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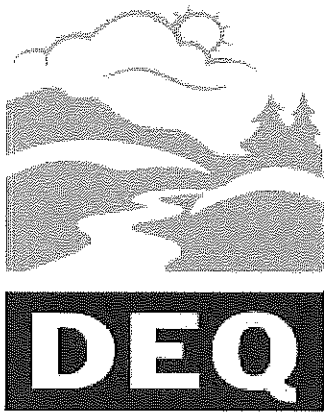
OREGON
ENVIRONMENTAL QUALITY
COMMISSION MEETING
MATERIALS 08/06/1998



State of Oregon
Department of Environmental Quality

Environmental Quality Commission

☒ Rule Adoption Item
☐ Action Item
☐ Information Item

Agenda Item K
August 7, 1998 Meeting

Title:

Rule Revisions for Transportation Conformity, Indirect Source Construction Permits, General Conformity, and SIP Streamling.

Summary:

Proposed modifications to the Transportation Conformity rules add streamlining provisions recently allowed by federal regulations. Changes to General Conformity rules remove attainment areas from the program (as clarified by Congress). Revisions of the Indirect Source rules significantly reduce the permitting requirements for the construction of new parking facilities, and eliminate the requirements for highway projects since air pollution from these sources is now largely controlled under other regulations. Finally, amendment of the State Implementation Plan (SIP) rule will simplify the administrative requirements for submitting rules adopted by a regional air pollution authority for EPA approval when they are the same as rules previously adopted by the Commission. With the exception of the Indirect Source rules, these amendments (if adopted) will revise the SIP as required by the Clean Air Act.

Department Recommendation:

The department recommends the Commission adopt the proposed amendments for Transportation Conformity, Indirect Sources, General Conformity and the SIP rule. The department further recommends that with the exception of OAR 340-020-0100 through 340-020-0135, these amendments should be adopted a revision of the State of Oregon Clean Air Act Implementation Plan (SIP) under OAR 340-020-0047.

Dave Nordberg
Report Author

Andrew Ginsburg for Greg Green
Division Administrator

Director Langdon Marsh

Accommodations for disabilities are available upon request by contacting the Public Affairs Office at (503)229-5317(voice)/(503)229-6993(TDD).

State of Oregon
Department of Environmental Quality Memorandum

Date: July 21, 1998

To: Environmental Quality Commission

From: Langdon Marsh

Subject: Agenda Item K, August 7, 1998 EQC Meeting

Transportation Conformity, Indirect Source Construction Permits, General Conformity and SIP Streamlining.

Background

On May 13, 1998, the Director authorized the Air Quality Division to proceed to a rulemaking hearing on proposed rules which would amend the requirements for four groups of Oregon's regulations: Transportation Conformity, Indirect Source Construction Permits, General Conformity, and procedural requirements for revision of the State Implementation Plan or SIP. The proposed amendments modify existing rules to align state requirements with revised federal measures, provide additional flexibility, or streamline current procedural practices. If adopted, the Transportation Conformity, General Conformity and SIP Streamlining modifications will be submitted to EPA as revisions to the State Implementation Plan.

Pursuant to the authorization, hearing notice was published in the Secretary of State's Bulletin on June 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 May 20, 1998.

Public Hearings were held in Medford and Portland on June 24, 1998 with Anna Kemmerer and Dave Nordberg of the Department's staff serving as Presiding Officers. The Presiding Officers' Report (Attachment C) records that no members of the public attended either event.

Written comments were received through June 25, 1998 at 5:00 PM. Department staff have evaluated the single comment submitted as discussed in Attachment D. Based upon that evaluation, a modification to the initial rulemaking proposal is being recommended by the Department. This modification is summarized below and detailed in Attachment E.

The following sections summarize the issues this proposed rulemaking action is intended to address, the authority to address the issues, 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.

Issues this Proposed Rulemaking Action is Intended to Address

Transportation Conformity:

Transportation Conformity is the process required by the Clean Air Act that reconciles the amount of motor vehicle pollution produced by new transportation projects with the amount anticipated by a state's air quality Implementation Plan. In August 1997, the U.S. Environmental Protection Agency promulgated revisions to the federal Transportation Conformity regulations and required states to revisit their own transportation conformity rules within one year. This rule proposal is in response to this requirement.

The most significant issues addressed by the revisions are: 1) how non-metropolitan areas demonstrate conformity during the years beyond the SIP, 2) what projects can proceed during a conformity lapse, and 3) when a SIP emissions budget takes effect. Generally, the modifications reorganize the rules, streamline some of the requirements and provide additional flexibility in the transportation conformity process.

Indirect Source Construction Permits:

This program was originally adopted in 1974 to address potentially harmful levels of Carbon Monoxide produced by new facilities that attract concentrations of motor vehicles such as large parking lots. Since then, tighter federal regulations have significantly reduced the carbon monoxide emissions of new vehicles, and controls for carbon monoxide "hot spots" have been included in the regulations for Transportation Conformity. In view of the decreased problem, this proposal eliminates the requirement for Indirect Source Construction Permits for airports and highway sections, plus revises the permit requirement for parking facilities so only the largest new projects are addressed.

These modifications also repeal and remove from the SIP rules that apply to Parking Offsets in the Portland Central Business District which have had no effect following EPA's approval of Portland's Carbon Monoxide (CO) Maintenance Plan. This program was replaced by the parking element of the City of Portland's Central City Transportation Management Plan, the requirements of which were incorporated into the Portland CO Maintenance Plan.

General Conformity:

After Oregon's rules were adopted in 1995, Congress clarified that General Conformity is to apply to activities on federal lands (such as prescribed burning) only within nonattainment areas. The proposal modifies the regulations to reflect this clarification.

SIP Streamlining:

Regulations adopted by a regional air pollution authority must be approved and adopted into the State Implementation Plan (SIP) by the Environmental Quality Commission (EQC) through the rulemaking process. This rule would greatly simplify the procedural requirements of this process in cases where the regional authority's rules simply copy rules previously adopted by the Commission.

Relationship to Federal and Adjacent State Rules

Transportation Conformity:

The proposed revisions to Oregon's rules copy the federal requirements. Adjacent states are subject to the same measures and are also revisiting their regulations.

Indirect Source Construction Permits:

The Clean Air Act Amendments of 1977 repealed previous federal requirements for an Indirect Source Construction Permit program. Since then, Indirect Source Permit programs have been eliminated in neighboring states.

General Conformity:

The proposed amendments will align Oregon's rules with federal requirements. Neighboring states have or are developing similar regulations.

SIP Streamlining:

The Clean Air Act requires Oregon to have a State Implementation Plan, but the procedural requirements of how a SIP is revised vary. Oregon's SIP rule (OAR 340-020-0047) is structured differently than those of neighboring states.

Authority to Address the Issue

Authority to address these issues is provided in ORS 468.020 and 468A.025.

Process for Development of the Rulemaking Proposal (including Advisory Committee and alternatives considered)

Transportation Conformity:

The Department convened the Transportation Conformity Advisory Committee to advise the agency on modifications to the Transportation Conformity rules originally adopted in 1995. Because these rule amendments could have a significant effect on the transportation planning and approval process and several agencies, the Department determined an advisory committee to be necessary and did not consider alternate methods of rule development. The committee reflected the interests of state, local and regional agencies, transportation/land use groups, and environmental advocates. In meetings on April 3, and April 22, 1998 the committee evaluated whether the new flexibilities allowed by the federal revisions should be added to Oregon's Transportation Conformity program as outlined in the section that addresses significant issues below.

Indirect Source Construction Permits:

During the two meetings in April, the Transportation Advisory Committee discussed above also considered modification of the Indirect Source rules. Because this committee is knowledgeable about transportation system and vehicle emission issues it was considered the most appropriate forum for this topic. No alternative methods were seriously considered.

General Conformity:

No advisory committee involvement was used in developing the rule revisions for general conformity because the revisions merely reflect changes in federal law.

SIP Streamlining:

Because this revision applies only to procedural processes internal to the Department and does not present substantive issues, no advisory committee was used.

Summary of Rulemaking Proposal Presented for Public Hearing and Discussion of Significant Issues Involved.

Transportation Conformity:

The rule amendments presented for public comment and proposed for adoption incorporate incremental adjustments to several requirements, but the most significant effects are in the three areas discussed below:

The first significant modification affects conformity tests for non-metropolitan areas. Under the current conformity rules, consistency between a transportation plan and an air quality plan must be demonstrated for the entire twenty year transportation planning horizon. For non-metropolitan areas the proposed amendments will allow ODOT (in consultation with DEQ) to demonstrate conformity for the years beyond the three to ten year SIP time frame by four different ways: 1) show consistency with the emissions budget set for the last year of the SIP (existing requirement); 2) demonstrate conformity through dispersion modeling; 3) show reductions from 1990 levels; or 4) show that emissions from the "build" scenario will be less than the "no-build" scenario. This modification allows the additional flexibility needed for non-metropolitan areas which typically experience few projects and have few opportunities to pursue mitigating measures.

During the advisory committee discussion of this provision, several members expressed concern that it might be less protective of air quality because it could result in less mitigation and less VMT (Vehicle Miles Traveled) reduction than would otherwise be required. Others expressed concern about the fairness of providing non-metropolitan areas greater flexibility than metropolitan areas. However, the committee agreed to support the added flexibility for the following reasons: 1) added flexibility is appropriate because fewer projects and opportunities for mitigation occur in these areas, 2) the build/no-build test (potentially the most lenient criterion) still requires a project to demonstrate an air quality improvement, 3) retaining the more stringent current rule will not necessarily reduce VMT, and 4) new regulations for PM2.5 (particulate matter smaller than 2.5 microns) being developed should create a future opportunity to revisit the issue.

The second significant issue concerns the number of projects that can proceed in the event of a conformity lapse. The rules require a demonstration at regular intervals that transportation plans and programs are consistent with the SIP. Inability to show conformity at those intervals creates a conformity lapse. Under existing Oregon rules, only two types of projects are allowed to move forward during such a lapse: 1) those that are grandfathered because they have completed the NEPA (National Environmental Policy Act) process, and 2) those that are exempt. Under the proposed revisions, an additional group will also be allowed to proceed during a conformity lapse. This third group is non-federal projects that were included in the first three years of the previously conforming plan. Incorporating this change to the rules will decrease the amount of planning disruption caused by a conformity lapse while maintaining the effectiveness of the program.

The advisory committee also supported the additional flexibility of these new conformity lapse provisions. However, there was one dissenting vote from a member who felt no projects should be allowed to proceed under that circumstance. Another member agreed with the majority but requested that the Commission be advised that concern existed about agencies exchanging federal and non-federal funds for the purpose of avoiding conformity consequences. The committee proceeded with the assurances of ODOT and Metropolitan Planning Organization representatives that the proposed changes would not subvert the purpose of conformity because, in the event of a conformity lapse, it is highly unlikely that locally elected officials would change their support for previously agreed-to projects. The more likely result would be the mitigation of any negative effects through the adoption of new projects that benefit air quality.

The third issue relates to the time frame before areas are required to assess conformity using an emissions budget adopted by the EQC and submitted to EPA. The existing state rules are more stringent than the previous federal rule. The previous federal rule did not require conformity with an emissions budget until EPA approved an air quality plan which can be up to 24 months following submittal. Because the emissions budget is a more appropriate benchmark for evaluating future emissions, the existing rules require consistency with the emissions budget once it had been submitted to EPA. Under both the federal revision and this proposal, the emissions budget will now apply 45 days after submission to EPA, provided the emissions budget is not found to be inadequate during that period. This modification was accepted by the advisory committee with little discussion.

Indirect Source Construction Permits:

The proposed rule amendments remove airports and highway sections from the Indirect Source Construction Permit program and increase the thresholds at which new parking facilities are required to have permits. Parking facility thresholds would increase from 250 parking spaces to 1000 spaces (from 150 to 800 for central Portland).

The problem this program was originally created to address (high concentrations of carbon monoxide or CO) is now largely controlled by other measures, such as the significant reductions resulting from federal requirements for new vehicles. During the advisory committee process, the Department reported that its recent experience shows that only projects such as very large parking facilities are now capable of producing a significant CO effect. The problem is also addressed by transportation conformity regulations that require overall CO emissions to be considered in transportation plans and provide for "hot-spot" analysis of potential problem areas. Given these circumstances, the committee unanimously recommended that the program be greatly reduced to address only the largest parking facilities.

General Conformity:

General Conformity requires that activities on federal lands (such as prescribed burning by the

Forest Service) align with the air quality goals set in a State Implementation Plan. Oregon's current General Confomity rules apply to all areas of the state. Since they were adopted, however, Congress clarified that General Conformity pertains only to nonattainment or maintenance areas (those that do not--or did not in the past--meet the National Ambient Air Quality Standards or NAAQS). These revisions will have no effect on existing prescribed burning practices, as implementation of the General Conformity requirements in attainment areas was delayed pending the outcome of a federal determination of applicability.

Because General Conformity only restricts activities that take place within nonattainment or maintenance areas it does not address external activities regardless of any deleterious effects. Deviation from the federal provisions would require a large and complex implementation effort including state, local, and private parties. Such course of action is beyond the resources or intent of the Department. However, the Oregon Smoke Management Plan will continue to provide statewide guidelines for state and federal land managers to minimize smoke impacts from prescribed burning.

SIP Streamlining:

State and local air quality agencies must incorporate measures that implement Title 1 of the Clean Air Act into a State Implementation Plan or SIP. In Oregon this is done by amending OAR 340-020-0047 through the rulemaking process. After such measures are submitted to and approved by EPA, this action makes them federally enforceable and subject to citizen lawsuits. As a separate matter, many functions of the Oregon EQC can be delegated to a regional authority--the only one of which currently existing is the Lane Regional Air Pollution Authority or LRAPA.

When a regional authority is involved the process is subject to the following requirements:

First, the regional authority must adopt the regulation according to its own procedures. In the case of LRAPA, this is done following a joint DEQ/LRAPA public hearing/public comment period.

Second, under ORS 468A.135(2) regional authority regulations must be at least as stringent as state regulations. This is accomplished by a DEQ review prior to LRAPA adoption. For the review to be successful, the measure must be determined to require the same universe of regulated parties to be subject to at least an equal level of control as would be required under state regulations.

Third, ORS 468A.135(2) also provides that air quality standards adopted by a regional authority are subject to approval by the EQC.

Fourth, (for regulations that pertain to the SIP) the Commission must adopt the measures as a revision to the State Implementation Plan.

The third and fourth steps require the Department to take regulations adopted by a regional authority to the EQC through a formal and time consuming second rulemaking process before they can be submitted for EPA approval. When the measures adopted by a regional authority simply copy regulations previously adopted by the Commission as rules for the state, the process is substantively redundant. The proposed revision to OAR 340-020-0047 will delegate to the Department the authority to approve a regional agency's regulations and submit them to EPA as a revision to the SIP in cases where the regulations are verbatim copies of rules previously adopted by the Commission. When the rules are identical, this will allow more timely and efficient processing of LRAPA regulations by eliminating the third and fourth steps.

No significant issues arising out of this revision were identified.

Summary of Significant Public Comment and Changes Proposed in Response

Transportation Conformity:

The only comment received was submitted by a Metropolitan Planning Organization (MPO) in support of the proposed changes. This commenter also requested that the rules be amended to specify that MPOs are responsible for conducting conformity determinations for their entire Air Quality Maintenance Areas—including the areas outside their normal jurisdictions. Under existing regulations, responsibility for conformity determinations is established through consultation and inter-governmental agreements. The commenter noted that such agreements are often confusing to outlying small communities, and that reluctance on their part can delay the conformity process.

In consideration of this issue the regulation proposed for adoption by the EQC is modified to specify that when no agreement is currently in place, the responsibility for performing the air quality analyses (conformity determinations) belongs to the MPO.

Indirect Source Construction Permits:

In addition to the items cited above, the single commenter also expressed support for the proposed Indirect Source revisions.

General Conformity:

No comments were received.

SIP Streamlining:

No comments were received.

Summary of How the Proposed Rule Will Work and How it Will be Implemented

Transportation Conformity:

The rule amendments are modifications of an existing inter-agency consultation process and will have no impact on the present implementation program. Eventually, most of the consultation functions currently performed by DEQ Headquarters staff are expected to be transferred to staff in DEQ's Regional offices for reasons independent of these proposed revisions.

Indirect Source Construction Permits:

The modified program will be implemented as a change to the existing Indirect Source program.

General Conformity:

General Conformity regulations are implemented by federal agencies. These amendments will cause no implementation changes in existing practices.

SIP Streamlining:

The rule modification will be implemented by modifying existing Department procedures.

Recommendation for Commission Action

It is recommended that the Commission adopt the rule amendments regarding Transportation Conformity, Indirect Source Construction Permits, General Conformity and SIP Streamlining as a revision to the State Implementation Plan as presented in Attachment A of the Department Staff Report.

Attachments

A. Rule Amendments Proposed for Adoption
   1. Transportation Conformity
   2. Indirect Source Construction Permits
   3. General Conformity
   4. SIP Streamlining
B. Supporting Procedural Documentation:
   1. Legal Notice of Hearing
   2. Fiscal and Economic Impact Statement
   3. Land Use Evaluation Statements
   4. Questions to be Answered to Reveal Potential Justification for Differing from Federal Requirements
   5. Cover Memorandum from Public Notice
C. Presiding Officers' Report on Public Hearings
D. Department's Evaluation of Public Comment
E. Detailed Changes to Original Rulemaking Proposal made in Response to Public Comment
F. Advisory Committee Membership
G. Rule Implementation Plan

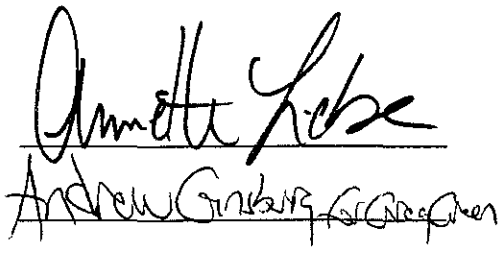
Reference Documents (available upon request)

Written Comment Received (listed in Attachment D)

Approved:

Section:

Division:



Report Prepared By: Dave Nordberg
Phone: (503) 229-5519
Date Prepared: June 30, 1998

~~Criteria and Procedures for Determining~~ Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit ~~Act~~ Laws

340-020-0710
Purpose
The purpose of OAR 340-020-0710 through 340-020-1070 ~~340-20-1080~~ is to implement section 176(c) of the Clean Air Act, as amended [42 U.S.C. 7401 et seq. ~~(1990)~~], and the related requirements of 23 U.S.C. 109(j), with respect to the conformity of Transportation Plans ~~transportation plans~~, programs, and Projects ~~projects~~ which are developed, funded, or approved by the United States Department of Transportation (DOT), and by Metropolitan Planning Organizations ~~metropolitan planning organizations~~ (MPOs) or other recipients of funds under title 23 U.S.C. or the Federal Transit ~~Act~~ Laws (49 U.S.C. Chapter 53 ~~1601 et seq.~~). OAR 340-020-0710 through 340-020-1070 ~~340-20-1080~~ sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such activities to an ~~a~~Applicable ~~i~~Implementation ~~p~~Plan developed pursuant to section 110 and Part D of the CAA.

State. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as Adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0720
Definitions
Terms used but not defined in this rule shall have the meaning given them by the CAA, titles 23 and 49 U.S.C., other Environmental Protection Agency regulations, or other DOT regulations, in that order of priority.

(1) "Applicable ~~i~~Implementation ~~p~~Plan" is defined in section 302(q) of the CAA and means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 110, or promulgated under section 110(c), or promulgated or approved pursuant to regulations promulgated under section 301(d) and which implements the relevant requirements of the CAA.

(2) "CAA" means the Clean Air Act, as amended ~~(1990).~~ (42 U.S.C. 7401 et seq.).

(3) "Cause or ~~e~~Contribute to a ~~n~~New ~~v~~Violation" for a project means:

(a) To cause or contribute to a new violation of a Standard ~~standard~~ in the area substantially affected by the project or over a region which would otherwise not be in violation of the Standard ~~standard~~ during the future period in question, if the project were not implemented; or

(b) To contribute to a new violation in a manner that would Increase the Frequency or Severity ~~increase the frequency or severity~~ of a new violation of a Standard ~~standard~~ in such area.

(4) "Clean Data" means air quality monitoring data determined by EPA to meet the requirements of 40 CFR part 58 that indicate attainment of the National Ambient Air Quality Standard.

~~(4)~~ (5) "Consult" or "Consultation" means that the party or parties responsible for consultation as established in OAR 340-020-0760 shall provide all appropriate information necessary to making a conformity determination and, prior to making a conformity determination, except with respect to a Transportation Plan ~~transportation plan~~ or TIP revision which merely adds or deletes exempt Projects ~~projects~~ listed in OAR 340-020-1050, consider the views of such parties and provide a timely, written response to those views. Such views and written responses shall be included in the record of decision or action.

~~(5)~~ (6) "Control Strategy Implementation Plan" or "Control ~~s~~Strategy ~~i~~Implementation ~~p~~Plan ~~r~~Revision" is the ~~applicable~~ implementation plan which contains specific strategies for controlling the emissions of and reducing ambient levels of pollutants in order to satisfy CAA requirements for demonstrations of reasonable further progress and attainment (CAA

§§ 182(b)(1), 182(c)(2)(A), 182(c)(2)(B), 187(a)(7), 189(a)(1)(B), and 189(b)(1)(A); and §§ 192(a) and 192(b), for nitrogen dioxide).

~~(6) "Control strategy period" with respect to particulate matter less than 10 microns in diameter (PM_{10}), carbon monoxide (CO), nitrogen dioxide (NO2), and/or ozone precursors [volatile organic compounds (VOC) and oxides of nitrogen (NOx)], means that period of time after EPA approves control strategy implementation plan revisions containing strategies for controlling PM_{10}, NO2, CO, and/or ozone, as appropriate. This period ends when the State submits and EPA approves a request under §107(d) of the CAA for redesignation to an attainment area.~~

(7) "DEQ" means the Department of Environmental Quality

(8) "Design ~~e~~Concept" means the type of facility identified by the project, e.g., freeway, expressway, arterial highway, grade separated highway, reserved right-of-way rail transit, mixed traffic rail transit, exclusive busway, etc.

