMDL or alternative plan had been developed and approved. In which case DEQ would remove from the list those segments and parameters covered by the TMDL or alternative plan.

DEQ will continually refine the 303d list as more data is collected and our knowledge increase about the condition of Oregon's waterbodies.

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### Authority of the Commission with Respect to the Issue

There is no requirement that the commission approve or otherwise accept the 303 (d) list. Where the commission's responsibilities occur are in the establishment of the standards use to determine whether a waterbody should appear on the list. The standards are used as the criteria to evaluate whether a waterbody is water quality limited. Additionally, the commission will be asked to review and approve those portions of a TMDL which require site specific rules for their implementation. These rules would deal with the setting of specific basin water quality parameters needed to limit certain pollutants to keep within the established TMDL.

### Alternatives and Evaluation

DEQ could choose not to develop a list. If DEQ chooses this option then EPA would be required under the Clean Water Act to develop the list for Oregon within 90 days.

### Summary of Public Input Opportunity

September 22, -	
November 21, 1997	Call for submittal of new Water Quality Data
February 17, 1998	Open Public Comment Period on 303(d) list
March 16 - April 3, 1998	Public Workshops/hearings on 303(d) list
April 17, 1998	Close of Public Comment period on 303(d)
Mid May 1998	Submit 303(d) to EPA for their approval
June 1998	EPA Approves Oregon's 303(d) list

### Conclusions

DEQ is in the process of updating the Water Quality Limited 303(d) list for 1998 as required by the Clean Water Act. The public comment period was opened on February 17, 1998 and will close on April 17, 1998. Public workshops/hearings will be held around the state in from March 16 to April 3, 1996. DEQ anticipates that it will submit a final 303(d) list to EPA for approval in mid May 1998.

### Intended Future Actions

DEQ will work with individuals, groups, local governments, watershed councils and its state and federal agency partners to address the concerns outlined for the 303(d) listed waters. This will include the development of TMDL's or alternative plans for the associated waterbodies.

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DEQ will begin the process of evaluating information and data for the next 303(d) list submittal, scheduled for April 1, 2000.

**Department Recommendation**

It is recommended that the Commission accept this report, discuss the matter, and provide advice and guidance to the Department as appropriate.

**Attachments**

None

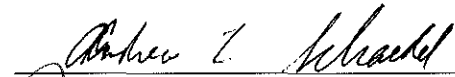
**Reference Documents (available upon request)**

Water Quality Limited Waterbodies (303(d)) List

Approved:

Section:

Division:



Report Prepared By:

Rick Kepler

Phone: (503) 229-6804

Date Prepared:

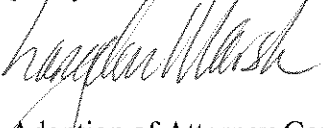
January 30, 1998

EQC Information Item Feb 20

**State of Oregon  
Department of Environmental Quality**

**Memorandum**

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**Date:** January 28, 1998  
**To:** Environmental Quality Commission  
**From:** Langdon Marsh   
**Subject:** Agenda Item G, Adoption of Attorney General's Model Rules, EQC Meeting:  
February 20, 1998

**Background**

The APA requires all agencies to adopt rules of procedure for use in rulemaking and contested cases. The APA also requires the Attorney General to adopt rules of procedure for petitions by interested persons requesting rulemaking or declaratory rulings by the agency that must be used by agencies. Finally, the APA requires the Attorney General to create model rules of procedure that agencies may adopt in whole or in part in order to meet the legal requirement of agency rules for procedure.

**Issue this Proposed Rulemaking Action is Intended to Address**

The EQC last adopted the Model Rules in early 1997. This adoption will bring the Department's rules into conformity with the latest version of the Model Rules. The Department is proposing to adopt the Model Rules without change but will exclude from adoption OAR 137-001-0008 through 0009 and OAR 137-005-0010 through 0070 which relate to collaborative dispute resolution.

**Summary of Public Input Opportunity**

If the Model Rules are adopted without change, under ORS 183.341(1), the Department may adopt the Rules by reference without public comment period or other public input.

**Authority to Address the Issue**

ORS 183.341(2) requires all agencies subject to the APA to adopt rules of procedure for use in rulemaking and contested cases. Adoption of the Model Rules satisfies this requirement. Furthermore, under ORS 183.390 and 183.410, the Attorney General must promulgate rules for petitions for rulemaking and declaratory judgment. These rules must be adopted as written by all agencies.

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Accommodations for disabilities are available upon request by contacting the Public Affairs Office at (503) 229-5317 (voice)/(503) 229-6993 (TDD).

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Page 2

**Recommendation for Commission Action**

It is recommended that the Commission adopt the rule amendments adopting the Attorney General's Model Rules as amended through September 15, 1997 as presented in Attachment A of the Department Staff Report.

**Attachments**

- A. Rule (Amendments) Proposed for Adoption
- B. Attorney General's Uniform and Model Rules, effective September 15, 1997

Report Prepared By: Susan M. Greco

Phone: (503) 229-5213

Date Prepared: January 28, 1998

# RULES OF GENERAL APPLICABILITY AND ORGANIZATION

## DIVISION 11

### Definitions

**340-11-005** The words and phrases used in this Division have the same meaning given them in ORS 183.310. Additional terms are defined as follows unless context requires otherwise.

(1) "Adoption" means the carrying of a motion by the Commission with regard to the subject matter or issues of an intended agency action.

(2) "Agency Notice" means publication in OAR and mailing to those on the list as required by ORS 183.335(6).

(3) "Commission" means the Environmental Quality Commission.

(4) "Department" means the Department of Environmental Quality.

(5) "Director" means the Director of the Department or the Director's authorized delegates.

(6) "Filing" means receipt in the office of the Director. Such filing is adequate where filing is required of any document with regard to any matter before the Commission, Department or Director, except a claim of personal liability.

(7) "Model Rules" or "Uniform Rules" means the Attorney General's Uniform and Model Rules of Procedure, OAR 137-01-005 through 137-04-080, excluding OAR 137-001-008 through 137-001-0009 as amended and in effect on January 1, 1996 September 15, 1997.

(8) "Presiding Officer" or "Hearing Officer" means the Commission, its Chairman, the Director, or any individual designated by the Commission or the Director to preside in any contested case, public, or other hearing. Any employee of the Department who actually presides in any such hearing is presumptively designated by the Commission or Director, such presumptive designation to be overcome only by a written statement to the contrary bearing the signature of the Commission Chairman or the Director.

**Attorney General's Uniform and Model Rules**  
(Effective through September 15, 1997)

Rules 137-01-0070 and 137-002-0010 through  
137-002-0060 are uniform rules of procedure. All  
others are model rules of procedure.

**OAR Chapter 137, Division 1**  
**Rulemaking**

**Definitions**

**137-001-0005** For the purposes of OAR 137-001-0005 to 137-005-0070, unless otherwise defined therein, the words and phrases used in these rules have the same meaning as given to them in ORS 183.310 and

(1) "Consensus" means unanimous concurrence among the participants in a dispute resolution process, unless the participants agree otherwise;

(2) "Convenor" means a person who aids in identifying appropriate issues and members for a negotiated rulemaking committee to develop a proposed rule, or who aids in identifying issues and participants for a collaborative dispute resolution process;

(3) "Collaborative dispute resolution process" or "collaborative DR process" means any process by which a collaborative dispute resolution provider assists the participants in working together to develop a mutually acceptable resolution to an issue in controversy. A collaborative DR process does not include:

(a) Contested case hearings;

(b) Meetings, outside of a negotiated rulemaking process, in which a facilitator is used solely to lead an orderly meeting, manage an agenda or assist the group in accomplishing tasks and the facilitator is not attempting to resolve a controversy by developing consensus among the participants;

(c) A process in which an agency employee negotiates, facilitates or mediates between the disputants solely through telephone or other electronic communication; or

(d) A process in which the resolution of the controversy is accomplished informally, without a written agreement between the disputants or an agency order.

(4) "Collaborative dispute resolution provider" or "collaborative DR provider" means an individual who assists the participants in a dispute resolution process to work together to develop a mutually acceptable resolution to an issue in controversy. The collaborative DR provider may function as a mediator, facilitator, convenor, neutral fact-finder or other neutral. Arbitrators, investigators, customer service representatives and ombudspersons are not considered collaborative dispute resolution providers.

(5) "Disputants" means agencies, persons or entities, or their representatives, who have a direct interest in a controversy and does not include a collaborative DR provider or person involved only as a witness.

(6) "Facilitation" means a process in which a collaborative DR provider encourages and fosters discussions and negotiations to assist in reaching consensus.

(7) "Mediation" means a process in which a collaborative DR provider assists two or more disputants in reaching a mutually acceptable resolution of the controversy.

(8) "Neutral fact-finder" means a third party who assists with the resolution of a controversy by conducting an investigation of critical facts and rendering non-binding, advisory findings.

(9) "Participants" means agencies, persons or entities involved in a dispute resolution proceeding, other than a collaborative DR provider or witness.

(10) "Agreement to collaborate" means the agreement specified in OAR 137-005-0030.

Stat. Authority: ORS 183.341, 183.502  
Stat. Implemented: ORS 183.310, 183.502

### **Public Input Prior to Rulemaking**

**137-001-0007** (1) The agency may seek public input before giving notice of intent to adopt, amend or repeal a rule. Depending upon the type of rulemaking anticipated, the agency may appoint an advisory committee, solicit the views of persons on the agency's mailing list maintained pursuant to ORS 183.335(7) and those legislators designated in ORS 183.335(14), or use any other means to obtain public views to assist the agency.

(2) If the agency appoints an advisory committee, the agency shall make a good faith effort to ensure that the committee's members represent the interests of persons likely to be affected by the rule. The meetings of the advisory committee shall be open to the public. Notice of committee meetings shall be provided to persons on the agency's mailing list maintained pursuant to ORS 183.335(7) and to those legislators designated in ORS 183.335(14).

(3) Written minutes shall be taken at all advisory committee meetings. The minutes must reflect all of the matters discussed and the views expressed by the participants. The agency's rules coordinator shall maintain copies of the minutes of any meetings of advisory committees appointed pursuant to this rule and any written input received by such committee or the agency concerning the anticipated rulemaking.

Stat. Authority: ORS 183.341  
Stat. Implemented: ORS 183.025(2), 183.330(2)

### **Assessment for Collaborative Dispute Resolution in Rulemaking**

**137-001-0008** (1) In lieu of, or in addition to, a rulemaking advisory committee appointed under ORS 183.025(2), the agency may, in its discretion, establish a negotiated rulemaking committee to develop and seek agreement on a proposed rulemaking action. In making a decision to use a negotiated rulemaking process, the agency may consider any factors the agency considers to be relevant, including whether--

(a) There is a need for a rulemaking action;

(b) There are a limited number of identifiable interests that will be significantly affected by the rulemaking action, and the representatives of such interests have sufficient expertise and resources to participate effectively in the negotiation process;

(c) There is a reasonable likelihood that a committee can be convened which is composed of persons who can adequately represent the interests identified under paragraph (b) and who are willing to negotiate in good faith to reach a consensus on the proposed rulemaking action;



(d) There is a reasonable likelihood that a committee will reach a consensus on the proposed rulemaking action within an appropriate period of time to avoid unreasonable delay in the agency's final rulemaking;

(e) The interest of the agency is in joint problem-solving, agreement or consensus which could best be met through negotiated rulemaking, and not solely in obtaining public comment, consultation or feedback, which may be addressed through an advisory committee;

(f) The agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and

(g) The agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rulemaking action as the basis for a notice of intended adoption, amendment or repeal of a rule pursuant to ORS 183.335.

(2) The agency may use the services of a convener to assist the agency in identifying persons, interest groups or entities who will be significantly affected by a proposed rulemaking action and the issues of concern to them, and in ascertaining whether a negotiated rulemaking committee is feasible and appropriate for the particular rulemaking action. Upon request of the agency, the convener may ascertain the names of persons who are willing and qualified to represent interests that will be significantly affected by the proposed rule.

(3) Upon request of the agency, the convener shall report findings in writing and may make recommendations to the agency. Any written report and recommendations of the convener shall be made available to the public upon request.

Stat. Authority: ORS 183.341, 183.502

Stat. Implemented: ORS 183.502

### **Use of Collaborative Dispute Resolution in Rulemaking**

**137-001-0009** (1) If, after consideration of the factors set out in OAR 137-001-0008, the agency chooses to establish a negotiated rulemaking committee, the agency shall inform persons on the agency's mailing list maintained pursuant to ORS 183.335(7) and those legislators designated in ORS 183.335(14) of the subject and scope of the proposed rulemaking action. This notice may include:

(a) The interests that are likely to be significantly affected by the rulemaking action;

(b) A proposed agenda and schedule for completing the work of the committee, including a target date for publication by the agency of its intended rulemaking action pursuant to ORS 183.335; and

(c) The membership of the rulemaking committee.

(2) The agency may limit membership on a negotiated rulemaking committee to ensure proper functioning of the committee or to achieve balanced membership. The committee shall include at least one person representing the agency.

(3) The person or persons participating on behalf of the agency on a negotiated rulemaking committee may participate in the deliberations and activities of the committee with the same status as other members of the committee. Such person or persons shall be authorized to speak for the agency in the discussions and negotiations of the committee and shall inform the committee of the decision making process within the agency that will be necessary to bind the agency to any consensus reached by the committee.

(4) A negotiated rulemaking committee established under this rule shall consider the matter proposed by the agency and attempt to reach a consensus concerning a proposed rulemaking action with respect to such matter and any other matter the committee determines is relevant to the proposed rulemaking action.

(5) The agency may nominate an agency employee or anyone else to serve as a facilitator for the negotiations of the committee, subject to the approval of the committee by consensus. In submitting the nominee for approval, the agency may state any financial or other limitations that may affect the choice of a facilitator. If the committee does not approve the agency's nominee for facilitator, the agency may submit a substitute nomination or allow the committee to select by consensus a person to serve as facilitator. A person designated to represent the agency in substantive issues may not serve as a facilitator or otherwise chair the committee.

(6) A facilitator approved or selected by a negotiated rulemaking committee shall chair the meetings of the committee in an impartial manner, impartially assist the members of the committee in conducting discussions and negotiations, and manage the keeping of minutes and records.

(7) For purposes of a negotiated rulemaking, both convenors and facilitators are considered dispute resolution providers, except that the agency's personal services contract for convenors need not contain the elements listed in OAR 137-005-0040(6)(b).

(8) A negotiated rulemaking committee established under this rule may adopt procedures for the operation of the committee. If the committee reaches a consensus on a proposed rulemaking action, the committee shall transmit to the agency a report containing the proposed rulemaking action. The committee may include in its report any other information, recommendations or materials that the committee considers appropriate. If the committee does not reach a consensus on a proposed rulemaking action, the committee may transmit to the agency a report specifying any areas in which the committee did reach a consensus and any other information the committee wishes to transmit to the agency.

(9) If the agency chooses to proceed with a rulemaking action after receiving the report of the committee, the agency shall comply with the rulemaking procedures in ORS 183.325 to ORS 183.355.

(10) The agency may request the committee to reconvene after a notice of proposed rulemaking action required by ORS 183.335(1) in order to consider any public comments received by the agency related to the rule. If the agency wishes to receive input from the committee after the deadline for comment on the proposed rulemaking action, the agency shall extend the comment deadline in order to receive such recommendations from the committee. The agency shall provide notice of the extended deadline to persons on the agency's mailing list maintained pursuant to ORS 183.335(7), to those legislators designated in ORS 183.335(14) and to persons identified in its notice rule adopted under ORS 183.341(4).

(11) The negotiated rulemaking committee shall terminate upon the agency's adoption, amendment or repeal of the final rule under consideration, unless the committee specifies an earlier termination date. The agency may terminate the negotiated rulemaking committee at any time.

(12) The members of a negotiated rulemaking committee are responsible for their own expenses of participation in the committee. If authorized by law, the agency may pay a

member's reasonable travel and per diem expenses and other expenses as the agency deems appropriate.

Stat. Authority: ORS 183.341, 183.502  
Stat. Implemented: ORS 183.502

### **Rulemaking Format**

**137-001-0011** When the agency proposes to amend an existing rule, the agency shall set forth the rule in full with matter proposed to be deleted enclosed in brackets and proposed additions shown by bold face.

Stat. Authority: ORS 183.341  
Stat. Implemented: ORS 183.335(2)

### **Limitation of Economic Effect on Businesses**

**137-001-0018** (1) Based upon its economic effect analysis under ORS 183.335(2)(b)(D) or upon comments made in response to its rulemaking notice, the agency shall, before adoption of a rule, determine whether the economic effect upon business is significantly adverse.

(2) If the agency determines there is a significant adverse effect on a business or businesses, it shall, modify the rule to reduce the rule's adverse economic impact on those businesses to the extent consistent with the public health and safety purposes of the rule.

(3) Modification to reduce the rule's adverse economic impact on small business shall be as provided in ORS 183.540.

Stat. Authority: ORS 183.341  
Stat. Implemented: ORS 183.341(1), 183.540

### **Conduct of Rulemaking Hearings**

**137-001-0030** (1) The hearing to consider a rule shall be conducted by and shall be under the control of the presiding officer. The presiding officer may be the chief administrative officer of the agency, a member of its governing body, or any other person designated by the agency.

(2) At the beginning of the hearing, any person wishing to be heard shall provide name, address, and affiliation to the presiding officer. The presiding officer may also require that the person complete a form showing any other information the presiding officer deems appropriate. Additional persons may be heard at the discretion of the presiding officer.

(3) At the beginning of the hearing, the presiding officer may summarize the content of the notice given under ORS 183.335, unless requested by a person present to read the notice in full.

(4) Subject to the discretion of the presiding officer, the order of the presentation shall be:

- (a) Statements of proponents;
- (b) Statements of opponents; and
- (c) Statements of other witnesses present and wishing to be heard.

(5) The presiding officer or any member of the agency may question any witness making a statement at the hearing. The presiding officer may permit other persons to question witnesses.

(6) There shall be no additional statement given by any witness unless requested or permitted by the presiding officer.

(7) The hearing may be continued with recesses as determined by the presiding officer, until all listed witnesses have had an opportunity to testify.

(8) The presiding officer shall, when practicable, receive physical and documentary evidence presented by witnesses. Exhibits shall be marked and shall identify the witness offering the exhibit. Any written exhibits shall be preserved by the agency pursuant to any applicable retention schedule for public records under ORS 192.001 *et seq.*

(9) The presiding officer may set reasonable time limits for oral presentation and may exclude or limit cumulative, repetitious, or immaterial matter.

(10) The presiding officer shall make a record of the proceeding, by audio or video tape recording, stenographic reporting or minutes.

Stat. Authority: ORS 183.341  
Stat. Implemented: ORS 183.335(3), 183.341(1)

### **Rulemaking Record**

**137-001-0040** (1) The agency shall maintain a record of any data or views it receives in response to a notice of intent to adopt, amend or repeal a rule.

(2) If a hearing is held, the agency may require the presiding officer, within a reasonable time after the hearing, to provide the agency a written summary of statements given and exhibits received and a report of the officer's observations of physical experiments, demonstrations, or exhibits. The presiding officer may make recommendations, but such recommendations are not binding upon the agency. The rulemaking record shall contain the presiding officer's summary, or a recording of oral submissions received at the hearing, and the presiding officer's recommendation, if any.

(3) The rulemaking record shall be maintained by the rules coordinator. The agency shall make the rulemaking record available to members of the public upon request.

Stat. Authority: ORS 183.341  
Stat. Implemented: ORS 183.330(2) 183.335(3), 183.341(1)

### **Agency Rulemaking Action**

**137-001-0050** At the conclusion of the hearing, or after receipt of the presiding officer's requested report and recommendation, if any, the agency may adopt, amend, or repeal rules covered by the notice of intended action. The agency shall fully consider all written and oral submissions.

Stat. Authority: ORS 183.341  
Stat. Implemented: ORS 183.335(3)

### **Secretary of State Rule Filing**

**137-001-0060** (1) The agency shall file in the office of the Secretary of State a certified copy of each adopted or amended rule and each order repealing an agency rule.

(2) The rule or order shall be effective upon filing with the Secretary of State unless a different effective date is required by statute or a later effective date is specified in the rule or order.

Stat. Authority: ORS 183.341  
Stat. Implemented: ORS 183.341(1), 183.355

**Note:** Rule 137-001-0070 was adopted by the Attorney General as required by ORS 183.390. Agencies must apply this rule without further adoption or amendment.

### **Petition to Promulgate, Amend, or Repeal Rule**

**137-001-0070** (1) An interested person may petition an agency to adopt, amend, or repeal a rule. The petition shall state the name and address of the petitioner and any other person known to the petitioner to be interested in the rule. The petition shall be legible, signed by or on behalf of the petitioner, and shall contain a detailed statement of:

(a) The rule petitioner requests the agency to adopt, amend, or repeal. When a new rule is proposed, the petition shall set forth the proposed language in full. When an amendment of an existing rule is proposed, the rule shall be set forth in the petition in full with matter proposed to be deleted enclosed in brackets and proposed additions shown by boldface;

(b) Facts or arguments in sufficient detail to show the reasons for and effects of adoption, amendment, or repeal of the rule;

(c) All propositions of law to be asserted by petitioner.

(2) The agency:

(a) May provide a copy of the petition, together with a copy of the applicable rules of practice, to all persons named in the petition;

(b) May schedule oral presentations;

(c) Shall, in writing, within 30 days after receipt of the petition, either deny the petition or initiate rulemaking proceedings.

Stat. Authority: ORS 183.390

Stat. Implemented: ORS 183.390

### **Temporary Rulemaking Requirements**

**137-001-0080** (1) If no notice has been provided before adoption of a temporary rule, the agency shall give notice of its temporary rulemaking to persons, entities, and media specified under ORS 183.335(1) by mailing or personally delivering to each of them a copy of the rule or rules as adopted and a copy of the statements required under ORS 183.335(5). If a temporary rule or rules are over ten pages in length; the agency may provide a summary and state how and where a copy of the rule or rules may be obtained. Failure to give this notice shall not affect the validity of any rule.

(2) The agency shall file with the Secretary of State a certified copy of the temporary rule and a copy of the statement required by ORS 183.335(5).

(3) A temporary rule is effective for 180 days, unless a shorter period is specified in the temporary rule.

Stat. Authority: ORS 183.341

Stat. Implemented: ORS 183.335(5), 183.341(1), 183.355

## Periodic Rule Review

**137-001-0085** (1) Pursuant to ORS 183.545, the agency shall review and analyze all of its rules at least once every three years, including rules reviewed during prior reviews and rules adopted after the last review.

(2) As part of the review the agency shall invite public comment upon the rules and shall give notice of the review in accordance with ORS 183.335(1).

(3) The notice shall identify the rules under review by rule or division number and subject matter. It shall state that the agency invites written comments concerning the continued need for the rule; the complexity of the rule; the extent to which the rule duplicates, overlaps, or conflicts with other state rules, federal regulations, and local government regulations; the degree to which technology, economic conditions, or other factors have changed in the subject area affected by the rule; the rule's potential for enhancement of job-producing enterprises; and the legal basis for the rule.

(4) The notice shall state the date by which written comments must be received by the agency and the address to which the comments should be sent.

(5) If the agency provides a public hearing to receive oral comments on the rules, the notice shall include the time and place of the hearing.

Stat. Authority: ORS 183.341

Stat. Implemented: ORS 183.341(1), 183.545, 183.550, Or Laws 1982, ch 15, Or Laws 198 , ch 535

## OAR Chapter 137, Division 2 Declaratory Rulings

**NOTE:** Rules 137-002-0010 through 137-002-0060 were adopted by the Attorney General as required by ORS 183.390. Agencies must apply these rules without further adoption or amendment.

## Petition for Declaratory Ruling

**137-002-0010** The petition to initiate proceedings for declaratory ruling shall contain:

(1) The rule or statute that may apply to the person, property, or state of facts;

(2) A detailed statement of the relevant facts, including sufficient facts to show petitioner's interest;

(3) All propositions of law or contentions asserted by petitioner;

(4) The questions presented;

(5) The specific relief requested; and

(6) The name and address of petitioner and of any other person or entity known by petitioner to be interested in the requested declaratory ruling.

Stat. Authority: ORS 183.410

Stat. Implemented: ORS 183.410

### **Service of Declaratory Ruling Petition**

**137-002-0020** (1) The petition shall be deemed filed when received by the agency.

(2) Within 60 days after the petition is filed, the agency shall notify the petitioner in writing whether it will issue a ruling. If the agency decides to issue a ruling, it shall serve all persons and entities named in the petition by mailing:

(a) A copy of the petition together with a copy of the agency's rules of practice; and

(b) Notice of any proceeding including the hearing at which the petition will be considered. (See 137-002-0030 for contents of notice.)

(3) Notwithstanding subsection (2) of this rule, the agency may decide at any time it will not issue a declaratory ruling in any specific instance. The agency shall notify the petitioner in writing when the agency decides not to issue a declaratory ruling.

Stat. Authority: ORS 183.410

Stat. Implemented: ORS 183.410

### **Intervention in Declaratory Rulings**

**137-002-0025** (1) Any person or entity may petition the agency for permission to participate in the proceeding as a party.

(2) The petition for intervention shall be in writing and shall contain:

(a) The rule or statute that may apply to the person, property, or state of facts;

(b) A statement of facts sufficient to show the intervenor's interest;

(c) A statement that the intervenor accepts the petitioner's statement of facts for purposes of the declaratory ruling;

(d) All propositions of law or contentions asserted by the intervenor;

(e) A statement that the intervenor accepts the petitioner's statement of the questions presented or a statement of the questions presented by the intervenor; and

(f) A statement of the specific relief requested.

(3) The agency may, in its discretion, invite any person or entity to file a petition for intervention.

(4) The agency, in its discretion, may grant or deny any petition for intervention. If a petition for intervention is granted, the status of the intervenor(s) shall be the same as that of an original petitioner, i.e., the declaratory ruling, if any, issued by the agency shall be binding between the intervenor and the agency on the facts stated in the petition, subject to review as provided in ORS 183.410.

(5) The decision to grant or deny a petition for intervention shall be in writing and shall be served on all parties.

Stat. Authority: ORS 183.410

Stat. Implemented: ORS 183.410

## **Notice of Declaratory Ruling Hearing**

**137-002-0030** The notice of hearing for a declaratory ruling shall:

- (1) Be accompanied by a copy of the petition requesting the declaratory ruling and by a copy of any petition for intervention if copies of these petitions have not previously been served on the party;
- (2) Set forth the time and place of the proceeding; and
- (3) Identify the presiding officer.

Stat. Authority: ORS 183.410  
Stat. Implemented: ORS 183.410

## **Declaratory Ruling Procedure**

**137-002-0040** (1) The proceeding shall be conducted by and shall be under the control of the presiding officer. The presiding officer may be the chief administrative officer of the agency, a member of its governing body or any other person designated by the agency.

(2) No testimony or other evidence shall be accepted at the hearing. The petition will be decided on the facts stated in the petition, except that the presiding officer may agree to accept, for consideration by the agency, a statement of alternative facts if such a statement has been stipulated to in writing by all parties to the proceeding, including any intervening parties.

(3) The parties and agency staff shall have the right to present oral argument. The presiding officer may impose reasonable time limits on the time allowed for oral argument. The parties and agency staff may file briefs in support of their respective positions. The presiding officer shall fix the time and order of filing briefs and may direct that the briefs be submitted prior to oral argument. The presiding officer may permit the filing of memoranda following the hearing.

(4) The proceeding may be conducted in person or by telephone.

(5) As used in this rule, "telephone" means any two-way electronic communication device.

Stat. Authority: ORS 183.410  
Stat. Implemented: ORS 183.410

## **Presiding Officer's Proposed Declaratory Ruling**

**137-002-0050** (1) Except when the presiding officer is the decision maker, the presiding officer shall prepare a proposed declaratory ruling in accordance with OAR 137-002-0060 for consideration by the decision maker.

(2) When a proposed declaratory ruling is considered by the decision maker, the parties and agency staff shall have the right to present oral argument to the decision maker.

Stat. Authority: ORS 183.410  
Stat. Implemented: ORS 183.410

## **Issuance of Declaratory Ruling**

**137-002-0060** (1) The agency shall issue its declaratory ruling within 60 days of the close of the record.

(2) The ruling shall be in writing and shall include:

- (a) The facts upon which the ruling is based;
- (b) The statute or rule in issue;



- (c) The agency's conclusion as to the applicability of the statute or rule to those facts;
  - (d) The agency's conclusion as to the legal effect or result of applying the statute or rule to those facts;
  - (e) The reasons relied upon by the agency to support its conclusions; and
  - (f) A statement that under ORS 183.480 the parties may obtain judicial review by filing a petition with the Court of Appeals within 60 days from the date the declaratory ruling is served.
- (3) The ruling shall be served by mailing a copy to the parties.

Stat. Authority: ORS 183.410  
Stat. Implemented: ORS 183.410

### **OAR Chapter 137, Division 3 Contested Case Proceedings**

#### **Contested Case Notice**

**137-003-0001** (1) In addition to the requirement of ORS 183.415(2), a contested case notice may include either or both of the following:

(a) a statement that the record of the proceeding to date, including information in the agency file or files on the subject of the contested case, automatically become part of the contested case record upon default for the purpose of proving a prima facie case;

(b) a statement that a collaborative dispute resolution process is available as an alternative to a contested case hearing, if requested within the time period stated in the notice, and that choosing such a process will not affect the right to a contested case hearing if a hearing request is received by the agency within the time period stated in the notice and the matter is not resolved through the collaborative process.

(2) The contested case notice shall:

(a) specify the time within which a person may make a request for a hearing; and

(b) include a statement that if a request for hearing is not received by the agency within the time stated in the notice, the person shall have waived the right to a hearing under ORS chapter 183, except as provided in OAR 137-003-0075(4).

Stat. Authority: ORS 183.341, 183.502  
Stat. Implemented: ORS 183.341(1), 183.413, 183.415(6), 183.502

#### **Rights of Parties in Contested Cases**

**137-003-0002** (1) In addition to the information required to be given under ORS 183.413(2) and 183.415(7), before commencement of a contested case hearing, the agency shall inform a party, if the party is an agency, corporation, or an unincorporated association, that such party must be represented by an attorney licensed in Oregon, unless statutes applicable to the contested case proceeding specifically provide otherwise.

(2) Except as otherwise required by ORS 183.415(7), the information referred to in section (1) of this rule may be given in writing or orally before the commencement of the hearing.

(3) Upon the agreement of the agency and the parties, and unless otherwise precluded by law, alternative methods of dispute resolution may be used in contested case matters. Such alternative methods of resolution may include non-binding arbitration, modified contested case

proceedings, nonrecord abbreviated hearings or any collaborative method designed to encourage the agency and the parties to work together to develop a mutually agreeable solution, such as negotiation, mediation, use of a facilitator or a neutral fact-finder or settlement conferences, but may not include binding arbitration.

(4) Final disposition of contested cases may be by a final hearing order or, unless precluded by law, by stipulation, agreed settlement, consent order or final order by default. A stipulation, agreed settlement or consent order disposing of a contested case must be in writing and signed by the party or parties. By signing such an agreement, the party or parties waive the right to a contested case hearing. The agency shall incorporate that disposition into a final order.

Stat. Authority: ORS 183.341, 183.502

Stat. Implemented: ORS 9.320, 183.341(1), 183.413, 183.415, 183.502

### **Late Filing**

**137-003-0003** (1) Unless otherwise provided by law, when a person fails to file any document within the time specified by agency rules or these model rules of procedure, the late filing may be accepted if the agency or presiding officer determines that the cause for failure to file the document timely was beyond the reasonable control of the party.

(2) The agency may require a statement explaining the reasons for the late filing.

Stat. Authority: ORS 183.341

Stat. Implemented: 183.341(1)

### **Participation as Party or Limited Party**

**137-003-0005** (1) When an agency gives notice that it intends to hold a contested case hearing, persons who have an interest in the outcome of the agency's proceeding or who represent a public interest in such result may request to participate as parties or limited parties.

(2) A person requesting to participate as a party or limited party shall file a petition with the agency at least 21 days before the date set for the hearing and shall include a sufficient number of copies of the petition for service on all parties. Petitions untimely filed shall not be considered unless the agency determines that good cause has been shown for failure to file timely.

(3) The petition shall include the following:

(a) Names and addresses of the petitioner and of any organization the petitioner represents;

(b) Name and address of the petitioner's attorney, if any;

(c) A statement of whether the request is for participation as a party or a limited party, and, if as a limited party, the precise area or areas in which participation is sought;

(d) If the petitioner seeks to protect a personal interest in the outcome of the agency's proceeding, a detailed statement of the petitioner's interest, economic or otherwise, and how such interest may be affected by the results of the proceeding;

(e) If the petitioner seeks to represent a public interest in the results of the proceeding, a detailed statement of such public interest, the manner in which such public interest will be affected by the results of the proceeding, and the petitioner's qualifications to represent such public interest; and

(f) A statement of the reasons why existing parties to the proceeding cannot adequately represent the interests identified in subsections (3)(d) or (e) of this rule.

(4) The agency shall serve a copy of the petition on each party personally or by mail. Each party shall have seven days from the date of personal service or agency mailing to file a response to the petition.

(5) If the agency determines under OAR 137-003-0003 that good cause has been shown for failure to file a timely petition, the agency at its discretion may:

- (a) Shorten the time within which answers to the petition shall be filed; or
- (b) Postpone the hearing until disposition is made of the petition.

(6) If a person is granted participation as a party or a limited party, the agency may postpone or continue the hearing to a later date if necessary to avoid an undue burden to one or more of the parties in the case.

(7) In ruling on petitions to participate as a party or a limited party, the agency shall consider:

(a) Whether the petitioner has demonstrated a personal or public interest that could reasonably be affected by the outcome of the proceeding;

(b) Whether any such affected interest is within the scope of the agency's jurisdiction and within the scope of the notice of contested case hearing;

(c) When a public interest is alleged, the qualifications of the petitioner to represent that interest; and

(d) The extent to which the petitioner's interest will be represented by existing parties.

(8) A petition to participate as a party may be treated as a petition to participate as a limited party.

(9) If the agency grants a petition, the agency shall specify areas of participation and procedural limitations as it deems appropriate.

(10) An agency ruling on a petition to participate as a party or as a limited party shall be by written order and served promptly on the petitioner and all parties. If the petition is allowed, the agency shall also serve petitioner with the notice of rights required by ORS 183.413(2).

Stat. Authority: ORS 183.341

Stat. Implemented: ORS 183.341(1), 183.415(4), 183.450(3)

### **Agency Participation as Interested Agency or Party**

**137-003-0007** (1) When an agency gives notice that it intends to hold a contested case hearing, it may also notify the parties that it intends to name any other agency that has an interest in the outcome of that proceeding as a party or as an interested agency, either on its own initiative or upon request by that other agency.

(2) Each party shall have seven days from the date of personal service or mailing of the notice to file objections.

(3) The agency decision to name an agency as a party or as an interested agency shall be by written order and served promptly on the parties and the named agency.

(4) An agency named as a party or as an interested agency has the same procedural rights and shall be given the same notices, as any party in the proceeding. An interested agency, unlike a party, has no right to judicial review.

(5) An agency may not be named as a party under this rule without written authorization of the Attorney General.

Stat. Authority: ORS 183.341

Stat. Implemented: ORS 180.060, 183.220, 183.341(1), 183.415(4)

### **Authorized Representative in Designated Agencies**

**137-003-0008** (1) For purposes of this rule, the following words and phrases have the following meaning:

(a) "Agency" means: State Landscape Contractors Board; Office of Energy and the Energy Facility Siting Council; Environmental Quality Commission and the Department of Environmental Quality; Insurance Division of the Department of Consumer and Business Services for proceedings in which an insured appears pursuant to ORS 737.505; State Fire Marshal in the Department of State Police; Division of State Lands for proceedings regarding the issuance or denial of fill or removal permits under ORS 541.605 to 541.685; Public Utility Commission; Water Resources Commission and the Water Resources Department; Land Conservation and Development Commission and the Department of Land Conservation and Development; and State Department of Agriculture for purposes of hearings under ORS 215.705.

(b) "Authorized representative" means a member of a partnership, an authorized officer or regular employee of a corporation, association or organized group, or an authorized officer or employee of a governmental authority other than a state agency.

(c) "Legal argument" includes arguments on:

(A) The jurisdiction of the agency to hear the contested case;

(B) The constitutionality of a statute or rule or the application of a constitutional requirement to an agency; and

(C) The application of court precedent to the facts of the particular contested case proceeding.

(d) "Legal argument" does not include presentation of evidence, examination and cross-examination of witnesses or presentation of factual arguments or arguments on:

(A) The application of the facts to the statutes or rules directly applicable to the issues in the contested case;

(B) Comparison of prior actions of the agency in handling similar situations;

(C) The literal meaning of the statutes or rules directly applicable to the issues in the contested case; and

(D) The admissibility of evidence or the correctness of procedures being followed.

(2) A party or limited party participating in a contested case hearing before an agency listed in subsection (1)(a) of this rule may be represented by an authorized representative as provided in this rule if the agency has by rule specified that authorized representatives may appear in the type of contested case hearing involved.

(3) Before appearing in the case, an authorized representative must provide the presiding officer with a letter authorizing the named representative to appear on behalf of a party or limited party.

(4) The presiding officer may limit an authorized representative's presentation of evidence, examination and cross-examination of witnesses, or presentation of factual arguments to insure the orderly and timely development of the hearing record, and shall not allow an authorized representative to present legal argument as defined in subsection (1)(c) of this rule.

(5) When an authorized representative is representing a party or limited party in a hearing, the presiding officer shall advise such representative of the manner in which objections may be made and matters preserved for appeal. Such advice is of a procedural nature and does not change applicable law on waiver or the duty to make timely objection. Where such objections may involve legal argument as defined in this rule, the presiding officer shall provide reasonable opportunity for the authorized representative to consult legal counsel and permit such legal counsel to file written legal argument within a reasonable time after conclusion of the hearing.

Stat. Authority: ORS 183.457

Stat. Implemented: ORS 183.341(1), 183.457

### **Emergency License Suspension, Refusal to Renew**

**137-003-0010** (1) If the agency finds there is a serious danger to the public health or safety, it may immediately suspend or refuse to renew a license. For purposes of this rule, such a decision is referred to as an emergency suspension order. An emergency suspension order must be in writing and may be issued without prior notice to the licensee or an opportunity for a hearing as required for contested cases under ORS chapter 183.

(2)(a) Except where the danger to the public health or safety is so imminent that opportunity for the licensee to object under subsection (3) of this rule is not practicable as determined by the agency, the agency shall provide the licensee with notice and opportunity to object prior to issuing the emergency suspension order. For purposes of this rule, this notice is referred to as a presuspension notice.

(b) The presuspension notice shall:

(A) Describe generally the acts of the licensee and the circumstances that would be grounds for revocation, suspension or refusal to renew the license under the agency's usual procedures;

(B) Describe generally the reasons why the acts of the licensee and the circumstances seriously and immediately endanger the public's health or safety; and

(C) Identify a person in the agency whom the licensee may contact and who is authorized to issue the emergency suspension order or to make recommendations regarding the issuance of the emergency suspension order.

(c) The agency may provide the presuspension notice to the licensee in writing, orally by telephone or in person, or by any other means available to the agency.

(3) Following the presuspension notice, the agency shall provide the licensee an immediate opportunity to respond to the presuspension notice before a person authorized to issue the emergency suspension order or to make recommendations regarding the issuance of the emergency suspension order. An emergency suspension order may be issued anytime thereafter.

(4)(a) When the agency issues an emergency suspension order, the agency shall serve the order on the licensee either personally or by registered or certified mail.

(b) The order shall include the following statements:

(A) Those required under ORS 183.415(2) and (3);

(B) That the licensee has the right to demand a hearing to be held as soon as practicable to contest the emergency suspension order;

(C) That if the demand for hearing is not received by the agency within 90 days of the date of notice of the emergency suspension order the licensee shall have waived its right to a hearing under ORS chapter 183;

(D) The effective date of the emergency suspension order;

(E) Findings of the specific acts or omissions of the licensee that are grounds for revocation, suspension or refusal to renew the license, and the reasons these acts or omissions seriously and immediately endanger the public's health or safety; and

(F) That the agency may combine the hearing on the emergency suspension order with any other agency proceeding affecting the license. The procedures for a combined proceeding shall be those applicable to the other proceeding affecting the license.

(5)(a) If timely requested by the licensee, the agency shall hold a hearing on the emergency suspension order as soon as practicable.

(b) At the hearing, the agency shall consider the facts and circumstances including, but not limited to:

(A) Whether the acts or omissions of the licensee pose a serious danger to the public's health or safety; and

(B) Whether circumstances at the time of the hearing justify confirmation, alteration or revocation of the order.

Stat. Authority: ORS 183.341

Stat. Implemented: ORS 183.341(1), 183.430

### **Use of Collaborative Dispute Resolution in Contested Cases**

**137-003-0015** (1) If, upon receipt of a notice required by ORS 183.415, a party requests to participate in a collaborative dispute resolution (DR) process, but does not make a request for a contested case hearing, any participation by the agency in such a process is voluntary and, in any event, does not toll the period for filing a timely request for a contested case hearing.

(2) If a party makes a timely request for a contested case hearing and also a request to participate in a collaborative DR process offered by the agency:

(a) The agency and the party must sign an agreement containing:

(i) The terms specified in OAR 137-005-0030(1), (5) and (6);

(ii) The deadline, if any, for the conclusion of the collaborative process and a statement whether this deadline may be extended by agreement of the agency and the party; and

(iii) A statement that, "Failing to reach a settlement or agreement will not affect the right to a contested case hearing."

(b) The agency shall stay the contested case proceeding until the collaborative DR process is completed, the agency or the party opts out of such process, or the deadline, if any, specified in the agreement required by paragraph (2)(a)(ii) of this rule.

(3) If the agency agrees to participate in a collaborative DR process, any informal disposition of the contested case shall be consistent with ORS 183.415(5) and OAR 137-003-0002(4).

(4) If the collaborative DR process terminates without settlement of the contested case, the agency shall proceed to schedule the contested case hearing, unless the party withdraws the hearing request.

Stat. Authority: ORS 183.341, 183.502  
Stat. Implemented: ORS 183.502

### **Discovery in Contested Cases**

**137-003-0025** (1) Discovery by the agency or any party may be permitted in appropriate contested cases at the discretion of the agency. Any party may petition the agency pursuant to the requirements in this rule for an order allowing discovery. Before requesting a discovery order, a party must seek the discovery through an informal exchange of information.

(2) Discovery may include but is not limited to one or more of the following methods:

- (a) depositions of a material witness;
- (b) disclosure of names and addresses of witnesses expected to testify at the hearing;
- (c) production of documents, which may but need not be limited to documents that the party producing the documents plans to offer as evidence;
- (d) production of objects for inspection;
- (e) permission to enter upon land to inspect land or other property;
- (f) requests for admissions;
- (g) written interrogatories;
- (h) prehearing conferences, as provided in OAR 137-003-0035.

(3) (a) A party seeking to take the testimony of a material witness by deposition shall file a written request with the agency, with a copy to all other parties. The request must include the name and address of the witness, a showing of the materiality of the witness's testimony, an explanation of why a deposition rather than informal or other means of discovery is necessary, and a request that the witness's testimony be taken before an officer named in the request for the purpose of recording testimony.

(b) For all other forms of discovery, a request for a discovery order must be in writing and must include a description of the attempts to obtain the requested discovery informally. The request must be mailed or delivered to the agency, with a copy to other parties.

(4) Any discovery request must be reasonably likely to produce information that is generally relevant to the case. If the relevance of the requested discovery is not apparent, the agency may require the party requesting discovery to explain how the request is likely to produce relevant information. If the request appears to be unduly burdensome, the agency may require an explanation of why the requested information is necessary or is likely to facilitate resolution of the case.

(5) The agency may, but is not required to, authorize the requested discovery. In making its decision, the agency shall consider any objections by the party from whom discovery is sought. The agency shall issue an order granting or denying a discovery request in whole or in part.

(6) If the agency does authorize discovery, the agency shall control the methods, timing and extent of discovery. The agency may limit discovery to a list of witnesses and the principle documents upon which the agency and parties will rely.

(7) Only the agency may issue subpoenas in support of discovery. The agency may apply to the circuit court to compel obedience to a subpoena.

(8) The agency may delegate to a presiding officer its authority to order and control discovery. The delegation must be in writing, and it may be limited to specified forms of discovery.

(9) The presiding officer may refuse to admit evidence that was not disclosed in response to a discovery order, unless the party that failed to provide discovery offers a satisfactory reason for having failed to do so, or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10). If the presiding officer admits evidence that was not disclosed as ordered, the presiding officer may grant a continuance to allow an opportunity for the agency or other party to respond.

Stat. Authority: ORS 183.341

Stat. Implemented: ORS 183.341(1), 183.425

### **Prehearing Conferences**

**137-003-0035** (1) Prior to hearing, the agency may, in its discretion, conduct one or more prehearing conferences to facilitate the conduct and resolution of the case. The agency may convene the conference on its own initiative or at a party's request.

(2) The purposes of a prehearing conference may include, but are not limited to the following:

(a) to facilitate discovery and to resolve disagreements about discovery;

(b) to identify, simplify and clarify issues;

(c) to eliminate irrelevant issues;

(d) to obtain stipulations of fact;

(e) to provide to the presiding officer, agency and parties, in advance of the hearing, copies of all documents intended to be offered as evidence at the hearing and the names of all witnesses expected to testify;

(f) to authenticate documents;

(g) to decide the order of proof and other procedural matters pertaining to the conduct of the hearing;

(h) to discuss the use of a collaborative dispute resolution process in lieu of or preliminary to holding the contested case hearing; and

(i) to discuss settlement or other resolution or partial resolution of the case.

(3) The prehearing conference may be conducted in person or by telephone.

(4) The agency must make a record of any stipulations, rulings and agreements. The agency may make an audio or stenographic record of the pertinent portions of the conference or may place the substance of stipulations, rulings and agreements in the record by written summary. Stipulations to facts and to the authenticity of documents and agreements to narrow issues shall be binding upon the agency and the parties unless good cause is shown for rescinding a stipulation or agreement.

(5) After the hearing begins, the presiding officer may at any time recess the hearing to discuss any of the matters listed in subsection (2).



(6) The agency may delegate to the presiding officer the discretion to conduct prehearing conferences.

Stat. Authority: ORS 183.341, 183.502  
Stat. Implemented: ORS 183.341(1), 183.430, 183.502

### **Conducting Contested Case Hearing**

**137-003-0040** (1) The contested case hearing shall be conducted by and under the control of the presiding officer. The presiding officer may be the chief administrative officer of the agency, a member of its governing body, or any other person designated by the agency.

(2) If the presiding officer or any decision maker has an actual or potential conflict of interest as defined in ORS 244.020(1) or (7), that officer shall comply with the requirements of ORS chapter 244 (*e.g.*, ORS 244.120 and 244.130).

(3) The hearing shall be conducted, subject to the discretion of the presiding officer, so as to include the following:

(a) The statement and evidence of the proponent in support of its action;

(b) The statement and evidence of opponents, interested agencies, and other parties; except that limited parties may address only subjects within the area to which they have been limited;

(c) Any rebuttal evidence; and

(d) Any closing arguments.

(4) Presiding officers or decision makers, agency representatives, interested agencies, and parties shall have the right to question witnesses. However, limited parties may question only those witnesses whose testimony may relate to the area or areas of participation granted by the agency.

(5) The hearing may be continued with recesses as determined by the presiding officer.

(6) The presiding officer may set reasonable time limits for oral presentation and may exclude or limit cumulative, repetitious, or immaterial matter.

(7) Exhibits shall be marked and maintained by the agency as part of the record of the proceedings.

(8) If the presiding officer or any decision maker receives any written or oral *ex parte* communication on a fact in issue during the contested case proceeding, that person shall notify all parties and otherwise comply with the requirements of OAR 137-003-0055.

Stat. Authority: ORS 183.341  
Stat. Implemented: ORS 183.341(1), 183.415(9), 183.462

### **Telephone Hearings**

**137-003-0045** (1) Unless precluded by law, the agency may, in its discretion, hold a hearing or portion of a hearing by telephone. Nothing in this rule precludes an agency from allowing some parties or witnesses to attend by telephone while others attend in person.

(2) The agency may direct that a hearing be held by telephone upon request or on its own motion.

(3) The agency shall make an audio or stenographic record of any telephone hearing.

(4) Prior to commencement of an evidentiary hearing that is held by telephone, each party and the agency shall provide to all other parties and to the agency copies of documentary evidence that it will seek to introduce into the record.

(5) Nothing in this rule precludes any party or the agency from seeking to introduce documentary evidence in addition to evidence described in subsection (4) during the telephone hearing and the presiding officer shall receive such evidence, subject to the applicable rules of evidence, if inclusion of the evidence in the record is necessary to conduct a full and fair hearing. If any evidence introduced during the hearing has not previously been provided to the agency and to the other parties, the hearing may be continued upon the request of any party or the agency for sufficient time to allow the party or the agency to obtain and review the evidence.

(6) The agency may delegate to the presiding officer the discretion to rule on issues raised under this rule.

(7) As used in this rule, "telephone" means any two-way electronic communication device, including video conferencing.

Stat. Authority: ORS 183.341

Stat. Implemented: ORS 183.341(1)

### **Evidentiary Rules**

**137-003-0050** (1) Evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible.

(2) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, and privileges afforded by Oregon law shall be recognized by the presiding officer.

(3) All offered evidence, not objected to, will be received by the presiding officer subject to the officer's power to exclude irrelevant, immaterial, or unduly repetitious matter.

(4) Evidence objected to may be received by the presiding officer. Rulings on its admissibility or exclusion, if not made at the hearing, shall be made on the record at or before the time a final order is issued.

(5) The presiding officer shall accept an offer of proof made for excluded evidence. The offer of proof shall contain sufficient detail to allow the reviewing agency or court to determine whether the evidence was properly excluded. The presiding officer shall have discretion to decide whether the offer of proof is to be oral or written and at what stage in the proceeding it will be made. The presiding officer may place reasonable limits on the offer of proof, including the time to be devoted to an oral offer or the number of pages in a written offer.

Stat. Authority: ORS 183.341

Stat. Implemented: ORS 183.341(1), 183.415(11), 183.450

### **Ex Parte Communications**

**137-003-0055** (1) An ex parte communication is an oral or written communication to an agency decision maker or the presiding officer not made in the presence of all parties to the hearing, concerning a fact in issue in the proceeding, but does not include communication from agency staff or counsel about facts in the record.

(2) If an agency decision maker or presiding officer receives an ex parte communication during the pendency of the proceeding, the officer shall:

(a) Give all parties notice of the substance of the communication, if oral, or a copy of the communication, if written; and

(b) Provide any party who did not present the ex parte communication an opportunity to rebut the substance of the ex parte communication at the hearing, at a separate hearing for the limited purpose of receiving evidence relating to the ex parte communication, or in writing.

(3) The agency's record of a contested case proceeding shall include:

(a) The ex parte communication, if in writing;

(b) A statement of the substance of the ex parte communication, if oral;

(c) The agency or presiding officer's notice to the parties of the ex parte communication; and

(d) Rebuttal evidence.

Stat. Authority: ORS 183.341

Stat. Implemented: ORS 183.341(1), 183.415(9), 183.462

### **Proposed Orders in Contested Cases, Filing Exceptions**

**137-003-0060** (1) If a majority of the officials who are to render the final order in a contested case have neither attended the hearing nor reviewed and considered the record, and the order is adverse to a party, a proposed order including findings of fact and conclusions of law shall be served upon the parties.

(2) When the agency serves a proposed order on the parties, the agency shall at the same time or at a later date notify the parties:

(a) When written exceptions must be filed to be considered by the agency; and

(b) When and in what form argument may be made to the officials who will render the final order.

(3) After receiving exceptions and argument, if any, the agency may adopt the proposed order or prepare a new order.

(4) Nothing in this rule prohibits the staff of a non-party agency from commenting on the proposed order.

Stat. Authority: ORS 183.341

Stat. Implemented: ORS 183.341(1), 183.460, 183.464

### **Final Orders in Contested Cases**

**137-003-0070** (1) Final orders in contested cases shall be in writing.

(2) Except as provided in section (3) of this rule, final orders in contested cases shall include the following:

(a) Rulings on admissibility of offered evidence when the rulings are not set forth in the record;

(b) Findings of fact—those matters that are either agreed as fact or that, when disputed, are determined by the factfinder, on substantial evidence, to be facts over contentions to the contrary. A finding must be made on each fact necessary to reach the conclusions of law on which the order is based;

(c) Conclusion(s) of law—applications of the controlling law to the facts found and the legal results arising therefrom;

(d) Order—the action taken by the agency as a result of the facts found and the legal conclusions arising therefrom; and

(e) A citation of the statutes under which the order may be appealed.

(3) When informal disposition of a contested case is made by stipulation, agreed settlement or consent order as provided in OAR 137-003-0002(4), the final order need not comply with section (2) of this rule. However, the order must state the agency action and

(a) incorporate by reference a stipulation or agreed settlement signed by the party or parties agreeing to that action, or

(b) be signed by the party or parties.

(4) The date of service of the order on the parties shall be specified in writing and be part of or be attached to the order on file with the agency, unless service of the final order is not required by statute.

Stat. Authority: ORS 183.341

Stat. Implemented: ORS 183.341(1), 183.470

### **Final Orders by Default**

**137-003-0075** (1) The agency may issue a final order by default:

(a) When the agency has given a party an opportunity to request a hearing and the party fails to make a request within a specified time,

(b) When the party withdraws a request for a hearing,

(c) When the agency has scheduled a hearing and the party fails to appear at the specified time and place, or

(d) When the agency has scheduled a hearing in a matter in which only one party is before the agency and that party subsequently notifies the agency that the party will not appear at the specified time and place, unless the agency has agreed to reschedule the hearing.

(2) The agency may issue a final order by default only after making a prima facie case on the record. The record shall be made at a scheduled hearing on the matter or, if the hearing is canceled or not held, at an agency meeting or at the time the final order by default is issued, unless the agency designates the agency file as the record at the time the contested case notice is issued in accordance with OAR 137-003-0001(1).

(3) The record may consist of oral (transcribed, recorded or reported) or written evidence or a combination of oral and written evidence. In all cases, the record must contain evidence that persuades the decision maker of the existence of facts necessary to support the order.

(4)(a) When a party requests a hearing after the time specified by the agency, but 70 days or less after the agency has entered a final order by default, the agency may grant the request only if the cause for failure to timely request the hearing was beyond the reasonable control of the party, unless other applicable law provides a different standard. The agency may require the request to be supported by an affidavit and may conduct such further inquiry, including holding a hearing, as it deems appropriate.

(b) If a final order by default has already been entered, the party requesting the hearing shall deliver or mail within a reasonable time a copy of the hearing request to all persons and agencies required by statute, rule, or order to receive notice of the proceeding.

(c) If the hearing request is allowed by the agency, it shall enter an order granting the request and schedule a hearing in due course. If the request is denied, the agency shall enter an order setting forth its reasons for the denial.

(5) The agency shall notify a defaulting party of the entry of a final order by default by delivering or mailing a copy of the order. If the contested case notice contained an order that was to become effective unless the party requested a hearing, and designated the agency file as the record, that order becomes a final order by default if no hearing is requested, and no further order need be served upon the party.

Stat. Authority: ORS 183.341

Stat. Implemented: ORS 183.341(1), 183.415(6), 183.470

### **Reconsideration and Rehearing—Contested Cases**

**137-003-0080** (1) A party may file a petition for reconsideration or rehearing of a final order in a contested case with the agency within 60 days after the order is served. A copy of the petition shall also be delivered or mailed to all parties or other persons and agencies required by statute, rule, or order to receive notice of the proceeding.

(2) The petition shall set forth the specific grounds for reconsideration or rehearing. The petition may be supported by a written argument.

(3) A rehearing may be limited by the agency to specific matters.

(4) The petition may include a request for stay of a final order if the petition complies with the requirements of OAR 137-003-0090(2).

(5) The agency may consider a petition for reconsideration or rehearing as a request for either or both. The petition may be granted or denied by summary order and, if no action is taken, shall be deemed denied as provided in ORS 183.482.

(6) Within 60 days after the order is served, the agency may, on its own initiative, reconsider the final order or rehear the case. The procedural and substantive effect of reconsideration or rehearing under this subsection shall be identical to the effect of granting a party's petition for reconsideration or rehearing.

(7) Reconsideration or rehearing shall not be granted after the filing of a petition for judicial review, except in the manner provided by ORS 183.482(6).

(8) A final order remains in effect during reconsideration or rehearing until stayed or changed.

(9) Following reconsideration or rehearing, the agency shall enter a new order, which may be an order affirming the existing order.

Stat. Authority: ORS 183.341

Stat. Implemented: ORS 183.341(1), 183.482(1), (3)

### **Stay Request**

**137-003-0090** (1) Any person who petitions for reconsideration, rehearing or judicial review may request the agency to stay the enforcement of the agency order that is the subject of the petition.

(2) The stay request shall contain:

(a) The name, address and telephone number of the person filing the request and of that person's attorney, if any;

(b) The full title of the agency decision as it appears on the order and the date of the agency decision;

(c) A summary of the agency decision; and

(d) The name, address, and telephone number of each other party to the agency proceeding. When the party was represented by an attorney in the proceeding, then the name, address and telephone number of the attorney shall be provided and the address and telephone number of the party may be omitted.

(e) A statement advising all persons whose names, addresses and telephone numbers are required to appear in the stay request as provided in subsection (2)(d) of this rule, that they may participate in the stay proceeding before the agency if they file a response in accordance with OAR 137-003-0091 within ten days from delivery or mailing of the stay request to the agency;

(f) A statement of facts and reasons sufficient to show that the stay request should be granted because:

(A) The petitioner will suffer irreparable injury if the order is not stayed;

(B) There is a colorable claim of error in the order; and

(C) Granting the stay will not result in substantial public harm.

(g) A statement identifying any person, including the public, who may suffer injury if the stay is granted. If the purposes of the stay can be achieved with limitations or conditions that minimize or eliminate possible injury to other persons, petitioner shall propose such limitations or conditions. If the possibility of injury to other persons cannot be eliminated or minimized by appropriate limitation or conditions, petitioner shall propose an amount of bond, irrevocable letter of credit or other undertaking to be imposed on the petitioner should the stay be granted, explaining why that amount is reasonable in light of the identified potential injuries;

(h) A description of additional procedures, if any, the petitioner believes should be followed by the agency in determining the appropriateness of the stay request;

(i) In a request for a stay of an order in a contested case, an appendix of affidavits containing evidence (other than evidence contained in the record of the contested case out of which the stay request arose) relied upon in support of the statements required under subsections (2)(f) and (g) of this rule. The record of the contested case out of which the stay request arose is a part of the record of the stay proceedings; and

(j) In a request for stay of an order in other than a contested case, an appendix containing evidence relied upon in support of the statement required under subsections (2)(f) and (g) of this rule.

(3) The request must be delivered or mailed to the agency and on the same date a copy delivered or mailed to all parties identified in the request as required by subsection (2)(d) of this rule.

Stat. Authority: ORS 183.341

Stat. Implemented: ORS 183.341(1), 183.482(3)

### **Intervention in Stay Proceeding**

**137-003-0091** (1) Any party identified under OAR 137-003-0090(2)(d) desiring to participate as a party in the stay proceeding may file a response to the request for stay.

(2) The response shall contain:

(a) The full title of the agency decision as it appears on the order;

(b) The name, address, and telephone number of the person filing the response, except that if the person is represented by an attorney, then the name, address, and telephone number of the attorney shall be included and the person's address and telephone number may be deleted;

(c) A statement accepting or denying each of the statements of facts and reasons provided pursuant to OAR 137-003-0090(2)(f) in the petitioner's stay request; and

(d) A statement accepting, rejecting, or proposing alternatives to the petitioner's statement on the bond, irrevocable letter of credit or undertaking amount or other reasonable conditions that should be imposed on petitioner should the stay request be granted.

(3) The response may contain affidavits containing additional evidence upon which the party relies in support of the statement required under subsections (2)(c) and (d) of this rule.

(4) The response must be delivered or mailed to the agency and to all parties identified in the stay request within 10 days of the date of delivery or mailing to the agency of the stay request.

Stat. Authority: ORS 183.341

Stat. Implemented: ORS 183.341(1), 183.482(3)

### **Stay Proceeding and Order**

**137-003-0092** (1) The agency may conduct such further proceedings pertaining to the stay request as it deems desirable. The agency shall commence such proceedings promptly after receiving the stay request.

(2) The agency shall issue an order granting or denying the stay request within 30 days after receiving it. The agency's order shall:

(a) Grant the stay request upon findings of irreparable injury to the petitioner and a colorable claim of error in the agency order and may impose reasonable conditions, including but not limited to, a bond, irrevocable letter of credit or other undertaking and that the petitioner file all documents necessary to bring the matter to issue before the Court of Appeals within a specified reasonable period of time; or

(b) Deny the stay request upon a finding that the petitioner failed to show irreparable injury or a colorable claim of error in the agency order; or

(c) Deny the stay request upon a finding that a specified substantial public harm would result from granting the stay, notwithstanding the petitioner's showing of irreparable injury and a colorable claim of error in the agency order; or

(d) Grant or deny the stay request as otherwise required by law.

(4) Nothing in OAR 137-003-0055 or in 137-003-0090 to 137-003-0092 prevents an agency from receiving evidence from agency staff concerning the stay request. Such evidence shall be presented by affidavit within the time limits imposed by OAR 137-003-0091(4). If there are further proceedings pursuant to OAR 137-003-0092(1), the agency staff may present additional evidence in the same manner that parties are permitted to present additional evidence.

Stat. Authority: ORS 183.341

Stat. Implemented: ORS 183.341(1), 183.482(3)

**OAR Chapter 137, Division 4**  
**Miscellaneous, Orders in Other than Contested Cases**

**Unacceptable Conduct**

**137-004-0010** A presiding officer may expel a person from an agency proceeding if that person engages in conduct that disrupts the proceeding.

Stat. Authority: ORS 183.341  
Stat. Implemented: ORS 183.341(1)

**Reconsideration—Orders in Other Than Contested Case**

**137-004-0080** (1) A person entitled to judicial review under ORS 183.484 of a final order in other than a contested case may file a petition for reconsideration of a final order in other than a contested case with the agency within 60 days after the date of the order. A copy of the petition shall also be delivered or mailed to all other persons and agencies required by statute or rule to be notified.

(2) The petition shall set forth the specific grounds for reconsideration. The petition may be supported by a written argument.

(3) The petition may include a request for a stay of a final order if the petition complies with the requirements of OAR 137-003-0090(2).

(4) The petition may be granted or denied by summary order, and, if no action is taken, shall be deemed denied as provided by ORS 183.484(2).

(5) Within 60 days after the date of the order, the agency may, on its own initiative, reconsider the final order. The procedural and substantive effect of granting reconsideration under this subsection shall be identical to the effect of granting a party's petition for reconsideration.

(6) Reconsideration shall not be granted after the filing of a petition for judicial review, unless permitted by the court.

(7) A final order remains in effect during reconsideration until stayed or changed.

(8) Following reconsideration, the agency shall enter a new order, which may be an order affirming the existing order.

Stat. Authority: ORS 183.341  
Stat. Implemented: ORS 183.484(2)

**OAR Chapter 137, Division 5**  
**Collaborative Dispute Resolution**

**Use of Collaborative Dispute Resolution Processes**

**137-005-0010** (1) Unless otherwise precluded by law, the agency may, in its discretion, use a collaborative dispute resolution process in contested cases, rulemaking proceedings, judicial proceedings, and any other decision-making or policy development process or controversy involving the agency. Collaborative dispute resolution may be used to prevent or to minimize the escalation of disputes and to resolve disputes once they have occurred.

(2) Nothing in this rule limits innovation and experimentation with collaborative or alternative forms of dispute resolution, with negotiated rulemaking or with other procedures or dispute resolution practices not otherwise prohibited by law.



(3) The collaborative means of dispute resolution may be facilitated negotiation, mediation, facilitation or any other method designed to encourage the agency and the other participants to work together to develop a mutually agreeable solution. The agency may also consider using neutral fact-finders in an advisory capacity.

(4) The agency shall not agree to any dispute resolution process in which its ultimate settlement or decision making authority is given to a third party, including arbitration or fact-finding, without prior written authorization from the Attorney General.

(5) Nothing in this rule obligates the agency to offer funds to settle any case, to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to submit to binding arbitration, or to alter any existing delegation of settlement or litigation authority.

Stat. Authority: ORS 183.341, 183.502

Stat. Implemented: ORS 183.502

### **Assessment For Use of Collaborative DR Process**

**137-005-0020** (1) Prior to instituting a collaborative dispute resolution process, the agency may conduct an assessment to determine if the dispute is appropriate for this type of process. The dispute may not be appropriate for collaborative dispute resolution if:

(a) The outcome of the dispute is important for its precedential value, and a collaborative DR process is unlikely to be accepted as an authoritative precedent;

(b) The matter involves significant questions of agency policy, and it is unlikely that a collaborative DR process will help develop or clarify agency policy;

(c) Maintaining established policies and consistency among decisions is important, and a collaborative DR process likely would result in inconsistent outcomes for comparable matters;

(d) The matter significantly affects persons or organizations who are not participants in the process or whose interests are not adequately represented by participants;

(e) A public record of the proceeding is important, and a collaborative DR process cannot provide such a record; or

(f) The agency must maintain authority to alter the disposition of the matter because of changed circumstances, and a collaborative DR process would interfere with the agency's ability to do so.

(2) The assessment may also be used to:

(a) Determine or clarify the nature of the dispute or the issues to be resolved;

(b) Match a dispute resolution process to the objectives and interests of the disputants;

(c) Determine who will participate in the process;

(d) Estimate the time and resources needed to implement a collaborative DR process;

(e) Assess the potential outcomes of a collaborative DR process and the desirability of those outcomes;

(f) Determine the likely means for enforcing any agreement or settlement that may result;

(g) Determine the compensation, if any, of the dispute resolution provider;

- (h) Determine the ground rules for the collaborative DR process; and
  - (i) Determine the degree to which the parties and the agency wish, and are legally able, to keep the proceedings confidential.
- (3) The agency may contract with a collaborative DR provider pursuant to OAR 137-005-0040 to assist in conducting the assessment.

Stat. Authority: ORS 183.341, 183.502  
Stat. Implemented: ORS 183.502

### **Agreement to Collaborate**

**137-005-0030** In preparation for, or in the course of, a collaborative DR process the agency, the other participants and the provider may enter into a written agreement to collaborate. This agreement may include:

- (1) A brief description of the dispute or the issues to be resolved;
- (2) A list of the participants;
- (3) A description of the proposed collaborative DR process;
- (4) An estimated starting date and ending date for the process;
- (5) A statement whether the collaborative DR provider will receive compensation and, if so, who will be responsible for its payment;
- (6) A description of the process, including, but not limited to: the role of witnesses, whether and how counsel may participate in the process and, consistent with applicable statute and rules, the degree to which the proceedings or communications made during the course of the collaborative DR process are confidential; and
- (7) A description of the likely means for enforcing any agreement or settlement that may result.

Stat. Authority: ORS 183.341, 183.502  
Stat. Implemented: ORS 183.502

### **Selection and Procurement of Dispute Resolution Providers**

**137-005-0040** (1) A collaborative DR provider may be a permanent or temporary employee of the state or any other individual. The agency may select the collaborative DR provider or may opt to select the provider by consensus of the participants.

(2) A collaborative DR provider who has a financial interest in the subject matter of the dispute, who is an employee of an agency in the dispute, who has a financial relationship with any participant in the collaborative DR process or who otherwise may not be impartial is considered to have a potential bias. If, before or during the dispute resolution process, a provider has or acquires a potential bias, the provider shall so inform all the participants. Any participant may disqualify a provider who has a potential bias if the participant believes in good faith that the potential bias will undermine the ability of the provider to be impartial throughout the process.

(3) If the collaborative DR provider is a public official as defined by ORS 244.020(15), the provider shall comply with the requirements of ORS chapter 244.

(4) If the agency procures the services of a collaborative DR provider, the agency must comply with all procurement and contracting rules provided by law. A roster of collaborative

DR providers and a simplified mediator and facilitator procurement process developed by the Department of Justice may be used by the agency when selecting a collaborative DR provider by consensus.

(5) If the collaborative DR provider is a mediator or facilitator who is not an employee of the agency, the participants shall share the costs of the provider, unless the participants agree otherwise or the provider is retained solely by the agency or by a non-participant.

(6) Whenever the agency compensates a provider who is not an employee of the agency, the agency must execute a personal services contract with the provider. If the agency and the other participants choose to share the cost of the collaborative DR provider's services, the non-agency participants may enter into their own contract with the provider or may be a party to the contract between the agency and the provider, at the discretion of the agency. The agency's contract with a provider must state:

(a) The name and address of the provider and the contracting agency;

(b) The nature of the dispute, the issues being submitted to the collaborative DR process and the identity of the participants, as well as is known at the time the contract is signed;

(c) The services the provider will perform (scope of work);

(d) The compensation to be paid to the provider and the maximum contract amount;

(e) The beginning and ending dates of the contract and that the contract may be terminated by the agency or the provider upon mutual written consent, or at the sole discretion of the agency upon 30 days notice to the provider or immediately if the agency determines that the DR process is unable to proceed for any reason.

(7) A student, intern or other person in training or assisting the provider may function as a co-provider in a dispute resolution proceeding. The co-provider shall sign and be bound by the agreement to collaborate specified in OAR 137-005-0030, if any, and, if compensated by the agency, a personal services contract as specified in section (6) of this rule.

Stat. Authority: ORS 183.341, 183.502

Stat. Implemented: ORS 183.502

### **Confidentiality of Mediation Communications**

**137-005-0050** (1) For the purposes of this rule,

(a) "Mediation" means a process in which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between a mediator and any party or agent of a party, until such time as a resolution is agreed to by the parties or the mediation process is terminated.

(b) "Mediation communication" means:

(i) all communications that are made, in the course of or in connection with a mediation, to a mediator, a mediation program or a party to, or any other person present at, the mediation proceedings; and

(ii) all memoranda, work products, documents and other materials, including any draft mediation agreement, that are prepared for or submitted in the course of or in connection with a mediation or by a mediator, a mediation program or a party to, or any other person present at, mediation proceedings.

(c) "Mediator" means a third party who performs mediation. 'Mediator' includes agents and employees of the mediator or mediation program.

(d) "Party" means a person or agency participating in a mediation who has a direct interest in the controversy that is the subject of the mediation. A person or agency is not a party to a mediation solely because the person or agency is conducting the mediation, is making the mediation available or is serving as an information resource at the mediation.

(2) If the agency is a party to a mediation or is mediating a dispute as to which the agency has regulatory authority:

(a) Subject to approval by the Governor, the agency may adopt confidentiality rules developed by the Attorney General pursuant to Oregon Laws 1997, chapter 670, in which case mediation communications shall be confidential to the extent provided in those rules.

(b) If the agency has not adopted confidentiality rules pursuant to Oregon Laws 1997, chapter 670; mediation communications shall not be confidential, and the agency shall inform the parties in the mediation of that fact in an agreement to collaborate pursuant to OAR 137-005-0030 or other document.

(3) If the agency is mediating a dispute as to which the agency is not a party and does not have regulatory authority, mediation communications are confidential, except as provided in Oregon Laws 1997, chapter 670. The agency and the other parties to the mediation may agree in writing that all or part of the mediation communications are not confidential. Such an agreement may be made a part of an agreement to collaborate authorized by OAR 137-005-0030.

(4) If the agency and the other participants in a collaborative DR process other than a mediation wish to make confidential the communications made during the course of the collaborative DR process:

(a) The agency, the other participants and the collaborative DR provider, if any, shall sign an agreement to collaborate pursuant to OAR 137-005-0030 or any other document that expresses their intent with respect to:

(i) Disclosures by the agency and the other participants of communications made during the course of the collaborative DR process;

(ii) Disclosures by the collaborative DR provider of communications made during the course of the collaborative DR process;

(iii) Any restrictions on the agency's use of communications made during the course of the collaborative DR process in any subsequent administrative proceeding of the agency; and

(iv) Any restrictions on the ability of the agency or the other participants to introduce communications made during the course of the collaborative DR process in any subsequent judicial or administrative proceeding relating to the issues in controversy with respect to which the communication was made.

(b) Notwithstanding any agreement under subsection (4)(a) of this rule, communications made during the course of a collaborative DR process:

(i) May be disclosed if the communication relates to child abuse and is made to a person who is required to report abuse under ORS 419B.010;

(ii) May be disclosed if the communication relates to elder abuse and is made to a person who is required to report abuse under ORS 124.050 to 124.095;

(iii) May be disclosed if the communication reveals past crimes or the intent to commit a crime;

(iv) May be disclosed by a party to a collaborative DR process to another person if the party's communication with that person is privileged under ORS chapter 40 or other provision of law;

(v) May be used by the agency in any subsequent proceeding to enforce, modify or set aside an agreement arising out of the collaborative DR process;

(vi) May be disclosed in an action for damages or other relief between a party to a collaborative DR process and a DR provider to the extent necessary to prosecute or defend the matter; and

(vii) Shall be subject to the Public Records Law, ORS 192.410 to 192.505, and the Public Meetings Law, ORS 192.610 to 192.690.

(c) If a demand for disclosure of a communication that is subject to an agreement under this section is made upon the agency, any other participant or the collaborative DR provider, the person receiving the demand for disclosure shall make reasonable efforts to notify the agency, the other participants and the collaborative DR provider.

Stat. Authority: ORS 183.341, 183.502

Stat. Implemented: Or Laws 1997, ch 670

## **Mediation**

**137-005-0060** (1) Unless otherwise provided by law, mediation is a voluntary process from which the agency and other participants may withdraw at any time.

(2) The mediator does not represent the interests of any of the participants or offer legal advice. Likewise, the mediator is not a judge and has no decision making power to impose a settlement on the participants or to render decisions.

(3) The person participating in the mediation on behalf of the agency shall be knowledgeable about the issues in dispute and have authority to effectively recommend settlement options to the agency.

Stat. Authority: ORS 183.341, 183.502

Stat. Implemented: ORS 183.502

## **Contract Clauses Specifying Dispute Resolution**

**137-005-0070** (1) The agency may specify or require any form of dispute resolution except binding arbitration as a condition of a contract.

(2) The agency may specify binding arbitration by contract only if the Attorney General has approved the contract containing the clause specifying binding arbitration and the clause itself for legal sufficiency.

(3) The agency may provide for the resolution of technical, scientific or accounting matters of fact by requiring the submission of such matters to a neutral fact finder selected and appointed as specified in a contract clause.

(4) The specification of a method of dispute resolution in a contract clause does not:

(a) Remove the requirement to provide notices or filings or to meet deadlines otherwise required by law, regulation or contract provision,

(b) Constitute a waiver of the sovereign immunity of the State of Oregon, or

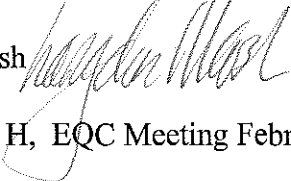
(c) Prohibit the participants from entering into an agreement to use any other method of dispute resolution that appears to be more suitable for the particular dispute in lieu of or in addition to the method specified by contract.

Stat. Authority: ORS 183.341, 183.502

Stat. Implemented: ORS 183.502

State of Oregon  
Department of Environmental Quality Memorandum

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**Date:** January 21, 1998  
**To:** Environmental Quality Commission  
**From:** Langdon Marsh   
**Subject:** Agenda Item H, EQC Meeting February 20, 1998

**Background**

This rulemaking has resulted from the Department's review and consideration of concerns raised by the Governor and Legislators from the Portland Area. The Governor sent a request to the EQC and Department to consider the issue of low income and related equity issues, and to take action to implement relief programs if appropriate.

On November 12, 1997 the Director authorized the Air Quality Division to proceed to a rulemaking hearing on proposed rules which would establish a hardship waiver from the Enhanced Vehicle Emissions Program. Pursuant to the authorization, hearing notice was published in the Secretary of State's Bulletin on December 1, 1997. The Hearing Notice and informational materials were mailed to the mailing list of those persons who have asked to be notified of rulemaking actions, and to a mailing list of persons known by the Department to be potentially affected by or interested in the proposed rulemaking action on November 13, 1997.

A Public Hearing was held December 17, 1997 with Ed Woods serving as Presiding Officer. Written comment was received through December 19, 1997. There was no attendance at the hearing. One comment letter was received during the comment period which states support for the proposed rules (A copy of the comments is available upon request.)

The following sections summarize the issue that this proposed rulemaking action is intended to address, the authority to address the issue, the process for development of the rulemaking proposal including alternatives considered, a summary of the rulemaking proposal presented for public hearing, a summary of the significant public comments and the changes proposed in

response to those comments, a summary of how the rule will work and how it is proposed to be implemented, and a recommendation for Commission action.

**Issue this Proposed Rulemaking Action is Intended to Address**

The Governor and some members of the Legislature have expressed concerns regarding the need to assure fairness and equity in implementing the Vehicle Inspection Program. The Commission has been asked to consider questions of hardship on low income vehicle owners, inspection of vehicles seldom used, and requirements on vehicles that have little impact on Portland's air quality. In regards to the hardship relief issue, the Department is responding with this proposed rulemaking. In respect to the other concerns, the Department's response is provided in Attachment F.

Adoption of the proposed rule will address a concern of the potential financial impact of the vehicle inspection enhanced test requirements on Oregon low income vehicle owners. The rule establishes a pilot program that will be operated for a two year period which provides DEQ an opportunity to gather data on the program and assess the viability of a permanent program.

**Relationship to Federal and Adjacent State Rules**

The Vehicle Emissions Test Program is a key strategy for ensuring the Portland Area Air Quality Maintenance Area maintains compliance with federal standards while accommodating growth in both population and vehicle miles traveled. The Enhanced Emissions Test is the single most important emission reduction strategy and determined the most cost effective. Vancouver, which is part of the Portland Air Quality Maintenance Area, has initiated a corresponding program.

State statutes and rules that relate to the proposed rules are as follows:

- ORS 468A.363 (2) EQC to adopt measures related to improvements in motor vehicle inspection program.
- ORS 468A.363(4)(c) EQC to incorporate emission reductions from on-road vehicles resulting from enhanced testing as reduction credits into the maintenance plan.
- OAR 340-24-0300 Motor vehicle emission control, inspection test criteria, methods, and standards.

**Authority to Address the Issue**

The above statute citations provide the EQC with the authority to adopt the proposed rules.



**Process for Development of the Rulemaking Proposal (including Advisory Committee and alternatives considered)**

A vehicle inspection Certificate of Compliance is required to register cars and light duty trucks within the Portland program boundary. Vehicles are tested every two years. There is no fee imposed until a vehicle passes the required test; upon passing the test a \$21 fee is assessed.

Because of the limited and defined needs involved with this rule, the Department determined a technical advisory group was appropriate as opposed to the creation of a formal citizen advisory committee. The VIP staff established and met with a small group of social service agency representatives to discuss the hardship issue on February 6, 1997. The committee consisted of representatives from Oregon Legal Services, Catholic Community Services, and Albina Headstart. The purpose of the meeting was to obtain advice on the need for a low income program and to identify waiver options. The group's conclusions follow:

- There is a need for a low income hardship program. Vehicle emissions repairs are considered to be low on the priority list of low income drivers, and some individuals risk driving with expired registration.
- A monetary assistance program to provide for repairs to pass the basic test program is preferable because the waiver concept provides for economic relief but does not achieve emission reductions.
- Food stamp or other approved social service program documentation could be used to establish qualification.
- Information on the program should be distributed at the testing stations, DMV locations, and in vehicle registration document mailings.
- DEQ should administer a vehicle repair voucher program for vehicles that fail the enhanced test with a determined dollar ceiling.
- Prefers using a repair assistance program for the basic test program for up to two registration cycles, in lieu of waiving the enhanced test requirements.
- Recommends first establishing a pilot program for the purpose of evaluating the effectiveness of the program and determining if the program should be changed or discontinued.

Staff held a second meeting with this group and two other service agency representatives on October 7, 1997. At this meeting, staff was advised to consider an income threshold that would allow inclusion of a greater percentage of the working low income population. It was felt that the program would be more attractive if staff utilize a brief and simple application process to encourage greater participation. Staff was also advised to consider reliance on the applicant's declaration of eligibility. The group believed the low level of participation in other similar state programs is that vehicle emission compliance is a low priority compared to other crises or issues that must be dealt with by individuals at low income and poverty levels. A simple and direct

application process was thought important in promoting participation.

The most promising alternative involved establishing a program which would provide the necessary funds to repair qualified vehicles that fail the test. However there are no current resources to fund such a program.

**Summary of Rulemaking Proposal Presented for Public Hearing and Discussion of Significant Issues Involved.**

The proposed rule establishes a two year hardship waiver for the vehicle emission enhancement test requirements. Eligibility is established by income thresholds based on family size. The thresholds are generally equivalent to 125 per cent of the currently defined federal poverty level. Eligible vehicle owners are responsible for the required test fees and must pass the basic vehicle emission test.

**Issues:** There are four key policy issues relating to this rule: resource needs; the loss of enhanced testing emission reduction credits from the maintenance plan; the duration of the waiver program; and, how low income is defined for purposes of establishing eligibility.

**Resource Needs** - Department staff estimates one FTE is required for implementing this program.

**Loss of Emission Reductions** - The loss of emission reductions issue is balanced by the direction provided to the agency from the Governor and Legislature. There is a perceived need that some relief is appropriate to offset the impact of the cost of VIP program on low income vehicle owners. An option that would achieve emission reductions as well as provide for hardship relief would in the form of monetary assistance. However, given the need to act promptly on the direction provided to DEQ and the lack of a funding source, the one-time waiver from the enhanced test is viewed as the appropriate solution at this time.

**Duration of Waiver Program** - This program is being developed as a pilot program that will operate for a two year period. A two year duration was selected because it coincides with the DMV two year registration cycle and, it provides adequate time to assess the public's need, response and participation. The Department will use data collected from the program to assess the appropriateness of and need for a permanent hardship program.

**Defining Low Income** - Staff discussed this task with a number of state and local social service assistance agencies and explored approaches used by other states. Arizona and Texas determine eligibility for their waiver programs through participation in the Federal Food Stamp Program. Colorado bases low income eligibility on participation in one of several identified social service assistance programs. Washington established a 125 percent of Federal Poverty Level threshold for its vehicle repair assistance pilot project, and Ohio uses a 150 percent of Federal Poverty Level threshold to qualify for a hardship extension.

Given there is no dedicated funding for this program, DEQ's eligibility threshold must be one that requires minimal administrative oversight. Department staff determined that eligibility be based on established income levels basically equivalent to 125% of the Federal Poverty Level. For example, a family of four would qualify if its net income is \$20,064 or less. It is believed this threshold level will include the vast majority of vehicle owners that participate in the major state assistance programs as well as non-participant low income vehicle owners.

#### **Summary of Significant Public Comment and Changes Proposed in Response**

There was no public attendance at the public hearing. One comment letter was received which stated general support for the proposed rules.

#### **Summary of How the Proposed Rule Will Work and How it Will be Implemented**

The proposed hardship program concept involves the following implementation steps:

- preparing application procedures for VIP staff;
- developing flyers or information to be distributed through social service agencies and included in DMV registration mailings;
- developing a data base for tracking the hardship application process;
- developing forms for: certifying eligibility; tracking basic testing of participants, and notifying participants of the waiver's expiration period; and,
- Tech Center staff will receive training on documenting eligibility and in providing participants with necessary information to complete the waiver process.

#### **Recommendation for Commission Action**

It is recommended that the Commission adopt the rule amendments regarding a hardship waiver from the Enhanced Vehicle Emissions Program as presented in Attachment A of the Department

Staff Report. Staff also recommends the Commission approval of the Department's response to the Governor's directive presented in Attachment F.

**Attachments**

- A. Rule (Amendments) Proposed for Adoption
- B. Supporting Procedural Documentation:
  - 1. Legal Notice of Hearing
  - 2. Fiscal and Economic Impact Statement
  - 3. Land Use Evaluation Statement
  - 4. Questions to be Answered to Reveal Potential Justification for Differing from Federal Requirements
  - 5. Cover Memorandum from Public Notice
- C. Presiding Officer's Report on Public Hearing
- D. Advisory Committee Membership and Report
- E. Rule Implementation Plan
- F. DEQ Response to Governor Directive


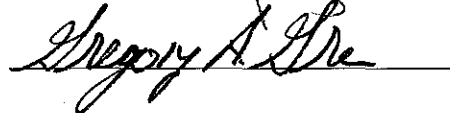
**Reference Documents (available upon request)**

Written Comments Received (listed in Attachment C)

Approved:

Section:

Division:

Report Prepared By: Ed Woods  
Roberta Young

Phone: 503-731-3050 ex 231  
503-229-6408

Date Prepared: 1/21/98

Hardship Waiver from Enhanced Vehicle Emissions Program  
Proposed Oregon Administrative Rules

340-24-0300 (3) For vehicle registrations that expire between 2/1/98 and 1/31/2000, vehicle owners may apply for a one-time waiver from the enhanced test requirements in OAR 340-24-0300 (1)(b) and 340-24-0312. Vehicle owners are eligible if they declare the net household income is within the established income levels based on household size:

Household Size	Net Monthly Income Thresholds
1	\$ 822
2	1106
3	1389
4	1672
5	1956
6	2239
7	2522
8	2806
Each add. member	+ 284

If the Department approves the waiver, the owner must pass the basic motor vehicle emissions test requirements in OAR 340-24-0300 (2) and 340-24-0309 and pay the required fees in order to receive a certificate of compliance.

# NOTICE OF PROPOSED RULEMAKING HEARING

Department of Environmental Quality

OAR Chapter 340-24-0300 (3)

**DATE:**                      **TIME:**                      **LOCATION:**

12/17/97                      1:00-3:00 p.m. 811 SW Sixth Ave., Portland, OR, 3rd Floor Conf. Room 3A

**HEARINGS OFFICER(s):**                      Ed Woods

**STATUTORY AUTHORITY:**                      ORS 468.020, 468A.365 and 468.363 (2) and (4) (c)

or **OTHER AUTHORITY:**

**STATUTES IMPLEMENTED:** ORS 468A.365

**ADOPT:**

**AMEND:**                      OAR 340-024-0300

**REPEAL:**

**RENUMBER:**

**AMEND & RENUMBER:**

- This hearing notice is the initial notice given for this rulemaking action.
- This hearing was requested by interested persons after a previous rulemaking notice.
- Auxiliary aids for persons with disabilities are available upon advance request.

## SUMMARY:

The purpose of this rule is to provide low income vehicle owners economic relief from the new enhanced vehicle emissions test requirements. This rule constitutes a revision to the State Implementation Plan (SIP) under OAR 340-020-0047. The rule will allow a vehicle newer than 1981 and older than five model years to be granted a one-time waiver from the enhanced test if specified criteria are met. Vehicle owner eligibility is based on established net monthly income thresholds according to household size. Eligible applicants are subject to the standard emission test fee and the waived vehicle must pass the basic vehicle emissions test. The program will operate for a two year period, one complete vehicle registration cycle. Copies of the proposed rule can be inspected by calling (503)229-6408. Written comments may be submitted to the attention of Roberta Young at Department of Environmental Quality, 811 SW Sixth Ave. Portland, Oregon 97204, and must be received before 5:00 p.m. December 19, 1997.

**LAST DATE FOR COMMENT:**                      Before 5:00 p.m. on 12/19/97

**AGENCY RULES COORDINATOR:**

Susan M. Greco, (503) 229-5213

**AGENCY CONTACT FOR THIS PROPOSAL:**

Roberta Young, (503)229-6408

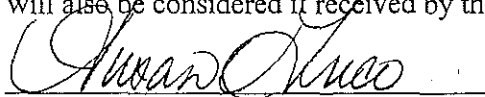
**ADDRESS:**

811 S. W. 6th Avenue  
Portland, Oregon 97204

**TELEPHONE:**

/1-800-452-4011

Interested persons may comment on the proposed rules orally or in writing at the hearing. Written comments will also be considered if received by the date indicated above.

  
Signature

11/12/97  
Date

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State of Oregon  
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal  
for  
Hardship Waiver from Enhanced Vehicle Emissions Program

Fiscal and Economic Impact Statement

**Introduction**

These rules establish a program to grant compliance waivers to eligible low income vehicle owners that fail the enhanced vehicle emissions test. This test applies to vehicles newer than 1981 and older than 5 model years. Vehicle owners are eligible if they declare the household income meets the established income thresholds. A one-time waiver can be provided over the program's two year duration period. Eligible applicants will be responsible for the emissions test fees and must pass the basic vehicle emissions test.

The program will provide direct benefit to eligible applicants in the form of vehicle repair savings. Department staff has examined Tri-County census data for purposes of defining poverty level vehicle owners. Average vehicle repair costs necessary to pass the enhanced emissions test are estimated at \$180.00. Average repair costs to meet the basic emissions test requirement is \$75.00. Staff estimates show approximately 18,000 vehicle owners may be eligible for the hardship waiver and would, on average, realize a direct savings of \$105.00 per vehicle as a participant in the program. The selected income thresholds have been determined slightly higher than the poverty levels used in the analysis so that eligibility be more inclusive of the working low income population. Given the low participation rates in hardship programs of other states, staff assumes participation will be lower than estimated in Oregon as well.

**General Public**

Although, the loss of emission reductions as a result of this program are viewed to be minimal, there will be some increase in emissions for eligible vehicles. There will be no direct financial cost to the general public.

**Small Business**

Essentially all auto repair shops which would otherwise perform the required repairs are small businesses. These shops will be impacted by the loss of potential repair work on vehicles granted program waivers. The \$1,890,000 potential savings by owners of waived vehicles represents loss of income in the same amount by small businesses.

**Large Business**

Very few auto repair shops are large businesses and hence will not generally be impacted by the loss of potential repair work on vehicles granted program waivers.

**Local Governments**

There are no identified fiscal or economic impacts to local governments.

**State Agencies**

- DEQ
  - FTE's 1.0 FTE, AS 1 @ \$62,000
  - Revenues \$0
  - Expenses \$0

The Department estimates the staff resource needs of one FTE to carry out the responsibilities associated with the hardship program. As the standard emission test fee must be paid by eligible vehicle owners, there is no loss of revenue to DEQ. The Department will request authorization for this position from the Legislative Emergency Board in November, 1997.

- Other Agencies None identified.

**Assumptions**

Based on the low participation levels experienced by other states with similar programs(1% of tested vehicles), the Department believes participation will be significantly lower than calculations using census data indicate.



**Housing Cost Impact Statement**

The Department has determined that this proposed rulemaking will have no effect on the cost of development of a 6,000 square foot parcel and the construction of a 1,200 square foot detached single family dwelling on that parcel.

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State of Oregon  
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal  
for  
Hardship Waiver from Enhanced Vehicle Emission Program

Land Use Evaluation Statement

**1. Explain the purpose of the proposed rules.**

The purpose of this rule is to provide low income vehicle owners economic relief from the new enhanced vehicle emissions test requirements. The rule will allow a vehicle newer than 1981 and older than five model years to be granted a one-time waiver from the enhanced test if specified criteria are met. Vehicle owner eligibility is based on established monthly income levels according to household size. Eligible applicants are subject to the standard emission test fee and the waived vehicle must pass the basic vehicle emissions test.

**2. Do the proposed rules affect existing rules, programs or activities that are considered land use programs in the DEQ State Agency Coordination (SAC) Program?**

Yes \_\_\_ No X

a. If yes, identify existing program/rule/activity:

b. If yes, do the existing statewide goal compliance and local plan compatibility procedures adequately cover the proposed rules?

Yes \_\_\_ No \_\_\_ (if no, explain):

**c. If no, apply the following criteria to the proposed rules.**

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.

In applying criterion 2. above, two guidelines should be applied to assess land use 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.

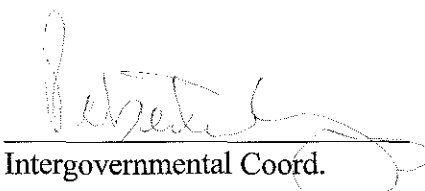
**In the space below, state if the proposed rules are considered programs affecting land use. State the criteria and reasons for the determination.**

The Department has reviewed the above criteria and maintains its current policy and determination that agency activities under the Vehicle Inspection Program are not programs or activities that significantly affect land use.

- 3. If the proposed rules have been determined a land use program under 2. above, but are not subject to existing land use compliance and compatibility procedures, explain the new procedures the Department will use to ensure compliance and compatibility.**

Non-applicable

\_\_\_\_\_  
Division

  
\_\_\_\_\_  
Intergovernmental Coord.

1/21/98  
Date

**Questions to be Answered to Reveal  
Potential Justification for Differing from Federal Requirements.**

**1. Are there federal requirements that are applicable to this situation? If so, exactly what are they?**

There are no specific federal requirements applicable to this rule. The Department has selected to use the enhanced vehicle emission test as a strategy to maintain compliance with the National Ambient Air Quality Standards.

**2. Are the applicable federal requirements performance based, technology based, or both with the most stringent controlling?**

n/a

**3. Do the applicable federal requirements specifically address the issues that are of concern in Oregon? Was data or information that would reasonably reflect Oregon's concern and situation considered in the federal process that established the federal requirements?**

n/a

**4. Will the proposed requirement improve the ability of the regulated community to comply in a more cost effective way by clarifying confusing or potentially conflicting requirements (within or cross-media), increasing certainty, or preventing or reducing the need for costly retrofit to meet more stringent requirements later?**

n/a

**5. Is there a timing issue which might justify changing the time frame for implementation of federal requirements?**

n/a

**6. Will the proposed requirement assist in establishing and maintaining a reasonable margin for accommodation of uncertainty and future growth?**

n/a

**7. Does the proposed requirement establish or maintain reasonable equity in the requirements for various sources? (level the playing field)**

n/a

**8. Would others face increased costs if a more stringent rule is not enacted?**

n/a

**9. Does the proposed requirement include procedural requirements, reporting or monitoring requirements that are different from applicable federal requirements? If so, Why? What is the "compelling reason" for different procedural, reporting or monitoring requirements?**

n/a

**10. Is demonstrated technology available to comply with the proposed requirement?**

n/a

**11. Will the proposed requirement contribute to the prevention of pollution or address a potential problem and represent a more cost effective environmental gain?**

n/a

**State of Oregon**  
**Department of Environmental Quality**

**Memorandum**

**Date:** November 13, 1997

**To:** Interested and Affected Public

**Subject:** Rulemaking Proposal and Rulemaking Statements - Hardship Waiver from Enhanced Vehicle Emission Program

This memorandum contains information on a proposal by the Department of Environmental Quality (Department) to adopt new rules/rule amendments regarding the Vehicle Inspection Program. Pursuant to ORS 183.335, this memorandum also provides information about the Environmental Quality Commission's intended action to adopt a rule. This rule constitutes a revision to the State Implementation Plan (SIP) under OAR 340-020-0047.

This proposal would allow a vehicle newer than 1981 and older than five model years to be granted a one-time waiver from the enhanced test if specified criteria are met. The enhanced test more accurately identifies problems with vehicle emission systems. Vehicle owner eligibility is based on established monthly income levels according to household size. Eligible applicants are subject to the standard emission test fee and the waived vehicle must pass the basic vehicle emissions test. The program will operate for a two year period, one complete vehicle registration cycle. The Department considers the hardship program a pilot effort for purposes of assessing the need for relief and to determine participation potential. At the program's conclusion, the Department will conduct an evaluation of the program and determine if it should be discontinued, continued as is, or continued with modifications.

The Department has the statutory authority to address this issue under ORS 468.020, 468A.363 (2) and (4) (c), and 468A.365.

**What's in this Package?**

Attachments to this memorandum provide details on the proposal as follows:

- Attachment A The official statement describing the fiscal and economic impact of the proposed rule. (required by ORS 183.335)
- Attachment B A statement providing assurance that the proposed rules are consistent with statewide land use goals and compatible with local land use plans.
- Attachment C Questions to be Answered to Reveal Potential Justification for Differing from Federal Requirements.
- Attachment D The actual language of the proposed rule (amendments).

Memo To: Interested and Affected Public  
November 13, 1997  
Page 2

### **Hearing Process Details**

The Department is conducting a public hearing at which comments will be accepted either orally or in writing. The hearing will be held as follows:

**Date:** December 17, 1997

**Time:** 1:00 p.m. to 3:00 p.m.

**Place:** DEQ Headquarters, Conf. Rm. 3A, 811 SW Sixth Ave., Portland , Oregon

**Deadline for submittal of Written Comments:** Before 5:00 P.M. December 19, 1997  
Ed Woods will be the Presiding Officer at the hearing.

Written comments can be presented at the hearing or to the Department any time prior to the above date. Comments are to be sent to: Department of Environmental Quality, Attn: Roberta Young, 811 SW 6th Avenue, Portland, Oregon 97204.

In accordance with ORS 183.335(13), no comments from any party can be accepted after the deadline for submission of comments has passed. Thus if you wish for your comments to be considered by the Department in the development of these rules, your comments must be received prior to the close of the comment period. The Department recommends that comments are submitted as early as possible to allow adequate review and evaluation of the comments submitted.

### **What Happens After the Public Comment Period Closes**

Following close of the public comment period, the Presiding Officer will prepare a report which summarizes the oral testimony presented and identifies written comments submitted. The Environmental Quality Commission (EQC) will receive a copy of the Presiding Officer's report. The public hearing will be tape recorded, but the tape will not be transcribed.

The Department will review and evaluate the rulemaking proposal in light of all information received during the comment period. Following the review, the rules may be presented to the EQC as originally proposed or with modifications made in response to public comments received.

The EQC will consider the Department's recommendation for rule adoption during one of their regularly scheduled public meetings. The targeted meeting date for consideration of this rulemaking proposal is February 19/20, 1998. This date may be delayed if needed to provide additional time for evaluation and response to testimony received in the hearing process.

Attachment B

You will be notified of the time and place for final EQC action if you present oral testimony at the hearing or submit written comment during the comment period. Otherwise, if you wish to be kept advised of this proceeding, you should request that your name be placed on the mailing list. No public comments will be taken on the proposed rules at the EQC meeting.

**Background on Development of the Rulemaking Proposal**  
**Why is there a need for the rule?**

The Vehicle Emissions Test Program is a key strategy for ensuring the Portland Area Air Quality maintains compliance with federal standards while accommodating growth in both population and vehicle miles traveled. The enhanced test is the single most important emission reduction strategy and determined the most cost effective.

A vehicle inspection Certificate of Compliance is required to register cars and light duty trucks within the Portland program boundary. Vehicles are tested every two years. There is no fee imposed until a vehicle passes the required test; upon passing the test a \$21 fee is assessed.

The need for this rulemaking has evolved over the course of the last two Legislative Sessions. The Governor vetoed HB 2937, a bill from the 1997 Legislative Session, which would have allowed geographic-based exemptions from the motor vehicle inspection program. A concern about the potential impact of the testing programs on low income groups, however, resulted in a Governor's request for the EQC and Department to consider the issue of hardship and implement relief programs if appropriate.

**How was the rule developed**

Because of the limited and defined needs involved with this rule, the Department determined a technical advisory group was appropriate as opposed to the creation of a formal citizen advisory committee. The VIP staff established and met with a small group of social service agency representatives to discuss the hardship issue on February 6, 1997. The committee consisted of representatives from Oregon Legal Services, Catholic Community Services, and Albina Headstart. The purpose of the meeting was to obtain advice on the need for a low income program and to identify waiver options. The group's conclusions follow:

- There is a need for a low income hardship program. Vehicle emissions repairs are considered to be low on the priority list of low income drivers, and some individuals risk driving with expired registration.



- A monetary assistance program to provide for repairs to pass the basic test program is preferable because the waiver concept provides for economic relief but does not achieve emission reductions.
- Food stamp or other approved social service program documentation could be used to establish qualification.
- Information on the program should be distributed at the testing stations, DMV locations, and in vehicle registration document mailings.
- DEQ should administer a vehicle repair voucher program for vehicles that fail the enhanced test with a determined dollar ceiling.
- Prefers using a repair assistance program for the basic test program for up to two registration cycles, in lieu of waiving the enhanced test requirements.
- Recommends first establishing a pilot program for the purpose of evaluating the effectiveness of the program and determining if the program should be changed or discontinued.

Staff held a second meeting with this group and two other service agency representatives on October 7, 1997. At this meeting, staff was advised to consider an income threshold that would allow inclusion of a greater percentage of the working low income population. It was felt that the program would be more attractive if staff utilize a brief and simple application process to encourage greater participation. Staff was also advised to consider reliance on the applicant's declaration of eligibility. The group believed the low level of participation in other similar state programs is that vehicle emission compliance is a low priority compared to other crisis or issues must be dealt with by individuals at low income and poverty levels. A simple and direct application process was thought important in promoting participation.

Copies of the documents relied upon in the development of this rulemaking proposal can be reviewed at the Department of Environmental Quality's office at 811 SW 6th Avenue, Portland, Oregon. These include minutes from two meetings with a technical advisory group and information provided from other states that have similar programs( Ohio, Washington, Colorado and Arizona). Please contact Roberta Young for times when the documents are available for review.

**Whom does this rule affect including the public, regulated community or other agencies, and how does it affect these groups?**

This rule will affect the low income population within the Portland Area program boundary. Eligible vehicle owners will be provided temporary relief from meeting the requirements of the enhanced test requirements. It is estimated the average repair cost for vehicles that fail this test will increase from \$75 to \$180 as a result of the enhanced program.

Memo To: Interested and Affected Public  
November 13, 1997  
Page 5

Staff anticipates a minimal impact, due to the temporary status of this rule, to the Department's emission reduction target in that the waived vehicles will be allowed on the roads for a two year period, before the next registration renewal. Operation of this program over the next two years will provide data to assess the benefits and impacts of the program.

### **How will the rule be implemented**

The Department Vehicle Inspection Program staff will incorporate the implementation of this program into the existing vehicle emissions testing procedures. It is estimated that one full time staff position is necessary for program implementation.

### **Are there time constraints**

The enhanced vehicle emissions test will become mandatory beginning February 1, 1998. The Department wants to be prepared to implement this rule as close as possible to the date the enhanced emissions test becomes mandatory.

### **Contact for more information**

If you would like more information on this rulemaking proposal, or would like to be added to the mailing list, please contact:

Roberta Young  
Intergovernmental Coordinator  
Department of Environmental Quality  
811 SW Sixth Avenue  
Portland, Oregon 97204

Telephone: 503 229-6408  
FAX: 503-229-5850

State of Oregon

**Department of Environmental Quality**

**Memorandum**

Date: December 24, 1997

To: Environmental Quality Commission

From: Ed Woods, Vehicle Inspection Program

Subject: Presiding Officer's Report for Rulemaking Hearing:

Hearing Date and Time: December 17, 1997 1 P.M. to 3 P.M.  
Hearing Location: DEQ Headquarter's Bldg, 811 SW Sixth Ave.  
Portland, Oregon  
Title of Proposal: Rules for Hardship Waiver from Enhanced  
Vehicle Emission Program

The rulemaking hearing on the above proposal was opened at 1:00 P.M. by the Presiding Officer. No one attended the hearing and no testimony was presented. The hearing was closed at 3:00 P.M..

The time period for written comments was open until 5:00 P.M. December 19, 1997. The Department received one letter from:

Ellen Mendoza  
Promenade Building, Suite 110  
421 High Street  
Oregon City, OR 97405

A copy of the letter is available upon request.

State of Oregon  
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal  
for  
Hardship Waiver from Enhanced Vehicle Emission Program

Advisory Group Membership and Report

Because of the limited and defined needs involved with this rule, the Department determined a technical advisory group was appropriate as opposed to the creation of a formal citizen advisory committee. The VIP staff established and met with a small group of social service agency representatives to discuss the hardship issue on February 6, 1997. The committee consisted of representatives from Oregon Legal Services, Catholic Community Services, and Albina Headstart. The purpose of the meeting was to obtain advice on the need for a low income program and to identify waiver options. The group's conclusions follow:

- There is a need for a low income hardship program. Vehicle emissions repairs are considered to be low on the priority list of low income drivers, and some individuals risk driving with expired registration.
- A monetary assistance program to provide for repairs to pass the basic test program is preferable because the waiver concept provides for economic relief but does not achieve emission reductions.
- Food stamp or other approved social service program documentation could be used to establish qualification.
- Information on the program should be distributed at the testing stations, DMV locations, and in vehicle registration document mailings.
- DEQ should administer a vehicle repair voucher program for vehicles that fail the enhanced test with a determined dollar ceiling.
- Prefers using a repair assistance program for the basic test program for up to two registration cycles, in lieu of waiving the enhanced test requirements.
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Group Members:

Ellen Mendoza, Oregon Legal Services

Nancy Kimmons, Albina HeadStart

Loren Kurtz, Salvation Army

Doug Alles, Catholic Community Services

Janis Pelster, St. Vincent de Paul

State of Oregon  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
Rulemaking Proposal  
for  
Hardship Waiver from Enhanced Vehicle Emissions Program  
  
Rule Implementation Plan

**Summary of the Proposed Rule:** The proposed rule will allow low income drivers to reduce the cost of vehicle repair by meeting the requirements of the current emission test instead of the new enhanced emission test. It is expected that the average cost of repair for the current emission test is about \$75; while the average repair cost for the new enhanced test is about \$180.

**Proposed Effective Date of the Rule:** The rule will be effective when approved by the EQC and filed with the Secretary of State.

**Proposal for Notification of Affected Persons:** Information on the new rule will be included with other information provided to all drivers whose vehicle fails the test. In addition, local social service agencies will have information available for their customers.

**Proposed Implementing Actions:** The implementation of the rule will occur when the new enhanced emission test becomes mandatory, probably on April 1, 1998. Application forms will be developed and information pamphlets will be distributed.

**Proposed Training Actions:** Administrative staff will be trained in evaluation and processing of applications.

## DEQ RESPONSE TO GOVERNOR DIRECTIVE

### Statement of Purpose

In a letter dated June 26, 1997, Governor Kitzhaber asked the Environmental Quality Commission (EQC) to consider possibilities for providing equitable relief for three groups subject to the Vehicle Inspection Program (VIP). These groups are low income drivers, owners of vehicles that are seldom used, and owners of vehicles that have little impact on the Portland area's air quality. Legislators have also expressed interest in exempting outlying communities, particularly Newberg and Scappoose, from the vehicle inspection program.

### Background

Since October 1997, the Portland Metropolitan Area (PMA) has been in attainment with the national health standards for carbon monoxide (CO) and ozone (O<sub>3</sub>). With the projected 31 percent increase in population by 2006, the PMA should be able to maintain attainment for carbon monoxide for the foreseeable future. However, ozone attainment may be threatened in the late 1990's. Auto emission reductions on the order of 36 percent for volatile organic compounds (VOC's) and 20 percent for nitrogen oxides (NO<sub>x</sub>) will be necessary so citizens can continue breathing healthful air.

In anticipation of the increasing population effect on air quality as described above, the State Task Force on Reducing Motor Vehicle Emissions reviewed 100 air pollution strategies to obtain required emission reductions. Expansion of the vehicle inspection boundary to include 11 percent more vehicles was one of seven options recommended by the task force. The expansion of the vehicle inspection boundary was endorsed by a number of organizations and the Oregon Legislature. These endorsements were based in part on the low cost of controlling auto emissions, i.e. \$3,000 per ton of pollutant as compared to other strategies which might exceed \$10,000 per ton.

The Special House Committee on Emissions believed the new boundary would be most equitable provided urbanized communities were added to the vehicle inspection boundary area. The Technical Advisory Task Force on Vehicle Inspection Boundary Change was created to establish criteria, including the Special Committee on Emission's recommendations, by which the Department could create a new vehicle inspection boundary. The Task Force was comprised of individuals from industry, the planning community, Oregon Department of Motor Vehicles, Department of Environmental Quality, environmental groups, and local government.

The Task Force used the 1990 Census report "Journey to Work" to evaluate commuter travel in census tracts adjacent to the current boundary. The boundary expansion was to include areas demonstrating the highest levels of commuter travel into the vehicle inspection boundary area. The following criteria were applied:

1. The boundary should encompass the greatest population density.
2. The boundary should be contiguous with non-attainment area and contain no "islands".
3. The boundary should rely, where possible, on pre-existing recognizable boundaries.

The Task Force asked the Department to consider non-work trips when evaluating frequency of trips into the boundary area. At that time the Department was unwilling to accept related data in that it was considered unreliable. However, there is now non-commuter data for these communities that is considered reliable.

### **Low-Income Drivers**

The Department is addressing this item by proposing, by rule adoption, a pilot program to allow low-income vehicle owners to delay compliance with the new Enhanced I/M test for two years.

### **Exemptions - General**

A factor that leads some to support exemptions from the vehicle inspection program is the assumption the Department's Vehicle Inspection Program is intended to control only travel to and from work. That assumption is incorrect—the intent of the program is to control emissions from the area's vehicles regardless of the purpose for which they are driven. This misconception apparently came from earlier rulemakings to expand the VIP boundary. Discussions were dominated by data on work-commute behavior. Those rulemakings focused on work related commuting patterns because the 1990 census offered excellent data for that behavior but did not address driving behavior for non-work purposes. The fact that work-commute travel was used as a surrogate for all vehicle travel was apparently not evident to some interested parties.

Any mandatory program including the vehicle inspection program requires an administrative process for implementation and to ensure compliance. As the criteria for determining compliance and applicability become more complex, the administrative processes become more complicated and expensive. Any exemption from the boundary would require additional administrative and enforcement resources and increase the cost of the program for all remaining participants. The cost of the program as reflected by the test fee is a concern for many Portland area drivers.

Any modification that reduces the number of vehicles tested reduces the effectiveness of the program to reduce air pollution. Since the smog problem in the Portland area impacts many areas outside the city and suburbs, emission reductions in more rural areas help to fight this problem. In order to maintain clean air that meets health-based standards, reductions in program effectiveness would need to be offset by emission reductions from other sources. Since the vehicle inspection program is one of the most cost-effective programs, reductions from other sources would likely cost more.



## **Senior Exemption**

The concept of allowing exemptions for senior citizens registered within the expanded area of the vehicle inspection boundary initially seemed promising. The most favored way of achieving this would be to grant Vehicle Inspection & Maintenance Program exemptions to owners older than 65 living in 16 ZIP Code areas that lie entirely outside the original boundary. Implicit in such a plan is the assumption that seniors are likely to be retired, and because retirees do not have to commute to work, they drive less than average within the Air Quality Maintenance Area.

On investigation, DEQ staff found little evidence to support the suggested exemption. The best available information on the subject is Metro's Household Activity Survey which was conducted in 1994-1995. That survey indicates the total vehicle miles driven by seniors who drive regularly and live in the non-urban portions of the expanded boundary is only 14 percent lower than the average of all drivers in those areas. Furthermore, the study indicates that the average length of the trips driven by seniors is essentially the same as the average length of trips driven by all drivers of the same geographic location. This finding suggests that non-urban seniors travel to the same destinations as their neighbors, often destinations inside the Air Quality Maintenance Area or AQMA.

In addition to the Department's position in September 1997, the Attorney General's office advised that the statutes authorizing the Vehicle Inspection Program deal only with the EQC's authority to regulate classes of vehicles, and concluded the EQC lacks authority to exempt classes of people.

## **Low-Use Vehicle Exemption**

Granting an exemption for low-use vehicles was investigated and found to have implementation difficulties. Problems arise from the need for a technique to verify "low-use vehicles". The first difficulty is the fact that a vehicle's level of use must be documented which typically requires a trip to an Inspection/Maintenance station. This means the inconvenience of having to travel to an inspection facility is retained. Other problems stem from the fact that past use does not always indicate future use, and that newly acquired vehicles require additional effort to establish that vehicle's baseline of use. (This could involve even more trips to an inspection facility, or the collection and submission of other evidence to demonstrate a vehicle's likely level of use.)

In addition, the overarching issue troubling efforts to identify "low-use" vehicles is the fact that odometer settings can be easily falsified. For this reason, EPA's policy is to allow "low-use" exemptions only when the number of vehicles applying for exemptions is consistent with the percentage of low-use vehicles EPA knows to actually exist. The State of Maine conducted the only known pilot program of the "low-use" concept, but

the experiment was dropped when exemption applications were submitted in disproportionately high numbers.

### **Vehicles Not Used in the Air Shed**

The Department also considered exemptions for vehicles registered within the outer portions of the VIP boundary but which do not enter the urbanized area (and therefore do not contribute to Portland air quality problems). On investigation, the Department determined this concept to be an attractive approach, but one which would require additional resources for implementation. EPA indicates such a program would be acceptable only if the agency made a commitment to actively enforce the program to prevent wide spread abuse of the provision. This would require some method to readily identify vehicles operating under the exemption (such as distinctive license plate stickers) and additional staff to identify and deter program violators. The Oregon Legislature was not receptive to the idea of using distinctive license plate stickers in previous discussions, and the Department does not have nor anticipates receiving additional resources to seek out violators.

### **Remote Sensing**

The final possibility reviewed to address the Governor's concerns was the potential use of "remote sensing" to detect gross emitters of pollutants. Simply stated, remote sensing involves detection equipment used to identify gross polluting vehicles traveling in a manner similar to the way police use radar guns to identify speeders. While this technique holds some promise, the Department finds that remote sensing applications are not suited to the current situation for several reasons. Remote sensing techniques seem to be fairly well suited for the detection of gross emitters of Carbon Monoxide, but are not very effective at identifying gross emitters of Volatile Organic Compounds (VOC) or Nitrogen Oxides (NOX), the major precursors of ground-level ozone. Because control of ground-level ozone is a leading purpose of Portland's Vehicle Inspection Program, this characteristic becomes a fundamental shortcoming.

At its best, remote sensing is appropriate only as a "screening" technique, meaning gross polluters identified by this method must subsequently be taken to a vehicle test facility for a determination of actual emissions. Due to complications such as this, EPA reports that what initially seems to be a simple way of identifying gross polluters would end up being an intricate and complex effort.

Finally, an effective remote sensing program has not yet been demonstrated to EPA's satisfaction. The most advanced effort to date is a pilot program for remote sensing currently being planned in Texas. EPA hopes to gain valuable experience from the Texas effort, but at this point remains skeptical about such a program's ultimate efficacy.

## **Scappoose and Newberg Impacts**

Since included in the vehicle inspection boundary several years ago, some residents in Scappoose and Newberg have maintained their vehicles have no impact on air quality in the metropolitan area and should be exempted from the program. While some residents of these areas have produced anecdotal information suggesting they never drive into the metro area, a look at broader measures suggests these bedroom communities are significant contributors of vehicle pollution.

On July 20, 1993 the Public Utility Commission of Oregon (PUC) held hearings concerning Newberg's and Scappoose's applications for expansion of the Portland Extended Area Phone Service Region into their communities. Central to the PUC's consideration for Extended Area Phone Service is existence of a "community of interest". A community of interest exists where social, economic, or political interdependence exists between two communities or there is heavy dependence by one area on the other for services and facilities. The demand for EAS is the result of the changing nature of communities in Oregon. Improved transportation, communications, and the general growth of cities and towns has expanded the psychological boundary of what the local resident viewed as their community. Communities on the outskirts of larger urban areas, once isolated and self-sufficient, have become interdependent parts of larger communities. This has been accelerated by better roads, mass transit, location of businesses outside the urban core, regional coverage by news media and growth of commuter populations.

Newberg's business linkage to the Portland Metropolitan Area is measured by leakage of local shopping dollars to the PMA. Fifteen years ago there was an array of consumer goods available on Newberg's First Street. Since that time Washington Square was built, drawing away some Newberg shoppers. In the 1970s there was an influx of new residents who do not have loyalty to downtown merchants as long time residents. In 1986, research found that capture rates, (the amount of money businesses capture then lose to out of area stores) were 90 percent for food sales and a low of 20 percent for general merchandise stores. The migration of business from Newberg to Portland further defines the community of interest between Newberg and the Portland EAS Region.

The PUC found that a community of interest exists between the Portland EAS and Newberg. This is due to Newberg's proximity to the western metropolitan area and the good highway system connecting the two. Newberg has become a bedroom community for many Portland workers, as reflected by the residents commuting patterns which are similar to other Westside Portland suburban communities. Many Newberg resident's look to the western metropolitan area stores for shopping needs. Ties to several metropolitan communities, particularly Portland, Tigard, Beaverton and Tualatin exist. Newberg is treated as part of the metropolitan area by institutions such as Portland Community College and Portland Metro Athletic League. It is part of the Portland Consolidated Metropolitan Statistical Area.

To further demonstrate Newberg's growing importance in the social and economic life of the metropolitan region, the *Oregonian* conducted a region-wide survey in 1993. Respondents were asked "In the past 30 days, where have you shopped? Newberg citizens ranked 1 for Washington Square (10,135 trips), ranked 2 for Downtown (2,159 trips), ranked 3 for Lloyd Center (1,139 trips), and ranked 4 for Tualatin Fred Meyer (960).

The city of Scappoose has also applied for EAS. On May 6, 1993 the PUC held a hearing to determine whether Scappoose qualified as a "community of interest". Scappoose lies 20 miles northwest of downtown Portland and is situated between the Columbia River and the Tualatin Mountains. US Route 30 is the only improved transportation route in and out of the area. For this reason residents depend on Portland for goods and services, particularly durable goods and entertainment. The Scappoose City Club's EAS survey revealed 76 percent of residents make most or all of their clothing purchases in Portland and 70 percent buy home appliances and furnishings in Portland. 40 percent of Scappoose's citizens obtain building and maintenance materials from Portland. The survey found 50 percent of Scappoose residents travel to Portland for concerts, theater and sporting events; more than 60 percent frequent Portland for fine dining. Scappoose is served by the Portland Community College system, but all PCC campuses are within the PMA. Portland provides medical care for 50 percent; Scappoose residents and dental care for an other 40 percent. The City Club Survey also revealed that 94 percent of Scappoose businesses have suppliers or customers in the Portland EAS. Although not approved for EAS, the Public Service Commission declared that Scappoose has strong ties to the Portland Metropolitan Area.

In 1994-95 Metro conducted the "Household Activity Survey" for residents of Columbia and Yamhill counties. This survey shows the average number of week-day trips made by households in Scappoose, Newberg and their respective counties. A trip was defined as motorcar travel made by a resident of either city or county, whether the trip originated, terminated or both within Clackamas, Multnomah or Washington counties. 38 percent or 11,149 average week-day trips from Scappoose went daily into the Vehicle Inspection Boundary Area. Overall, 27 percent or 48,750 average week-day trips were made by Columbia county residents into the boundary area. Approximately 25 percent of Newberg or 15,297 average week day trips involved the boundary area, and 21 percent or 42,232 average week-day trips originating in Yamhill County traversed the boundary area.

The PUC application hearings for expansion of the Portland Extended Area Phone Service, data from the *Oregonian* survey, and Metro's 1994-95 Household Activity Survey suggest that a high number of non-commuting trips originate in Newberg and Scappoose, and that these discretionary trips pass through or terminate inside the Vehicle Inspection Boundary.

The Oregon goal of pure air quality without adverse effect from motor vehicle air pollution on human health, safety, welfare, the quality of life and protection of property is dependent upon proactive vehicle inspection program to control or eliminate vehicular emissions within the VIP boundary. The air protected by the program receives emissions from cars that travel to restaurants, theaters, shopping areas, and dental/health facilities in the Portland Metropolitan Area. There is an issue of equity between controlled and uncontrolled vehicles operating within the boundary. Vehicles reasonably expected to traverse the VIP boundary must be included within the Vehicle Inspection Program Boundary. Simplicity in design and administration is necessary to ensure cost effective operations within the boundary. The protection of human health and the environment should not be jeopardized by trying to make micro decisions about whether vehicles in fringe areas should be subjected to emission testing. The protection of the air shed is the responsibility of everyone who enjoys the benefits of clean air and who drives within the Vehicle Inspection Program Boundary.

### **Summary**

Department staff is proposing rulemaking to establish a pilot project to provide hardship relief for low-income vehicle owners subject to the enhanced vehicle emission program. In respect to the issues involving vehicle use that doesn't impact the area's air quality and low-use vehicles, staff and legal counsel conclude it is not appropriate to pursue state relief for those categories. For the above discussed reasons, the Department recommends no action at this time. It is the Department's position that all citizens, both urban and rural, benefit from clean air and avoiding economic sanctions by USEPA, it is important that all participate in keeping the air clean.

lieqcatt.doc

February 20, 1998

Addendum to February 20, 1998 Memo to the EQC  
on Summary and Response to Public Comment

**Comments by Glen Stonebrink, Western Institute for Nature, Resources, Education  
and Policy**

1. What were the areas where consensus was not reached by the Advisory Committee and what is the disagreement by the members of the Advisory Committee on the draft rules.

Response: There is disagreement about the policy for granting certifications on water quality limited waters, on where general certifications should be allowed, on the amount of information required in the application and on the specificity and qualitative nature of the evaluation criteria. The Advisory Committee report to the Commission at the Work Session on February 19 covered these topics in more detail.

2. Questions about the matrix and a concern that other written testimony was not included.

Response: The matrix is an attachment to Appendix D of the Report. Appendix D summarizes all written and oral testimony received through January 20, identifies the parties who made the comment and give the DEQ and ODA response. The matrix was used as a means to identify people who made comments that were repeated in very large number, rather than listing all the names in the main body of Appendix D.

3. CWA Section 401 refers to "navigable water" but the proposed rules refer to "waters of the United States" in 340-048-0100. It should be clear that the State owns the waters and that the CWA addresses navigable waters, not all waters.

Response: It is staff's understanding that navigable waters means "waters of the United States" but that this does not mean that the federal government rather than the State owns these waters. Also "navigable" waters is very broadly applied and essentially means nearly all surface waters.

4. Comments on the timing of receiving a certification under a general certification and a concern that it could require 75 days for an individual to obtain certification.

Response: The 45 day public comment period occurs when DEQ is developing the general certification. At this point there are no specific applicants for certification under the general. After a general certification is developed, a permittee can apply to be certified under the general. After the DEQ receives an application to be

Response: DEQ typically provides for public hearings when they are requested. We will try to conduct this in a manner that will not significantly delay issuance of certifications.

11. 340-048-0140, paragraph 3: Restore the wording addressing “management activities covered by the grazing permit,” otherwise the responsibilities for activities can become unlimited in scope and landscape beyond the intent of section 401.

Response: The 401 certification only pertains to the proposed activities for which the applicant must obtain a federal permit, in case the activities related to livestock grazing. The concept is also stated in the 3<sup>rd</sup> sentence, which has not been eliminated.

12. 340-048-0140: Restore the term site capability and delete the term site potential.

Response: Site potential indicates what the site is capable of achieving given its ecological setting. Site capability, as defined by the BLM, includes economic, political and social factors not intended to be incorporated into the evaluation criteria in this rule.

13. 340-048-0140: Rest from grazing violates the federal Taylor Grazing Act and the Oregon Constitution provision on “Saving Existing Rights.”

Response: The State disagrees that using rest as a land management tool violates the Taylor Grazing Act and this claim is also inconsistent with federal plans and policies. Staff is unfamiliar about the Constitutional provision you refer to and will ask our attorney about your comment.

Date: February 17, 1998  
To: Environmental Quality Commission  
From: Langdon Marsh *Langdon Marsh*  
Subject: Agenda Item I, 401 Certifications for Livestock Grazing on Federal Lands, Summary and Response to Comments Received January 21 to February 16, 1998

The following is a summary of written comments received by DEQ between January 21 and February 16, 1998. In addition to these comments, we have received a large number of submissions that were summarized in the matrix appended to your staff report at Appendix D. We are currently compiling a similar matrix for comments received between January 21 and February 16, 1998, and will have this available for your workshop on Thursday.

Below are the additional comments along with the person or organization which made the comment and the DEQ/ODA Response. Following the "General" section, they are organized by section of the proposed rules.

### GENERAL

1. Stipulate that certification requirements apply prospectively only where new permits are issued to replace waived or expired permits.

#### **US Forest Service**

Response: It is the application for a federal permit that triggers the certification requirement in Section 401. It is not required that every permit holder obtain certification until such time as their permit is due for re-issuance.

2. Section 340-048-0020 is confusing and redundant with new rule provisions.

#### **US Forest Service**

Response: The language has been changed such that -0020 does not apply to applications for certification of grazing activity.



3. The Fiscal and Economic Impact Statement fails to recognize the likelihood that some businesses may be unable to operate an economically viable livestock grazing operation under the terms of a 401 certification. There is also a possible loss of tax revenue to state and local governments if businesses are closed or realize smaller profits.

**US Forest Service  
Douglas County Planning Department**

Response: Last season 401 certifications were based on implementation of existing federal plans and permit conditions. No additional cost was, therefore imposed on businesses.

4. It is unlikely that 1.5 FTE will be adequate to process certification applications, let alone conduct monitoring and enforcement duties.

**US Forest Service**

Response: This level of resources successfully conducted this program last season within the stipulated timelines. This was achieved largely as a result of a close and cooperative working relationship between ODA and DEQ. We look forward to a similar working relationship with the federal agencies.

5. The Forest Service strongly suggests that the State reinstate its temporary rule and wait for a decision on the appeal of this case before promulgating a permanent rule.

**US Forest Service**

Response: The Administrative Procedures Act prohibits the use of a temporary rule for more than 180 days and prohibits re-adoption of temporary rules. The temporary rules were adopted due to the short time the agencies had to develop rules between the court decision and the 1997 grazing season. Now that another year has passed to give the program more careful consideration, we feel that the proposed rules are an improvement over the temporary rules.

**DEFINITIONS**

1. Terms are defined that are not used in the rules.

**US Forest Service**

Response: Several terms that are not used have been deleted from the proposed rules.

## **BACKGROUND AND PURPOSE**

1. This case is under appeal. If the Federal Ninth District Circuit Court holds that Sec. 401 does not apply to federally permitted livestock grazing activities, the draft Sec. 401 rules have no legal force or effect.

### **US Forest Service**

Response: These rules are proposed for adoption pursuant to a decision from a federal district court. The decision currently applies to grazers in Oregon on US Forest Service lands. The rules do not “require” grazers to apply for certification. The rule provides the process by which certifications will be issued in the event that grazer’s apply. The court decision in combination with the Clean Water Act are clear, however, that a federal permit may not be issued without a 401 certification.

2. The rules should acknowledge that livestock grazing can and does produce discharges that result in water quality standards violations and should state their purpose as ensuring that grazing authorized by a Federal permit is conducted to meet water quality standards, prohibit impairment of beneficial uses and meet the antidegradation policy.

### **National Marine Fisheries Service**

Response: Grazing and water quality are not incompatible. The purpose of these rules is to ensure that where waters are meeting or are better than standards, that grazing does not degrade water quality, and for those streams that are not meeting standards, that grazing be conducted in a manner than improves water quality.

## **CERTIFICATION POLICY AND OPTIONS**

1. Regarding 340-048-0110 (2), the rule should require a demonstrated causal link between the livestock grazing and designation of the stream as “water quality limited” before this provision is applicable. It is inappropriate to require that grazing activity provide for improvement of water quality parameters where grazing was not the basis for a listing or would not impact the water quality parameters of concern.

### **US Forest Service**

Response: The assumption is that grazers are not being required to address pollution caused by others. The wording of 340-0480-0110(2) makes this change unnecessary. The rule requires that for water quality limited waters that grazing be conducted in a manner that will not degrade water quality, and will result in improvements to site characteristics that impact water quality. While TMDLs may require this type of proof in order to allot load allocations, section 401 of the

Clean Water Act states only that the activity must be carried out so as not to violate state water quality provisions.

2. The rules should not permit continued grazing alongside polluted streams when grazing is known to be a source of pollution to those streams.

**See Matrix**

**Peter Sorenson, Lane County Commissioner**

**Beverly Stein, Multnomah County Chair**

**Kent Daniels Benton County Commissioner**

**Everett Peterson**

Response: Grazing and water quality are not necessarily incompatible. The State's preferred approach is to evaluate each site or area to determine what is necessary to protect water quality at that location. It is possible that some sites will require rest or severe restrictions on grazing but we do not at this time believe it is necessary to make this an automatic statewide requirement. Certifications issued under the proposed rules will include conditions to ensure that water quality is protected.

3. Grazing permits should be granted in areas near polluted streams in the interest of the local economies, but at a reduced level and managed so that improvement in river quality can be attained.

**John Lester**

Response: This is the intent of the proposed rules, to allow grazing to occur where it can be managed to allow water quality to be protected or to allow recovery where standards are not met.

4. The rules should not allow certification where no data exists on a stream. Rather, data should be collected prior to certification.

**See Matrix**

**Peter Sorenson, Lane County Commissioner**

**Beverly Stein, Multnomah County Chair**

**Kent Daniels, Benton County Commissioner**

Response: Where site specific data is not available, certification may be based on general knowledge of the activity and practices proposed and their potential impacts on streams and water quality, and a "professional judgment" as to whether the proposed activity will comply with water quality standards. In addition, monitoring will be required as a condition of the certification or through a Memorandum of Agreement with the federal agencies.

5. The rules should not allow grazing alongside streams that lack a water quality management plan.

**Peter Sorenson, Lane County Commissioner**  
**Beverly Stein, Multnomah County Chair**  
**Kent Daniels, Benton County Chair**

Response: See comments above. The proposed rules provide an incentive for grazers and the federal agencies to develop water quality management plans. Once developed and approved, these plans can form the basis for a general certification which will protect water quality, and reduce the application materials that need to be supplied by applicants.

6. A general certification should be developed in coordination with the Douglas County Planning Department for exclusive farm use or forest zoned lands in Douglas County.

**Douglas County Planning Department**

Response: The 401 certification requirement only applies to federally permitted grazing activity on federal lands, but the rules do provide for general certifications.

7. Certification of a grazing permit on water quality limited waters that are not in Proper Functioning Condition (PFC) or where site conditions are not presently achieving riparian and aquatic habitat resource management objectives, should be granted only after a finding that the proposed activity will not retard the natural rate of recovery toward attainment of standards and aquatic and riparian management objectives.

**National Marine Fisheries Service**

Response: DEQ does not agree that it must allow the “natural rate of recovery” to occur under the provisions of section 401. We do agree that we need to continue to consult the scientific literature and experts in relevant fields to determine what grazing management systems and practices are demonstrated to allow adequate recovery on various types of range land sites.

8. Additional information is necessary to decide whether general certifications are sufficient to ensure that livestock grazing is conducted to meet water quality standards. Recommend specific findings for general certifications.

**National Marine Fisheries Service**

Response: Information will be required and evaluated during the process of developing a general certification as stated in proposed OAR 340-048-0110 (5)(b). The rules simply identify circumstances under which the State has the option to

develop a general certification. The findings required for individual and general certifications should be the same.

### **APPLICATION REQUIREMENTS AND REVIEW**

1. Every application should include information on fish presence and status, particularly salmonids and salmonid habitat, in the waters potentially affected by the proposed activity.

#### **National Marine Fisheries Service**

Response: This information may not be readily accessible to applicants. It is, however, available to the two state regulating agencies, and will be taken into account in developing certifications.

### **CONTENT OF CERTIFICATION**

No comments received.

### **GRAZING CERTIFICATION EVALUATION CRITERIA**

1. The criteria section identifies practices and activities (BMPs) but does not mention State water quality standards or how the BMPs will assist in maintaining or improving said standards. The rules should state that BMPs have been designed to assure compliance with water quality standards and that the proper implementation of those BMPs will promote or further the protection of water quality standards.

#### **US Forest Service**

Response: The rules state that “objectives will integrate Best Management Practices (BMPs) in order to fully address water quality standards.” (340-048-0140)

2. The rules do not require permittees to satisfy the objectives using best management practices (BMPs).

#### **National Marine Fisheries Service**

Response: The rules have been changed to address this concern. They now read that the “objectives will integrate BMPs in order to fully address water quality standards.”

3. The meaning of the third paragraph of introductory language in this section is unclear.

**National Marine Fisheries Service**

Response: The wording has been changed to clarify the intent.