(9) "Design ~~s~~Scope" means the design aspects of a facility which will affect the proposed facility's impact on regional emissions, usually as they relate to vehicle or person carrying capacity and control, e.g., number of lanes or tracks to be constructed or added, length of project, signalization, access control including approximate number and location of interchanges, preferential treatment for high-occupancy vehicles, etc.

(10) "DOT" means the United States Department of Transportation.

(11) "EPA" means the Environmental Protection Agency.

(12) "FHWA" means the Federal Highway Administration of DOT.

(13) "FHWA/FTA project" for the purpose of OAR 340-020-0710 through 340-020-1070 ~~this rule~~, is any highway or Transit Project ~~transit project~~ which is proposed to receive funding assistance and approval through the Federal-Aid Highway program or the Federal mass Transit ~~transit~~ program, or requires Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) approval for some aspect of the project, such as connection to an interstate highway or deviation from applicable design Standards ~~standards~~ on the interstate system.

(14) "FTA" means the Federal Transit Administration of DOT.

(15) "Forecast ~~p~~Period" with respect to a Transportation Plan ~~transportation plan~~ is the period covered by the Transportation Plan ~~transportation plan~~ pursuant to **23 CFR Part 450**.

(16) "Highway ~~p~~Project" is an undertaking to implement or modify a highway facility or highway-related program. Such an undertaking consists of all required phases necessary for implementation. For analytical purposes, it must be defined sufficiently to:

(a) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

(b) Have independent utility or significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and

(c) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

(17) "Horizon ~~y~~Year" is a year for which the Transportation Plan ~~transportation plan~~ describes the envisioned transportation system in accordance with OAR 340-020-0770.

(18) "Hot-~~s~~Spot ~~a~~Analysis" is an estimation of likely future localized CO and PM_{10} pollutant concentrations and a comparison of those concentrations to the National Ambient Air Quality Standards ~~national ambient air quality standards~~. ~~Pollutant concentrations to be estimated should be based on the total emissions burden which may result from the implementation of a single, specific project, summed together with future background concentrations (which can be estimated using the ratio of future to current traffic multiplied by the ratio of future to current emission factors) expected in the area. The total concentration must be estimated and analyzed at appropriate receptor locations in the area substantially affected by the project.~~ Hot-~~s~~Spot ~~a~~Analysis assesses impacts on a scale smaller than the entire nonattainment or Maintenance Area ~~maintenance area~~, including, for example, congested roadway intersections and highways or Transit ~~transit~~ terminals, and uses an air quality dispersion model to determine the effects of emissions on air quality.

~~(19) "Incomplete data area" means any ozone nonattainment area which EPA has classified, in 40 CFR Part 81, as an incomplete data area.~~

~~(20)~~ (19) "Increase the ~~f~~Frequency or ~~s~~Severity" means to cause a location or region to exceed a Standard ~~standard~~ more often or to cause a violation at a greater concentration than previously existed and/or would otherwise exist during the future period in question, if the project were not implemented.

(20) "Lapse" means that the conformity determination for a Transportation Plan or TIP has expired, and thus there is no currently conforming Transportation Plan and TIP.

~~(21) "ISTEA" means the Intermodal Surface Transportation Efficiency Act of 1991.~~

~~(22)~~ (21) "Lead ~~p~~Planning ~~a~~Agency" means an agency designated pursuant to section 174 of the Clean Air Act as responsible for developing an ~~a~~Applicable ~~i~~Implementation ~~p~~Plan.

~~(23)~~ (22) "Maintenance ~~a~~Area" means any geographic region of the United States previously designated nonattainment pursuant to the CAA Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a Maintenance Plan ~~maintenance plan~~ under § 175A of the CAA, as amended.

~~(24) "Maintenance period" with respect to a pollutant or pollutant precursor means that period of time beginning when a State submits and EPA approves a request under § 107(d) of the CAA for redesignation to an attainment area, and lasting for 20 years, unless the applicable implementation plan specifies that the maintenance period shall last for more than 20 years.~~

~~(25)~~ (23) "Maintenance ~~p~~Plan" means an implementation plan adopted by the Environmental Quality Commission, endorsed by the Governor and submitted to EPA under section 175(a) of the CAA, as amended.

~~(26)~~ (24) "Maximum ~~p~~Priority" means that all possible actions must be taken to shorten the time periods necessary to complete essential steps in TCM implementation - for example, by increasing the funding rate - even though timing of other Projects ~~projects~~ may be affected. It is not permissible to have prospective discrepancies with the SIP's TCM implementation schedule due to lack of funding in the TIP, lack of commitment to the project by the sponsoring agency, unreasonably long periods to complete future work due to lack of staff or other agency resources, lack of approval or consent by local governmental bodies, or failure to have applied for a permit where necessary work preliminary to such application has been completed. However, where statewide and metropolitan funding resources and planning and management capabilities are fully consumed, within the flexibilities of the Intermodal Surface Transportation Efficiency Act (ISTEA), with responding to damage from natural disasters, civil unrest, or terrorist acts, TCM implementation can be determined to be timely without regard to the above, provided reasonable efforts are being made.

~~(27)~~ (25) "Metropolitan ~~a~~Area" means any area where a Metropolitan Planning Organization ~~metropolitan planning organization~~ has been designated.

~~(28)~~ (26) "Metropolitan ~~p~~Planning ~~o~~Organization" or ~~("MPO)~~" is that organization designated as being responsible, together with the State, for conducting the continuing, cooperative, and comprehensive planning process under 23 U.S.C. 134 and 49 U.S.C. ~~1607~~ 5303. It is the forum for cooperative transportation decision-making.

~~(29)~~ (27) "Milestone" has the meaning given in § 182(g)(1) and § 189(c) of the CAA. A Milestone ~~milestone~~ consists of an emissions level and the date on which it is required to be achieved.

~~(30)~~ (28) "Motor Vehicle Emissions Budget ~~vehicle emissions budget~~" is that portion of the total allowable emissions defined in ~~a revision to the applicable implementation plan (or in an implementation plan revision which was adopted by the Environmental Quality Commission, subject to a public hearing, and submitted to EPA, but not yet approved by EPA),~~ the submitted or approved Control Strategy Implementation Plan Revision or Maintenance Plan for a certain date for the purpose of meeting reasonable further progress Milestones ~~milestones~~ or demonstrating attainment or maintenance ~~demonstrations,~~ of the NAAQS, for any criteria pollutant or its precursors, allocated ~~by the applicable implementation plan~~ to highway and Transit ~~transit~~ vehicles use and emissions. ~~The~~

~~applicable implementation plan for an ozone nonattainment area may also designate a motor vehicle emissions budget for oxides of nitrogen (NO_x) for a reasonable further progress milestone year if the applicable implementation plan demonstrates that this NO_x budget will be achieved with measures in the implementation plan (as an implementation plan must do for VOC milestone requirements). The applicable implementation plan for an ozone nonattainment area includes a NO_x budget if NO_x reductions are being substituted for reductions in volatile organic compounds in milestone years required for reasonable further progress.~~

~~(31)~~ (29) "National ~~a~~Ambient ~~a~~Air ~~q~~Quality ~~s~~Standards" or ~~(~~"NAAQS~~)~~" are those ~~s~~Standards established pursuant to § 109 of the CAA.

~~(32)~~ (30) "NEPA" means the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.).

~~(33)~~ (31) "NEPA ~~p~~Process ~~e~~Completion" with respect to FHWA or FTA, means the point at which there is a specific action to make a final determination that a project is categorically excluded, to make a Finding of No Significant Impact, or to issue a record of decision on a Final Environmental Impact Statement under NEPA.

~~(34)~~ (32) "Nonattainment ~~a~~Area" means any geographic region of the United States which has been designated as nonattainment under § 107 of the CAA for any pollutant for which a ~~n~~National ~~a~~Ambient ~~a~~Air ~~q~~Quality ~~s~~Standard exists.

~~(35) "Not classified area" means any carbon monoxide nonattainment area which EPA has not classified as either moderate or serious.~~

~~(36)~~ (33) "ODOT" means the Oregon Department of Transportation.

~~(37) "Phase II of the interim period" with respect to a pollutant or pollutant precursor means that period of time after December 27, 1993, lasting until the earlier of the following:~~

~~(a) Submission to EPA of the relevant control strategy implementation plan revisions which have been adopted by the Environmental Quality Commission and have been subject to a public hearing, or~~

~~(b) Submission to EPA of a maintenance plan which has been adopted by the Environmental Quality Commission and has been subject to a public hearing, or~~

~~(c) The date that the Clean Air Act requires relevant control strategy implementation plans to be submitted to EPA, provided EPA has made a finding of the State's failure to submit any such plans and the State, MPO, and DOT have received notice of such finding of the State's failure to submit any such plans. The precise end of Phase II of the interim period is established in OAR 340-20-990.~~

~~(38)~~ (34) "Policy ~~l~~Level ~~o~~Official" means elected officials, and management and senior staff level employees.

~~(39)~~ (35) "Project" means a Highway Project ~~highway project~~ or Transit Project ~~transit project~~.

(36) "Protective Finding" means a determination by EPA that a submitted Control Strategy Implementation Plan Revision contains adopted control measures or Written Commitments to adopt enforceable control measures that fully satisfy the emissions reductions requirements relevant to the statutory provision for which the implementation plan revision was submitted, such as reasonable further progress or attainment.

~~(40)~~ (36) "Recipient of funds designated under title 23 U.S.C. or the Federal Transit ~~Act~~ Laws" means any agency at any level of State, county, city, or regional government that routinely receives title 23 U.S.C. or Federal Transit ~~Act~~ Laws funds to construct FHWA/FTA Projects ~~projects~~, operate FHWA/FTA Projects ~~projects~~ or equipment, purchase equipment, or undertake other services or operations via contracts or agreements. This definition does not include private landowners or developers, or contractors or entities that are only paid for services or products created by their own employees.

~~(41)~~ (37) "Regional ~~a~~Air ~~a~~Authority" means a regional air authority established pursuant to ORS 468A.105.

~~(42)~~ (38) "Regionally ~~s~~Significant ~~p~~Project" means a Transportation Project ~~transportation project~~, other than an exempt project, that is on a facility which serves regional transportation needs, such as access to and from the area outside the region, major activity centers in the region, major planned developments such as new retail malls, sports complexes, etc., or transportation terminals as well as most terminals themselves, and would normally be included in the modeling of a Metropolitan Area's ~~metropolitan area's~~ transportation network, including at a minimum:

(a) all principal arterial highways,

(b) all fixed guideway Transit ~~transit~~-facilities that offer an alternative to regional highway travel, and

(c) any other facilities determined to be regionally significant through interagency ~~e~~Consultation pursuant to OAR 340-020-0760.

A project that is included in the modeling of an area's transportation network may not, subject to interagency ~~e~~Consultation, be considered regionally significant because it is not on a facility which serves regional transportation needs.

~~(43) "Rural transport ozone nonattainment area" means an ozone nonattainment area that does not include, and is not adjacent to, any part of a Metropolitan Statistical Area or, where one exists, a Consolidated Metropolitan Statistical Area, as defined by the United States Bureau of the Census, and is classified under Clean Air Act section 182(h) as a rural transport area.~~

(39) "Safety Margin" means the amount by which the total projected emissions from all sources of a given pollutant are less than the total emissions that would satisfy the applicable requirement for reasonable further progress, attainment, or maintenance.

(40) "Scope" means "Design Scope" as defined in section (9) of this rule when the term folows "Design Concept and...".

~~(44)~~ (41) "Standard" means a National Ambient Air Quality Standard ~~national ambient air quality standard~~.

~~(45) "Submarginal area" means any ozone nonattainment area which EPA has classified as submarginal in **40 CFR Part 81**.~~

~~(46)~~ (42) "Transit" is mass transportation by bus, rail, or other conveyance which provides general or special service to the public on a regular and continuing basis. It does not include school buses or charter or sightseeing services.

~~(47)~~ (43) "Transit ~~p~~Project" is an undertaking to implement or modify a Transit ~~transit~~-facility or transit-related program; purchase Transit ~~transit~~-vehicles or equipment; or provide financial assistance for Transit ~~transit~~-operations. It does not include actions that are solely within the jurisdiction of local Transit ~~transit~~-agencies, such as changes in routes, schedules, or fares. It may consist of several phases. For analytical purposes, it must be defined inclusively enough to:

(a) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

(b) Have independent utility or independent significance; i.e., be a reasonable expenditure even if no additional transportation improvements in the area are made; and

(c) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

~~(48) "Transitional area" means any ozone nonattainment area which EPA has classified as transitional in **40 CFR Part 81**.~~

~~(49) "Transitional period" with respect to a pollutant or pollutant precursor means that period of time which begins after submission to EPA of the relevant control strategy implementation plan or maintenance plan which has been adopted by the Environmental Quality Commission, and has been subject to a public hearing. The transitional period lasts until EPA takes final approval or disapproval action on the control strategy implementation plan submission or finds it to be incomplete. In the case of maintenance plan submissions, the transitional period shall last until EPA takes final approval or disapproval action. In the case of submissions other than maintenance plans, the precise beginning and end of the transitional period is established in OAR 340-20-990.~~

~~(50)~~ (44) "Transportation ~~c~~Control ~~m~~Measure" or ~~("~~"TCM~~)~~" is any measure that is specifically identified and committed to in the ~~a~~Applicable ~~i~~Implementation ~~p~~Plan that is either one of the

types listed in section 108 of the CAA, or any other measure for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions. Notwithstanding the ~~above~~ first sentence of this definition, vehicle technology-based, fuel-based, and maintenance-based measures which control the emissions from vehicles under fixed traffic conditions are not TCMs for the purposes of ~~this subpart~~ OAR 340-020-0710 through 340-020-1070.

~~(51)~~ (45) "Transportation ~~i~~Improvement ~~p~~Program" or ~~("~~TIP~~)~~" means a staged, multiyear, intermodal program of Transportation Projects ~~transportation projects~~ covering a metropolitan planning area which is consistent with the metropolitan Transportation Plan ~~transportation plan~~, and developed pursuant to **23 CFR Part 450**.

~~(52)~~ (46) "Transportation ~~p~~Plan" means the official intermodal metropolitan Transportation Plan ~~transportation plan~~ that is developed through the metropolitan planning process for the metropolitan planning area, developed pursuant to **23 CFR Part 450**.

~~(53)~~ (47) "Transportation ~~p~~Project" means a roadway project or a Transit Project ~~transit project~~.

~~(54)~~ (48) "VMT" means vehicle miles traveled.

(49) "Written Commitment" for the purposes of OAR 340-020-0710 through 340-020-1070 means a written commitment that includes a description of the action to be taken; a demonstration that funding necessary to implement the action has been authorized by the appropriating or authorizing body; and an acknowledgment that the commitment is an enforceable obligation under the Applicable Implementation Plan.

State. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as Adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0730
Applicability

(1) Action applicability. Except as provided for in section (3) of this rule or OAR 340-020-1050, conformity determinations are required for:

(a) The adoption, acceptance, approval or support of Transportation Plans ~~transportation plans~~ and Transportation Plan amendments developed pursuant to **23 CFR Part 450** or **49 CFR Part 613** by an MPO or a DOT;

(b) The adoption, acceptance, approval or support of TIPs and TIP amendments developed pursuant to **23 CFR Part 450** or **49 CFR Part 613** by an MPO or DOT; and

(c) The approval, funding, or implementation of FHWA/FTA Transportation Projects ~~transportation projects~~ or Regionally Significant Projects ~~regionally significant projects~~ by a recipient of funds under title 23 U.S.C. -

(2) Geographic Applicability.

(a) The provisions of OAR 340-020-0710 through 1070 ~~1080~~ shall apply in all nonattainment and Maintenance Areas ~~maintenance areas~~ for transportation-related criteria pollutants for which the area is designated nonattainment or has a Maintenance Plan ~~maintenance plan~~.

(b) The provisions of this rule apply with respect to emissions of the following criteria pollutants: ozone, carbon monoxide, nitrogen dioxide, and particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM_{10}).

(c) The provisions of this rule apply with respect to emissions of the following precursor pollutants:

(A) Volatile organic compounds and nitrogen oxides in ozone areas; ~~, except with respect to interim period reductions required under this rule, which shall not apply to nitrogen oxides if the Administrator has made a determination under section 182(f) of the CAA that additional NOx reductions would not contribute to attainment in the area and has not notified the state or MPO that a subsequent violation of the ozone standard rescinds that determination;~~

(B) Nitrogen oxides in nitrogen dioxide areas; and

(C) Volatile organic compounds, nitrogen oxides, and PM_{10} in PM_{10} areas if:

(i) ~~During the interim period, t~~The EPA Regional Administrator or the director of the Department of Environmental Quality, or the director of any other Regional Air Authority ~~regional air authority~~ has made a finding, including a finding in an ~~a~~Applicable ~~i~~Implementation ~~p~~Plan or a submitted implementation plan revision that transportation related precursor emissions within the Nonattainment Area ~~nonattainment area~~ are a significant contributor to the PM_{10} nonattainment problem and has so notified the MPO and DOT; or

(ii) ~~During the transitional, control strategy, and maintenance periods, t~~The ~~a~~Applicable ~~i~~Implementation ~~p~~Plan, or implementation plan submission, establishes a budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy.

(d) The provisions of OAR 340-020-0710 through 340-020-1070 apply to Maintenance Areas for 20 years from the date EPA approves the area's request under section 107(d) of the CAA for redesignation to attainment, unless the Applicable Implementation Plan specifies that the provisions of OAR 340-020-0710 through 340-020-1070 shall apply for more than 20 years.

(3) Limitations.

(a) Projects subject to this regulation for which the NEPA process and a conformity determination have been completed by ~~FHWA or FTA~~ DOT may proceed toward implementation without further conformity determinations ~~if one of the following major steps has occurred in the past three years:~~ unless more than three years have elapsed since the most recent major step (NEPA ~~p~~Process ~~c~~Completion; start of final design; acquisition of a significant portion of the right-of-way; or approval of the plans, specifications and estimates) occurred. All phases of such projects which were considered in the conformity determination are also included, if those phases were for the purpose of funding final design, right of-way acquisition, construction, or any combination of these phases.

(b) A new conformity determination for the project will be required if there is a significant change in project ~~d~~Design ~~c~~Concept and Scope ~~scope~~, if a supplemental environmental document for air quality purposes is initiated, or if ~~no major steps to advance the project have occurred within the past three years~~ three years have elapsed since the most recent major step to advance the project occurred.

State. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-39-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as Adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0740
Priority

When assisting or approving any action with air quality related consequences, FHWA and FTA shall give priority to the implementation of those transportation portions of an ~~a~~Applicable ~~i~~Implementation ~~p~~Plan prepared to attain and maintain the NAAQS. This priority shall be consistent with statutory requirements for allocation of funds among States or other jurisdictions.

Stat. Auth.: ORS 468A.035
Stats. Implemented:ORS 468A.035
Hist.: DEQ 7-1995, f. & cert. ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as Adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0750
Frequency of Conformity Determinations

(1) Conformity determinations and conformity redeterminations for Transportation Plans ~~transportation plans~~, TIPs, FHWA/FTA projects, and Regionally Significant Projects ~~regionally~~

~~significant projects~~ approved or adopted by a recipient of funds under title 23 U.S.C. must be made according to the requirements of this rule and the ~~a~~Applicable ~~i~~Implementation ~~p~~Plan.

(2) ~~Transportation plans~~ Frequency of conformity determinations for Transportation Plans .

(a) Each new Transportation Plan ~~transportation plan~~ must be ~~found~~ demonstrated to conform before the Transportation Plan ~~transportation plan~~ is approved by the MPO or accepted by DOT. Each new Transportation Plan ~~transportation plan~~ must be ~~found~~ demonstrated to conform in accordance with the Consultation ~~consultation~~ requirements in OAR 340-020-0760.

(b) All Transportation Plan ~~transportation plan~~ revisions must be found to conform before the Transportation Plan ~~transportation plan~~ revisions are approved by an MPO or accepted by DOT, unless the revision merely adds or deletes exempt projects listed in OAR 340-020-1050. The conformity determination must be based on the Transportation Plan ~~transportation plan~~ and the revision taken as a whole, and must be made in accordance with the Consultation ~~consultation~~ provisions of OAR 340-020-0760.

~~(c) Conformity of existing transportation plans must be redetermined within 18 months of the following or the existing conformity determination will lapse:~~

~~(A) November 24, 1993; or~~

~~(B) EPA approval of an implementation plan revision which:~~

~~(i) Establishes or revises a transportation related emissions budget (as required by CAA section 175A(a), 182(b)(1), 182(c)(2)(A), 182(c)(2)(B), 187(a)(7), 189(a)(1)(B), and 189(b)(1)(A); and sections 192(a) and 192(b), for nitrogen dioxide); or~~

~~(ii) Deletes, or changes TCMs.~~

~~(C) within 24 months after the EQC adopts a SIP revision which adds TCMs, or 18 months after EPA approval of a SIP revision which adds TCMs, or at the next transportation plan approval (whichever comes first).~~

~~(D) EPA promulgation of an implementation plan which establishes or revises a transportation related emissions budget or adds, deletes, or changes TCMs.~~

~~(d) In any case, conformity determinations must be made no less frequently than every three years, or the existing conformity determination will lapse.~~

(c) The MPO and DOT must determine the conformity of the Transportation Plan no less frequently than every three years. If more than three years elapse after DOT's conformity determination without the MPO and DOT determining conformity of the Transportation Plan, the existing conformity determination will Lapse.

(3) Frequency of conformity determinations for Transportation Improvement Programs ~~transportation improvement programs~~.

(a) A new TIP must be ~~found~~ demonstrated to conform before the TIP is approved by the MPO or accepted by DOT. The new TIP must be ~~found~~ demonstrated to conform in accordance with the Consultation ~~consultation~~ requirements in OAR 340-020-0760.

(b) A TIP amendment requires a new conformity determination for the entire TIP before the amendment is approved by the MPO or accepted by DOT, unless the amendment merely adds or deletes exempt projects listed in OAR 340-020-1050 or 340-020-1060. The TIP amendment must be ~~found~~ demonstrated to conform in accordance with the Consultation ~~consultation~~ requirements in OAR 340-020-0760.

(c) The MPO and DOT must determine the conformity of the TIP no less frequently than every three years. If more than three years elapse after DOT's conformity determination without the MPO and DOT determining conformity of the TIP, the existing conformity determination will Lapse.