4. Effective criteria must be based on quantifiable resource standards, such as PFC and achievement of identified aquatic and riparian management objectives, and livestock management BMPs necessary to attain them. The criteria lack any basis for comparison, measurement or correlation with water quality standards and their connections to site condition are equally vague. NMFS requests this section be rewritten to include scientifically supportable, quantifiable riparian management standards and livestock management BMPs. Examples of such criteria include the Aquatic Conservation Strategy (1995), PACFISH (1995) and INFISH (1995).

**National Marine Fisheries Service**

Response: The approach in the proposed rules is that rather than placing quantified criteria in the rules that apply statewide, the applicant propose site condition objectives in his/her application. The minimum we would expect would be those included in the Aquatic Conservation Strategy and Riparian Management Objectives in PACFISH or INFISH that already apply on federal lands in Oregon. Where we are not satisfied with the objectives proposed, the state can add them as conditions of certification.

**COMPLIANCE MONITORING AND ENFORCEMENT**

1. Monitoring and enforcement of the certification terms and conditions other than those imposed by the Federal agency are State responsibilities.

**US Forest Service  
Everett Peterson**

Response: Section 401(d) of the Clean Water Act states explicitly that “Any certification provided under this section shall set forth any effluent limitations and other limitations and, monitoring requirements.....and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.” (My emphasis) Upon being incorporated into the federal permit, monitoring and enforcement of the conditions become the responsibility of the issuing federal agency.

2. DEQ’s enforcement authority must be enlarged to allow it to take action without awaiting action (or lack of action) by the federal agency.

**US Forest Service**

Response: This change to the proposed rules has been made.

3. DEQ may not withhold certification from a qualified applicant based on compliance “problems” in “that area” if the lack of compliance does not directly involve that applicant. Also, this provision doesn’t define what constitutes a compliance “problem” nor what “that area” might be.

**US Forest Service**

Response: We have deleted “that area” from this provision. By compliance problem we mean a lack of compliance with the terms and conditions of the water quality certification permit. DEQ may also enforce its water quality standards and rules under our general authorities to do so outside the 401 program.

4. No certifications should be issued when there is uncertainty as to whether the proposed activity will degrade water quality.

**Peter Sorenson, Lane County Commissioner**  
**Beverly Stein, Multnomah County Chair**  
**Kent Daniels, Benton County Commissioner**

Response: If there is uncertainty that is so great that the finding of “reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards and other appropriate requirements of state law,” cannot be made, then certification will be denied. Uncertainty, however, is a feature of water quality certifications. There is rarely complete certainty. The rule provides for monitoring to assist in alleviating uncertainty.

5. If a grazer fails to comply with a certification punitive action should be taken, and reparations paid.

**Everett Peterson**

Response: The draft rules provide for revocation of certification in the event of noncompliance. In addition, an applicant’s compliance history may be considered in evaluating future certification requests. In adopting these rules, the state has not relinquished its authority to take enforcement action for violations of water quality under other provisions of the Clean Water Act or state law.

6. The rules give all the compliance monitoring responsibility to the Federal permitting agencies but the Federal agencies may be reluctant to accept this responsibility. Recommend taking steps for habitat structure in the Oregon Plan, including setting clear,

quantifiable livestock management objectives and grazing measures to accomplish the objectives. This would provide the State standards and measures to monitor in cooperation with the Federal agencies.

**National Marine Fisheries Service**

Response: At the point at which the water quality certification conditions are incorporated into the federal license or permit, then become the responsibility of the federal agency to monitor and enforce. In the last season, under the temporary rules, the state relied on pre-existing federal requirements contained in plans, which should be being enforced by the federal agencies already. The state looks forward to a cooperative relationship with the federal agencies in which roles and expectations can be clearly identified.

7. Consider adopting the monitoring system developed by EPA to assess grazing impacts on water quality in streams (reference provided).

**National Marine Fisheries Service**

Response: This issue is being evaluated. This is problematic because the rules need to be general enough to apply statewide while being detailed enough to address site specific conditions. We are strengthening the linkages to documents which provide guidance to the federal agencies concerning these issues.

8. Objective certification criteria are prerequisites for fair and equal enforcement procedures. DEQ or ODA need to record implementation of all ongoing activities and associated monitoring and enforcement to help determine annual work plan commitments and state funding needs.

**National Marine Fisheries Service**

Response: Implementation falls into two categories. There is implementation of permit conditions which falls on applicants and the federal agencies. Then there is implementation of these rules vis-à-vis producing certifications (denials). The state will be keeping track of the latter.

**MISCELLANEOUS**

1. The rules must be specific and complete so everyone understands his or her obligation.

**Evertt Peterson**



Response: The proposed rules are complete and specific. In addition, ODA will be conducting a series of workshops around the state to explain the program. Staff of both DEQ and ODA are available to provide technical assistance.

2. State certify private sector representatives to assist in controlling mis-information.

**Evertt Peterson**

Response: ODA and DEQ will ensure that accurate information is presented to grazers, the public and federal agencies. State certification is not required for that information to be transmitted to others.

Matrix - Supplemental response to Public Comment

Name/Address	Strengthen rules to protect streams, water quality, fish	Need action now, fish can't wait	Rest or deny cert. on polluted streams until water quality standards are met	Where there is no data, require monitoring as condition of cert.	Where there is no data, require monitoring before certification	Livestock damage streams and habitat	Livestock damage streams, I've seen it	Restrict grazing along streams
Abrahams Peter 1948 Mapleleaf Rd Lake Oswego OR 97034		✓	✓	✓		✓	✓	
Adee Avis + Eileen 1150 Janes Rd Medford, OR 97501			✓		✓			
Angenent Tom & Virginia RR 2, Box 322 Bandon, OR 97411			✓		✓			
Ayres Betty PO Box 2 Cannon Beach OR 97110	✓							✓
Bachhuber Stephen 10561 SE Idleman Rd Happy Valley, OR 97266	✓	✓	✓	✓				
Bailey Kenneth 2867 NE Hamblet Portland, OR 97212		✓	✓	✓				
Bardel Patrick 2300 SE Woodward St Portland, OR			✓		✓			
Baxter Thomas PO Box 201 Dexter, OR 97431			✓		✓		✓	
Beebe Bonnie 11145 SW Morgen Ct Portland, OR 97223	✓					✓		
Berrington Rachel 2509 NE Flanders #307 Portland, OR 97232		✓	✓	✓		✓		
Bianculli Joe 22135 Erickson Rd Bend, OR 97701	✓		✓		✓			
Black KE PO Box 640 Boring OR 97009	✓	✓	✓	✓		✓		
Bonicatto Jim	✓	✓	✓	✓		✓		

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642 SW Grant Portland, OR 97201								
Bonnlander Mark, Benjamin 156 Country Club Lane Albany, OR 97321		✓	✓					
Boorman Benjamin 6351 Arbor Cr. Trail, Apt.207 Memphis, TN 38115			✓		✓	✓		
Boring Bob 3321 Vale Rd Klamath Falls, OR 97603								✓
Bradshaw Betty 1027 S Hwy 140 Eagle Point, OR								
Brown Kimberly PO Box 537 Williams, OR 97544		✓	✓	✓		✓		
Buckmaster Aimee 1480 NE "D" Grants Pass, OR 97526	✓		✓	✓				
Burley Bill 2400 NW 80th St Seattle, WA 98117	✓	✓		✓				✓
Cable Nancy 40323 SW LaSalle Rd Gaston, OR 97119								
Calver WH 4360 SE Lambert St Portland, OR 97206	✓							
Cameron Judi 160 E Broadway Eugene, OR 97401	✓			✓		✓		✓
Cameron Ron 160 E Broadway Eugene, OR 97401	✓			✓		✓		✓
Campbell Dan 4325 NE Halsey #18		✓	✓	✓		✓		

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Portland, OR 97213								
Carter Nancy 918 Cypress Point Loop Ashland, OR 97520			✓		✓			
Conley James, VP Santiam Watershed PO Box 18361 Salem, OR 97305			✓		✓			
Corbett Scott Microsound Systems 16055-B Boones Ferry Red, Suite 149 Lake Oswego, OR 97035	✓	✓	✓	✓	✓	✓		
Craig Linda 17645 NW Rolling Hill Lane Beaverton, OR 97006	✓		✓		✓		✓	
Cummings Mel 1704 63rd NE Salem, OR 97305			✓		✓			
Dafoe Vera 9449 SW 62nd Dr Portland, OR 97219	✓		✓		✓	✓		
Daniels Kent Benton Co. Commissioner PO Box 3020 Covallis, OR 97339-3020			✓		✓			
deGroot Diana 380 Little River Glide OR 97443			✓				✓	
Downing Greg PO Box 192 Blue River, OR 97413	✓		✓			✓		
Ducks Toni 12820 SW Tarpan Dr. Beaverton, OR 97008								
Drom David Susan Gonzales		✓	✓	✓		✓		

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1460 SE 35 <sup>th</sup> St Troutdale, OR 97060								
Dymale Sandra 160 E Broadway Eugene, OR 97401	✓			✓		✓		✓
Dyson Greg 232 NE Stanton Portland, OR 97212			✓		✓			
Ediger Joel 12670-A SW Farmington Beaverton, OR 97005			✓		✓			
Ekblaw Daniel 502 S 4 <sup>th</sup> St Yakima, WA 98901-3226	✓		✓		✓			
Elshoff Alice General Delivery Frenchglen, OR 97736	✓	✓	✓	✓				
Enbysk Dan 941 NE Ainsworth St Portland, OR 97211		✓	✓	✓		✓		
Eisson Ole 414 SE 18 <sup>th</sup> Ave Portland, OR 97214			✓		✓			
Faulkner Larry & Bev 7207 NE Mason Portland, OR 97218	✓					✓		
Findley Roger 3535 Butte Drive Ontario, OR 97914								
Flint Joan Lance Winger 1305 S 39 <sup>th</sup> St Springfield, OR 97478			✓		✓	✓		
Fonvielle Eden 921 SE 118 <sup>th</sup> #3 Portland, OR 97214								
Fowler Jane	✓		✓	✓	✓			

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804 NE Lafayette Bend, OR 97701								
Freeman Burnell 777 Stanton Blvd Ontario, OR 97914								
Fuglister Jill 3725 SE Francis Portland, OR 97202	✓		✓		✓			
Fuller David & Elizabeth 155 Jason Way Grants Pass, OR 97527		✓	✓	✓				
Gagen Carrie 63654 Ranch Village Dr Bend, OR 97701		✓	✓		✓			
Ganes Douglas PO Box 40131 Portland, OR 97240		✓	✓	✓		✓		
Garr Elizabeth Holmes National Marine Fisheries Serv 525 NE Oregon Street Portland, OR 97232								
Gentry melissa 35473 S Dicky Prairie Rd Molalla OR 97038			✓	✓				
Gerald Annette 1945 SW Knoll Ave. Bend, OR 97702			✓		✓			
Gilbert Larry 160 E Broadway Eugene, OR 97401	✓			✓		✓		✓
Goodrich Jerry 233 NE Fulton Roseburg, OR			✓		✓	✓		
Gritzka, MD Thomas 7525 SE 29 <sup>th</sup> Portland, OR 97202			✓		✓			
Gross John		✓		✓			✓	✓

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39621 Deerhorn Rd Springfield, OR 97478								
Hall Stacie 927 Clearbrook Dr Oregon City, OR 97045	✓				✓	✓		
Handy Rob 455-1/2 River Rd Eugene, OR 97404			✓					
Haram Gerald 22464 S Evergreen Dr Beavercreek, OR 97004			✓		✓			
Harville John 2430 SW Boundary St Portland, OR 97201	✓		✓		✓		✓	
Heerspink Kathleen 13918 SE 97 <sup>th</sup> Ave Clackamas, OR 97015		✓	✓	✓		✓		
Hobart M 213 NE 11 <sup>th</sup> St Newport, OR 97365				✓				✓
Honeyman Bruce Rt 1, Box 143A Halfway, OR 97834			✓		✓		✓	
Howarth Ralph & Wilma 390 E 46 <sup>th</sup> St Eugene, OR			✓		✓			
Huling Karlynn 4786 Dakota Rd, SE Salem, OR 97302	✓			✓	✓			
Javens Eugene & Elizabeth 1030 16 <sup>th</sup> NE Salem, OR 97301	✓		✓					
Johnsrude Kevin 2625 NW Mulkey Ave Corvallis, OR 97330		✓	✓		✓			
Jorgensen Betty 2350 SE Evergreen St		✓	✓					

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Milwaukie, OR 97222								
Kameia Robert 9429 E. Adobe Dr. Scottsdale, AZ 85255			✓		✓			✓
Koenig John Native Plant Society of OR PO Box 902 Eugene, OR 97440		✓	✓	✓		✓		
Keyser Rodney 9421 SW 12 <sup>th</sup> Portland, OR 97219	✓	✓		✓		✓		
Kirk Phyllis 15226 S Springwater Rd Oregon City OR 97045		✓	✓					
Klingler Lee 2357-Z N Irving St Portland, OR 97219	✓			✓			✓	✓
Kreuz Keith & Lynn OR Desert Brine Shrimp 9360 NW Harbor Blvd Portland, OR 97231	✓		✓		✓		✓	
Kriegh Steve 480 Horn Lane Eugene, OR 97404	✓		✓		✓		✓	
Kupillas Sue Jackson Co 10 S Oakdale Medford, OR 97501								
Kurzel Reuel 8675 SW Cecilia Terrace Portland, OR 97223	✓	✓	✓					
Lack Larry Lee Ann ward 3736 SE Caruthers Portland, OR 97214	✓		✓		✓		✓	✓
Lacy Robbin & Angeline 173 Hummingbird Ln					✓	✓		✓



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Talent, OR 97540								
Lankster Wendi 22400 SE Bear Creek Rd Prineville, OR 97754								
Leeds Michelle Cree 12555 SW 27th St Beaverton, OR 97008								
LeRoy Tamara 3333 SE 39th #50 Portland, OR 97202		✓	✓	✓		✓		
Lester John Haring Hall UC Davis Davis, CA 95616								
Lester Rebecca 1804 SE Alder Portland, OR 97214	✓	✓	✓		✓	✓		
Lewin Phillip 865 Shalar Court Eugene, OR 97405			✓		✓	✓		
Lipe Mark 814 NE Liberty St Portland, OR 97211	✓		✓			✓		
Liversidge Justin 1973 NW Awbrey Bend, OR 97701			✓		✓			
Livingston Katherine PO Box 23 Camp Sherman, OR 97730	✓							
Lloyd Kathy Drake Barton 314 Travis Creek Rd Clancy, MT 59634		✓	✓		✓	✓		
Locke Nancy Applewood Farm 1339 NE 7th St Bend, OR 97701			✓		✓			

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Locklear Clyde 6222 SW 36 <sup>th</sup> Ave Portland, OR 97221	✓	✓	✓		✓	✓		
Loe Michael 160 E Broadway Eugene, OR 97401	✓		<del>✓</del>	✓		✓		✓
Madison Valerie 4704 SE 100 <sup>th</sup> Portland, OR 97266	✓	✓	✓					
MaGee Caroline 160 E Broadway Eugene, OR 97401	✓			✓		✓		✓
Mance Jim 601 N Cascade Ave #3 Colorado Springs, CO 808903	✓		✓		✓			
Marek Ronald Marek & Morris 810 SW Madison Ave Corvallis, OR 97333		✓	✓			✓		
Mason Sarah 62804 Montana Dr Bend, OR 97701		✓	✓	✓			✓	
Maxfield Randy 260 Kenwood NE Salem, OR 97301	✓			✓		✓		
McAlister Shahoma 555 Beach Ashland, OR 97520	✓					✓		✓
McCarthy Brian 160 E Broadway Eugene, OR 97401	✓			✓		✓		✓
McConnaughey Beyard 1653 Fairmont Eugene, OR 97403			✓		✓	✓		
McCormack Runinda McCormack & Sons 28833 Bear Creek Rd			<del>✓</del>		<del>✓</del>	<del>✓</del>		

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Prineville, OR 97754								
McDowell Cheryl 3431 SW Kelly Avenue Portland, OR 97201	✓		✓		✓			
McJanel Gaylord 1909 Combs Flat Prineville, OR 97754	✓					✓		
McKay John & Michele 1334 NW Trenton Bend, OR 97701			✓		✓			
Merwin Kyla 406 NW Wall Street Bend, OR 97701	✓		✓		✓			
Michel Chris 56970 NW Strassel Rd Forest Grove OR 97116			✓		✓	✓		
Miller Rick & Nora 11717 NW Laidlaw Rd Portland, OR 97229	✓						✓	
Miller Sharon 1625 NE 58th Portland, OR 97213			✓		✓			
Mintkeski Walter 6815 SE 31st Ave Portland, OR 97202			✓					
Mix Meryl 2525 NE 34th Ave Portland, OR 97212		✓	✓	✓		✓		
Moore Mary Lou PO Box 354 Estacada, OR 97023		✓	✓	✓		✓		
Moore Scott PO Box 959 Hines, OR 97738			✓		✓			
Mullen Robert & Laura 2250 Ranch Rd Ashland, OR 97520			✓		✓		✓	

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Newhart Joy 740 Broken Arrow Bend, OR 97701	✓	✓	✓	✓				
Nolte David 6322 NW Atkinson Ave Redmond, OR 97756	✓					✓		
Novick Jane 84881 Harry Taylor Rd Eugene OR 97405	✓	✓	✓		✓	✓		
O'Neal Richard 9100 SW 80th Ave Tigard OR 97223	✓					✓		
Oates Carl 776 Glendale Ave Ashland, OR 97520								
Olney HD + Vivian 1018 Leeward Ct N Keizer, OR 97303	✓		✓		✓			
Pabst Rob 2848 NW Audene Dr Corvallis, OR 97331	✓		✓	✓	✓		✓	
Paulsen Marc 10220 SW Melnore St Portland, OR 97225						✓		✓
Peasley Terry 959 NE 28th St McMinnville, OR 97128			✓	✓		✓		
Penchoen Thomas 2556 East Side Rd Hood River, Or 97031	✓		✓		✓			
Penunuri Ralph 5-65 SW Beals Corvallis, OR 97333	✓	✓	✓		✓			
Peterson Everett 9600 S Bank Dr. Roseburg, OR 97470			✓					
Phillips Charles & Elaine			✓		✓			

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1075 W 18 <sup>th</sup> Avenue Eugene, OR 97402								
Pilhofer William PO Box 656 Canyonville, OR 97417	✓		✓		✓			
Plissner, Pres. Jon <i>et al</i> (41) Audubon Soc. Of Corvallis PO Box 148 Corvallis, OR 97339	✓					✓		✓
Powers Thomas Dept of Geological Science 1272 University of Oregon Eugene, OR 97403	✓	✓	✓			✓		
Ramsey Fred & Mary 8536 SE 190 <sup>th</sup> Dr Portland, OR 97236	✓							✓
Raney Maryann 233 NE Fulton Roseburg, OR		✓	✓		✓			
Rarey Byron 365 Kirkway Baker City OR 97814			✓		✓			
Rayne Steven 621 SW Alder, S 930 Portland, OR 97205	✓	✓	✓		✓		✓	
Rekote Janet PO Box 222 Cannon Beach, OR 97110	✓	✓						
Resident <i>J. Fleur ?</i> 20092 SW Kirkwood Beaverton, OR 97006		✓	✓	✓		✓		
Resident PO Box 1355 Portland, OR 97207								
Rice Jan 4226 Cedar Lane Medford, OR 97501	✓		✓		✓			

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Riley Mike 1590 NW Davenport Ave Bend, OR 97701	✓		✓	✓		✓		
Risbrudt Christopher Acting Assoc. Deputy Chief US Dept of Ag PO Box 96090 Washington, DC 20090								
Rogers Henry Rogue Flyfishers PO Box 4637 Medford, OR 97501			✓		✓			
Rogland Paul 806 Charles Ave S Salem, OR 97302	✓		✓		✓	✓		
Rohn Carrie 12912 SE Cooper St Portland, OR 97236			✓			✓		
Rosenthal Gerritt 7205 SW Norwood Rd Tualatin, OR 97062			✓		✓	✓		✓
ross Moses 1017 SW Morrison, Suite 411 Portland, OR 97205	✓	✓	✓	✓			✓	
Russell Donald 1896 SE Brooklane Dr Corvallis, OR 97333			✓		✓		✓	
Saunders Lynofa 13790 SW Knaus Rd Lake Oswego, OR 97034								
Scheibe Matthew 160 E Broadway Eugene, OR 97401	✓			✓		✓		✓
Schemm Jennifer Blue Mtn Native Forest All. 506 M Avenue La Grande, OR 97850	✓	✓	✓	✓				

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Sefler William 46303 SW Easterday Rd Forest Grove OR 97116					✓	✓		✓
Seivers Jason 771 E 21 <sup>st</sup> Ave Eugene, OR 97405	✓		✓		✓	✓		
Seiker Frank 6121 SW Tower Way Portland, OR 97221			✓	✓		✓		
Serrell Peter 2545 SW Terwilliger Blvd, #727 Portland, OR 97201			✓					
Setzler Brian 934 SW Cheltenham St Portland, OR 97201	✓		✓	✓				
Smith Eric 278 Humbug Creek Rd Jacksonville, OR 97530			✓		✓	✓		
Smith Kim R. PO Box 5505 Eugene, OR 97405	✓		✓		✓	✓		
Sorenson Peter Public Service Bldg 125 E 8 <sup>th</sup> Ave Eugene, OR 97401			✓		✓			
Spero Jonathan PO Box 16 Williams, OR 97544			✓		✓		✓	
Stahl John & Janet 9780 Whiskey Creek Rd Tillamook OR 97141					✓		<del>✓</del>	✓
Stammer Ilo 13620 SW Beef Bend Rd #27 Tigard, OR 97224	✓						✓	
Stein Beverly Multnomah County Rm 1515, Portland Bldg			✓		✓			

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1120 SW Fifth Ave Portland, OR 97204								
Stenbeck Phillip Room 106, Justice Bldg Douglas Co Courthouse Roseburg, OR 97470								
Stephens Margaret 1830 23rd St NE Salem, OR 97303								
Stewart W.H. PO Box 643 Oregon City, OR 97045			✓		✓	✓		
Stone Lynne PO Box 3519 Ketchum, ID 83340	✓		✓		✓	✓	✓	
Stout Jennifer 3133 Douglas Circle Lake Oswego, OR 97035	✓		✓		✓	✓		
Stuebaker Paul 1925 N Hembree McMinnville, OR 97128	✓		✓	✓				
Sturman Bill 8495 Hwy 35 Mt. Hood Parkdale, OR 97041							✓	✓
Sturman Julie 8495 Hwy 35 Parkdale, OR 97041	✓	✓	✓	✓				
Summers David 4625 SW Wichita St Tualatin, OR 97062			✓				✓	✓
Sweetman Davy HC 86 Box 158 Myrtle Point, OR 97458	✓	✓	✓	✓				
Thomson C 20288 S Bakers Ferry Rd Oregon City, OR 97045	✓			✓				✓
Towler Jeanette		✓	✓		✓			



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226 Greenridge Dr Lake Oswego, OR 97035								
Tracey Rob 8210 Broadmead Rd Amity OR 97101	✓		✓		✓	✓		
Tracy Nancy 7310 SW Pine St Portland, OR 97223								
Traver Howard 900 Prescott Lane Eugene, OR 97477	✓							✓
Tucker Lynda 765 Sw 56 <sup>th</sup> St Corvallis, OR 97333			✓		✓			
Turner-Cheung James & Joan 535 SE 61 <sup>st</sup> Portland, OR 97215		✓	✓	✓		✓		
Ullian Karin 2883 Williams Hwy Grants Pass, OR 97527			✓		✓		✓	
Van Fleet Doug 2816 NE 14 <sup>th</sup> Ave Portland, OR 97212-3203								✓
Walker Colleen PO Box 13778 Salem, OR 97309	✓		✓	✓				
Walker Isaac 769 S Mountain Ave Ashland, OR 97520	✓		✓		✓			
Ward Rayner Holly Whitney 2235 N Alberta St Portland, OR 97217	✓		✓		✓			
Weber Gundrun and Walter 665 SW Vermont Dr Portland, OR 97225		✓	✓	✓		✓		
Weih Jeff			✓		✓			

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1130 SE 53 Ave Portland, OR 97215								
Weiss Robert 1850 SW High St Portland, OR 97201			✓		✓			
Wessler M.J. & D.B 11800 Hwy 99 South Ashland, OR 97520			✓		✓		✓	
Westcott Richard 2057 Mockingbird Dr, S Salem, OR 97302			✓	✓			✓	
Williams Cindy 22225 SE Ankeny St Gresham OR 97030			✓		✓			
Wilson Bob 174 Juniper Coos Bay, OR 97420				✓		✓		✓
Wilson Sarah Leigh 18660 S Greenview Dr Oregon City, OR 97045	✓		✓		✓		✓	
Wing Raven PO Box 321 Bend, OR 97709			✓		✓			
Winter Alan PO Box 11381 Portland, OR 97211	✓	✓			✓			
Winter-Gorsline Leslie 7683 SW Leslie St Portland, OR	✓		✓		✓			
Witterman Gary & Dorothy PO Box 301401 Portland, OR 97294			✓		✓			
Wolfe Walt 400 SW Madison Madras OR 97741	✓		✓	✓				
Woolfe Ruth 1185 Jays Dr. NE	✓		✓					

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Keizer, OR 97303								
Wright Lloyd 14375 S Ames St Oregon City, OR 97045				✓		✓		
Zackheim Ivan 117 SW Taylor, 3 <sup>rd</sup> flr Portland, OR 97204					✓	✓		✓
Zogas Valerie 8522 Se 93 <sup>rd</sup> Ct Portland, OR 97266								
Zufich Anthony & Nancy 615 Ashland St Ashland, OR 97520		✓	✓	✓				
Alice Fleming Pueschner			✓		✓			
Bob Eckland & A Hammond			✓					
Carolyn Thusmann	✓		✓		✓			
Coralee Lindquist	✓	✓	✓		✓			
Dave Kruse				✓				✓
Dennis Todd					✓			✓
Ehrick							✓	✓
eliz Elizabeth Farquhar						✓		
Foxcr								
Gail Pharesl			✓		✓			
George B Hug		✓	✓	✓				
Greg Fredricks				✓	✓	✓		✓
Greg Perrine and Beth Brown			✓		✓			
Ira D Luman	✓		✓	✓	✓			
Jdespain			✓		✓			
Jim Mooers			✓		✓			
Jsp Jean Parker							✓	✓
Julie Hulme								
Kahler Martinson + Donna	✓	✓		✓				
Karen N Smith			✓		✓		✓	
Kent Rudisill		✓	✓	✓		✓		
LD Gorsline			✓		✓			

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MerlyMarge			✓					
Mike & Karin Beagle	✓		✓					
Phillip Johnson			✓			✓		
Ron Norton	✓		✓		✓			
Ruth Satyanarayan			✓		✓	✓		
Sabra Chor		✓	✓	✓	✓	✓		
Smith Richard M.								
Sue Knight			✓		✓			
Sara Wiker Baker			✓					
Wendell Mueller			✓				✓	

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Name/Address	Strengthen rules to protect streams, water quality, fish	Need action now, fish can't wait	Rest or deny cert. on polluted streams until water quality standards are met	Where there is no data, require monitoring as condition of cert.	Where there is no data, require monitoring <u>before</u> certification	Livestock damage streams and habitat	Livestock damage streams, I've seen it	Restrict grazing along streams
Abram Kristen 4532 NE 20 <sup>th</sup> Portland, OR 97211		✓	✓	✓		✓		
Applegate Susan PO Box 116 Yoncalla OR 97499			✓	✓	✓		✓	
Black B 423 Winchester Roseburg, OR 97470	✓			✓		✓		✓
Bowerman Kris 33707 McKenzie View Eugene, OR 97408							✓	✓
Carson Maxine 2151 NW Johnson St #9 Portland, OR 97210		✓	✓	✓				
Conley Jim Salem Audubon Society 189 Liberty St NE Salem, OR 97301	✓		✓		✓			
Cox Susan PO Box 1046 Welches, OR 97067		✓	✓	✓		✓		
Duetschman Bill 455 Hillside Ave Klamath Falls, OR 97601-2337	✓				✓		✓	✓
Gagnon Family 2625 NE 35 <sup>th</sup> Pl Portland, OR 97212		✓	✓	✓		✓		
Geiser Peter 97 NW Shasta Pl Bend, OR 97701			✓		✓			
Gilliam Paul & Doreen 6905 SW King Blvd Beaverton, OR 97008		✓	✓	✓		✓		
Goldman Mary 3508 Arbor West Linn Or 97068		✓	✓	✓		✓		

Name/Address	Strengthen rules to protect streams, water quality, fish	Need action now, fish can't wait	Rest or deny cert. on polluted streams until water quality standards are met	Where there is no data, require monitoring as condition of cert.	Where there is no data, require monitoring <u>before</u> certification	Livestock damage streams and habitat	Livestock damage streams, I've seen it	Restrict grazing along streams
Graham Dr. John & Marian 6105 Skyline Blvd Hillsborough CA 94010			✓		✓		✓	
Hammond Michael 2321 SE 110 <sup>th</sup> Portland, OR 97215		✓	✓	✓		✓		
Harmon SM PO Box 11364 Portland, OR 97211	✓		✓	✓		✓		
Joos Sandra 4259 Sw Patrick Pl Portland, OR 97201			✓		✓			
Kaufman Kip Andrew 2230 NE 15 <sup>th</sup> Ave, #4 Portland, OR 97212		✓	✓	✓		✓		
Kee Jeffrey Society of Wetland Scientists 13638 NW Riverview Dr Portland, OR 97231	✓							✓
Kershaw Chef & Karen 806 SW Valley Forge Aloha OR 97006		✓	✓	✓		✓		
Kish Gary 29395 NW Reeder Rd Sauvie Island, OR 97231	✓		✓	✓			✓	
Kuch David 4800 NE Wasco St Portland, OR 97213		✓	✓	✓		✓		
Kurland Alexis Box 1416 Lewis & Clark College Portland, OR 97219		✓	✓	✓		✓		
Levins Randall 4400 NE Broadway, Apt 1215 Portland, OR 97213		✓	✓	✓		✓		
Lindsay Jaime		✓	✓	✓		✓		

Name/Address	Strengthen rules to protect streams, water quality, fish	Need action now, fish can't wait	Rest or deny cert. on polluted streams until water quality standards are met	Where there is no data, require monitoring as condition of cert.	Where there is no data, require monitoring <u>before</u> certification	Livestock damage streams and habitat	Livestock damage streams, I've seen it	Restrict grazing along streams
1404 SE Pine St Apt A Portland, OR 97214								
Lindsey Tracy 820 NE 29th Portland, OR 97232		✓	✓	✓		✓		
Mallory Clark 2732 NE 15th Ave Portland, OR 97212		✓	✓	✓		✓		
Mandel Phillip 8321 Sw Lori Way Aloha, OR 97007								
McFarland Lewis 5325 SW 63rd Ave Portland, OR 97221		✓	✓	✓				
McGuire Omar & Lucy 2850 Alder Eugene, OR 97405			✓		✓			
Moore Karen 2222 SE 57th Ave Portland, OR 97215		✓	✓	✓		✓		
Nathan Gerald 18075 Oakdale Rd Dallas, OR 97338		✓	✓	✓		✓		
O'Brien Patricia 1919 NE 21st Ave Apt 5 Portland, OR 97212		✓	✓	✓		✓		
Paul David Cascade Bldg 520 SW 6th, Suite 920 Portland, OR 97204			✓		✓			
PorteM 2226 NE Weidler #4 Portland, OR 97232		✓	✓	✓		✓		
Resident 2266 NW Johnson Portland, OR 97210		✓	✓	✓		✓		
Resident		✓	✓	✓		✓		

Name/Address	Strengthen rules to protect streams, water quality, fish	Need action now, fish can't wait	Rest or deny cert. on polluted streams until water quality standards are met	Where there is no data, require monitoring as condition of cert.	Where there is no data, require monitoring <u>before</u> certification	Livestock damage streams and habitat	Livestock damage streams, I've seen it	Restrict grazing along streams
1217 SW Morrison Portland, OR 97205								
Resident 3224 NE 21 <sup>st</sup> Portland, OR 97212		✓	✓	✓		✓		
Rianda J 6306 SE 44th Ave Portland, OR 97206		✓	✓	✓		✓		
Rollins Rich <del>Gibson Barbara</del> 2509 SE Yamhill Portland, OR 97214	✓		✓		✓			
Spady Sha 17855 Alden St Oregon city, OR 97045			✓		✓			
Speaker Bob Benton Co. Commissioner PO Box 3020 Corvallis, OR 97339			✓		✓			
Speer Charles 11981 Fargo Rd Aurora, OR 97002		✓	✓	✓		✓		
Stone David Lane Co Audubon Society PO Box 5086 Eugene, OR 97405		✓	✓	✓		✓		
Vargo Andrea 3303 NE 14 <sup>th</sup> Portland, OR 97212		✓	✓	✓		✓		
Wheeler Susan 842 NE Portland, Blvd Portland, OR 97211		✓	✓	✓		✓		
Johnson, Sara		✓	✓	✓		✓		
Robben, Mark			✓		✓			



**Date:** February 9, 1998

**To:** Environmental Quality Commission

**From:** Langdon Marsh *Supria Taylor*

**Subject:** Agenda Item I, 401 Certifications for Livestock Grazing on Federal Lands: Final Rules, EQC Meeting February 20, 1998

**Background**

On December 11, 1997, the Director authorized the Water Quality Division to proceed to a rulemaking hearing on proposed permanent rules which would enable the issuance of water quality (Section 401) certifications for grazing on federal lands.

Pursuant to the authorization, hearing notice was published in the Secretary of State's Bulletin on January 1, 1998. The Hearing Notice and informational materials were mailed to the mailing list of those persons who have asked to be notified of rulemaking actions, and to a mailing list of persons known by the Department to be potentially affected by or interested in the proposed rulemaking action on December 15, 1997.

Public Hearings were held in Salem and Bend on January 15, 1998, and in Grants Pass and La Grande on January 16, 1998. Mark Hamlin was presiding officer in Salem. Dick Nichols was presiding officer in Bend. Ken Betterton was presiding officer in La Grande. John Blanchard was presiding officer in Grants Pass. The Presiding Officers' Reports (Attachment C) summarize the oral testimony presented at the hearings. (A copy of the comments is available upon request.)

The original public notice released on December 15, 1997 advised the public that written comments would be received through January 20, 1998. However, due to possible confusion at one of the public hearings, the deadline for receiving comments was extended until 5:00 p.m. on February 19, 1998. Department staff have evaluated the comments received through January 20, 1998 (Attachment D). Comments received during the extended comment period will be summarized and presented to the Commission on Friday February 20, 1998. Based upon evaluation of the comments received by January 20, 1998, modifications to the initial rulemaking proposal are being recommended by the Department. These modifications are summarized below and detailed in Attachment E.

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The following sections summarize the issue that this proposed rulemaking action is intended to address, the authority to address the issue, the process for development of the rulemaking proposal including alternatives considered, a summary of the rulemaking proposal presented for public hearing, a summary of the significant public comments and the changes proposed in response to those comments, a summary of how the rule will work and how it is proposed to be implemented, and a recommendation for Commission action.

**Issue this Proposed Rulemaking Action is Intended to Address**

Section 401 of the Clean Water Act is a direct delegation from Congress to the states requiring a state certification prior to the issuance of a federal license or permit which may result in a discharge into navigable waters. The certification is required to specify that any discharge complies with the following sections of the Clean Water Act:

Section 301	Effluent Limitations
Section 302	Water Quality Related Effluent Limitations
Section 303	Water Quality Standards and Implementation Plans
Section 306	National Standards of Performance
Section 307	Toxic and Pretreatment Effluent Standards

Of these, Section 303 relating to compliance with water quality standards has been the primary focus of Section 401 certifications.

On November 29, 1996 a federal district court entered judgment directing the US Forest Service to require permit applicants to obtain state 401 Water Quality Certification before a federal grazing permit would be issued or renewed. In response to that decision, the Environmental Quality Commission (EQC) and Oregon Department of Agriculture (ODA) adopted temporary administrative rules in February 1997 to cover the 1997 grazing season. Those rules expired in August 1997, and the attached permanent rules have been developed to meet the requirements of the federal court decision.

A subsequent suit has been filed to enfold the federal Bureau of Land Management (BLM) into this process. Appeals have also been filed in the Ninth Circuit Court of Appeals seeking to have the district court's decision reviewed. At this time, however, the district court decision is in force, and permanent rules are required to put it into effect.

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### **Relationship to Federal and Adjacent State Rules**

The proposed rules are fully in accord with the federal district court decision issued on November 29, 1996. They are also in accord with Section 401 of the federal Clean Water Act (at 33 U.S.C. 1341).

To date, states adjoining Oregon have taken the stance that this decision applies only in Oregon and have not moved to adopt similar rules. Adjoining states do, however, operate a similar program to Oregon's, requiring water quality certifications for dredging and filling in state waters.

The rules are being jointly adopted by the EQC and ODA because of the statutory split in jurisdictions. Water quality certifications are issued by DEQ. The Legislature has made it clear, however, that the Department of Agriculture is solely responsible for regulating farming practices on agricultural lands. Neither agency alone can achieve what the federal district court has mandated. Generally, the rules are structured to enable DEQ to receive applications, conduct the public process and issue the certification. The Department of Agriculture is responsible for evaluating the application, making the determination that there is reasonable assurance that the activity will be conducted in a manner that will not violate water quality standards and other appropriate provisions of state law. Final certifications are issued by the Director of DEQ.

### **Authority to Address the Issue**

The EQC has authority to address this issue through the provisions of Section 401 of the federal Clean water Act (at 33 U.S.C. 1341).

The EQC also has authority pursuant to state statute at ORS 468.020 authorizing the adoption of rules to carry out the functions vested in the Commission, and at ORS 468.035 authorizing the adoption of rules to implement the federal Clean Water Act.

ODA is similarly authorized under its applicable state statutes. Specifically, ORS 561.190 authorizes ODA to adopt rules, and ORS 561.191 authorizes the adoption of rules specifically for water quality.

### **Process for Development of the Rulemaking Proposal (including advisory committee and alternatives considered)**

A joint DEQ/ODA rules advisory committee was convened to assist in developing a comprehensive rule package.

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The advisory committee met five times between September 9, 1997 and December 4, 1997, providing advice and comment to the agencies in the development of draft rules. These rules were released for public comment on December 15, 1997. The committee was chaired by Gail Achterman, and included representatives from the following interests:

- Bureau of Land Management (BLM)
- OSU Cooperative Extension Service
- US Forest Service (USFS)
- Oregon Trout
- Pacific Rivers Council
- Oregon Natural Desert Association
- Oregon Farm Bureau Federation
- Klamath Watershed Council
- Oregon Cattlemen's Association
- Confederated Tribes of the Warm Springs Reservation
- Confederated Tribes of the Umatilla Indian Reservation
- Environmental Protection Agency (EPA)

The Committee was staffed jointly by DEQ and ODA.

In considering the rules, the Committee reviewed the temporary rules adopted by the EQC in February 1997, and the certifications issued pursuant to those rules. The Committee also included two field trips, one near Prineville, and the other to the Upper Grande Ronde basin.

The draft rules released for public comment were developed by staff with input and advice from the advisory committee. The advisory committee did not reach consensus on all aspects of the proposed rules. Further, due to time constraints, the advisory committee did not have the opportunity to review the draft rules that were released for public comment. No person on the committee, or interest represented on the committee, was precluded from filing comments on the rules during the public comment period.

No alternatives to rulemaking were considered, as the federal district court decision establishes the requirement to obtain a 401 certification from the state prior to the US Forest Service issuing a grazing permit. This can only be done through the adoption of rules.

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**Summary of Rulemaking Proposal Presented for Public Hearing and Discussion of Significant Issues Involved.**

The rules released for public comment contained a number of minor editorial changes to the existing rules relating to 401 certifications for dredge and fill work. The major purpose of the rules, however, is to address livestock grazing on federal lands.

**Certification**

The rules make clear that following ODA review, DEQ may issue a certification if there is reasonable assurance that the activity will be conducted in a manner that will not violate the applicable provisions of the Clean Water Act.

In relation to waters not currently meeting standards, certification may be issued if livestock grazing will not further degrade water quality and will allow site characteristics that influence water quality to improve. On these streams, if livestock grazing is expected to maintain water quality (i.e. below standards) or degrade water quality further, certification will be denied.

For high quality waters (i.e. those waters that meet or exceed water quality standards), certification will be issued if grazing is expected not to degrade current water quality conditions.

**Significant Issue:** For waters that are not meeting standards, the advisory committee was unable to reach consensus. At the polar extremes of opinion were those who believed that no certifications should be issued on streams not currently meeting standards, and those who believed certification should be issued based solely on the best professional judgment of the agencies. A compromise, which was not agreed to by the advisory committee was to provide for certification on 303(d) listed streams provided there was a demonstrated improving trend in the site characteristics that influence water quality. The rules do not, however, specify the rate at which site characteristics that influence water quality are to improve. The rules assume any rate of improvement. Some members of the advisory committee and the public wished to see that rate be equated with the rate of improvement that would be achieved by resting the allotment from all grazing.

**General Certifications**

The rules provide for a federal agency to apply for a general certification under which permits may be issued for a specified geographical area or categorical description. General certifications may be issued where:

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1. a water quality management plan has been approved by DEQ or ODA;
2. for areas in which there are high quality waters where there has been continuing grazing and federal plans are preventing degradation;
3. where a permit fully protects riparian areas specifically to meet riparian restoration goals specifically for protecting water quality;
4. if existing federal plans, decision notices or records of decision meet or exceed the certification criteria contained in these rules.

The rules allow for either ODA or DEQ to require an individual certification even if a particular applicant could be covered by a general permit. General certifications will be reviewed every five years. In this regard, these are consistent with the nationwide permits offered by the US Army Corps of Engineers which require recertification every five years.

Significant Issue: The significant issue here is whether general certifications should be allowed, or whether each site specific application must be reviewed on its own merits. The argument in support of general certifications is primarily staff resource-related for the administering agencies. It is also resource-related for applicants in that it reduces the burden on applicants in compiling their applications. Environmentally, if DEQ is able to identify a class of operations that are the same, to which the same certification conditions would be applied, DEQ is, in effect issuing a general certification. From an agency staff and budget standpoint, general certifications assist in workload, allowing limited DEQ and ODA resources to focus on those permits that have the environmentally greatest impact.

#### Application Requirements and Review

Applicants for individual certifications are required to furnish an application with various details, including names, addresses, and so on. Applicants are also required to specify:

1. if there are any waterbodies on the 303(d) list in the allotment;
2. a description of the proposed grazing activity;
3. a statement of current upland, riparian and water quality conditions. Applicants could include any supporting data, along with their most current federal inspection report;
4. description of present and proposed management objectives along with proposed control measures to protect water quality;
5. documentation of both applicant and federal proposed monitoring
6. a map of the allotment

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Applicants for certification under a general certification need only supply basic details consistent with the plan that was approved for general certification. If an application is not complete it will be returned to the applicant, or additional information requested.

Public notice shall be issued inviting public comment for a period of thirty days

An applicant's compliance history may be considered in making a decision on certification.

Significant Issue: There is a fine line between imposing unreasonable requirements on an applicant to produce documentation and information, and gathering sufficient material to make the required findings for certification. We have tried hard to minimize the burden on applicants, but believe that we cannot require anything less if the required findings are to be made. The federal agencies are in the best position to assist applicants with their applications, and the EQC may want to consider strongly encouraging the US Forest Service, and any other federal agency requiring certifications, to afford full cooperation to applicants in preparing their applications.

#### Evaluation Criteria

Evaluation of the application will be carried out by the Oregon Department of Agriculture. The evaluation criteria are specified in the rule as:

1. Grazing management practices. All practices are to be based on site characteristics which determine a site's capacity to respond to management actions. ODA will also assess season, timing, duration, intensity of livestock grazing use and rest;
2. Livestock dispersing activities. This includes elements such as fencing, herding, placement of water and salt.
3. Livestock handling. Livestock handling facilities, such as corrals and drinking troughs shall be placed so as to avoid discharges of sediment into waters of the state;
4. Monitoring. Water quality trend data is a responsibility of the federal agencies and will be pursued in a Memorandum of Agreement. DEQ and ODA will encourage the federal agencies to work with the state to develop these as quickly as possible. The rules provide that water quality trend data may be a condition of a general certification.

Significant Issue: The significant issue here is the same as above, i.e. to what extent is it reasonable to require an applicant to undertake monitoring. Monitoring of water quality in waters impacted by activities on lands under federal control should be the responsibility of the federal agency. The state will pursue Memoranda of Agreement with the federal agencies to undertake this activity. It is not unreasonable to expect applicants to undertake some monitoring activities, such as documenting improvements through photographs. Applicants may need to conduct such

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site monitoring as is required to ensure that they are in compliance with their permit, e.g. monitor stubble height.

### Compliance Monitoring

The rules place the responsibility with the federal permitting agency for ensuring compliance with the conditions contained in the certification. Certification conditions should be incorporated into the federal permit, as occurs with other 401 certifications issued to the US Army Corps of Engineers. State agencies may request periodic reports from the federal agencies.

Significant Issue: The only significant issue here is the willingness and/or ability of the federal agencies to monitor compliance within the resources they are allocated. There is disagreement among the federal agencies over this. Generally, BLM agrees that it is its responsibility, while the Forest Service disagrees.

### Enforcement

Enforcement of the permit is the responsibility of the federal permitting agency. Where there is a permit violation, the federal agency will take corrective action, including permit suspension or revocation. DEQ, in consultation with ODA, may also revoke or revise a certification if a permittee violates the conditions of the certification.

Significant Issue: No additional significant issues have been identified here. As with compliance monitoring above, the EQC should encourage federal agencies to devote resources to enforcement of their permits.

### Summary of Significant Public Comment and Changes Proposed in Response

Prior to January 20, 1998, the departments had received over 400 written comments, covering all aspects of the rules. While the volume of comments was large, and addressed every conceivable facet of the proposed rules, a number of common themes emerged.

### Certification Policy and Options

Many commenters asked that the rules be amended to prohibit livestock grazing from streambanks or that certification be denied for livestock grazing on any water quality limited waterbodies. Some of those who sought this, however, also commented on the proposal contained in the draft rules that certification may be permitted if site characteristics that influence water quality show an



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improving trend. Their viewpoint was that the improvements should occur at a rate which would be achieved in the absence of any grazing.

One comment was received asking that a rebuttable presumption be established that livestock grazing is not consistent with attainment of water quality standards, and that the burden should be placed upon applicants to overcome this presumption through best management practices.

Other comments stated that either DEQ or ODA, or both, agencies should not be involved in 401 certifications for livestock grazing, and that the state should simply waive certification. One commenter suggested that these rules would make cattle ranching cost-prohibitive.

Proposed Changes: No changes to the proposed rules as a result of these comments. The department believes the proposed rules provide a compromise between these two viewpoints which comply with the federal Clean Water Act yet keep the burden imposed on applicants to a minimum.

#### General Certifications

Comments were received suggesting that no general certifications should be issued on 303(d) listed streams, outstanding resource waters or salmonid spawning areas. A number of comments were also received raising questions about the relationship between 401 certifications, TMDLs and SB 1010 agricultural water quality management plans.

A number of commenters suggested that neither DEQ nor ODA had sufficient resources to implement the requirements of these rules.

One commenter stated that 30 days is insufficient for public comment on a general certification.

Proposed Changes: No substantial changes are proposed as a result of these comments. General certifications are proposed in the draft rules to address, in part, the resource question. The proposed rules contain sufficient safeguards to ensure that general certifications will only be issued where a water quality management plan has been approved by DEQ, in areas where waters are meeting standards and grazing has been a continuing practice, where grazing practices such as exclusion or rest are imposed, or where the applicable provisions of federal plans exceed the certification criteria.

Under changes proposed to the rules, general certifications would be released for public comment at the time they are developed, but not at the time of assignment to a particular grazer. It is not unreasonable that the public comment period should be extended for these certifications, and a

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change has been incorporated to allow for a 45 day public comment period for general certifications.

#### Application Requirements and Review

The proposed rules stated that "applicants may" apply for certification. One commenter asked if this means that applicants could choose not to apply. Comments were received suggesting that these rules would make cattle ranching cost-prohibitive.

Comments were received suggesting that an undue burden was being placed upon applicants in the application requirements.

Proposed Changes: On the issue of application, no changes are proposed to the rules. The federal court decision has been interpreted as applying only on US Forest Service lands in Oregon. If this is subsequently widened, we do not want to have to pass new rules. At the same time, grazers on BLM lands do not need to apply at this point. As a result, we have left the statement that applicants may apply.

The agencies have been sensitive to the imposition of undue burden upon applicants to supply application materials. There is a fine balance, though, between minimizing application requirements, and providing sufficient information to make the required findings. Changes have been proposed that make clearer the general certification provisions, which will significantly reduce the burden on applicants. A general certification will be released for public comment at the time it is proposed. Thereafter, providing applicants meets the requirements of the general certification, the federal agency can assign them a permit with the general certification conditions contained in it, without further application materials having to be sent to the state.

#### Certification Evaluation Criteria

Much comment was received on this part of the rules. Generally comments referred to the lack of specificity in the evaluation criteria that would enable the reasonable assurance of compliance with the Clean water Act and applicable state provisions to be made.

Commenters also suggested that it is inappropriate to consider an applicant's compliance history in deciding whether to certify.

Proposed Changes: A number of changes were made to this section to underline the relationship between the required finding and the evaluation criteria. In particular, ODA's role has been more clearly defined. It will make recommendations to DEQ on certification or denial, and will develop

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any conditions that may need to be included in a certification. The stipulation that certification conditions relate only to management activities has been removed.

Rest from grazing has been added with its own subsection to underline the importance of this technique in attaining water quality standards. A change has been inserted in the Livestock Dispersement section to make it clear that the objective of dispersement is for the purpose of protecting water quality.

Finally, the provision relating to uncertainty that the proposed activity will degrade water quality and the provision that monitoring could be inserted into a certification has been removed.

The provision that an applicant's compliance history can be taken into account has been retained. This is an important component in making a finding of reasonable assurance that water quality will be attained.

#### Compliance and Enforcement

Comments were received indicating that the lack of implementation/enforcement by the federal agencies meant that the required findings for certification could not be made.

Proposed Changes: No changes are able to be made in response to this comment. The state will pursue this matter with the federal agencies to ensure that enforcement of federally issued permits is conducted. Ultimately, nothing in these rules detracts from the state's ability to pursue enforcement, including revocation of a certification, for violations of the Clean Water Act.

#### Process

Comments were received that insufficient time had been spent in developing these rules. One comment was also received that the rules should be sent to the Interagency Multidisciplinary Science Team (IMST) constituted to review provisions under the Oregon Plan.

Proposed Changes: No changes are proposed as a result of these comments. The timeframe for developing the rules was extremely tight to accommodate grazers for the 1998 season. In terms of the IMST, anyone can refer a matter relating to the Oregon Plan to the team for review. The team makes its own determination as to what it will consider. The commenter has been advised that it can refer these rules if it wishes.

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### Economic Impact on Businesses

A number of comments were received noting that the requirements imposed by these rules impose a significant economic burden on the livestock industry. Some went as far as to predict that these rules will cause the cattle industry to be cost prohibitive.

Before adopting rules, the Commission must determine whether there will be a significantly adverse economic effect upon business. If it is determined that there is such an impact, the rules should be modified to reduce the economic impact consistent with the purposes of the rule.

In this instance there are two pertinent points. The first is that this rule is being implemented as a result of a federal court ruling. Even if there are economic impacts on business, it is not clear what amendments could be made. A general waiver would not be in the public interest, and may result in transfer of the responsibility to the applicable federal agency which could impose equal or greater costs on business. More importantly, though, the Commission is in a position to find that there are no adverse economic impacts. Certifications issued last year under temporary rules relied upon existing federal plans and permit conditions. These are costs that are already being borne by grazers. Accordingly, in adopting these rules, the Commission should find that there is no adverse economic impact imposed by these rules.

### Summary of How the Proposed Rule Will Work and How it Will be Implemented

The proposed rule will be implemented jointly by the Departments of Agriculture and Environmental Quality along the same lines as implementation of the temporary rules adopted by the EQC in 1997.

Applications for certification will be received by DEQ and reviewed for completeness. If the application is complete, the applicant will be so notified, and a public notice soliciting comments will be issued. The file will be sent to the Department of Agriculture for review, specification of the conditions of certification and a recommendation on certification or denial. These will be forwarded to DEQ which will issue the certification.

A Memorandum of Agreement was entered into between the two agencies upon adoption of the temporary rule. That agreement captures the above, and remains in force. A copy of the agreement is attached at Attachment G.

**Recommendation for Commission Action**

It is recommended that the Commission adopt the rules/rule amendments regarding issuance of water quality certifications for grazing on federal lands as presented in Attachment A of the Department Staff Report.

**Attachments**

- A. Rule (Amendments) Proposed for Adoption
- B. Supporting Procedural Documentation:
  - 1. Legal Notice of Hearing
  - 2. Fiscal and Economic Impact Statement
  - 3. Land Use Evaluation Statement
  - 4. Questions to be Answered to Reveal Potential Justification for Differing from Federal Requirements
  - 5. Cover Memorandum from Public Notice
- C. Presiding Officer's Report on Public Hearing
- D. Department's Evaluation of Public Comment
- E. Detailed Changes to Original Rulemaking Proposal made in Response to Public Comment
- F. Advisory Committee Membership and Report
- G. Rule Implementation Plan

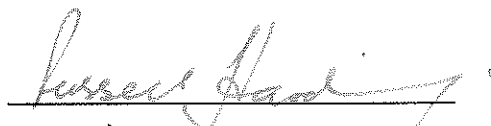
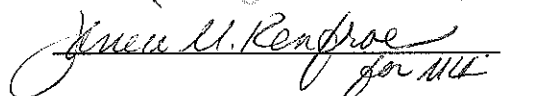
**Reference Documents (available upon request)**

Written Comments Received (listed in Attachment D)

Approved:

Section:

Division:

Report Prepared By: Debra Sturdevant

Phone: (503) 229-6691

Date Prepared: February 9, 1998

## DIVISION 48

## CERTIFICATION OF COMPLIANCE WITH WATER QUALITY REQUIREMENTS AND STANDARDS

## 340-048-0005

**Purpose**

The purpose of these rules is to describe the procedures to be used by the Department of Environmental Quality for receiving and processing applications for certification of compliance with water quality requirements and standards for projects which are subject to federal agency permits or licenses and which may result in any discharge into navigable waters or impact water quality. In this certification process, the Department of Environmental Quality acts pursuant to Section 401 of the Federal Clean Water Act. The Department will also comply with state law to the extent that federal law does not supersede state law.

Stat. Auth.: ORS Ch. 468

Stats. Implemented: ORS

Hist.: DEQ 18-1985, f. & ef. 12-3-85; DEQ 1-1987, f. & ef. 1-30-87

## 340-048-0010

**Definitions**

As used in these rules unless otherwise required by context:

- (1) "Certification" means a written declaration by the Department of Environmental Quality, signed by the Director, that a project or activity subject to federal permit or license requirements will not violate applicable water quality requirements or standards.
- (2) "Clean Water Act" means the Federal Water Pollution Control Act of 1972, Public Law 92-500, as amended.
- (3) "Coast Guard" means U.S. Coast Guard.
- (4) "Commission" means Oregon Environmental Quality Commission.
- (5) "Corps" means U.S. Army Corps of Engineers.
- (6) "Department" or "DEQ" means Oregon Department of Environmental Quality.
- (7) "Director" means Director of the Department of Environmental Quality or the Director's authorized representative.
- (8) "Local Government" means county and city government.
- (9) "Agricultural Water Quality Management Area Plan" means an ODA approved plan for the prevention and control of water pollution from agricultural activities and soil erosion in a management area whose boundaries have been designated under ORS 568.909.
- (10) "Federal permitting agency" or "federal agency" means those agencies which grant federal grazing permits such as the United States Bureau of Land Management, Fish and Wildlife Service, Forest Service and National Park Service.
- (11) "Grazing Permit" means a document authorizing grazing use of lands managed by a federal agency, including grazing leases. Grazing permits specify all authorized use including livestock grazing and suspended use. Permits specify the maximum number of animals and months apportioned, the area authorized for grazing use, or both. In the case of the Bureau of Land Management (BLM), the term "grazing permit" is used to designate those areas within a grazing district, while the term "grazing lease" is used to designate those areas outside an established grazing district.
- (12) "High Quality Waters" has the meaning given in OAR 340-041-0006.

- (13) "Livestock" means any type of animal for which a grazing permit may be issued by a federal permitting agency and includes but is not limited to horses, mules, asses, cattle, sheep, goats, swine, and fowl.
- (14) "ODA" means the Oregon Department of Agriculture.
- (15) "Ordinary high-water mark" means the point on the streambank or shore up to which the presence and action of surface water is so continuous as to leave a distinctive mark such as by erosion, destruction or prevention of terrestrial vegetation, predominance of aquatic vegetation, or other recognizable characteristics.
- (16) "Person" means the United States and agencies thereof, any state, any individual, public or private corporation, political subdivision, governmental agency, municipality, copartnership, association, firm, trust, estate or any other legal entity whatever.
- (17) "Potential Natural Community" means the biotic community that would become established if all successional sequences were completed without interference by human beings under the present environmental conditions. Natural disturbances are inherent in development. PNC's can include naturalized non-native species.
- (18) "Riparian area" means a zone of transition from an aquatic ecosystem to a terrestrial ecosystem, dependent upon surface or subsurface water, that reveals through the zone's existing or potential soil-vegetation complex, the influence of such surface or subsurface water. A riparian area may be located adjacent to a lake, reservoir, estuary, pothole, spring, wet meadow, muskeg or ephemeral, intermittent or perennial stream.
- (19) "Riparian Pasture" means a management unit (paddock or pasture) covering a riparian area which may be managed differently than upland units within a permit area. This management is keyed to characteristics which may differentiate riparian areas from upland areas such as plant community composition, plant development, soil conditions, and forage composition.
- (20) "Site Potential" means the highest ecological status an area can attain given no political, social, or economical constraints; often referred to as the "potential natural community" (PNC).
- (21) "Vegetative Cover" means live plants, and plant litter and residue.
- (22) "Water" or "waters of the state" has the meaning given in ORS 468B.005(8).
- (23) "Water quality limited" has the meaning given in OAR 340-041-0006.

Stat. Author.: ORS 561.191; ORS 468.020; ORS 468b.035

Stat. Imp.: 33 USC 1341; ORS 468B.035

Stat. Auth.: ORS Ch. 468

Stats. Implemented: ORS

Hist.: DEQ 18-1985, f. & ef. 12-3-85

### **340-048-0015**

#### **Certification Required**

Any applicant for a federal license or permit to conduct any activity, including but not limited to the construction or operation of facilities which may result in any discharge to waters of the state, must provide the licensing or permitting agency a certification from the Department that any such activity will comply with Sections 301, 302, 303, 306, and 307 of the Clean Water Act which generally prescribe effluent limitations, water quality related effluent limitations, water quality standards and implementation plans, national standards of performance for new sources, and toxic and pretreatment effluent standards.

Stat. Auth.: ORS Ch. 468

Stats. Implemented: ORS

Hist.: DEQ 18-1985, f. & ef. 12-3-85

**340-048-0020**

**Application for Certification**

~~(1) Except as provided in section (6) of this rule, completed applications for project certification shall be filed directly with the DEQ.~~ (1) This rule does not apply to applications filed with Division of State Lands pursuant to OAR 340-048-0022 or applications for federal grazing permits pursuant to OAR 340-048-0120 to 340-048-0160.

(2) A completed application filed with DEQ shall contain, at a minimum, the following information:

- (a) Legal name and address of the project owner;
- (b) Legal name and address of owner's designated official representative, if any;
- (c) A description of the project location sufficient to locate and distinguish proposed project facilities;
- (d) Names and addresses of immediately adjacent property owners;
- (e) A complete description of the project proposal, using written discussion, maps, diagrams, and other necessary materials;
- (f) Name of involved waterway, lake, or other water body;
- (g) Copies of the environmental background information required by the federal permitting or licensing agency or such other environmental background information as may be necessary to demonstrate that the proposed project or activity will comply with water quality requirements;
- (h) Copy of any public notice and supporting information, issued by the federal permitting or licensing agency for the project;
- (i) An exhibit which:
  - (A) Identifies and cites the specific provisions of the appropriate local land use plan and implementing regulations that are applicable to the proposed project;
  - (B) Describes the relationship between the proposed project and each of the provisions identified in paragraph (A) of this section; and
  - (C) Discusses the potential direct and indirect relationship to water quality of each item described in paragraph (B) of this section.
  - (D) If specific land use compatibility findings have been prepared by the local planning jurisdiction, these findings should be submitted as part of this exhibit and may be substituted for the requirements in paragraphs (A) and (B) of this section.
- (j) For hydroelectric projects, an exhibit which:
  - (A) Identifies and cites the applicable provisions of ORS 469.371 and 543.017 and implementing rules adopted by the Energy Facility Siting Council and Water Resources Commission;
  - (B) Describes the relationship between the proposed project and each of the provisions identified in paragraph (A) of this section; and
  - (C) Discusses the potential direct and indirect relationship to water quality each item described in paragraph (B) of this section.
- (k) An exhibit which identifies and describes any other requirements of state law applicable to the proposed project which may have a direct or indirect relationship to water quality.

(3) The DEQ reserves the right to request any additional information necessary to complete an application or to assist the DEQ to adequately evaluate the project impacts on water quality. Failure to complete an application or provide any requested additional information within the time specified in the request shall be grounds for denial of certification.

(4) The Department shall notify the applicant by certified mail of the date the application is determined to be complete. The application will be immediately deemed complete if a preliminary review



indicates that all information required by section (2) of this rule is provided and the exhibit required by subsection (2)(i) of this rule contains findings of the local planning jurisdiction. If findings of the local planning jurisdiction are not included, the Department shall forward the exhibit submitted in response to subsection (2)(i) of this rule to the local planning jurisdiction for review and comment. The application shall not be deemed complete until the local planning jurisdiction provides comments to the Department, or 60 days have elapsed, whichever occurs first. If no comment is received within the 60 day period, the Department will continue to seek information from the planning jurisdiction, but will deem the application complete and proceed with evaluation of public notice as provided in section (5) of this rule.

(5) In order to inform potentially interested persons of the application, a public notice announcement shall be prepared and circulated in a manner approved by the Director. Notice will be mailed to adjacent property owners as cited in the application. The notice shall tell of public participation opportunities, shall encourage comments by interested individuals or agencies, and shall tell of any related documents available for public inspection and copying. The Director shall specifically solicit comments from affected state agencies. The Director shall provide a period of not less than 30 days following the date of the public notice during which time interested persons may submit written views and comments. All comments received during the 30-day period shall be considered in formulating the Department's position. The Director shall add the name of any person or group upon request to a mailing list to receive copies of public notice.

(6) The Director shall provide an opportunity for the applicant, any affected state, or any interested agency, person, or group of persons to request or petition for a public hearing with respect to certification applications. If the Director determines that new information may be produced thereby, a public hearing will be held prior to the Director's final determination. Instances of doubt shall be resolved in favor of holding the hearing. There shall be public notice of such a hearing.

~~(7) For projects or activities where the Division of State Lands is responsible for compiling a coordinated state response (normally applications requiring permits from the Corps or Coast Guard), the following procedure for application and certification shall apply:~~

- ~~—(a) Application to the federal agency for a permit constitutes application for certification;~~
- ~~—(b) Applications are forwarded by the federal agency to the Division of State Lands for distribution to affected agencies;~~
- ~~—(c) Notice is given by the federal agency and Division of State Lands through their procedures. Notice of request for DEQ certification is circulated with the federal agency notice;~~
- ~~—(d) All comments including DEQ Water Quality Certification are forwarded to the Division of State Lands for evaluation and coordination of response. The Division of State Lands is responsible for assuring compatibility with the local comprehensive plan or compliance with statewide planning goals.~~

(78) In order to make findings required by OAR 340-048-0025(2), the Department's evaluation of an application for project certification may include but need not be limited to the following:

- (a) Existing and potential beneficial uses of surface or groundwater which could be affected by the proposed facility;
- (b) Potential impact from the generation and disposal of waste chemicals or sludges at a proposed facility;
- (c) Potential modification of surface water quality or water quantity as it affects water quality;
- (d) Potential modification of groundwater quality;
- (e) Potential impacts from the construction of intake or outfall structures;
- (f) Potential impacts from waste water discharges;
- (g) Potential impacts from construction activities;

- (h) The project's compliance with plans applicable to Section 208 of the Federal Clean Water Act;
- (i) The project's compliance with water quality related standards established in Sections 3 and 5 of Chapter 569, Oregon Laws 1985 (ORS 543.017 and 469.371) and rules adopted by the Water Resources Commission and the Energy Facility Siting Council implementing such standards.

Stat. Auth.: ORS Ch. 468

Stats. Implemented: ORS

Hist.: DEQ 18-1985, f. & ef. 12-3-85; DEQ 1-1987, f. & ef. 1-30-87

340-048-0022 For projects or activities where the Division of State Lands is responsible for compiling a coordinated state response (normally applications requiring permits from the Corps or Coast Guard), the following procedure for application and certification shall apply:

- (1) Application to the federal agency for a permit constitutes application for certification;
- (2) Applications are forwarded by the federal agency to the Division of State Lands for distribution to affected agencies;
- (3) Notice is given by the federal agency and Division of State Lands through their procedures. Notice of request for DEQ certification is circulated with the federal agency notice;
- (4) All comments including DEQ Water Quality Certification are forwarded to the Division of State Lands for evaluation and coordination of response. The Division of State Lands is responsible for assuring compatibility with the local comprehensive plan or compliance with statewide planning goals;
- (5) Evaluation of the application will be consistent with the provisions of OAR 340-048-0020(7)

Stat. Author.: ORS 468.020; ORS 468B.035

Stat. Imp.: 33 USC 1341; ORS 468B.035

### **340-048-0025**

#### **Issuance of a Certificate**

(1) Within 90 days after an application is deemed complete pursuant to OAR 340-048-0020(4), the DEQ shall serve written notice upon the applicant that the certification is granted or denied or that a further specified time period is required to process the application. Written notice shall be served in accordance with the provisions of OAR 340-011-0097 except that granting of certification may be by regular mail. Any extension of time shall not exceed one year from the date of filing a completed application.