~~(c)~~ (d) After an MPO adopts a new or revised Transportation Plan ~~transportation plan~~, conformity of the TIP must be redetermined by the MPO and DOT within six months from the date of ~~adoption~~ DOT's conformity determination for the transportation ~~of the~~ plan, unless the new or revised plan merely adds or deletes exempt projects listed in OAR 340-020-1050 or 340-20-1060. Otherwise, the existing conformity determination for the TIP will Lapse ~~lapse~~.

~~(d) In any case, conformity determination must be made no less frequently than every three years or the existing conformity determination will lapse.~~

(4) Projects. FHWA/FTA Transportation Projects ~~transportation projects~~ must be found to conform before they are adopted, accepted, approved, or funded. In the case of recipients of funds under title 23 U.S.C. or the Federal Transit ~~Act~~ Laws, all Regionally Significant Projects ~~regionally significant projects~~ must be ~~found~~ demonstrated to conform before they are approved or adopted. Conformity must be redetermined for any FHWA/FTA project or any Regionally Significant Project ~~regionally significant project~~ adopted or approved by a recipient of funds under title 23 U.S.C. if ~~none of the following major steps has occurred within the past three years:~~ three years have elapsed since the most recent major step to advance the project (NEPA ~~p~~Process ~~c~~Completion; start of final design; acquisition of a significant portion of the right-of-way; or approval of the plans, specifications ~~or~~ and estimates) occurred.

(5) Triggers for Transportation Plan and TIP conformity determinations. Conformity of existing transportation plans and TIPS must be redetermined within 18 months of the following, or the existing conformity determination will Lapse, and no new project-level conformity determinations may be made until conformity of the Transportation Plan and TIP has been determined by the MPO and DOT:

(a) November 24, 1993;

(b) The date of the State's initial submission to EPA of each Control Strategy Implementation Plan or Maintenance Plan establishing a Motor Vehicle Emissions Budget;

(c) EPA approval of a Control Strategy Implementation Plan Revision or Maintenance Plan establishing a Motor Vehicle Emissions Budget;

(d) EPA approval of an implementation plan revision that adds, deletes, or changes TCMs; and

(e) EPA promulgation of an implementation plan which establishes or revises a Motor Vehicle Emissions Budget or adds, deletes, or changes TCMs.

(6) Additional triggers for Transportation Plan and TIP conformity determinations. Conformity of existing Transportation Plans and TIPS must be redetermined within 24 months after the EQC adopts a SIP revision which adds TCMs or the next Transportation Plan approval (whichever comes first) or the existing conformity determination will Lapse, and no new project-level conformity determinations may be made until conformity of the Transportation Plan and TIP has been determined by the MPO and DOT.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0760
Consultation

(1) General:

(a) This section provides procedures for interagency Consultation ~~consultation~~ (Federal, State, and local) and resolution of conflicts. Consultation shall be undertaken by MPOs, the Oregon Department of Transportation, affected local jurisdictions, and USDOT before making conformity determinations and in developing regional Transportation Plans ~~transportation plans~~ and Transportation Improvement Programs ~~transportation improvement programs~~. Consultation shall be undertaken by a Lead Planning Agency, the Department of Environmental Quality, the Lane Regional Air Pollution Authority (for actions in Lane County which are subject to OAR 340-020-0710 through OAR 340-020-~~1080~~ 1070), or any other Regional Air Authority ~~regional air authority~~, and EPA in developing ~~a~~Applicable ~~i~~Implementation ~~p~~Plans.

(b) The Lead Planning Agency, the Department of Environmental Quality, the Lane Regional Air Pollution Authority for Lane County, or any other Regional Air Authority ~~regional air authority~~, shall be the lead agency responsible for preparing the final document or decision and for assuring the adequacy of the interagency Consultation ~~consultation~~ process with respect to the development, amendment or revision (except administrative amendments or revisions) of an ~~a~~Applicable ~~i~~Implementation ~~p~~Plan including, the Motor Vehicle Emissions Budget ~~motor vehicle~~

~~emissions budget~~. The MPO, ODOT, or any other party responsible for making conformity determinations pursuant to this rule, shall be the lead agency responsible for preparing the final document or decision and for assuring the adequacy of the interagency Consultation ~~consultation~~ process with respect to the development of the Transportation Plan ~~transportation plan~~, the TIP, and any determinations of conformity under this rule. The project sponsor shall be responsible for assuring the conformity of FHWA/FTA projects and Regionally Significant Projects ~~regionally significant projects~~ approved or adopted by a recipient of funds under title 23.

(c) In addition to the lead agencies identified in subsection (b), other agencies entitled to participate in any interagency Consultation ~~consultation~~ process under OAR 340-020-0760 include the Oregon Department of Transportation, both headquarters and each affected regional or district office, each affected MPO, the Federal Highway Administration regional office in Portland and State division office in Salem, the Federal Transit Administration regional office, the Department of Environmental Quality, both headquarters and each affected regional office, any affected Regional Air Authority ~~regional air authority~~, the United States Environmental Protection Agency, both headquarters and each affected regional or district office, and any other organization within the State responsible under State law for developing, submitting or implementing transportation-related provisions of an implementation plan, any local Transit ~~transit~~ agency, and any city or county transportation or air quality agency.

(d) Specific roles and responsibilities of various participants in the interagency Consultation ~~consultation~~ process shall be as follows:

(A) The Lead Planning Agency, the Department of Environmental Quality, the Lane Regional Air Pollution Authority, or any other Regional Air Authority ~~regional air authority~~, shall be responsible for developing:

(i) emissions inventories,

(ii) emissions budgets,

(iii) attainment and maintenance demonstrations,

(iv) ~~e~~Control ~~s~~Strategy ~~i~~Implementation ~~p~~Plan ~~r~~Revisions, and

(v) updated motor vehicle emissions factors.

(B) Unless otherwise agreed to in a Memorandum of Understanding between the affected jurisdictions and the Department of Environmental Quality, the Department of Environmental Quality shall be responsible for developing the Transportation Control Measures ~~transportation control measures~~ to be included in SIPs in PM_{10} nonattainment or Maintenance Areas ~~maintenance areas~~, except Oakridge.

(C) The Lane Regional Air Pollution Authority shall be responsible for developing Transportation Control Measures ~~transportation control measures~~ for PM_{10} in Oakridge.

(D) The MPO shall be responsible for:

(i) developing Transportation Plans ~~transportation plans~~ and TIPs, and making corresponding conformity determinations,

(ii) making conformity determinations for the entire nonattainment or maintenance area including areas beyond the boundaries of the MPO where no agreement is in effect as required by **23 CFR § 450.310(f)**,

~~(ii)~~ (iii) monitoring Regionally Significant Projects ~~regionally significant projects~~,

~~(iii)~~ (iv) developing and evaluating TCMs in ozone and/or carbon monoxide nonattainment and/or Maintenance Areas ~~maintenance areas~~,

~~(iv)~~ (v) providing technical and policy input on emissions budgets,

~~(v)~~ (vi) performing transportation modeling, regional emissions analyses and documenting timely implementation of TCMs as required for determining conformity,

~~(vi)~~ (vii) distributing draft and final project environmental documents which have been prepared by the MPO to other agencies.

(E) The Oregon Department of Transportation (ODOT) shall be responsible for:

(i) providing technical input on proposed revisions to motor vehicle emissions factors,

(ii) distributing draft and final project environmental documents prepared by ODOT to other agencies,

(iii) convening air quality technical review meetings on specific projects when requested by other agencies or, as needed.

(iv) convening interagency Consultation ~~consultation~~ meetings required for purposes of making conformity determinations in non-metropolitan nonattainment or Maintenance Areas ~~maintenance areas~~, except Grants Pass.

(v) making conformity determinations in non-metropolitan nonattainment or Maintenance Areas ~~maintenance areas~~, except Grants Pass.

(F) In addition to the responsibilities of MPOs described in paragraph (1)(d)(D) above, the Rogue Valley Council of Governments shall be responsible for:

(i) convening interagency Consultation ~~consultation~~ meetings required for purposes of making conformity determinations in Grants Pass;

(ii) making conformity determinations in Grants Pass.

(G) The project sponsor shall be responsible for

(i) assuring project level conformity including, where required by this rule, localized air quality analysis,

(ii) distributing draft and final project environmental documents prepared by the project sponsor to other agencies,

(H) FHWA and FTA shall be responsible for assuring timely action on final findings of conformity, after Consultation ~~consultation~~ with other agencies as provided in this section and **40 CFR § 93.105**.

(I) EPA shall be responsible for:

(i) reviewing and approving updated motor vehicle emissions factors, and

(ii) providing guidance on conformity criteria and procedures to agencies in interagency Consultation ~~consultation~~.

(J) Any agency, by mutual agreement with another agency, may take on a role or responsibility assigned to that other agency under this rule.

(K) In Metropolitan Areas ~~metropolitan areas~~, any state or local transportation agency, or Transit ~~transit~~ agency shall disclose Regionally Significant Projects ~~regionally significant projects~~ to the MPO standing committee established under OAR 340-020-0760(2)(b) in a timely manner.

(i) Such disclosure shall be made not later than the first occasion on which any of the following actions is sought: adoption or amendment of a local jurisdiction's transportation system plan to include a proposed project, the issuance of administrative permits for the facility or for construction of the facility, the execution of a contract for final design or construction of the facility, the execution of any indebtedness for the facility, any final action of a board, commission or administrator authorizing or directing employees to proceed with final design, permitting or construction of the project, or any approval needed for any facility that is dependent on the completion of the Regionally Significant Project ~~regionally significant project~~.

(ii) To help assure timely disclosure, the sponsor of any potentially Regionally Significant Project ~~regionally significant project~~ shall disclose to the MPO annually on or before July 1.

(iii) In the case of any Regionally Significant Project ~~regionally significant project~~ that has not been disclosed to the MPO and other interested agencies participating in the Consultation ~~consultation~~ process in a timely manner, such Regionally Significant Project ~~regionally significant project~~ shall be deemed not to be included in the regional emissions analysis supporting the currently conforming TIP's conformity determination and not to be consistent with the Motor Vehicle Emissions Budget ~~motor vehicle emissions budget~~ in the ~~a~~Applicable ~~i~~Implementation ~~p~~Plan, for the purposes of OAR 340-020-1000.

(L) In non-Metropolitan Areas ~~metropolitan areas~~, except Grants Pass, any state or local transportation agency, or Transit ~~transit~~ agency shall disclose Regionally Significant Projects ~~regionally significant projects~~ to ODOT in a timely manner.

(i) Such disclosure shall be made not later than the first occasion on which any of the following actions is sought: adoption or amendment of a local jurisdiction's transportation system plan to include a proposed project, the issuance of administrative permits for the facility or for construction of the facility, the execution of a contract for final design or construction of the facility, the execution of any indebtedness for the facility, any final action of a board, commission

or administrator authorizing or directing employees to proceed with final design, permitting or construction of the project, or any approval needed for any facility that is dependent on the completion of the Regionally Significant Project ~~regionally significant project~~.

(ii) To help assure timely disclosure, the sponsor of any potentially Regionally Significant Project ~~regionally significant project~~ shall disclose to ODOT as requested. Requests for disclosure shall be made in writing to any affected state or local transportation or Transit ~~transit~~ agency.

(M) In Grants Pass, any state or local transportation agency, or Transit ~~transit~~ agency shall disclose Regionally Significant Projects ~~regionally significant projects~~ to RVCOG in a timely manner.

(i) Such disclosure shall be made not later than the first occasion on which any of the following actions is sought: adoption or amendment of a local jurisdiction's transportation system plan to include a proposed project, the issuance of administrative permits for the facility or for construction of the facility, the execution of a contract for final design or construction of the facility, the execution of any indebtedness for the facility, any final action of a board, commission or administrator authorizing or directing employees to proceed with final design, permitting or construction of the project, or any approval needed for any facility that is dependent on the completion of the Regionally Significant Project ~~regionally significant project~~.

(ii) To help assure timely disclosure, the sponsor of any potentially regionally significant project shall disclose to RVCOG as requested. Requests for disclosure shall be made in writing to any affected state or local transportation or Transit ~~transit~~ agency.

(2) Interagency Consultation ~~consultation~~: specific processes

(a) State Implementation Plan development

(A) It shall be the affirmative responsibility of the agency with the responsibility for preparing or revising a State Implementation Plan, except for administrative amendments or revisions, to initiate the Consultation ~~consultation~~ process by notifying other participants and convening a working group made up of representatives of each affected agency in the Consultation ~~consultation~~ process including representatives of the public, as appropriate. Such working group shall be chaired by a representative of the convening agency, unless the group by consensus selects another chair. The working group shall make decisions by majority vote. Such working group shall begin Consultation ~~consultation~~ meetings early in the process of decision on the final SIP, and shall prepare all drafts of the final SIP, the emissions budget, and major supporting documents, or appoint the representatives or agencies that will prepare such drafts. Such working group shall be made up of Policy Level Officials ~~policy level representatives~~, and shall be assisted by such technical committees or technical engineering, planning, public works, air quality, and administrative staff from the member agencies as the working group deems appropriate. The chair, or his/her designee, shall set the agenda for meetings and assure that all relevant documents and information are supplied to all participants in the Consultation ~~consultation~~ process in a timely manner.

(B) Regular Consultation ~~consultation~~ on development or amendment of an implementation plan shall include meetings of the working group at regularly scheduled intervals, no less frequently than quarterly. In addition, technical meetings shall be convened as necessary.

(C) Each lead agency with the responsibility for preparing the SIP subject to the interagency Consultation ~~consultation~~ process, shall confer through the working group process with all other agencies identified under subsection (1)(c) of this rule with an interest in the document to be developed, provide all appropriate information to those agencies needed for meaningful input, and, consider the views of each such agency and respond to substantive comments in a timely, substantive written manner prior to making a recommendation to the Environmental Quality Commission for a final decision on such document. Such views and written response shall be made part of the record of any decision or action.

(D) The working group may appoint subcommittees to address specific issues pertaining to SIP development. Any recommendations of a subcommittee shall be considered by the working group.

(E) Meetings of the working group shall be open to the public. The agency with the responsibility of preparing the SIP shall provide timely written notification of working group meetings to those members of the public who have requested such notification. In addition, reasonable efforts shall be made to identify and provide timely written notification to interested parties.

(b) Metropolitan Areas. There shall be a standing committee for purposes of Consultation ~~consultation~~ required under this rule by an MPO. The standing committee shall advise the MPO. The committee shall include representatives from state and regional air quality planning agencies and State and local transportation and Transit ~~transit~~ agencies. The standing committee shall Consult ~~consult~~ with EPA and USDOT. If not designated by committee bylaws, the standing committee shall select its chair by majority vote.

(A) For MPOs designated prior to the effective date of this rule, the following standing committees are designated for purposes of interagency Consultation ~~consultation~~ required by this rule:

(i) Lane Council of Governments: Transportation Planning Committee;

(ii) Salem-Keizer Area Transportation Study: Technical Advisory Committee;

(iii) Metro: Transportation Policy Alternatives Committee;

(iv) Rogue Valley Council of Governments: Technical Advisory Committee.

(B) Any MPO designated subsequent to the effective date of this rule shall establish a standing committee to meet the requirements of this rule.

(C) The standing committee shall hold meetings at least quarterly. The standing committee shall make decisions by majority vote.

(D) The standing committee shall be responsible for Consultation ~~consultation~~ on:

(i) determining which minor arterials and other Transportation Projects ~~transportation projects~~ should be considered "regionally significant" for the purposes of regional emissions analysis, in addition to those functionally classified as principal arterial or higher or fixed guideway systems or extensions that offer an alternative to regional highway travel;

(ii) determining whether a project's Design Concept ~~design concept~~ and Scope ~~scope~~ have changed significantly since the plan and TIP conformity determination;

(iii) evaluating whether projects otherwise exempted from meeting the requirements of this rule should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason;

(iv) making a determination, as required by OAR 340-020-0840(3)(a), whether past obstacles to implementation of TCMs which are behind the schedule established in the ~~a~~Applicable ~~i~~Implementation ~~p~~Plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving Maximum Priority ~~maximum priority~~ to approval or funding for TCMs; this Consultation ~~consultation~~ process shall also consider whether delays in TCM implementation necessitate revisions to the ~~a~~Applicable ~~i~~Implementation ~~p~~Plan to remove TCMs or substitute TCMs or other emission reduction measures;

(v) Identifying, as required by OAR 340-020-1020(4) projects located at sites in PM_{10} nonattainment or Maintenance Areas ~~maintenance areas~~ which have vehicle and roadway emission and dispersion characteristics which are essentially identical to those at sites which have violations verified by monitoring, and therefore require quantitative PM_{10} Hot-Spot Analysis ~~hot-spot analysis~~;

(vi) forecasting vehicle miles traveled, and any amendments thereto;

(vii) making a determination, as required by OAR 340-020-1000(2), whether the project is included in the regional emissions analysis supporting the currently conforming TIP's conformity determination, even if the project is not strictly "included" in the TIP for the purposes of MPO project selection or endorsement, and whether the project's Design Concept ~~design concept~~ and Scope ~~scope~~ have not changed significantly from those which were included in the regional emissions analysis, or in a manner which would significantly impact use of the facility;

(viii) determining whether the project sponsor or MPO has demonstrated that the requirements of OAR 340-020-0870, 340-020-0890, and 340-020-0900 are satisfied without a particular mitigation or control measure, as provided in OAR 340-020-1040(4);

(ix) evaluating events which will trigger new conformity determinations in addition to those triggering events established in OAR 340-020-0750;

(x) Consulting ~~consulting~~ on emissions analysis for transportation activities which cross the borders of MPOs or nonattainment or Maintenance Areas ~~maintenance areas~~ or air basins;

(xi) assuring that plans for construction of Regionally Significant Projects ~~regionally significant projects~~ which are not FHWA/FTA projects, including projects for which alternative locations, Design Concept ~~design concept~~ and Scope ~~scope~~, or the no-build option are still being considered, are disclosed to the MPO on a regular basis, and assuring that any changes to those plans are immediately disclosed;

(xii) the design, schedule, and funding of research and data collection efforts and regional transportation model development by the MPO (e.g., household/travel transportation surveys);

(xiii) development of Transportation Improvement Programs ~~transportation improvement programs~~;

(xiv) development of regional Transportation Plans ~~transportation plans~~;

(xv) establishing appropriate public participation opportunities for project-level conformity determinations required by OAR 340-20-710 through 340-20-~~1080.~~ 1070, in the manner specified by 23 CFR Part 450; and

(xvi) notification of Transportation Plan or TIP revisions or amendments which merely add or delete exempt projects listed in OAR 340-020-1050 or 340-020-1060.

(E) The chair of each standing committee, or his/her designee, shall set the agenda for all meetings. The chair of each standing committee shall assure that all agendas, and relevant documents and information are supplied to all participants in the Consultation ~~consultation~~ process in a timely manner prior to standing committee meetings which address any issues described in paragraph (2)(b)(D) of this rule.

(F) Such standing committees shall begin Consultation ~~consultation~~ meetings early in the process of decision on the final document, and shall review all drafts of the final document and major supporting documents. The standing committee shall Consult ~~consult~~ with EPA and USDOT.

(G) The MPO shall confer with the standing committee and shall Consult ~~consult~~ with all other agencies identified under subsection (1)(c) of this rule with an interest in the document to be developed, shall provide all appropriate information to those agencies needed for meaningful input, and consider the views of each such agency. The MPO shall provide draft conformity determinations to standing committee members and shall allow a minimum of 30 days for standing committee members to comment. The 30 day comment period for standing committee members may occur concurrently with the public comment period. The MPO shall respond to substantive comments raised by a standing committee member in a timely, substantive written manner at least 7 days prior to any final decision by the MPO on such document. Such views and written response shall be made part of the record of any decision or action.

(H) The standing committee may, where appropriate, appoint a subcommittee to develop recommendations for consideration by the full committee.

(I) Meetings of the standing committee shall be open to the public. The MPO shall provide timely written notification of standing committee meetings to those members of the public who have requested such notification. In addition, reasonable efforts shall be made to identify and provide timely written notification to interested parties.

(c) An MPO, or any other party responsible for developing Transportation Control Measures, shall Consult ~~consult~~ with affected parties listed in subsection (1)(c) in developing TCMs for inclusion in an ~~a~~Applicable ~~i~~Implementation ~~p~~Plan.

(d) Non-Metropolitan Areas ~~metropolitan areas~~.

(A) In non-Metropolitan Areas ~~metropolitan areas~~ the following interagency Consultation ~~consultation~~ procedures shall apply, unless otherwise agreed to by the affected parties in an Memorandum of Understanding, or specified in an ~~a~~Applicable ~~state i~~Implementation ~~p~~Plan:

(B) In each non-metropolitan nonattainment or Maintenance Area ~~maintenance area~~, except in Grants Pass, the Oregon Department of Transportation shall facilitate a meeting of the affected agencies listed in subsection (1)(c) of this rule prior to making conformity determinations to:

(i) determine which minor arterials or other Transportation Projects ~~transportation projects~~ shall be considered "regionally significant";

(ii) determine which projects have undergone significant changes in Design Concept ~~design concept~~ and Scope ~~scope~~ since the regional emissions analysis was performed;

(iii) evaluate whether projects otherwise exempted from meeting the requirements of this rule should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason,

(iv) make a determination, as required by OAR 340-020-0840(3)(a), whether past obstacles to implementation of TCMs which are behind the schedule established in the ~~a~~Applicable ~~i~~Implementation ~~p~~Plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving Maximum Priority ~~maximum priority~~ to approval or funding for TCMs; this Consultation ~~consultation~~ process shall also consider whether delays in TCM implementation necessitate revisions to the ~~a~~Applicable ~~i~~Implementation ~~p~~Plan to remove TCMs or substitute TCMs or other emission reduction measures;

(v) Identify, as required by OAR 340-020-1020(4) projects located at sites in PM_{10} nonattainment or Maintenance Areas ~~maintenance areas~~ which have vehicle and roadway emission and dispersion characteristics which are essentially identical to those at sites which have violations verified by monitoring, and therefore require quantitative PM_{10} Hot-Spot Analysis ~~hot spot analysis~~;

(vi) confer on the forecast of vehicle miles traveled, and any amendments thereto;

(vii) determine whether the project sponsor has demonstrated that the requirements of OAR 340-020-0870, 340-020-0890, and 340-020-0900 are satisfied without a particular mitigation or control measure, as provided in OAR 340-020-1040(d);

(viii) evaluate events which will trigger new conformity determinations in addition to those triggering events established in OAR 340-020-0750;

(ix) assure that plans for construction of Regionally Significant Projects ~~regionally significant projects~~ which are not FHWA/FTA projects, including projects for which alternative locations, Design Concept ~~design concept~~ and Scope ~~scope~~, or the no-build option are still being considered, are disclosed on a regular basis, and assuring that any changes to those plans are immediately disclosed.

(x) confer on the design, schedule, and funding of research and data collection efforts and transportation model development (e.g., household/travel transportation surveys).

(xi) establish appropriate public participation opportunities for project-level conformity determinations required by this rule in the manner specified by 23 CFR Part 450;

(xii) provide notification of Transportation Plan or TIP revisions or amendments which merely add or delete exempt projects listed in OAR 340-020-1050 or 340-020-1060; and

(xiii) choose conformity tests and methodologies for non-metropolitan nonattainment and Maintenance Areas, as required by OAR 340-020-0800(7)(b)(C).

(C) Notwithstanding paragraph (2)(d)(B) of this rule, the Rogue Valley Council of Governments shall be responsible for facilitating a meeting of the affected agencies listed in subsection (1)(c) of this rule prior to making conformity determinations for Grants Pass, Oregon for the purpose of Consulting ~~consulting~~ on the items listed in paragraph (2)(d)(B) of this rule.

(D) The Oregon Department of Transportation, or the Rogue Valley Council of Governments (RVCOG) in Grants Pass, shall Consult ~~consult~~ with all other agencies identified under subsection (1)(c) of this rule with an interest in the document to be developed, shall provide all appropriate information to those agencies needed for meaningful input, and consider the views of each such agency. All draft regional conformity determinations as well as, supporting documentation shall be made available to agencies with an interest in the document and those agencies shall be given at least 30 days to submit comments on the draft document. ODOT, or RVCOG in Grants Pass, shall respond to substantive comments received from other agencies in a timely, substantive

written manner at least 7 days prior to any final decision on such document. Such views and written response shall be made part of the record of any decision or action.

(E) Meetings hereby required shall be open to the public. Timely written notification of any meetings relating to conformity shall be provided to those members of the public who have requested such notification. In addition, reasonable efforts shall be made to identify and provide timely written notification to interested parties.

(F) If no Transportation Projects ~~transportation projects~~ are proposed for the upcoming fiscal year, there is no obligation to facilitate the annual meeting required by paragraphs (2)(d)(B)&(C) of this rule.

(G) The meetings required by paragraphs (2)(d)(B)&(C) of this rule may take place using telecommunications equipment, where appropriate.

(e) An MPO or ODOT shall facilitate an annual statewide meeting, unless otherwise agreed upon by ODOT, DEQ and the MPOs, of the affected agencies listed in subsection (1)(c) to review procedures for regional emissions and hot-spot modeling.

(A) The members of each agency shall annually jointly review the procedures used by affected MPOs and agencies to determine that the requirements of OAR 340-020-1010 are being met by the appropriate agency.

(B) An MPO or ODOT shall facilitate a statewide meeting of parties listed in subsection (1)(c) of this rule to receive comment on the EPA guidelines on hot-spot modeling, to determine the adequacy of the guidelines, and to make recommendations for improved hot-spot modeling to the EPA Regional Administrator. DEQ, LRAPA, or any other Regional Air Authority ~~regional air authority~~, may make recommendations for improved hot-spot modeling guidelines to the EPA Regional Administrator with the concurrence of ODOT. ODOT may make recommendations for improved hot-spot modeling guidelines to the EPA Regional Administrator with the concurrence of the affected air quality agency (e.g., DEQ, LRAPA or any other Regional Air Authority ~~regional air authority~~).

(C) The MPO or ODOT shall determine whether the transportation modeling procedures are in compliance with the modeling requirements of OAR 340-020-1010. The DEQ or LRAPA (in Lane County), or any other Regional Air Authority ~~regional air authority~~, shall determine whether the modeling procedures are in compliance with the air quality emissions modeling requirements of OAR 340-020-1010.

(D) The affected agencies shall evaluate and choose a model (or models) and associated methods and assumptions to be used in Hot-Spot Analyses and regional emissions analyses.

(f) FHWA and FTA will, for any proposed or anticipated Transportation Improvement Program ~~transportation improvement program~~ (TIP) or Transportation Plan ~~transportation plan~~ conformity determination, provide a draft conformity determination to EPA for review and comment. FHWA and FTA shall allow a minimum of 14 days for EPA to respond. DOT shall respond in writing to any significant comments raised by EPA before making a final decision. In addition, where FHWA/FTA request any new or revised information to support a TIP or Transportation Plan ~~transportation plan~~ conformity determination, FHWA/FTA shall either return the conformity determination for additional Consult ation Consult ~~consultation~~ under subsections (2)(b) or (2)(d) of this rule, or FHWA/FTA shall provide the new information to the agencies listed in subsection (1)(c) of this rule for review and comment. Where FHWA/FTA chooses to provide the new or additional information to the affected agencies listed in subsection (1)(c), FHWA and FTA shall allow for a minimum of 14 days to respond to any new or revised supporting information; DOT shall respond in writing to any significant comments raised by the agencies Consulted ~~consulted~~ on the new or revised supporting information before making a final decision.

(g) Each agency subject to an interagency Consultation ~~consultation~~ process under this rule (including any Federal agency) shall provide each final document that is the product of such Consultation ~~consultation~~ process, together with all supporting information that has not been the subject of any previous Consultation ~~consultation~~ required by this rule, to each other agency that has participated in the Consultation ~~consultation~~ process within 14 days of adopting or approving such document or making such determination. Any such agency may supply a checklist of

available supporting information, which such other participating agencies may use to request all or part of such supporting information, in lieu of generally distributing all supporting information.

(h) It shall be the affirmative responsibility of the agency with the responsibility for preparing a Transportation Plan ~~transportation plan~~ or TIP revision which merely adds or deletes exempt projects listed in OAR 340-020-1050 to initiate the process by notifying other participants early in the process of decision on the final document and assure that all relevant documents and information are supplied to all participants in the Consultation ~~consultation~~ process in a timely manner.

(i) A meeting that is scheduled or required for another purpose may be used for the purposes of Consultation ~~consultation~~ required by this rule if the conformity Consultation ~~consultation~~ purpose is identified in the public notice for the meeting.

(j) It shall be the affirmative responsibility of a project sponsor to Consult ~~consult~~ with the affected transportation and air quality agencies prior to making a project level conformity determination required by this rule.

(3) Resolving conflicts.

(a) Any conflict among State agencies or between State agencies and an MPO shall be escalated to the Governor if the conflict cannot be resolved by the heads of the involved agencies. In the first instance, such agencies shall make every effort to resolve any differences, including personal meetings between the heads of such agencies or their policy-level representatives, to the extent possible.

(b) A State agency, Regional Air Authority ~~regional air authority~~, or MPO has 14 calendar days to appeal a determination of conformity, SIP submittal, or other decision under OAR 340-020-0710 through 340-20-~~1080~~ 1070, to the Governor after the State agency, Regional Air Authority ~~regional air authority~~, or MPO has been notified of the resolution of all comments on such proposed determination of conformity, SIP submittal, or decision. If an appeal is made to the Governor, the final conformity determination, SIP submittal, or policy decision must have the concurrence of the Governor. The appealing agency must provide notice of any appeal under this subsection to the lead agency. If an action is not appealed to the Governor within 14 days, the lead agency may proceed.

(c) The Governor may delegate the role of hearing any such appeal under this section and of deciding whether to concur in the conformity determination to another official or agency within the State, but not to the head or staff of the State air quality agency or any local air quality agency, the State department of transportation, a State transportation commission or board, the Environmental Quality Commission, any agency that has responsibility for only one of these functions, or an MPO.

(4) ~~Public participation. Affected agencies, except USDOT, making conformity determinations for transportation plans and/or transportation improvement programs shall make available the draft conformity determination and all supporting documentation 30 days prior to a final decision. Notification of the availability of the draft determination and all supporting documentation shall be given by prominent advertisement in the area affected. Written notification of the availability of the draft determination and all supporting documentation shall also be provided to any party requesting such notification. Members of the public may submit oral and/or written comments to the affected agency prior to the final decision. These comments shall be made part of the record of any final decision. The full record, including public comments and responses to comments shall be submitted to USDOT. In addition, the affected agencies must specifically address in writing all public comments that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been properly reflected in the emissions analysis supporting a proposed conformity finding for a transportation plan or TIP.~~

Public Consultation procedures. Affected agencies making conformity determinations on Transportation Plans, programs, and projects shall establish a proactive public involvement process which provides opportunity for public review and comment by, at a minimum, providing reasonable public access to technical and policy information considered by the agency at the beginning of the public comment period and prior to taking formal action on a conformity

determination for all Transportation Plans and TIPs, consistent with these requirements and those or 23 CFR 450.316(b). Any charges imposed for public inspection and copying should be consistent with the fee schedule contained in 49 CFR 7.95. In addition, these agencies must specifically address in writing all public comments that known plans for a Regionally Significant Project which is not receiving FHWA or FTA funding or approval have not been properly reflected in the emissions analysis supporting a proposed conformity finding for a Transportation Plan or TIP. These agencies shall also provide opportunity for public involvement in conformity determinations for projects where otherwise required by law.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0770
Content of Transportation Plans

(1) Transportation Plans ~~plans~~ adopted after January 1, ~~1995~~ 1997 in serious, severe, or extreme ozone Nonattainment Areas ~~nonattainment areas~~ and in serious carbon monoxide Nonattainment Areas ~~nonattainment areas~~. If the metropolitan planning area contains an urbanized area population greater than 200,000, t~~T~~he Transportation Plan ~~transportation plan~~ must specifically describe the transportation system envisioned for certain future years which shall be called Horizon Years ~~horizon years~~.

(a) The agency or organization developing the Transportation Plan ~~transportation plan~~, after Consultation ~~consultation~~ pursuant to OAR 340-020-0760, may choose any years to be Horizon Years ~~horizon years~~, subject to the following restrictions:

(A) Horizon Years ~~years~~ may be no more than 10 years apart;

(B) The first Horizon Year ~~horizon year~~ may be no more than 10 years from the base year used to validate the transportation demand planning model;

(C) If the attainment year is in the time span of the Transportation Plan ~~transportation plan~~, the attainment year must be a Horizon Year ~~horizon year~~;

(D) The last Horizon Year ~~horizon year~~ must be the last year of the transportation plan's Forecast Period ~~forecast period~~.

(b) For these Horizon Years ~~horizon years~~:

(A) The Transportation Plan ~~transportation plan~~ shall quantify and document the demographic and employment factors influencing expected transportation demand, including land use forecasts, in accordance with implementation plan provisions and OAR 340-020-0760;

(B) The highway and Transit ~~transit~~ system shall be described in terms of the regionally significant additions or modifications to the existing transportation network which the Transportation Plan ~~transportation plan~~ envisions to be operational in the Horizon Year ~~horizon years~~. Additions and modifications to the highway network shall be sufficiently identified to indicate intersections with existing regionally significant facilities, and to determine their effect on route options between transportation analysis zones. Each added or modified highway segment shall also be sufficiently identified in terms of its Design Concept ~~design concept~~ and Design Scope ~~design scope~~ to allow modeling of travel times under various traffic volumes, consistent with the modeling methods for area-wide transportation analysis in use by the MPO. Transit ~~Transit~~ facilities, equipment, and services envisioned for the future shall be identified in terms of Design Concept ~~design concept~~, Design Scope ~~design scope~~, and operating policies that are sufficient~~ly to allow~~ for modeling of their Transit ~~transit~~ ridership. ~~The description of a~~ Additions and modifications to the transportation network shall ~~also~~ be described sufficiently ~~specific~~ to show that there is a reasonable relationship between expected land use and the envisioned transportation system; and

(C) Other future transportation policies, requirements, services, and activities, including intermodal activities, shall be described.

(2) Moderate areas reclassified to serious. Ozone or CO Nonattainment Areas ~~nonattainment areas~~ which are reclassified from moderate to serious and have an urbanized population greater than 200,000 must meet the requirements of subsection (1)(a) of this rule within two years from the date of reclassification.

(3) Transportation Plans ~~plans~~ for other areas. Transportation Plans ~~plans~~ for other areas must meet the requirements of subsection (a) of this section at least to the extent it has been the previous practice of the MPO to prepare plans which meet those requirements. Otherwise, ~~transportation plans must describe~~ the transportation system envisioned for the future ~~specifically enough to allow determination of conformity~~ must be sufficiently described within the Transportation Plans so that a conformity determination can be made according to the criteria and procedures of OAR 340-020-0800 through 340-020-0900 ~~340-20-980~~.

(4) Savings. The requirements of this section supplement other requirements of applicable law or regulation governing the format or content of Transportation Plans ~~transportation plans~~.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0780
Relationship of Transportation Plan and TIP Conformity with the NEPA Process

The degree of specificity required in the Transportation Plan ~~transportation plan~~ and the specific travel network assumed for air quality modeling do not preclude the consideration of alternatives in the NEPA process or other project development studies. Should the NEPA process result in a project with Design Concept ~~design concept~~ and Scope ~~scope~~ significantly different from that in the Transportation Plan ~~transportation plan~~ ~~of~~ or TIP, the project must meet the criteria in OAR 340-020-0800 through 340-020-900 ~~340-20-980~~ for projects not from a TIP before NEPA ~~p~~Process ~~e~~Completion.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0790
Fiscal Constraints for Transportation Plans and TIPs

Transportation Plans ~~plans~~ and TIPs must be ~~financially~~ fiscally constrained consistent with DOT's metropolitan planning regulations at **23 CFR Part 450** in order to be found in conformity.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0800
Criteria and Procedures for Determining Conformity of Transportation Plans, Programs, and Projects: General

(1) In order ~~to be found to conform,~~ for each Transportation Plan ~~transportation plan~~, program, FHWA/FTA project, and Regionally Significant Project ~~regionally significant project~~ approved or adopted by a recipient of funds under title 23 U.S.C. to be found to conform, ~~must satisfy the applicable criteria and procedures in OAR 340-20-810 through 340-20-980 as listed in Table 1, and must comply with all applicable conformity requirements of implementation plans and this rule~~ the MPO and DOT must demonstrate that the applicable criteria and procedures in OAR 340-020-0710 through 1070 are satisfied, and the MPO and DOT must comply with all

applicable conformity requirements of implementation plans, and of court orders for the area which pertain specifically to conformity ~~determination requirements~~. The criteria for making conformity determinations differ based on the action under review (Transportation Plans , TIPS, and FHWA/FTA projects), ~~the time period in which the conformity determinations is made, and~~ the relevant pollutant(s), and the status of the implementation plan.

(2) Table 1 indicates the criteria and procedures in OAR 340-020-0810 through 340-020-0900 ~~340-20-980~~ which apply for ~~each action in each time period.~~ Transportation Plans , TIPs, and FHWA/FTA projects. Sections (3) through (6) of this rule explain when the budget, emission reduction, and hot spot tests are required for each pollutant. Section (7) of this rule addresses isolated rural nonattainment and Maintenance Areas. Table 1 follows:

Table 1.--Conformity Criteria

All Actions at all times:

OAR 340-020-0810 Latest planning assumptions.
OAR 340-020-0820 Latest emissions model.
OAR 340-020-0830 Consultation .

Transportation Plan:

OAR 340-020-0840(2) TCMs.
OAR 340-020-0890 or 0900 Emissions budget or Emission reduction.

TIP:

OAR 340-020-0840(3) TCMs.
OAR 340-020-0890 or 0900 Emissions budget or Emission reduction.

Project (From a Conforming Plan and TIP):

OAR 340-020-0850 Currently conforming plan and TIP.
OAR 340-020-0860 Project from a conforming plan and TIP.
OAR 340-020-0870 CO and PM10 hot spots.
OAR 340-020-0880 PM10 control measures.

Project (Not From a Conforming Plan and TIP):

OAR 340-020-0840 TCMs.
OAR 340-020-0850 Currently conforming plan and TIP.
OAR 340-020-0870 CO and PM10 hot spots.
OAR 340-020-0880 PM10 control measures.
OAR 340-020-0890 Emissions budget or Emission reduction.

~~TABLE 1 CONFORMITY CRITERIA~~

~~ACTION CRITERIA~~

~~ALL PERIODS~~

~~Transportation plan TIP~~	~~340-20-810; 340-20-820; 340-20-830; 340-20-840(b). 340-20-810; 340-20-820; 340-20-830; 340-20-840(c).~~
~~Project from a conforming plan and TIP.~~	~~340-20-810; 340-20-820; 340-20-830; 340-20-850; 340-20-860; 340-20-870; 340-20-880.~~
~~Project NOT from a conforming plan and TIP.~~	~~340-20-810; 340-20-820; 340-20-830; 340-20-840(d); 340-20-850; 340-20-870; 340-20-880.~~

~~PHASE II OF THE INTERIM PERIOD~~

~~Transportation plan~~	~~340-20-930; 340-20-960.~~
~~TIP~~	~~340-20-940; 340-20-970.~~
~~Project from a conforming plan and TIP.~~	~~340-20-920.~~
~~Project NOT from a conforming plan and TIP.~~	~~340-20-920; 340-20-950; 340-20-980.~~

~~TRANSITIONAL PERIOD~~

~~Transportation plan~~	~~340-20-890; 340-20-930; 340-20-960.~~
~~TIP~~	~~340-20-900; 340-20-940; 340-20-970.~~
~~Project from a conforming plan and TIP.~~	~~340-20-920.~~
~~Project NOT from a conforming plan and TIP.~~	~~340-20-910; 340-20-920; 340-20-950; 340-20-980.~~

~~CONTROL STRATEGY AND MAINTENANCE PERIODS~~

~~Transportation plan~~	~~340-20-890.~~
~~TIP~~	~~340-20-900.~~
~~Project from a conforming plan and TIP.~~	~~No additional criteria.~~
~~Project NOT from a conforming plan and TIP.~~	~~340-20-910.~~

(3) Ozone nonattainment and Maintenance Areas. In addition to the criteria listed in Table 1 in section (2) of this rule that are required to be satisfied at all times, in ozone nonattainment and Maintenance Areas conformity determinations must include a demonstration that the budget and/or emission reduction tests are satisfied as described in the following:

(a) In ozone nonattainment and Maintenance Areas the budget test must be satisfied as required by OAR 340-020-0890 for conformity determinations made:

(A) 45 days after a Control Strategy Implementation Plan Revision or Maintenance Plan has been submitted to EPA, unless EPA has declared the Motor Vehicle Emissions Budget inadequate for transportation conformity purposes; or

(B) After EPA has declared that the Motor Vehicle Emissions Budget in a submitted Control Strategy Implementation Plan Revision or Maintenance Plan is adequate for transportation conformity purposes.

(b) In ozone Nonattainment Areas that are required to submit a Control Strategy Implementation Plan Revision (usually moderate and above areas), the emission reduction tests must be satisfied as required by OAR 340-020-0900 for conformity determinations made:

(A) During the first 45 days after a Control Strategy Implementation Plan Revision or Maintenance Plan has been submitted to EPA, unless EPA has declared a Motor Vehicle Emissions Budget adequate for transportation conformity purposes; or

(B) If EPA has declared the Motor Vehicle Emissions Budget in a submitted Control Strategy Implementation Plan Revision or Maintenance Plan inadequate for transportation conformity purposes, and there is no previously established Motor Vehicle Emissions Budget in the approved implementation plan or a previously submitted Control Strategy Implementation Plan Revision or Maintenance Plan.

(c) An ozone Nonattainment Area must satisfy the emission reduction test for NOX, as required by OAR 340-020-0900, if the implementation plan or plan submission that is applicable for the purposes of conformity determinations is a 15% plan or Phase I attainment demonstration that does not include a Motor Vehicle Emissions Budget for NOX. The implementation plan will be considered to establish a Motor Vehicle Emissions Budget for NOX if the implementation plan or plan submission contains an explicit NOX Motor Vehicle Emissions Budget that is intended to act as a ceiling on future NOX emissions, and the NOX Motor Vehicle Emissions Budget is a net reduction from NOX emissions levels in 1990.

(d) Ozone Nonattainment Areas that have not submitted a Maintenance Plan and that are not required to submit a Control Strategy Implementation Plan Revision (usually marginal and below areas) must satisfy one of the following requirements:

(A) The emission reduction tests required by OAR 340-020-0900; or

(B) The State shall submit to EPA an implementation plan revision that contains Motor Vehicle Emissions Budget(s) and an attainment demonstration, and the budget test required by OAR 340-020-0890 must be satisfied using the submitted Motor Vehicle Emissions Budget(s) (as described in subsection (3)(a) of this rule).

(e) Notwithstanding subsections (3)(a) and (3)(b) of this rule, moderate and above ozone Nonattainment Areas with three years of Clean Data that have not submitted a Maintenance Plan and that EPA has determined are not subject to the Clean Air Act reasonable further progress and attainment demonstration requirements must satisfy one of the following requirements:

(A) The emission reduction tests as required by OAR 340-020-0900;

(B) The budget test as required by OAR 340-020-0890, using the Motor Vehicle Emissions Budgets in the submitted Control Strategy Implementation Plan (subject to the timing requirements of subsection (3)(a) of this rule); or

(C) The budget test as required by OAR 340-020-0890, using the motor vehicle emissions of ozone precursors in the most recent year of Clean Data as Motor Vehicle Emissions Budgets, if such budgets are established by the EPA rulemaking that determines that the area has Clean Data.

(4) CO nonattainment and Maintenance Areas. In addition to the criteria listed in Table 1 in section (2) of this rule that are required to be satisfied at all times, in CO nonattainment and Maintenance Areas conformity determinations must include a demonstration that the hot spot, budget and/or emission reduction tests are satisfied as described in the following:

(a) Projects in CO nonattainment or Maintenance Areas must satisfy the hot spot test required by OAR 340-020-0870 and OAR 340-020-1020 at all times. Until a CO attainment demonstration or Maintenance Plan is approved by EPA, FHWA/FTA projects must also satisfy the hot spot test required by OAR 340-020-0870(2).