- (2) DEQ's certification for a project shall contain the following:
  - (a) Name of applicant;
  - (b) Project's name and federal identification number (if any);
  - (c) Type of project activity;
  - (d) Name of water body;
  - (e) General location;
  - (f) Findings that the proposed project is consistent with:
    - (A) Rules adopted by the EQC on Water Quality;
    - (B) Provisions of Sections 301, 302, 303, 306 and 307 of the Federal Water Pollution Control Act,

Public Law 92-500, as amended;

(g) Such conditions as the Director determines necessary to require compliance with:

(A) For hydroelectric projects, those standards established in Sections 3 and 5 of Chapter 569, Oregon Laws 1985 (ORS 543.017 and 469.371) and rules adopted by the Water Resources Commission and Energy Facility Siting Council implementing such standards that the Director determines are water quality related;

(B) Standards of other state and local agencies that the Director determines are water quality related and are other appropriate requirements of state law according to Section 401 of the Federal Water Pollution Control Act, Public Law 92-500, as amended.

(h) A condition which requires the certificate holder to notify the Department of all changes in the project proposal subsequent to certification.

(3) If the applicant is dissatisfied with the conditions of any granted certification, the applicant may request a hearing before the Commission. Such requests for a hearing shall be made in writing to the Director within 20 days of the date of mailing of the certification. Any hearing shall be conducted pursuant to the rules of the Commission for contested cases.

(4) Certifications granted pursuant to these rules are valid for the applicant only and are not transferable.

Stat. Auth.: ORS Ch. 468

Stats. Implemented: ORS

Hist.: DEQ 18-1985, f. & ef. 12-3-85; DEQ 1-1987, f. & ef. 1-30-87

### **340-048-0030**

#### **Certification Delivery**

For projects where application for certification is filed directly with DEQ by the applicant, the DEQ certification will be returned directly to the applicant. For those applications that are coordinated by the Division of State Lands, DEQ certification will be delivered to the Division of State Lands for distribution to the applicant and the federal permitting agencies as part of the Oregon coordinated response.

Stat. Auth.: ORS Ch. 468

Stats. Implemented: ORS

Hist.: DEQ 18-1985, f. & ef. 12-3-85

### **340-048-0035**

#### **Denial of Certification**

If the Department proposes to deny certification for a project, a written notice setting forth the reasons for denial shall be served upon the applicant following procedures in OAR 340-011-0097. The written notice shall advise the applicant of appeal rights and procedures. A copy shall also be provided to the federal permitting agency. The denial shall become effective 20 days from the date of mailing such notice unless within that time the applicant requests a hearing before the Commission or its authorized representative. Such a request for hearing shall be made in writing to the Director and shall state the grounds for the request. Any hearing held shall be conducted pursuant to the rules of the Commission for contested cases.

Stat. Auth.: ORS Ch. 468

Stats. Implemented: ORS

Hist.: DEQ 18-1985, f. & ef. 12-3-85

### **340-048-0040**

#### **Revocation or Suspension of Certification**

(1) Certification granted pursuant to these rules may be suspended or revoked if the Director determines that:

- (a) The federal permit or license for the project is revoked;
- (b) The federal permit or license allows modification of the project in a manner inconsistent with the certification;
- (c) The application contained false information or otherwise misrepresented the project;
- (d) Conditions regarding the project are or have changed since the application was filed;
- (e) Special conditions or limitations of the certification are being violated.

(2) Written notice of intent to suspend or revoke shall be served upon the applicant following procedures in OAR 340-011-0097. The suspension or revocation shall become effective 20 days from the date of mailing such notice unless within that time the applicant requests a hearing before the Commission or its authorized representative. Such a request for hearing shall be filed with the Director and shall state the grounds for the request. Any hearing held shall be conducted pursuant to the rules of the Commission for contested cases.

Stat. Auth.: ORS Ch. 468

Stats. Implemented: ORS

Hist.: DEQ 18-1985, f. & ef. 12-3-85

### **WATER QUALITY CERTIFICATION - FEDERAL GRAZING PERMITS**

#### **340-048-0100 Background and Purpose**

Section 401 of the Federal Clean Water Act requires that any applicant for a federal license or permit to conduct any activity which may result in a discharge to waters of the United States, must provide the licensing or permitting agency certification from DEQ of compliance with water quality requirements and standards. The DEQ and ODA jointly developed rules to provide the authority and process for certifying federal grazing permits that will not violate state water quality standards and other applicable requirements of state law.

Rules 340-048-0100 to -0160 apply to water quality certification of livestock grazing on lands managed by federal agencies within the State of Oregon as required under Clean Water Act § 401 (33 USC § 1341).

Note: A federal district court entered judgment on November 29, 1996, that requires 401 Water Quality Certification for US Forest Service grazing permits.

Stat. Author.: ORS 468.020; ORS 468B.035; ORS 561.190; ORS 561.191

Stat. Imp.: 33 USC 1341; ORS 468B.035

#### **340-48-0110 Certification Policy and Options**

(1) Any person seeking a grazing permit from a federal agency may request water quality certification from DEQ.

(2) Following ODA review and evaluation of the application described in Section 340-048-0120, DEQ may issue an individual or general certification based on a finding that there is reasonable assurance that the activity will be conducted in a manner which will not violate water quality standards and other appropriate requirements of state law.

(a) On water quality limited waters, certification may be granted if the proposed activity, as conditioned, is conducted in a manner which does not further degrade water quality and will allow the site characteristics that influence the water quality parameters of concern to improve.

(b) On water quality limited waters, certification will be denied if the proposed activity is expected to maintain or further degrade the current site conditions where those conditions influence the water quality parameters of concern.

(c) On high quality waters, certification may be granted if the proposed activity is expected to meet DEQ's antidegradation policy [OAR 340-041-0026 (1) (a)].

(3) Water quality certifications are valid for the term of the permit except as provided elsewhere in these rules.

(4) Individual Certification. A person who does not qualify for a general certification as specified in section (5) below may apply for individual certification of their proposed activity.

(5) General Certifications:

(a) An applicant may request to be certified under a general certification. The applicant must identify the general certification that covers the proposed activity and provide to DEQ the information specified under OAR 340-048-0120(2) below. DEQ/ODA must determine within 30 days whether an individual certification will be required and notify the applicant if an individual certification is required and of the additional application requirements.

(b) A federal agency may request the development of a general certification of all its grazing permits within a specified geographical area or categorical description as specified below. The federal agency must submit the proposed conditions of the general certification along with information supporting the proposition that the activity conducted under these conditions will comply with applicable water quality standards and other appropriate requirements of state law.

(c) General certifications may be issued under one or more of the following circumstances:

(A) For areas where a water quality management plan has been approved by DEQ or ODA.

(B) For permits within the watersheds of high quality waters within a specified geographic area where grazing has been an on-going land use and the federal plans in place are preventing degradation of water quality.

(C) For areas where the permit requires that one or more of the following management strategies is applied to all the intermittent or perennial streams on the area affected by the permit:

1. Riparian pasture where utilization of the riparian pasture is specifically designed to meet stream and riparian restoration goals established for the purpose of attaining water quality standards.

2. Riparian corridor fencing that excludes livestock from the riparian area and stream, except for limited access for watering purposes, or

3. Rest or closure.

(D) For areas where the pollution prevention and control measures and standards and guidelines contained in the applicable federal agency plans, decision notices and/or records of decision, meet or exceed the certification criteria described in section 340-048-0140 of these rules, a general certification can be issued for permits within a specified geographic area covered by those plans.

(d) DEQ will provide an opportunity for public comment of not less than 45 days on draft proposed general certifications prior to the issuance of the general certification.

(e) DEQ or ODA may require an individual certification of any permit applicant within an area covered by a general certification if DEQ or ODA determine that there is a need for an individual certification due either to particular characteristics of the allotment or the proposed activity which make the general certification insufficient, or due to the compliance history of the applicant on matters relevant to water quality.

(f) General certifications may be revised or voided at any time DEQ and ODA determine such action is needed and shall be reviewed no less than once every 5 years to ensure that the provisions and conditions of the general certification are adequate to protect water quality. The provisions and conditions of the updated general certification will be incorporated as conditions of the grazing permits when those permits are issued, renewed, or otherwise open for review and amendment.

(6) Persons proposing to graze areas that have no waters of the United States within or adjacent to the grazed area and that have no significant chance of discharge to such waters are not required to obtain a water quality certification.

(7) Following consultation with the federal permitting agency, permittees who have received a water quality certification and are grazing under a federal permit shall notify DEQ if the nature of the certified activity changes significantly in a manner that may adversely impact water quality. DEQ, at its own discretion and in consultation with ODA, may revise or withdraw the certification based on the proposed changes in grazing activity.

Stat. Author.: ORS 468.020; ORS 468B.035; ORS 561.190; ORS 561.191

Stat. Imp.: 33 USC 1341; ORS 468B.035

### **340-048-0120 Application Requirements and Review for Grazing Certifications**

(1) An application for individual water quality certification shall be submitted to DEQ and must include the following information:

(a) Legal name and address of the applicant;

(b) Legal name and address of the designated official representative of the person seeking a federal grazing permit, if any;

(c) Name of the federal agency with authority to approve the grazing permit;

(d) Identification of all waterbodies and those listed as water quality limited under the Clean Water Act Sec. 303(d) in the area of the permitted activity, and the parameters of concern. Statement of how the proposed grazing activity will comply with State of Oregon water quality requirements and address waterbodies listed as water quality limited under the Clean Water Act Sec. 303(d);

(e) Description of the grazing activity. Included in this description will be a reference to type, number and class of livestock, the season and duration of use and the grazing system proposed.

(f) Statement of current upland, riparian and water quality conditions, and identification of historic and present livestock contributions to water quality limitations. Include identification of assessments and monitoring programs used to develop this statement as well as the most recent inspection report. Other material which might be used to evaluate the application include aerial photographs, PFC assessments as referenced in Bureau of Land Management Technical Reference Publication 1737-9, 1993, Revised 1995, and utilization maps.

(g) Description of present and proposed site condition objectives and pollution prevention and control measures to be utilized to protect water quality. The description should include identification of required range improvement projects and funds needed.

(h) Identify elements to be monitored to document implementation of the proposed grazing program, trend in stream, riparian and site conditions related to water quality and progress toward achieving the objectives stated under (g) above. Summarize the federal agency monitoring program used to document change, trend and rate. Management objectives can be used to design and implement the monitoring effort and gauge the degree to which compliance is taking place.

(i) Map of the allotment showing locations of streams and any 303(d) listed streams.

(2) Any person seeking water quality certification under a general certification must include the following information in their application to DEQ:

(a) Legal name and address of the person seeking a federal grazing permit;

(b) Legal name and address of the designated official representative of the person seeking a federal grazing permit, if any;

(c) Name of the federal land management agency with authority to approve the grazing permit;

(d) Any information necessary to determine that the proposed grazing permit qualifies for coverage under the specified general certification.

(3) DEQ and ODA may request information on and consider an applicant's compliance history when deciding whether to certify the proposed activity, or to certify under a general certification. A permittee's compliance history is relevant to the finding that the State must make that there is reasonable assurance that the activity will be conducted in a manner that complies with water quality standards and other appropriate requirements of state law.

(4) The applicant will be notified by certified mail of the date the application is determined to be complete.

(5) If DEQ or ODA determine that an application is not complete or that additional information is necessary to adequately evaluate the activity's impact on water quality, DEQ shall notify the applicant and

(a) return the application as incomplete; or

(b) request additional information.

(6) In order to inform potentially interested persons of an application for individual certification, a public notice shall be prepared and circulated. Public notice for general certifications shall be issued in accordance with OAR 340-48-0110(5)(d) above at the time of development of the general certification. Interested persons, including local governments, special districts, and agencies of the state or federal government, may request to be notified of applications for certification. DEQ will mail or electronically transmit a copy of a complete application to persons requesting an application within seven days after such a request is made. DEQ and ODA will consider written comments received by the Department within 30 days from date of DEQ mailing of notification.

(7) The Director shall provide an opportunity for the applicant, any affected state, or any interested agency, person, or group of persons to request or petition for public hearing with respect to certification applications. If the Director determines that new information may be produced thereby, a public hearing will be held prior to the Director's final determination. There shall be public notice of such a hearing.

Stat. Author.: ORS 468.020; ORS 468B.035; ORS 561.190; ORS 561.191

Stat. Imp.: 33 USC 1341; ORS 468B.035

#### **340-048-0130 Contents of Certification of Grazing Activity**

(1) The certification of grazing activity on federal lands shall include:

(a) a statement that there is reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards and other appropriate requirements of state law, and

(b) a statement of any conditions which the ODA deems necessary in order to make the finding in (a) above.

(2) For grazing activity, the contents of certification specified in this rule supersede OAR 340-048-0025 (2).

#### **340-048-0140 Grazing Certification Evaluation Criteria**

ODA will use the following criteria to evaluate all activities authorized by new and renewed grazing permits for lands managed by federal agencies within the State of Oregon that require certification under Clean Water Act § 401 (33 USC § 1341). ODA will determine the necessary conditions of certification and recommend to DEQ whether to grant or deny certification of the activity.

These criteria are based on objectives which guide the site specific management of individual grazing permits. These objectives will integrate Best Management Practices (BMPs) in order to fully address water quality standards. Best Management Practices include stipulations regarding season of use, number of animals, intensity of use, kind and class of livestock, types of grazing systems applied, the spatial distribution of grazing, and others. The manner in which these BMPs are applied will depend on local conditions and site potential.



The effects of actions resulting from activities specified in the grazing permit are the responsibility of the permittee. Exceptional circumstances that are not related to these management activities will not be considered as part of the application review.

(1) Grazing management practices

(a) All grazing management practices shall be based on site potential and a site's ability to respond to management actions.

(b) The season, timing, frequency, duration and intensity of livestock grazing use shall be managed to improve the following components on water quality limited waters and maintain or improve these components on waters that are not water quality limited.

(A) vegetative cover and soil conditions that promote water infiltration, conserve soil moisture and maintain soil stability in upland areas;

(B) vegetative cover and plant community structure to promote streambank stability, debris and sediment capture, shade to moderate water temperature, and floodwater energy dissipation in riparian areas;

(C) diverse riparian plant populations and communities that enhance soil stability and increase water infiltration and storage.

(2) Rest From Grazing

(a) Rest from grazing is an appropriate alternative to improve riparian conditions.

(3) Livestock Dispersment Activities

(a) Livestock dispersment practices such as fencing, herding, water development, and the placement of salt and supplements shall be used where appropriate to:

(A) promote livestock distribution; and

(B) maintain the integrity of riparian areas and other areas sensitive for the purpose of protecting water quality and minimize livestock influence on streambank erosion. In certain prescribed cases, short term concentrations of livestock may be called for in the grazing system.

(4) Livestock Handling Activities

(a) Existing livestock handling facilities (corrals, water troughs) within riparian areas shall be managed to ensure no placement, delivery, or sloughing of sediment into waters of the state.

(b) Future development shall avoid placement of livestock handling facilities in riparian areas.

(c) Livestock management activities including trailing, bedding, watering, loading, salting, and other handling activities shall be limited to those areas and times that shall not reduce the quality of waters of the

state below the quality standards established by rule for such waters by the Environmental Quality Commission.

#### **(5) Monitoring Activities**

(a) Parameters must be selected to demonstrate trend in stream, riparian and site conditions related to water quality and monitored as a condition of the certification. These parameters and a monitoring plan shall be included in the certification application.

(b) Water quality trend data can be a condition of general certification and can be included in a Memorandum of Agreement with the federal agencies.

Stat. Author.: ORS 468.020; ORS 468B.035; ORS 561.190; ORS 561.191

Stat. Imp.: 33 USC 1341; ORS 468B.035

#### **340-048-0150 Compliance Monitoring for Grazing Certifications**

(1) The federal permitting agency is responsible for ensuring that all permit conditions, including the conditions of the water quality certification, are implemented and achieved. Any monitoring necessary to accomplish this task is the responsibility of the federal permitting agency. DEQ or ODA may request reports on this information.

(2) Where federal agency standards and guidelines are identified as the water quality certification conditions, monitoring of the PACFISH or INFISH Riparian Management Objectives, the Aquatic Conservation Strategy Objectives and/or other standard and guide parameters, as applicable, shall be part of the compliance monitoring responsibility of the federal permitting agency.

Stat. Author.: ORS 468.020; ORS 468B.035; ORS 561.190; ORS 561.191

Stat. Imp.: 33 USC 1341; ORS 468B.035

#### **340-048-0160 Enforcement for Grazing Certifications**

(1) Enforcement of the grazing permit terms and conditions is primarily the responsibility of the federal permitting agency. The water quality certification and any conditions included in the certification are incorporated as conditions on the federal grazing permit. Where there is a violation of permit conditions, the federal permitting agency is authorized to cancel or suspend the permit in accordance with permit terms and conditions and federal grazing regulations.

(2) If a permittee violates the conditions of the water quality certification, or as otherwise provided in OAR 340-048-0040, DEQ may, at its own discretion and in consultation with the ODA, revise the certification or revoke or suspend the certification as provided in OAR 340-048-0040.

(3) DEO may, at its discretion, conduct random surveys or audits of federal agency compliance data to determine compliance with 401 certifications. If compliance problems are identified, DEO, in consultation with ODA, may either revoke certifications or deny further certifications until the compliance issues are resolved.

(4) Nothing in these rules is intended to limit the authority of DEO, ODA or the Environmental Quality Commission under other applicable law.

Stat. Author.: ORS 468.020; ORS 468.035; ORS 561.190; ORS 561.191

Stat. Imp. 33 USC 1341; ORS 468B.035

*fixed 12/15*

# NOTICE OF PROPOSED RULEMAKING HEARING

APPENDIX B.

Department of Environmental Quality

OAR Chapter 340-048-0010 to 340-048-0170

DATE:	TIME:	LOCATION:
January 15	1:00-3:00 pm	Central Oregon Board of Realtors, 2112 4 <sup>th</sup> , Bend
January 15	7:00-9:00 pm	Loucks Lecture Hall, Salem Public Library, 585 Liberty St, Salem
January 16	1:00-3:00 pm	Municipal Building Council Chambers, 101 NW A St., Grants Pass
January 16	1:00-3:00 pm	Ag Services Building, 10507 N. McAllister Rd., La Grande

**HEARINGS OFFICER(s):**

**STATUTORY AUTHORITY:** ORS 183.335, ORS 468.020, ORS 468B.035, ORS 561.109 and ORS 561.101

or **OTHER AUTHORITY:**

**STATUTES IMPLEMENTED:** Federal Clean Water Act Section 401 (33USC 1341), ORS 468B.035

**ADOPT:** 340-048-0100, 340-048-0110, 340-048-0120, 340-048-0130, 340-048-0140, 340-048-0150, 340-048-0160

**AMEND:** 340-48-0010, 340-48-0020, 340-048-0022

**REPEAL:**

**RENUMBER:**

(prior approval from Secretary of State REQUIRED)

**AMEND & RENUMBER:**

(prior approval from Secretary of State REQUIRED)

- This hearing notice is the initial notice given for this rulemaking action.
- This hearing was requested by interested persons after a previous rulemaking notice.
- Auxiliary aids for persons with disabilities are available upon advance request.

**SUMMARY:**

The proposed rules would establish an ODA/DEQ administered 401 certification program for grazing activity on Federal lands. Section 401 of the Federal Clean Water Act requires that any applicant for a federal license or permit to conduct an activity which may result in a discharge to waters of the state, must provide the licensing or permitting agency State certification of compliance with water quality requirements and standards.

The DEQ and ODA propose the adoption of joint rules. The ODA will assume key responsibility for the application review and determination of certificate conditions. The DEQ will be responsible for the issuance of the 401 certificates.

**LAST DATE FOR COMMENT:** Written Comments due January 20. Public Comment period ends February 19.

**AGENCY RULES COORDINATOR:**  
**AGENCY CONTACT FOR THIS PROPOSAL:**  
**ADDRESS:**

Susan M. Greco, (503) 229-5213  
Debra Sturdevant  
811 S. W. 6th Avenue  
Portland, Oregon 97204  
503-229-6691/1-800-452-4011

**TELEPHONE:**

Interested persons may comment on the proposed rules orally or in writing at the hearing. Written comments will also be considered if received by the date indicated above.

*Susan Greco*      *12/12/97*

Signature

Date

State of Oregon  
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal  
for  
Amendments to Water Quality Rules  
Relating to 401 Certification of Grazing Activity on Federal Lands

Fiscal and Economic Impact Statement

**Introduction**

The Department of Environmental Quality (DEQ) and Oregon Department of Agriculture (ODA) propose the adoption of joint administrative rules to provide the authority and process for the issuance of 401 Certification to federal land grazing lessees. Several federal agencies may participate in the certification process. However, the U.S. Forest Service is the only known participant at this time.

State 401 Certification of federal grazing activity will require the ODA and DEQ to establish an administrative process for receiving, processing and issuing certificates. The certificate is good for the term of the federal grazing permit, however DEQ/ODA may choose to review the permits for compliance at their discretion. Currently, 401 Certificates are issued for federal construction activities that result in discharges into state waters. There is no fee requirement at this time, although the 1977 Legislature did grant authority to DEQ to develop such fees. There are agency plans in 1998 to consider a fee requirement for 401 Certification to cover the costs of administering the program. If adopted, this fee would apply to the certification of grazing activities.

Currently, federal grazing permittees are required to comply with federal plan requirements to protect water quality. These rules establish a process that includes an examination of the federal requirements to determine compliance with the 401 condition provisions. Permittees, in some cases, may be required to invest in water quality practices beyond the requirements of the federal agency. This likely will vary, permit by permit.

**General Public**

The general public will gain a net overall benefit from the proposed rules by the resultant improvements to the quality of impacted waters and the protection of fish and other beneficial uses of the state's waters. The costs of these improvements however, may be passed on to the consumer by the grazing permit holders through higher meat prices.

### **Small Business**

It is believed that the vast majority of potential grazing certificate holders will be small businesses, having less than 50 employees. There are approximately 553 USFS and 1390 BLM active grazing permits. Many, but not all, of these permits are issued for a 10 year term.

Staff estimates the 401 Certificate application requires an average of 16 hours preparation time. At \$10.00 per hour, the cost of preparing each application will be approximately \$160.00. As stated above, DEQ has future plans to consider a fee requirement for all 401 Certifications. When this issue is addressed through a committee and rule process, the economic impact to the affected parties will be analyzed at that time.

Permittees may also incur costs related to management practices implemented to protect water quality. These management changes and related costs will vary permit by permit. For example, an approximate figure for the cost of fencing is \$2000 to \$4000 per mile, and off-stream watering facilities will often range from approximately \$2000 to \$3500 each.

### **Large Business**

There are probably some ranching operations that qualify as large businesses. However, in the case that an application may involve a large business, the economic impacts would be the same as identified for small businesses.

### **Local Governments**

Local governments will receive the same benefit as the general public through the improvement to the quality of waters in their jurisdiction. There may also be situations where drinking water supplies or wastewater treatment systems will directly benefit from water quality improvements as a result of implementation of the certificate conditions.

### **State Agencies**

DEQ: The DEQ will assume responsibility for the application processing, issuance of certificates and limited technical assistance which will include staff resource for the following:

- Preparation of application packets
- Development of process to track the application process
- Receive and process applications
- Preparation and issuance of certificates
- Response to application process inquiries
- Review for compliance of existing certificates

- Coordination with ODA and federal agencies

One-half FTE will be required to carry out DEQ's responsibilities. Revenue for staff resources will be obtained from a combination of application fees (if such fees are approved by the EQC) and general fund or federal grants.

ODA: The ODA will assume responsibility for reviewing the applications and determining appropriate certificate conditions and will provide direct technical assistance to the grazing lessees and federal agencies. Specific duties will include:

- Create tracking system for application reviews
- Conduct application reviews
- Provide DEQ with a recommendation for certification or denial and any certificate conditions
- Respond to applicant/federal agency requests for technical assistance
- Review for compliance of existing certificates
- Coordination with DEQ, federal agencies

ODA will require 1 FTE to carry out its responsibilities. Funding for staff resource will be obtained from general fund or federal grants.

### Assumptions

- ODA and DEQ will jointly administer the 401 Certification process for federal grazing lessees. DEQ's key responsibility is administration of the application process and issuance of certificates. ODA's key responsibilities include review of applications, determination of certificate conditions, recommendation on certification or denial and provision of technical assistance.
- Issued 401 Certificates will be incorporated into the federal agency's grazing permits. Enforcement of the certificate conditions are primarily the responsibility of the federal agency.
- The certificate holder will incur the cost of preparing the application and may be required to make investments to protect water quality.
- DEQ/ODA may conduct surveys or audits of federal agency compliance data as a means to determine compliance with 401 certificates.
- Monitoring as determined necessary to accomplish the certificate conditions is the responsibility of the affected federal agency.

### Housing Cost Impact Statement



The Department has determined that this proposed rulemaking will have no effect on the cost of development of a 6,000 square foot parcel and the construction of a 1,200 square foot detached single family dwelling on that parcel.

401rufis.doc

State of Oregon  
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal  
for  
Amendments to Water Quality Rules  
Relating to 401 Certification of Grazing Activity on Federal Lands

Land Use Evaluation Statement

**1. Explain the purpose of the proposed rules.**

Section 401 of the Federal Clean Water Act requires that any applicant for a federal license or permit to conduct any activity which may result in a discharge to waters of the state, must provide the licensing or permitting agency DEQ certification of compliance with water quality requirements and standards. Types of activities that may require DEQ 401 Certification include agriculture, mining, ports, transportation projects, and industrial siting/construction and operations.

In the 401 Certification process, applicants often are required to incorporate protective measures or Best Management Practices in their plans to ensure compliance with water quality laws and standards. Examples of measures include bank stabilization, treatment of stormwater runoff, spill protection, and fish and wildlife protection.

A federal district court entered judgment on November 29, 1996, directing the U.S. Forest Service to require permit applicants to provide State 401 Water Quality Certification before issuing or renewing grazing permits. In response to that court decision, the DEQ and Oregon Department of Agriculture (ODA) adopted temporary administrative rules, in February 1997, to respond to applications for 401 Certification of U.S. Forest Service grazing leases for the 1997 grazing season.

The DEQ and ODA propose the adoption of joint permanent rules to provide for the authority and process for issuing 401 Certifications for grazing on federal lands. The ODA will assume key responsibility for the application review and determination of certificate conditions. The DEQ will be responsible for establishing concurrence with ODA determinations and responsible for the issuance of the 401 Certificates.

**2. Do the proposed rules affect existing rules, programs or activities that are considered land use programs in the DEQ State Agency Coordination (SAC) Program?    Yes    X No**

**a. If yes, identify existing program/rule/activity:**

N/A

b. If yes, do the existing statewide goal compliance and local plan compatibility procedures adequately cover the proposed rules?  Yes  No (if no, explain):  
N/A

c. If no, apply the following criteria to the proposed rules.

In the space below, state if the proposed rules are considered programs affecting land use. State the criteria and reasons for the determination.

The proposed rules have been determined not to constitute a program affecting land use. These rules are intended to apply only to grazing activities on specified federal lands. The Department has concluded that county governments do not have the authority to prohibit or condition these land uses. See California Coastal Commission v. Granite Rock Company, 480 U.S. 572, 107 S. Ct. 1419 (1987).

3. If the proposed rules have been determined a land use program under 2. above, but are not subject to existing land use compliance and compatibility procedures, explain the new procedures the Department will use to ensure compliance and compatibility.  
N/A

\_\_\_\_\_  
Division

401rule.doc

\_\_\_\_\_  
Intergovernmental Coordinator

12/15/97  
Date

**Questions to be Answered to Reveal  
Potential Justification for Differing from Federal Requirements.**

1. Are there federal requirements that are applicable to this situation? If so, exactly what are they?

Section 401 of the Federal Clean Water Act requires states to certify that projects or activities subject to federal permits or license requirements will not violate applicable water quality requirements and standards. The proposed rules implement that requirement of the federal law. There are no federal Clean Water Act requirements that specifically apply to grazing activity.

2. Are the applicable federal requirements performance based, technology based, or both with the most stringent controlling?

The federal requirement for water quality certification is performance based. The State must certify that the activity will be conducted in a manner that will comply with applicable water quality standards and other appropriate requirements of state law.

3. Do the applicable federal requirements specifically address the issues that are of concern in Oregon? Was data or information that would reasonably reflect Oregon's concern and situation considered in the federal process that established the federal requirements?

The rules require the State to evaluate applications and issue certifications, thereby allowing Oregon to tailor its program to its own sites and concerns. The impetus for the proposed rules is a 1996 federal district court decision which requires the U.S. Forest Service to require that permittees obtain 401 certification before issuing or renewing term grazing permits.

4. Will the proposed requirement improve the ability of the regulated community to comply in a more cost effective way by clarifying confusing or potentially conflicting requirements (within or cross-media), increasing certainty, or preventing or reducing the need for costly retrofit to meet more stringent requirements later?

The proposed rules will increase certainty about what is required to comply with water quality standards and rules in Oregon. In some cases, implementing the 401 program now may prevent the need for restoration or more stringent requirements later, but in other cases problems already occur and restoration efforts are already necessary.

5. Is there a timing issue which might justify changing the time frame for implementation of federal requirements?

The court decision requiring the certification of grazing permits was effective immediately and the state has already implemented the program one year under temporary emergency rules. A delay of the State 401 program could mean that grazing permittees would be unable to put their livestock on federal grazing lands, which could be an economic hardship.

6. Will the proposed requirement assist in establishing and maintaining a reasonable margin for accommodation of uncertainty and future growth?

Not applicable to the proposed rules.

7. Does the proposed requirement establish or maintain reasonable equity in the requirements for various sources? (level the playing field)

The rules will apply to all individuals seeking federal grazing permits.

8. Would others face increased costs if a more stringent rule is not enacted?

Not applicable to the proposed rules.

9. Does the proposed requirement include procedural requirements, reporting or monitoring requirements that are different from applicable federal requirements? If so, Why? What is the "compelling reason" for different procedural, reporting or monitoring requirements?

The proposed rules include procedural and monitoring requirements that are not required by the federal government because the federal law requires that the States conduct the certification program and there are no comparable federal requirements. However, if the State does not issue certifications, the federal law requires that the EPA perform the certifications in place of the State. At that point, then, the requirements would be federal.

10. Is demonstrated technology available to comply with the proposed requirement?

There are grazing management practices or systems that can be employed to meet the requirements of the 401 program. There are also monitoring and assessment methods available to meet those requirements.

11. Will the proposed requirement contribute to the prevention of pollution or address a potential problem and represent a more cost effective environmental gain?

Yes, certification of grazing activities will promote the utilization of management practices that address potential problems and prevent water quality degradation as well as improving water quality where problems already occur. Management that will prevent water quality problems will generally be less costly than the management practices (which may include rest from grazing) that may be necessary to correct a problem and restore water quality.

**State of Oregon  
Department of Environmental Quality**

**Memorandum**

**Date:** December 15, 1998  
**To:** Interested and Affected Public  
**Subject:** Rulemaking Proposal and Rulemaking Statements - Amendments to Water Quality rules Relating to 401 Certification of Grazing Activities on Federal Lands.

This memorandum contains information on a proposal by the Department of Environmental Quality (DEQ) and Oregon Department of Agriculture (ODA) to adopt joint new rules and rule amendments regarding 401 Certification of grazing activities on federal lands. Pursuant to ORS 183.335, this memorandum also provides information about the Environmental Quality Commission's intended action to adopt a rule. The public comments and hearing process described is a joint public comment process between ODA and DEQ. The final rules will also be proposed for adoption by the Director of the Department of Agriculture.

This proposal would establish an ODA/DEQ administered 401 Certification Program for Grazing Activity on Federal Lands. Section 401 of the Federal Clean Water Act requires that any applicant for a federal license or permit to conduct any activity which may result in a discharge to waters of the United States, must provide the licensing or permitting agency DEQ certification of compliance with water quality requirements and standards. Types of activities that may require Section 401 Certification include agriculture, mining, ports, transportation projects, and industrial siting/construction and operations.

In the Section 401 Certification process, applicants often are required to incorporate protective measures or Best Management Practices in their plans to ensure compliance with water quality laws and standards. Examples of measures include bank stabilization, treatment of stormwater runoff, spill protection, and fish and wildlife protection. Examples of measures that may relate to grazing activity include: management of vegetative cover and soil conditions; frequency, duration and intensity of grazing; and livestock dispersment and handling activity.

The DEQ and ODA propose the adoption of joint permanent rules to provide for the authority and procedure for issuing Section 401 Certifications for grazing on federal lands. The ODA will assume key responsibility for the application review and determination of certificate conditions. The DEQ will be responsible for the issuance of the 401 Certificates.

The Departments have the statutory authority to address this issue under ORS 183.335, ORS 468.020, ORS 468B.035, ORS 561.101 and ORS 561.109. These rules implement section 401 of the federal Clean Water Act as interpreted by judicial decision and ORS 468B.035.

Other minor housekeeping amendments are proposed to OAR 340-048-0020 and 340-048-0022.

### What's in this Package?

Attachments to this memorandum provide details on the proposal as follows:

- Attachment A A statement describing the fiscal and economic impact of the proposed rule (required by ORS 183.335).
- Attachment B A statement providing assurance that the proposed rules are consistent with statewide land use goals and compatible with local land use plans.
- Attachment C Questions to be Answered to Reveal Potential Justification for Differing from Federal Requirements.
- Attachment D Proposed Rule Amendments - Water Quality Certification - Federal Grazing Permits

### Public Comment Period

You are invited to review these materials and present written comment on the proposed rules. Written comments must be presented to the Department by 5:00 p.m., January 20, 1998. Please send all comments to Department of Environmental Quality, Attn: Debra Sturdevant, 811 S.W. 6th Avenue, Portland, Oregon, 97204. Comments can be hand delivered to the Department of Environmental Quality, 811 S.W. 6<sup>th</sup> Ave., 7<sup>th</sup> Floor (Water Quality reception desk) between 8:00 a.m. and 5:00 p.m.

Public hearings will be held for the presentation of oral testimony as follows:

January 15, 1998	7:00-9:00 pm	Loucks Lecture Hall, Salem Public Library, 585 Liberty St., Salem
January 15, 1998	1:00-3:00 pm	Central Oregon Board of Realtors, 2112 NE 4th, Bend
January 16, 1998	1:00-3:00 pm	Municipal Building Council Chambers, 101 NW A St., Grants Pass
January 16, 1998	1:00-3:00 pm	Ag Services Building, 10507 N. McAllister Rd, La Grande

The public comment period will remain open until February 19 at 5:00 pm to allow for oral comment from advisory committee members and the public to the Commission at the EQC work session that day. Public comment at the work session but may be limited to short statements due to time constraints. In accordance with ORS 183.335(13), no comments can be accepted after the close of the comment period. Thus, if you wish your comments to be considered by the Department in the development of these rules, your comments **must** be received prior to the close of the comment period. Interested parties are strongly encouraged to present their comments at

the hearings or prior to the January 20 deadline for written comment in order to ensure adequate review and evaluation of the comments presented.

### **What Happens After the Public Comment Period Closes**

Following close of the public comment period, the Department will prepare a report which summarizes the comments received. The Environmental Quality Commission (EQC) will receive a copy of this report.

The Department will review and evaluate the rulemaking proposal in light of all information received during the comment period. Following the review, the rules may be presented to the EQC as originally proposed or with modifications made in response to the public comments received. The final proposed rules will also be provided to the Director of Agriculture.

The Department is proposing to hold a work session with the EQC on the proposed rules on February 19<sup>th</sup>. The EQC will then consider the Department's recommendation for rule adoption during one of its regularly scheduled public meetings. The targeted meeting date for consideration of this rulemaking proposal is February 20<sup>th</sup>, 1998.

You will be notified of the time and place for the EQC work session and final EQC action if you submit written comment during the comment period or ask to be notified of the proposed final action on this rulemaking proposal.

### **Background on Development of the Rulemaking Proposal**

#### **Why is there a need for the rule?**

A federal district court entered judgment on November 29, 1996, directing the U.S. Forest Service to require permit applicants to provide State 401 Water Quality Certification before issuing or renewing grazing permits. In response to that court decision, the DEQ and Oregon Department of Agriculture (ODA) adopted temporary administrative rules, in February 1997, to respond to applications for 401 Certification of U.S. Forest Service grazing leases for the 1997 grazing season. The temporary rules have expired and ODA/DEQ proposes that the program be continued with the adoption of permanent rules.

#### **How was the rule developed?**

ODA/DEQ has utilized a joint citizen advisory committee to assist in the development of these rules. The committee met five times over a 4 month period.



Memo To: Interested and Affected Public

December 15, 1997

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Copies of the documents relied upon in the development of this rulemaking proposal can be reviewed at the Department of Environmental Quality's office at 811 S.W. 6th Avenue, Portland, Oregon. Please contact Debra Sturdevant at this address or by phone, (503)229-6691 for times when the documents are available for review. These documents include:

- Section 404 of the Clean Water Act,
- Reports and minutes of the joint DEQ/ODA Advisory Committee, and
- US District Court Civil No. 94-522-HA Opinion and Order

**Whom does this rule affect including the public, regulated community or other agencies, and how does it affect these groups?**

The proposed rule applies to all individuals or businesses seeking or renewing federal grazing permits. The ODA and DEQ will administer the program and the federal agencies have responsibilities to ensure certificate compliance, including monitoring. Affected federal agencies include the Forest Service and possibly the Bureau of Land Management, Fish & Wildlife Service and the National Park Service.

**How will the rule be implemented?**

The DEQ and ODA will jointly administer the program. DEQ's responsibilities primarily apply to the application process, providing public notice, and issuance of certificates. The ODA will review the applications and determine certificate conditions and provide technical assistance to the certificate holders. Both agencies may carry out activities to determine compliance with water quality standards.

**Are there time constraints?**

Yes. These rules must be available for the 1998 grazing season. ODA/DEQ expect to start up the program the first of March 1998.

**Contact for More Information**

If you would like more information on this rulemaking proposal, or would like to be added to the mailing list, please contact:

Debra Sturdevant  
Department of Environmental Quality  
811 SW Sixth Ave. , 6<sup>th</sup> Floor  
Portland, Oregon 97204

(503) 229-6691  
or toll free at  
1-800-452-4011 X6691

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*This publication is available in alternate format (e.g. large print, Braille) upon request. Please contact DEQ Public Affairs at 503-229-5317 to request an alternate format.*

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**Presiding Officers' Reports**

**This Appendix includes the reports of the presiding officers at the four public hearings:**

**Salem  
La Grande  
Grants Pass  
Bend**



State of Oregon  
Department of Environmental Quality

Memorandum

Date: January 24, 1998

To: Environmental Quality Commission, and  
Bruce Andrews, Director, Oregon Department of Agriculture

From: John Blanchard, Presiding Officer

Subject: Presiding Officer's Report for Rulemaking Hearing  
Hearing Date and Time: January 16, 1998 beginning at 1:00 PM  
Hearing Location: Grants Pass, Oregon

Title of Proposal: Draft Water Quality Rules Relating to Water Quality (401) Certification of  
Grazing Activities on Federal Lands

The rulemaking hearing on the above titled proposal was convened at 1:00PM. People were asked to sign witness registration forms if they wished to present testimony. People were also advised that the hearing was being recorded and of the procedures to be followed.

Thirty-eight people were in attendance, 12 people gave testimony.

Prior to receiving testimony, Debra Sturdevant briefly explained the specific rulemaking proposal, the reason for the proposal, and responded to questions from the audience. The formal part of the hearing began at 1:35 PM.

Summary of Oral Testimony

**1. Dennis Vroman, Siskiyou Audubon Society of Grants Pass**

We fully support protection of riparian habitats from degradation and the restoration of degraded riparian habitats. Naturally functioning riparian ecosystems are important, providing the clear, clean water that we require and habitat for hundreds of wildlife species. Insects provide food for fish and wildlife. Without adequate streamside vegetation fish and wildlife populations decline.

While bird monitoring in high quality Applegate River riparian habitat during the 1997 nesting period I captured 300 individuals totaling 33 bird species. More than 50% of the species and 54% of the individuals were neotropical migrant species obviously using river riparian habitats. Thirteen of the 17 neotropical bird species found have declining populations.

If we are going to maintain water quality for our needs and stabilize declining bird and wildlife populations we must protect and restore riparian vegetation. Livestock require access to riparian zones for water, but do not need access to all the riparian corridor of a stream, just a small fragment.

**2. Eleanor Edmondson-Collins**

I have lived in the area for 20+ years. We believe it is absolutely vital to the health of the state, which includes people animals, water and land, that the Oregon Plan be strengthened. This means resting polluted streams from livestock grazing to meet water quality standards, monitoring where water quality data is not available and restoring our rivers sooner than 10 or 20 years. We must be aggressive, we have wasted too many years refusing to recognize that there is a problem and the necessary immediacy of a solution. There are compromises, we can't

expect people to give up everything. We need to work together. I'm almost 75 and I hope by the time I'm 100 we'll have cleared a lot of these problems.

### **3. Rich Nawa**

From 1979 to 1982 I was employed by BLM as a wildlife biologist and was a member of a team of scientists that wrote environmental impact statements concerning livestock grazing in Eastern Oregon. The principal finding of the team was that riparian areas that were in poor or fair condition or that were declining would not improve unless livestock grazing was eliminated. Studies since then have bore out this conclusion. Any permit issued on BLM lands where conditions are poor or fair or declining is not based on science if no grazing wasn't the prescription. I caution you about issuing certifications without site visits, can't do it just with data provided by the bureaucracies or the applicant.

Another thing we found was that allotments are divided into pastures. The best would be to apply the no grazing prescription to the riparian pasture as a whole.

Need to take watershed perspective on this to see real improvement. Unless there is improvement on private lands, the water quality will remain degraded. I'm disappointed that it has been 15 years since we identified these problems to the BLM and not much has happened in those 15 years.

### **3. Kathy Vejtasa**

Steps must be taken to protect polluted streams from the effects of livestock grazing. The livestock industry must be made accountable for its pollution. I'm aware that accountability carries a cost. We are building a home on the N. Umpqua River and DEQ required us to make sure that the river was protected from our pollution. Our septic system cost \$10,000. We also had to designate a spare "repair site" which compromised the location of our house and out buildings. I bring this up not to complain, but to point out that not just the livestock industry has to endure costs to protect water quality.

I urge you not to approve grazing permits where water quality standards are not met. Where water quality data are not available, require water quality monitoring as a condition of certification. Protecting water quality should be a normal cost of doing business, especially using federal land.

### **4. Rex Crume**

I'm a rancher on the Tiller District of the Umpqua National Forest. We received a certification last year and have been doing monitoring. We have found that in most of our upland streams (tributaries to 303d streams) go underground and come up cool enough to meet the requirements. In the 303d stream there's been very little change over the years and very little disturbance to the soil. Need to use an adequate length of stream to do PFC assessment. Streams are listed for sediment and temperature inside and outside of the allotments. Only about half of the district has cattle on it. Sediment often starts from a slide and has nothing to do with cattle. When these are found it should be specified why (cause). Some streams if you stopped all use are not capable of meeting the temperature criteria by the state. Needs to be process by which some streams are identified that say they will never reach 65° for 7 days in the summer and some way of figuring out what their potential is that's reasonable. There needs to be a way of removing a stream from the 303d list that is understood. If the stream meets the requirements for 3 or 4 years and was listed during drought years. How many years of monitoring does it take to get off the 303d list?

If the sedimentation source is a huge slide then that shouldn't affect permits. I put all natural ingredients into my cows. The manure is all natural material. Insects thrive on some of these nutrients. If you hear Jacques Cousteau talking about hippopotamuses pooping in the water its natural nutrients for other animals to live off of. But when its a cow its something bad. I wouldn't call these streams polluted just because they're 303, sometimes its just for temperature or sediment from a natural source.

Is state willing to help with the expense of fences, or Audobon society or other people so the only option isn't to remove cattle. Its impossible for the permittee to sustain the cost of all those fences. Is there a way for the state to help in important areas?

Under the PFC definition - I would like to see language on minimum stream length of one-quarter mile to do PFC. On Riparian Area definition. The Forest Service uses 300 feet whether there is any vegetation change or not. It is not the distance it is the vegetation. Need good strong definition. Federal government definition is broad and doesn't make sense as far as vegetation management.

Butterflies eat on cow pies and birds eat the insects and small animals turn cow pies over and eat insects underneath and then the area gets fertilized.

Allowing us to move cattle onto federal land for 6 months gives our own land a rest, which is in the same watershed. If restrict federal lands so much, we must use our own lands to their highest potential. Will have to eliminate wildlife use of them which would not be good.

Added later: If the cattle are an impact in our district, then the elk must surely be a larger impact. Elk numbers have been allowed to grow and grow. If we don't have use of federal lands we're going to have to stop use of private lands by elk. Western pond turtle needs warm water to survive. There needs to be clarity on term 303d streams and water quality limited. People are getting impression that a 303d stream is polluted for human consumption when is might just be that its 2° too warm for a salmon. It wont hurt people that are used to drinking it.

#### **5. Joann Gilliam**

I operate cattle on the Umpqua National Forest. We intensely monitored our range during our 1997 grazing season. I believe that I and the other permittees did an excellent job of addressing the many concerns of the agencies. We are being singled out to defend grazing on public land under false assumptions and opinions rather than scientific based information. It is agreed that there are other sources affecting waterways, yet grazing and farm use are being singled out to be a demonstration in a flawed approach. Streams on our range that are 303d listed are impacted by many other sources with cattle grazing having a minor place in the picture. Our uplands have been looked at by rangeland and grazing experts who concur that our range is in excellent condition with cattle grazing playing a large role in that healthy condition. We need to keep focused on the positives not the negatives. Agriculture is a positive contribution to our state and our nation.

#### **6. John Roach**

I was a member of the Middle Rogue Watershed Council. Everyone puts the responsibility on someone else and has an excuse for the state of the fisheries. A billion dollar industry is down the toilet. If you can't connect yourself and your highland streams to the guy on the coast and you don't see it as an American problem or an Oregon problem. If everyone would put their house in order we would not have this problem.



#### **7. Lorraine Roach**

We all need water. We need to turn around and see what we have done that hasn't worked. It's not just agricultural pollution. There is some question having ODA check and release these certifications as their basis is upon agriculture - we always question should you police your own house. Everyone should work together.

#### **8. Ashley Henry, Rogue Group Sierra Club**

We question how it is that an activity known to be polluting can be conducted in a manner to comply with water quality standards when the waterway is already water quality limited. We suggest prohibiting livestock grazing on all waterways on the 303d list until water quality standards have been met. Other sources of pollution should be halted as well.

DEQ should not rely on the federal agencies for compliance monitoring. The agencies in general have failed to responsibly manage the range program already under their authority and giving them additional responsibility is not a good thing to do. Last year the Umpqua National Forest noted in the certification applications that it does not have the funding to do the monitoring on streams flowing through the allotments. How then can DEQ rely on the USFS for compliance monitoring?

Under section (1)(g) under Application Requirements and Review there is a statement that management objectives should include identification of required range improvements and funds needed but does not make clear whether or not the funds need to be secured at the time of application. It seems essential that funds for project be secured up front in order to assure that proposed management objectives can be met. Otherwise there is no certainty the objectives upon which the certification is based will be achieved.

PFC should not be used as a monitoring tool. It is subjective. I've been in the field with scientists trained in PFC who have gotten different results for the same site.

#### **9. Don Grissom, Eagle Point**

I've run cattle over 50 years on the same allotment. I believe there is a tremendous lack of data by people declaring that cattle are the non point source of pollutants in the stream. I'd like to see data collected over a longer period of time. Let's take samples below the cities and see if cattle are contributing one iota to pollutants as a whole to the streams. The range I've run on for 50 years is far better than they were 50 years ago. The streams have not been hurt in any way shape or form. The erosion that has happened is because of floods and slides, things that happen naturally, not because of livestock. Game will not graze a place where you've taken livestock off for 5 years.

#### **10. Joel Hayward, Eagle Point**

Cattle are only out there 17% of the year. Elk and other wildlife 100% of year. We need to figure atmospheric fall from vehicles, trash, etc. We need to figure damage from towns. We should pick on the bigger perspective of the problem than the little one.

#### **11. Marcus Freeman**

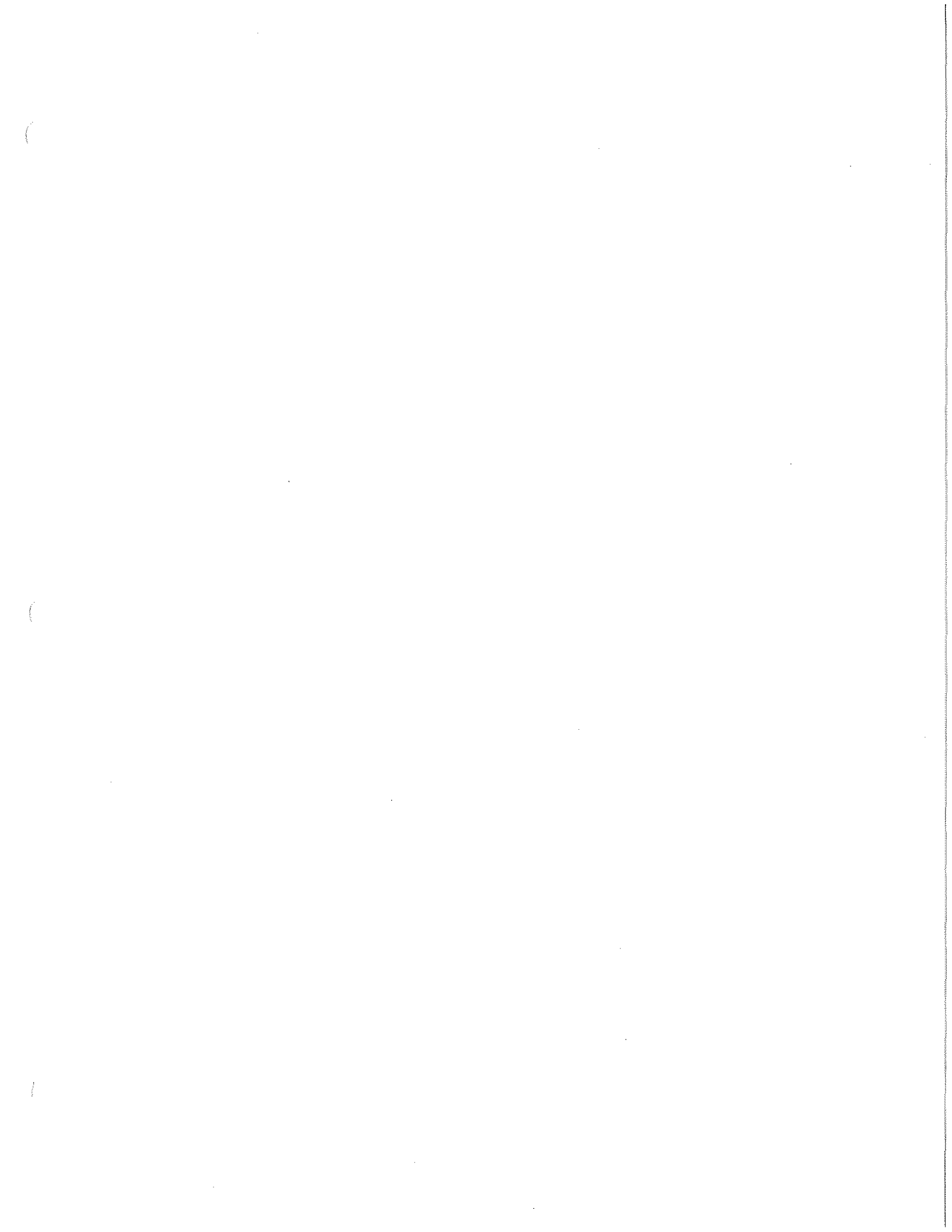
The loss of free flowing streams as a result of deforestation and watershed degradation is a related issue to our agenda here today. Water quality should be common sense. A frog wouldn't drink up her own pond. Between logging, wood cutting and mushroom picking I've worked in the woods for over 10 years. Add to that a lifetime of

hunting fishing and camping in this Oregon country and around the Northwest, I've seen with my own eyes the watershed degradation that has occurred, I helped to do it. Ranchers and cows are not the only culprits here but they most certainly have an involvement and a responsibility. Obvious physical destruction of stream banks and riparian zones is totally unacceptable. Unnatural concentrations of animal as occurs in grazing operations can and have strained the capacities of our natural systems.

Written Testimony

No written comment was submitted but someone who did not present oral testimony:

There was no further testimony and the hearing was closed at 3:00 PM.



State of Oregon  
Department of Environmental Quality

Memorandum

**Date:** January 28, 1998

**To:** Environmental Quality Commission and  
Bruce Andrews, Director of Oregon Department of Agriculture

**From:** Ken Betterton (Oregon Employment Department)

**Subject:** Presiding Officer's Report for Rulemaking Hearing  
Hearing Date and Time: Jan 16, 1998, beginning at 1:00pm  
Hearing Location: La Grande, Oregon  
Title of Proposal: Draft Water Quality rules relating to Water Quality (401) Certification of  
Grazing Activities on Federal Lands

The rulemaking hearing on the above titled proposal was convened at 1:05 PM. People were asked to sign witness registration forms if they wished to present testimony. People were also advised that the hearing was being recorded and of the procedures to be followed.

Twenty-six people attended and six people presented testimony.

Prior to receiving testimony, Ray Jaindl explained the specific rulemaking proposal, the reason for the proposal, and responded to questions from the audience.

Summary of Oral Testimony

**1. Bill Oberteuffer - Island City Oregon**

Mr. Oberteuffer described a project in Maryland that is using a Conservation Reserve approach to improve riparian condition. A quote was provided from an article by Kauffman et al. that appeared in the May issue of Watershed Restoration. This quotation provided a description of passive restoration and how it might be used to improve riparian condition. The rules should provided the basis for avoiding the degradation of riparian systems. In situations where riparian systems have been degraded then they be given time to naturally repair themselves which is cheaper and possibly more effective than active restoration.

**2. Sharon Beck - Oregon Cattlemen's Association and Rancher -La Grande**

Read a letter- submitted it as an exhibit

The costs of this process (lawsuits, planning, meetings, information gathering,..) should be added up and presented to the public so that they are aware of the consequences of harassment lawsuits against the livestock industry. This money could have been spent on other things more closely related to water quality  
Four major points (check the written comments submitted)

1. Requirements or conditions, including any amendments to 401 Certificates must be separate from the grazing permit and must be based on substantial evidence *over time*.
2. ODA should administer 401 and should reach agreement with EQC before adopting rules.

3. There must be a mechanism for temporary or interim 401 Certificates to provide time to address requirements or conditions without interrupting the ongoing grazing use as permitted by the U.S.F.S. And the certification needs to be processed expeditiously.

4. There needs to be an acknowledgment by agencies of the costs in money and time for the permittees.... Costs that could easily triple under these proposed rules,... Costs that are unnecessarily added to our beleaguered industry.

### **3. Mack Birkmaier - Oregon Cattlemen's Association and Rancher - Joseph**

The judgement concerning 401 certification is currently under appeal. The temporary rules should be kept in place since these decisions have not been finalized. Makeup of the Citizens Advisory Committee was tilted because there were no permittees included. At the same time, participants in the original lawsuit were included. Any fees associated with this process should be payed by the state since it is the public who benefit. The General certification option is the most desirable. Individual applications requires too many resources of the individual permittee. There is too much required information to fully evaluate an individual application in order to evaluate certification status.

Permits that have undergone consultation with NMFS should be exempt from this process.

Witness submitted Fred Otley's memo as an exhibit.

Questions from the Hearings Officer to Mack-

How long will it take to put information together?

About 2 days including time of USFS personnel

When will an opinion be rendered concerning the appeal?

About a year

### **4. John Hays - Unity**

Read written comments.

This is part of a perceived attack on the world's food chain. Why is monitoring not done on a yearlong basis (data collected throughout a twelve month period)? Get scientific facts and background before evaluating certification status.

Witness submitted written comment as an exhibit.

### **5. Dan Warnock - Baker City**

It is unclear (p. 10-11) whether ODA is to use the standards to evaluate certification or denial or will these standards be used to evaluate conditions to include in the certification or both. If applications fail to meet one or more of the standards what happens? Page 8 e,f,g,h - for most of us accumulation of required information would take 2-3 weeks.

**6. Lois Barry - La Grande - Retired Professor of English**

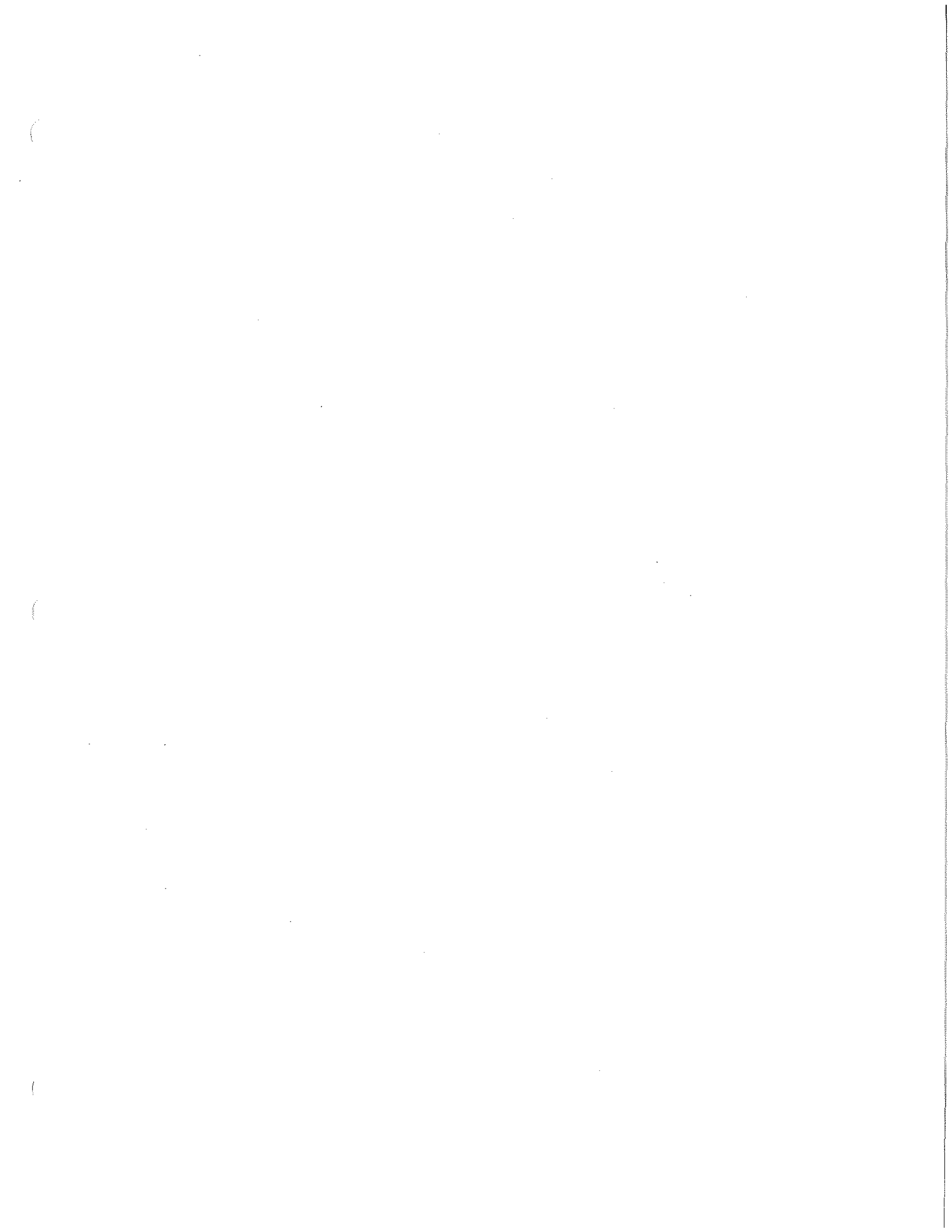
Water quality is a concern and the use of federal lands for grazing is a privilege. Section 2 (a) doesn't address water quality correctly. Example, if you have a scale from 1 to 100, and 100 = pure water, and 40 represents a streams condition, on an academic scale this is an F. According to the rules, as long as condition is not deteriorating then ok but still an F using the previous example. Even with slight improvement this is still unacceptable. We must allow time for natural repair of these systems.

Written Testimony

No one submitted written testimony at this time who did not also present oral testimony. Written comments are summarized in the Summary and Response to Comments.

Due to lack of testimony the hearing was taken off the record at 2:15 PM.

Hearing was put back on record at 2:50 PM. There was no further testimony and the hearing was closed at 3:00 PM.



State of Oregon  
Department of Environmental Quality

Memorandum

Date: January 24, 1998

To: Environmental Quality Commission and  
Bruce Andrews, Director, Oregon Department of Agriculture

From: Mark Hamlin

Subject: Presiding Officer's Report for Rulemaking Hearing  
Hearing Date and Time: Jan 15, 1998, beginning at 7:00pm  
Hearing Location: Salem, Oregon  
Title of Proposal: Draft Water Quality rules relating to Water Quality (401) Certification of  
Grazing Activities on Federal Lands

The rulemaking hearing on the above titled proposal was convened at 7:00 PM. People were asked to sign witness registration forms if they wished to present testimony. People were also advised that the hearing was being recorded and of the procedures to be followed.

Twenty-five people attended and fifteen people presented testimony.

Prior to receiving testimony, Debra Sturdevant briefly explained the specific rulemaking proposal, the reason for the proposal, and responded to questions from the audience.

Summary of Oral Testimony

**1. Jean Underhill-Wilkinson, Oregon Cattlemen's Association**

In section 340-48-0110(2) stick with "reasonable assurance..." language for the standard for certification and eliminate (a) through (c) that attempt to further define the standard. How will the State determine that the activity does not further degrade water quality? What does (a) mean, site characteristics? I don't like the term "improve," it may prompt challenges to a certification that may not be necessary.

General certification and individual certification should be more parallel. If a management plan has been approved one should be able to get individual certification but this is only mentioned under general certification. They should have to meet the same standards.

Certification evaluation criteria. Is ODA supposed to use this section to determine whether certifications should be granted or to determine what conditions should be put into certification, or both. What are the provisions on Page 11, 1-4 to be used for, to determine whether certification should be granted? Does the application have to meet all four to be granted? It isn't real clear what ODA is going to do with standards listed on p.11.

DEQ has all the authority in these rules. ODA should have large part in this. ODA standards on page 11 are less stringent than the standards at the beginning in section 340-48-0110(2). ODA should have joint authority to decide to issue or deny certification or to revoke certification under the enforcement section.

**2. Pete Test, Oregon Farm Bureau Federation**

I'd like to ditto most of Jean's comments. If the appeal is successful, these rules will go away, the footnote about this should be more clear. I don't feel 401 applies to nonpoint sources and it is wasting taxpayers money to have state oversight of federal government activities. The federal government already has to obey water quality laws



and meet state water quality standards. Section 401 grants authority directly to the State. The State has right to waive its authority to issue certifications. If state doesn't do it, EPA does not have right to step in and do it for us. DEQ is overstepping authority given by statute to ODA. DEQ does have authority to issue 401s and to oversee ODA, but have overstepped authority in these rules.

With some correction these rules are workable and because of the law have to work. We will do what we can to see that they do so.

### **3. Glen Stonebrink, Western Institute for Nature, Resources, Education and Policy**

Clean Water Act is unconstitutional. Oregon's compliance with section 319 satisfies compliance with section 401. Unless a permittee has been cited with a violation of section 319, he or she is in compliance with section 401 and has earned the right of a certificate.

### **4. Steve Grasty, Burns**

Some people in the state a 4 hour drive from any of the hearing locations. I request you open another site even if it means extending the comment period. Have left out local planning jurisdictions.

Non-303d streams should have automatic certification. This would allow others to be issued in more timely fashion. Suggest we address how we are going to address monitoring before a lawsuit comes along that requires the state to do it. Question legal precedent for joint authority. How would respond to situation where stream is now 303d listed and becomes de-listed, how certification process would be handled or what would happen to existing certification at that time.

### **5. Marty Wilson, Oregon City**

I am average citizen, not being paid to testify. State waters belong to State of Oregon, not to federal government or ranchers. Deeply concerned about water quality. Have real problems that need real solutions and real monitoring. These rules don't achieve this goal in any reasonable length of time. 10-year grazing permits will mean business as usual, will do the same thing they've been doing. Suggest that the State of Oregon realizes that they have the responsibility to control what happens to waters of this State and take action to correct the deficiencies within a reasonable length of time. Suggest that water sources that are identified as deficient must meet standards within maximum of 5 years. Federal government should not be responsible for monitoring or enforcement. State has that responsibility. Federal people don't own the water and have not taken care of it in the past. If State doesn't have money to do monitoring, at least on statistical basis, legislature must provide money. Rules need to be tougher.

### **6. Karen Sjogren, Salem**

I circulated petition for Clean Streams Initiative in Salem and got over 2000 signatures. I learned that the public is very much aware of pollution problems caused by cattle. DEQ has identified livestock grazing as the State's leading cause of nonpoint pollution. Grazing is a particularly serious source of pollution in eastern Oregon and are impacting important habitat for salmon, steelhead and trout. These species now in serious decline. 110 out of 139 salmon and steelhead runs on BLM lands in Oregon are "at risk" of extinction. Gov. Kitzhaber and Oregon Legislature recognized the connection between livestock grazing and salmonid decline when they created and funded the Oregon Plan, which promises to restore salmon runs by removing agricultural pollutants from Oregon's rivers. A 1995 poll indicated that 75% of Oregon voters believe livestock should not be allowed in streams. The public wants to believe that agencies will deal effectively with this serious water pollution problem.

The rules are not strong enough to guarantee that impaired streams will improve or high quality streams will not degrade. The "reasonable assurance" finding is not strong enough. A certification should be based on a finding that the activity will comply with water quality standards, etc. Also certification should not be allowed because grazing does not further degrade or will allow site characteristics to improve. Certification should not be given until they do improve. Monitoring should be required by the permittee.