(b) In CO nonattainment and Maintenance Areas the budget test must be satisfied as required by OAR 340-020-0890 for conformity determinations made:

(A) 45 days after a Control Strategy Implementation Plan Revision or Maintenance Plan has been submitted to EPA, unless EPA has declared the Motor Vehicle Emissions Budget inadequate for transportation conformity purposes; or

(B) After EPA has declared that the Motor Vehicle Emissions Budget in a submitted Control Strategy Implementation Plan Revision or Maintenance Plan is adequate for transportation conformity purposes.

(c) Except as provided in subsection (4)(d) of this rule, in CO Nonattainment Areas the emission reduction tests must be satisfied as required by OAR 340-020-0900 for conformity determinations made:

(A) During the first 45 days after a Control Strategy Implementation Plan Revision or Maintenance Plan has been submitted to EPA, unless EPA has declared a Motor Vehicle Emissions Budget adequate for transportation conformity purposes; or

(B) If EPA has declared the Motor Vehicle Emissions Budget in a submitted Control Strategy Implementation Plan Revision or Maintenance Plan inadequate for transportation conformity purposes, and there is no previously established Motor Vehicle Emissions Budget in the approved implementation plan or a previously submitted Control Strategy Implementation Plan Revision or Maintenance Plan.

(d) CO Nonattainment Areas that have not submitted a Maintenance Plan and that are not required to submit an attainment demonstration (e.g., moderate CO areas with a design value of 12.7 ppm or less or not classified CO areas) must satisfy one of the following requirements:

(A) The emission reduction tests required by OAR 340-020-0900; or

(B) The State shall submit to EPA an implementation plan revision that contains Motor Vehicle Emissions Budget(s) and an attainment demonstration, and the budget test required by OAR 340-020-0890 must be satisfied using the submitted Motor Vehicle Emissions Budget(s) (as
described in subsection (4)(b) or this rule.

(5) PM10 nonattainment and Maintenance Areas. In addition to the criteria listed in Table 1 in section (2) of this rule that are required to be satisfied at all times, in PM10 nonattainment and Maintenance Areas conformity determinations must include a demonstration that the hot spot, budget and/or emission reduction tests are satisfied as described in the following:

(a) Projects in PM10 nonattainment or Maintenance Areas must satisfy the hot spot test required by OAR 340-020-0870 and OAR 340-020-1020.

(b) In PM10 nonattainment and Maintenance Areas the budget test must be satisfied as required by OAR 340-020-0890 for conformity determinations made:

(A) 45 days after a Control Strategy Implementation Plan Revision or Maintenance Plan has been submitted to EPA, unless EPA has declared the Motor Vehicle Emissions Budget inadequate for transportation conformity purposes; or

(B) After EPA has declared that the Motor Vehicle Emissions Budget in a submitted Control Strategy Implementation Plan Revision or Maintenance Plan is adequate for transportation conformity purposes.

(c) In PM10 Nonattainment Areas the emission reduction tests must be satisfied as required by OAR 340-020-0900 for conformity determinations made:

(A) During the first 45 days after a Control Strategy Implementation Plan Revision or Maintenance Plan has been submitted to EPA, unless EPA has declared a Motor Vehicle Emissions Budget adequate for transportation conformity purposes;

(B) If EPA has declared the Motor Vehicle Emissions Budget in a submitted Control Strategy Implementation Plan Revision or Maintenance Plan inadequate for transportation conformity purposes, and there is no previously established Motor Vehicle Emissions Budget in the approved implementation plan or a previously submitted Control Strategy Implementation Plan Revision or Maintenance Plan; or

(C) If the submitted implementation plan revision is a demonstration of impracticability under CAA section 189(a)(1)(B)(ii) and does not demonstrate attainment.

(6) NO2 nonattainment and Maintenance Areas. In addition to the criteria listed in Table 1 in section (2) of this rule that are required to be satisfied at all times, in NO2 nonattainment and Maintenance Areas conformity determinations must include a demonstration that the budget and/or emission reduction tests are satisfied as described in the following:

(a) In NO2 nonattainment and Maintenance Areas the budget test must be satisfied as required by OAR 340-020-0890 for conformity determinations made:

(A) 45 days after a Control Strategy Implementation Plan Revision or Maintenance Plan has been submitted to EPA, unless EPA has declared the Motor Vehicle Emissions Budget inadequate for transportation conformity purposes; or

(B) After EPA has declared that the Motor Vehicle Emissions Budget in a submitted Control Strategy Implementation Plan Revision or Maintenance Plan is adequate for transportation conformity purposes.

(b) In NO2 Nonattainment Areas the emission reduction tests must be satisfied as required by OAR 340-020-0900 for conformity determinations made:

(A) During the first 45 days after a Control Strategy Implementation Plan Revision or Maintenance Plan has been submitted to EPA, unless EPA has declared a Motor Vehicle Emissions Budget adequate for transportation conformity purposes; or

(B) If EPA has declared the Motor Vehicle Emissions Budget in a submitted Control Strategy Implementation Plan Revision or Maintenance Plan inadequate for transportation conformity purposes, and there is no previously established Motor Vehicle Emissions Budget in the approved implementation plan or a previously submitted Control Strategy Implementation Plan Revision or Maintenance Plan.

(7) Non-metropolitan nonattainment and Maintenance Areas. This paragraph applies to any nonattainment or Maintenance Area (or portion thereof) which does not have a metropolitan Transportation Plan or TIP and whose projects are not part of the emissions analysis of any MPO's metropolitan Transportation Plan or TIP. This paragraph does not apply to "donut" areas which are outside the metropolitan planning boundary and inside the nonattainment/Maintenance Area boundary.

(a) FHWA/FTA projects in all non-metropolitan nonattainment and Maintenance Areas must satisfy the requirements of OAR 340-020-0810 through 340-020-0830, OAR 340-020-0840(4),and OAR 340-020-0870 through 340-020-0880. Until EPA approves the Control Strategy Implementation Plan or Maintenance Plan for a rural CO nonattainment or Maintenance Area , FHWA/FTA projects must also satisfy the requirements of OAR 340-020-0870(2) ("Localized CO and PM10 violations (hot spots)").

(b) Non-metropolitan nonattainment and Maintenance Areas are subject to the budget and/or emission reduction tests as described in OAR 340-020-0800(3) through 340-020-0800(6), with the following modifications:

(A) When the requirements OAR 340-020-0890 and 340-020-0900 apply to non-metropolitan nonattainment and Maintenance Areas, references to "Transportation Plan" or "TIP" should be taken to mean those projects in the statewide Transportation Plan or statewide TIP which are in the non-metropolitan nonattainment or Maintenance Area.

(B) In non-metropolitan nonattainment and Maintenance Areas that are subject to OAR 340-020-0890, FHWA/FTA projects must be consistent with Motor Vehicle Emissions Budget(s) for the years in the timeframe of the attainment demonstration or Maintenance Plan. For years after the attainment year (if a Maintenance Plan has not been submitted) or after the last year of the Maintenance Plan, FHWA/FTA projects must satisfy one of the following requirements:

(i) OAR 340-020-0890;

(ii) OAR 340-020-0900 (including regional emissions analysis for NOX in all ozone nonattainment and Maintenance Areas, notwithstanding OAR 340-020-0900(4)(b)); or

(iii) As demonstrated by the air quality dispersion model or other air quality modeling technique used in the attainment demonstration or Maintenance Plan, the FHWA/FTA project, in combination with all other Regionally Significant Projects expected in the area in the timeframe of the statewide Transportation Plan, must not Cause or Contribute to a New Violation of any Standard in any areas; Increase the Frequency or Severity of any existing violation of any Standard in any area; or delay timely attainment of any Standard or any required interim emission reductions or other Milestones in any area. Control measures assumed in the analysis must be enforceable.

(C) The choice of requirements in paragraph (7)(b)(B) of this rule and the methodology used to meet the requirements of paragraph (7)(b)(B)(iii)of this rule must be determined through the interagency Consultation process required in OAR 340-020-0760(2)(d)(B)(xiii) through which the relevant recipients of title 23 U.S.C. or Federal Transit Laws funds, the local air quality agency, the State air quality agency, and the State department of transportation should reach consensus about the option and methodology selected. EPA and DOT must be Consulted through this process as well. In the event of unresolved disputes, conflicts may be escalated to the Governor consistent with the procedure in OAR 340-020-0760(3), which applies for any State air agency comments on a conformity determination.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0810
Criteria and Procedures: Latest Planning Assumptions

(1) The conformity determination, with respect to all other applicable criteria in OAR 340-020-0820 through ~~340-20-980~~ 340-020-0900, must be based upon the most recent planning assumptions in force at the time of the conformity determination. ~~This criterion applies during all periods.~~ The conformity determination must satisfy the requirements of sections (2) through (6) of this rule.

(2) Assumptions must be derived from the estimates of current and future population, employment, travel, and congestion most recently developed by the MPO or other agency authorized to make such estimates and approved by the MPO. The conformity determinations must also be based on the latest planning assumptions about current and future background concentrations.

(3) The conformity determination for each Transportation Plan ~~transportation plan~~ and TIP must discuss how Transit ~~transit~~ operating policies, including fares and service levels, and assumed Transit ~~transit~~ ridership have changed since the previous conformity determination.

(4) The conformity determination must include reasonable assumptions about Transit ~~transit~~ service and increases in Transit ~~transit~~ fares and road and bridge tolls over time.

(5) The conformity determination must use the latest existing information regarding the effectiveness of the TCMs and other implementation plan measures which have already been implemented.

(6) Key assumptions shall be specified and included in the draft documents and supporting materials used for the interagency and public Consultation ~~consultation~~ required by OAR 340-020-0760.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0820
Criteria and Procedures: Latest Emissions Model

(1) The conformity determination must be based on the latest emission estimation model available. This criterion applies during all periods. It is satisfied if the most current version of the motor vehicle emissions model specified by EPA for use in the preparation or revision of implementation plans in that State or area is used for the conformity analysis. Where EMFAC is the motor vehicle emissions model used in preparing or revising the ~~a~~Applicable ~~i~~Implementation ~~p~~Plan, new versions must be approved by EPA before they are used in the conformity analysis.

(2) EPA will Consult ~~consult~~ with DOT to establish a grace period following the specification of any new model.

(a) The grace period will be no less than three months and no more than 24 months after notice of availability is published in the Federal Register.

(b) The length of the grace period will depend on the degree of change in the model and the scope of re-planning likely to be necessary by MPOs in order to assure conformity. If the grace period will be longer than three months, EPA will announce the appropriate grace period in the Federal Register.

(3) ~~Conformity analyses for which the emissions analysis was begun during the grace period or before the Federal Register notice of availability of the latest emission model may continue to use the previous version of the model for transportation plans and TIPs. The previous model may also be used for projects if the analysis was begun during the grace period or before the Federal Register notice of availability, provided no more than three years have passed since the draft environmental document was issued.~~

Transportation Plan and TIP conformity analyses for which the emissions analysis was begun during the grace period or before the Federal Register notice of availability of the latest emission model may continue to use the previous version of the model. Conformity determinations for projects may also be based on the previous model if the analysis was begun during the grace period of before the Federal Register notice of availability, and if the final environmental document for the project is issued no more than three years after the issuance of the draft environmental document.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0830
Criteria and procedures: Consultation

~~The MPO or ODOT must make conformity determinations according to the interagency consultation procedures in OAR 340-20-760, and according to the public involvement procedures established in OAR 340-20-760 and public involvement procedures established by the MPO in compliance with **23 CFR Part 450**. This criterion applies during all periods.~~

Conformity must be determined according to the Consultation procedures in OAR 340-020-0760 and in the Applicable Implementation Plan, and according to the public involvement procedures established in compliance with **23 CFR part 450**. Until the implementation plan revision required by 40 CFR 51.390 is fully approved by EPA, the conformity determination must be made according to OAR 340-020-0760(1)(b) and 340-020-0760(4) and the requirements of **23 CFR part 450**.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0840
Criteria and Procedures: Timely Implementation of TCMs

(1) The Transportation Plan ~~transportation plan~~, TIP or FHWA/FTA project or Regionally Significant Projects ~~regionally significant projects~~ approved or adopted by a recipient of funds under title 23 U.S.C. which is not from a conforming plan and TIP must provide for the timely implementation of TCMs from the ~~a~~Applicable ~~i~~Implementation ~~p~~Plan. ~~This criterion applies during all periods.~~

(2) For Transportation Plans ~~transportation plans~~, this criterion is satisfied if the following two conditions are met:

(a) The Transportation Plan ~~transportation plan~~, in describing the envisioned future transportation system, provides for the timely completion or implementation of all TCMs in the

aApplicable iImplementation pPlan which are eligible for funding under title 23 U.S.C. or the Federal Transit Act Laws, consistent with schedules included in the aApplicable iImplementation pPlan. Timely implementation of TCMs which are not eligible for funding under title 23 U.S.C. or the Federal Transit Act Laws is required where failure to implement such measure(s) will jeopardize attainment or maintenance of a Standard standard.

(b) Nothing in the Transportation Plan transportation plan interferes with the implementation of any TCM in the aApplicable iImplementation pPlan.

(3) For TIPs, this criterion is satisfied if the following conditions are met:

(a) An examination of the specific steps and funding source(s) needed to fully implement each TCM indicates that TCMs which are eligible for funding under title 23 U.S.C. or the Federal Transit Act Laws are on or ahead of the schedule established in the aApplicable iImplementation pPlan, or, if such TCMs are behind the schedule established in the aApplicable iImplementation pPlan, the MPO and DOT have determined after Consultation consultation in accordance with OAR 340-020-0760 that past obstacles to implementation of the TCMs have been identified and have been or are being overcome, and that all State and local agencies with influence over approvals or funding of TCMs are giving Maximum Priority maximum priority to approval of or funding of TCMs over other projects within their control, including projects in locations outside the nonattainment or Maintenance Area maintenance area. Timely implementation of TCMs which are not eligible for funding under title 23 U.S.C. or the Federal Transit Act Laws is required where attainment or maintenance of a Standard standard is jeopardized.

(b) If TCMs in the aApplicable iImplementation pPlan have previously been programmed for Federal funding but the funds have not been obligated and the TCMs are behind the schedule in the implementation plan, then the TIP cannot be found to conform if the funds intended for those TCMs are reallocated to projects in the TIP other than TCMs, or if there are no other TCMs in the TIP, if the funds are reallocated to projects in the TIP other than projects which are eligible for Federal funding under ISTEA's intended for air quality improvement projects, e.g., the Congestion Mitigation and Air Quality Improvement Program.

(c) Nothing in the TIP may interfere with the implementation of any TCM in the aApplicable iImplementation pPlan.

(4) For FHWA/FTA projects and Regionally Significant Projects regionally significant projects approved or adopted by a recipient of funds under title 23 U.S.C. which are not from a conforming Transportation Plan transportation plan and TIP, this criterion is satisfied if the project does not interfere with the implementation of any TCM in the aApplicable iImplementation pPlan.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0850
Criteria and Procedures: Currently Conforming Transportation Plan and TIP

There must be a currently conforming Transportation Plan transportation plan and currently conforming TIP at the time of project approval. This criterion applies during all periods. It is satisfied if the current transportation plan and TIP have been found to conform to the applicable implementation plan by the MPO and DOT according to the procedures of OAR 340-20-710 through 340-20-1080.

(1) Only one conforming Transportation Plan transportation plan or TIP may exist in an area at any time; conformity determinations of a previous Transportation Plan transportation plan or TIP expire once the current plan or TIP is found to conform by DOT. The conformity determination on a Transportation Plan transportation plan or TIP will also Lapse lapse if conformity is not determined according to the frequency requirements of OAR 340-020-0750.

(2) This criterion is not required to be satisfied at the time of project approval for a TCM specifically included in the Applicable Implementation Plan, provided that all other relevant criteria of OAR 340-020-0710 through 340-020-1070 are satisfied.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0860
Criteria and procedures: Projects from a plan and TIP

(1) The project must come from a conforming plan and program. ~~This criterion applies during all periods.~~ If this criterion is not satisfied, the project must satisfy all criteria in Table 1 of OAR 340-020-0800 for a project not from a conforming Transportation Plan ~~transportation plan~~ and TIP. A project is considered to be from a conforming Transportation Plan ~~transportation plan~~ if it meets the requirements of section (2) of this rule and from a conforming program if it meets the requirements of section (3) of this rule. Special provisions for TCMs in an Applicable Implementation Plan are provided in section (4) of this rule.

(2) A project is considered to be from a conforming Transportation Plan ~~transportation plan~~ if one of the following conditions applies:

(a) For projects which are required to be identified in the Transportation Plan ~~transportation plan~~ in order to satisfy OAR 340-020-0770 ("Content of Transportation Plans"), the project is specifically included in the conforming Transportation Plan ~~transportation plan~~ and the project's Design Concept ~~design concept~~ and Scope ~~scope~~ have not changed significantly from those which were described in the Transportation Plan ~~transportation plan~~, or in a manner which would significantly impact use of the facility; or

(b) For projects which are not required to be specifically identified in the Transportation Plan ~~transportation plan~~, the project is identified in the conforming Transportation Plan ~~transportation plan~~, or is consistent with the policies and purpose of the Transportation Plan ~~transportation plan~~ and will not interfere with other projects specifically included in the Transportation Plan ~~transportation plan~~.

(3) A project is considered to be from a conforming program if the following conditions are met:

(a) The project is included in the conforming TIP and the Design Concept ~~design concept~~ and Scope ~~scope~~ of the project were adequate at the time of the TIP conformity determination to determine its contribution to the TIP's regional emissions, and the project Design Concept and Scope have not changed significantly from those which were described in the TIP~~, or in a manner which would significantly impact use of the facility~~; and

(b) If the TIP describes a project Design Concept ~~design concept~~ and Scope ~~scope~~ which includes project-level emissions mitigation or control measures, Written Commitments ~~written commitments~~ to implement such measures must be obtained from the project sponsor and/or operator as required by OAR 340-020-1040(a) in order for the project to be considered from a conforming program. Any change in these mitigation or control measures that would significantly reduce their effectiveness constitutes a change in the Design Concept ~~design concept~~ and Scope ~~scope~~ of the project.

(4) TCMs. This criterion is not required to be satisfied for TCMs specifically included in an Applicable Implementation Plan.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0870

Criteria and Procedures: Localized CO and PM-10 Violations (Hot spots)

(1) This section applies at all times. A FHWA/FTA project and any Regionally Significant Project ~~regionally significant project~~ approved or adopted by a recipient of funds under title 23 U.S.C. must not cause or contribute to any new localized CO or PM_{10} violations or Increase the Frequency or Severity ~~increase the frequency or severity~~ of any existing CO or PM_{10} violations in CO and PM_{10} nonattainment and Maintenance Areas ~~maintenance areas. This criterion applies during all periods.~~ This criterion is satisfied if it is demonstrated that no new local violations will be created and the severity or number of existing violations will not be increased as a result of the project. —

~~(2)~~ — The demonstration must be performed according to the Consultation requirements of OAR 340-020-0760(2)(e) and the methodology requirements of OAR 340-020-1020.

(2) This section applies for CO Nonattainment Areas as described in OAR 340-020-800(4)(a). Each project must eliminate or reduce the severity and number of localized CO violations in the area substantially affected by the project (in CO Nonattainment Areas) according to the Consultation requirements of OAR 340-020-0760(2)(e) and the methodology requirements of OAR 340-020-1020. This criterion is satisfied with respect to existing localized CO violations if it is demonstrated that existing localized CO violations will be eliminated or reduced in severity and number as a result of the project.

~~(3) For projects which are not of the type identified by OAR 340-20-1020(1), or 340-20-1020(4), this criterion may be satisfied if consideration of local factors clearly demonstrates that no local violations presently exist and no new local violations will be created as a result of the project. Otherwise, in CO nonattainment and maintenance areas, a quantitative demonstration must be performed according to the requirements of OAR 340-20-1020(2).~~

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0880

Criteria and Procedures: Compliance with PM_{10} Control Measures

A FHWA/FTA project and any Regionally Significant Project ~~regionally significant project~~ approved or adopted by a recipient of funds under title 23 U.S.C. must comply with PM_{10} control measures in the ~~a~~Applicable ~~i~~Implementation ~~p~~Plan. This criterion ~~applies during all periods. It~~ is satisfied if the project-level conformity determination contains a Written Commitment from the project sponsor to include the final plans, specifications, and estimates for the project those control measures (for the purpose of limiting PM_{10} emissions from the construction activities and/or normal use and operation associated with the project) contained in the ~~a~~Applicable ~~i~~Implementation ~~p~~Plan. ~~are included in the final plans, specifications, and estimates for the project.~~

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0890

Criteria and Procedures: Motor Vehicle Emissions Budget ~~(Transportation Plan)~~

~~(1) The transportation plan must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan or implementation plan submission. This criterion applies during the transitional period and the control strategy and maintenance periods, except as provided in OAR 340-20-1070. This criterion may be satisfied if the requirements in section (2) and (3) of this rule are met:~~

~~(2) A regional emissions analysis shall be performed as follows:~~

~~(a) The regional analysis shall estimate emissions of any of the following pollutants and pollutant precursors for which the area is in nonattainment or maintenance and for which the applicable implementation plan or implementation plan submission establishes an emissions budget:~~

~~(A) VOC as an ozone precursor;~~

~~(B) NOx as an ozone precursor;~~

~~(C) CO;~~

~~(D) PM_{10} (and its precursors VOC and/or NOx if the applicable implementation plan or implementation plan submission identifies transportation-related precursor emissions within the nonattainment area as a significant contributor to the PM_{10} nonattainment problem or establishes a budget for such emissions); or~~

~~(E) NOx (in NO_2 nonattainment or maintenance areas);~~

~~(b) The regional emissions analysis shall estimate emissions from the entire transportation system, including all regionally significant projects contained in the transportation plan and all other regionally significant highway and transit projects expected in the nonattainment or maintenance area in the timeframe of the transportation plan;~~

~~(c) The emissions analysis methodology shall meet the requirements of OAR 340-20-1010;~~

~~(d) For areas with a transportation plan that meets the content requirements of OAR 340-20-770(1), the emissions analysis shall be performed for each horizon year. Emissions in milestone years which are between the horizon years may be determined by interpolation; and~~

~~(e) For areas with a transportation plan that does not meet the content requirements of OAR 340-20-770(1), the emissions analysis shall be performed for any years in the time span of the transportation plan provided they are not more than ten years apart and provided the analysis is performed for the last year of the plan's forecast period. If the attainment year is in the time span of the transportation plan, the emissions analysis must also be performed for the attainment year. Emissions in milestone years which are between these analysis years may be determined by interpolation.~~

~~(3) The regional emissions analysis shall demonstrate that for each of the applicable pollutants or pollutant precursors in subsection (2)(a) of this rule the emissions are less than or equal to the motor vehicle emissions budget as established in the applicable implementation plan or implementation plan submission as follows:~~

~~(a) If the applicable implementation plan or implementation plan submission establishes emissions budgets for milestone years, emissions in each milestone year are less than or equal to the motor vehicle emissions budget established for that year;~~

~~(b) For nonattainment areas, emissions in the attainment year are less than or equal to the motor vehicle emissions budget established in the applicable implementation plan or implementation plan submission for that year;~~

~~(c) For nonattainment areas, emissions in each analysis or horizon year after the attainment year are less than or equal to the motor vehicle emissions budget established in the applicable implementation plan or implementation plan submission for the attainment year. If emissions budgets are established for years after the attainment year, emissions in each analysis year or horizon year must be less than or equal to the motor vehicle emissions budget for that year, if any, or the motor vehicle emissions budget for the most recent budget year prior to the analysis or horizon year; and~~

~~(d) For maintenance areas, emissions in each analysis or horizon year are less than or equal to the motor vehicle emissions budget established by the maintenance plan for that year, if any, or the emissions budget for the most recent budget year prior to the analysis or horizon year.~~

(1) The Transportation Plan, TIP, and project not from a conforming Transportation Plan and TIP must be consistent with the Motor Vehicle Emissions Budget(s) in the Applicable Implementation Plan (or implementation plan submission). This criterion applies as described in OAR 340-020-0800(3) through (7). This criterion is satisfied if it is demonstrated that emissions of the pollutants or pollutant precursors described in paragraph (c) of this section are less than

or equal to the Motor Vehicle Emissions Budget(s) established in the Applicable Implementation Plan or implementation plan submission.

(2) Consistency with the Motor Vehicle Emissions Budget(s) must be demonstrated for each year for which the Applicable (and/or submitted) Implementation Plan specifically establishes Motor Vehicle Emissions Budget(s), for the last year of the Transportation Plan's forecast period, and for any intermediate years as necessary so that the years for which consistency is demonstrated are no more than ten years apart, as follows:

(a) Until a Maintenance Plan is submitted:

(A) Emissions in each year (such as Milestone years and the attainment year) for which the Control Strategy Implementation Plan Revision establishes Motor Vehicle Emissions Budget(s) must be less than or equal to that year's Motor Vehicle Emissions Budget(s); and

(B) Emissions in years for which no Motor Vehicle Emissions Budget(s) are specifically established must be less than or equal to the Motor Vehicle Emissions Budget(s) established for the most recent prior year. For example, emissions in years after the attainment year for which the implementation plan does not establish a budget must be less than or equal to the Motor Vehicle Emissions Budget(s) for the attainment year.

(b) When a Maintenance Plan has been submitted:

(A) Emissions must be less than or equal to the Motor Vehicle Emissions Budget(s) established for the last year of the Maintenance Plan, and for any other years for which the Maintenance Plan establishes Motor Vehicle Emissions Budgets. If the Maintenance Plan does not establish Motor Vehicle Emissions Budgets for any years other than the last year of the Maintenance Plan, the demonstration of consistency with the Motor Vehicle Emissions Budget(s) must be accompanied by a qualitative finding that there are no factors which would Cause or Contribute to a New Violation or exacerbate an existing violation in the years before the last year of the Maintenance Plan. The interagency Consultation process required by OAR 340-020-0760 shall determine what must be considered in order to make such a finding;

(B) For years after the last year of the Maintenance Plan, emissions must be less than or equal to the Maintenance Plan's Motor Vehicle Emissions Budget(s) for the last year of the Maintenance Plan; and

(C) If an approved Control Strategy Implementation Plan has established Motor Vehicle Emissions Budgets for years in the timeframe of the Transportation Plan, emissions in these years must be less than or equal to the Control Strategy Implementation Plan's Motor Vehicle Emissions Budget(s) for these years.

(3) Consistency with the Motor Vehicle Emissions Budget(s) must be demonstrated for each pollutant or pollutant precursor in OAR 340-020-0730(2) for which the area is in nonattainment or maintenance and for which the Applicable Implementation Plan (or implementation plan submission) establishes a Motor Vehicle Emissions Budget.

(4) Consistency with the Motor Vehicle Emissions Budget(s) must be demonstrated by including emissions from the entire transportation system, including all Regionally Significant Projects contained in the Transportation Plan and all other regionally significant highway and Transit Projects expected in the nonattainment or Maintenance Area in the timeframe of the Transportation Plan.

(a) Consistency with the Motor Vehicle Emissions Budget(s) must be demonstrated with a regional emissions analysis that meets the requirements of OAR 340-020-1010 and 340-020-0760(2)(e).

(b) The regional emissions analysis may be performed for any years in the timeframe of the Transportation Plan provided they are not more than ten years apart and provided the analysis is performed for the attainment year (if it is in the timeframe of the Transportation Plan) and the last year of the plan's Forecast Period. Emissions in years for which consistency with Motor Vehicle Emissions Budgets must be demonstrated, as required in section (2) of this rule, may be determined by interpolating between the years for which the regional emissions analysis is performed.

(5) Motor Vehicle Emissions Budgets in submitted Control Strategy Implementation Plan Revisions and submitted Maintenance Plans.

(a) Consistency with the Motor Vehicle Emissions Budgets in submitted Control Strategy Implementation Plan Revisions or Maintenance Plans must be demonstrated if EPA has declared the Motor Vehicle Emissions Budget(s) adequate for transportation conformity purposes, or beginning 45 days after the Control Strategy Implementation Plan Revision or Maintenance Plan has been submitted (unless EPA has declared the Motor Vehicle Emissions Budget(s) inadequate for transportation conformity purposes). However, submitted implementation plans do not supersede the Motor Vehicle Emissions Budgets in approved implementation plans for the period of years addressed by the approved implementation plan.

(b) If EPA has declared an implementation plan submission's Motor Vehicle Emissions Budget(s) inadequate for transportation conformity purposes, the inadequate budget(s) shall not be used to satisfy the requirements of this section. Consistency with the previously established Motor Vehicle Emissions Budget(s) must be demonstrated. If there are no previous approved implementation plans or implementation plan submissions with Motor Vehicle Emissions Budgets, the emission reduction tests required by OAR 340-020-0900 must be satisfied.

(c) If EPA declares an implementation plan submission's Motor Vehicle Emissions Budget(s) inadequate for transportation conformity purposes more than 45 days after its submission to EPA, and conformity of a Transportation Plan or TIP has already been determined by DOT using the budget(s), the conformity determination will remain valid. Projects included in that Transportation Plan or TIP could still satisfy OAR 340-020-0850 and 340-020-0860, which require a currently conforming Transportation Plan and TIP to be in place at the time of a project's conformity determination and that projects come from a conforming Transportation Plan and TIP.

(d) EPA will not find a Motor Vehicle Emissions Budget in a submitted Control Strategy Implementation Plan Revision or Maintenance Plan to be adequate for transportation conformity purposes unless the following minimum criteria are satisfied:

(A) The submitted Control Strategy Implementation Plan revision or Maintenance Plan was endorsed by the Governor (or his or her designee) and was subject to a State public hearing;

(B) Before the Control Strategy Implementation Plan or Maintenance Plan was submitted to EPA, Consultation among federal, State, and local agencies occurred; full implementation plan documentation was provided to EPA; and EPA's stated concerns, if any, were addressed;

(C) The Motor Vehicle Emissions Budget(s) is clearly identified and precisely quantified;

(D) The Motor Vehicle Emissions Budget(s), when considered together with all other emissions sources, is consistent with applicable requirements for reasonable further progress, attainment, or maintenance (whichever is relevant to the given implementation plan submission);

(E) The Motor Vehicle Emissions Budget(s) is consistent with and clearly related to the emissions inventory and the control measures in the submitted Control Strategy Implementation Plan Revision or Maintenance Plan; and

(F) Revisions to previously submitted Control Strategy Implementation Plans or Maintenance Plans explain and document any changes to previously submitted budgets and control measures; impacts on point and area source emissions; any changes to established Safety Margin s (see OAR 340-020-0720 for definition); and reasons for the changes (including the basis for any changes related to emission factors or estimates of vehicle miles traveled).

(e) Before determining the adequacy of a submitted Motor Vehicle Emissions Budget, EPA will review the State's compilation of public comments and response to comments that are required to be submitted with any implementation plan. EPA will document its consideration of such comments and responses in a letter to the State indicating the adequacy of the submitted Motor Vehicle Emissions Budget.

(f) When the Motor Vehicle Emissions Budget(s) used to satisfy the requirements of this section are established by an implementation plan submittal that has not yet been approved or disapproved by EPA, the MPO and DOT's conformity determinations will be deemed to be a statement that the MPO and DOT are not aware of any information that would indicate that emissions consistent with the Motor Vehicle Emissions Budget will Cause or Contribute to a New Violation of any Standard; Increase the Frequency or Severity of any existing violation of

any Standard; or delay timely attainment of any Standard or any required interim emission reductions or other Milestones.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0900
Criteria and Procedures: ~~Motor vehicle Emissions Budget (TIP)~~ Emission Reductions in Areas Without Motor Vehicle Emissions Budgets.

~~(1) The TIP must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan or implementation plan submission. This criterion applies during the transitional period and the control strategy and maintenance periods, except as provided in OAR 340-20-1070. This criterion may be satisfied if the requirements in sections (2) and (3) of this rule are met:~~

~~(2) For areas with a conforming transportation plan that fully meets the content requirements of OAR 340-20-770(1), this criterion may be satisfied without additional regional analysis if:~~

~~(a) Each program year of the TIP is consistent with the Federal funding which may be reasonably expected for that year, and required State/local matching funds and funds for State/local funding only projects are consistent with the revenue sources expected over the same period; and~~

~~(b) The TIP is consistent with the conforming transportation plan such that the regional emissions analysis already performed for the plan applies to the TIP also. This requires a demonstration that:~~

~~(A) The TIP contains all projects which must be started in the TIP's timeframe in order to achieve the highway and transit system envisioned by the transportation plan in each of its horizon years;~~

~~(B) All TIP projects which are regionally significant are part of the specific highway or transit system envisioned in the transportation plan's horizon years; and~~

~~(C) The design concept and scope of each regionally significant project in the TIP is not significantly different from that described in the transportation plan.~~

~~(c) If the requirements in subsections (a) and (b) of this section are not met, then:~~

~~(A) The TIP may be modified to meet those requirements; or~~

~~(B) The transportation plan must be revised so that the requirements in subsections (a) and (b) of this section are met. Once the revised plan has been found to conform, this criterion is met for the TIP with no additional analysis except a demonstration that the TIP meets the requirements of subsections (a) and (b) of this section~~

~~(3) For areas with a transportation plan that does not meet the content requirements of OAR 340-20-770(1), a regional emissions analysis must meet all of the following requirements:~~

~~(a) The regional emissions analysis shall estimate emissions from the entire transportation system, including all projects contained in the proposed TIP, the transportation plan, and all other regionally significant highway and transit projects expected in the nonattainment or maintenance area in the timeframe of the transportation plan;~~

~~(b) The analysis methodology shall meet the requirements of OAR 340-20-1010; and~~

~~(c) The regional analysis shall satisfy the requirements of OAR 340-20-890(2)(a), 340-20-890(2)(e), and 340-20-890(3).~~

(1) The Transportation Plan, TIP, and project not from a conforming Transportation Plan and TIP must contribute to emissions reductions. This criterion applies as described in OAR 340-020-0800(3) through 340-020-0800(7). It applies to the net effect of the action (Transportation Plan, TIP, or project not from a conforming Transportation Plan and TIP) on motor vehicle emissions from the entire transportation system.

(2) This criterion may be met in moderate and above ozone Nonattainment Areas that are subject to the reasonable further progress requirements of CAA section 182(b)(1) and in moderate with design value greater than 12.7 ppm and serious CO Nonattainment Areas if a regional emissions analysis that satisfies the requirements of OAR 340-020-1010 and sections (5) through (8) of this rule demonstrates that for each analysis year and for each of the pollutants described in section (4) of this rule:

(a) The emissions predicted in the "Action" scenario are less than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; and

(b) The emissions predicted in the "Action" scenario are lower than 1990 emissions by any nonzero amount.

(3) This criterion may be met in PM10 and NO2 Nonattainment Areas; marginal and below ozone Nonattainment Areas and other ozone Nonattainment Areas that are not subject to the reasonable further progress requirements of CAA section 182(b)(1); and moderate with design value less than 12.7 ppm and below CO Nonattainment Areas if a regional emissions analysis that satisfies the requirements of OAR 340-020-1010 and sections (5) through (8) of this rule demonstrates that for each analysis year and for each of the pollutants described in section (4) of this rule, one of the following requirements is met:

(a) The emissions predicted in the "Action" scenario are less than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; or

(b) The emissions predicted in the "Action" scenario are not greater than baseline emissions. Baseline emissions are those estimated to have occurred during calendar year 1990, unless an implementation plan revision defines the baseline emissions for a PM10 area to be those occurring in a different calendar year for which a baseline emissions inventory was developed for the purpose of developing a Control Strategy Implementation Plan.

(4) Pollutants. The regional emissions analysis must be performed for the following pollutants:

(a) VOC in ozone areas;

(b) NOX in ozone areas, unless the EPA Administrator determines that additional reductions of NOX would not contribute to attainment;

(c) CO in CO areas;

(d) PM10 in PM10 areas;

(e) Transportation-related precursors of PM10 in PM10 nonattainment and Maintenance Areas if the EPA Regional Administrator or the director of the State air agency has made a finding that such precursor emissions from within the area are a significant contributor to the PM10 nonattainment problem and has so notified the MPO and DOT; and

(f) NOX in NO2 areas.

(5) Analysis years. The regional emissions analysis must be performed for analysis years that are no more than ten years apart. The first analysis year must be no more than five years beyond the year in which the conformity determination is being made. The last year of a Transportation Plan's Forecast Period must also be an analysis year.

(6) "Baseline" scenario. The regional emissions analysis required by sections (2) and (3) of this rule must estimate the emissions that would result from the "Baseline" scenario in each analysis year. The "Baseline" scenario must be defined for each of the analysis years. The "Baseline" scenario is the future transportation system that will result from current programs, including the following (except that exempt projects listed in OAR 340-020-1050 and projects exempt from regional emissions analysis as listed in OAR 340-020-1060 need not be explicitly considered):

(a) All in-place regionally significant highway and Transitfacilities, services and activities;

(b) All ongoing travel demand management or transportation system management activities; and

(c) Completion of all Regionally Significant Projects, regardless of funding source, which are currently under construction or are undergoing right-of-way acquisition (except for

hardship acquisition and protective buying); come from the first year of the previously conforming Transportation Plan and/or TIP; or have completed the NEPA process.

(7) "Action" scenario. The regional emissions analysis required by sections (2) and (3) of this rule must estimate the emissions that would result from the "Action" scenario in each analysis year. The "Action" scenario must be defined for each of the analysis years. The "Action" scenario is the transportation system that would result from the implementation of the proposed action (Transportation Plan, TIP, or project not from a conforming Transportation Plan and TIP) and all other expected Regionally Significant Projects in the Nonattainment Area. The "Action" scenario must include the following (except that exempt projects listed in OAR 340-020-1050 and projects exempt from regional emissions analysis as listed in OAR 340-020-1060 need not be explicitly considered):

(a) All facilities, services, and activities in the "Baseline" scenario;

(b) Completion of all TCMs and Regionally Significant Projects (including facilities, services, and activities) specifically identified in the proposed Transportation Plan which will be
operational or in effect in the analysis year, except that regulatory TCMs may not be assumed to begin at a future time unless the regulation is already adopted by the enforcing jurisdiction or the TCM is identified in the Applicable Implementation Plan;

(c) All travel demand management programs and transportation system management activities known to the MPO, but not included in the Applicable Implementation Plan or utilizing any Federal funding or approval, which have been fully adopted and/or funded by the enforcing jurisdiction or sponsoring agency since the last conformity determination;

(d) The incremental effects of any travel demand management programs and transportation system management activities known to the MPO, but not included in the Applicable Implementation Plan or utilizing any Federal funding or approval, which were adopted and/or funded prior to the date of the last conformity determination, but which have been modified since then to be more stringent or effective;

(e) Completion of all expected regionally significant highway and Transit Projects which are not from a conforming Transportation Plan and TIP; and

(f) Completion of all expected regionally significant non-FHWA/FTA highway and Transit Projects that have clear funding sources and commitments leading toward their implementation and completion by the analysis year.

(8) Projects not from a conforming Transportation Plan and TIP. For the regional emissions analysis required by sections (2) and (3) of this rule, if the project which is not from a conforming Transportation Plan and TIP is a modification of a project currently in the plan or TIP, the "Baseline" scenario must include the project with its original Design Concept and Scope, and the "Action" scenario must include the project with its new Design Concept and Scope.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-0910

~~**Criteria and Procedures: Motor Vehicle Emissions Budget (Project not from a Plan and TIP)**~~

Consequences of Control Strategy Implementation Plan Failures.

~~(1) The project which is not from a conforming transportation plan and a conforming TIP must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan or implementation plan submission. This criterion applies during the transitional period and the control strategy and maintenance periods, except as provided in OAR 340-20-1070. It is satisfied if emissions from the implementation of the project, when considered with the emissions from the projects in the conforming transportation plan and TIP and all other regionally significant~~

~~projects expected in the area, do not exceed the motor vehicle emissions budget(s) in the applicable implementation plan or implementation plan submission.~~

~~(2) For areas with a conforming transportation plan that meets the content requirements of OAR 340-20-770(1):~~

~~(a) This criterion may be satisfied without additional regional analysis if the project is included in the conforming transportation plan, even if it is not specifically included in the latest conforming TIP. This requires a demonstration that:~~

~~(A) Allocating funds to the project will not delay the implementation of projects in the transportation plan or TIP which are necessary to achieve the highway and transit system envisioned by the transportation plan in each of its horizon years;~~

~~(B) The project is not regionally significant or is part of the specific highway or transit system envisioned in the transportation plan's horizon years; and~~

~~(C) The design concept and scope of the project is not significantly different from that described in the transportation plan.~~

~~(b) If the requirements in subsection (a) of this section are not met, a regional emissions analysis must be performed as follows:~~

~~(A) The analysis methodology shall meet the requirements of OAR 340-20-1010;~~

~~(B) The analysis shall estimate emissions from the transportation system, including the proposed project and all other regionally significant projects expected in the nonattainment or maintenance area in the timeframe of the transportation plan. The analysis must include emissions from all previously approved projects which were not from a transportation plan and TIP; and~~

~~(C) The emissions analysis shall meet the requirements of OAR 340-20-890(2)(a), 340-20-890(2)(d) and 340-20-890(3).~~

~~(3) For areas with a transportation plan that does not meet the content requirements of OAR 340-20-770(1), a regional emissions analysis must be performed for the project together with the conforming TIP and all other regionally significant projects expected in the nonattainment or maintenance area. This criterion may be satisfied if:~~

~~(a) The analysis methodology meets the requirements of OAR 340-20-1010;~~

~~(b) The analysis estimates emissions from the transportation system, including the proposed project, and all other regionally significant projects expected in the nonattainment or maintenance area in the timeframe of the transportation plan;~~

~~(c) The regional analysis satisfies the requirements OAR 340-20-890(2)(a); 340-20-890(2)(d), and 340-20-890(3).~~

(1) Disapprovals.

(a) If EPA disapproves any submitted Control Strategy Implementation Plan Revision (with or without a Protective Finding), the conformity status of the Transportation Plan and TIP shall Lapse on the date that highway sanctions as a result of the disapproval are imposed on the Nonattainment Area under section 179(b)(1) of the CAA. No new Transportation Plan, TIP, or project may be found to conform until another Control Strategy Implementation Plan Revision fulfilling the same CAA requirements is submitted and conformity to this submission is determined.

(b) If EPA disapproves a submitted Control Strategy Implementation Plan Revision without making a Protective Finding, then beginning 120 days after such disapproval, only projects in the first three years of the currently conforming Transportation Plan and TIP may be found to conform. This means that beginning 120 days after disapproval without a Protective Finding, no Transportation Plan, TIP, or project not in the first three years of the currently conforming plan and TIP may be found to conform until another Control Strategy Implementation Plan Revision
fulfilling the same CAA requirements is submitted and conformity to this submission is determined. During the first 120 days following EPA's disapproval without a Protective Finding, Transportation Plan, TIP, and project conformity determinations shall be made using the Motor Vehicle Emissions Budget(s) in the disapproved Control Strategy Implementation Plan, unless another Control Strategy Implementation Plan Revision has been submitted and its

Motor Vehicle Emissions Budget(s) applies for transportation conformity purposes, pursuant to OAR 340-020-0800.

(c) In disapproving a Control Strategy Implementation Plan Revision, EPA would give a Protective Finding where a submitted plan contains adopted control measures or Written Commitments to adopt enforceable control measures that fully satisfy the emissions reductions requirements relevant to the statutory provision for which the implementation plan revision was submitted, such as reasonable further progress or attainment.

(2) Failure to submit and incompleteness. In areas where EPA notifies the State, MPO, and DOT of the State's failure to submit a Control Strategy Implementation Plan or submission of an incomplete Control Strategy Implementation Plan Revision (either of which initiates the sanction process under CAA sections 179 or 110(m)), the conformity status of the Transportation Plan and TIP shall Lapse on the date that highway sanctions are imposed on the Nonattainment Area for such failure under section 179(b)(1) of the CAA, unless the failure has been remedied and acknowledged by a letter from the EPA Regional Administrator.