A general permit should not be issued for riparian pasture "designed to meet stream and riparian restoration goals," because the best means of meeting these goals is not to graze the riparian pasture at all. Evaluate these on a site specific basis. General certifications should be reviewed no less than once a year.

The application requirements should be stricter. Under 1(d) the permittee should have to state how grazing will be kept out of water quality limited waterbodies. 1(g) does not make sense, grazing activities do not contribute to the protection of water quality. Under 1(h) it is not clear whether or not the permittees or the federal government must actually conduct a monitoring program. The permittee must be required to conduct a monitoring program to assess the impact of grazing on riparian areas and water quality. The development and implementation of a monitoring program should be a precondition of grazing certification. Point sources must monitor discharges in order to obtain and keep discharge permits. Under 340-48-0120(4), requests for certification applications should not be limited to a specific geographic area.

The certification evaluation criteria are not strong enough. Paragraph 2 should state "These objectives will integrate BMPs in order to fully address water quality standards." Paragraph 3 is unclear. Certification conditions should apply to all activities specified in the grazing permit, not just "management activities" and it is unclear what "exceptional circumstances" are being referred to and why then are not included. On p.11, (1)(b) should state "shall be managed to restore...", improve is not strong enough. (2)(a)(B) should read "...and eliminate livestock influence on..." (3)(b) should read "Future development shall prohibit..." Under (4)(a) "can" should be replaced by "will," monitoring should be required. Under (4)(c) "may be" should be replaced by "shall."

On page 12, 340-048-0150(1) does not reassure the reader that the certification process will result in the protection of water quality and riparian areas in Oregon's waters. Only the federal permitting agency is responsible for ensuring that the permit conditions are implemented and achieved and for monitoring to determine if compliance has been achieved. Enforcement by the State appears to be completely discretionary.

If the state does not have the resources to monitor compliance, a better course of action would be to simply not issue grazing permits in the vicinity of water quality impaired streams.

I am also submitting suggested technical editing.

#### **7. Sandy Lonsdale, Juniper Group Sierra Club**

As a professional outdoor photographer I've walked a lot of these streams, I've looked with my own eyes, I trust my eyes and I'm convinced we have a huge problem that we need to address as soon as possible. I hope this process will work because Oregon's quality of life and nature are at stake. BLM states 110 of 138 anadromous salmonid species on BLM lands in Oregon are at risk of extinction. Agree with Karen's comments.

Enforcement is critical. The only enforcement that will work is de-certification until standards are met. Require rest along streams where livestock contribute to water quality problems and continue rest until standards are met. The rules allow certification where no water quality exists. Need to know what we're losing before we lose it. Require monitoring as a condition of certification. I have 500 people willing to help by doing volunteer monitoring.

**8. Robert Jensen, Salem.**

I'm here as a private advocate for public land riparian zone health. To assure that the rules protect the public's interest in water quality, I recommend that the final rules deny certification for grazing within the riparian area of any stream in which water quality standards are not being met or in which the riparian wetland area is not in proper functioning condition. In response to question earlier about why we need state oversight of what federal government is already doing, the question is answered by the BLM itself which in its surveys finds that the majority of streams on BLM lands in Oregon are not in proper functioning condition.

**9. Jim Myron, Oregon Trout**

Oregon Trout participated in the rules advisory committee that assisted the Department in the development of these rules. One of the main issues that the committee did not reach agreement on is what to do with a certification request on a water quality limited stream. My comments will focus on that question. Oregon Trout does not believe that the finding that there is reasonable assurance that grazing will be conducted in a manner that complies with water quality standards will be able to be made on water quality limited streams where livestock grazing has contributed to the current water quality condition. The only alternative available to the agencies will be to deny certification in these situations.

The environmental community presented an alternative during the advisory committee process that is not this drastic. It would create a rebuttable presumption that on water quality limited streams, grazing is presumed to be incompatible and will not be certified. This presumption could be overcome by the livestock operator by presenting evidence that grazing would not contribute to water quality problems. We still believe that such a rebuttable presumption should still be included in the rules.

This issue would benefit from some scientific input and we suggest the rules be submitted to the Oregon Plan Independent Multidisciplinary Science Team for review. DEQ has included the certification process as one of the measures in the Steelhead Supplement to the Oregon Plan. If you look at SB 924 closely, DEQ and ODA probably have an obligation to bring in the Science Team. We believe this is the right thing to do even though it would delay the adoption of the rules.

**10. Michael Carrigan, Oregon Peace Works and Santiam Watershed Guardians**

DEQ must ensure that grazing on federal lands does not degrade our State's waterways. The draft rules do not do enough to protect water quality. Stronger rules must be adopted. 1. Require rest from livestock grazing on streams where livestock contribute to pollution. Require rest until water quality standards are met. 2. Where data is insufficient, require stream monitoring before a permit is certified. If standards are violated, deny the permit until standards are met. 3. Require a water quality management plan before certifying a grazing permit.

**11. Bob Phillips**

My review of the proposal is based on 29 years experience as a fisheries biologist concerned with livestock grazing effects on fish habitat. I've been trying for 29 years to get the cows out of the creek and haven't had much luck. The ODA has veto power over certification process. Disappointed with proposed program, it is likely to fail. It is flawed because it is based solely on subjective evaluation by the ODA. There are not objective quantitative criteria. Certification may be granted on polluted waters if ODA in its opinion rules that the proposed activity will not further degrade water quality and will allow eventual improvement. This is outrageous! The state is set to rubber stamp customary practices that have caused or contributed to the presently degraded water quality. There is no schedule for restoring water quality. Without a deadline, such a certification would be a sham.

Certification evaluation will be based on best management practices, which include, among others, intensity of use. Utilization limits must be specified to prevent overuse in any one year. It is a myth that each allotment is so unique that it is impossible to prescribe criteria that pertain to most if not all allotments. This is a favorite ruse of lessees and agency managers for avoiding specifics for which they may be held accountable.

To be effective the program must: 1. Immediately halt all livestock grazing along water quality limited waters until water quality is restored. 2. Establish utilization standards for watersheds and riparian areas to prevent degradation of waters not now water quality limited. 3. Require monitoring by DEQ in cooperation with federal agencies to assure compliance by lessees. 2.0 FTE should be adequate. 4. Remove all livestock handling facilities in riparian areas within 2 years. Major revision of the proposed rules is needed to respond effectively to the Clean Water Act.

## 12. Mary Scurlock, Pacific Rivers Council

PRC has long been advocate for using 401 authority for federal lands management activities and we were plaintiffs in the lawsuit that is responsible for the development of these draft rules. Would like Oregon to set positive precedent for state exercise of 401 authority that can serve as model for other states. I have participated in rules advisory committee of ODA and DEQ.

Throughout our participation PRC has advised the state that it should use the certification process in the following ways: 1) require adequate baseline information upon which to base a finding that water quality standards will be met under a proposed grazing regime; 2) Independently validate existing federal policies and their ecological objectives where they are adequate and bolster them where they are not; 3) prohibit grazing alongside degraded streams unless near natural or natural rates of recovery are demonstrably attainable under the proposed grazing regime - requirement which is arguable required by existing laws and federal lands policies but which is not being implemented; and 4) increase federal accountability for following through on existing monitoring requirements where they are adequate and impose additional monitoring requirements where they are not.

The draft rules are an improvement over the emergency rules in that they anticipate the possibility of a fairly rigorous analysis of certification applications based on adequate information about water quality impacts of the proposed grazing. They concede that at a minimum, grazing activities affecting waters not meeting standards must be compatible with an upward trend toward meeting standards in order to conform with the CWA. Do need to keep this explicit policy statement in the rule.

There is a great need for serious scrutiny of federal lands grazing by states in their roles as lead water quality regulators. State certification provides the state a means to check for proper and complete implementation of existing policies intended to protect and restore aquatic ecosystems. Such a check is critically necessary because current federal policies do not provide adequate guidance to federal agencies to ensure that only those practices which protect aquatic systems from degradation or which permit recovery are authorized. Also, grazing continues to have serious impacts on salmon and trout habitat in Oregon.

Serious problems exist with state deferral to existing federal policies due to serious implementation problems, substantive biological shortcomings and legal questions about their sufficiency. The scientific evidence strongly supports a conservative approach to riparian grazing which presumes grazing to be inappropriate without documentation that ecological objectives will be met. Current policies also lack strict restrictions on human livestock access to spawning habitats and redds during spawning and incubation periods. Existing policies provide inadequate guidance on implementation and effectiveness monitoring.

There is a need to establish a presumption against riparian grazing on water bodies that do not currently meet water quality standards and grazing is a known contributor to the problem. This presumption would be rebuttable and could be overcome if the application can show 3 things: 1) livestock grazing does not currently contribute to the water quality violations for which the stream is listed, 2) grazing will not prevent or retard attainment of ecological objectives for that site which are related to the water quality parameters of concern, and 3) the affected stream is in properly functioning condition.

Rules on general certification need to be reconsidered. If going to use water quality management plan as framework for general certification shouldn't do it on basis of only DEQ or ODA approval, need to wait for EPA approval. PRC is also wary of proposal to grant general certification at the level of a regional, district or forest-wide management plan. They are either not implemented as written or they are not specific enough to determine whether water quality standards will be met in any particular location. We strongly urge the Department to reserve general certifications for plans which apply at the 6<sup>th</sup> field watershed level or below.

The state should take this opportunity to clarify its interpretation of the CWA's requirements on a 303d listed stream prior to the development of a TMDL. The CWA prohibits the further degradation of water bodies which are not meeting standards. Grazing cannot cause any detectable change in water quality as measured by changes in relevant ecological indicators. For example, where vegetative condition is an appropriate indicator of progress toward meeting the temperature standard, vegetative status and trend would be evaluated to determine compliance, among other indicators. A detectable change includes the measurable slowing of progress toward meeting standards. This issue will continue to come up so the State is well-advised to clarify its interpretation of the law at this juncture.

The more decisive these rule can be the more evidence Oregon has that it can deliver on the promises made in the Oregon Plan and the more likely it is that future ESA listings can be avoided. We need to say what we are going to do with existing authority. Being clear about when certification will be denied and when it will be granted will be more efficient and less subject to controversy and political pressure later. Making a hard decision now will put the affected parties on notice about needed management changes and move us all more quickly down the road to recovery of our fisheries and water quality.

Agree that the Department should seek the advice of the Independent Multidisciplinary Science Team on these rules and their implementation.

### **13. Zephyr Moore, Portland**

Cove Creek, near Fossil, Oregon has had unrestricted grazing for 150 years. Sage brush grows in the bottom of the creek where there are cow hoof prints on the sun-baked clay creek bed. Sparse non-native cheatgrass is the only plant on the eroding hills surrounding the creek. Indian used to catch Steelhead trout from the creek.

An example of restricted grazing is Mill Creek, 20 miles north of Warm Springs. This 6 in. creek was fenced 10 feet from its banks. On the banks grow sedges, rushes, grasses and low willows. It has fist sized rock with green slime attached on the creek bottom. On the cow side of the Mill Cr. Fence, no vegetation stands except 3 foot high sage brush and widely spaced clumps of grass eaten to dirt level. The compacted dirt had a top layer of dust. A 1994 BLM Rangeland Reform report states "Primarily due to livestock grazing, riparian areas are in their worst condition in history." Will laws to restrict grazing take effect soon enough?

Suggestions: 1. All polluted streams impacted by livestock grazing must have livestock removed until water quality standards are met. 2. Where water quality data is not available, require water quality monitoring as a condition of grazing permit certification. 3. Strengthen grazing rules to be consistent with the Oregon Plan to restore water quality statewide, now!

**14. Gillian Lyons, Oregon Natural Desert Association**

What is in the draft rules is not that objectionable, it is what's missing that has us worried. Oregon has an unprecedented opportunity to control one of the most significant sources of water pollution on federal lands - livestock grazing. The most effective way to control water pollution is to eliminate or curtail the source. We expect certification rules that make a serious attempt at curbing water pollution from federal grazing allotments. We respectfully urge DEQ to include in the rules a stipulation that if livestock grazing on a federal allotment is known to contribute to a stream's water quality problems, that state certification of the permit in question be denied until water quality standards are met. Rest the allotment from grazing until the stream recovers.

I suspect that every application DEQ receives will state that the proposed activity will result over the years in improved site conditions. Any well-meaning permit applicant will likely make attempts to improve water quality conditions. But I fear small incremental improvements won't be good enough. The majority of Oregon's salmon and steelhead populations are in dire straits. Their habitat must be protected now.

ONDA would like to see natural rates of recovery on streams. Studies show streams recover much more quickly without grazing pressures than with grazing pressures. If we truly want to protect our streams, we must alter our approach. Lets give these streams a chance to heal, lets rest them from the pressures associated with livestock grazing. This is the fastest, most effective way to restore the majority of Oregon's polluted streams that flow through federal lands. It is also the best way to address the goals and objectives of the Oregon Plan and prevent the listing of more salmon and steelhead stocks.

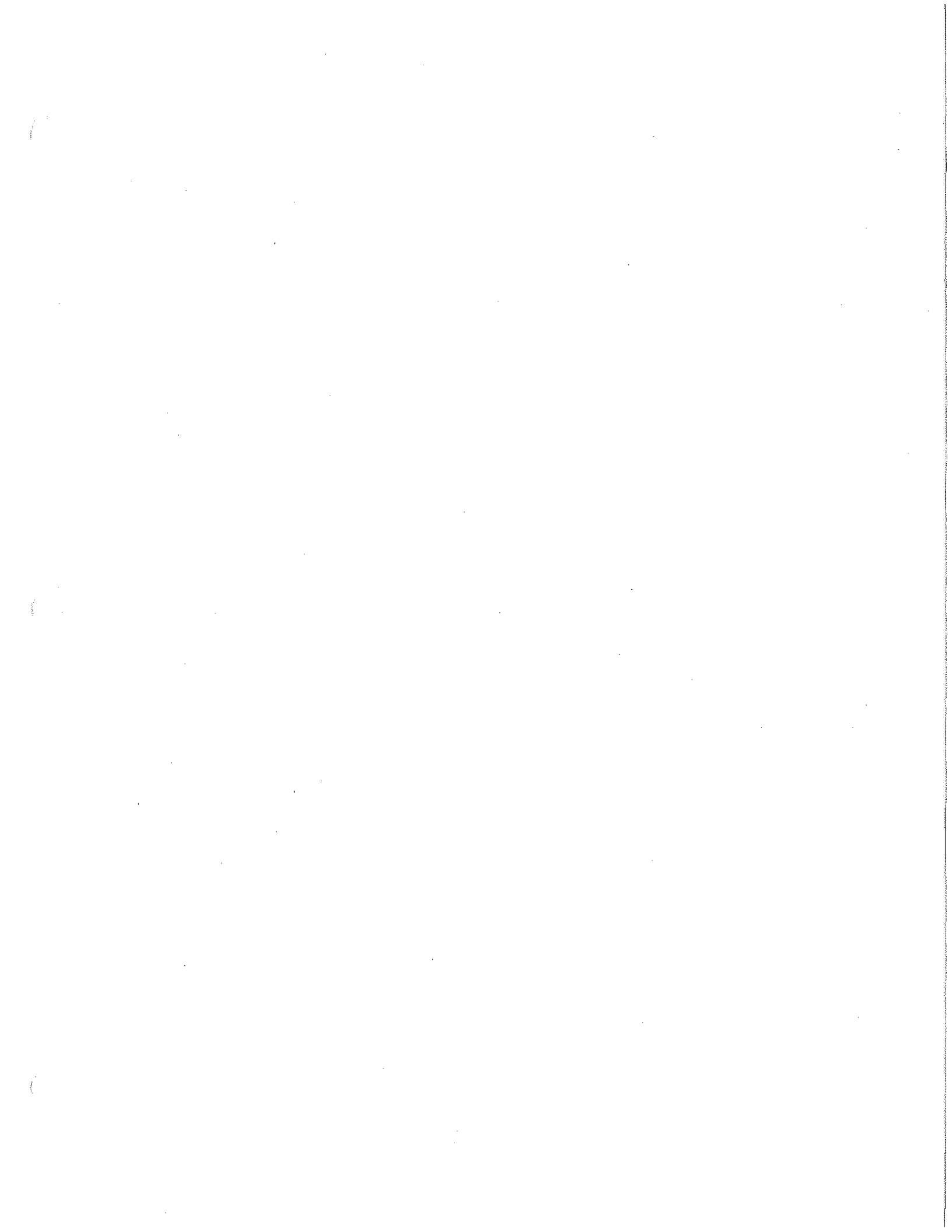
**15. Larry Erikson, Portland**

There is enough good science to have DEQ base there actions on stream improvements based on good science. Salmon streams sufficiently degraded now that there is low probability of their recovery without aggressive action by DEQ. Grazing is part of Oregon history and there is a sentiment in the state that we should continue to subsidize grazing. I believe that ranchers can adapt, salmon can't. Ranchers aren't going to starve if there are strong rules for salmon recovery but the salmon can't adapt to weak rules and survive. Streams that are water quality deficient should be rested. Where there is no data, data should be collected before certification is allowed.

Written Testimony

No one submitted written testimony at this time who did not also present oral testimony. Written comments are summarized in the Summary and Response to Comments.

There was no further testimony and the hearing was closed at 8:45 PM.



State of Oregon  
Department of Environmental Quality

Memorandum

Date: January 28, 1998

To: Environmental Quality Commission and  
Bruce Andrews, Director of Oregon Department of Agriculture

From: Dick Nichols

Subject: Presiding Officer's Report for Rulemaking Hearing  
Hearing Date and Time: Jan 15, 1998, beginning at 1:00pm  
Hearing Location: Bend, Oregon  
Title of Proposal: Draft Water Quality rules relating to Water Quality (401) Certification of  
Grazing Activities on Federal Lands

The rulemaking hearing on the above titled proposal was convened at 1:00 PM. People were asked to sign witness registration forms if they wished to present testimony. People were also advised that the hearing was being recorded and of the procedures to be followed.

Twenty-seven people attended and twelve people presented testimony.

Prior to receiving testimony, Ray Jandl explained the specific rulemaking proposal, the reason for the proposal, and responded to questions from the audience.

Questions:

Question: Is there a form for the application process? Will separate narratives be required for each applicant?  
Response: We will develop a form and template for the 1998 processing

Question: Who is responsible for the monitoring?  
Response: Permittee may be responsible for parameters such as vegetation  
Watershed issues which may be difficult to measure-  
Within the Citizens Advisory Committee, some feel this is the permittees responsibility  
Within the Citizens Advisory Committee, some feel this is an agency responsibility

Question: What should be monitored?  
Response: Temperature, sediment, nutrients,

Questions: Have monitored parameters been developed for each stream?  
Response: It was proposed that monitoring be done as a condition of the certification by the Citizens Advisory Committee and the monitoring plan be developed from consultations between the federal agency and the permittee.

Question: How is water temperature measured?  
Response: Most permittees will probably use Hobos

Question: What are the temperature standards? How are they related to natural temperature fluctuations?  
Response: "When the temperature is 64 degrees or higher then there shall no increases in stream temperature due to anthropogenic causes"



Question: How is degradation monitored?

Response: Conditions and how they change will be monitored.

Question: Do ranchers have the expertise to do monitoring?

Response: This should be explored.

Question: Is monitoring confined to water temperature?

Response: Sediment, bacteria, temperature, and others will be monitored depending on the stream

Question: Will this be written into the certification?

Response: This is being deliberated by the Citizens Advisory Committee.

Question: What is the concern for water quality?

Response: Driven by DEQ standards and concern for other beneficial uses

Question: Is predation factored in, including human depredation on fish stocks?

Response: No clear answer

Question: When are applications due?

Response: 30 - 45 days before turn out - due to application processing time

Question: Is BLM affected?

Response: This is under negotiation

Clarification by Tim DeBoodt (attender and Citizens Advisory Committee member) - Certification is only applied for when permit is renewed

#### Summary of Oral Testimony

##### **1. Ned Austin - Central Oregon Flyfishers**

"We are treating symptoms rather than fundamental causes, i.e., instream structures,...". Water quality limited streams should be rested until water quality standards are met. Water quality monitoring should be used as a criteria for certification when water quality data are not available. The final rules should focus on both shot-term and long-term goals.

##### **2. Catherine Anderson - Coordinator for the Harney Co. Watershed Council**

First, there is the concern for water quality. Noting that concern, there is also a concern for the need to produce agriculture products from the land. Finally, there is the concern that this certification process is being used as a vehicle to harm the agriculture industry. The question is, is there middle ground between certification and denial and how this might be handled? Will educational and technical assistance be available to applicants and potential applicants.

##### **3. Van Decker - Rancher from the Burns area**

Sustaining economic productivity through food and fiber production is a concern. Problems may be encountered with regard to timing of the process. Turn out is spring and early summer on most allotments which could create problems if application review is prolonged. There is concern related to the opportunity to provide input to the 401 process, the ranching community may not be given equal access to this process.

Witness submitted a written exhibit

#### **4. Craig Miller - Physician in Bend**

He is concerned that livestock grazing will continue on water quality limited streams. There appear to be no specific time lines regarding the 401 process. Time lines should be 10 years. Specific standards and goals need to be listed in the rules. As currently written, the rules stipulate water quality monitoring as optional. Water quality monitoring should be a required stipulation. This monitoring should be done by persons with expertise in water quality monitoring. Polluting activities should not be allowed on streams that are not monitored.

Witness submitted a written exhibit

#### **5. Bill Marlett - Oregon Natural Desert Association - Citizens Advisory Committee**

All livestock grazing should be removed from water quality limited streams until water quality standards are met. This position is supported by recent scientific work including the Eastside panel. A quotation was provided from that report which included the following excerpt; "no grazing should be permitted in degraded riparian zones until conditions have been restored". Monitoring is critical to determine change in these systems. Once the monitoring information indicates that water quality standards have been met then the stream can be removed from the 303 (d) list. Both ranching and environmental communities don't want any streams on the 303 (d) list. Proposed rules do not clearly describe the relationship between certification and the Oregon Salmon and Watershed Plan. There should be linkages between the 303 (d) list and ESA listed species. Monitoring data must be required as a part of the certification. The permittee is responsible for monitoring not the federal agency and not DEQ.

Witness made reference to submitted written comment

#### **6. Whitney Lowe - Bend**

Read a letter from Elise Wolf and submitted it as an exhibit.

#### **7. Bob Williams - Paulina**

There is the concern that too much is being done in too short a time span. Additionally, there is the concern that this process is requiring the time of too many people. The effect of predation on fish should be considered when formulating rules. The real agenda behind this process is to remove cattle from public land. Recreation and wildlife have a large impact on grazing allotments that should be considered in the rules. Most monitoring occurs in the riparian areas while the most "brittle" environments occur in the uplands.

#### **8. Lou Davies - BLM permittee from the Princeton area**

Read a letter that was submitted as an exhibit.

Additional comments provided include:

There is a lack of a reference to scientific information in the rules and the understanding provided by this information. It is important to understand the critical nature of cooperation and limitations of confrontation. There are examples of cooperation and education. The WEST program is working to educate permittees in Harney County. There is a false assumption that by removing cattle, water temperature will be brought into compliance. Water temperature coming out of some wilderness areas does not meet standards. The public has some

misconceptions regarding BLM permits. Permits are obtained by purchasing the base property (ranch). The cost of running cattle on these permits is from 10.00 - 20.00 plus the cost of the permit. Point source pollution is allowed (industries in Portland,...) while non point sources (temperature,...) will not be allowed. Up to now, everyone has been cooperating, however, if these rules go into effect and permittees are not allowed to turn out - we have lost everything we have worked for. Monitoring needs to be done to document changes. There appears to be concern as to whether the permittee can collect accurate information - most data collecting devices are tamper proof. Other contributors to water quality need to be examined in addition to grazing impacts.

**9. Jack Remington**

Has observed stream degradation resulting from cattle grazing. There is the conclusion that people like clean water.

**10. Bob Jeppert - Powell Butte**

There is the concern that the draft rules have not been adequately circulated and as a result have not received the level of comment needed. There is some confusion regarding monitoring - who has the responsibility for monitoring? What is to be monitored?, and what are the costs of monitoring? The 303 (d) list may not accurately reflect stream status. Some streams on this list have been dry for the last 2 years while others have all the attributes of healthy streams. The quality of these streams have never been monitored at a level that promotes understanding. The 303 (d) list is not a proper mechanism.

**11. John Anderson - Retired Professor**

No certificates should be issued for streams on the water quality limited list. The rules should read that all streams subject to 401 certification should be monitored on a regular basis. Enforcement of the certificate conditions should clearly list parties solely responsible or shared responsibilities. Water quality requirements or standards should be listed in an addendum to the rules.

**12. Van Decker**

It is helpful to recognize the improvements that have been made in riparian condition since the 1950's. Most allotments were managed under seasonlong (April - October (November)) grazing before that time. Presently, grazing activities are managed under some form of rotation. Rotation times vary from 20 to 60 days. There have been many noticeable improvements in riparian and upland areas due to these practices.

**13. Bob Jeppert**

This process may have a significant effect on the workload of employees due to the expected increase in the number of applications. Are there any contingencies to take care of the increased flow of applications? There is the concern that response to applicants will not be timely and may interfere with turn out dates.

**14. Jack Jones**

The system dictates how water behaves. The rancher has no influence on this process. Ranching is a business and is run that way. There is the concern that there is presently too much regulation.

Memo To: Environmental Quality Commission and Bruce Andrews January 28, 1998  
Presiding Officer's Report on January 15, 1998 Rulemaking Hearing  
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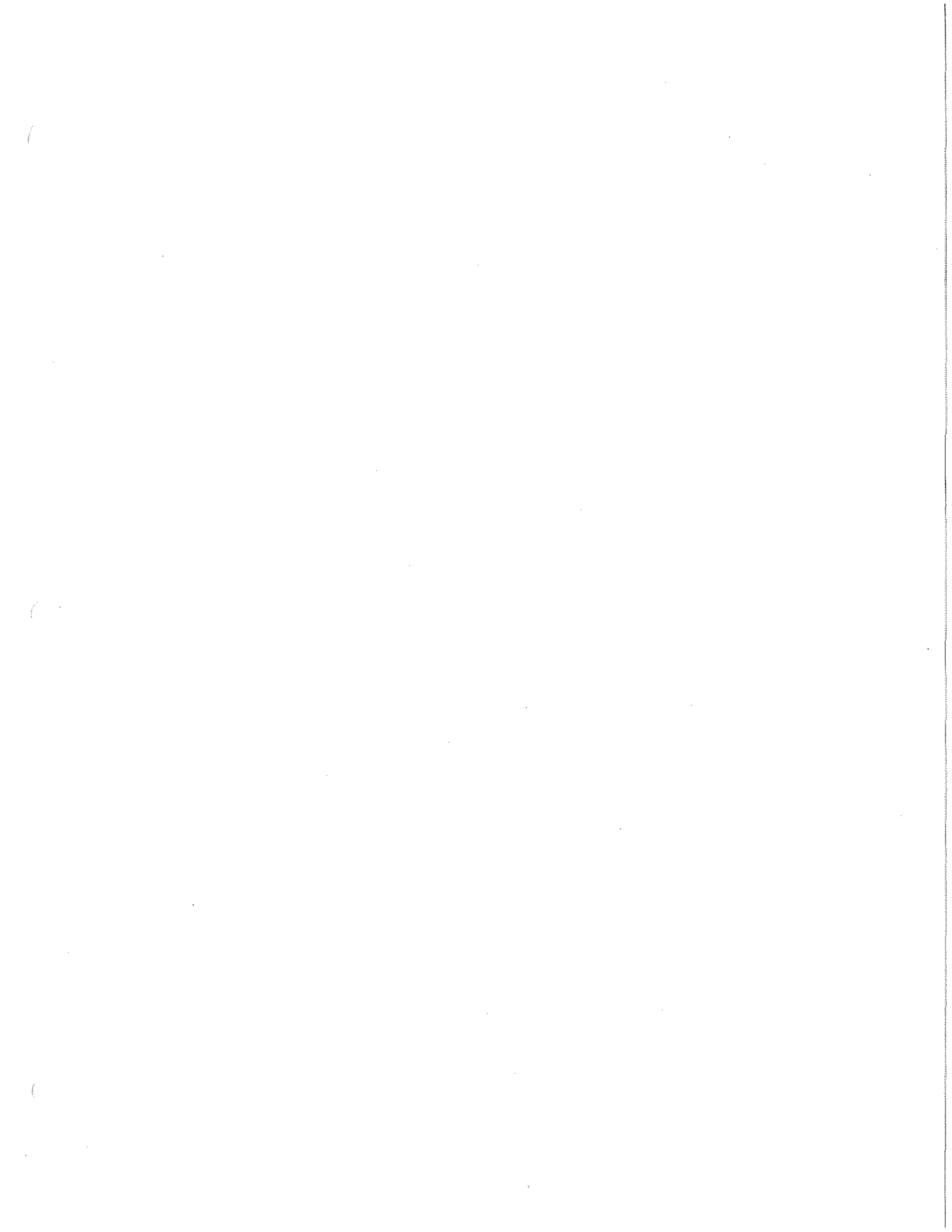
The system dictates how the water will behave  
Rancher has little effect on the system  
Concern about too much regulation

Witness provided exhibit - Globalized Grizzlies

Written Testimony

No one submitted written testimony at this time who did not also present oral testimony. Written comments are summarized in the Summary and Response to Comments.

There was no further testimony and the hearing was closed at 2:35 PM.



DEQ and ODA Responses to Comments on  
Draft Proposed Rules for Water Quality Certification of Federal Grazing Permits

This Appendix includes summaries of all comments, both written and oral, received by the Department up until 5:00 p.m., January 20, 1998. Comments received after that time and until the close of the comment period at 5:00 p.m., February 19, 1998 will be summarized separately and presented to the Commission.

At the end of this summary is a matrix of comments. This has been used for comments submitted by more than 20 people. Responses to comments summarized in the matrix are contained in the "General" section below. For numbers less than this, separate summaries and responses are provided in the narrative part of this attachment. More detailed comments are summarized, along with the person(s) making the comment, and with DEQ's and ODA's responses.

GENERAL

1. Protect Oregon's water quality and fish/aquatic ecosystems.

**Many - see matrix**

Response: It is DEQ's intent to protect water quality and aquatic ecosystems as mandated by the federal Clean Water Act and by State law.

2. Protect streams now, fish can't wait, in decline and at risk of extinction.

**Many - see matrix**

Response: The State agrees that there is a need to take action to protect our native fishes. This is demonstrated by the Oregon Plan and Governor's Healthy Streams Partnership, in which the State commits to a schedule to clean up water quality limited waters and develop water quality management plans for nonpoint sources of pollution, including agricultural sources.

3. Livestock damage streams, I've seen it.

**Many - see matrix**

Response: Yes, livestock can damage streams if not properly managed and the purpose of this program is to correct and prevent livestock damage that impacts water quality.

4. The livestock industry should be accountable for its pollution.

**Many - see matrix**

Response: All sources should prevent or minimize their pollution to the extent possible.

5. The 401 certification should be granted in conjunction with the grazing permit and adjusted, if necessary, through the grazing allotment management plan process.

**Harney County**

Response: The 401 certification will be granted in conjunction with the grazing permit. It is the issuance of the grazing permit that triggers the requirement for a certification and the

certification becomes part of the grazing permit. The Allotment Management Plan will be an important item submitted in an application for certification. If an AMP is amended and DEQ/ODA believes the change is significant for water quality, we could revise the affected certifications at that time as well.

6. Provisions and conditions of the certification should not be incorporated as conditions of grazing permits as proposed.

**Harney County, Allen Otley**

Response: The State believes this is a requirement of federal law.

7. The purpose of Sec. 401 is to provide states, in their roles as lead water quality regulators, authority to ensure that federal activities do not frustrate the states' efforts to restore, maintain and protect water quality. Due to the extent and severity of water quality problems stemming from livestock grazing on federal lands, there is a tremendous need for serious state scrutiny of federal grazing permits.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project; Robert Jensen.**

Response: The State will follow the decision of the courts on what activities occurring on federal lands need water quality certification requirement.

8. Serious problems exist with state deferral to existing federal policies due to serious implementation problems, substantive biological shortcomings and legal questions about their sufficiency.

**Pacific Rivers Council**

Response: The federal policies (standards and guidelines under PACFISH, the NW Forest Plan, etc.) have gone through more scientific and public review (NEPA) than the State has been able to conduct at this time. We will continue to evaluate the adequacy of these policies as our program matures.

9. I am concerned about the lack of time allotted to develop these rules. As a member of the advisory committee I felt many issues were not given adequate attention. I fear that these issues will manifest later on when individual certifications are challenged for failing to provide reasonable assurance that water quality standards will be met.

**Oregon Natural Desert Association**

Response: DEQ agrees that the time for development of these rules was short and there are issues that deserve additional research and consideration. The tight timeframe was necessary in order to be prepared to handle applications for certifications needed for the 1998 grazing season. We intend to give further consideration to some issues, particularly some of the technical issues, over the coming year in the form of guidance for implementation of the program. If rule amendments are needed as the program matures, that is also a possibility.

10. How will the 401 process link up with the development of water quality management plans and TMDLs? They should be consistent.

**EPA**

Response: It is our hope and intent that as TMDLs and water quality management plans are developed these will become the basis for water quality certifications, preferably as general certifications. If the plan is specific and sufficient enough to make the finding necessary under CWA Section 401, it would most likely be incorporated by reference in the certification.

11. How will 401 certification process be integrated in to SB 1010?

**Joanne Richley**

Response: Same as #10 above.

12. Fiscal and Economic Impact Statement. The FTE identified for ODA and DEQ to implement this program are insufficient.

**BLM, Tthe Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project; Trout Unlimited; Harney County; Bob Jeppert.**

Response: Certifications were issued last grazing season within the timelines identified in the temporary rules. There has been no reduction in FTE in either DEQ or ODA between then and now.

13. These rules will cause cattle production to be cost prohibitive.

**Hammond Ranches**

Response: The state acknowledges that there will be costs to ranchers to implement this program. We disagree that this program will cause cattle production to no longer be viable in this state. We do recognize, however, that there may be some producers who will find the additional expense or reduced access to federal lands cost prohibitive for their operation. We must recognize that there are negative economic consequences to the loss of water quality and fish production. These manifest themselves, for example in higher costs to treat drinking and industrial water, and higher costs to treat municipal and industrial wastewater because receiving streams are degraded.

14. Is state willing to help with expense of fences?

**Rex Crume**

Response: There are state and federal programs to help with the expense of fencing riparian areas. Please consult first with your federal permitting agency. Then, for additional information contact the Natural Resources Conservation Service (formerly the Soil Conservation Service), your local Soil and Water Conservation District or the Governor's Watershed Enhancement Board.

15. Look at the financial impact to ranchers of keeping cattle out of sensitive streams. Balance that with the financial impact from potential fishing losses.

**Jeff Williams, Ellen Leatham**



Response: The state acknowledges that there will be costs to ranchers to implement this program, although most of these costs should already be borne. The certifications already issued referenced existing federal plans and requirements. It is also recognized that there are also economic consequences to the loss of water quality and fish production.

16. Improvements to water quality would benefit small water-dependent recreational businesses.

**Brian J. Posewitz**

Response: We recognize that there are economic benefits to improving water quality and fish production.

17. ODA and DEQ's respective roles should be clarified. ODA and DEQ need to cooperate more closely, providing BLM with a single contact point for 401 certification.

**BLM**

Response: We have made some changes in the proposed rules that clarify DEQ and ODA roles. Perhaps as we gain experience in implementing the program we can make the process more efficient. For now it is possible, you may need to deal with both agencies.

18. DEQ alone should administer the 401 certification program.

**Brian J. Posewitz, Larry Erikson, Richard Gorringer, Robert Nisbet, Darlene Philpott, Tom Wiemann, Lorraine Roach, Bob Phillips**

Response: The joint DEQ/ODA authority and responsibility for this program is required by state law (ORS 561.191), adopted in 1995.

19. EPA gave DEQ, not ODA, the authority to implement the CWA. ODA is not statutorily authorized to determine the substantive aspects of the state's 401 program.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: The CWA Section 401 specifically gives the States the authority to do water quality certifications. This is not part of the program delegated by EPA to the State, like the issuance and enforcement of NPDES permits.

20. DEQ is the wrong agency to lead in water quality certification. ODA should administer 401 and should reach agreement with EQC before adopting rules.

**Northwest Forest Resources Council, Sharon Beck**

Response: Water quality certification requires an analysis of the activity's impact on the receiving stream. DEQ is the agency in Oregon with the authority, responsibility, training and expertise to undertake this review. However, on land used for agriculture purposes, ODA has been delegated the responsibility for water quality. The present 401 process involves issues that overlap in these jurisdictions.

21. ODA should have joint authority, DEQ has too much authority in these rules.

**Oregon Cattlemen's Assn., Oregon Farm Bureau Federation, Jackson County, E. Straus, Boyden, H. Otley, A. Otley, F. Otley.**

Response: We believe the parceling out of authority we have done is legally based. DEQ has the final authority to issue or deny a water quality certification. ODA has the authority to directly regulate farming practices for the purpose of protecting water quality. The rules state that ODA will determine the conditions necessary to obtain certification and recommend to DEQ whether certification shall be granted or denied. DEQ makes the final decision whether or not to issue the certification. Our intent is to rely on the ODA recommendation.

22. I question the legal precedent for the joint authority in these rules.

**Steve Grasty**

Response: It is an unusual situation without much precedence, but the State Office of Attorney's General has advised that it is legal. See also the related responses above.

23. DEQ does not have authority to require specific BMPs.

**Northwest Forest Resources Council, Associated Oregon Industries**

Response: ODA, as required by ORS 561.191, will do this when it is necessary. It is the responsibility of the federal agency to meet water quality standards under the Clean Water Act (CWA Section 313).

24. "Questions to be Answered..." Attachment C, Question 7. If "various sources" refers not only to grazers but to other land uses, it should be noted that loggers and others are already obligated to comply with appropriate, mandatory set backs and other restrictions to protect riparian zones.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: While we do not go back and revise Attachment C to the public notice at this point in time, your point is so noted.

25. "Questions to be Answered..." Attachment C, Question 10. Add to the response that no grazing, corridor fencing and reduced levels of use are the only "technologies" demonstrated to restore and protect riparian function. Utilization level is the most important consideration of any grazing system.

**Comment by: the Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: Utilization is an important consideration, as is the distribution of utilization in space (across the area grazed) and time (the season). ODA believes there are a variety of management practices or systems that may be used on certain sites that will allow restoration and protection of riparian function. Those you have mentioned are certainly among them. "Reduced use" is a relative term to the level of use that produced current conditions. In many cases, use has already been reduced either in number of animals or in the amount of time an area is grazed.

26. Ask the Independent Multi-Disciplinary Science Team established by SB 924, which established the Oregon Plan, to review the rules.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Pacific Rivers Council; Oregon Trout; Idaho Watersheds Project.**

Response: You can make this request directly. We doubt that given the Science Team priorities that they would be able to review the rules soon and we can not hold up adoption of rules that provide us the authority to accept requests for certification needed for the 1998 grazing season. However, we would be very interested in what the Science Team has to say about the rules as well as the technical issues we must address that are not included in the rules.

27. 401 certification is not required under the CWA for nonpoint source pollution.

**Northwest Forest Resources Council, Associated Oregon Industries**

Response: It is the ruling of the federal courts that 401 certification does apply to federal grazing permits and we must abide by this decision unless and until it is overturned.

28. Compliance with section 319 should suffice to meet requirements for section 401.

**Western Institute for Nature, Resources, Education and Policy**

Response: In *ONDA v. Thomas*, the case that decided 401 applies to grazing permits, the Judge ruled that 319 does not replace 401 for purposes of grazing. It is DEQ and ODA's intent to coordinate the programs and utilize plans developed under 319 for 401 purposes when we find it is appropriate and the plans adequately serve Section 401 requirements.

29. The rule language is ambiguous or unclear and will lead to arbitrary enforcement.

**Northwest Forest Resources Council**

Response: It is difficult to respond to this comment without more specific information. Specific requirements that would apply to all sites were not included in the rules to allow the flexibility to evaluate the needs and potential of specific sites or areas of the state. It is our understanding that the agricultural community prefers this approach to more specific requirements that apply statewide.

30. Permits reviewed by NMFS and permits on streams that are not water quality limited or are limited only for temperature should be exempted from 401 certification.

**Mack Birkmaier**

Response: CWA Section 401 requires water quality certification for all activity that may discharge to waters of the United States, regardless of the condition of the waterbody. If permits have been reviewed by NMFS and there is a biological opinion we would likely utilize this information and incorporate their requirements in the certification. We do not wish to repeat relevant work that has already been done.

31. Grazing should not be delayed during the certification review process. Problems with timing may occur for early turn out dates.

**Mack Birkmaier, Van Decker, Bob Jeppert**

Response: Federal permits may not be issued until a certification has been issued and grazing may not occur without a permit. We do not wish to delay grazing either but it will be up to the applicant to provide us completed applications with adequate time to conduct the review and make a decision. This first year may cause some problems due to the short time between rule adoption and the beginning of the grazing season. We will do our best to minimize unnecessary delays.

32. Use the temporary rules until the appeal is resolved.

**Mack Birkmaier**

Response: The Administrative Procedures Act prohibits the use of a temporary rule for more than 180 days and prohibits re-adoption of temporary rules. The temporary rules were adopted due to the short time the agencies had to develop rules between the court decision and the 1997 grazing season. Now that another year has passed to give the program more careful consideration, we feel that the proposed rules are an improvement over the temporary rules.

33. In our area, cattle are a small contributor or don't contribute to water quality problems. Other sources affect waterways as well or more. Claims that cattle are polluting need to be based on scientific information not opinion.

**Rex Crume, JoAnn Gilliam, Don Grissom, Joel Hayward**

Response: The rules provide the framework for evaluating and minimizing the impacts of grazing around the state on a site or area specific basis. Where the state finds that the proposed grazing activity does not contribute to water quality problems and will not degrade water quality during the term of the permit, certification will be granted.

34. If use of federal lands is restricted, pressure on private lands will increase (less rest, less wildlife use).

**Rex Crume**

Response: We understand that it is best to manage water quality and protect aquatic ecosystems on a watershed basis regardless of ownership, and we are pursuing that course with other programs, such as CWA Section 303 (TMDLs), Agricultural Water Quality Management Plans (under ODA) and the Coastal Nonpoint Pollution Control Program. The water quality certification program, however, only applies to federally permitted activity and we must find that activities occurring on federal lands will comply with water quality standards.

35. It is a waste of taxpayer money to have state oversight of federal activity. The federal government already has to meet state water quality standards.

**Oregon Farm Bureau Federation**

Response: Section 401 specifically provides for state review of activity on federal lands in our role as water quality regulators under the Clean Water Act. The federal courts have ruled that Section 401 applies to federal grazing permits and we must abide by this decision unless and until it is overturned. We are trying to make our program as efficient as possible by utilizing work already done by other agencies relevant to the protection of water quality and beneficial uses and by issuing general certifications where appropriate.

36. The State has the right to waive 401 authority.

**Oregon Farm Bureau Federation**

Response: The Office of Attorney's General has advised that if DEQ waives its authority to conduct the 401 certification program: 1) EPA can implement the program in our place, and 2) the State risks its delegation of authority from EPA to implement other provisions of the CWA.

37. 401 certification at the time of permit re-issuance, regardless of the geographic area affected, may conflict with BLM priorities for resource protection and recovery, and also with DEQ's priorities for addressing 303(d) listed waters.

**BLM**

Response: We recognize that this may occur and we are willing to explore how to implement this program in a manner that is consistent with other water quality protection and restoration programs to the extent possible. The requirement that certifications be obtained at the time a permit is renewed comes from federal law and can not be changed in the State's administrative rules.

38. DEQ should consider granting conditional or temporary certifications, in light of the current uncertainties surrounding the lawsuit and the appeal and the time delays involved in starting up a new regulatory program. The rules should provide a phased-in implementation commensurate with ODA's and DEQ's staffing levels. For example, conditional certifications may be issued first with only a cursory review, while a more detailed examination and certification may be done later.

**BLM, Harney, H-Otley, A-Otley.**

Response: The current status of the lawsuit is that the decision issued by Judge Haggerty is in force in Oregon on US Forest Service lands. This requires grazers to obtain 401 certifications at the time of renewal or issue of their grazing leases. Should the status of the lawsuit change as a result of appeals, the state will respond accordingly. Until that time, certifications are required, and the finding of "reasonable assurance" contained in the proposed rule needs to be made. A conditional certification has no legal basis, either in the proposed rules, or the Clean Water Act.

39. It is inappropriate to require that grazing activities improve the water quality if it has not been demonstrated that existing water quality problems are caused by grazing.

**BLM, Derfler, Weyerhaeuser, Jackson.**

Response: The purpose of these rules is to address livestock grazing and it's interaction with water quality not to address the other forces which may have influence on water quality. Importantly, experimental data concerning water quality fluctuations and proper livestock grazing is rare and inconclusive. Further, data which isolates the influence of livestock grazing from other landscape forces and other management actions is virtually non-existent. The current rules attempt to deal with this problem by linking surrogate parameters such as vegetation characteristics with changes in water quality.

40. In cases where the public land within a grazing allotment consists of scattered parcels comprising a minority of the unit, the cause-effect relationship between federal livestock management and stream water quality conditions is less certain.

**BLM**

Response: This point is well taken. We will likely have to rely on site conditions that influence water quality, such as vegetation and soil conditions, in this case to determine the impacts of the activity.

41. The fiscal and economic impact statement should recognize that some livestock operations (both small and large) may not be able to maintain an economically viable operation under the terms of a 401 certification. Also, the statement should recognize the potential loss of tax revenue to state and local governments if livestock businesses close down or realize smaller profits under the terms of a 401 certification.

**BLM**

Response: The State recognizes that there may be some economic impact as a result of the 401 process. On those allotments where severe water quality problems exist, improvements in vegetation conditions may also equate into improved economic viability. The state is also aware that any loss of productive livestock operations as a result of the 401 process may have significant economic impacts on local economies. Many of the costs imposed on grazers in certifications issued last grazing season were already imposed through existing federal plans and existing lease conditions.

42. If operators relinquish or transfer their permits on federal lands because of the burden of the 401 program, it is likely to increase grazing pressure on private lands.

**BLM**

Response: The state understands the possible repercussions of the removal of livestock from an allotment and is aware of the implications to the privately owned land base. No additional "burden" was imposed on grazers last season. Certifications were based on federal plans and already existing provisions of federal permits. The state is not trying to eliminate cattle ranching, and believes that grazing is not inconsistent with water quality protection.

43. Fiscal and economic impact analysis flawed: Any benefits from these rules will be outweighed by the costs of administration and the financial burdens or losses to livestock operators.

**Oregon Farm Bureau Federation**

Response: Balance should always be sought between economic viability, ecological stability, and societal perspectives. In some cases these factors may not be balanced which may produce problems with an individual factor. The state is aware that the costs associated with this program may not currently be at an economical level for some operations.

44. The rules may conflict with federal land management because the federal agencies must consider economic factors, while the 401 process need not.

**Oregon Farm Bureau Federation**

Response: The 401 certification process is driven by the mandates of the Clean Water Act and as such is keyed to water quality and factors that might influence water quality, in this case livestock grazing. There is some limited opportunity for consideration of the economic impact of implementing water quality rules, such as that provided within the antidegradation policy.

45. The effects of land use could be negative if the failure of livestock business takes the land out of agricultural production.

**Oregon Farm Bureau Federation**

Response: The State is aware of the possibility of increased economic pressure on livestock producers as a result of the 401 process. There is an awareness of the potential economic impacts to the livestock industry.

46. The proposed permanent rule is premature because of the pending appeal.

**Weyerhaeuser**

Response: In response to the 1996 District Court decision, permanent rules must be developed that guide the 401 process. The state is aware of the possibility of successful appeal and the resultant changes in management.

47. DEQ is improperly adopting new narrative water quality standards by basing the 401 certification on compliance with BMPs and on compliance monitoring for such as PACFISH, INFISH RMO's and the Aquatic Conservation Strategy objectives.

**Weyerhaeuser**

Response: Best Management Practices are suggested as a component in an objective driven management program. There are many approaches to address water quality issues and a wide variety of BMP's can be used to assist in this process. By linking to interim documents such as PACFISH the certificate can indirectly address potential changes in the forest plan brought about by the amending of these plans by the interim documents.

48. Watershed councils were not consulted in the writing of these rules, but would like to participate.

**Malheur-Owyhee Watershed Council, Malheur County**

Response: The Citizens Advisory Committee assembled by ODA and DEQ included a representative of the Klamath Watershed Council. In addition, members of watershed councils were mailed the public notice of proposed rulemaking and chance to comment on these rules.

49. The draft rules are very complex.

**Malheur-Owyhee Watershed Council, Malheur County**

Response: There is a fine balance between specificity and generality. The rules must respond to issues that are inherently complex and not easily understood while being general enough to address water quality and grazing throughout the state of Oregon. During the formation of the rules, there was considerable discussion about the best method to deal with the need for site specificity and the requirement for generality.

50. The draft rules provide no clear blueprint of what is expected.

**Malheur-Owyhee Watershed Council, Malheur County**

Response: The rules were never meant to be prescriptive and included references to Best Management Practices that could be used to accomplish objectives. Applications for 401 certification can include a wide variety of materials that demonstrate how management will address water quality standards. Therefore, only a general suggested set of materials and approaches can be offered.

51. The rules and review of certifications don't allow enough time for an orderly or timely turn out of livestock on federal allotments in the 1998 season.

**Malheur-Owyhee Watershed Council, Malheur County**

Response: These proposed rules must be approved by the Environmental Quality Commission and the Director of the Oregon Department of Agriculture. The next opportunity to present these rules for adoption is February 20, 1998. After that date, permittees may submit applications for certification. Importantly, application for certification under section 401 is only required upon permit renewal (often 10 year intervals) or when a livestock grazing permit is transferred. One approach to deal with this time problem is to stockpile application materials before the expected date of renewal. This application material can be used to apply once the rules have been approved.

52. Good management is site-specific, yet the site specific requirements for the certifications open the possibilities for endless complications.

**Malheur-Owyhee Watershed Council, Malheur County**

Response: The rules cannot address all possible site conditions nor deal with the uniqueness of each landscape. They must be general enough to permit some site specific adjustments. These adjustments must be handled through the permitting agency. The guidance for these procedures comes from the forest plan and interim decision documents. However, water quality standards must be addressed regardless of the approach taken.

53. The cost for implementation by ODA, DEQ, and the federal agency have not been allocated by state and federal legislators.

**Malheur-Owyhee Watershed Council, Malheur County**

Response: This program was successfully operated by DEQ and ODA last year with existing resources. No reduction in resources has occurred between then and now.

54. The effort to administer this program will divert energy and resources away from "on the ground" improvements to paperwork processes.

**Malheur-Owyhee Watershed Council, Malheur County, Oregon Farm Bureau Federation, Harney County, Boyden, A-Otley.**

Response: The state will make every effort to operate this program efficiently so that it neither detracts from "on-the-ground" efforts, nor imposes an undue burden on grazers.

55. The certification process should allow for the flexibility necessary in natural resource management plans.

**Malheur-Owyhee Watershed Council**

Response: These rules were developed with a concern for the linkages between certifications and existing planning processes. However, the objective is to address section 401 of the Clean Water Act.

56. Involvement of interested persons and the general public should be limited to providing information and input but should have no standing in the certification process.



**Harney County, H-Otley, A-Otley.**

Response: Issues concerning the management of federally managed land involves the public. Therefore, since these 401 certification rules concern U.S.F.S. managed lands then the public will be included in the process.

57. The 401 rules should not allow requirements and conditions of permits to be changed, new provisions added, or the permits themselves revoked, by the agencies without substantial evidence of damage caused by grazing. The burden of proof on the state must be substantial.

**H-Otley, A-Otley.**

Response: The way section 401 works, the applicant must demonstrate to the State that his/her proposed activity will comply with water quality regulations. The State must have reasonable assurance that water quality standards will not be violated in order to issue a certification.

58. A non-degradation policy should not be part of the 401 certification. It would be an impossible standard to meet, partly because it relates to unspecified and unforeseen "things" that "might" happen.

**H-Otley, A-Otley.**

Response: The State must only find that we have reasonable assurance that the proposed activity will not violate water quality standards, including the anti-degradation policy in OAR 340-41-026.

59. The listing of a stream on the 303(d) list after issuance of a 401 certification is not necessarily substantial evidence to support permit changes or revocation. A careful review by the agencies and the permittee of the permittee's current management practices may find that they are adequate, but that other factors in the watershed, including legacies of past practices, are the cause of the listing.

**H-Otley.**

Response: DEQ agrees with this comment.

60. Why were not all grazing permittees notified of the rule making and provided copies of the proposed rules?

**H-Otley.**

Response: The major difficulty we faced was that the federal agencies would not furnish us a list of grazers. Most major interest groups were represented on the Citizens Advisory Committee impaneled by the state and therefore could inform their constituents of major developments. The public notice was mailed to over 800 persons. Anyone interested in receiving public notice of 401 applications or future rule amendments should call DEQ and ask to be added to the mailing list.

61. There must be an acknowledgment by agencies of the cost in money and time for the permittees.

**Sharon Beck**

Response: The state is aware of the financial burden placed on the permittee in response to 401 certification and the time that will be required to comply.

62. The makeup of the 401 Citizens Advisory Committee was tilted toward the environmental community and original plaintiffs in the lawsuit were included. No permittees were included on the committee.

**Mack Birkmaier**

Response: A concerted effort was made to include representatives from all interested and effected parties. We relied on participants from organizations such as the Oregon Cattlemen's Association and the Farm Bureau to represent livestock grazing interests and communicate developments to their constituents

63. Any fee associated with the 401 certification process should be paid by the state.

**Mack Birkmaier**

Response: Application fees for 401 are currently being considered by DEQ with the assistance of an advisory committee. The Oregon Cattlemen's Association is on this committee as well. The purpose of application fees is to provide money to the State to implement the program. This is a common practice for other 401 and permit programs.

64. This is an attack on the world's food chain

**John Hays**

Response: The state does not believe that protection of water quality and grazing are inconsistent. The two can exist together.

65. Get scientific facts and background before evaluating certification status.

**John Hays**

Response: The state is aware of the importance of scientific facts in decision making and policy formation. However, there are many unknowns related to proper livestock grazing and water quality. For most watersheds in Oregon there is only limited data regarding background characteristics that might provide a basis from which to evaluate grazing influences.

66. Water quality is a concern and the use of federal lands for grazing is a privilege

**Lois Barry**

Response: There are considerable differences of opinion on the rights of ranchers to use public lands for grazing. This is outside the scope of these rules. It is, however, our mandate to protect water quality.

67. The final rules should focus on both short-term and long-term goals.

**Ned Austin**

Response: Clear management objectives must be outlined and linked to timelines if goals are to be met. However, the proposed rules were not developed to be prescriptive but rather to provide the environment for meeting the overall goal of water quality standards. The state recognizes the importance of goals, objectives and timelines. Further, the state understands that each individual site will require unique approaches to meeting the water quality standards.

68. There is a need for clean water and to produce agriculture products from the land

**Catherine Anderson**

Response: The state understands the importance of these goals and is aware that both are attainable in most situations.

69. There is the concern that the 401 process is being used to harm the livestock industry

**Catherine Anderson**

Response: This is not the intent of the State.

70. Is there middle ground between certification and denial and how might this be handled?

**Catherine Anderson**

Response: Presently, there is a clear line between certification and denial. The decision will be based on the content of the application packet. One middle ground is that the State can certify the activity with conditions if we believe that we can add conditions that will allow the proposed activity to occur and not violate water quality standards.

71. Will technical assistance be available to applicants?

**Catherine Anderson**

Response: Currently, this resides with the federal permitting agency. Assistance on the requirements of the program will be available from the State within the resources provided. We will operate this process efficiently to ensure that technical assistance is available.

72. Ranchers may not be given equal ability to provide input into the 401 process

**Van Decker**

Response: ODA and DEQ are acutely aware of the need for public input concerning the 401 process. Ranchers have and will continue to have equal opportunity to provide input into the development and implementation of this program. Anyone who wished to be added to the DEQ mailing list to receive public notices can call and make this request.

73. There should be clear objectives and timelines in certifications

**Craig Miller**

Response: DEQ expects there to be clear objectives. We are not yet sure how we will address the issue of timelines.

74. This process is requiring too much time and too many resources

**Bob Williams**

Response: In order to fully evaluate the livestock grazing management on the allotment all pertinent information must be examined. This material may exist in many locations and formats. The federal permitting agency can assist in assembling this material.

75. The real agenda in this process is to remove cattle from public land

**Bob Williams**

Response: This is not the agenda of the State. Our focus is to carry out our mandate to protect water quality.

76. There is a lack of reference to scientific information in the rules and the understanding provided by this information.

**Lou Davies**

Response: The rules provide the policy and procedure by which the State will carry out its mandate to implement 401. We will base our review and findings on scientific information to the extent that it is available.

77. It is important to understand the influences of cooperation and confrontation in water planning

**Lou Davies**

Response: The state is interested in cooperation between individuals and groups whose focus is on water quality and more specifically water quality on federal lands. An environment of cooperation is sought at every occasion. The state also understands the consequences of confrontation and its impact on land management issues.

78. There is the false assumption that by removing cattle, water temperature will be brought into compliance

**Lou Davies**

Response: Many factors interact to produce changes in stream temperature and the pattern with which these factors interact depend heavily on site specific characteristics. In some cases removal of livestock grazing may result in decreased water temperature but may or may not result in compliance with water quality standards.

79. Water quality standards and requirements should be listed in an addendum to the rules.

**John Anderson**

Response: This information is provided in another section of the OARs and is quite lengthy. We do not believe it is necessary to repeat OAR 340-041 within OAR 340-048. However, this information could be provided with information packages to applicants.

80. Historically, allotments were managed on a season long basis. Presently, these allotments are managed on a rotational basis which has resulted in noticeable improvements in site conditions

**Van Decker**

Response: Unquestionably, improvements have been made to many riparian systems in Oregon since the 1950's. The degree to which these improvements have occurred may not be satisfactory in some cases.

81. The system dictates how water behaves, the rancher has no influence on this process

**Jack Jones**

Response: There are forces which act outside the human frame of reference such as changes in the geomorphic character of the landscape, large scale hydrologic processes or climatic changes. However, humans do interact with their environment and in some cases in negative ways.

82. There is too much regulation, the ranchers don't need more.

**Jack Jones**

Response: These rules implement a provision of the federal Clean Water Act which the courts have decided is applicable to grazing on federal lands. The State must abide by this decision.

83. Restrict grazing from streamsides.

**Many - see matrix**

Response: This is an option under the proposed rules, but DEQ and ODA do not agree that it is necessarily a requirement that must be imposed on all sites in order to protect water quality and therefore, we do not include this as a required prescription for the entire state in the rules. Rather, the rules call for site or area specific evaluation of a proposed grazing management plan.

## **DEFINITIONS**

1. "Certification" definition, 2<sup>nd</sup> sentence, should be amended to read: "Certification must include a written finding that there is..."

**Comment by: the Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: This definition is an existing definition used for the 401 program as a whole. DEQ does not understand the need to change "statement" to "written finding."

2. (23) Change definition to read: "...description of site potential or the ability of the site..."

**John Ward**

Response: This change has been made to the rules.

3. Delete definition of site capability.

**John Ward**

Response: This change has been made to the rules.

4. Add a definition for Interested Persons for the purpose of petitioning for a public hearing under 340-048-0020(6). The definition should include persons who provide public comment on an application pursuant to 340-48-0020(5)

**Comment by: the Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: This is addressed by definition 16

5. Add a definition for antidegradation policy.

**John Ward, Patricia Larson**

Response: From OAR 340-041-0026 (1) Antidegradation Policy for Surface Waters. The purpose of the Antidegradation Policy is to guide decisions that affect water quality such that unnecessary degradation from point and nonpoint sources of pollution is prevented, and to protect, maintain, and enhance existing surface water quality to protect all existing beneficial uses. Such definition is already specified, and is not necessary to repeat in these rules.

6. No clear relationship is established between "Proper Functioning Condition" and water quality standards attainment.

**Columbia River Inter-Tribal Fish Commission**

Response: DEQ agrees that a stream that meets PFC does not necessarily comply with water quality standards. However, PFC provides information on condition of a stream/riparian site that

affect water quality, such as the vegetation and channel morphology. The linkages from PFC to water quality come from descriptions of the physical characteristics of the stream. We expect monitoring to address these changes such as those that might be observed in stream cross sections. References to "Proper Functioning Condition" have been removed from the rules.

7. Need strong definition of riparian area based on vegetation, not distance.

**Rex Crume**

Response: The definition in the rules is not based on distance. The spatial extent of a riparian area is determined by the availability of water to the system. Therefore, the area of each riparian area will vary depending on the characteristics of the water table in a particular area and thus varies from site to site.

8. It is good that many definitions were taken from the Soc. For Range Management, but some of those are out of date. Suggest the definitions be adjusted to fit the new SRM language.

**Oregon Farm Bureau Federation**

Response: The Society for Range Management definitions were consulted regarding the definitions but in certain instances other sources were used which provided clearer definitions.

9. Regarding definition #9: On line one, strike "a specific potential natural community" and substitute "specific community types."

**Oregon Farm Bureau Federation.**

Response: The definition of "Ecological Site" has been deleted.

10. Regarding definition #9: After "production emphasis" add new sentence: "Each site will have several possible plant communities that can be stable on the site."

**Oregon Farm Bureau Federation.**

Response: The definition of "Ecological Site has been deleted.

11. Regarding definition #11: "Conservation use" was stricken by a Wyoming court as a use associated with a grazing permit. It is under appeal.

**Oregon Farm Bureau Federation.**

Response: The phrase "conservation use" has been deleted

12. Regarding definition #14: Instead of "whose use serves" we prefer "of sufficient abundance and palatability to justify its use."

**Oregon Farm Bureau Federation.**

Response: The definition of "Key Species" has been deleted

13. Regarding definition #19: Delete if deleted from definition #9. If retained, the definition should reflect multiple potential natural community types on a site.

**Oregon Farm Bureau Federation.**

Response: The plural of community has been added to indicate the possibility of multiple steady states

14. Regarding definition #21: Recommend defining some minimum size that relates to management, so that widely differing riparian area sizes aren't confused.

**Oregon Farm Bureau Federation**

Response: This recommendation will be considered as we proceed with program implementation and development.

15. Regarding definition #22: Edit if #19 is eliminated. Also, include several possible community types on a range.

**Oregon Farm Bureau Federation.**

Response: This has been addressed in the definition for Potential Natural Community.

16. Regarding definition #25: Change this to reflect multiple stable plant communities as described by the SRM.

**Oregon Farm Bureau Federation.**

Response: The definition of "Ecological Site" has been deleted.



## **BACKGROUND AND PURPOSE**

1. This case is under appeal. If the Federal Ninth District Circuit Court holds that Sec. 401 does not apply to federally permitted livestock grazing activities, the draft Sec. 401 rules have no legal force of effect.

### **BLM, Oregon Farm Bureau Federation**

Response: This is true. The way the rules are written, they are only effective when DEQ receives a request for 401 certification, they do not require the permittee to obtain 401 certification.

2. Include the footnote regarding the reason for the rules in the main body of the rules.

### **Oregon Farm Bureau Federation**

Response: We do not feel this is necessary.

3. Amend to include the following language after the first sentence: “Whereas it is established that livestock grazing may and does cause discharges of pollutants into waters of the United States, the purpose of the certification process is to provide assurance that grazing activity authorized by federal razing permits will comply with state water quality standards. Compliance with state water quality standards includes compliance with numeric criteria, protection of beneficial uses, and consistency with Oregon’s antidegradation policy as described in ORS Chapter 468B and OAR 340.

The rules provide the authority and process for certifying federal grazing permits.

The rules jointly developed by ODA and DEQ for certification of federal grazing permits provide the conditions ...and the conditions under which certifications will be denied due to the inability of the grazing activity to comply with water quality standards.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: It is not established that livestock grazing when properly managed causes discharges of pollutants into waters of the United States in all cases. We added that the rules provide the authority and process for certifying federal grazing permits. We do not believe additional rule language is necessary at this time.

## **CERTIFICATION POLICY AND OPTIONS**

1. The rules should stipulate that state 401 certification requirements will apply prospectively, where new permits are issued to replace expired permits or those waived as part of conveyance or transfer of base ranch property or livestock.

**BLM**

Response: 401 certification are required whenever the federal permit is issued or renewed. This is a federal requirement and not something we can change in the State's rules.

2. The rules need to describe the appeals process, the roles and standing of the various parties, what management approach will be pursued while the appeal is pending, and the time frame for resolution.

**BLM**

Response: This is described in the rules that apply to all 401 certifications, 340-048-0025.

3. Individual permittees should be able to obtain certification if there is an approved water quality management plan for the allotment being used or if they are operating under a plan approved through consultation under the Endangered Species Act.

**Oregon Farm Bureau Federation, Derfler, Straus.**

Response: We agree that if these types of plans are in place and meet the criteria and findings necessary for water quality certification, they will likely already contain the necessary conditions and will be referenced in the certification.

4. Oregon law prohibits increased discharge loads in 303d streams unless those loads are neither directly nor indirectly related to the water quality limited parameter. Therefore, no new permits shall be certified on 303d streams and no increase in the level of grazing activity (increase in AUMs or duration of grazing) shall be allowed. Suggested language provided.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: We agree that on waters not meeting standards, the level of grazing activity (AUMs) with access to streams should not increase. However, this does not need to be stated in these rules.

5. Does using "may request" mean that an applicant may not request?

**Patricia Larson**

Response: It is possible, depending on the outcome of the law suits currently pending. The State does not wish to write the rules in such a manner that they require certification of federal grazing permits. It is currently required by the court that the USFS may not issue grazing permits unless the applicant first has a certification from the State. This case is on appeal and a similar suit has been brought that would require the same of the BLM. The proposed rules provide the authority and process by which the State will grant certifications when they are requested.

6. 340-48-0110(2) should be moved to the 'Certification Evaluation and Criteria' as a new section (1).

**Comment by Pacific Rivers Council**

Response: Section (2) has been left in -0110, but we have changed the title of the rule to "Certification Policy and Options."