(3) Federal implementation plans. If EPA promulgates a Federal implementation plan that contains Motor Vehicle Emissions Budget(s) as a result of a State failure, the conformity Lapse imposed by this section because of that State failure is removed.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

~~**340-20-920**~~
~~**Criteria and Procedures: Localized CO Violations (Hot-Spots) in the Interim Period**~~
[Repealed]

~~(1) Each FHWA/FTA project, or regionally significant project approved or adopted by a recipient of funds under title 23 U.S.C., must eliminate or reduce the severity and number of localized CO violations in the area substantially affected by the project in CO nonattainment areas. This criterion applies during the interim and transitional periods only. This criterion is satisfied with respect to existing localized CO violations if it is demonstrated that existing localized CO violations will be eliminated or reduced in severity and number as a result of the project.~~

~~(2) The demonstration must be performed according to the requirements of OAR 340-20-760(2)(e) and 340-20-1020.~~

~~(3) For projects which are not of the type identified by OAR 340-20-1020(1), this criterion may be satisfied if consideration of local factors clearly demonstrates that existing CO violations will be eliminated or reduced in severity and number. Otherwise, a quantitative demonstration must be performed according to the requirements of OAR 340-20-1020(2).~~

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

~~**340-20-930**~~
~~**Criteria and Procedures: Interim Period Reductions in Ozone and CO Areas (Transportation Plan)**~~
[Repealed]

~~(1) A transportation plan must contribute to emissions reductions in ozone and CO nonattainment areas. This criterion applies during the interim and transitional periods only, except as otherwise provided in OAR 340-20-1070. It applies to the net effect on emissions of all~~

projects contained in a new or revised transportation plan. This criterion may be satisfied if a regional emissions analysis is performed as described in sections (2) through (6) of this rule.

(2) Determine the analysis years for which emissions are to be estimated. Analysis years shall be no more than ten years apart. The first analysis year shall be no later than the first milestone year, 1995 in CO nonattainment areas and 1996 in ozone nonattainment areas. The second analysis year shall be either the attainment year for the area, or if the attainment year is the same as the first analysis year or earlier, the second analysis year shall be at least five years beyond the first analysis year. The last year of the transportation plan's forecast period shall also be an analysis year.

(3) Define the "Baseline" scenario for each of the analysis years to be the future transportation system that would result from current programs, composed of the following (except that projects listed in OAR 340-20-1050 and 340-20-1060 need not be explicitly considered):

(a) All in place regionally significant highway and transit facilities, services and activities;

(b) All ongoing travel demand management or transportation system management activities; and

(c) Completion of all regionally significant projects, regardless of funding source, which are currently under construction or are undergoing right-of-way acquisition (except for hardship acquisition and protective buying); come from the first three years of the previously conforming transportation plan and/or TIP; or have completed the NEPA process. (For the first conformity determination on the transportation plan after November 24, *1993*, a project may not be included in the "Baseline" scenario if one of the following major steps has not occurred within the past three years: NEPA process completion; start of final design; acquisition of a significant portion of the right-of-way; or approval of the plans, specifications and estimates. Such a project must be included in the "Action" scenario, as described in subsection (4) of this section.)

(4) Define the "Action" scenario for each of the analysis years as the transportation system that will result in that year from the implementation of the proposed transportation plan, TIPs adopted under it, and other expected regionally significant projects in the nonattainment area. It will include the following (except that projects listed in OAR 340-20-1050 and 340-20-1060 need not be explicitly considered):

(a) All facilities, services, and activities in the "Baseline" scenario;

(b) Completion of all TCMs and regionally significant projects (including facilities, services, and activities) specifically identified in the proposed transportation plan which will be operational or in effect in the analysis year, except that regulatory TCMs may not be assumed to begin at a future time unless the regulation is already adopted by the enforcing jurisdiction or the TCM is identified in the applicable implementation plan;

(c) All travel demand management programs and transportation system management activities known to the MPO, but not included in the applicable implementation plan or utilizing any Federal funding or approval, which have been fully adopted or funded by the enforcing jurisdiction or sponsoring agency since the last conformity determination on the transportation plan;

(d) The incremental effects of any travel demand management programs and transportation system management activities known to the MPO, but not included in the applicable implementation plan or utilizing any Federal funding or approval, which were adopted or funded prior to the date of the last conformity determination on the transportation plan, but which have been modified since then to be more stringent or effective;

(e) Completion of all expected regionally significant highway and transit projects which are not from a conforming transportation plan and TIP; and

(f) Completion of all expected regionally significant non-FHWA/FTA highway and transit projects that have clear funding sources and commitments leading toward their implementation and completion by the analysis year.

(5) Estimate the emissions predicted to result in each analysis year from travel on the transportation systems defined by the "Baseline" and "Action" scenarios and determine the difference in regional VOC and NOx emissions, unless the EPA Administrator or his/her designee determines that additional reductions of NOx would not contribute to attainment, between the two

~~scenarios for ozone nonattainment areas and the difference in CO emissions between the two scenarios for CO nonattainment areas. The analysis must be performed for each of the analysis years according to the requirements of OAR 340-20-1010. Emissions in milestone years which are between the analysis years may be determined by interpolation.~~

~~(6) This criterion is met if regional VOC and NOx emissions (for ozone nonattainment areas) and CO (for CO nonattainment areas) predicted in the "Action" scenario are less than the emissions predicted from the "Baseline" scenario in each analysis year, and if this can reasonably be expected to be true in the periods between the first milestone year and the analysis years. The regional analysis must show that the "Action" scenario contributes to a reduction in emissions from the 1990 emissions by any nonzero amount.~~

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

~~340-20-940~~
~~Criteria and Procedures: Interim Period Reductions in Ozone and CO Areas (TIP)~~
[Repealed]

~~(1) A TIP must contribute to emissions reductions in ozone and CO nonattainment areas. This criterion applies during the interim and transitional periods only, except as otherwise provided in OAR 340-20-1070. It applies to the net effect on emissions of all projects contained in a new or revised TIP. This criterion may be satisfied if a regional emissions analysis is performed as described in sections (2) through (6) of this rule.~~

~~(2) Determine the analysis years for which emissions are to be estimated. The first analysis year shall be no later than the first milestone year, 1995 in CO nonattainment areas and 1996 in ozone nonattainment areas. The analysis years shall be no more than ten years apart. The second analysis year shall be either the attainment year for the area, or if the attainment year is the same as the first analysis year or earlier, the second analysis year shall be at least five years beyond the first analysis year. The last year of the transportation plan's forecast period shall also be an analysis year.~~

~~(3) Define the "Baseline" scenario as the future transportation system that would result from current programs, composed of the following (except that projects listed in OAR 340-20-1050 and 340-20-1060 need not be explicitly considered):~~

~~(a) All in-place regionally significant highway and transit facilities, services and activities;~~

~~(b) All ongoing travel demand management or transportation system management activities; and~~

~~(c) Completion of all regionally significant projects, regardless of funding source, which are currently under construction or are undergoing right-of-way acquisition (except for hardship acquisition and protective buying); come from the first three years of the previously conforming TIP; or have completed the NEPA process. (For the first conformity determination on the TIP after November 24, 1993, a project may not be included in the "Baseline" scenario if one of the following major steps has not occurred within the past three years: NEPA process completion; start of final design; acquisition of a significant portion of the right-of-way; or approval of the plans, specifications and estimates. Such a project must be included in the "Action" scenario, as described in section (4) of this rule.)~~

~~(4) Define the "Action" scenario as the future transportation system that will result from the implementation of the proposed TIP and other expected regionally significant projects in the nonattainment area in the timeframe of the transportation plan. It will include the following (except that projects listed in OAR 340-20-1050 and 340-20-1060 need not be considered):~~

~~(a) All facilities, services, and activities in the "Baseline" scenario.~~

~~(b) Completion of all TCMs and regionally significant projects (including facilities, services, and activities) included in the proposed TIP, except that regulatory TCMs may not be assumed to~~

~~begin at a future time unless the regulation is already adopted by the enforcing jurisdiction or the TCM is contained in the applicable implementation plan;~~

~~(c) All travel demand management programs and transportation system management activities known to the MPO, but not included in the applicable implementation plan or utilizing any Federal funding or approval, which have been fully adopted and/or funded by the enforcing jurisdiction or sponsoring agency since the last conformity determination on the TIP;~~

~~(d) The incremental effects of any travel demand management programs and transportation system management activities known to the MPO, but not included in the applicable implementation plan or utilizing Federal funding or approval, which were adopted or funded prior to the date of the last conformity determination on the TIP, but which have been modified since then to be more stringent or effective;~~

~~(e) Completion of all expected regionally significant highway and transit projects which are not from a conforming transportation plan and TIP; and~~

~~(f) Completion of all expected regionally significant non-FHWA/FTA highway and transit projects that have clear funding sources and commitments leading toward their implementation and completion by the analysis year.~~

~~(5) Estimate the emissions predicted to result in each analysis year from travel on the transportation systems defined by the "Baseline" and "Action" scenarios, and determine the difference in regional VOC and NOx emissions, unless the EPA Administrator or his/her designee determines that additional reductions of NOx would not contribute to attainment, between the two scenarios for ozone nonattainment areas and the difference in CO emissions between the two scenarios for CO nonattainment areas. The analysis must be performed for each of the analysis years according to the requirements of OAR 340-20-1010. Emissions in milestone years which are between analysis years may be determined by interpolation.~~

~~(6) This criterion is met if the regional VOC and NOx emissions in ozone nonattainment areas and CO emissions in CO nonattainment areas predicted in the "Action" scenario are less than the emissions predicted from the "Baseline" scenario in each analysis year, and if this can reasonably be expected to be true in the period between the analysis years. The regional analysis must show that the "Action" scenario contributes to a reduction in emissions from the 1990 emissions by any nonzero amount.~~

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

~~340-20-950~~

~~Criteria and Procedures: Interim Period Reductions for Ozone and CO Areas (Project not from a Plan and TIP)~~

[Repealed]

~~A transportation project which is not from a conforming transportation plan and TIP must contribute to emissions reductions in ozone and CO nonattainment areas. This criterion applies during the interim and transitional periods only, except as otherwise provided in OAR 340-20-1070. This criterion is satisfied if a regional emissions analysis is performed which meets the requirements of OAR 340-20-930 and which includes the transportation plan and project in the "Action" scenario. If the project which is not from a conforming transportation plan and TIP is a modification of a project currently in the plan or TIP, the "Baseline" scenario must include the project with its original design concept and scope, and the "Action" scenario must include the project with its new design concept and scope.~~

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

~~340-20-960~~

~~Criteria and Procedures: Interim Period Reductions for PM_{10} and NO_2 Areas (Transportation Plan)~~

[Repealed]

~~(1) A transportation plan must contribute to emission reductions or must not increase emissions in PM_{10} and NO_2 nonattainment areas. This criterion applies only during the interim and transitional periods. It applies to the net effect on emissions of all projects contained in a new or revised transportation plan. This criterion may be satisfied if the requirements of either sections (2) or (3) of this rule are met.~~

~~(2) Demonstrate that implementation of the plan and all other regionally significant projects expected in the nonattainment area will contribute to reductions in emissions of PM_{10} in a PM_{10} nonattainment area, and of each transportation related precursor of PM_{10} in PM_{10} nonattainment areas if the EPA Regional Administrator or the director of the Department of Environmental Quality, or the director of any regional air authority has made a finding that such precursor emissions from within the nonattainment area are a significant contributor to the PM_{10} nonattainment problem and has so notified the MPO and DOT, and of NOx in an NO_2 nonattainment area, by performing a regional emissions analysis as follows:~~

~~(a) Determine the analysis years for which emissions are to be estimated. Analysis years shall be no more than ten years apart. The first analysis year shall be no later than 1996 (for NO_2 areas) or four years and six months following the date of designation (for PM_{10} areas). The second analysis year shall be either the attainment year for the area, or if the attainment year is the same as the first analysis year or earlier, the second analysis year shall be at least five years beyond the first analysis year. The last year of the transportation plan's forecast period shall also be an analysis year.~~

~~(b) Define for each of the analysis years the "Baseline" scenario, as defined in OAR 340-20-930(3), and the "Action" scenario, as defined in OAR 340-20-930(4).~~

~~(c) Estimate the emissions predicted to result in each analysis year from travel on the transportation systems defined by the "Baseline" and "Action" scenarios and determine the difference between the two scenarios in regional PM_{10} emissions in a PM_{10} nonattainment area (and transportation related precursors of PM_{10} in PM_{10} nonattainment areas if the EPA Regional Administrator or the Director of the Department of Environmental Quality, or the director of any regional air authority has made a finding that such precursor emissions from within the nonattainment area are a significant contributor to the PM_{10} nonattainment problem and has so notified the MPO and DOT) and in NOx emissions in an NO_2 nonattainment area. The analysis must be performed for each of the analysis years according to the requirements of OAR 340-20-1010. The analysis must address the periods between the analysis years and the periods between 1990, the first milestone year (if any), and the first analysis years. Emissions in milestone years which are between the analysis years may be determined by interpolation.~~

~~(d) Demonstrate that the regional PM_{10} emissions and PM_{10} precursor emissions, where applicable, (for PM_{10} nonattainment areas) and NOx emissions (for NO_2 nonattainment areas) predicted in the "Action" scenario are less than the emissions predicted from the "Baseline" scenario in each analysis year, and that this can reasonably be expected to be true in the periods between the first milestone year (if any) and the analysis years.~~

~~(3) Demonstrate that when the projects in the transportation plan and all other regionally significant projects expected in the nonattainment area are implemented, the transportation system's total highway and transit emissions of PM_{10} in a PM_{10} nonattainment area (and transportation related precursors of PM_{10} in PM_{10} nonattainment areas if the EPA Regional Administrator or the director of the Department of Environmental Quality or the director of any regional air authority has made a finding that such precursor emissions from within the nonattainment area are a significant contributor to the PM_{10} nonattainment problem and has so notified the MPO and DOT) and of NOx in an NO_2 nonattainment area will not be greater than baseline levels, by performing a regional emissions analysis as follows:~~

~~(a) Determine the baseline regional emissions of PM_{10} and PM_{10} precursors, where applicable (for PM_{10} nonattainment areas) and NOx (for NO_2 nonattainment areas) from highway and transit sources. Baseline emissions are those estimated to have occurred during calendar year 1990, unless an implementation plan revision defines the baseline emissions for a PM_{10} area to be those occurring in a different calendar year for which a baseline emissions inventory was developed for the purpose of developing a control strategy implementation plan.~~

~~(b) Estimate the emissions of the applicable pollutant(s) from the entire transportation system, including projects in the transportation plan and TIP and all other regionally significant projects in the nonattainment area, according to the requirements of OAR 340-20-1010. Emissions shall be estimated for analysis years which are no more than ten years apart. The first analysis year shall be no later than 1996 (for NO_2 areas) or four years and six months following the date of designation (for PM_{10} areas). The second analysis year shall be either the attainment year for the area, or if the attainment year is the same as the first analysis year or earlier, the second analysis year shall be at least five years beyond the first analysis year. The last year of the transportation plan's forecast period shall also be an analysis year.~~

~~(c) Demonstrate that for each analysis year the emissions estimated in subsection (3)(b) of this section are no greater than baseline emissions of PM_{10} and PM_{10} precursors, where applicable (for PM_{10} nonattainment areas) or NOx (for NO_2 nonattainment areas) from highway and transit sources.~~

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

~~340-20-970~~

~~Criteria and Procedures: Interim Period Reductions for PM_{10} and NO_2 Areas (TIP)~~
[Repealed]

~~(1) A TIP must contribute to emission reductions or must not increase emissions in PM_{10} and NO_2 nonattainment areas. This criterion applies only during the interim and transitional periods. It applies to the net effect on emissions of all projects contained in a new or revised TIP. This criterion may be satisfied if the requirements of either section (2) or (3) of this rule are met.~~

~~(2) Demonstrate that implementation of the plan and TIP and all other regionally significant projects expected in the nonattainment area will contribute to reductions in emissions of PM_{10} in a PM_{10} nonattainment area, and transportation related precursors of PM_{10} in PM_{10} nonattainment areas if the EPA Regional Administrator or the director of the Department of Environmental Quality, or the director of any regional air authority has made a finding that such precursor emissions from within the nonattainment area are a significant contributor to the PM_{10} nonattainment problem and has so notified the MPO and DOT, and of NOx in an NO_2 nonattainment area, by performing a regional emissions analysis as follows:~~

~~(a) Determine the analysis years for which emissions are to be estimated, according to the requirements of OAR 340-20-960(2)(a).~~

~~(b) Define for each of the analysis years the "Baseline" scenario, as defined in OAR 340-20-940(3), and the "Action" scenario, as defined in OAR 340-20-940(4).~~

~~(c) Estimate the emissions predicted to result in each analysis year from travel on the transportation systems defined by the "Baseline" and "Action" scenarios as required by OAR 340-20-960(2)(c), and make the demonstration required by OAR 340-20-960(2)(d).~~

~~(3) Demonstrate that when the projects in the transportation plan and TIP and all other regionally significant projects expected in the area are implemented, the transportation system's total highway and transit emissions of PM_{10} in a PM_{10} nonattainment area, and transportation related precursors of PM_{10} in PM_{10} nonattainment areas if the EPA Regional Administrator or the director of the Department of Environmental Quality, or the director of any regional air authority has made a finding that such precursor emissions from within the nonattainment area are a significant contributor to the PM_{10} nonattainment problem and has so~~

notified the MPO and DOT, and of NOx in an NO_2 nonattainment area will not be greater than baseline levels, by performing a regional emissions analysis as required by OAR 340-20-960(3)(a) through (c).

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-20-980
Criteria and Procedures: Interim Period Reductions for PM_{10} and NO_2 Areas (Project not from a Plan and TIP)
[Repealed]

A transportation project which is not from a conforming transportation plan and TIP must contribute to emission reductions or must not increase emissions in PM_{10} and NO_2 nonattainment areas. This criterion applies during the interim and transitional periods only. This criterion is met if a regional emissions analysis is performed which meets the requirements of OAR 340-20-960 and which includes the transportation plan and project in the "Action" scenario. If the project which is not from a conforming transportation plan and TIP is a modification of a project currently in the transportation plan or TIP, and OAR 340-20-960(2) is used to demonstrate satisfaction of this criterion, the "Baseline" scenario must include the project with its original design concept and scope, and the "Action" scenario must include the project with its new design concept and scope.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-20-990
Transition from the Interim Period to the Control Strategy Period
[Repealed]

(1) Areas which submit a control strategy implementation plan revision after November 24, 1993.

(a) The transportation plan and TIP must be demonstrated to conform according to transitional period criteria and procedures by one year from the date the Clean Air Act requires submission of such control strategy implementation plan revision. Otherwise, the conformity status of the transportation plan and TIP will lapse, and no new project level conformity determinations may be made.

(A) The conformity of new transportation plans and TIPs may be demonstrated according to Phase II interim period criteria and procedures for 90 days following submission of the control strategy implementation plan revision, provided the conformity of such transportation plans and TIPs is redetermined according to section (1)(a) of this rule.

(B) Beginning 90 days after submission of the control strategy implementation plan revision, new transportation plans and TIPs shall demonstrate conformity according to transitional period criteria and procedures.

(b) If EPA disapproves the submitted control strategy implementation plan revision and so notifies the State, MPO, and DOT, which initiates the sanction process under Clean Air Act sections 179 or 110(m), the conformity status of the transportation plan and TIP shall lapse 120 days after EPA's disapproval, and no new project level conformity determinations may be made. No new transportation plan, TIP, or project may be found to conform until another control strategy implementation plan revision is submitted and conformity is demonstrated according to transitional period criteria and procedures.

~~(c) Notwithstanding section (1)(b) of this rule, if EPA disapproves the submitted control strategy implementation plan revision but determines that the control strategy contained in the revision would have been considered approvable with respect to requirements for emission reductions if all committed measures had been submitted in enforceable form as required by Clean Air Act section 110(a)(2)(A), the provisions of section (1)(a) of this rule shall apply for 12 months following the date of disapproval. The conformity status of the transportation plan and TIP shall lapse 12 months following the date of disapproval unless another control strategy implementation plan revision is submitted to EPA and found to be complete.~~

~~(2) Areas which have not submitted a control strategy implementation plan revision.~~

~~(a) For areas whose Clean Air Act deadline for submission of the control strategy implementation plan revision is after November 24, 1993, and EPA has notified the State, MPO, and DOT of the State's failure to submit a control strategy implementation plan revision, which initiates the sanction process under Clean Air Act section 179 or 110(m):~~

~~(A) No new transportation plans or TIPs may be found to conform beginning 120 days after the Clean Air Act deadline; and~~

~~(B) The conformity status of the transportation plan and TIP shall lapse one year after the Clean Air Act deadline, and no new project level conformity determinations may be made.~~

~~(b) For areas whose Clean Air Act deadline for submission of the control strategy implementation plan was before November 24, 1993 and EPA has made a finding of failure to submit a control strategy implementation plan revision, which initiates the sanction process under Clean Air Act sections 179 or 110(m), the following apply unless the failure has been remedied and acknowledged by a letter from the EPA Regional Administrator:~~

~~(A) No new transportation plans or TIPs may be found to conform beginning March 24, 1994; and~~

~~(B) The conformity status of the transportation plan and TIP shall lapse November 25, 1994, and no new project level conformity determinations may be made.~~

~~(3) Areas which have not submitted a complete control strategy implementation plan revision.~~

~~(a) For areas where EPA notifies the State, MPO, and DOT after November 24, 1993 that the control strategy implementation plan revision submitted by the State is incomplete, which initiates the sanction process under Clean Air Act sections 179 or 110(m), the following apply unless the failure has been remedied and acknowledged by a letter from the EPA Regional Administrator:~~

~~(A) No new transportation plans or TIPs may be found to conform beginning 120 days after EPA's incompleteness finding; and~~

~~(B) The conformity status of the transportation plan and TIP shall lapse one year after the Clean Air Act deadline, and no new project level conformity determinations may be made.~~

~~(C) Notwithstanding sections (3)(a)(A) and (B) of this rule, if EPA notes in its incompleteness finding that the submittal would have been considered complete with respect to requirements for emission reductions if all committed measures had been submitted in enforceable form as required by Clean Air Act section 110(a)(2)(A), the provisions of section (1)(a) of this rule shall apply for a period of 12 months following the date of the incompleteness determination. The conformity status of the transportation plan and TIP shall lapse 12 months following the date of the incompleteness determination unless another control strategy implementation plan revision is submitted to EPA and found to be complete.~~

~~(b) For areas where EPA has determined before November 24, 1993, that the control strategy implementation plan revision is incomplete, which initiates the sanction process under Clean Air Act sections 179 and 110(m), the following apply unless the failure has been remedied and acknowledged by a letter from the EPA Regional Administrator:~~

~~(A) No new transportation plans or TIPs may be found to conform beginning March 24, 1994; and~~

~~(B) The conformity status of the transportation plan and TIP shall lapse November 25, 1994, and no new project level conformity determinations may be made;~~

~~(C) Notwithstanding section (3)(b)(A) and (B) of this rule, if EPA notes in its incompleteness finding that the submittal would have been considered complete with respect to requirements for~~

emission reductions if all committed measures had been submitted in enforceable form as required by Clean Air Act section 110(a)(2)(A), the provisions of subsection (4)(a) of this rule shall apply for a period of 12 months following the date of the incompleteness determination. The conformity status of the transportation plan and TIP shall lapse 12 months following the date of the incompleteness determination unless another control strategy implementation plan revision is submitted to EPA and found to be complete.