7. Reasonable assurance finding not strong enough.

**Karen Sjogren**

Response: This is the finding required by federal regulation (40 CFR 121) and the State is not willing at this time to make our finding more stringent than the federal requirement.

8. Delete (2)(a) through (c) and stick with the "reasonable assurance" standard. What does "site characteristics mean in (a)? Don't like term "improve".

**Oregon Cattlemen's Association, Oregon Farm Bureau Federation, Jackson County**

Response: The sub-provisions under (2) provide some definition of what it means to "not violate water quality standards and other application requirements of state law." We believe this will help applicants and the general public understand the finding necessary to grant water quality certification, particularly on waterbodies not currently meeting standards.

Site characteristics are characteristics of the location at which the proposed activity will occur. For example, these could include vegetation composition and cover, soil compaction, stream bank erosion, channel morphology and others. In this context, "improve" means change in a direction consistent with improving water quality, a trend toward meeting water quality standards.

9. ODA standards on p. 11 are less stringent than those in (2) here.

**Oregon Cattlemen's Association**

Response: This section provides guidance on the finding that must be made to issue certification. The criteria listed in 340-048-0140 will be used by ODA to evaluate the information an applicant provides and determine what conditions must be placed on the certification and whether the policy in -0110 (2) will be met.

10. Add a (d) to 340-48-0110(2) stating that certification will be granted where a valid plan for 303d purposes is reflected in the permit under review.

**Pacific Rivers Council, Oregon Cattlemen's Association**

Response: It is our intent to incorporate and rely on water quality management plans where they are sufficient to meet the requirements of these rules. It is not necessary to include a specific provision requiring this in the rule language.

11. Individual and general certifications should be subject to the same standards.

**Oregon Cattlemen's Association**

Response: DEQ agrees and we have added wording to -0110 (2) to make this clear.

12. Certification should be denied for waterbodies not meeting standards (i.e. listed on the 303d list) for which grazing is a contributing factor. Rest from grazing until standards are met.

**Many - see Matrix, Oregon Trout, Sierra Club Juniper Group**

Response: The State's preferred approach is to evaluate each site or area to determine what is necessary to protect streams at that location. It is possible that some sites will require rest or severe restrictions on grazing but we do not at this time believe it is necessary to make this an automatic statewide requirement.

13. Pollution caused by grazing should be reduced where water quality standards are not being met.

**Columbia River Inter-Tribal Fish Commission**

Response: DEQ agrees and believes that the 401 certification program for grazing as outlined in the proposed rules will accomplish this goal where the parameter of concern is affected by the grazing activity.

14. The State should presume that continued livestock grazing on 303d streams would not provide reasonable assurance that water quality standards will be met. The presumption can be rebutted by an applicant upon making certain demonstrations.

**Oregon Natural Desert Association, Pacific Rivers Council, Oregon Trout, Hells Canyon Preservation Council, The Confederated Tribes of the Warm Springs Reservation, Pacific Rivers Council**

Response: Such a negative presumption is not consistent with DEQ's history or policy on other activities. The applicant must provide the information that will allow us to determine whether or not the proposed activity will comply with water quality rules. A presumption against the activity is not necessary.

15. On water quality limited streams, DEQ must allow natural recovery to occur (i.e. not retard or impede recovery). Allowing any grazing on polluted streams violates the basic concept of reasonable assurance. The rules ignore a significant body of scientific literature suggesting that livestock grazing should be suspended along streams in order to recover water quality.

**Oregon Natural Desert Association, Pacific Rivers Council**

Response: DEQ does not agree that it must allow the "natural rate of recovery" to occur under the provisions of section 401. We do agree that we need to continue to consult the scientific literature and experts in relevant fields to determine what grazing management systems and practices are demonstrated to allow adequate recovery on various types of range land sites.

16. Deficient water sources must meet standards within certain time period (one suggestion was 5 years).

**Marty Wilson, Bob Phillips**

Response: DEQ is hesitant to place a time limit for meeting water quality standards because this is dependent on a number of factors, many of which are beyond human control. For those factors that are in our control, we would like to see standards attained in the shortest possible time.

17. Amend (2)(A) to include "maintain or" before improve. Amend (2)(B) to delete "maintain." Delete section 3 on p. 11.

**Evelyn Zurfluh**

Response: In order to certify a proposed activity, DEQ must find that the activity will comply with water quality standards and requirements of law. Where water quality standards are not being met and grazing is contributing to the water quality problem, we can not allow the activity to maintain current conditions and make the finding necessary to grant water quality certification.

18. Certifications should not be issued unless conditions of the certification would assure attainment of water quality standards.

**Brian Posewitz**

Response: DEQ agrees and this is the intent of the proposed program, provided that the grazing activity proposed is contributing to the water quality parameters of concern.

19. Applicants on 303d listed streams should be certified only if the permit is consistent with an EPA approved Total Maximum Daily Load (TMDL) which establishes load allocations specific to livestock. If no EPA approved TMDL is applicable, the application shall be certified only if: 1) the applicant shows grazing does not currently contribute to the water quality violations, 2) the applicant shows grazing will not retard or prevent the attainment of standards and riparian management objectives, and 3) the affected waterbodies are in proper functioning condition. Certifications on 303d streams should be subject to review by DEQ whenever the TMDL is reviewed.

**Comment by: the Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: Most places where federal lands grazing occurs do not yet have TMDLs established although DEQ is actively working on establishing TMDLs. On your second point, we agree that grazing activity can not be certified if it will prevent the attainment of standards. Existing federal standards and guidelines under PACFISH, INFISH and the NW Forest Plan include the requirement to not prevent or retard the attainment of riparian management or aquatic conservation strategy objectives and ODA intends to included Federal standards and guidelines as minimum conditions of certification. The state does not believe that we have to impose a "natural" rate of recovery if that is defined as the same recovery that would occur with no grazing in order to meet the requirements of Section 401 of the Clean Water Act.

The appropriate use of PFC is something we will continue to consider. A PFC assessment is one piece of information an applicant can submit to show that the condition of the stream/riparian area is improving. It is very important to understand that a stream that is in Proper Functioning Condition according to the BLM methodology does not necessarily meet water quality standards. Accordingly, there are shortcomings to this methodology in terms of water quality certification. We are not prepared to include a specific requirement related to PFC in the rules at this time.

20. Certifications on 303d listed waterbodies should be reviewed at the time of TMDL development.

**Brian Posewitz**

Response: The state will review certifications consequent to development of a TMDL. This will be undertaken as permits come up for recertification or renewal.

21. How will you respond to streams now on the 303d list that become de-listed.

**Steve Grasty**

Response: A water quality certification is required whenever a permit is issued or renewed. If a rancher proposes to change his/her grazing management/activity in a manner that would require an amendment of his/her permit, the rancher could apply for a new certification at that time. If the stream now meets standards the certification could be issued if the activity will maintain or improve the stream (not degrade the stream). On waters not meeting standards, the state must find that the proposed activity will allow the stream to improve.

22. Who will determine whether the proposed activity is expected to degrade conditions and how?

**Patricia Larson**

Response: This determination will first be made by ODA based on review of the information provided by the applicant. DEQ must also be confident in the finding in order to issue the certification.

23. Improvement of site characteristics or condition for which applicant deems no responsibility is not required under 401.

**Associated Oregon Industries**

Response: The applicant is only responsible for conditions directly or indirectly impacted by his/her grazing and related permitted activity, not for impacts from unrelated activity such as forest roads, logging, mining, etc.

24. Water quality should not be degraded by grazing for those waters currently meeting standards.

**Columbia River Inter-Tribal Fish Commission, Brian Posewitz, Sierra Club Juniper Group**

Response: The State concurs and we state in 340-048-0110 (2)(c) that the anti-degradation policy applies to high quality waters - those currently meeting standards.

25. Streams not water quality limited should get automatic certification.

**Steve Grasty**

Response: The State must still find that the proposed activity will comply with water quality regulations but we do believe that the process will be less difficult on streams that meet standards.

26. Issue certification on Outstanding Resource Waters (ORWs) only if there is assurance that the grazing will maintain and protect the waterbody's outstanding water quality or ecological value. Deny certification when ORWs are listed under Section 303d. Suggested language provided.

**Comment by: the Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: We believe the policy statement in 340-048-0110(2)(c) on high quality waters has this covered. Outstanding Resource Waters are also high quality waters.

27. Various commentors suggested that individual rather than general certification should be required in certain circumstances, including applicants on 303d listed waters, Outstanding Resource Waters, salmon spawning and rearing habitat and areas covered by the Oregon Plan. One commentor suggested there be no general certifications.

**Comment by: the Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project; Oregon Natural Desert Association; Columbia River Inter-Tribal Fish Commission; Hells Canyon Preservation Council; Trout Unlimited; Anita Ward.**

Response: A general certification means the State will evaluate an area or a category of applicants and develop certification conditions and language that would apply to a group of applicants rather than a single applicant. It does not mean that the protection of water quality is less and it does not necessarily mean that the information requirements will be less, that depends on the nature of the certification. For example, developing a general certification for permittees who propose to fence riparian corridors or rest riparian pastures may require a different amount or type of information than what would be required to evaluate proposals to graze the riparian area.

The advantage of general certifications is that they, hopefully, provide efficiencies in the process of issuing certifications and save agency resources that may then be utilized for other aspects of the program, such as monitoring and enforcement.

28. I support the use of general certifications.

**John Ward, Mack Birkmaier**

Response: We are glad there is support for this process.

29. The State should have the option of waiving certification instead of issuing general certification.

**Northwest Forest Resources Council**

Response: The state has the option of waiving certification. However, according to the federal regulations, to waive a certification means the State takes no action to certify or deny an application for one year and after that year, the certification requirement is considered to be waived. In the intervening period, no permit may be issued by the federal agency. Waiving certification is not an alternative to a general certification. The alternative sought is possibly a certification without conditions. The state has the authority to issue these, and could do so in circumstances where water quality is fully protected.

30. 340-48-0110(5) should make clear that all general certifications must be approved by DEQ and be accompanied by a written finding of assurance that individual permits certified under the general cert. will comply with water quality standards.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife**

**Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: General certifications are “certifications” as defined in 340-048-0010(1), which addresses this concern. The responsibility for determining that any individual application falls under a general certification rests, in the first instance, with the federal agency. The state may undertake random audits to ensure that the general certification is not being extended beyond its scope. These types of audits occur in other parts of the 401 program at present.

31. Page 7, (5)(b): Change to read: The federal agency shall submit the proposed conditions, if any, of the general certification along with information supporting the proposition that the activity conducted under these conditions will comply with applicable water quality standards and other appropriate requirements of state law.

**OCA, H-Otley, A-Otley, F-Otley.**

Response: It is not necessary to add the words “if any” to this provision. If the federal agency thinks no conditions are needed they could propose no conditions.

32. (5)(b) A federal agency proposing to develop a general certification shall submit the proposed conditions and additional information 180 days prior to the desired effective date of the certification.

**John Ward**

Response: It will take time to develop general certifications and this would likely be a good time frame in most cases, but we can communicate this to the federal agencies without putting it in the rules. Currently, we have no time limit for developing general certifications and legally, we have up to one year to respond to a certification application.

33. The rules state that general certifications may be developed where DEQ or ODA has approved a water quality management plan (WQMP) for the purposes of meeting CWA Section 303 requirements. ODA does not make 303 related approvals, however. It is also not clear that ODA has the authority to develop or approve WQMPs on federal lands. As such, reference to ODA in Section (5)(c)(A) should be removed.

**EPA**

Response: We removed the phrase ‘for the purposes of meeting the CWA Section 303 requirements’ under this provision. This provision describes a circumstance under which DEQ and ODA may develop a general certification, a certification that covers more than one applicant. The state must still evaluate the information provided and determine that it can make the required finding of water quality protection in order to grant certification. We will also provide an opportunity for public comment on draft general certifications.

34. Require EPA approval under (5)(c)(A). Water quality management plans cannot provide a valid framework for a general certification until they have been approved by EPA, as is required by the CWA for such a plan to comply with Section 303.

**Pacific Rivers Council**

Response: See response above. Currently EPA does not intend to review and approve Water Quality Management Plans. This is DEQ’s responsibility.

34. Eliminate general certifications based on ODA and DEQ approved water quality management plans (WQMP) developed to meet CWA Section 303. If these general certifications are retained, modify to



require the following: 1) the plans must include a waste load allocation for livestock, 2) the cumulative permits certified pursuant to the WQMP must not exceed the waste load allocation and 3) the WQMP must be enforceable. Suggested language included.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: See responses to related comments above.

36. Under option (5)(c)(B) require plans to maintain and protect high quality waters, not just prevent degradation. This category should be eliminated as compliance with federal land use plans is not sufficient to ensure that high quality waters will be maintained and protected.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: Preventing degradation could mean either to maintain or improve, which we feel is a better option.

37. Option (5)(c)(B) must be limited to those areas where adequate information about the attainment of water quality standards exists to make a solid determination about the adequacy of federal plans. General certification should not be an option for areas that have no water quality information.

**Pacific Rivers Council**

Response: We agree, with the exception of a general certification is based on a practice that is demonstrated to be protective of water quality, such as riparian corridor fencing or rest.

38. In (5)(c)(B) clarify that this applies to permits entirely within watersheds containing only high quality waters. What if the water body becomes listed downstream?

**John Ward**

Response: This was the intent of using the word "within" in this provision. Where waterbodies violate water quality standards downstream of the proposed activity, these issues will best be dealt with through a watershed based water quality management plan and the 303/TMDL process.

39. Page 8, (5)(c)(C): To allow for a combination of management practices to qualify for a general certification, revise this provision to allow general certification when management practices provided in (C) are used on some streams and practices provided in (A), (B), or (D) apply to other streams in the same area.

**OCA, H-Otley, A-Otley, F-Otley.**

Response: The general certification category described in (5)(c)(C) is meant to be specifically for the practices listed. Other practices would need to be evaluated in the context of one of the other general certification categories listed or an individual certification.

40. General certification under (5)(c)(C) may be appropriate for riparian corridor fencing if upland livestock management does not retard recovery inside the excluded area.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: We agree that the effect of the proposed activity in the uplands on water quality should be addressed in this general certification.

41. General certifications under (5)(c)(C) should only be issued where livestock do not have access to riparian areas and should not include riparian pastures or corridor fencing. These practices are variable enough to require site-specific approval.

**Pacific Rivers Council, Karen Sjogren**

Response: The state would like to maintain these as options at this point in time. If we can not develop a general certification that satisfies the finding we must make, we will not issue one. There will be an opportunity for public comment on draft general certifications.

42. General certification should not be allowed under (5)(c)(C) for riparian pastures.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Pacific Rivers Council; Idaho Watersheds Project; John Ward; Columbia River Inter-Tribal Fish Commission.**

Response: See response to # 41 above.

43. Omit (5)(c)(D) as a general certification option. Broadscale plans are generally not implemented as written or they are not specific enough about grazing activities to determine whether water quality standards will be met in any particular location. Reserve programmatic approaches to plans at the 6<sup>th</sup> field watershed level or below.

**Pacific Rivers Council , Confederated Tribes of the Warm Springs Reservation**

Response: See the response above. Once conditions are placed in the Certification they are enforceable by both the Federal permitting agency and the State.

44. General certification category (5)(c)(D) should be eliminated unless: 1) the evaluation criteria are improved, and 2) the phrase "require specific grazing practices and systems at the allotment/permit level to meet water quality standards" is inserted after "...and/or records of decision."

**EPA**

Response: At this time, we prefer to keep our options within the rules broader rather than to limit them. We can not issue a general certification unless we can make the "reasonable assurance..." finding. Draft general certifications will be put out for public review and comment prior to issuing any certifications.

45. Change the wording in (5)(c)(D) from "condition of certification" to "evaluation criteria for certification."

**John Ward**

Response: This change has been made in the proposed rules.

46. (5)(d) All general certifications should be subject to public notice and the comment period needs to be much longer than 30 days (60 days).

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project; John Ward.**

Response: The Department will provide an opportunity for public comment on general certifications. The minimum public comment period for rules and permits is typically 30 days. We have, however, provided for a 45 day period in the rules for general certifications. As a general policy, the agency feels 30 days is adequate time for public comment. Anyone interested in receiving notice of certifications may request to be added to the mailing list and will receive notices directly.

47. The word "significant" should be deleted from section 340-48-0110(6).

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: We believe it is best to leave "significant" in the wording so we do not end up in arguments about the term "no chance."

48. (7) Require re-certification whenever there are substantive changes in annual operating plans, new information relevant to protection of water quality, and/or a change of permittee.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: The rules require that DEQ be notified of substantive changes to the proposed activity relative to water quality and allow DEQ and ODA to determine when "re-certification" is needed. We want to maintain that discretion.

## **APPLICATION REQUIREMENTS AND REVIEW**

1. When no water quality data is available for one or more streams in the permit area, DEQ should require the applicant to monitor water quality as a condition of the certification. If monitoring shows that standards are not being met for parameters associated with livestock grazing, the applicant shall submit a new application to DEQ for certification.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: The State prefers that this type of ambient water quality monitoring be the responsibility of the federal agencies and the State rather than the applicant. Where we discover the stream is not meeting standards, we will most likely review the certification when the permit is renewed or amended.

2. Require adequate baseline information on which to base a finding that water quality standards will be met under a proposed grazing regime.

**Pacific Rivers Council**

Response: All permits issued by the federal agencies are accompanied by a plan for monitoring the watershed to assure that grazing practices will meet standards. DEQ will work closely with the federal agencies to review proposed monitoring programs.

3. On waters of uncertain quality, grant a temporary annual certification conditioned on collecting water quality data to determine whether or not water quality standards are being met.

**John Ward, Anita Ward (Friends of Greensprings)**

Response: Presently, there is no stipulation in the rules that addresses a conditioned annual permit. A finding of reasonable assurance of no violation of the Clean water Act and applicable provisions needs to be made before any certification can be issued. Certifications will be issued based on the above finding. If subsequent data shows that the finding is unfounded, then the rules allow for modification of the certification.

4. Require site visits before certifications are issued.

**Anita Ward (Friends of Greensprings), Rich Nawa**

Response: Although this would be ideal, it is impractical from a staff and budget standpoint to visit every site. The State will review the efforts of the federal agencies to conduct compliance monitoring, but will have to rely on the information provided by the applicant and federal agencies in the applications in many instances to make our initial certification decision.

5. Independently validate existing federal policies and their ecological objectives where they are adequate and bolster them where they are not.

**Pacific Rivers Council**

Response: Until we have the time and resources to conduct our own reviews, the State will have to rely on existing documents and agency standards and guidelines and have been through

scientific and public review. Where we believe there is the need to bolster these and we have the information to do so, we will.

6. Specify that applications may take 90 days to process and issue certification.

**John Ward**

Response: If this were done, applicants would need to apply in early January in order to receive certification before turn out time. This also means that the applicant would need to accumulate application materials before that time well into the previous year. Legally, DEQ has up to one year before the certification is considered waived. We intend to process applications much faster than this but will take the time necessary for adequate review.

7. The rules are insufficiently specific on how the applicant will meet the burden of ensuring that water quality standards are met.

**Columbia River Inter-Tribal Fish Commission**

Response: There is always difficulty in providing the necessary detail to deal with environmental conditions that vary on a statewide scale. There must be enough generality to deal with this variation. The structure and attendant processes will vary by region and watershed. The patterns of livestock grazing are strongly correlated with these landscape patterns. The resultant interactions with water quality will also reveal this unique pattern.

8. The following information should be required in all applications: identify all "waters of the state" affected by the proposed permit; identify the designated beneficial uses of all waters; identify all 303d waters and the parameters for which they are listed; identify applicable water quality management plans or TMDLs, and any waste load allocations specific to livestock; identify all Outstanding Resource Waters; identify all salmon spawning reaches and the salmon species present, their spawning and rearing areas and incubation periods; discuss how spawning reaches will be protected from grazing during incubation periods; identify all mandatory and voluntary range and improvement projects and whether those projects have been implemented; describe the monitoring program that will be followed (parameters, methods, frequency and duration, record keeping and who is responsible); analysis of baseline ecological conditions; and applicant's permit compliance history.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: The proposed rules at 340-048-0120 already require much of what is sought here. Specifically, an applicant is being asked to provide details of all waters, as well as those that are listed on the 303(d) list, and the parameters for listing. Applicants are also asked to supply statements of upland conditions, site conditions, range improvement projects and monitoring proposals. The major elements not in the current rules are Outstanding Resource waters, salmonid spawning reaches and beneficial uses. All three of these are available, and readily accessible to the two regulating agencies, and will be taken into account in issuing certifications.

9. In (1)(d) Also list the parameters of concern.

**John Ward**

Response: This suggested change has been made to the rules.

10. In (1)(e) Also describe the grazing system proposed.

**John Ward**

Response: This suggested change has been made to the rules.

11. In (1)(g) Also describe the funds allocated the funding source and the implementation schedule.

**John Ward**

Response: A portion of this proposed change has been made to the rules.

12. (1)(g) doesn't make sense. Grazing activities do not contribute to the protection of water quality.

**Karen Sjogren**

Response: The text of the rules have been changed to reflect this concern.

13. Funds for projects should be secured at the time of application.

**Ashley Henry**

Response: Ideally, this would be desirable but is not practical. Additionally, the permittee may not be able to control the flow of financial resources to the allotment. If improvements or actions included in the application and as conditions of the certification are not implemented, however, the certification can be suspended or revoked.

14. If funds are not available to make improvements will the permit be denied? If the improvements aren't necessary to meet water quality requirements will the permit be denied?

**Patricia Larson**

Response: Although it would be helpful if this information was included in the application the state is aware that in most cases this information will not be available to the application reviewers. Other information included in the application can be used to confirm how water quality was being addressed. This particular piece of information would supplement other information in the application and would not be used as the deciding factor in certification or denial. However, if improvements are included in the application as a measure to address water quality or as a condition of certification and are not implemented, enforcement action could be taken by the federal agency or the State.

15. In (1)(h), also identify water quality parameters to be monitored and summarize monitoring program to document baseline condition as well as trend.

**John Ward**

Response: The suggested changes have been made to the proposed rules.

16. In (1)(I) specify that 303d listed waters shall be identified on the map provided.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: This information is requested in the proposed rules.

17. Require that applications for general certification also provide the information required in 0120(1).

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project; John Ward.**

Response: Section (2) describes the information a permittee must submit when he/she requests to be certified under a general certification. The type of information you are suggesting would be submitted and reviewed at the time the general certification is developed.

18. Under (4), public notice, require that all applications be subject to public notice and comment. Interested persons shall receive both notice and a copy of the completed application.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: All interested persons will receive a notice of 401 applications. Those interested in reviewing an application may then request a copy of the full application.

19. Under (4), requests for certification applications for public review should not be limited to a specific geographic area.

**Karen Sjogren**

Response: The proposed rules have been changed as suggested.

20. The public comment period should be at least 30 days from the date DEQ distributes and public notice and application.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: This is provided by the proposed rules.

21. All interested persons, including any person who provides public comment on the application, may request a hearing on DEQ's issuance or denial.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: A provision to this effect has been added to the grazing application rules.

22. Include a requirement that only fully completed applications will be considered for certification.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: Applications must be complete in order for ODA and DEQ to make a certification decision. If applications are incomplete they will either be returned to the applicant or the additional required information will be requested.

23. For additional information requirements, need a faster DEQ/ODA response.

**Northwest Forest Resources Council**

Response: Response to application packets must be a priority and the state must respond in a timely manner. The degree to which this timeliness happens largely depends on the budget and staffing levels at DEQ and ODA.

24. Past compliance should not be factored into certification decisions.

**Northwest Forest Resources Council, Associated Oregon Industries**

Response: Past compliance behavior may be indicative of possible difficulties in the future and is relevant to the finding of "reasonable assurance" that the activity will be conducted in a manner that will not violate water quality standards and other appropriate water quality laws.

25. Regarding application requirements, Sec. (d): The applicants will not have knowledge of how their grazing activities will comply with state water quality requirements. DEQ and ODA should instead request information regarding the applicant's grazing practices such as intensity of use, season of use, rotations, off-stream watering, and monitoring (information already requested in section (g)).

**OCA, Jackson, H-Otley, A-Otley, F-Otley.**

Response: From an educational standpoint, permittees should be aware of what the water quality standards are and how their activities might interact with water quality. We agree that permittees should communicate the items suggested. Ideally, water quality should be viewed in the context of the livestock grazing system and how the two things might interact.

26. Regarding application requirements, Sec. (f): 303(d) listing and the water quality standards involved are already requested in section (d), and no more than that could be provided by the applicant.

**OCA, H-Otley, A-Otley, F-Otley, Harney County**

Response: In order to fully evaluate the influence of grazing management on the allotment and its interaction with water quality a description of allotment conditions is useful and sets the context for monitoring data. Monitoring is required to gauge changes that are taking place on the allotment. A clearly defined monitoring plan will illustrate the linkages between water quality and vegetation changes. This information may be available from the federal agency managing the allotment.

27. Regarding application requirements, Sec. (f): Historic livestock contributions have no relevance to whether the grazing activity is going to comply with water quality standards, unless DEQ and ODA plan



to give special consideration to those areas where drastic improvement have been made due to significant decreases in herd sizes.

**Oregon Cattlemen's Association, H-Otley, A-Otley, F-Otley.**

Response: The background conditions (historic or landscape history) for allotments have a significant effect on present site conditions and thus effect the present condition of the waters on the allotment. It is informative for the reviewers of the applications to examine background information in order to evaluate the influence of the proposed grazing practices on present and future water quality conditions.

28. We see no need for the permittee to supply any more information than evidence that he has been a proper manager.

**Oregon Farm Bureau Federation, Derfler.**

Response: If proper is defined then it is defined by data and information that describes the allotment and the integrity of the landscape. In order to evaluate this definition of proper in the context of the allotment the application reviewer must see all pertinent data.

29. To reduce burdens and complications for the permittee: Permit applications should be acted on within 15 days or else be awarded automatically.

**Harney County.**

Response: This will not be possible because we are required to provide an opportunity for public comment of 30 days. The amount of time after that depends heavily on the staffing and funding levels of DEQ and ODA. By defaulting the timeline and awarding the certification potential water quality problems are not dealt with.

30. If the permit is not accepted as complete, the permittee and agency should have 30 days to complete the application, with another 15 days for processing by ODA/DEQ. If upon second submission the application still is not complete, an temporary, interim permit, not subject to the usual 401 certification criteria, should be issued to avoid disruption of business and land management activities.

**Harney County, A-Otley.**

Response: Currently, the rules do not address temporary or interim certifications.

31. 401 certifications should be valid for the entire 10 year permit period.

**Harney County**

Response: Presently, 401 certifications are on the same cycle as the federal grazing permit schedule which is usually a 10 year interval. One exception to this is the transfer of permits between owners.

32. Regarding certification requirements, Sec. (f): The information required here is very burdensome and many times not available, especially to ranchers without the means to provide aerial photographs, PFC assessments, utilization maps, and so on.

**Jackson County, Boyden, H-Otley.**

Response: Application packets can contain a wide variety of information including those listed in the comment plus others. However, the applicant is not limited to the basic documents such as the Term Grazing permit, the Annual Operating Plan, or the Allotment Management Plan but can add any information that may demonstrate site conditions or water quality conditions. These conditions can be documented using many types of information. The applicant is encouraged to work with the federal agency as they may have some of the information.

33. Requirements or conditions, including any amendments to 401 certificates must be separate from the grazing permit and must be based on substantial evidence over time.

**Sharon Beck**

Response: The 401 certification is a separate document but becomes a requirement of the federal permit. Compliance with water quality standards is documented through time by the monitoring plan.

34. There must be a mechanism for temporary or interim 401 certificates to provide time to address requirements or conditions without interrupting the ongoing grazing use as permitted by the U.S.F.S. And the certification needs to be processed expeditiously.

**Sharon Beck**

Response: Presently, there is no mechanism by which interim or temporary permits can be processed. The state is aware that applications must be processed in a timely manner and will make every attempt to do so within the limitations of staff and budget.

35. Too much material is required in the application and may not be reviewable in a timely manner.

**Mack Birkmaier, Dan Warnock**

Response: The state will make every effort to process and review applications in a timely manner. Applicants are encouraged to submit all material that might possibly demonstrate site conditions on the allotment.

## CONTENTS OF CERTIFICATION

1. A specified maximum time limits for DEQ's actions would be helpful for planning purposes.

### **BLM**

Response: For responding to applications for certification, this is addressed in the general 401 procedural rules in 340-048-0025, which says DEQ will either grant or deny certification or inform the applicant that a further specified time period is required. We legally have one year to take action on a 401 application and if we do not in that time, the State waives its authority to issue it. There is no time limit for developing general certification language. Any person seeking a permit prior to the development of a general that would apply to their situation will need to apply for an individual certification.

2. Suggest adding a new section which reads: All certifications of federal grazing permits, whether general or individual, must be accompanied by a written finding that the grazing activity authorized in the permit application will not violate state water quality standards, including numeric criteria, protection of beneficial uses, and consistency with Oregon's anti-degradation policy. DEQ shall certify only upon assurance that grazing will not impair the designated beneficial uses.

**Comment by: the Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: The State does not see the need to alter the language of the finding we must make to certify an activity from that provided in the federal regulations (40 CFR, 121.2). This language covers water quality standards, numeric and narrative, and the antidegradation policy.

3. Amend (1) to say that "The certification shall include a written finding that there is reasonable assurance..."

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: The State does not see the need to alter the language of the finding we must make to certify an activity from that provided in the federal regulations (40 CFR, 121.2). The existing language does not preclude a written finding.

4. Certifications must include monitoring requirements necessary to assure that water quality standards are being met. Suggested language included.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: Such requirements would be included under the conditions of certification.

5. Include in the certification a statement requiring that in addition to compliance with applicable BMPs, standards and guidelines, grazing activity will be conducted in a manner that will not violate water quality standards. Suggested language provided.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: We had such a statement in the certifications we issued last year and will likely do so again this year. We do not feel it is necessary to add this to the rules.

6. Delete the phrase in (1)(a) "there is reasonable assurance that."

**Sierra Club Juniper Group**

Response: This language is from the federal regulations. The reasonable assurance provision is necessary because we are making a judgment about a proposed future activities impact on water quality in an area where the confidence levels in our prediction methods are not 100 percent.

7. What is reasonable assurance?

**Patricia Larson**

Response: This term has not been defined in federal or state rule or statute at this time. DEQ must be reasonably assured that the activity will not violate water quality standards. We must have credible information on which to base such a finding.

## **GRAZING CERTIFICATION EVALUATION CRITERIA**

1. The rules should include criteria that can be reliably used to determine whether water quality standards will be met. The Certification evaluation criteria in the rules (pp. 10-11) are not quantified nor qualified. They are vague and unmeasurable. It is not clear how ODA/DEQ could with reasonable assurance use the criteria to determine water quality standards will be met. We suggest you use scientifically supported criteria or benchmarks (references and examples provided).

### **EPA**

Response: This issue is being evaluated. This is problematic because the rules need to be general enough to apply statewide while being detailed enough to address site specific conditions. We are strengthening the linkages to documents which provide guidance to the federal agencies concerning these issues.

2. The evaluation criteria are too vague to provide reasonable assurance that water quality standards will be met.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project, Bob Phillips.**

Response: This issue will continue to be evaluated. We do not propose changes to the rules at this time. This is problematic because the rules need to be general enough to apply statewide while being detailed enough to address site specific conditions. We are strengthening the linkages to documents which provide guidance to the federal agencies concerning these issues.

3. The evaluation criteria contain objectives, but do not incorporate actions necessary to achieve those objectives.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: The actions will be proposed by the applicant and evaluated by ODA as to whether they meet the criteria and policies in the rules and whether the certification finding can be made.

4. Best management practices are being used as surrogates for water quality standard attainment.

### **Columbia River Inter-Tribal Fish Commission**

Response: In the majority of cases, the linkages between livestock grazing and water quality are vegetation and soil characteristics. Most Best Management Practices influence the effect of livestock grazing on vegetation and soil with the expectation that changes in water quality can be linked to changes in the influence of livestock grazing on vegetation and soil. There is considerable disagreement between researchers regarding the interpretation of the linkages since a surrogate condition is being monitored and interpreted in terms of the conditions a linked process or structure. Interpreting the influences of other landscape forces and other management activities in concert with interpretations of livestock grazing impacts is also problematical and imprecise.

5. Use specified utilization limits to prevent overuse in any one year.

**Bob Phillips**

Response: Utilization levels are specified in the management documents of the federal permitting agency. The 401 grazing rules are tied to these documents and associated policy.

6. What are BMPs and where are they referenced?

**Patricia Larson**

Response: BMP's are Best Management Practices and are referenced in the opening section of the Certification Evaluation Criteria portion of the rules.

7. The evaluation criteria should reflect the current scientific knowledge of livestock grazing, including: 1) there is no season in which livestock grazing is not harmful, 2) studies fail to show an advantage to riparian areas from any specific grazing system, 3) the level of utilization is the most important consideration in protecting riparian areas and water quality, 4) "no grazing" and corridor fencing are the only systems consistently found to resort and protect water quality, and 5) exclusion of livestock for two or more years is necessary for the initiation of recovery of degraded streams.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: See response in the General section of these responses.

8. Evaluation criteria have not been adopted as water quality standards, therefore DEQ has no authority to impose them.

**Associated Oregon Industries**

Response: These criteria will be used to evaluate whether or not the proposed activity can be conducted in a manner that will not violate water quality standards. There are many activities that affect instream water quality. While instream water quality information will be useful, information on the impact on site conditions that in turn influence water quality will provide insight to the impact specifically of grazing activity.

9. Certification Evaluation Criteria section, pp. 10-11. Grazing management practices should not be based on "site capability" as defined in these rules, which includes political, social and economic constraints.

**EPA, John Ward**

Response: We have made the suggested change to the proposed rules.

10. Who is responsible for determining site potential and capability and how will that determination be made?

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural**

**Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project; Patricia Larson.**

Response: This guidance is usually provided by staff ecologists for each federal permitting agency. Site potential is usually dealt with by descriptions such as Ecological site or Habitat Type which indicate potential of the site to support a particular vegetation/soil/topography complex. Current theory also includes the influence of disturbance such as fire. The disturbance regime dictates how materials are cycled within the site.

11. Do these rules suggest improving conditions beyond natural occurrences?

**Patricia Larson**

Response: The rules do not imply, nor require this.

12. The range of management practices known to be effective in achieving desired water quality and ecological function should be set forth as minimum standards and guidelines for certification and applied according to site potential and applicable water quality standards.

**EPA**

Response: This comment will be considered as we develop informational materials or guidance for this program. We do not feel it is necessary to add this to the rules.

13. The Oregon Watershed and Salmon Plan requires DEQ to take action under Section 401 of the CWA to “ensure salmon habitat is protected.” We therefore recommend that DEQ require additional conditions on certifications for permits subject to the Oregon Plan irrespective of whether the stream is on the 303d list, possible including rest, larger streamside buffers or additional monitoring to ensure the recovery of salmon habitat.

**Oregon Natural Desert Association**

Response: The 401 program is one measure the State is taking to will help to ensure salmon habitat is protected by ensuring that grazing activity will not violate water quality standards established to protect cold-water fish.

14. 340-048-0140. Certification Evaluation Criteria. Shorten or reorganize the introductory language.

**Pacific Rivers Council**

Response: This change was made to the proposed rules.

15. 340-048-0140. Certification Evaluation Criteria. In the second paragraph of introductory language, what are the “objectives” which are the basis for the criteria? If they are not water quality standards they need to be articulated. If they are the “site characteristics which influence water quality parameters of concern” as per earlier language, use the same language here.

**Pacific Rivers Council**

Response: In addition to water quality standards, the objectives referred to are the site condition objectives that will be described under (1)(g) of the application requirements. The expectation is that at a minimum, these will be the Riparian Management and Aquatic Conservation Strategy objectives in PACFISH, INFISH and the Northwest Forest Plan.

16. Paragraph 2 should state "These objectives will integrate BMPs in order to fully address water quality standards."

**Karen Sjogren**

Response: This change has been made to the proposed rules.

17. Add to list of BMPs in second paragraph of introductory language, "rangeland improvement installation and maintenance." And change the last word of that paragraph from "capability" to "potential."

**John Ward**

Response: The second change has been made. The first is included later in this section.

18. Paragraph 3 of introductory language is unclear. Certification should apply to all activities specified in the grazing permit. What are "exceptional circumstances" and why are they not included?

**Karen Sjogren**

Response: The wording of this paragraph has been changed.

19. 340-048-0140. Certification Evaluation Criteria. This section needs to be more explicit. Section (1)(a) and (b) need to include ecological indicators that will be used to measure the site potential/capability. "Components" under (b) is unclear. (1)(b)(A), (B) and (C) are vague and seem to overlap. How will vegetative cover and community structure, soil conditions, bank stability and sedimentation be assessed? The "Riparian Management Objectives" developed under interim federal policies now in place should provide a starting point for the state to determine the appropriate ecological indicators it will use to assess site conditions and capability and set measurable objectives related to meeting water quality standards.

**Pacific Rivers Council**

Response: We will consider these comments as the program develops but do not propose to change the language at this time. The Riparian Management Objectives in existing federal policies are anticipated to be a minimum starting point for site condition objectives.

20. I am concerned that a section on Rangeland Improvements that was in the Evaluation Criteria section was removed. Please add the Range Management Best Practice RM-4 that safeguards water quality.

**John Ward**

Response: This section was not included because rangeland improvements are not criteria but actions or practices that may be taken to achieve water quality protection. These improvements will be suggested by the applicant and evaluated against the criteria and finding that must be made for certification.

21. (1)(a) eliminate the term "site capability" and insert "rangeland improvements."

**John Ward**

Response: "Site capability" was removed. The response of rangeland improvements is less dependent on site potential. The fact that it is not included here does not mean that these measures should not be included where they will help to protect or restore water quality.



22. (1)(b)(B) If livestock remain out of the riparian area, why must grazing promote debris and sediment capture?

**Patricia Larson**

Response: Wording in the rules has been adjusted to reflect the management of grazing rather than grazing itself

23. Shade must be measured in order to know if it influences water temperature.

**Patricia Larson**

Response: Many factor influence water temperature, of which shading is one. There is scientific literature suggesting that stream temperatures can be ameliorated, and that shading is one way of doing this.

24. Amend (1)(b)( C) to read: "...communities that fully occupy the site, ..."

**John Ward**

Response: The existing rule language does not preclude this condition. Indeed, this could be used in particular circumstances if it is considered necessary to protect water quality.

25. Add to (2)(a): "( C) Exclude livestock seasonally from sensitive fish spawning and rearing habitat.

**John Ward**

Response: This is already covered in existing rule language which requires maintenance of sensitive areas for water quality.

26. (2)(a)(B) should read "and eliminate livestock influence on..."

**Karen Sjogren**

Response: The state does not believe that grazing and attainment of water quality are mutually exclusive. Provided there are adequate safeguards the integrity of riparian areas and other sensitive areas can be protected while allowing for livestock grazing.

27. (3)(B) should read "Future development shall prohibit..."

**Karen Sjogren**

Response: See comment above.

28. Remove all livestock handling facilities from riparian areas within 2 years.

**Bob Phillips**

Response: Since these rules concern all federal lands, moving these facilities from all riparian areas may not be practical.

29. 340-048-0140 (4)(c). Monitoring cannot be used to provide information which is needed to determine whether water quality standards will be met in the first instance. Any "uncertainty" cannot be so great as to prevent the state from having "reasonable assurance" that standards will be met based on the application.

**Pacific Rivers Council , EPA**

Response: DEQ agrees that any "uncertainty" can not be so great as to jeopardize the finding of "reasonable assurance." Monitoring is the way to accurately gauge short-term and long-term changes in the system and determine whether assumptions made in making a finding of reasonable assurance are correct.

30. Monitoring must be an integral part of the 401 program and should be specifically required, including monitoring of current condition, implementation, effectiveness and habitat and water quality. A properly prepared and specified monitoring plan should be in place at the time of certification.

**Pacific Rivers Council, American Fisheries Society**

Response: This stipulation is currently in the rules. The state is aware that monitoring is important and critical.

31. Regarding certification evaluation criteria: Livestock distribution should not be a stipulation because it cannot be absolutely controlled.

**BLM**

Response: Proper livestock distribution is key to proper grazing management and has a large bearing on impact to water quality. Techniques such as salt and alternative drinking water placement have a large impact on livestock distribution.

32. Regarding certification evaluation criteria: The utilization level of an area is a goal, not a BMP.

**BLM**

Response: The rule language has been modified.

33. Regarding certification evaluation criteria, page 11, item #3(a): "[E]nsure no..." should be deleted and replaced with "minimize."

**BLM**

Response: This change has not been incorporated. There is flexibility to place livestock handling facilities to ensure no delivery of sediment to waters. With minimizing delivery, water quality standards could still be violated.

34. Page 7, (2)(a) and (b): Use of the term "improve" could prompt unnecessary legal challenges of certifications if it is interpreted to not allow any utilization and disruption of vegetation, especially in areas where a PFC assessment has shown that vegetation is not as vigorous as it should be. If the term "improve" must be used, definitions from the Society For Range Management should be consulted. But instead, we propose:

On water quality limited waters, certification will be granted if the proposed activity will allow for improvement of water quality.

On water quality limited waters, certification will be denied if the proposed activity is expected to further degrade water quality.

**OCA, Jackson County, Boyden, H-Otley, A-Otley, F-Otley.**

Response: See the response to this comment under Certification Policy and Options above.

35. Regarding certification evaluation criteria: ODA could use the criteria on page 11 to evaluate the applications, but how the criteria will be used needs to be clarified. What happens if an application fails to meet one or more of the criteria?

**OCA, Jackson County, Boyden, H-Otley, A-Otley, F-Otley.**

Response: ODA could either: 1) identify conditions to be placed on the certification that will allow it to meet the criteria and the required finding of certification, or 2) recommend denial of the certification. If a certification is denied, the applicant may always revise their application and proposed grazing activity and re-submit their certification.

36. Regarding certification evaluation criteria, Sec. (1)(a): This section is meaningless and should be deleted. How will ODA determine whether grazing management practices are based on site potential or capability?

**OCA, Jackson, H-Otley, A-Otley, F-Otley.**

Response: Site potential determines a site's ability to respond to management. Some sites have the ability to rapidly respond to management actions while other sites respond more slowly. ODA determines this by examining documentation from the federal agency.

37. Regarding certification evaluation criteria, Sec. (1)(b): Delete the term "rest." It is rarely used and cannot be managed.

**OCA, H-Otley, A-Otley, F-Otley.**

Response: This change has been done to the rules and a separate section called "Rest From Grazing" has been added.

38. Regarding certification evaluation criteria, Sec. (4)(a): Water quality trend data needs to be defined.

**OCA, H-Otley, A-Otley, F-Otley.**

Response: This would be defined as the general certification or Memorandum of Agreement with the federal agency is developed.

39. Regarding certification evaluation criteria, Sec. (4)(a): Perhaps Sec. 4(a) and (b) can be combined.

**OCA, H-Otley, A-Otley, F-Otley.**

Response: These sections were kept intact but their sequence was changed to add clarity. The draft 4(a) applied to general certifications whereas the draft 4(b) applies to all certifications.

40. Regarding certification evaluation criteria, Sec. (4)(c): This provision should be included in the certification Options and Processes section on page 7: (2)(a) and (b).

**OCA, H-Otley, A-Otley, F-Otley.**

Response: This section (4)(c) has been deleted from Certification Evaluation Criteria because it was redundant with 4(b).

41. It is not appropriate to consider an applicant's compliance history when deciding whether to certify. The certification should be based only on whether water quality standards will be achieved.

**Weyerhaeuser**

Response: The record of compliance can reflect potential for cooperation in dealing with water quality issues and making a determination that there is reasonable assurance the proposed activity will be conducted in a manner that will not violate water quality regulations.

42. It is unclear whether ODA is to use the standards to evaluate certification or denial or will these standards be used to evaluate conditions to include in the certification or both.

**Dan Warnock**

Response: Both. Reference to water quality standards is used throughout the application review process.

43. If applications fail to meet one or more of the standards what happens?

**Dan Warnock**

Response: If the permitted activity doesn't meet water quality standards and livestock grazing is contributing to the water quality problems then either conditions would be placed on the certification to ensure that water quality would be protected or the application would be denied.

44. Most monitoring takes place in riparian systems while the most brittle environments are found in the uplands

**Bob Williams**

Response: Any monitoring plan will need to consider a watershed approach which links information from both the riparian systems and upland systems. To understand the interactions of livestock grazing and water quality a watershed approach is needed.

45. There is some confusion regarding monitoring - Who is responsible?, What is to be monitored, and What are the costs of monitoring?

**Bob Jeppert**

Response: The State believes the federal permitting agency is responsible for monitoring compliance with permit conditions. The federal agencies may place some monitoring responsibilities on the permittee. Costs of these monitoring efforts are absorbed by each party. The State also has some shared responsibility in monitoring water quality.

46. The 303(d) list may not accurately reflect stream status. The quality of these streams has never been monitored at a level that promotes understanding. The 303 (d) list is not a proper mechanism.

**Bob Jeppert**

Response: The 303(d) list is a compilation of waters not meeting standards for which data exists. Waters not on the list are either currently meeting standards, or there is no data for them. The 303(d) list is an appropriate mechanism for defining waters that are not meeting standards. Additional monitoring will determine if waters not on the list are meeting standards or not.

47. The rules should read that all streams subject to 401 certification should be monitored on a regular basis.

**John Anderson**

Response: The rules specify that a monitoring plan be a part of the application package.

### **COMPLIANCE MONITORING**

1. While monitoring and enforcement are current federal responsibilities, provisions of the rules may add significantly to that workload .

**BLM**

Response: We understand this and will try to work with agencies to ensure that the monitoring requirements are as efficient as possible to produce the information needed in order to comply with section 401.

2. Regarding compliance monitoring, page 12, item (1): The permitting process should call for DEQ to consult with the appropriate land management official in setting the terms and conditions for 401 certification.

**BLM**

Response: We intend to work with the federal agencies to identify the appropriate compliance monitoring needs. It is also up to the applicant to propose monitoring as stated in the application requirements, and we fully anticipate that the applicant will work with the federal agency in developing this portion of the application.

3. Where there is no data, require monitoring as a condition of certification.

**Many - see matrix**

Response: Where no information is available, monitoring will be required as a condition of the certification or through a Memorandum of Agreement with the federal agencies.

4. Where there is no data require monitoring prior to certification.

**Many - see matrix**

Response: Certification may be based on general knowledge of the activity and practices proposed and their potential impacts on streams and water quality, and a "professional judgment" as to whether the proposed activity will comply with water quality standards. In addition, monitoring would be required.

5. It is not sufficient to monitor compliance with permit conditions. The only way to assure water quality standards are being achieved is to monitor water quality. All certifications must require a monitoring program. More specifics provided.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project; Columbia River Inter-Tribal Fish Commission; Confederated Tribes of the Warm Springs Reservation; Sierra Club Juniper Group; Lou Davies..**

Response: Under the proposed rules, applicants are required to submit a monitoring proposal. In some cases, this may include monitoring of practices and site conditions but not in-stream monitoring and in some cases it could include some water quality monitoring. While we believe that water quality monitoring is also necessary and that the federal agencies should do this, it will in some cases be most appropriately done on a watershed basis, rather than allotment by allotment, and through a Memorandum of Agreement with the federal agency rather than as a certification condition on the applicant.

6. Who is responsible for monitoring?

**Joanne Richter, Steve Grasty, Karen Sjogren**

Response: The State believes there is shared responsibility for monitoring between the federal agencies, the applicant and the State. However, we believe the primary responsibility for monitoring on federal lands and for the purposed of managing a federal grazing program that meets the Clean Water Act, belongs to the federal agencies.

7. Monitoring should be done only by people trained in monitoring techniques.

**Evelyn Premselaar, Craig Miller**

Response: We agree that this is necessary in order to have confidence in the information produced.

8. Don't rely on the federal agencies for compliance monitoring.

**Ashley Henry, Brian Posewitz, Marty Wilson, Karen Sjogren**

Response: Please see response above. We do intend to conduct audits or reviews of federal compliance data and to have some share responsibility in monitoring as well.

9. Monitoring by DEQ in cooperation with federal agencies is needed to assure compliance.

**Bob Phillips**

Response: This is the approach we would like to take, with the federal agencies bearing the primary responsibility for on-site monitoring.

10. Monitoring should be required of permittee.

**Karen Sjogren, Brian Posewitz**

Response: The permittees will not typically have the skills and training to be responsible for instream monitoring and some feel that they shouldn't be monitoring their own compliance out of principle. In some areas, the federal agency may place some of the monitoring work on the permittee and in some places they may do it themselves.

11. The federal agency should be responsible for monitoring to ensure that state water quality standards are being achieved.

**The Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project; Pacific Rivers Council.**

Response: The State agrees. See responses above.

12. Whose monitoring techniques will be used to satisfy CWA requirements, State, USFS, BLM?

**Patricia Larson**

Response: Monitoring techniques or protocols could come from a variety of published or agency sources. However, DEQ is the agency responsible for water quality, and monitoring should conform to our protocols.

13. Do not use PFC as a monitoring tool.

**Ashley Henry**

Response: PFC is one method that will likely be used to evaluate the condition of some site characteristics related to physical stream and riparian area function. It is not sufficient alone to determine whether or not water quality standards are being met.

14. PFC should be done on an adequate stream length, at least one-quarter mile.

**Rex Crume**

Response: This comment is outside the scope of the draft rules, DEQ can not respond at this time.

## **ENFORCEMENT**

1. DEQ's enforcement authority should be expanded to allow it to take action without awaiting action (or lack of action) by the federal agency.

### **BLM**

Response: We have made this change to the proposed rules.

2. Regarding enforcement: DEQ must not be able to withhold certification from a qualified applicant based on compliance "problems" in "that area" if the lack of compliance does not directly involve that applicant. Also, this provision doesn't define what constitutes a compliance "problem" nor what "that area" might be.

### **BLM**

Response: We have deleted "that area" from this provision. By compliance problem we mean a lack of compliance with the terms and conditions of the water quality certification permit. DEQ may also enforce its water quality standards and rules under our general authorities to do so outside the 401 program.

3. Enforcement of the certificate conditions should clearly list parties solely responsible and where shared responsibilities occur.

### **John Anderson**

Response: The State believes it is the responsibility of the federal agency to enforce the terms and conditions of its permit, including the water quality certification conditions. We have also, however, reserved the right to take enforcement action ourselves should we feel that is necessary to fulfill our responsibilities under the Clean Water Act.

4. The public should be able to seek a revocation of certification for non-compliance or failure to meet water quality standards.

### **Brain Posewitz**

Response: The public can certainly register complaints and provide DEQ/ODA with information on non-compliance, but the authority to revoke, just as the authority to grant or deny, a certification rests only with the State and, ultimately, with the Director of DEQ.

5. ODA should have joint authority to revoke certifications.

### **Oregon Cattlemen's Association**

Response: We intend to work cooperatively and in consultation with ODA. The ultimate authority to revoke, just as to grant or deny, a certification, however, rests with the Director of DEQ.

6. DEQ should actively enforce its rules.

### **The Confederated Tribes of the Warm Springs Reservation, Ellen Leatham, Marty Wilson**

Response: Once a certification is issued, the conditions of the certification become part of the federal permit. The State believes it is the responsibility of the federal government to implement



and enforce its permits, including the certification conditions. However, we do retain the right to revoke or revise a certification if violations occur, and to take any other enforcement actions authorized under state law that we deem appropriate.

7. How will enforcement be effectively budgeted?

**Joanne Richter**

Response: Our intent is to attempt to get the necessary resources to adequately implement this program, to rely primarily on the federal agencies to enforce their permits and the certification conditions, and to make the issuance of certifications as efficient as possible so that we have the ability to do enforcement as well.

8. Amend (2) - Change DEQ “may” to “shall.” Delete repeatedly.

**Sierra Club Juniper Group**

Response: We deleted “repeatedly, but we must retain the ability to have discretion as to when revocation of the certification is the appropriate action, particularly in a situation where we believe the primary responsibility for enforcement of the permit and certification conditions rests with the federal agencies.

9. Amend (3) - Change “may” to “shall.”

**Sierra Club Juniper Group**

Response: DEQ feels we need to retain the discretion to do this as we deem necessary and as resources allow. It is our intent to do compliance audits.

## **MISCELLANEOUS**

1. Agriculture is a positive contribution to our state and our nation.

**JoAnn Gilliam**

Response: DEQ and ODA agree with this statement.

2. Additional miscellaneous editorial comments were provided.

**Multiple**

Response: Some editorial changes were helpful and were made to the rules.

3. A couple comments were made to sections of 340-048-0020 which are not being amended at this time.

**Comment by: the Western Environmental Law Center for the Oregon Natural Desert Assn., the Northwest Environmental Defense Center, American Rivers, the Oregon Wildlife Federation, Oregon Trout, the Pacific Rivers Council, Trout Unlimited, the Oregon Natural Resources Fund and Oregon Natural Resources Action; Idaho Watersheds Project.**

Response: We did change to section (1) of this rule such that all of 340-048-0020 does not apply to grazing certifications.

4. How will fencing affect irrigation needs and rights?

**D. Lear**

Response: We do not anticipate any affect.

5. Will fencing be required on intermittent streams with no flow during grazing and who will oversee fencing, the State or Federal agencies?

**Patricia Larson**

Response: The practices required will be dependent on the site conditions and proposed activity. We anticipate the federal agency to oversee the installation of fencing.

6. Will streams be de-listed if monitoring data shows improvement for a permitted allotment? How much data is needed?

**Patricia Larson, Rex Crume**

Response: Streams will be de-listed when water quality standards are attained, or a TMDL is in place.

7. Multiple comments were received on the impacts of activities and sources of pollution other than grazing or on natural sources of pollutants.

Response: DEQ recognizes that many activities and sources, including natural sources, affect water quality and we have other programs and controls or are working on solutions to these sources. We do not expect control of natural sources by permittees. The proposed rules are specifically for the purpose of controlling water quality impacts from grazing on federal lands.

8. Need a process to identify streams that will never reach 64° and a way to figure out their potential.

**Rex Crume**

Response: A process is described in the existing temperature standard for this circumstance. This is not part of this rulemaking.

9. Water quality limited streams are not necessarily polluted. May be OK for human consumption and just have a temperature or sediment problem that is natural.

**Rex Crume**

Response: The term “polluted” is often used to refer to any stream which does not meet water quality standards.

10. Attachment A, page 1, first paragraph under General Public: Federal grazing permittees don’t constitute a large enough share of the market to determine the cost of meat, so they cannot pass the costs of the 401 program along to the meat consumer.

**BLM, OFBF.**

Response: The fiscal impact statement is an agency estimate based upon the information available to the agency when it began rulemaking proceedings. Under the Administrative Procedures Act, an agency may not amend a fiscal impact statement based upon new information received in response to comments. These comments will be considered, however, and used for the purposes of complying with OAR 340-001-0018 and ORS 183.540.

11. Attachment A, page 2, last paragraph under Small Business: Present policy requires BLM to secure a water right from the Oregon Water Resources Dept. prior to constructing or permitting off-stream water developments. Therefore, we suggest that the impact statement mention the cost to both BLM and the permittee to obtain the necessary water rights.

**BLM.**

Response: The fiscal impact statement is an agency estimate based upon the information available to the agency when it began rulemaking proceedings. Under the Administrative Procedures Act, an agency may not amend a fiscal impact statement based upon new information received in response to comments. These comments will be considered, however, and used for the purposes of complying with OAR 340-001-0018 and ORS 183.540.

12. Attachment C, page 2, question #11: This question is already fully addressed by BLM plans and processes in place, such as Standards for Rangeland Health and Guidelines for Livestock Grazing Management, Resource Management Plans, the Northwest Forest Plan, the Interior Columbia Basin Ecosystem Management Project’s Science Assessment, and existing Management Framework Plans.

**BLM**

Response: Your point is noted, however, we do not revise Attachments to the public notice at this point in the process

13. Attachment D, definitions: These additional terms should be defined: “the antidegradation policy,” “repeatedly violates,” “appropriate corrective or enforcement action,” “compliance problems,” “that area,” “intermittent channel,” and “ephemeral channel.”

**BLM**

Response: For a variety of reasons we have not added these definitions to the rules. See earlier responses on some of these terms.

14. Attachment D, page 2, item (12): The definition of “high quality waters,” which is no longer than many others, should be spelled out in the text rather than through a reference to administrative rule.

**BLM**

Response: The reason we reference some definitions rather than stating them is so that if the definition is changed in another section of the rules we do not have conflicting definitions.

15. Attachment D, page 4, item #2(f): This should read “waterways(s), lake(s), or other water body (or bodies)” so that a single application can address whatever waters may lay within an allotment.

**BLM**

Response: The section of the rules this comment refers to is not being amended at this time and does not apply to grazing certifications.

16. Attachment D: The rules should use the definition for “waters of the United States” found in 40 CFR Sec. 122.2, and should provide that definition in either 34-048-0010 or 340-048-0100.

**BLM, Malheur-Owyhee Watershed Council**

Response: A definition for waters of the State is included in the rules.

17. Attachment D, page 7, item #2(b): What are the criteria for determining that the proposed activity is “expected to maintain or further degrade the current site conditions...?”

**BLM**

Response: The evaluation criteria are listed in proposed rule 340-048-0140.

18. Attachment D, page 7, item #5: WQMPs will take years to develop. In the interim we would have to deal with the 401 certification process permit by permit until the WQMPs are completed.

**BLM**

Response: There are other options for general certification that may be applicable, but it is likely that many will be done as individual certifications until WQMPs are developed.

19. Attachment D, page 7, item #5(C): Perhaps instead of “intermittent,” “perennial,” and “ephemeral,” this paragraph should refer to waters that affect beneficial uses for the given basin. Some channels may flow long enough to support riparian vegetation and may be considered “intermittent,” but do not flow long enough to support aquatic biota...and do not feed into a system that provides for any other beneficial use.

**BLM**

Response: If the suggested change is made, it would be difficult for people to know whether a particular stream is included or not. A stream with no beneficial use is likely an exception and could be identified on a case by case basis.

20. Attachment D, page 8, item #5(d): Where possible, coordinate DEQ's and ODA's public comment periods and issuance of the general certification with BLM's public comment periods for other purposes, such as Allotment Management Plans, Range Management Plans, etc.

**BLM**

Response: This is a good idea.

21. Attachment D, page 8, item #5(e): What types of water quality problems constitute a "need," and what information and data will be used to determine this?

**BLM**

Response: The "need" for individual rather than general certification will not necessarily be based on the type of water quality problem. This clause gives the agencies the discretion to require an individual certification if we believe that it is needed for any reason. That would most be the two already specified, that the site is different from that contemplated in the general certification or the permittee has a history of non-compliance.

22. Attachment D, page 8, item #7: This provision, although positive, could create the expectation in the public that every time BLM conducts an evaluation and/or changes the grazing schedule, the permittee would be required to inform DEQ, thus increasing everyone's work load.

**BLM**

Response: We will continue to work with the federal agencies on when this type of notification is needed and what it must include. DEQ believes that the rules already contains and adequate qualifier to this requirement. The large workload will be in reviewing whether or not re-certification is needed rather than the notification that there has been a change of activity.

23. Attachment D, page 9, item #1(e): The actual number of livestock may fluctuate within the prescribed carrying capacity.

**BLM**

Response: We suggest that the application include the range and the maximum number of livestock that would be permitted.

24. Attachment D, page 9, item #1(e): Animal Unit Months (AUMs) rather than the number of livestock are used for billing and use allocation purposes.

**BLM**

Response: We will need information on the number of livestock and season and duration of use and we thought this information was specified in the permit.

25. Attachment D, page 9, item #1(f): The identification of "historic and present livestock contributions to water quality limitations" are highly speculative, and thus will be very approximate estimates.

**BLM, Jackson County**

Response: The State understands this. This would be the opportunity, where appropriate, for an applicant to describe how management of the grazed area has changed over time and that the past practices that led to an unsatisfactory condition have been changed.

26. Attachment D, page 10, item #3(b): There should also be an entry stating “If the application is returned incomplete or there is a request for additional information, DEQ or ODA will specify what additional information is needed.”

**BLM**

Response: If we request additional information from the applicant, we will tell them what information is required.

Appendix 1. Matrix of Public Comment

Name/Address	Strengthen rules to protect streams, water quality, fish	Need action now, fish can't wait	Rest or deny cert. on polluted streams until water quality standards are met	Where there is no data, require monitoring as condition of cert.	Where there is no data, require monitoring <u>before</u> certification	Livestock damage streams and habitat	Livestock damage streams, I've seen it	Restrict grazing along streams	Hold the livestock industry accountable for its pollution
Written									
Adams Dawn 2310 Century Lane West Linn, OR 97068	✓		✓	✓					
Aitken Selene 446 Heiman St Ashland OR 97520	✓	✓	✓	✓					
Aldrich Nancy Cross 3439 NE Alameda St Portland OR 97212			✓		✓				
Alevizos L. Richard 1214 SE 52nd Portland OR 97215	✓								
Allizer Mercedes 201 Phelps St Silverton OR 97381									
Anderson Betty PO Box 268 Keno OR 97627	✓		✓	✓			✓		
Anderson Katherine Arney Co. Water Shed Council PO Box 848 Hines OR 97738									
Anderson John R 1283 NW Trenton Bend, OR 97702									
Anderson JR 1283 NW Trenton Bend OR 97701			✓						
Angenent Tom & Virginia RR 2 Box 322 Bandon OR 97411	✓								
Aschenbrenner Stanley 1225 SW Oak Terrace Lake Oswego OR 97034			✓		✓				
Aitcheson, Regina 28590 S Beaver Creek Rd Mulino, OR 97042		✓	✓	✓					
Austin Ned			✓		✓				





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431 45 <sup>th</sup> Ct NE Salem OR 97303									
Biehl, Glenn A. 2150 Sally Way Eugene, OR 97401	✓								
Bingham, Tim 2385 Lincoln St. Eugene, OR 97405	✓		✓	✓					
Birkmaier Mack 84263 Walker Ln Joseph OR 97846									
Bischke Scott Gibbon Katie 1565 NW Woodland Corvallis OR 97330	✓								
Boor Gary Malheur Cattlemen's Assoc 1020 Morgan Ave Ontario OR 97914									
Borgwardt Joyce 3466 SW Dasch View Ct Portland OR 97201				✓					
Baffero, Libby PO Box 2098 Sistrs. OR 97759	✓								
Boyer Jeff & Tracy 21827 Boonesborough Dr Bend, OR 97701	✓	✓	✓	✓					
Braut, William 2623 SE Brooklyn St Portland, OR 97202	✓	✓	✓	✓					
Bremer David PO Box 61 Merlin, OR 97532								✓	
Brorby Eric 600 Conifer Way Ashland OR 97520		✓	✓	✓					
Brown Carl & Shirley 204 NW 3 <sup>rd</sup> Ct Sublimity OR 97365			✓	✓					
Brown Terry & Carol 10428 NW Sichel Ct	✓	✓	✓			✓			

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Portland OR 97229									
Burke Deborah PO Box 1331 Bend, OR 97709	✓		✓						
Burke, Marilyn 3905 SW Sweetbrier Dr. Portland, OR 97221			✓	✓					
Bushnell Elizabeth 1665 SW Filmont Portland OR 97225	✓	✓							
Byrd Judith 1334 NE Purcell Blvd #6 Bend OR 97701		✓	✓	✓					
Campbell Homer 7210 SW Philomath Blvd Corvallis OR 97333	✓		✓		✓		✓		
Canvasser Inez 15541 NE Eilers Rd Aurora OR 97002		✓	✓	✓					
Carlstrom Andrea 15400 NW McNamee Rd Portland OR 97231	✓	✓	✓	✓					
Carrigan Michael Oregon PeacWorks 333 State St Salem, OR 97301									
Cedar Denise 6786 Rochster NE Brooks OR 97305	✓	✓	✓	✓					
Chambers Larry & Pam 15828 Lobster Valley Rd Asea OR 97324									
Charlton Stephen 4607 SW 37 <sup>th</sup> Ave Portland OR 97221	✓	✓	✓	✓					
Christensen Bonnis 63125 Fremont Bend OR 97701	✓	✓	✓	✓					
Christian Carl 1150 SW Chastain Dr Greshem OR 97080	✓					✓			
Churchill John	✓	✓	✓	✓					

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PO Box 4160 Salem OR 97302									
Clarke Chuck EPA 1200 Sixth Ave Seattle WA 98101									
Clarke-Jung Karma 1604 Freedman Ln Winston OR 97496	✓		✓						
Cleys, Kyle Allan 3959 NE 40 <sup>th</sup> Ave Portland, OR 97212	✓		✓	✓			✓		
Cody, Donna 5003 SE 34 <sup>th</sup> Ave Portland, OR 97202	✓								
Coe Kent 1012 13 <sup>th</sup> St La Grande OR 97850	✓	✓	✓	✓					
Coen Virginia Rt 1 Box 73 Baker City OR 97814	✓								✓
Cohen Deborah OR for Sustainable Forestry 810 SW Broadway, Suite 401 Portland OR 97205	✓								
Collins Eleanor 176 Teel Ln Grants Pass OR 97527	✓	✓	✓	✓					
Costa, Demelza 28626 Ridgeway Rd Sweet Home, OR 97386	✓	✓	✓	✓					
Cowger, MD, Robert 6650 SW Montgomery Wy Wilsonville OR 97070	✓								
Cox Susan PO Box 1046 Welches OR 97067		✓	✓	✓					
Cox, Harold D. Marilyn E. Fisher 5880 Reatha Ct Hubbard, OR 97032		✓	✓	✓					
Crumpacker Nancy	✓	✓		✓					

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6800 SW Canyon Dr Portland OR 97225									
Daggett Caroline 60033 Ridgeview Ct Bend OR 97702	✓		✓						
Damiano Henry 176 Albeda Dr Ashland OR 97520									
Davis James 45-1/2 NW Greeley Ave Bend OR 97701	✓		✓	✓					
Davis Lou PO Box 3006 Princeton OR 97721									
Davis Ray 5825 SW Lombard Ave Beaverton OR 97005	✓						✓		
Davis, Mark 652 SE Washington St McMinnville, OR 97128			✓					✓	
Decker Van PO Box 39 Burns OR 97720									
DeFazio Susanna 87805 Walker Creek Rd Walton OR 97490									
Dengler, MD, Wolfgang A. 1220 NW Overlook Dr Covallis, OR 97330	✓		✓	✓				✓	
Derfner Gene Senate Majority Leader S-223 State Capitol Bldg Salem, OR 97310									
Derouin Dale 497 SE Walnut Ave Dallas, OR 97338	✓		✓	✓					
Derr Mary Audubon Society Corvallis PO Box 148 Corvallis OR 97339			✓	✓					✓
Derry Tom HCR 1962	✓	✓	✓	✓					

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Camp Sherman OR 97730									
Dolan Robert 5315 Netarts Hwy NW Tillamook, OR 97141	✓	✓	✓	✓					
Driskill Linda HC 77 Box 2070 John Day OR 97845	✓								
DuBois Dennis & Kristi 16993 Timber Rd E Vernonia OR 97064	✓								
Ducks Toni 12820 SW Tarpan Dr Beaverton OR 97008	✓	✓	✓	✓					
Dudman Barbara 3529 SE Rex St Portland OR 97202		✓	✓	✓				✓	
Duff Robert James 1106 SW 12th Redmond OR 97756	✓			✓	✓				
Eddy, Jr., J.G. PO Box 305 Nehalem, OR 97131									
Edwards Jeff 2725 NW Thurman St, Apt 1 Portland, OR 97210		✓	✓	✓					✓
Ellis Tim 5421 SW Alta Mira Circle Portland OR 97201	✓								
Eshoff Col Steens Mt Rd Frenchglen OR 97736								✓	
Epstein Jordan 6243 SW 47th Pl Portland OR 97221	✓	✓	✓	✓					
Erickson Larry 2470 SW 173rd Ct Beaverton OR 97006			✓	✓					
Erwin Alan & Myra 300 Grandview Dr Ashland OR 97520									
Fautek Lucan 684 Chestnut St	✓	✓	✓						





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Unity OR 97884									
Henderson, Tony 356 NW Delaware Ave Bend, OR 97701			✓						
Herner Helen 7323 NE Sacramento Portland OR 97213	✓	✓	✓	✓					
Higgins Mike & Donna PO Box 806 Halfway OR 97834	✓	✓	✓	✓			✓		
Highland Jim 24001 E Rockwood Creek Rhododendron OR 97049	✓							✓	
Hillis Jeanne 1709 E 9th The Dalles, OR 97058									
Hilsabeck Dennis 3442 Se Belmont Portland OR 97214	✓							✓	
Hirschfeld Gerald 425 Ashland St Ashland OR 97520		✓	✓						
Hodges, Harry & Alma 1145 NW Cooke Ave Grants Pass, OR 97526	✓	✓	✓	✓					
Hopewell Mark 1241 W 13th Ave Eugene, OR 97402	✓	✓	✓	✓					
Hopkins David 441 NW Miller Rd Portland, OR 97229	✓	✓	✓	✓					
Horngren Scott One Main Place 101 SW Main St #1800 Portland OR 97204									
Horvath Eric PO Box 721 South Beach OR 97366	✓	✓	✓	✓					
Howard Simon 2151 SE Brookwood Ave Hillsboro OR 97123	✓	✓							
Howlet Doris	✓	✓	✓	✓					



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10880 S Reif Rd Powell Butte OR 97753									
Hungerford Robert 2415 SE Courtney Rd Milwaukie OR 97222	✓	✓	✓	✓					
Hutchings Nancy 201 Mariposa Terrace Medford, OR 97504	✓	✓	✓	✓					
Imhoff David 26761 S Fish Road Mulino OR 97042	✓	✓	✓	✓					
Irwin Karen 1403 SW Broadway Dr Portland OR 97201	✓	✓	✓	✓					
Jappart Bob 36805 Minam Rd Power Butte OR 97753									
Jensen RD 3401 Vifae Springs Rd Salem, OR 97306				✓					
Jones Helen 11680 S Davis Loop Prineville OR 97754	✓								
Jones Jack 230 SE 3 <sup>rd</sup> Bend OR 97702									
Karon Jan 719 NW Johns Pl Pendleton OR 97801	✓								
Keesey James 396 Orchard Hts NW Salem, OR 97304	✓		✓	✓	✓				
Kern Gerald 1605 NW Iowa Bend, OR 97701			✓	✓					
Kerfay, MD, Charles 20592 Dorchester E Bend OR 97702	✓	✓	✓	✓					
Kimball Jess 3414 SE Harold Ct Portland OR 97202	✓		✓	✓					
Kirchfeld, Friechehm	✓		✓	✓					

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2937 NE Flanders St Portland, OR 97232									
Klaas Larry 21725 Rickard Rd Bend OR 97702	✓	✓	✓						
Klingler Lee 2357-Z NW Irving St Portland OR 97210	✓						✓		
Know Leigh 1875 SW 187 <sup>th</sup> Aloha OR 97006	✓		✓						
Koenig John Toobert Deborah PO Box 10774 Eugene OR 97440	✓	✓	✓	✓			✓		
Koenig Matthew 355 S 8 <sup>th</sup> St, #30 Coos Bay OR 97420	✓	✓	✓	✓					
Korobeinikov Kapa 2340 SE Crystal Lake Dr Corvallis OR 97333	✓	✓	✓	✓			✓		
Krugar William 12542 Se Mt Scott Blvd Portland OR 97236									
Kupillas Sue 10 S Oakdale Medford OR 97501									
Lacy Carola 140 N 3 <sup>rd</sup> St Ashland, OR 97520	✓								
Lansdowne Jerry 12847 NW Alderview Dr Portland OR 97231			✓						
Larson Patricia 61931 Cottonwood Rd La Grande OR 97850									
Lawce John & Helen 6646 NE 63 <sup>rd</sup> Ave Portland OR 97218	✓		✓	✓			✓		
Layman Dorothy 10820 SE Meadowbrook Dr Tigard OR 97224	✓	✓	✓	✓					

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Ledger John Assoc OR Industries 1149 Court Street NE Salem OR 97301									
Lighty John & Merilee 33122 Oak Flat Rd Agness OR 97406	✓	✓					✓	✓	
Lillebo Tim OR Natural Resources 16 NW Kansas Ave Bend, OR 97701	✓		✓						
Lindley Walter 100 Rock Creek Rd Williams OR 97544				✓					
Lingenfelder 2896 Rogue River Hwy Gold Hill OR 97525	✓								✓
Linkogle, Jim 1924 Mohawk St Ashland, OR 97520	✓								
Loew Michelle 1241 W 13th Ave Eugene, OR 97402	✓	✓	✓	✓					
Lonsdale, Connie PO Box 2319 Waldport, OR 97394	✓	✓	✓						
Love, Glen & Rhoda 393 Fujiue Dr Eugene, OR 97405	✓	✓	✓	✓					
Lowe Whitney 237 NW St Helens Pl Bend OR 97701	✓	✓	✓	✓					
Lykovitch Walter 10915 SW hail Blvd #5 Tigard OR 97223									
Lynch Jack PO Box 351 Oregon City OR 97045	✓								
MacColl Kimbark Oregon Wildlife PO Box 30406 Portland OR 97294	✓	✓	✓	✓					

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Maier Dr Mab 56 Church St Ashland OR 97520	✓	✓	✓	✓					
Mandel Philip 8321 SW Lori Way Aloha OR 97007	✓	✓	✓	✓					
Mariett Bill OR Natural Desert Assoc 16 NW Kansas Bend, OR 97701									
Marshall Clyde 3925 NE 91st Ave Portland OR 97220	✓								
Marvel Jon Idaho Watersheds Project PO Box 1602 Hailey Idaho 83333									
Masters Christine PO Box 381 Roseburg, OR 97470									
Mayo Karen 2580 SE Crystal Lake Dr Corvallis, OR 97333	✓	✓	✓	✓					
McCartney Don & Carol 65935 Sisemore Rd Bend OR 97701	✓		✓	✓				✓	
McDow Barbara 14700 SE Regner Terrace Boring OR 97009				✓					
McKenna David 1670 Cinnamon Hill Dr SE Salem OR 97306									
McMillan Judith 2584 NW Overton St Portland OR 97210	✓		✓						
Michelson Jay 910 Talent Ave Talent OR 97540	✓	✓	✓	✓					
Michelsen Joan-Marie 200 Pine St Kalmar Falls OR 97601	✓								✓
Milbank M. Chapin				✓					

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PO Box 13687 Salem, OR 97309									
Miller Craig PO Box 6376 Bend OR 97708			✓	✓					
Miller Fred 4021 NE 22 <sup>nd</sup> Ave Portland OR 97212			✓	✓					
Mitchell, E. Wheaten Lane Veneta, OR 97487	✓	✓	✓	✓					
Moen, David B. 314 NE 47 <sup>th</sup> Portland, OR 97213	✓	✓	✓	✓					
Moore Jolynn 12775 NW Oak Ridge Rd Yamhill OR 97148		✓	✓	✓					
Moore Zephyr 2732 NE 15 <sup>th</sup> Portland OR 97212									
Morton Lajuana 840 S Main St Mt Angel OR 97362	✓								
Mumback Marus 830 W 21 <sup>st</sup> Ave Eugene, OR 97405	✓	✓	✓	✓					
Murdock Royal 4145 Alder St Eugene OR 97405	✓	✓	✓	✓	✓				
Myers Reuel 1002 E 10 <sup>th</sup> St Medford OR 97504		✓		✓				✓	
Myron Jim OR Trout 117 SW Front Ave Portland OR 97204									
Nahan Matthew Corvallis Area Forest Issues 535 NW 15 <sup>th</sup> St Corvallis OR 97330									
Neal Cheryl 12115 NE Skyline Blvd	✓		✓	✓			✓		



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Otley Fred OR Cattlemen's Assoc HC 72 Box 30 Diamond OR 97722									
Otley Harold Otley Brothers Inc HC 72 Box 31 Diamond OR 97722									
Pagen Lawrence 25590 Bellfountain Rd Monroe OR 97456	✓	✓	✓	✓					
Patrick Michael 1855 W main St Cottage Grove OR 97424	✓	✓	✓	✓		✓	✓		
Pavey Laurie 30800 S Arrow Ct Canby OR 97013	✓	✓						✓	
Pearce Oralee PO Box 2229 Waldport OR 97394									
Peterson Gail & Everett 9600 S Bank Dr Roseburg, OR 97470	✓		✓	✓					
Petty Walter 1979 Villard St Eugene OR 97403	✓	✓	✓	✓					
Phillips Bob 8512 SW 62 <sup>nd</sup> Ave Portland OR 97219									
Philpott, Darlene 21695 S McBurney Rd Beavercreek, OR 97004	✓	✓	✓	✓	✓				
Poddar Bhagwati Rt 4 Box 342 Astoria OR 97103	✓								✓
Palette Damai 4025 SE Hawthorne #120 Portland OR 97214	✓								
Pollock Robert & Jena 385 Oakview Dr Roseburg, OR 97470	✓	✓	✓	✓					
Porter MD, Phil	✓		✓						

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3624 Lawrence St SE Salem, OR 97302									
Posewitz Brian 8508 SE 11th Ave Portland OR 97202									
Powell Bruce 1600 SE Martha St Portland OR 97201	✓			✓	✓				
Powne Bob 8600 SW Leahy Rd Portland OR 97225									
Premselear Evelyn 69688 W Meadow Pkwy Sisters, OR 97759			✓	✓					
Ragan Joan 19461 SE 395th Ave Sandy OR 97055	✓								
Rayor Gary 2373 Washington St Eugene OR 97405	✓								
Read Larry PO Box 47 West Linn OR 97068	✓								
Remington Jack 64568 Findlay Lane Bend OR 97701	✓						✓		
Rendar Byron 3586 NE Stanton Portland OR 97212	✓	✓	✓						
Resident 656 W Humbug Applegate OR 97530									
Resident 2385 Lincoln St Eugene OR 97405									
Reynolds John W. 4471 Fairview Circus Portland OR 97221	✓			✓		✓			
Rhodes Jon 2330 SE Taylor St Portland OR 97214	✓		✓	✓					
Richardson Kristin	✓	✓	✓	✓					



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2002 Waverly Dr SE Albany OR 97321									
Richter Joanne 61845 Ten Barr Rd Bend OR 97701			✓	✓					
Riha Jeanne 904 NW 34 <sup>th</sup> St Corvallis OR 97330	✓		✓	✓					
Riley Mike 1590 NW Davenport Ave Bend, OR 97701			✓	✓					
Rio Shannon 872-1/2 B St Ashland OR	✓	✓	✓	✓					
Robinson Ronald 22720 Boones Ferry Rd NE Aurora OR 97002	✓								
Rocco Stan Lallas Laura 1333 NW 17 <sup>th</sup> St Corvallis OR 97330	✓	✓	✓	✓					
Rogers Henry PO Box 4637 Medford OR 97501			✓						✓
Roppe James 7175 S Highland Powell Butte, OR									
Rosier Arlie PO Box 1223 Sherwood OR 97140	✓								
Russell Douglas 1896 SW Brooklane Dr Corvallis OR 97333	✓		✓						
Ryan, MD, W. Michael 9155 SW Barnes Rd, #410 Portland, OR 97034			✓						
Salveson Stephen 3727 SE Spruce St Hillsboro Or 97123	✓			✓			✓		
Sarkkinen Dale & Bobby 1238 NE Scenic Madras, OR 97741	✓		✓	✓					



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Mailh Owyhee Water Council 2925 SW 6th Ave, #2 Ontario, OR 97914									
Shumaker Terence 16159 S Halcomb Blvd Oregon City OR 97045	✓	✓	✓	✓					
Siffen Esther PO Box 3426 Ashland OR 97520	✓	✓	✓	✓					
Silverstein Todd 1735 20th St NE Salem OR 97303	✓	✓	✓	✓					
Sims Patricia 13617 SE Grant Ct Portland OR 97233	✓	✓	✓	✓					
Sjogren Karen 339 Senate St NW Salem OR 97304	✓	✓	✓	✓	✓	✓			
Sorenson, Allan 3145 Ivy Glen Dr Eugene, OR 97402		✓	✓	✓					
Staines Dennis PO Box 622 Sisters, OR 97759	✓	✓							
Stanger Andrew 4323 Sunset Dr Lake Oswego OR 97035	✓		✓	✓				✓	
Steinberg Thomas 1830 Washington St Eugene OR 97401		✓		✓		✓			
Stensland Mark PO Box 368 Welches OR 97067	✓					✓			
Steme Jack PO Box 922 Sisters OR 97759									
Stevenson, Francis 60498 Arnold Mkt Rd Bend, OR 97701	✓	✓	✓	✓		✓			
Stewart Janet 5195 SW Sherwood Pl Beaverton OR 97005	✓	✓	✓	✓					

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Stilwell Carrie W Env Law Center 1216 Lincoln St Eugene OR 97401									
Stone Beverly HC 60 Box 1954 Lakeview OR 97630	✓		✓			✓	✓		
Stone George 3384 SE 16th Ave Portland OR 97202				✓				✓	
Stonebrink Ioydee W Institute of Nature PO Box 190 Rickreall OR 97371									
Strauss Evelyn 2301 Siskiyou Blvd #313 Ashland OR 97520	✓								
Strong Ted Cal Intertribal Fish Comm 729 NE Oregon #200 Portland, OR 97232									
Tanner Jean 156 SW Kingston Portland OR 97201								✓	
Tattam Bill Tattam Ian 4602 SW 55th Pl Portland, OR 97221	✓		✓	✓					
Teague Jeffrey 6220 SW 130th #12 Beaverton OR 97008	✓	✓				✓		✓	
Tennyson Eugene 181 Littrell Dr Medford OR 97504			✓	✓					
Thau Holly 513NW 3rd Pendleton OR 97801	✓	✓		✓					
Tichenor Steven PO Box 1874 Grants Pass OR 97526	✓	✓	✓	✓					
Titus Jon & Priscilla 1533 SE 33rd Ave, #2	✓			✓					

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Portland OR 97214									
Tracy Nancy Lou 7310 SW Pine St Portland OR 97223	✓	✓	✓	✓					
Tucker Julia 425 Ashland St Ashland OR 97520		✓	✓						
Lillman Carl 1218 Buck Island Dr Klamath Falls OR 97601	✓		✓	✓					
Valita Brad PO Box 810 Chiloquin OR 97624									
Van Kirk Fred 10290 SE Eastmont Dr Gresham OR 97080		✓		✓					
Vandaveer Marie Bush Animal Clinic 806 NW Brooks St Bend, OR 97701									
Vejtasa Stan & Kathy 1416 E Park St Grants Pass OR 97527	✓		✓	✓					✓
Verref, Cathy 2450 Polter Eugene, OR 97405	✓	✓	✓	✓					
Viani Nick & Sooney 1010 Paradise Lane Ashland OR 97520	✓	✓	✓	✓					✓
Vroman, Dennis P. 269 Sheland Dr Grants pass, OR 97526	✓							✓	
Wagner Kate 900 Oak Ashland OR 97520	✓	✓	✓	✓					
Waller, Patricia 5321 Avenir Dr. Grants Pass, OR 97526	✓								
Walters James PO Box 263 Chiloquin OR 97624	✓			✓					
Ward Anita				✓					

Name/Address	Strengthen rules to protect streams, water quality, fish	Need action now, fish can't wait	Rest or deny cert. on polluted streams until water quality standards are met	Where there is no data, require monitoring as condition of cert.	Where there is no data, require monitoring before certification	Livestock damage streams and habitat	Livestock damage streams, I've seen it	Restrict grazing along streams	Hold the livestock industry accountable for its pollution
Friends of Greensprings 15097 Hwy 66 Ashland OR 97520									
Wannock Dan Rt 1 Box 16 Baker City OR 97814									
Ward John Ward's Herefords 129 Southshore Lane Klamath Falls OR 97601									
Weeks Hal American Fisheries Society PO Box 722 Corvallis, OR 97339									
Weiner, Hank 513 NW 3 <sup>rd</sup> Pendleton, OR 97801	✓	✓	✓	✓					
Whitaker Evan 12665 SW 1346 <sup>th</sup> Ct Tigard OR 97223									
White Dale Harney County Court PO Box 699 Burns OR 97720									
White Rita 37142 Se Bluff Rd Boring OR 97009					✓				
White, Stephen 13150 SW Fielding Lake Oswego, OR 97034	✓	✓							
Whitney Matt 415 N Bridgeton Rd 32 Portland OR 97217	✓		✓						
Wiemann Tom PO Box 276 Corbett OR 97019			✓	✓					
Williams Bob GI Ranch Paulina OR 97751									
Willmon Ken 59695 Caigary Dr Bend, OR 97702	✓	✓	✓	✓					

Name/Address	Strengthen rules to protect streams, water quality, fish	Need action now, fish can't wait	Rest or deny cert. on polluted streams until water quality standards are met	Where there is no data, require monitoring as condition of cert.	Where there is no data, require monitoring <u>before</u> certification	Livestock damage streams and habitat	Livestock damage streams, I've seen it	Restrict grazing along streams	Hold the livestock industry accountable for its pollution
Wilson, Katherine 16282 Nonparell Rd Sutherlin, OR 97479	✓	✓	✓	✓					
Winegar Harold 947 E 1st Prineville OR	✓							✓	✓
Wingard Patrick 140 Alida St #7 Ashland OR 97520	✓	✓	✓	✓					
Wolf Elise 237 NW St Helens Pl Bend OR 97701	✓	✓	✓	✓					
Wuerfner George 1990 Augusta St Eugene OR 97403	✓		✓	✓					
Zahl Constance 3210 SW Hailey Pl Pendleton OR 97801	✓								
Zielinski Elaine US Dept of Interior PO Box 2965 Portland OR 97208									
Zurfluh 72 Land & Cattle PO Box 798 Crane OR 97732									
Zwicki Susanne 337 Country Aire Dr Grants Pass OR 97526		✓		✓		✓			
Oral									
Carriger Michael 333 State St Salem, OR 97301	✓		✓		✓				
Collins, Eleanor Edmondson - 176 Teel Ln Grants Pass OR 97527		✓	✓	✓					
Crume Rex 1398 Devils Knob Rd Tiller OR 97484									
Erickson Larry 2470 SW 173rd Ct		✓	✓		✓				





Name/Address	Strengthen rules to protect streams, water quality, fish	Need action now, fish can't wait	Rest or deny cert. on polluted streams until water quality standards are met	Where there is no data, require monitoring as condition of cert.	Where there is no data, require monitoring before certification	Livestock damage streams and habitat	Livestock damage streams, I've seen it	Restrict grazing along streams	Hold the livestock industry accountable for its pollution
Grants Pass OR 97517									
Scurlock Mary 10575 NW Skyline Blvd Portland OR 97231									
Sjogren Karen 339 Senate St NW Salem OR 97304									
Stonebrink Glen PO Box 190 Rickreall OR 97371									
Test Pete 3415 Commercial St SE Salem OR 97302									
Vejtasu Kathy 1416 E Park St Grants Pass OR 97527									
Vroman Dennis Siskiyou Audubon Society 269 Shetland Dr Grants pass OR 97526									
Wilkinson Jean 3415 Commercial St SE Salem OR 97302									
Wilson Marty 18660 S Greenview Dr Oregon City OR 97045	✓	✓							

Name	Strengthen rules to protect streams, water quality, fish	Need action now, fish can't wait	Rest or deny cert. on polluted streams until water quality standards are met	Where there is no data, require monitoring as condition of cert.	Where there is no data, require monitoring before certification	Livestock damage streams and habitat	Livestock damage streams, I've seen it	Restrict grazing along streams	Hold the livestock industry accountable for its pollution
No Address									
Aldrich Nancy									
Barnett Norman									
Beaverton School District									
Besant Linda			✓	✓					
Blakeslee Gary		✓	✓	✓	✓				
Bowers Jon			✓	✓					
C (?) Steve	✓						✓		
Cain James	✓	✓					✓		
Cain Jon	✓	✓	✓	✓					
Cerra Joshua	✓	✓	✓	✓					
Clark Britten	✓	✓	✓	✓				✓	✓
Cochron Holly & Marty	✓	✓	✓	✓				✓	
Corliss Grant	✓	✓		✓					
Crosby Carlisle	✓	✓	✓	✓					
Cusack Charles R	✓	✓	✓	✓					
Danehy Edward	✓	✓	✓	✓					
DeHart Douglas & Michele				✓					
Despain Jean Marie	✓			✓					
Drake Marian			✓				✓		
Durcharme Suzette	✓	✓	✓	✓					
Eggleston Dan		✓	✓	✓		✓			
Finn Melissa	✓	✓	✓	✓	✓				
Fisher Dennis	✓	✓	✓	✓					
Francisco Ernestine	✓	✓	✓	✓	✓				
Frost Mike	✓	✓	✓	✓	✓				
Geary Marceline	✓	✓	✓	✓	✓				
Goetsch, MD, Martha									
Goodman Rachel			✓	✓					
Griffiths John	✓		✓	✓					
Gritska Tom	✓	✓	✓	✓					

Name	Strengthen rules to protect streams, water quality, fish	Need action now, fish can't wait	Rest or deny cert. on polluted streams until water quality standards are met	Where there is no data, require monitoring as condition of cert.	Where there is no data, require monitoring before certification	Livestock damage streams and habitat	Livestock damage streams, I've seen it	Restrict grazing along streams	Hold the livestock industry accountable for its pollution
Harrison Fred	✓	✓	✓		✓		✓		
Hulbert Ted	✓	✓							
Jacobsen Brad	✓	✓	✓						
Johnson Dan	✓		✓						
Katz David	✓	✓	✓	✓					
Kelley Goeff	✓	✓	✓						
Kieszynski Kenneth	✓	✓	✓	✓					
Kloster Tom	✓		✓	✓					
Kolb Kenneth	✓	✓							
Kudasik Karen	✓		✓	✓	✓				
Lacy Craig	✓	✓							
Lear D									
Larue Kathy	✓	✓		✓					
Leatham Ellen			✓	✓					
MJDK84A	✓								
McClure Judith		✓							
McGuire Paul									
McKinney Ann	✓								
Mitchell Chuck		✓	✓	✓					
Mueller Gary		✓	✓	✓	✓				
Nichols Nancy	✓	✓	✓	✓					
O'Donnell Barney								✓	
Pastega Richard L	✓	✓							
Petfit Nelson		✓	✓	✓					
Phillips Dennis	✓	✓							
Powell Jeff	✓							✓	
Pro Ron			✓	✓					
Quenell Leslie	✓		✓				✓		
Radle Autumn			✓						
Robinson Peggy	✓		✓	✓					
Roose Carrie		✓	✓						
Salvo Mark	✓		✓						

Name	Strengthen rules to protect streams, water quality, fish	Need action now, fish can't wait	Rest or deny cert. on polluted streams until water quality standards are met	Where there is no data, require monitoring as condition of cert.	Where there is no data, require monitoring <u>before</u> certification	Livestock damage streams and habitat	Livestock damage streams, I've seen it	Restrict grazing along streams	Hold the livestock industry accountable for its pollution
Schauer Brent	✓		✓	✓					
Schaver D			✓	✓					
Schultz Darcy			✓						
Shaffer Tom									
Sheilah Toomey	✓		✓						
Shepardson Stan				✓				✓	
Shepardson Susan			✓		✓				
Slabaugh Mary			✓		✓				
Smith Dennis F.	✓		✓		✓				
Sutherland Jerry J.	✓			✓				✓	
Thomas Emily			✓						
Trout Dick		✓							
Tukla Louis	✓			✓					
Turner David	✓								
Van Hay Jeff	✓								
Whiting Allan	✓								
Wilbur Kimberly									
William Elliot									
Williams G. Phillips	✓		✓						
Williams Jeff									
Winthrop Kevin	✓								
wra26									
Yates Scott			✓						

## Detailed Changes to Original Rulemaking Proposal Made in Response to Public Comment

### WATER QUALITY CERTIFICATION

#### 340-048-0010 Definitions

The following definitions apply to terms in this division unless a different meaning is clearly indicated by context:

- (1) "Certification" means a written declaration by the Department of Environmental Quality, signed by the Director, that a project or activity subject to federal permit or license requirement will not violate applicable water quality requirements or standards. Certification must include a statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards and other appropriate requirements of state law.
- (2) "Clean Water Act" means the Federal Water Pollution Control Act of 1972, Public Law 92-500, as amended.
- (3) "Coast Guard" means U.S. Coast Guard.
- (4) "Commission" means Oregon Environmental Quality Commission.
- (5) "Corps" means U.S. Army Corps of Engineers.
- (6) "Department" or "DEQ" means the state Department of Environmental Quality.
- (7) "Director" means Director of the Department of Environmental Quality or the Director's authorized representative.
- (8) "Agricultural Water Quality Management Area Plan" means an ODA approved plan for the prevention and control of water pollution from agricultural activities and soil erosion in a management area whose boundaries have been designated under ORS 568.909.
- ~~(9) "Ecological Site" means a kind of rangeland with a specific potential natural community and specific physical site characteristics, differing from other kinds of rangeland in its ability to produce vegetation and to respond to management. Ecological sites are defined and described with soil, species composition, and production emphasis. Ecological site is synonymous with range site and ecological type.~~
- ~~(10)~~ "Federal permitting agency" or "federal agency" means those agencies which grant federal grazing permits such as the United States Bureau of Land Management, Fish and Wildlife Service, Forest Service and National Park Service.
- ~~(10)~~ "Grazing Permit" means a document authorizing grazing use of lands managed by a federal agency, including grazing leases. Grazing permits specify all authorized use including livestock grazing, and suspended use, ~~and conservation use~~. Permits specify the maximum number of animals

Land Management (BLM), the term "grazing permit" is used to designate those areas within a grazing district, while the term "grazing lease" is used to designate those areas outside an established grazing district.

(112) "High Quality Waters" has the meaning given in OAR 340-041-0006.

~~(13) "Key Area" means a relatively small portion of a range selected because of its location, use or grazing value as a monitoring point for grazing use. It is assumed that key areas, if properly selected, will reflect the overall acceptability of current grazing management over the range.~~

~~(14) "Key Species" means (1) forage species whose use serves as an indicator to the degree of use of associated species. (2) those species which must, because of their importance, be considered in the management program.~~

(125) "Livestock" means any type of animal for which a grazing permit may be issued by a federal permitting agency and includes but is not limited to horses, mules, asses, cattle, sheep, goats, swine, and fowl.

(136) "ODA" means the Oregon Department of Agriculture.

(147) "Ordinary high-water mark" means the point on the streambank or shore up to which the presence and action of surface water is so continuous as to leave a distinctive mark such as by erosion, destruction or prevention of terrestrial vegetation, predominance of aquatic vegetation, or other recognizable characteristics.

(158) "Person" means the United States and agencies thereof, any state, any individual, public or private corporation, political subdivision, governmental agency, municipality, copartnership, association, firm, trust, estate or any other legal entity whatever.

(169) "Potential Natural Community" means the biotic community that would become established if all successional sequences were completed without interference by human beings under the present environmental conditions. Natural disturbances are inherent in development. PNC's can include naturalized non-native species.

~~(20) "Proper Functioning Condition (PFC)" means riparian wetland areas are functioning properly when adequate vegetation, landform, or large woody debris is present to dissipate stream energy associated with high water flows, thereby reducing erosion and improving water quality; filter sediment, capture bedload, and aid floodplain development; improve flood water retention and ground-water recharge; develop diverse ponding and channel characteristics to provide the habitat and the water depth, duration, and temperature necessary for fish production, waterfowl breeding, and other uses; and support greater biodiversity. The functioning condition of riparian wetland areas is site specific and is a result of interaction among geology, soil, water, and vegetation.~~

(217) "Riparian area" means a zone of transition from an aquatic ecosystem to a terrestrial ecosystem, dependent upon surface or subsurface water, that reveals through the zone's existing or potential soil-vegetation complex, the influence of such surface or subsurface water. A riparian area may be located

adjacent to a lake, reservoir, estuary, pothole, spring, wet meadow, muskeg or ephemeral, intermittent or perennial stream .

(1822) "Riparian Pasture" means a management unit (paddock or pasture) covering a riparian area which may be managed differently than upland units within a permit area. This management is keyed to characteristics which may differentiate riparian areas from upland areas such as plant community composition, plant development, soil conditions, and forage composition.

~~(23) "Site Specific Criteria" means biological and physical characteristics (soils, climate, landform, vegetation, and others) which provide the conditions under which a site functions. Evaluations of these characteristics may result in a description of site potential or the capability of the site to develop and support a particular potential natural plant community (PNC). Unique potential site conditions can be described as Range Site (NRCS) or Ecological Site (BLM).~~

~~(24) "Site Capability" means The highest ecological status a riparian-wetland area can attain given political, social, or economical constraints. These constraints are often referred to as limiting factors.~~

(1925) "Site Potential" means the highest ecological status an area can attain given no political, social, or economical constraints; often referred to as the "potential natural community" (PNC).

(206) "Vegetative Cover" means live plants, and plant litter and residue.

~~(27) "Wastes" has the meaning given in ORS 468B.005(7).~~

(218) "Water" or "waters of the state" has the meaning given in ORS 468B.005(8).

(229) "Water quality limited" has the meaning given in OAR 340-041-0006.

Sat. Author.: ORS 183.335 561.191; ORS 468.020; ORS 468b.035

Sat. Imp.: 33 USC 1341; ORS 468B.035

Hist.: DEQ 18-1985, f. & ef. 12-3-85

## APPLICATION FOR CERTIFICATION

~~340-048-0020 (1) This rule does not apply to Except as provided in OAR 340-48-022 ( applications filed with Division of State Lands) pursuant to OAR 340-048-0022 or applications for federal grazing permits pursuant to and OAR 340-048-0120 to 340-048-0160. 23 (application requirements for federal grazing leases), applications for certification are subject to the provisions outlined in section (2) of this rule.~~

(2) An application containing the following information must be filed with DEQ:

- (a) Legal name and address of the project owner.
- (b) Legal name and address of owner's designated official representative, if any.
- (c) A description of the project location sufficient to locate and distinguish proposed project facilities.
- (d) Names and addresses of immediately adjacent property owners.

- (e) A complete description of the project proposal, using written discussion, maps, diagrams, and other necessary materials.
- (f) Name of involved waterway, lake, or other water body.
- (g) Copies of the environmental background information required by the federal permitting or licensing agency or such other environmental background information as may be necessary to demonstrate that the proposed project or activity will comply with water quality requirements.
- (h) Copy of any public notice and supporting information, issued by the federal permitting or licensing agency for the project.
- (i) An exhibit which:
  - (A) Identifies and cites the specific provisions of the appropriate local land use plan and implementing regulations that are applicable to the proposed project;
  - (B) Describes the relationship between the proposed project and each of the provisions identified in paragraph (A) of this section; and
  - (C) Discusses the potential direct and indirect relationship to water quality of each item described in paragraph (B) of this section.
  - (D) If specific land use compatibility findings have been prepared by the local planning jurisdiction, these findings should be submitted as part of this exhibit and may be substituted for the requirements in paragraphs (A) and (B) of this section.
- (j) For hydroelectric projects, an exhibit which:
  - (A) Identifies and cites the applicable provisions of ORS 469.371 and 543.017 and implementing rules adopted by the Energy Facility Siting Council and Water Resources Commission;
  - (B) Describes the relationship between the proposed project and each of the provisions identified in paragraph (A) of this section; and
  - (C) Discusses the potential direct and indirect relationship to water quality of each item described in paragraph (B) of this section.
- (k) An exhibit which identifies and describes any other requirements of state law applicable to the proposed project which may have a direct or indirect relationship to water quality.

(3) The DEQ reserves the right to request any additional information necessary to complete an application or to assist the DEQ to adequately evaluate the project impacts on water quality. Failure to complete an application or provide any requested additional information within the time specified in the request shall be grounds for denial of certification.

(4) The department shall notify the applicant by certified mail of the date the application is determined to be complete. The application will be immediately deemed complete if a preliminary review indicates that all information required by section (2) of this rule is provided and the exhibit required by subsection (i) of section (2) contains findings of the local planning jurisdiction. If findings of the local planning jurisdiction are not included, the Department shall forward the exhibit submitted in response to subsection (i) of section (2) to the local planning jurisdiction for review and comment. The application shall not be deemed complete until the local planning jurisdiction provides comments to the Department, or 60 days have elapsed, whichever occurs first. If no comment is received within the 60 day period, the Department will continue to seek information from the planning jurisdiction, but will deem the application complete and proceed with evaluation of public notice as provided in section (5) of this rule.



(5) In order to inform potentially interested persons of the application, a public notice announcement shall be prepared and circulated in a manner approved by the Director. Notice will be mailed to adjacent property owners as cited in the application. The notice shall tell of public participation opportunities, shall encourage comments by interested individuals or agencies, and shall tell of any related documents available for public inspection and copying. The Director shall specifically solicit comments from affected state agencies. The Director shall provide a period of not less than 30 days following the date of the public notice during which time interested persons may submit written views and comments. All comments received during the 30-day period shall be considered in formulating the Department's position. The Director shall add the name of any person or group upon request to a mailing list to receive copies of public notice.

(6) The Director shall provide an opportunity for the applicant, any affected state, or any interested agency, person, or group of persons to request or petition for public hearing with respect to certification applications. If the Director determines that new information may be produced thereby, a public hearing will be held prior to the Director's final determination. Instances of doubt shall be resolved in favor of holding the hearing. There shall be public notice of such a hearing.

(7) In order to make findings required by OAR 340-048-0025(2), the Department's evaluation of an application for project certification may include but need not be limited to the following:

- (a) Existing and potential beneficial uses of surface or groundwater which could be affected by the proposed facility.
- (b) Potential impact from the generation and disposal of waste chemicals or sludges at a proposed facility.
- (c) Potential modification of surface water quality or water quantity as it affects water quality.
- (d) Potential modification of groundwater quality.
- (e) Potential impacts from the construction of intake or outfall structures.
- (f) Potential impacts from waste water discharges.
- (g) Potential impacts from construction activities.
- (h) The project's compliance with plans applicable to Section 208 of the Federal Clean Water Act.
- (i) The project's compliance with water quality related standards established in Section 3 and 5 of Chapter 569. Oregon Laws 1985 (OAR 543.017 and 469.371) and rules adopted by the Water Resources Commission and the Energy Facility Siting Council implementing such standards.

Stat. Author.: ~~ORS 183.335~~; ORS 468.020; ORS 468B.035

Stat. Imp.: 33 USC 1341; ORS 468B.035

Hist.: DEQ 18-1985, f. & ef. 12-3-85; DEQ 1-1987, f.& ef. 1-30-87

#### **DIVISION OF STATE LANDS - COORDINATED RESPONSE**

**340-048-0022** For projects or activities where the Division of State Lands is responsible for compiling a coordinated state response (normally applications requiring permits from the Corps or Coast Guard), the following procedure for application and certification shall apply.

- (1) Application to the federal agency for a permit constitutes application for certification.
- (2) Applications are forwarded by the federal agency to the Division of State Lands for distribution to affected agencies.
- (3) Notice is given by the federal agency and Division of State Lands through their procedures. Notice of request for DEQ certification is circulated with the federal agency notice.
- (4) All comments including DEQ Water Quality Certification are forwarded to the Division of States Lands for evaluation and coordination of response. The Division of State Lands is responsible for assuring comparability with the local comprehensive plan or compliance with statewide planning goals.
- (5) Evaluation of the application will be consistent with the provisions of OAR 340-048-0020(7).

Stat. Author.: ~~ORS 183.355; ORS 468.020; ORS 468B.035~~

Stat. Imp.: 33 USC 1341; ORS 468B.035

## WATER QUALITY CERTIFICATION - FEDERAL GRAZING PERMITS

### **340-048-0100 Background and Purpose**

Section 401 of the Federal Clean Water Act requires that any applicant for a federal license or permit to conduct any activity which may result in a discharge to waters of the United States, must provide the licensing or permitting agency certification from DEQ of compliance with water quality requirements and standards. The DEQ and ODA jointly developed rules for 401 certificates of federal grazing permits. ~~The ODA rules provide the conditions to be placed into a 401 Certification to assure compliance with state water quality standards and other state law. The DEQ rules to provide the authority and process for certifying federal grazing permits that will not violate state water quality standards and other applicable requirements of state law.~~

Rules 340-048-0100 to -0160 ~~The rules in this division~~ apply to water quality certification of livestock grazing on lands managed by federal agencies within the State of Oregon as required under Clean Water Act § 401 (33 USC § 1341).

**Note:** A federal district court entered judgment on November 29, 1996, that requires 401 Water Quality Certification for US Forest Service grazing permits.

~~The authority to develop and adopt rules for the issuance of 401 Certification for grazing activities is provided in ORS 183.355; ORS 468.020; ORS 468B.035; ORS 561.190; and ORS 561.191~~

Stat. Author.: ORS 468.020; ORS 468B.035; ORS 561.190; ORS 561.191

Stat. Imp.: 33 USC 1341; ORS 468B.035

### **340-48-0110 Certification Policy and Options and Process**

(1) Any person seeking a grazing permit from a federal agency may request water quality certification from DEQ.

(2) Following ODA review and evaluation of the application described in Section 340-048-0120, DEQ may issue an individual or general certification based on a finding that there is reasonable assurance that the activity will be conducted in a manner which will ~~comply with applicable~~ not violate water quality standards and other appropriate requirements of state law.

(a) On water quality limited waters, certification may be granted if the proposed activity, as conditioned, is conducted in a manner which does not further degrade water quality and is ~~conducted in a manner which~~ will allow the site characteristics that influence the water quality parameters of concern to improve.

(b) On water quality limited waters, certification will be denied if the proposed activity is expected to maintain or further degrade the current site conditions where those conditions influence the water quality parameters of concern.

(c) On high quality waters, certification ~~will~~ may be granted if the proposed activity is expected to ~~maintain the current water quality conditions and meet the~~ DEQ's antidegradation policy [OAR 340-041-0026 (1) (a)].

(3) Water quality certifications are valid for the term of the permit except as provided elsewhere in these rules.

(4) Individual Certification. A person who does not qualify for a general certification as specified in section (5) below may apply for individual certification of their proposed activity.

(5) General Certifications:

(a) An applicant may request to be certified under a general certification. The applicant must identify the general certification that covers their proposed activity and provide to DEQ the information specified under OAR 340-048-0120(2) below. DEQ/ODA must determine within 30 days whether an individual certification will be required and notify the applicant if an individual certification is required and of the additional application requirements.

(b) A federal agency may request the development of a general certification of all its grazing permits within a specified geographical area or categorical description as specified below. The federal agency ~~shall~~ must submit the proposed conditions of the general certification along with information supporting the proposition that the activity conducted under these conditions will comply with applicable water quality standards and other appropriate requirements of state law.

(c) General certifications may be issued under one or more of the following circumstances:

(A) For areas where a ~~A~~ water quality management plan has been approved by DEQ or ODA ~~for purposes of meeting the requirements of section 303 of the Clean Water Act.~~

(B) For permits within the watersheds of high quality waters within a specified geographic area where grazing has been an on-going land use and the federal plans in place are preventing degradation of water quality.

(C) For areas where the permit requires that one or more of the following management strategies is applied to all the intermittent or perennial streams on the area affected by the permit:

1. Riparian pasture where utilization of the riparian pasture is specifically designed to meet stream and riparian restoration goals established for the purpose of attaining water quality standards.
2. Riparian corridor fencing that excludes livestock from the riparian area and stream, except for limited access for watering purposes, or
3. Rest or closure.

(D) For areas where ~~If~~ the pollution prevention and control measures and standards and guidelines contained in the applicable federal agency plans, decision notices and/or records of decision, meet or exceed the ~~conditions for~~ certification criteria described in section 340-048-0140 of these rules, a general certification can be issued for permits within a specified geographic area covered by those plans.

(d) DEQ will provide an opportunity for public comment of not less than 45 days on draft proposed general certifications prior to the issuance of the general certification.

(e) DEQ or ODA may require an individual certification of any permit applicant within an area covered by a general certification if DEQ or ODA determine that there is a need for an individual certification due either to particular characteristics of the allotment or the proposed activity which make the general certification insufficient, or due to the compliance history of the applicant on matters relevant to water quality.

(f) General certifications may be revised or ~~withdrawn-voided~~ at any time DEQ and ODA determine such action is needed and shall be reviewed no less than once every 5 years to ensure that the provisions and conditions of the general certification are adequate to protect water quality. The provisions and conditions of the updated general certification will be incorporated as conditions of the grazing permits when those permits are issued, renewed, or otherwise open for review and amendment.

(6) Persons proposing to graze areas that have no waters of the United States within or adjacent to the grazed area and that have no significant chance of discharge to such waters are not required to obtain a water quality certification.

(7) Following consultation with the federal permitting agency, permittees who have received a water quality certification and are grazing under a federal permit shall notify DEQ if the nature of the certified activity changes significantly in a manner that may adversely impact water quality. DEQ, at its own discretion and in consultation with ODA, may revise or withdraw the certification based on the proposed changes in grazing activity.

Stat. Author.: ORS 468.020; ORS 468B.035; ORS 561.190; ORS 561.191  
Stat. Imp.: 33 USC 1341; ORS 468B.035

### **340-048-0120 Application Requirements and Review for Grazing Certifications**

(1) An application for individual water quality certification shall be submitted to DEQ and must include the following information:

(a) Legal name and address of the applicant;

(b) Legal name and address of the designated official representative of the person seeking a federal grazing permit, if any;

(c) Name of the federal agency with authority to approve the grazing permit;

(d) Identification of all waterbodies and those listed as water quality limited under the Clean Water Act Sec. 303(d) in the area of the permitted activity, and the parameters of concern. Statement of how the proposed grazing activity will comply with State of Oregon water quality requirements and address waterbodies listed as water quality limited under the Clean Water Act Sec. 303(d);

(e) Description of the grazing activity. Included in this description will be a reference to type, number and class of livestock, ~~and the season and duration of use and the grazing system proposed.~~

(f) Statement of current upland, riparian and water quality conditions, and identification of historic and present livestock contributions to water quality limitations. Include identification of assessments and monitoring programs used to develop this statement as well as the most recent inspection report. Other material which might be used to evaluate the application include aerial photographs, PFC assessments as referenced in Bureau of Land Management Technical Reference Publication 1737-9, 1993, Revised 1995, and utilization maps.

(g) Description of present and proposed site condition management objectives and pollution prevention and control measures to ~~address the permitted grazing activities contribution be utilized to the protection protect~~ of water quality. The description should include identification of required range improvement projects and funds needed.

(h) Identify elements to be monitored to document implementation of the proposed grazing program, trend in stream, riparian and site conditions related to water quality and progress toward achieving the objectives stated under (g) above. Summarize the federal agency monitoring program used to document change, trend and rate. Management objectives can be used to design and implement the monitoring effort and gauge the degree to which compliance is taking place.

(i) Map of the allotment showing locations of streams and any 303(d) listed streams.

(2) Any person seeking water quality certification under a general certification must include the following information in their application to DEQ:

- (a) Legal name and address of the person seeking a federal grazing permit;
- (b) Legal name and address of the designated official representative of the person seeking a federal grazing permit, if any;
- (c) Name of the federal land management agency with authority to approve the grazing permit;
- (d) Any information necessary to determine that the proposed grazing permit qualifies for coverage under the specified general certification.

(35) DEQ and ODA may request information on and consider an applicant's compliance history when deciding whether to certify the proposed activity, or to certify under a general certification. A permittee's compliance history is relevant to the finding that the State must make that there is reasonable assurance that the activity will be conducted in a manner that complies with water quality standards and other appropriate requirements of state law.

(4) The applicant will be notified by certified mail of the date the application is determined to be complete.

(53) If DEQ or ODA determine that an application is not complete or that additional information is necessary to adequately evaluate the activity's impact on water quality, DEQ shall notify the applicant and

- (a) return the application as incomplete; or
- (b) request additional information.

(64) In order to inform potentially interested persons of an application for individual certification, a public notice shall be prepared and circulated. Public notice for general certifications shall be issued in accordance with OAR 340-48-0110(5)(d) above at the time of development of the general certification.

Interested persons, including local governments, special districts, and agencies of the state or federal government, may request to be notified of applications for certification. DEQ will mail or electronically transmit a copy of a complete application to persons requesting an application within seven days after such a request is made. ~~This request may be limited to applications within a specific geographical area.~~ DEQ and ODA will consider written comments received by the Department within 30 days from date of DEQ mailing of notification.

(7) The Director shall provide an opportunity for the applicant, any affected state, or any interested agency, person, or group of persons to request or petition for public hearing with respect to certification applications. If the Director determines that new information may be produced thereby, a public hearing will be held prior to the Director's final determination. There shall be public notice of such a hearing.

Stat. Author.: ORS 468.020; ORS 468B.035; ORS 561.190; ORS 561.191  
Stat. Imp.: 33 USC 1341; ORS 468B.035

**340-048-0130 Contents of Certification of Grazing Activity**

(1) The certification of grazing activity on federal lands shall include:

(a) a statement that there is reasonable assurance that the activity will be conducted in a manner which will ~~comply with~~ not violate applicable water quality standards and other appropriate requirements of state law, and

(b) a statement of any conditions which the ODA deems necessary in order to make the finding in (a) above.

(2) For grazing activity, the contents of certification specified in this rule supersede OAR 340-048-0025 (2).

**340-048-0140 Grazing Certification Evaluation Criteria**

ODA will ~~be use~~ the following criteria to evaluate all activities authorized by new and renewed grazing permits for lands managed by federal agencies within the State of Oregon ~~and that require certification under Clean Water Act § 401 (33 USC § 1341), and make a~~ ODA will determine the necessary conditions of certification and recommendation to DEQ whether to grant or deny ~~or certification or denial of the activity, and any conditions to be imposed.~~

These criteria are based on objectives which guide the site specific management of individual grazing permits. These objectives ~~will~~ may integrate Best Management Practices (BMPs) in order to fully address water quality standards. ~~Best Management Practices would include stipulations regarding season of use, number of animals, intensity of use, kind and class of livestock, types of grazing systems applied, the spatial distribution of grazing, and others. The manner in which these BMPs are applied will depend on local conditions and site~~ potential capability.

The effects of actions resulting from activities specified in the grazing permit are the responsibility of the permittee. ~~Therefore, certification conditions apply only to management activities covered by the grazing permit.~~ Exceptional circumstances that are not related to these management activities will not be considered as part of the application review.

(1) Grazing management practices

(a) All grazing management practices shall be based on site potential and ~~site capability which determine~~ a site's ability to respond to management actions.

(b) The season, timing, frequency, duration and intensity of livestock grazing use ~~including rest~~ shall be managed to improve the following components on water quality limited waters and maintain or improve these components on waters that are not water quality limited.

(A) vegetative cover and soil conditions that promote water infiltration, conserve soil moisture and maintain soil stability in upland areas;

(B) vegetative cover and plant community structure to promote streambank stability, debris and sediment capture, shade to moderate water temperature, and floodwater energy dissipation in riparian areas;

(C) diverse riparian plant populations and communities that enhance soil stability and increase water infiltration and storage.

(2) Rest From Grazing

(a) Rest from grazing is an appropriate alternative to improve riparian conditions.

(32) Livestock Dispersement Activities

(a) Livestock dispersement practices such as fencing, herding, water development, and the placement of salt and supplements shall be used where appropriate to:

(A) promote livestock distribution; and

(B) maintain the integrity of riparian areas; and other areas sensitive areas for the purpose of protecting water quality and minimize livestock influence on streambank erosion. In certain prescribed cases, short term concentrations of livestock may be called for in the grazing system.

(43) Livestock Handling Activities

(a) Existing livestock handling facilities (corrals, water troughs) within riparian areas shall be managed to ensure no placement, delivery, or sloughing of sediment into waters of the state.

(b) Future development shall avoid placement of livestock handling facilities in riparian areas.

(c) Livestock management activities including trailing, bedding, watering, loading, salting, and other handling activities shall be limited to those areas and times that shall not reduce the quality of waters of the state below the quality standards established by rule for such waters by the Environmental Quality Commission.

(54) Monitoring Activities

~~(a) Water quality trend data can be a condition of general certification and can be included in a Memorandum of Agreement with the federal agencies.~~

~~(b)~~ Parameters must be selected to demonstrate trend in stream, riparian and site conditions related to water quality and monitored as a condition of the certification. These parameters and a monitoring plan shall be included in the certification application.

(b) Water quality trend data can be a condition of general certification and can be included in a



Memorandum of Agreement with the federal agencies.

~~(e) Where there is uncertainty about whether the proposed activity will degrade water quality or, on water quality limited waters, prevent an improving trend toward standards, monitoring may be included as a condition of certification to provide the necessary information to resolve those uncertainties.~~

Stat. Author.: ORS 468.020; ORS 468B.035; ORS 561.190; ORS 561.191  
Stat. Imp.: 33 USC 1341; ORS 468B.035

**340-048-0150 Compliance Monitoring for Grazing Certifications**

(1) The federal permitting agency is responsible for ensuring that all permit conditions, including the conditions of the water quality certification, are implemented and achieved. Any monitoring necessary to accomplish this task is the responsibility of the federal permitting agency. DEQ or ODA may request reports on this information.

(2) Where federal agency standards ~~&~~and guidelines are identified as the water quality certification conditions, monitoring of the PACFISH or INFISH Riparian Management Objectives, the Aquatic Conservation Strategy Objectives and/or other standard and guide parameters, as applicable, shall be part of the compliance monitoring responsibility of the federal permitting agency.

Stat. Author.: ORS 468.020; ORS 468B.035; ORS 561.190; ORS 561.191  
Stat. Imp.: 33 USC 1341; ORS 468B.035

**340-048-0160 Enforcement for Grazing Certifications**

(1) Enforcement of the grazing permit terms and conditions is primarily the responsibility of the federal permitting agency. The water quality certification and any conditions included in the certification are incorporated as conditions on the federal grazing permit. Where there is a violation of permit conditions, the federal permitting agency is authorized to cancel or suspend the permit in accordance with permit terms and conditions and federal grazing regulations.

(2) If a permittee violates the conditions of the water quality certification, or as otherwise provided in OAR 340-048-0040, DEQ may, at its own discretion and in consultation with the ODA, revoke or revise a the certification or revoke or suspend the certification ~~certification if a permittee repeatedly violates the conditions of the water quality certification and the federal agency fails to take the appropriate corrective or enforcement action, as provided in OAR 340-048-0040.~~

(3) DEQ may, at its discretion, conduct random surveys or audits of federal agency compliance data to determine compliance with 401 certifications. If compliance problems are identified, DEQ, in consultation with ODA, may either revoke certifications or ~~notify the federal agency that further certifications in that area will not be issued~~ deny further certifications until the compliance issues are resolved.

(4) Nothing in these rules is intended to limit the authority of DEQ, ODA or the Environmental

Quality Commission under other applicable law.

Stat. Author.: ~~ORS 183.335~~; ORS 468.020; ORS 468.035; ORS 561.190; ORS 561.191

Stat. Imp. 33 USC 1341; ORS 468B.035

Advisory Committee Membership and ReportMembership List

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Elmer Scott, Jr. Watermaster  Alternate: Richard Craig Environmental Coordinator/ Special Enforcement	Confederated Tribes of the Warm Springs Reservation Soil & Water Resources, DNR PO Box C Warm Springs, OR 97761	Ph: 541-553-3580 Fax: 541-553-1994  Ph: 541-553-3581 Fax: 541-553-1994	

\*Bill Marlett, Executive Director of the Oregon natural Desert Association attended the majority of meetings in place of Dr. Belsky.

\*\*Dr. Kaufmann did not participate in the Committee process.

<b>Ex Officio Members:</b>			
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## Advisory Committee Report

This is not the committee's formal report. It is meant only to inform the Commission of the issues on which the committee failed to reach consensus, and that committee chair Gail Achterman and members will raise before the Commission at the work session on Thursday February 19, 1998. The committee will be making an oral report to the Commission at its work session on February 19, 1998. The committee was unable to reach consensus on some fundamental issues relating to the rules, and in its oral report will present the differing viewpoints represented on the committee.

The advisory committee met five times between September 9, 1997 and December 4, 1997 to provide advice to staff on the proposed rules. The committee met one further time on February 5, 1998 to consider its report and responses to changes proposed by the departments.

The committee had six points that it wishes to emphasize:

1. The confusion created at the Bend public hearing concerning submission of written comments. (Note, this was addressed by the agencies which extended the comment period). Time constraints imposed on the development of these rules, and the inability of applicants to comply with the new rules;

Water quality limited waterbodies. When, if at all, should water quality certifications be issued for water quality limited waterbodies? Three viewpoints were represented on the committee:

- a) the current draft rules which provide for certification if water quality is not degraded and site conditions impacting water quality are improving;
  - b) no certifications to water quality limited waterbodies until standards are attained;
  - c) certifications can be issued by agencies relying solely on their best professional judgment.
3. Evaluation Criteria. The issue here is, what is the appropriate level of specificity in the evaluation criteria? Are the criteria adequate to make the findings in the rules, or to determine if an applicant falls under a general permit? The distinction is between objective-based criteria (as proposed in the rules) or prescriptive best management practices as contained in current dredge and fill 401 certifications.
  4. State and federal agency coordination. This addresses the issue of a Memorandum of Agreement between the state and the federal agencies, as well as the issue of enforcement by the federal agencies;
  5. Agency resources, both at the state and federal level;
  6. The Oregon Plan, and scientific review of these rules by the IMST.

## Implementation Plan

Implementation of these rules will proceed largely the same as implementation of the temporary rules adopted by the Commission in February 1997. At that time a Memorandum of Agreement was completed between DEQ and ODA. A copy is appended to this attachment. This agreement details the respective roles of ODA and DEQ and provides a dispute resolution mechanism in the event of a disagreement between the agencies over a particular certification.

## Public Workshops

In the last week of February or first week of March, staff from ODA will travel around the state offering workshops to prospective applicants. They will distribute application forms, along with instructions and assistance in completing them.

## Applications

Applications will be processed by DEQ, as they were last year. They will be reviewed for completeness, in accordance with the provisions of the rules, and the application form. Public notice will be issued, and public comment sought on applications.

The application will be forwarded to ODA for evaluation, and for recommending certification, denial, or certification with conditions to DEQ. ODA will determine the conditions to be included.

As it is developing conditions, ODA will consult with DEQ.

## Certification

DEQ will receive ODA's recommendation, and along with public comment received, will evaluate the recommended action, and will issue the certification provided it is satisfied the required findings have been made and are supported. If DEQ is unable to determine this, it will consult with ODA prior to taking any action. However, if the conditions developed by ODA are insufficiently protective of water quality standards or other applicable water quality requirements, then DEQ must deny certification.

## State-Federal Memoranda of Agreement

DEQ and ODA will pursue memoranda of agreement with BLM and the US Forest Service. These will address issues of cooperation, general certification development, and enforcement of conditions.

**Memorandum of Agreement**  
Between Oregon Department of Agriculture  
And Oregon Department of Environmental Quality  
Relating to Livestock Grazing on Federal Lands

**I. Objective:**

On November 20, 1996, the U.S. District Court for Oregon enjoined the U.S. Forest Service from issuing grazing permits without first obtaining state water quality certification pursuant to section 401 of the Clean Water Act. (33 USC § 1341.) This ruling is likely to be applied to grazing on lands owned or managed by other federal agencies even though the agencies were not parties to the lawsuit. The purpose of this Memorandum of Agreement (MOA) is to coordinate the responsibilities of the Oregon Departments of Agriculture and Environmental Quality with respect to issuing state water quality certificates to applicants seeking federal leases or other approvals for grazing domestic livestock on lands owned or controlled by the federal government and managed by the U.S. Forest Service, Bureau of Land Management, Fish and Wildlife Service or National Park Service.

**II. Authority:**

This MOA is authorized under ORS 190.110, 468.030, 468.040, 468B.010, 468B.035, 561.191, and 561.240.

**III. ODA's Responsibilities:**

1. ODA will develop standard conditions for water quality certificates required under CWA § 401 for applications to graze domestic livestock on lands owned or managed by the federal agencies listed above. If the standard conditions are applicable to a class of applications, ODA will develop the criteria for determining applicability of the standard conditions.
2. ODA may consider whether conditions in applicable federal management plans already provide sufficient enforceable requirements and whether the conditions in such plans should be substituted for standard certificate conditions.
3. ODA will develop individual certificate conditions for applicants who elect not to use the standard certificate conditions.
4. ODA will consult with DEQ when it develops standard or individual certificate conditions.

**IV. DEQ's Responsibilities:**

1. DEQ will ask the Environmental Quality Commission to amend the CWA Section 401 rules codified in OAR Chapter 340, Division 48. These proposed amendments will provide for a streamlined application process for water quality certifications for grazing leases covered by this MOA. The rules will include provisions allowing DEQ to issue certification based upon standard certificate conditions developed by ODA or conditions imposed under an Agricultural Water Quality Management Plan prepared under OAR Chapter 603, Division 90. In addition, the rules may authorize certification based upon a federal management plan if ODA determines that a particular plan includes sufficient conditions to substitute for standard certificate conditions.

2. If DEQ receives an application for certification before ODA develops standard certification conditions or if an applicant elects to pursue individual certification, DEQ will forward the application to ODA for the purpose of developing individual certificate conditions.

3. If DEQ determines that a proposed livestock grazing lease, even with the conditions developed by ODA, is reasonably likely to cause or contribute to a violation of applicable water quality standards or other water quality requirements, then DEQ must deny certification. DEQ will consult with ODA, however, before issuing any order denying certification.

**V. Amendments and Termination:**

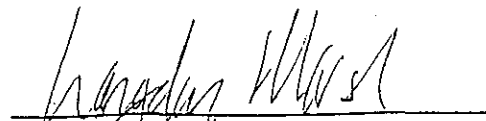
1. This MOA may be modified at any time by agreement of the parties. Any modification of the agreement must be made in writing and signed by the directors of the ODA and DEQ.

2. This MOA shall become effective upon signature by the directors of ODA and DEQ and shall remain in effect until terminated by either agency upon 180 days written notice or until modified by agreement as provided above.

DATED this 30 day of January 1997.



Bruce Andrews, Director  
Department of Agriculture



Langdon Marsh, Director  
Department of Environmental Quality



# Environmental Quality Commission

- Rule Adoption Item
- Action Item
- Information Item

Agenda Item J  
February 20, 1998 Meeting

**Title:**

Industrial Wastewater Discharge Permitting Program Fees

**Summary:**

This proposal would make permanent the temporary rule which implements the industrial permit fee increase approved by the 1997-99 Legislature. The temporary rule, which expired on December 20, 1997, allowed the Department to promptly send out invoices reflecting the new fees. The use of a temporary rulemaking process assured that there would be no interruption of permitting services to the regulated community or environmental protection to the public.

The 1997- 99 legislatively adopted budget authorizes an approximate 20% increase to the fees set in the 1995-97 budget. A new fee schedule was not adopted legislatively as part of this process; therefore, a revised fee schedule needs to be made part of permanent rule to assure that appropriate fees are in place.

The Department requested a fee increase in order to maintain existing positions, not to expand the program. Going into the 1997 legislative session, the industrial wastewater permitting program had projected a significant revenue shortfall and could not afford 14 existing permitting positions. The Department requested a \$1.5 million fee increase to maintain nine of the positions; however, the Legislature only approved a \$450,000 fee increase to support three positions. Five more positions were restored when the Legislature provided \$670,000 from the General Fund for a total of eight funded positions out of the 14 original positions.

**Department Recommendation:**

It is recommended that the Commission adopt the rule amendments regarding industrial wastewater permit fee schedule as presented in Attachment A of the Department Staff Report.

*Susan Dioletto*  
Report Author

*[Signature]*  
Division Administrator

Director *[Signature]*

**Date:** February 20, 1998  
**To:** Environmental Quality Commission  
**From:** Langdon Marsh  
**Subject:** Agenda Item J, Industrial Wastewater Discharge Program Permit Fees, EQC Meeting - February 20, 1998

**Background**

On December 15, 1997, the Director authorized the Water Quality Division to proceed with a rulemaking hearing on proposed rules which would make permanent the temporary rule which implements the industrial permit fee increase approved by the 1997-99 Legislature.

Pursuant to the authorization, hearing notice was published in the Secretary of State's Bulletin on January 1, 1998. The Hearing Notice and informational materials were mailed to the mailing list of those persons who have asked to be notified of rulemaking actions, and to a mailing list of persons known by the Department to be potentially affected by or interested in the proposed rulemaking action on industrial wastewater discharge permit fees.

A Public Hearing was held January 16, 1998 with Tom Lucas serving as Presiding Officer. Written comment was received through January 23, 1998. No formal testimony was given and only one written comment was received. No modifications to the initial rulemaking proposal are being recommended by the Department.

The following sections summarize the issue that this proposed rulemaking action is intended to address, the authority to address the issue, the process for development of the rulemaking proposal including alternatives considered, a summary of the rulemaking proposal presented for public hearing, a summary of the significant public comments and the changes proposed in response to those comments, a summary of how the rule will work and how it is proposed to be implemented, and a recommendation for Commission action.

**Issue this Proposed Rulemaking Action is Intended to Address**

This proposal would make permanent the temporary rule which implements the industrial permit fee increase approved by the 1997 Legislature. The temporary rule, which expired on December 20, 1997, allowed the Department to promptly send out invoices reflecting the new fees, and thus assured that there would be no interruption of permitting services to the regulated community or environmental protection to the public.

The 1997- 99 legislatively adopted budget authorizes an approximate 20% increase to the fees set in the 1995-97 budget. A new fee schedule was not adopted legislatively as part of this process; therefore, a revised fee schedule needs to be made part of permanent rule to assure that appropriate fees are in place.

The Department requested a fee increase in order to maintain existing positions, not to expand the program. Going into the 1997 legislative session, the industrial wastewater permitting had projected a significant revenue shortfall and could not afford 14 existing permitting positions. The Department requested a \$1.5 million fee increase to maintain nine of the positions; however, the Legislature only approved a \$450,000 fee increase to support three positions. Five more positions were restored when the Legislature provided \$670,000 from the General Fund for a total of eight funded positions out of the original 14 positions.

**Relationship to Federal and Adjacent State Rules**

The Department has delegation from the U.S. Environmental Protection Agency to operate the Federal National Pollutant Discharge Elimination System (NPDES) permitting program. Delegation of the program could be revoked and the implementation responsibility returned to the EPA if program resources are not maintained at a level sufficient to effectively run the program. Without this fee increase, the level of effort may not be sufficient to effectively run the program.

**Authority to Address the Issue**

The statutory authority for wastewater discharge permit fees is found in ORS 468.065 Issuance of permits; content; fees; use.

**Process for Development of the Rulemaking Proposal (including Advisory Committee and alternatives considered)**

The Department did not utilize an advisory committee for the development of these rules since the legislatively adopted budget required no interpretation or revisions. The Department's staff developed the rule amendments by relying on the 1997 Legislature's adopted budget. The Legislature did hold public hearings on the Department's budget and this fee increase.

**Summary of Rulemaking Proposal Presented for Public Hearing and Discussion of Significant Issues Involved.**

This proposal is needed to make permanent a temporary rule which implements the industrial permit fee increase approved by the 1997 Legislature. The temporary rule expired on December 20, 1997.

The Department temporarily amended Oregon Administrative Rule 340-45-075, Permit Fee Schedule, relating specifically to industrial permit fees effective July 17, 1997. A temporary rulemaking process was used because the Department found that following the permanent rulemaking process would result in serious prejudice to the public interest by not allowing adequate time for public comment. The temporary rulemaking allowed the Department to promptly send out invoices reflecting the new fees, and thus assured that there was no interruption of permitting services to the regulated community or environmental protection of the public.

The current fees in ORS 340-45-075 reflect rules adopted by the EQC in September 1994, which increased industrial water quality permit fees by about 100%. Before the increase was implemented, the 1995 Legislature rolled back the EQC-adopted fee increase about 70%, and set a new fee schedule as part of the 1995-97 budget bill. Since the fee schedule was set in the budget statute, the Department concluded that it was not necessary to go through the rulemaking process to revise the fee schedule. Because the 1997-99 budget provided for an increase, a revised fee schedule now needs to be made part of rule to assure that the appropriate fees are in place.

**Summary of Significant Public Comment and Changes Proposed in Response**

There was no public testimony, but two written comments were received. The first commentator did not support the fee increase for two reasons: 1) inflation has not gone up by 20%; therefore a 20% fee increase is not appropriate and 2) he has seen fees rise in Western States but has not seen a proportional increase in service or quality. The second comment focused on the negative impact State fee increases are having on struggling rural businesses.

Memo To: Environmental Quality Commission

**Agenda Item J, Industrial Wastewater Discharge Program Permit Fees, EQC Meeting**

Page 4

The Department is sensitive to the impact fee increases are having on small businesses; however, the fee increase is needed to maintain existing staff, not to expand the program. Even with the fee increase, the permitting program has lost six positions.

The Department does not propose any changes to the rule amendment.

**Recommendation for Commission Action**

It is recommended that the Commission adopt the rule amendments regarding industrial wastewater discharge program permitting fees as presented in Attachment A of the Department Staff Report.

**Attachments**

- A. Rule Amendments Proposed for Adoption
- B. Supporting Procedural Documentation:
  - 1. Legal Notice of Hearing
  - 2. Fiscal and Economic Impact Statement
  - 3. Land Use Evaluation Statement
  - 4. Questions to be Answered to Reveal Potential Justification for Differing from Federal Requirements
  - 5. Cover Memorandum from Public Notice
- C. Presiding Officer's Report on Public Hearing
- D. Fee schedule adopted by the 1995 Legislature

**Reference Documents (available upon request)**

Written Comments Received

Approved:

Section: \_\_\_\_\_

Division: \_\_\_\_\_

Report Prepared By: Susan Violette

Phone: 503-229-6602

Date Prepared: January 27, 1998

**PERMIT FEE SCHEDULE**

**Note: (Fees in the brackets are the fee amounts prior to the 1995 Legislature's reduction of the industrial permit fees. The fee schedule was made into law in 1995, therefore the rules were not changed. The 1995 adopted fee schedule expired with the 1997-99 budget and therefore new rules need to be adopted by the Department .)**

340-45-075

- (1) **Filing Fee.** Unless waived by this rule, a filing fee of \$50 shall accompany any application for issuance, renewal, modification, or transfer of an NPDES permit or WPCF permit, including registration for a General Permit pursuant to OAR 340-45-033 and request for a Special Permit pursuant to OAR 340-14-050. This fee is non-refundable and is in addition to any application processing fee or annual compliance determination fee which might be imposed. The following filing fees are waived:

- (a) Small gold mining suction dredges which qualify for General Permit 700, and with an intake hose diameter of four inches or less;
- (b) Small gold mining operations which qualify for General Permit 600, and which can process no more than five cubic yards of material per day.

- (2) **Application Processing Fee.**<sup>5</sup> Unless waived by this rule, an application processing fee shall be submitted with each application. The amount of the fee shall depend on the type of facility and the required action as follows:

- (a) New Applications:

(A) Major industries <sup>1</sup> .....	[\$40,000] <b>31,400</b>
(B) Minor industries .....	[\$8,000] <b>6,280</b>
(C) Major domestic <sup>2</sup> .....	\$ 20,000
(D) Minor domestic <sup>3</sup> :	
(i) Categories Da, Db .....	\$ 4,000
(ii) Category E .....	\$ 2,000
(iii) Category F.....	\$ 500
(E) Agricultural .....	[\$8,000] <b>6,280</b>

- (b) Permit Renewals (including request for effluent limit modification):

(A) Major industries <sup>1</sup> .....	[\$20,000] <b>15,700</b>
(B) Minor industries .....	[\$4,000] <b>3,140</b>
(C) Major domestic <sup>2</sup> .....	\$ 10,000
(D) Minor domestic <sup>3</sup> :	
(i) Categories Da, Db .....	\$ 2,000

	(ii) Category E.....	\$ 1,000	
(E)	Agricultural.....	\$[4,000]	<b><u>3,140</u></b>
(c)	Permit Renewals (without request for effluent limit modification):		
(A)	Major industries <sup>1</sup> .....	\$[10,000]	<b><u>7,850</u></b>
(B)	Minor industries.....	\$[1,500]	<b><u>1,180</u></b>
(C)	Major domestic <sup>2</sup> .....	\$ 5,000	
(D)	Minor domestic <sup>3</sup> :		
	(i) Categories Da, Db.....	\$ 750	
	(ii) Category E.....	\$ 500	
	(iii) Category F.....	\$ 200	
(E)	Agricultural.....	\$[1,500]	<b><u>1,180</u></b>
(d)	Permit Modifications (involving increase in effluent limitations):		
(A)	Major industries <sup>1</sup> .....	\$ [20,000]	<b><u>15,700</u></b>
(B)	Minor industries.....	\$[4,000]	<b><u>3,140</u></b>
(C)	Major domestic <sup>2</sup> .....	\$ 10,000	
(D)	Minor domestic <sup>3</sup> :		
	(i) Categories Da, Db.....	\$ 2,000	
	(ii) Category E.....	\$ 1,000	
(E)	Agricultural.....	\$[4,000]	<b><u>3,140</u></b>
(e)	Permit Modifications (not involving an increase in effluent limits): All categories.....		
		\$ 500	
(f)	Special Permits issued pursuant to OAR 340-14-050.....		
		\$ 250	
(g)	Modifications of septage alkaline stabilization facilities permits.....		
		\$ 200	
(h)	New General Permits, by permit number:		
(A)	100, 200, 400, 500, 600 (over 1,500 cubic yards per year), 900, 1000, 1200D, 1200S, 1400A	\$ [100]	<b><u>80</u></b>
(B)	300, 1200F, 1300, 1400B, 1500, 1600	\$[200]	<b><u>155</u></b>
(C)	All other 1200, 1700	\$[300]	<b><u>235</u></b>
(D)	Others not elsewhere specified	\$[300]	<b><u>235</u></b>

(E) In addition, the following fees shall be added to categories (A) through (D) when the listed activities are a required part of the application review process:

- (i) Disposal system plan review .....\$[400] **315**
- (ii) Site inspection and evaluation.....\$[1,000] **785**

- (i) Renewal of General Permits, as listed in subsection (2)(h) of this rule .....\$[100] **35**
- (j) Application processing fees described in subsections (2)(h) and (i) of this rule above are waived for specific categories as follows:

(A) Small gold mining operations which qualify for General Permit 600, and which can process no more than five cubic yards of material per day, or more that five cubic yards of material per day but less than 1,500 cubic yards of material per year.

(B) Small gold mining suction dredges which qualify for General Permit 700.

(3) **Technical Activities Fee.**<sup>4,5</sup> All permittees shall pay a fee for NPDES and WPCF permit-related technical activities, as follows:

- (a) New or substantially modified sewage treatment facility ..... \$ 4,600
- (b) Minor sewage treatment facility modifications and pump stations ..... \$ 500
- (c) Pressure sewer system, or major sewer collection system expansion ..... \$ 350
- (d) Minor sewer collection system expansion or modification ..... \$ 100
- (e) New or substantially modified water pollution control facilities utilizing alkaline agents to stabilize septage..... \$ 500

(4) **Annual Compliance Determination Fee Schedule:**<sup>5</sup>

- (a) Domestic Waste Sources — Initial and Annual Fee is based on Dry Weather Design Flow, Population Served by Facility, Type of Facility and Applicable Special Fees as follows:



<u>Category</u>	<u>Fees</u>
(A <sub>1</sub> ) Sewage Disposal — 50 MGD or more .....	\$ 42,410
(A <sub>2</sub> ) Sewage Disposal — At least 25 MGD but less than 50 MGD .....	
(A <sub>3</sub> ) Sewage Disposal — At least 10 MGD but less than 50 MGD .....	\$ 11,020
(B <sub>a</sub> ) Sewage Disposal — At least 5 MGD but less than 10 MGD .....	\$ 6,700
(B <sub>b</sub> ) Sewage Disposal — At least 5 MGD but less than 10 MGD — Systems where treatment occurs in lagoons that discharge to surface waters .....	\$ 3,070
(C <sub>1a</sub> ) Sewage Disposal — At least 2 MGD but less than 5 MGD .....	\$ 4,175
(C <sub>1b</sub> ) Sewage Disposal — At least 2 MGD but less than 5 MGD — Systems where treatment occurs in lagoons that discharge to surface waters .....	\$ 1,825
(C <sub>2a</sub> ) Sewage Disposal — At least 1 MGD but less than 2 MGD .....	\$ 2,510
(C <sub>2b</sub> ) Sewage Disposal — At least 1 MGD but less than 2 MGD — Systems where treatment occurs in lagoons that discharge to surface waters .....	\$ 1,060
(D <sub>a</sub> ) Sewage Disposal — Less than 1 MGD, and not otherwise categorized under Category E, .....	\$ 955
(D <sub>b</sub> ) Sewage Disposal — Less than 1 MGD — Systems where treatment occurs in lagoons that discharge to surface waters which are not otherwise categorized under Category E, .....	\$ 625
(E) Sewage Disposal — Systems where treatment is limited to lagoons which do not discharge to surface waters .....	\$ 600
(F) Septage alkaline stabilization facilities.....	\$ 200

(G) Sources determined by the Department to administer a pretreatment program pursuant to federal pretreatment program regulations (**40 CFR, Part 403; January 28, 1981**) shall pay an additional \$1,000 per year plus \$335 for each significant industrial user specified in their annual report for the previous year.

(H) Population Based Fee — All permittees shall pay an annual fee computed as follows: population served by the facility multiplied by a rate of 0.08038.

(I) In addition to applicable fees specified above, special Annual Compliance Fees for Tualatin Basin Pollution Abatement Activities will be applied to the following permittees until Fiscal Year 1998:

(i) Unified Sewerage Agency _ Durham .....	\$ 26,720
(ii) Unified Sewerage Agency _ Rock Creek .....	\$ 22,995
(iii) Unified Sewerage Agency _ Forest Grove .....	\$ 5,450
(iv) Unified Sewerage Agency _ Hillsboro .....	\$ 4,240
(v) Unified Sewerage Agency _ Banks .....	\$ 185
(vi) City of Portland _ Tryon Creek .....	\$ 910

(b) Industrial, Commercial and Agricultural Sources (Source and Initial and Annual Fee).

**(For multiple sources on one application select only the one with highest fee)**

(A) Major pulp, paper, paperboard, hardboard, and other fiber pulping industry .....\$[12,000] **9,420**

(B) Major sugar beet processing, potato and other vegetable processing, and fruit processing industry .....\$[12,000] **9,420**

(C) Seafood Processing Industry:

(i) Bottom fish, crab, and/or oyster processing .....\$[1,350] **1,060**

(ii) Shrimp processing .....\$[1,350] **1,060**

- (iii) Salmon and/or tuna processing .....\$[2,400] **1,885**
- (iv) Surimi processing . . . . . \$[2,400] **1,885**
- (D) Electroplating industry (excludes facilities which do anodizing only):
  - (i) Rectifier output capacity of 15,000 Amps, or more .....\$[12,000] **9,420**
  - (ii) Rectifier output capacity of less than 15,000 Amps but more than 5000 Amps .....\$[6,000] **4,710**
- (E) Primary Aluminum Smelting.....\$[12,000] **9,420**
- (F) Primary smelting and/or refining of non-ferrous metals utilizing sand chlorination separation facilities .....\$[12,000] **9,420**
- (G) Primary smelting and/or refining of ferrous and non-ferrous metals not elsewhere classified above .....\$[6,000] **4,710**
- (H) Alkalies, chlorine, pesticide, or fertilizer manufacturing with discharge of process waste waters .....\$[12,000] **9,420**
- (I) Petroleum refineries with a capacity in excess of 15,000 barrels per day discharging process wastewater.....\$[12,000] **9,420**
- (J) Cooling water discharges in excess of 20,000 BTU/sec \$.....[6,000] **4,710**
- (K) Milk products processing industry which processes in excess of 250,000 pounds of milk per day .....\$[12,000] **9,420**
- (L) Major mining operations (over 500,000 cubic yards per year).....\$[12,000] **9,420**
- (M) Minor mining and/or processing operations:
  - (i) Medium (100,000 to 500,000 cubic yards per

	year) mechanical processing.....\$	[4,000]	<b><u>3,140</u></b>
(ii)	Medium using froth flotation .....	\$ [6,000]	<b><u>4,710</u></b>
(iii)	Medium using chemical leaching....\$	[8,000]	<b><u>6,280</u></b>
(iv)	Small (less than 100,000 cubic yards per year) mechanical processing .....	\$ [1,000]	<b><u>785</u></b>
(v)	Small using froth flotation.....\$	[2,000]	<b><u>1,570</u></b>
(vi)	Small using chemical leaching .....	\$ [4,000]	<b><u>3,140</u></b>
(N)	All facilities not elsewhere classified with disposal of process wastewater .....	\$ [2,400]	<b><u>1,885</u></b>
(O)	All facilities not elsewhere classified which dispose of non-process wastewaters (i.e., small cooling water discharges, boiler blowdown, filter backwash, log ponds, etc.) .....	\$ [1,500]	<b><u>1,180</u></b>
(P)	Dairies and other confined feeding operations on individual permits .....	\$ [900]	<b><u>705</u></b>
(Q)	All facilities which dispose of wastewaters only by evaporation from watertight ponds or basins .....	\$ [900]	<b><u>705</u></b>
(R)	General permits, as listed under paragraph (2)(h)(A) through (2)(h)(D) of this rule, except as follows:.....\$	[350]	<b><u>275</u></b>
(i)	1400A.....\$	[200]	<b><u>155</u></b>
(ii)	Annual compliance determination fees are waived for gold mining activities which qualify for General Permit Categories 600 and 700.		

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<sup>1</sup> *Major Industries Qualifying Factors:*

-1- Discharges large BOD loads; or

- 2- Is a large metals facility; or
- 3- Has significant toxic discharges; or
- 4- Has a treatment system which, if not operated properly, will have a significant adverse impact on the receiving stream; or
- 5- Any other industry which the Department determines needs special regulatory control.

<sup>2</sup> *Major Domestic Qualifying Factors:*

- 1- Serving more than 10,000 people; or
- 2- Serving industries which can have a significant impact on the treatment system.

<sup>3</sup> *Minor Domestic Qualifying Factors:*

- 1- Do not meet major domestic qualifying factors;
- 2- Categories Da, Db discharge to surface waters;
- 3- Categories E and F do not discharge to surface waters, and are under Water Pollution Control Facilities (WPCF) Permit.

<sup>4</sup> *Technical Activities Fee Qualifying Factors:*

- 1- Fee charged for initial submittal of engineering plans and specifications;
- 2- Fee not charged for revisions and resubmittals of engineering plans and specifications;
- 3- Fee not charged for facilities plans, design studies, reports change orders or inspections.

<sup>5</sup> *Confined Animal Feeding Operations:*

Sections (2), (3), and (4) of this rule do not apply to General Permit 800, confined animal feeding operations, administered by the Oregon Department of Agricultural.

<sup>6</sup> *On-site Sewage Disposal Systems:*

Fees for on-site sewage disposal systems, including those requiring WPCF permits, are found in OAR Chapter 340, Division 71.

**[Publications: The publication(s) referred to or incorporated by reference  
in this rule are available from the office of the  
Department of Environmental Quality.]**

**Stat. Auth.: ORS Ch. 466.165 & 468.065(2)**

**Hist.: DEQ 113, f. & ef. 5-10-76; DEQ 129, f. & ef. 3-16-77; DEQ 31-1979, f. & ef. 10-1-79; DEQ 18-1981, f. & ef. 7-13-81; DEQ 12-1983, f. & ef. 6-2-83; DEQ 9-1987, f. & ef. 6-3-87; DEQ 18-1990, f. & cert. ef. 6-7-90; DEQ 10-1991, f. & cert. ef. 7-1-91; DEQ 9-1992, f. & cert. ef. 6-5-92; DEQ 10-1992, f. & cert. ef. 6-9-92; DEQ 30-1992, f. & cert. ef. 12-18-92**

## NOTICE OF PROPOSED RULEMAKING HEARING

Department of Environmental Quality

OAR Chapter 340-45-075

<b>DATE:</b>	<b>TIME:</b>	<b>LOCATION:</b>
January 16, 1998	4:00 p.m.	DEQ, 811 SW 6 <sup>th</sup> Ave., Room 3A, Portland, Or

**HEARINGS OFFICER(s):** Tom Lucas

**STATUTORY AUTHORITY:** ORS 468.020 and 468.065

or **OTHER AUTHORITY:**

**STATUTES IMPLEMENTED:** ORS 468B.050 and 468.065

**ADOPT:**

**AMEND:** OAR 340-45-075, Permit Fee Schedule

**REPEAL:**

**RENUMBER:**

(prior approval from Secretary of State REQUIRED)

**AMEND & RENUMBER:**

(prior approval from Secretary of State REQUIRED)

- This hearing notice is the initial notice given for this rulemaking action.
- This hearing was requested by interested persons after a previous rulemaking notice.
- Auxiliary aids for persons with disabilities are available upon advance request.

**SUMMARY:**

This proposal would make permanent a temporary rule which implements the industrial permit fee increase approved by the 1997 Legislature. The temporary rule, which expires on December 20, 1997, allowed the Department to promptly send out invoices reflecting the new fees, and thus assured that there would be no interruption of permitting services to the regulated community or environmental protection to the public.

The 1997-99 legislatively adopted budget authorizes an approximate 20% increase to the fees set in the 1995-97 budget; however, a new fee schedule was not adopted legislatively as part of this process. A revised fee schedule now needs to be made part of a permanent rule, to assure that the appropriate fees are in place.

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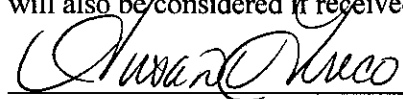
**LAST DATE FOR COMMENT:** January 23, 1998

**AGENCY RULES COORDINATOR:**  
**AGENCY CONTACT FOR THIS PROPOSAL:**  
**ADDRESS:**

Susan M. Greco, (503) 229-5213  
Susan Violette  
811 S. W. 6th Avenue  
Portland, Oregon 97204  
(503) 229-6602/1-800-452-4011

**TELEPHONE:**

Interested persons may comment on the proposed rules orally or in writing at the hearing. Written comments will also be considered if received by the date indicated above.

  
\_\_\_\_\_  
Signature

12/12/97  
Date



## NOTICE OF PROPOSED RULEMAKING HEARING

Department of Environmental Quality

**OAR Chapter 340-45-075**

<b>DATE:</b>	<b>TIME:</b>	<b>LOCATION:</b>
January 16, 1998	4:00 p.m.	DEQ, 811 SW 6 <sup>th</sup> Ave., Room 3A, Portland, Or

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This proposal would make permanent a temporary rule which implements the industrial permit fee increase approved by the 1997 Legislature. The temporary rule, which expires on December 20, 1997, allowed the Department to promptly send out invoices reflecting the new fees, and thus assured that there would be no interruption of permitting services to the regulated community or environmental protection to the public.

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State of Oregon  
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal  
for  
**Adoption of Permanent Rule Revising the Industrial Permit Fee Schedule  
for Wastewater Discharges**

**Fiscal and Economic Impact Statement**

**Introduction**

The overall degree of economic impact is expected to be minimal. The total revenue anticipated to be generated is approximately \$500,000. For the majority of businesses with an industrial wastewater discharge permit, the fee increase will amount to less than \$50 per year

The largest impact of the fee increase will fall on new businesses locating in Oregon. Major dischargers of pollution into Waters of the State will be required to pay \$5,000 more for a new permit; however, this amount does not cover the full cost of issuing the permit and the remainder of the cost will be paid for out of the State's general fund.

Greater detail of the impact of the fee increase may be found on page 2.

**General Public**

The general public may be indirectly impacted by the proposal. Businesses may pass the additional permit costs on to consumers in the form of marginally higher prices for goods and services. The potential price impact for consumers is expected to be very minimal.

**Industry**

Although industrial permit fees do not pay for the full cost of the program, the Department has established a schedule of fees which is proportional to the resources needed to process permit applications and for compliance determination. Consequently, fees are greater for industries which discharge larger amounts of wastewater or discharge a complex mixture. General permits are the least complicated and time consuming types of permits; therefore, permit fees for this type of permit are less than the other types. Individual permits are required for more complicated discharges which require special analysis and more staff time. Major individual permits are required for the discharge of large amounts of wastewater. Because of the actual Department costs incurred in issuing individual permits, the fees for these permits are higher.

The table below shows the change in fees and the amount of fee increase by permit type. Also included in the table is the number of businesses that will be paying the new fee.

**New Permit Fee (one time fee)**

Type of permit	Former Fee	Revised Fee	Amount of Increase	Number of Businesses
General Permits	\$ 65 to 195	\$ 80 to 235	\$ 15 to 40	N/A
Individual Minor	\$ 5,200	\$ 6,280	\$ 1,080	N/A
Individual Major	\$ 26,000	\$ 31,400	\$ 5,400	N/A

**Permit Renewals Fee (every five years)**

Type of permit	Former Fee	Revised Fee	Amount of Increase	Number of Businesses
General Permits	\$ 30	\$ 35	\$ 5	2,850
Individual Minor	\$ 2,600	\$ 3,140	\$ 540	200
Individual Major	\$ 13,000	\$ 15,700	\$ 2,700	25

**Annual Compliance Fee**

Type of permit	Former Fee	Revised Fee	Amount of Increase	Number of Businesses
General Permits	\$ 130 to 228	\$ 155 to 275	\$ 25 to 47	2,850
Individual Minor	\$ 878 to 7,800	\$ 1,060 to 9,240	\$ 182 to 1,620	200
Individual Major	\$ 7,800	\$ 9,420	\$ 1,620	25

**Small Business**

Any small business with a wastewater discharge permit for industrial discharges will be impacted by these fee increases; however, the increase to most small businesses will be less than \$50 per year.

### **Large Business**

Large businesses will pay \$1,620 more each year for annual compliance and \$2,700 more every five years for a permit renewal.

### **Local Governments**

There are a few municipalities which have permits for discharges other than domestic sewage, such as cooling water, filter backwash, geothermal disposal, and stormwater discharges. Most of these "non-sewage" activities are covered by general permits.

The proposed general permit fee schedule will apply to all permittees, including local governments. The annual compliance determination fees for activities covered by general permits will increase by a maximum of \$50 dollars. At the time of renewal (every five years) there will be a renewal fee of \$35 dollars.

### **State Agencies**

The primary fiscal impact of this rule will be on the Department of Environmental Quality; however, state agencies which discharge wastewater will be required to pay the fee increase.

The Department anticipates receiving \$500,000 more in revenue which pay will for 3.00 FTE for the 1997-99 biennium.

### **Housing Cost Impact Statement**

The Department has determined that this proposed rulemaking will have no effect on the cost of development of a 6,000 square foot parcel and the construction of a 1,200 square foot detached single family dwelling on that parcel.

State of Oregon  
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal  
for  
Adoption of Permanent Rule Revising the  
Industrial Water Quality Permit Fee Schedule as Approved by the 1997 Legislature

Land Use Evaluation Statement

**1. Explain the purpose of the proposed rules.**

This proposal would make permanent a temporary rule which implements the industrial permit fee increase approved by the 1997-99 Legislature. The temporary rule, which expires on December 20, 1997, allowed the Department to promptly send out invoices reflecting the new fees, and thus assured that there would be no interruption of permitting services to the regulated community or environmental protection to the public.

The 1997-99 legislatively adopted budget authorizes an approximate 20% increase to the fees set in the 1995-97 budget; however, a new fee schedule was not adopted legislatively as part of this process. A revised fee schedule now needs to be made part of permanent rule, to assure that the appropriate fees are in place.

**2. Do the proposed rules affect existing rules, programs or activities that are considered land use programs in the DEQ State Agency Coordination (SAC) Program?**

Yes  No

**a. If yes, identify existing program/rule/activity:**

These rules relate to the issuance of NPDES and WPCF permits has been determined (OAR 340-18-030 (e)) a DEQ land use rogram; however, the sole purpose of the proposed rule is to increase permit fees which will not directly impact land use.

**b. If yes, do the existing statewide goal compliance and local plan compatibility procedures adequately cover the proposed rules?**

Yes  No  (if no, explain):

The issuance of wastewater discharge permits requires a land use compatibility review and written approval by the affected local government. This procedure does not relate to this rulemaking which address funding needs for implementing the permit program.

\_\_\_\_\_  
Division

\_\_\_\_\_  
Intergovernmental Coord.

\_\_\_\_\_  
Date

**Questions to be Answered to Reveal  
Potential Justification for Differing from Federal Requirements.**

1. Are there federal requirements that are applicable to this situation? If so, exactly what are they? No
2. Are the applicable federal requirements performance based, technology based, or both with the most stringent controlling? Not applicable
3. Do the applicable federal requirements specifically address the issues that are of concern in Oregon? Was data or information that would reasonably reflect Oregon's concern and situation considered in the federal process that established the federal requirements? Not applicable
4. Will the proposed requirement improve the ability of the regulated community to comply in a more cost effective way by clarifying confusing or potentially conflicting requirements (within or cross-media), increasing certainty, or preventing or reducing the need for costly retrofit to meet more stringent requirements later? Not applicable
5. Is there a timing issue which might justify changing the time frame for implementation of federal requirements? No
6. Will the proposed requirement assist in establishing and maintaining a reasonable margin for accommodation of uncertainty and future growth? Not applicable
7. Does the proposed requirement establish or maintain reasonable equity in the requirements for various sources? (level the playing field) The increase of industrial permit fees may make the these permit fees more closely equivalent to similar domestic fees.
8. Would others face increased costs if a more stringent rule is not enacted? Not applicable
9. Does the proposed requirement include procedural requirements, reporting or monitoring requirements that are different from applicable federal requirements? If so, Why? What is the "compelling reason" for different procedural, reporting or monitoring requirements? No
10. Is demonstrated technology available to comply with the proposed requirement? Not applicable
11. Will the proposed requirement contribute to the prevention of pollution or address a potential problem and represent a more cost effective environmental gain? Not applicable

**State of Oregon  
Department of Environmental Quality**

**Memorandum**

**Date:** December 15 , 1997  
**To:** Interested and Affected Public  
**Subject:** Rulemaking Proposal - Adoption of Permanent Rule Revising the Industrial Permit Fee Schedule as Approved by the 1997 Legislature

This memorandum contains information on a proposal by the Department of Environmental Quality to adopt rule amendments regarding the Industrial Permit Fee Schedule for waste water discharges (Oregon Administrative Rules 340-45-075). Pursuant to ORS 183.335, this memorandum also provides information about the Environmental Quality Commission's intended action to adopt a rule.

**Rule Proposal**

This proposal would make permanent a temporary rule which implements the industrial permit fee increase approved by the 1997 Legislature. The temporary rule, which expires on December 20, 1997, allowed the Department to promptly send out invoices reflecting the new fees, and thus assured that there would be no interruption of permitting services to the regulated community or environmental protection to the public.

The 1997-99 legislatively adopted budget authorizes an approximate 20% increase to the fees set in the 1995-97 budget; however, a new fee schedule was not adopted legislatively as part of this process. A revised fee schedule now needs to be made part of permanent rule, to assure that the appropriate fees are in place.

The Department has the statutory authority to address this issue under ORS 468.020, ORS 468.065 and ORS 468B.050.

**What's in this Package?**

Attachments to this memorandum provide details on the proposal as follows:

- |                     |  |
|---------------------|--|
| <b>Attachment A</b> | The official statement describing the fiscal and economic impact of the proposed rule. (required by ORS 183.335)                               |
| <b>Attachment B</b> | A statement providing assurance that the proposed rules are consistent with statewide land use goals and compatible with local land use plans. |
| <b>Attachment C</b> | Questions to be Answered to Reveal Potential Justification for Differing from Federal Requirements.  |
| <b>Attachment D</b> | The revised permit fee schedule.   |

### **Hearing Process Details**

The Department is conducting a public hearing at which comments will be accepted either orally or in writing. The hearing will be held as follows:

**Date:** January 16, 1998

**Time:** 4 p.m.

**Place:** DEQ, 811 SW 6th Avenue, Room 3A, Portland, Oregon

Tom Lucas, DEQ, will be the Presiding Officer at the hearing.

**Deadline for submittal of Written Comments:** January 23, 1998

Written comments can be presented at the hearing or to the Department any time prior to the date above. Comments should be sent to: Department of Environmental Quality, Attn: Susan Violette, DEQ, 811 SW 6th Avenue, Portland, Oregon 97204.

In accordance with ORS 183.335(13), no comments from any party can be accepted after the deadline for submission of comments has passed. Thus if you wish for your comments to be considered by the Department in the development of these rules, your comments must be received prior to the close of the comment period. The Department recommends that comments are submitted as early as possible to allow adequate review and evaluation of the comments submitted.

### **What Happens After the Public Comment Period Closes**

Following close of the public comment period, the Presiding Officer will prepare a report which summarizes the oral testimony presented and identifies written comments submitted. The Environmental Quality Commission (EQC) will receive a copy of the Presiding Officer's report. The public hearing will be tape recorded, but the tape will not be transcribed.

The Department will review and evaluate the rulemaking proposal in light of all information received during the comment period. Following the review, the rules may be presented to the EQC as originally proposed or with modifications made in response to public comments received.

The EQC will consider the Department's recommendation for rule adoption during one of their regularly scheduled public meetings. The targeted meeting date for consideration of this rulemaking proposal is February 27, 1998. This date may be delayed if needed to provide additional time for evaluation and response to testimony received in the hearing process.

You will be notified of the time and place for final EQC action if you present oral testimony at the hearing or submit written comment during the comment period. Otherwise, if you wish to be kept advised of this proceeding, you should request that your name be placed on the mailing list.

### **Background on Development of the Rulemaking Proposal**

#### **Why is there a need for the rule?**



This proposal is needed to make permanent a temporary rule which implements the industrial permit fee increase approved by the 1997 Legislature. The temporary rule expires on December 20, 1997

The Department temporarily amended Oregon Administrative Rule 340-45-075, Permit Fee Schedule, relating specifically to industrial permit fees effective July 17, 1997. A temporary rulemaking process was used because the Department found that following the permanent rulemaking process, rather than taking this temporary rulemaking action, would result in serious prejudice to the public interest. The temporary rulemaking allowed the Department to promptly send out invoices reflecting the new fees, and thus assured that there will be no interruption of permitting services to the regulated community or environmental protection to the public.

Prior to the temporary rule change, the rule reflected actions taken by the EQC in September 1994, when industrial permit fees were increased by about 100%. Subsequent to the EQC action, the 1995 legislature rolled back the EQC-adopted fee increase about 70%, and set a new fee schedule as part of the 1995-97 budget bill. Since the fee schedule was set in the budget statute, the Department concluded that it was not necessary to go through the rulemaking process to revise the fee schedule.

The 1997-99 legislatively adopted budget authorizes an approximate 20% increase to the fees set in the 1995-97 budget; however, a new fee schedule was not adopted legislatively as part of this process. With the adoption of the 1997-99 budget, the previous budget statute expires, as does that fee schedule. A revised fee schedule now needs to be made part of rule, to assure that the appropriate fees are in place and to assure no break in permitting services to the regulated community or environmental protection to the public.

**How was the rule developed**

The Department did not utilize an advisory committee for the development of these rules since the legislatively adopted budget required no interpretation or revisions. The Department's staff developed the rule amendments by relying on the 1997 Legislature's adopted budget. Copies of the documents relied upon in the development of this rulemaking proposal can be reviewed at the Department of Environmental Quality's office at 811 SW 6th Avenue, Portland, Oregon, 97204. Please contact Susan Violette, (503) 229-662, for times when the documents are available for review.

**Whom does this rule affect including the public, regulated community or other agencies, and how does it affect these groups?**

This rule will impact industries which discharge pollution into waters of the state by requiring they pay approximately 20% more in fees for new permits and for annual compliance fees.

**Are there time constraints**

The temporary rule expires on December 20, 1997 and the rules need to be adopted as soon as possible to prevent a break in permitting services.

**Contact for more information**

**Memo To: Interested and Affected Public  
Industrial Permit Fee Schedule**

**Page 4**

**If you would like more information on this rulemaking proposal or would like to be added to the mailing list, please contact: Susan Violette, (503) 229-6602**

State of Oregon  
Department of Environmental Quality

Memorandum

Date: January 20, 1998

To: Environmental Quality Commission

From: Tom Lucas

Subject: Presiding Officer's Report for Rulemaking Hearing  
Hearing Date and Time: January 16, 1998, beginning at 4:00 p.m.  
Hearing Location: 811 SW 6<sup>th</sup> Ave., Portland, OR

Title of Proposal: Industrial Wastewater Discharge Program Permit Fee Increase

The rulemaking hearing on the above titled proposal was convened at 4:00 p.m. People were asked to sign witness registration forms if they wished to present testimony. People were also advised that the hearing was being recorded and of the procedures to be followed.

Four people were in attendance, but no one signed up to give testimony.

A brief explanation of the specific rulemaking proposal and the reason for the proposal was provided then staff responded to questions from the audience.

Summary of Oral Testimony

There was no oral testimony.

Written Testimony

There was no written testimony handed in at the hearing.

The hearing was closed at 4:35 p.m.

**SECTION 7.** This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect July 1, 1995.

Approved by the Governor June 30, 1995  
Filed in the office of Secretary of State June 30, 1995  
Effective date July 1, 1995

**CHAPTER 438**

AN ACT

SB 5515

Relating to state financial administration of the Columbia River Gorge Commission; appropriating money; and declaring an emergency.  
Be It Enacted by the People of the State of Oregon:

**SECTION 1.** There is appropriated to the Columbia River Gorge Commission, for the biennium beginning July 1, 1995, out of the General Fund, the amount of \$556,375.

**SECTION 2.** Notwithstanding any other law, all sections of this Act are subject to Department of Administrative Services rules related to allotting, controlling and encumbering funds.

**SECTION 3.** This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect July 1, 1995.

Approved by the Governor June 30, 1995  
Filed in the office of Secretary of State June 30, 1995  
Effective date July 1, 1995

**CHAPTER 439**

AN ACT

SB 5516

Relating to the financial administration of the Department of Environmental Quality; appropriating money; limiting expenditures; and declaring an emergency.  
Be It Enacted by the People of the State of Oregon:

**SECTION 1.** There is appropriated to the Department of Environmental Quality, for the biennium beginning July 1, 1995, out of the General Fund, the amount of \$16,072,424.

**SECTION 2.** Notwithstanding any other law, the amount of \$76,852,881 is established for the biennium beginning July 1, 1995, as the maximum limit for payment of expenses from fees,

moneys or other revenues, including Miscellaneous Receipts, excluding lottery funds, including federal funds from indirect cost recoveries, including the proceeds of bonds for the Orphan Site Account, collected or received by the Department of Environmental Quality.

**SECTION 3.** Section 2 of this Act does not limit, affect or apply to expenditures for debt service paid from Other Funds or for loans made from the Pollution Control Fund or for loans made from the Water Pollution Control Revolving Fund.

**SECTION 4.** In addition to and notwithstanding any other law, \$6,442,394 is established for the biennium beginning July 1, 1995, as the maximum limit for payment of expenses from lottery moneys allocated from the Executive Department Economic Development Fund to the Department of Environmental Quality.

**SECTION 5.** Notwithstanding any other law, the amount of \$18,135,332 is established for the biennium beginning July 1, 1995, as the maximum limit for the payment of expenses from federal funds collected or received by the Department of Environmental Quality.

**SECTION 6.** Notwithstanding any other law, all sections of this Act are subject to Department of Administrative Services rules related to allotting, controlling and encumbering funds.

**SECTION 7.** If Senate Bill 333 becomes law, for the purpose of carrying out the provisions of this Act, the fee increases implemented by the Environmental Quality Commission on or after January 1, 1994, pursuant to its authority to modify fees by administrative rule are approved as follows:

<u>Gasoline Vapor Permit Fees</u>	<u>Base Fee</u>
Annual vapor balance system permit application fee.....	\$ 50
Vapor transfer permit application fee.....	\$ 25
Stage II vapor collection permit application fee.....	\$ 100
<u>Air Contaminant Discharge Permit Fees</u>	
Modeling Review .....	\$ 2,000
Initial Permitting or Construction	
Complex .....	\$22,000
Moderately Complex .....	\$10,000
Simple .....	\$ 2,000
Elective Permits - Synthetic Minor Sources	
Permit application or modification.....	\$ 1,900
Annual compliance assurance .....	\$ 1,000

Standard Industrial Classification      Application      Annual Compliance

State Department of Agriculture for agricultural services.

(2) Within the appropriations made by subsection (1) of this section, payment is authorized for expenses of the State Department of Agriculture in connection with entertainment for furthering economic development.

**SECTION 5.** Notwithstanding any other law, all sections of this Act are subject to Department of Administrative Services rules related to allotting, controlling and encumbering funds.

**SECTION 6.** If Senate Bill 333 becomes law, for the purpose of carrying out the provisions of this Act, the fee increases implemented by the State Department of Agriculture on or after January 1, 1994, pursuant to its authority to modify fees by administrative rule, are approved as follows:

FEE DESCRIPTION	CURRENT FEES
a. Shipping point expense guarantee inspection fee	\$26/hr & \$30/hr (Medford only)
b. Grain inspection & weighing fee	\$20 per hour. \$20 minimum. \$11 per unofficial sample with a \$20 minimum.
c. Virus fruit tree certification fees	\$100 administration fee per year + \$7.50 for each prunus (prune) test or \$5 for each malus & pyrus (apple & pear) test
d. Pest and disease reimbursement certification	\$5 per acre (1) \$40 minimum per field, \$200 maximum per field. (2) Bean fields are an exception at \$3.50 per acre. Minimum charge=\$30. Two inspections are required per season, therefore total cost=\$7 acre. Minimum charge = \$60.
e. Nursery certification fee	\$10 per certificate
f. Apiary registration	\$10 per person
g. Delinquent license penalty	\$30 if license less than \$100 or the amount of the license fee if it is less than \$30. If license greater than \$100, delinquent fee is 30% of license amount up to \$750 maximum.
h. SB 1010 fees/water quality management plan fee	Not to exceed \$200 per year per landowner
i. Shellfish shucker/packer license	If annual gross income is less      If annual gross income is

	than \$60,000 \$150	\$60,000 or more \$300
j. Shellfish grower license	\$100	\$200
k. Shellfish distributor license	\$100	\$225
L. Shellfish commercial harvester license	\$75	\$75
TOTAL FEES NOT TO EXCEED		
	\$250	\$500

	ACRES OF TREES	BASIC CHARGE	ACREAGE ASSESSMENT
m. Christmas tree grower license	1 to 40	\$60 plus	\$3.00 per acre
	41 to 100	\$160 plus	\$2.50 per acre over 40
chart	101 to 200	\$280 plus	\$2.00 per acre over 100
(current)	over 200	\$430 plus	\$1.50 per acre over 200

(1) Nursery dealers, florists and landscapers	If Gross Purchases are:	The License Fee is:
	up to 5,000	\$65
	5,001 to 20,000	\$75
	20,001 to 100,000	\$100 plus .00125 over 20,000
	100,001 to 200,000	\$200 plus .001 over 100,000
	200,001 to 500,000	\$300 plus .0005 over 200,000
	500,001 to 2,000,000	\$450 plus .00025 over 500,000
	2,000,001 and above	\$825 plus .0001 over 2,000,000
	Maximum Fee - \$20,000	

Research Assessment Fee  
 X .0002 Gross Purchases or \$10 Minimum  
 Total Fee Due

(2) Dealers who license five or more outlets with reported purchases not exceeding \$100,000 per sales location may pay a flat rate license fee of \$125. There is an additional research assessment fee for each sales location.

(3) Greenhouse growers of herbaceous plants	If Gross Sales are:	The License Fee is:
	up to 20,000	\$75
	20,001 to 100,000	\$100 plus .00125 over 20,000
	100,001 to 200,000	\$200 plus .001 over 100,000
	200,001 to 500,000	\$300 plus .0005 over 200,000
	500,001 to 2,000,000	\$450 plus .00025 over 500,000
	2,000,001 and above	\$825 plus .0001 over 2,000,000
	Maximum Fee - \$20,000	

Research Assessment Fee  
 X .0002 Gross Purchases or \$10 Minimum  
 Total Fee Due

(4) Nursery stock growers and collectors of native plants	If Gross Sales are:	The License Fee is:
	up to 5,000	\$75
	5,001 to 20,000	\$100
	20,001 to 100,000	\$100 plus .0031 over 20,000
	100,001 to 200,000	\$348 plus .0029 over 100,000
	200,001 to 500,000	\$638 plus .0023 over 200,000
	500,001 to 2,000,000	\$1,328 plus .0014 over 500,000
	2,000,001 and above	\$3,428 plus .0004 over 2,000,000
	Maximum Fee - \$20,000	

Research Assessment Fee  
 X .0002 Gross Purchases or \$10 Minimum  
 Total Fee Due

<u>Air Contaminant Source</u>	<u>Number (Reference Only)</u>	<u>Processing Fee</u>	<u>Determination Fee</u>
Seed cleaning and associated grain elevators located in special control areas, commercial operations only	0723	\$616	\$939
Flour and other grain mill products and associated grain elevators in special control areas	2041		
(a) 10,000 or more tons/yr		\$2,002	\$1,848
(b) Less than 10,000 tons/yr		\$1,540	\$793
Cereal preparations and associated grain elevators in special control areas	2043	\$2,002	\$1,332
Blended and prepared flour and associated grain elevators in special control areas	2045		
(a) 10,000 or more tons/yr		\$2,002	\$1,332
(b) Less than 10,000 tons/yr		\$1,540	\$770
Prepared feeds for animals and fowl and associated grain elevators in special control areas	2048		
(a) 10,000 or more tons/yr		\$2,002	\$1,848
(b) Less than 10,000 tons/yr		\$1,232	\$1,455
Beet sugar manufacturing	2063	\$2,618	\$9,171
Animal reduction facilities	2077		
(a) 10,000 or more tons/yr input		\$2,464	\$2,957
(b) Less than 10,000 tons/yr input		\$1,848	\$1,602
Coffee roasting, 30 tons/yr or more roasted product	2095	\$1,232	\$1,209
Sawmills and/or planing mills 25,000 or more bd.ft./shift finished product or 10 or more employees per shift	2421, 2426	\$1,232	\$1,848
Millwork (including kitchen cabinets and structural wood members), 25,000 or more bd.ft./shift input or 10 or more employees per shift	2431, 2434, 2439	\$924	\$1,455
Plywood manufacturing and/or veneer drying	2435, 2436		
(a) 25,000 or more sq.ft./hr, 3/8" basis finished product		\$3,850	\$3,727
(b) 10,000 or more but less than 25,000 sq.ft./hr, 3/8" basis finished product		\$2,772	\$2,518
(c) Less than 10,000 sq.ft./hr, 3/8" basis finished product		\$924	\$1,332
Wood preserving (excluding waterborne)	2491	\$1,540	\$1,478
Particleboard manufacturing (including strandboard, flakeboard and waferboard)	2493		
(a) 10,000 or more sq.ft./hr, 3/4" basis finished product		\$3,850	\$4,389
(b) Less than 10,000 sq.ft./hr, 3/4" basis finished product		\$1,848	\$2,094

Board manufacturing (including fiberboard)	2493		
(a) 10,000 or more sq.ft./hr, 1/8" basis finished product		\$3,850	\$3,604
(b) Less than 10,000 sq.ft./hr, 1/8" basis finished product		\$1,848	\$1,848
Battery separator mfg.	2499	\$1,540	\$3,203
Furniture and fixtures 25,000 or more bd.ft./ shift input or 10 or more employees per shift	2511	\$924	\$1,455
Pulp mills, paper mills and paperboard mills	2611, 2621, 2631		
(a) Kraft, sulfite and neutral sulfite only		\$7,700	\$15,947
(b) Other - 100 tons or more of emissions		\$7,700	\$15,947
Building paper and building- board mills	2621, 2493	\$1,232	\$1,209
Alkalies and chlorine mfg.	2812		
(a) High cost		\$3,773	\$4,235
(b) Low cost		\$2,156	\$3,180
Calcium carbide manufacturing	2819		
(a) High cost		\$4,043	\$4,235
(b) Low cost		\$2,310	\$3,180
nitric acid manufacturing	2819		
(a) High cost		\$2,695	\$2,133
(b) Low cost		\$1,540	\$1,602
Ammonia manufacturing	2819		
(a) High cost		\$2,695	\$2,464
(b) Low cost		\$1,540	\$1,848
Industrial inorganic and organic chemicals manufacturing (not elsewhere included)	2819, 2851, 2869		
(a) High cost		\$3,504	\$3,018
(b) Low cost		\$2,002	\$2,272
Synthetic resin manufacturing	2821		
(a) High cost		\$2,695	\$2,464
(b) Low cost		\$1,540	\$1,848
Charcoal manufacturing	2861	\$2,156	\$3,850
Pesticide manufacturing	2879	\$3,850	\$15,947
Petroleum refining	2911		
(a) Refining, general		\$7,700	\$15,947
(b) Asphalt production by distillation		\$1,540	\$1,848
Asphalt blowing plants	2952	\$1,540	\$2,395
Asphaltic concrete paving plants	2951		
(a) Stationary		\$770	\$909
(b) Portable		\$770	\$1,155
Asphalt felts or coating	2952	\$770	\$1,386

Rerefining of lubricating oils and greases, and reprocessing of oils and solvents for fuel	2992	\$1,386	\$1,725
Glass container manufacturing	3221	\$1,540	\$2,272
Cement manufacturing	3241	\$4,928	\$11,681
Concrete manufacturing, including redimix and CTB	3271, 3272, 3273	\$308	\$493
Lime manufacturing	3274	\$2,310	\$1,209
Gypsum products	3275	\$1,232	\$1,332
Rock crusher	1442, 1446, 3295		
(a) Stationary		\$693	\$909
(b) Portable		\$693	\$1,155
Steel works, rolling and finishing mills, electro-metallurgical products	3312, 3313	\$3,850	\$3,180
Incinerators	4953		
(a) 250 or more tons/day capacity or any off-site infectious waste incinerator		\$18,480	\$7,962
(b) 50 or more but less than 250 tons/day capacity		\$4,620	\$2,418
(c) 2 or more but less than 50 tons/day capacity		\$770	\$939
(d) Crematoriums and pathological waste incinerators, less than 2 tons/day capacity		\$770	\$939
(e) PCB and/or hazardous waste incinerator		\$18,480	\$7,962
Gray iron and steel foundries, malleable iron foundries, steel investment foundries, steel foundries (not elsewhere classified)	3321, 3322, 3324, 3325		
(a) 3,500 or more tons/yr production		\$3,850	\$2,787
(b) Less than 3,500 tons/yr production		\$924	\$1,455
Primary aluminum production	3334	\$7,700	\$15,947
Primary smelting of zirconium or hafnium	3339	\$7,700	\$15,947
Primary smelting and refining of ferrous and nonferrous metals (not elsewhere classified)	3331, 3339		
(a) 2,000 or more tons/yr production		\$3,850	\$6,899
(b) Less than 2,000 tons/yr production		\$770	\$2,664
Secondary smelting and refining of nonferrous metals, 100 or more tons/yr metal charged	3341	\$1,848	\$1,848
Nonferrous metals foundries, 100 or more tons/yr metal charged	3363, 3364, 3365, 3366, 3369	\$924	\$1,602
Galvanizing and pipe coating (excluding all other activities)	3479	\$770	\$1,209



Battery manufacturing	3691	\$924	\$1,602
Grain elevators, intermediate storage only, located in special control areas (not elsewhere classified)	4221		
(a) 20,000 or more tons/yr grain processed		\$1,386	\$2,518
(b) Less than 20,000 tons/yr grain processed		\$770	\$1,209
Electric power generation	4911		
(a) Wood or coal fired, 25 MW or more		\$30,800	\$15,947
(b) Oil or natural gas fired, 25 MW or more		\$2,772	\$3,850
Fuel burning equipment for gas production and/or distribution, 10 million or more BTU/hr heat input	4922, 4925		
(a) Natural gas transmission		\$2,926	\$1,848
(b) Natural gas production and/or mfg.		\$2,926	\$1,848
Terminal elevators primarily engaged in buying and/or marketing grain, in special control areas	5153		
(a) 20,000 or more tons/yr grain processed		\$3,850	\$3,180
(b) Less than 20,000 tons/yr grain processed		\$1,078	\$1,209
Fuel burning equipment within the boundaries of the Portland and Medford-Ashland Air Quality Maintenance Areas, Salem Area Transportation Study Boundary and Grants Pass, Klamath Falls and La Grande Urban Growth Areas	4961		
(a) Residual or distillate oil fired, 250 million or more BTU/hr heat input		\$2,464	\$2,418
(b) Residual or distillate oil fired, 10 or more but less than 250 million BTU/hr heat input		\$1,540	\$1,332
Fuel burning equipment within the boundaries of the Portland and Medford-Ashland Air Quality Maintenance Areas, Salem Area Transportation Study Boundary and Grants Pass, Klamath Falls and La Grande Urban Growth Areas	4961		
(a) Wood or coal fired, 35 million or more BTU/hr heat input		\$2,464	\$2,418
(b) Wood or coal fired, less than 35 million BTU/hr heat input		\$616	\$1,332
Fuel burning equipment outside the boundaries of the Portland and Medford-Ashland Air Quality Maintenance Areas, Salem Area Transportation Study Boundary and Grants Pass, Klamath Falls and La Grande Urban Growth Areas	4961		
All oil fired 30 million or more BTU/hr heat input, and all wood and coal fired 10 million or more BTU/hr heat input		\$1,540	\$1,332
Sources installed in or after 1971 not listed herein which would emit			

5 or more tons PM10 in a PM10 nonattainment area, or 10 or more tons/yr of any air contaminants in any part of the state. This includes but is not limited to particulates, SO<sub>x</sub>

or Volatile Organic Compounds (VOC), if the source were to operate uncontrolled

	any	\$13,860	\$9,856
(a) High cost		\$3,850	\$1,725
(b) Medium cost		\$924	\$739
(c) Low cost			

Sources installed in or after 1971 not listed herein which would emit significant malodorous emissions, as determined by departmental review of sources which are known to have similar air contaminant emissions

	any	\$13,860	\$9,856
(a) High cost		\$3,850	\$1,725
(b) Medium cost		\$924	\$739
(c) Low cost			

Sources not listed herein for which an air quality problem is identified by the department or which are otherwise required to obtain a permit

	any	\$13,860	\$9,856
(a) High cost		\$3,850	\$1,725
(b) Medium cost		\$924	\$739
(c) Low cost			

Bulk gasoline plants regulated by OAR 340-22-120

5171	\$616	\$793
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Bulk gasoline terminals

5171	\$6,160	\$2,664
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Liquid storage tanks, 39,000 gallons or more capacity, regulated by OAR 340-22-160 (not elsewhere included)

5169, 5171	\$308/tank	\$547/tank
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Can or drum coating

3411, 3412		
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(a) 50,000 or more units/mo.	\$9,240	\$4,782
(b) Less than 50,000 units/mo.	\$616	\$1,063

Paper or other substrate coating

2672, 3861	\$9,240	\$4,782
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Coating flat wood regulated by OAR 340-22-200

2435	\$3,080	\$1,602
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Surface coating, manufacturing

any		
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(a) 100 or more tons VOC/yr	\$3,080	\$2,125
(b) 10 or more but less than 100 tons VOC/yr	\$924	\$1,063
(c) Less than 10 tons VOC/yr (at sources' request)	\$308	\$447

Flexographic or rotogravure printing, 60 or more tons VOC/yr per plant

2754, 2759	\$3,465	\$3,080
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Sources subject to NESHAPS rules (except demolition and renovation)

any	\$616	\$770
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Sources requiring toxic air pollutant review, including Maximum

Available Control Technology (MACT), (not elsewhere classified)	any	\$1,540	\$1,478
Soil remediation plants	1799		
(a) Stationary		\$1,540	\$1,455
(b) Portable		\$1,540	\$1,848

Asbestos Notification and Certification Fees

	Base Fee
The project notification fee shall be:	
For each project less than 40 linear feet or 80 square feet, residential building, or nonfriable asbestos abatement project.....	\$ 35
For each project greater than or equal to 40 linear feet or 80 square feet but less than 260 linear feet or 160 square feet of asbestos-containing material .....	\$ 70
For each project greater than or equal to 260 linear feet or 160 square feet, and less than 1,300 linear feet or 800 square feet of asbestos-containing material.....	\$ 275
For each project greater than or equal to 1,300 linear feet or 800 square feet, and less than 2,600 linear feet or 1,600 square feet of asbestos-containing material.....	\$ 375
For each project greater than or equal to 2,600 linear feet or 1,600 square feet, and less than 5,000 linear feet or 3,500 square feet of asbestos-containing material.....	\$ 650
For each project greater than or equal to 5,000 linear feet or 3,500 square feet, and less than 10,000 linear feet or 6,000 square feet of asbestos-containing material.....	\$ 750
For each project greater than or equal to 10,000 linear feet or 6,000 square feet, and less than 26,000 linear feet or 16,000 square feet of asbestos-containing material ..	\$ 1,200
For each project greater than or equal to 26,000 linear feet or 16,000 square feet, and less than 260,000 linear feet or 160,000 square feet of asbestos-containing material .....	\$ 2,000
For each project greater than 260,000 linear feet or 160,000 square feet of asbestos-containing material .....	\$ 2,500
For annual notifications for friable asbestos abatement projects involving 40 linear feet or 80 square feet or less of	

asbestos removal .....	\$ 260
Nonrefundable contractor license application fee:	
One year full-scale asbestos abatement contractor license.....	\$ 1,000
One year small-scale asbestos abatement contractor license.....	\$ 200
Nonrefundable worker certification fee:	
Two year certification as certified supervisor for full-scale asbestos abatement.....	\$ 130
Two year certification as certified worker for full-scale asbestos abatement .....	\$ 90
Two year certification as certified worker for small-scale asbestos abatement .....	\$ 80
Nonrefundable training provider accreditation application fee:	
One year accreditation to provide a course for training for any level of certification .....	\$ 320

Industrial Wastewater Discharge Fees

Application Processing Fee:	Base Fee
New Applications:	
Major industries .....	\$26,000
Minor industries .....	\$ 5,200
Agricultural .....	\$ 5,200
Permit Renewals (including request for effluent limit modification):	
Major industries .....	\$13,000
Minor industries .....	\$ 2,600
Agricultural .....	\$ 2,600
Permit Renewals (without request for effluent limit modification):	
Major industries .....	\$ 6,500
Minor industries .....	\$ 975
Agricultural .....	\$ 975
Permit Modifications (involving increase in effluent limitations):	
Major industries .....	\$13,000
Minor industries .....	\$ 2,600

Agricultural <sup>1</sup> .....	\$ 2,600	Petroleum refineries with a capacity in excess of 15,000 barrels per day discharging process wastewater .....	\$ 7,800
New General Permits, by permit number:		Cooling water discharges in excess of 20,000 BTU/sec.....	\$ 3,900
100, 200, 400, 500, 600 (over 1,500 cubic yards per year), 900, 1000, 1200D, 1200S, 1400A .....	\$ 65	Milk products processing industry which processes in excess of 250,000 pounds of milk per day .....	\$ 7,800
300, 1200F, 1300, 1400B, 1500, 1600.....	\$ 130	Major mining operations (over 500,000 cubic yards per year).....	\$ 7,800
All other 1200, 1700.....	\$ 195	Minor mining and/or processing operations:	
Others not elsewhere specified.....	\$ 195	Medium (100,000 to 500,000 cubic yards per year) mechanical processing .....	\$ 2,600
In addition, the following fees shall be added to New General Permit fees when the listed activities are a required part of the application review process:		Medium using froth flotation .....	\$ 3,900
Disposal system plan review.....	\$ 260	Medium using chemical leaching.....	\$ 5,200
Site inspection and evaluation.....	\$ 650	Small (less than 100,000 cubic yards per year) mechanical processing .....	\$ 650
Renewal of General Permits.....	\$ 30	Small using froth flotation .....	\$ 1,300
Annual Compliance Determination Fee for Industrial, Commercial and Agricultural Sources (Source and Initial and Annual Fee)		Small using chemical leaching.....	\$ 2,600
Major pulp, paper, paperboard, hardboard and other fiber pulping industry .....	\$ 7,800	All facilities not elsewhere classified with disposal of process wastewater.....	\$ 1,560
Major sugar beet processing, potato and other vegetable processing, and fruit processing industry.....	\$ 7,800	All facilities not elsewhere classified which dispose of nonprocess wastewaters (i.e., small cooling water discharges, boiler blowdown, filter backwash, log ponds, etc.) .....	\$ 975
Seafood Processing Industry:		Dairies and other confined feeding operations on individual permits <sup>1</sup> .....	\$ 585
Bottom fish, crab and/or oyster processing .....	\$ 878	All facilities which dispose of wastewaters only by evaporation from watertight ponds or basins .....	\$ 585
Shrimp processing .....	\$ 878	General permits:	
Salmon and/or tuna processing .....	\$ 1,560	1400A.....	\$ 130
Surimi processing.....	\$ 1,560	All other numbers .....	\$ 228
Electroplating industry (excludes facilities which do anodizing only):		<sup>1</sup> State Fish Hatcheries subject to OAR 340-41-470. Fish hatcheries operated by the State Department of Fish and Wildlife and located in the Clackamas River subbasin, the McKenzie River subbasin above Hayden Bridge and the North Santiam River subbasin shall be issued individual permits, but shall be charged fees in accordance with those set for general permits.	
Rectifier output capacity of 15,000 Amps, or more.....	\$ 7,800		
Rectifier output capacity of less than 15,000 Amps but more than 5,000 Amps.....	\$ 3,900		
Primary Aluminum Smelting.....	\$ 7,800		
Primary smelting and/or refining of nonferrous metals utilizing sand chlorination separation facilities .....	\$ 7,800		
Primary smelting and/or refining of ferrous and nonferrous metals not elsewhere classified above .....	\$ 3,900		
Alkalies, chlorine, pesticide or fertilizer manufacturing with discharge of process wastewaters.....	\$ 7,800		

Wastewater Operator Certification Fee  
Fee Schedule:

	<u>Provisional</u>	<u>Grade I</u>	<u>Grade II</u>	<u>Grade III</u>	<u>Grade IV</u>
(a) Application Fee	\$ 25.00	\$ 25.00	\$ 35.00	\$ 45.00	\$ 55.00
(b) Examination Fee	\$ 35.00	\$ 35.00	\$ 45.00	\$ 55.00	\$ 65.00
(c) Re-examination or					

Reschedule Fee	\$ 35.00	\$ 35.00	\$ 45.00	\$ 55.00	\$ 65.00
(d) Reciprocity Fee	\$ 60.00	\$ 60.00	\$ 80.00	\$100.00	\$120.00
(e) 2-Year Renewal Fee	N/A	\$ 60.00	\$ 60.00	\$ 80.00	\$ 80.00
(f) Reinstatement Fee	N/A	\$ 50.00	\$ 50.00	\$ 50.00	\$ 50.00

Fee

Grade I Conversion..... \$ 20

Combination Renewal for Grades I  
and/or II ..... \$ 90

<sup>2</sup>  
A reinstatement fee is payable in addition to the renewal fee for a certificate if an operator allows his/her certificate to lapse (expire).

Certificate and Document Replacement -- all grades..... \$ 20

<u>ON-SITE SEWAGE DISPOSAL FEES</u>	<u>MAXIMUM FEE</u>	<u>gallons/day</u>
New Site Evaluation:		Commercial Facility System, Plan Review:
Single Family Dwelling:		For projected daily sewage flow of 600 gallons, but not more than 1,000 gallons.....\$ 165
First lot.....\$ 335		For projected daily sewage flow above 1,000 gallons/day.....\$ 165
Commercial Facility System:		Permit Renewal:
For first 1,000 gallons projected daily sewage flow.....\$ 335		If field visit required.....\$ 240
Site evaluation application fee for systems with projected sewage flows greater than 1,000 gallons, but not more than 5,000 gallons.....\$ 335		Alteration Permit.....\$ 450
plus an additional \$90 for each 500 gallons or part thereof above 1,000 gallons.		Repair Permit:
Site Evaluation Report Review .....\$ 290		Single family dwelling:
Construction-Installation Permit:		Major .....\$ 245
For First 1,000 Gallons Projected Daily Sewage Flow:		Minor .....\$ 125
Standard on-site system.....\$ 460		Commercial Facility:
Alternative system:		Minor .....\$ 200
Aerobic system.....\$ 460		Permit Denial Review.....\$ 290
Capping fill .....\$ 710		Authorization Notice:
Cesspool.....\$ 460		If field visit required.....\$ 280
Disposal trenches in saprolite.....\$ 460		Authorization notice denial review.....\$ 290
Evapotranspiration-absorption.....\$ 460		Annual Evaluation of Alternative System (where required).....\$ 235
Gray water waste disposal sump.....\$ 200		Evaluation of temporary or hardship Mobile Home.....\$ 235
Pressure distribution.....\$ 690		Rural Area Variance to Standard Subsurface Rules:
Redundant .....\$ 460		Site evaluation.....\$ 335
Sand filter .....\$ 880		Sewage Disposal Service:
Seepage pit.....\$ 460		New business license.....\$ 260
Seepage trench.....\$ 460		Renewal of existing and valid business license.....\$ 190
Steep slope .....\$ 460		Transfer of or amendments to license.....\$ 135
Tile dewatering.....\$ 690		Reinstatement of suspended license.....\$ 160
Reinspection fee .....\$ 140		Pumper truck inspection, first vehicle:
For projected daily sewage flow above 1,000 gallons/day.....\$ 40		Each inspection.....\$ 80
for each 500 gallons or part thereof above 1,000		Each additional vehicle, each inspection.....\$ 45
		Experimental Systems:
		Permit .....\$ 3,670
		Existing System Evaluation Report.....\$ 285
		Statewide On-Site Sewage Disposal Program Surcharge:
		(a) For each site evaluated .....\$ 30
		(b) For each construction installation permit .....\$ 30

(c) For all other activities for which an application is submitted .....\$ 30

**SECTION 8.** This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect July 1, 1995.

Approved by the Governor June 30, 1995  
Filed in the office of Secretary of State June 30, 1995  
Effective date July 1, 1995

**CHAPTER 440**

**AN ACT**

HB 5023

Relating to state financial administration; creating new provisions; amending ORS 137.303, 137.305, 166.715, 167.203, 167.212, 167.222, 167.238, 167.242, 167.247, 366.524, 417.310, 418.191, 418.193, 418.199, 419C.239, 419C.443, 475.005, 475.035, 475.125, 475.135, 475.145, 475.165, 475.190, 475.225, 475.235, 475.245, 475.255, 475.265, 475.275, 475.285, 475.405, 475.425, 475.525, 475.955, 475.992, 475.993, 475.994, 475.995, 475.999, 689.405, 689.445, 689.455 and 802.155 and section 16, chapter 791, Oregon Laws 1989; repealing ORS 430.400; appropriating money; limiting expenditures; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

**SECTION 1.** ORS 137.303 is amended to read:

137.303. (1) The Department of Revenue is responsible for assuring that moneys in the Criminal Fine and Assessment Account are properly distributed and shall distribute the moneys monthly according to the following formula:

(a) 16.1000 percent of moneys in the account shall be transferred to the Police Standards and Training Account established under ORS 181.690.

(b) 7.9881 percent of moneys in the account shall be transferred to the Criminal Injuries Compensation Account established under ORS 147.225.

[(c) 0.1547 percent of moneys in the account shall be transferred to the Boating Safety, Law Enforcement and Facility Account established under ORS 830.140.]

[(d)] (c) 4.3548 percent of moneys in the account shall be transferred to the Intoxicated Driver Program Fund established under ORS 813.270.

[(e) 0.0500 percent of moneys in the account shall be transferred to the State Highway Fund established under ORS 366.505, to be used and expended for purposes designated by the Oregon Transportation Commission pursuant to ORS 802.110.]

[(f) 2.0726 percent of moneys in the account shall be transferred to the State Highway Fund established under ORS 366.505, to be used and expended as are other state highway funds.]

[(g) 0.0369 percent of moneys in the account shall be transferred to the State Parks and Recreation Department Fund.]

[(h) 0.5521 percent of moneys in the account shall be transferred to the Motor Vehicle Records Account established under ORS 802.150.]

[(i) 2.0138 percent of moneys in the account shall be transferred to the Department of Transportation and is continuously appropriated to the department for administrative expenses connected with driver and motor vehicle services.]

[(j) 0.5538 percent of moneys in the account shall be transferred to the State Wildlife Fund established under ORS 496.300.]

[(k)] (d) [50.5796] 50.1151 percent of moneys in the account shall be transferred to the General Fund to be used for general governmental expenses.

[(L)] (e) 2.4152 percent of the moneys in the account shall be reserved to be distributed as provided in ORS 137.305.

[(m) 0.1343 percent of the moneys in the account shall be transferred to the Department of Human Resources for use by alcohol and drug abuse programs under ORS 430.400.]

[(n)] (f) [4.1954] 2.843 percent of the moneys in the account shall be transferred to the Department of State Police and is continuously appropriated to the department.

[(o)] (g) [0.8106] 0.811 percent of moneys in the account shall be transferred to the Department of State Police and is continuously appropriated to the department for the purpose of enhanced enforcement of traffic laws against drivers of commercial motor vehicles.

[(p)] (h) 7.9881 percent of the moneys in the account shall be transferred to the Child Abuse Multidisciplinary Intervention Account established in ORS 418.746.

(i) 3.5615 percent of the moneys in the account shall be transferred to the Department of State Police and is continuously appropriated to the department for the purpose of performing forensic laboratory analyses and maintaining the forensic services implied consent unit.

(j) 1.2367 percent of the moneys in the account shall be transferred to the Domestic Violence Fund established under ORS 108.660 and is continuously appropriated for the purposes of ORS 108.620 (1)(a) to (c).

(k) 3.4645 percent of the moneys in the account shall be transferred to the Safety Education Fund created by ORS 802.155.

(L) 2.1226 percent of the moneys in the account shall be transferred to the Children's Trust Endowment Fund established under section 46 of this 1995 Act.

(2) The Department of Revenue shall report to Children's Services Division monthly on the amount of moneys transferred to the Child Abuse Multidisciplinary Intervention Account under subsection [(I)(p)] (1)(h) of this section. In making the report, the Department of Revenue shall specify the amount