(4) Areas which submitted a control strategy implementation plan before November 24, 1993.

(a) The transportation plan and TIP must be demonstrated to conform according to transitional period criteria and procedures by November 25, 1994. Otherwise, their conformity status will lapse, and no new project level conformity determinations may be made.

(A) The conformity of new transportation plans and TIPs may be demonstrated according to Phase II interim period criteria and procedures until February 22, 1994, provided the conformity of such transportation plans and TIPs is redetermined according to transitional period criteria and procedures as required in subsection (4)(a) of this rule.

(B) Beginning February 22, 1994, new transportation plans and TIPs shall demonstrate conformity according to transitional period criteria and procedures.

(b) If EPA has disapproved the most recent control strategy implementation plan submission, the conformity status of the transportation plan and TIP shall lapse March 24, 1994, and no new project level conformity determinations may be made. No new transportation plans, TIPs or projects may be found to conform until another control strategy implementation plan revision is submitted and conformity is demonstrated according to transitional period criteria and procedures.

(c) Notwithstanding subsection (4)(b) of this rule, if EPA has disapproved the submitted control strategy implementation plan revision but determines that the control strategy contained in the revision would have been considered approvable with respect to requirements for emission reductions if all committed measures had been submitted in enforceable form as required by Clean Air Act section 110(a)(2)(A), the provisions of subsection (4)(a) of this rule shall apply for 12 months following November 24, 1993. The conformity status of the transportation plan and TIP shall lapse 12 months following November 24, 1993, unless another control strategy implementation plan revision is submitted to EPA and found to be complete.

(5) Projects. If the currently conforming transportation plan and TIP have not been demonstrated to conform according to transitional period criteria and procedures, the requirements of sections (5)(a) and (b) of this rule must be met.

(a) Before a FHWA/FTA project or project approved or adopted by a recipient of funds under title 23 U.S.C., which is regionally significant and increases single occupant vehicle capacity (a new general purpose highway on a new location or adding general purpose lanes) may be found to conform, the Department of Environmental Quality, or any regional air authority must be consulted on how the emissions which the existing transportation plan and TIP's conformity determination estimates for the "Action" scenario (as required by OAR 340-20-930 through 340-20-980) compare to the motor vehicle emissions budget in the implementation plan submission of the projected motor vehicle emissions budget in the implementation plan under development.

(b) In the event of unresolved disputes on such project level conformity determinations, the Department of Environmental Quality, or any regional air authority may escalate the issue to the Governor consistent with the procedure in OAR 340-20-760(3) which applies for any State or regional air agency comments.

(6) Redetermination of conformity of the existing transportation plan and TIP according to the transitional period criteria and procedures.

(a) The redetermination of the conformity of the existing transportation plan and TIP according to transitional period criteria and procedures, as required by subsections (1)(a) and (4)(a) of this rule, does not require new emissions analysis and does not have to satisfy the requirements of OAR 340-20-810 and 340-20-820 if:

(A) The control strategy implementation plan revision submitted to EPA uses the MPO's modeling of the existing transportation plan and TIP for its projections of motor vehicle emissions; and

~~(B) The control strategy implementation plan does not include any transportation projects which are not included in the transportation plan and TIP.~~

~~(b) A redetermination of conformity as described in subsection (6)(a) of this rule is not considered a conformity determination for the purposes of OAR 340-20-750(2)(d) or 340-20-750(3)(d) regarding the maximum intervals between conformity determinations. Conformity must be determined according to all the applicable criteria and procedures of OAR 340-20-800 within three years of the last determination which did not rely on subsection (6)(a) of this rule.~~

~~(7) Ozone nonattainment areas.~~

~~(a) The requirements of subsection (2)(a) of this rule apply if a serious or above ozone nonattainment area has not submitted the implementation plan revisions which Clean Air Act sections 182(c)(2)(A) and 182(c)(2)(B) require to be submitted to EPA November 15, 1994, even if the area has submitted the implementation plan revision which Clean Air Act section 182(b)(1) requires to be submitted to EPA November 15, 1993.~~

~~(b) The requirements of subsection (2)(a) of this rule apply if moderate ozone nonattainment area which is using photochemical dispersion modeling to demonstrate the "specific annual reductions as necessary to attain" required by Clean Air Act section 182(b)(1), and which has permission from EPA to delay submission of such demonstration until November 15, 1994, does not submit such demonstration by that date. The requirements of subsection (2)(a) of this rule apply in this case even if the area has submitted the 15% emission reduction demonstration required by Clean Air Act section 182(b)(1).~~

~~(c) The requirements of section (1) of this rule apply when the implementation plan revisions required by Clean Air Act section 182(c)(2)(A) and 182(c)(2)(B) are submitted.~~

~~(8) Nonattainment areas which are not required to demonstrate reasonable further progress and attainment. If an area listed in OAR 340-20-1070 submits a control strategy implementation plan revision, the requirements of sections (1) and (5) of this rule apply. Because the areas listed in OAR 340-20-1070 are not required to demonstrate reasonable further progress and attainment and therefore have no Clean Air Act deadline, the provisions of section (2) of this rule do not apply to these areas at any time.~~

~~(9) Maintenance plans. If a control strategy implementation plan revision is not submitted to EPA but a maintenance plan required by Clean Air Act section 175A is submitted to EPA, the requirements of section (1) or (4) of this rule apply, with the maintenance plan submission treated as a "control strategy implementation plan revision" for the purposes of those requirements.~~

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-1000
Requirements for Adoption or Approval of Projects by Other Recipients of Funds Designated under title 23 U.S.C. or the Federal Transit ~~Act~~ Laws

~~No recipient of federal funds designated under title 23 U.S.C. or the Federal Transit Act shall adopt or approve a regionally significant highway or transit project, regardless of funding source, unless there is currently conforming transportation plan and TIP consistent with the requirements of OAR 340-20-850 and any requirements of sections (1) through (6) of this rule are met:~~

~~(1) The project comes from a conforming plan and program consistent with the requirements of OAR 340-20-860;~~

~~(2) The project is included in the regional emissions analysis supporting the currently conforming TIP's conformity determination, even if the project is not strictly "included" in the TIP for purposes of MPO project selection or endorsement, and the project's design concept and scope have not changed significantly from those which were included in the regional emissions analysis, or in a manner which would significantly impact use of the facility;~~

~~(3) During the control strategy or maintenance period, the project is consistent with the motor vehicle emissions budget(s) in the applicable implementation plan consistent with the requirements of OAR 340-20-910;~~

~~(4) During Phase II of the interim period, the project contributes to emissions reductions or does not increase emissions consistent with the requirements of OAR 340-20-950 (in ozone and CO nonattainment areas) or OAR 340-20-980 (in PM_{10} and NO_2 nonattainment areas); or~~

~~(5) During the transitional period, the project satisfies the requirements of sections (3) and (4) of this rule.~~

~~(6) During all periods the project satisfies the requirements of OAR 340-20-870.~~

(1) Except as provided in section 2 of this rule, no recipient of Federal funds designated under title 23 U.S.C. or the Federal Transit Laws shall adopt or approve a regionally significant highway or Transit Project, regardless of funding source, unless the recipient finds that the requirements of one of the following are met:

(a) The project was included in the first three years of the most recently conforming Transportation Plan and TIP (or the conformity determination's regional emissions analyses), even if conformity status is currently Lapsed; and the project's Design Concept and Scope has not changed significantly from those analyses;

(b) There is a currently conforming Transportation Plan and TIP, and a new regional emissions analysis including the project and the currently conforming Transportation Plan and TIP demonstrates that the Transportation Plan and TIP would still conform if the project were implemented (consistent with the requirements of OAR 340-020-0890 and/or 340-020-0900 for a project not from a conforming Transportation Plan and TIP); or

(c) Where applicable, as established in OAR 340-020-1020, project level Hot-Spot Analysis criteria have been satisfied.

(2) In non-metropolitan nonattainment and Maintenance Areas subject to OAR 340-020-0800(7), no recipient of Federal funds designated under title 23 U.S.C. or the Federal Transit Laws shall adopt or approve a regionally significant highway or Transit Project, regardless of funding source, unless the recipient finds that the requirements of one of the following are met:

(a) The project was included in the regional emissions analysis supporting the most recent conformity determination for the portion of the statewide Transportation Plan and TIP which are in the nonattainment or Maintenance Area, and the project's Design Concept and Scope has not changed significantly;

(b) A new regional emissions analysis including the project and all other Regionally Significant Projects expected in the nonattainment or Maintenance Area demonstrates that those projects in the statewide Transportation Plan and statewide TIP which are in the nonattainment or Maintenance Area would still conform if the project were implemented (consistent with the requirements of OAR 340-020-890 and/or 340-020-900 for projects not from a conforming Transportation Plan and TIP); or

(c) Where applicable, as established in OAR 340-020-1020, project level Hot-Spot Analysis criteria have been satisfied.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-1010
Procedures for Determining Regional Transportation-Related Emissions

~~(1) General requirements.~~

~~(a) The regional emissions analysis for the transportation plan, TIP, or project not from a conforming plan and TIP shall include all regionally significant projects expected in the nonattainment or maintenance area, including FHWA/FTA projects proposed in the transportation plan and TIP and all other regionally significant projects which are disclosed to the MPO or~~

~~ODOT as required by OAR 340-20-760. Projects which are not regionally significant are not required to be explicitly modeled, but VMT from such projects must be estimated in accordance with reasonable professional practice. The effects of TCMs and similar projects that are not regionally significant may also be estimated in accordance with reasonable professional practice.~~

~~(b)The emissions analysis may not include for emissions reduction credit any TCMs which have been delayed beyond the scheduled date(s) until such time as implementation has been assured. If the TCM has been partially implemented and it can be demonstrated that it is providing quantifiable emission reduction benefits, the emissions analysis may include that emissions reduction credit.~~

~~(c)Emissions reduction credit from projects, programs, or activities which require a regulation in order to be implemented may not be included in the emissions analysis unless the regulation is already adopted by the enforcing jurisdiction. Adopted regulations are required for demand management strategies for reducing emissions which are not specifically identified in the applicable implementation plan, and for control programs which are external to the transportation system itself, such as tailpipe or evaporative emission standards, limits on gasoline volatility, inspection and maintenance programs, and oxygenated or reformulated gasoline or diesel fuel. A regulatory program may also be considered to be adopted if an opt-in to a Federally enforced program has been approved by EPA, if EPA has promulgated the program (if the control program is a Federal responsibility, such as tailpipe standards), or if the Clean Air Act requires the program without need for individual State action and without any discretionary authority for EPA to set its stringency, delay its effective date, or not implement the program.~~

~~(d)Notwithstanding subsection (1)(c) of this rule, during the transitional period, control measures or programs which are committed to in an implementation plan submission as described in OAR 340-20-890 through 340-20-910, but which has not received final EPA action in the form of a finding of incompleteness, approval, or disapproval may be assumed for emission reduction credit for the purpose of demonstrating that the requirements of OAR 340-20-890 through 340-20-910 are satisfied.~~

~~(e)A regional emissions analysis for the purpose of satisfying the requirements of OAR 340-20-930 through 340-20-950 may account for the programs in section (1)(d) of this rule, but the same assumptions about these programs shall be used for both the "Baseline" and "Action" scenarios.~~

~~(f)Ambient temperatures shall be consistent with those used to establish the emissions budget in the applicable implementation plan. Factors other than temperatures, for example the fraction of travel in a hot stabilized engine mode, may be modified after interagency consultation according to OAR 340-20-760 if the newer estimates incorporate additional or more geographically specific information or represent a logically estimated trend in such factors beyond the period considered in the applicable implementation plan.~~

(1) General requirements.

(a) The regional emissions analysis required by OAR 340-020-0890 and 340-020-0900 for the Transportation Plan, TIP, or project not from a conforming plan and TIP must include all Regionally Significant Projects expected in the nonattainment or Maintenance Area. The analysis shall include FHWA/FTA projects proposed in the Transportation Plan and TIP and all other Regionally Significant Projects which are disclosed to the MPO as required by OAR 340-020-0760. Projects which are not regionally significant are not required to be explicitly modeled, but vehicle miles traveled (VMT) from such projects must be estimated in accordance with reasonable professional practice. The effects of TCMs and similar projects that are not regionally significant may also be estimated in accordance with reasonable professional practice.

(b) The emissions analysis may not include for emissions reduction credit any TCMs or other measures in the Applicable Implementation Plan which have been delayed beyond the scheduled date(s) until such time as their implementation has been assured. If the measure has been partially implemented and it can be demonstrated that it is providing quantifiable emission reduction benefits, the emissions analysis may include that emissions reduction credit.

(c) Emissions reduction credit from projects, programs, or activities which require a regulatory action in order to be implemented may not be included in the emissions analysis unless:

(A) The regulatory action is already adopted by the enforcing jurisdiction;

(B) The project, program, or activity is included in the Applicable Implementation Plan;

(C) The Control Strategy Implementation Plan submission or Maintenance Plan submission that establishes the Motor Vehicle Emissions Budget(s) for the purposes of OAR 340-020-0890 contains a Written Commitment to the project, program, or activity by the agency with authority to implement it; or

(D) EPA has approved an opt-in to a Federally enforced program, EPA has promulgated the program (if the control program is a Federal responsibility, such as vehicle tailpipe Standards), or the Clean Air Act requires the program without need for individual State action and without any discretionary authority for EPA to set its stringency, delay its effective date, or not implement the program.

(d) Emissions reduction credit from control measures that are not included in the Transportation Plan and TIP and that do not require a regulatory action in order to be implemented may not be included in the emissions analysis unless the conformity determination includes Written Commitments to implementation from the appropriate entities.

(A) Persons or entities voluntarily committing to control measures must comply with the obligations of such commitments.

(B) The conformity implementation plan revision required in 40 CFR 51.390 must provide that Written Commitments to control measures that are not included in the Transportation Plan and TIP must be obtained prior to a conformity determination and that such commitments must be fulfilled.

(e) A regional emissions analysis for the purpose of satisfying the requirements of OAR 340-020-0900 must make the same assumptions in both the "Baseline" and "Action" scenarios regarding control measures that are external to the transportation system itself, such as vehicle tailpipe or evaporative emission Standards, limits on gasoline volatility, vehicle inspection and maintenance programs, and oxygenated or reformulated gasoline or diesel fuel.

(f) The ambient temperatures used for the regional emissions analysis shall be consistent with those used to establish the emissions budget in the Applicable Implementation Plan. All other factors, for example the fraction of travel in a hot stabilized engine mode, must be consistent with the Applicable Implementation Plan, unless modified after interagency Consultation according to OAR 340-020-0760(2)(e) to incorporate additional or more geographically specific information or represent a logically estimated trend in such factors beyond the period considered in the Applicable Implementation Plan.

(g) Reasonable methods shall be used to estimate nonattainment or Maintenance Area VMT on off-network roadways within the urban Transportation Planning area, and on roadways outside the urban transportation planning area.

~~(2)Serious, severe, and extreme ozone nonattainment areas and serious carbon monoxide areas after January 1, 1995. Estimates of regional transportation related emissions used to support conformity determinations must be made according to procedures which meet the requirements in sections (2)(a) through (e) of this rule.~~

~~(a)A network based transportation demand model or models relating travel demand and transportation system performance to land use patterns, population demographics, employment, transportation infrastructure, and transportation policies must be used to estimate travel within the metropolitan planning area of the nonattainment area. Such a model shall possess the following attributes:~~

~~(A)The modeling methods and the functional relationships used in the model(s) shall in all respects be in accordance with acceptable professional practice, and reasonable for purposes of emission estimation;~~

~~(B)The network based model(s) must be validated against ground counts for a base year that is not more than 10 years prior to the date of the conformity determination. Land use, population,~~

~~and other inputs must be based on the best available information and appropriate to the validation base year;~~

~~(C)For peak hour or peak period traffic assignments, a capacity sensitive assignment methodology must be used;~~

~~(D)Zone to zone travel times used to distribute trips between origin and destination pairs must be in reasonable agreement with the travel times which result from the process of assignment of trips to network links. Where use of transit currently is anticipated to be a significant factor in satisfying transportation demand, these times should also be used for modeling mode splits;~~

~~(E)Free flow speeds on network links shall be based on empirical observations;~~

~~(F)Peak and off peak travel demand and travel times must be provided;~~

~~(G)Trip distribution and mode choice must be sensitive to pricing, where pricing is a significant factor, if the network model is capable of such determinations and the necessary information is available;~~

~~(H)The model(s) must utilize and document a logical correspondence between the assumed scenario of land development and use and the future transportation system for which emissions are being estimated. Reliance on a formal land use model is not specifically required but is encouraged;~~

~~(I)A dependence of trip generation on the accessibility of destinations via the transportation system (including pricing) is strongly encouraged but not specifically required, unless the network model is capable of such determinations and the necessary information is available;~~

~~(J)A dependence of regional economic and population growth on the accessibility of destinations via the transportation system is strongly encouraged but not specifically required, unless the network model is capable of such determinations and the necessary information is available; and~~

~~(K)Consideration of emissions increases from construction related congestion is not specifically required.~~

~~(b)Highway Performance Monitoring System (HPMS) estimates of vehicle miles traveled shall be considered the primary measures of vehicle miles traveled within the portion of the nonattainment or maintenance area and for the functional classes of roadways included in HPMS, for urban areas which are sampled on a separate urban area basis. A factor (or factors) shall be developed to reconcile and calibrate the network based model estimates of vehicle miles traveled in the base year of its validation to the HPMS estimates for the same period, and these factors shall be applied to model estimates of future vehicle miles traveled. In this factoring process, consideration will be given to differences in the facility coverage of the HPMS and the modeled network description. Departure from these procedures is permitted with the concurrence of DOT and EPA.~~

~~(c)Reasonable methods shall be used to estimate nonattainment area vehicle travel on off network roadways within the urban transportation planning area, and on roadways outside the urban transportation planning area.~~

~~(d)Reasonable methods in accordance with good practice must be used to estimate traffic speeds and delays in a manner that is sensitive to the estimated volume of travel on each roadway segment represented in the network model.~~

(2) Regional emissions analysis in serious, severe, and extreme ozone Nonattainment Areas and serious CO Nonattainment Areas must meet the requirements of subsections (2)(a) through (c) of this rule if their metropolitan planning area contains an urbanized area population over 200,000.

(a) By January 1, 1997, estimates of regional transportation- related emissions used to support conformity determinations must be made at a minimum using network-based travel models according to procedures and methods that are available and in practice and supported by current and available documentation. These procedures, methods, and practices are available from DOT and will be updated periodically. Agencies must discuss these modeling procedures and practices through the interagency Consultation process, as required by OAR 340-020-0760(2)(e). Network-based travel models must at a minimum satisfy the following requirements:

(A) Network-based travel models must be validated against observed counts (peak and off-peak, if possible) for a base year that is not more than 10 years prior to the date of the conformity determination. Model forecasts must be analyzed for reasonableness and compared to historical trends and other factors, and the results must be documented;

(B) Land use, population, employment, and other network-based travel model assumptions must be documented and based on the best available information;

(C) Scenarios of land development and use must be consistent with the future transportation system alternatives for which emissions are being estimated. The distribution of employment and residences for different transportation options must be reasonable;

(D) A capacity-sensitive assignment methodology must be used, and emissions estimates must be based on a methodology which differentiates between peak and off-peak link volumes and speeds and uses speeds based on final assigned volumes;

(E) Zone-to-zone travel impedances used to distribute trips between origin and destination pairs must be in reasonable agreement with the travel times that are estimated from final assigned traffic volumes. Where use of Transit currently is anticipated to be a significant factor in satisfying transportation demand, these times should also be used for modeling mode splits; and

(F) Network-based travel models must be reasonably sensitive to changes in the time(s), cost(s), and other factors affecting travel choices.

(b) Reasonable methods in accordance with good practice must be used to estimate traffic speeds and delays in a manner that is sensitive to the estimated volume of travel on each roadway segment represented in the network-based travel model.

(c) Highway Performance Monitoring System (HPMS) estimates of vehicle miles traveled (VMT) shall be considered the primary measure of VMT within the portion of the nonattainment or Maintenance Area and for the functional classes of roadways included in HPMS, for urban areas which are sampled on a separate urban area basis. For areas with network-based travel models, a factor (or factors) may be developed to reconcile and calibrate the network-based travel model estimates of VMT in the base year of its validation to the HPMS estimates for the same period. These factors may then be applied to model estimates of future VMT. In this factoring process, consideration will be given to differences between HPMS and network-based travel models, such as differences in the facility coverage of the HPMS and the modeled network description. Locally developed count-based programs and other departures from these procedures are permitted subject to the interagency Consultation procedures of OAR 340-020-0760(2)(e).

(3) All other metropolitan Nonattainment Areas ~~nonattainment areas~~ shall comply with the following requirements after January 1, 1996:

(a) Estimates of regional transportation-related emissions used to support conformity determinations must be made according to the procedures which meet the requirements in sections (3)(b) and (c) of this rule.

(b) Procedures which satisfy some or all of the requirements of section (2) of this rule shall be used in all areas not subject to section (2) of this rule where those procedures have been the previous practice of the MPO.

(c) At a minimum, these areas shall estimate emissions using methodologies and procedures which possess the following attributes:

(A) a network based travel demand model which describes the network in sufficient detail to capture at least 85 percent of the vehicle trips;

(B) an ability to generate plausible vehicle trip tables based on current and future land uses and travel options in the region;

(C) software, or other appropriate procedures, to assign the full spectrum of vehicular traffic including, where possible, truck traffic, to the network;

(D) other modes of travel shall be estimated in accordance with reasonable professional practice either quantitatively or qualitatively;

(E) sufficient field observations of traffic (e.g. average speeds, average daily volumes, average peaking factors for specific links that are directly identifiable in the network) to calibrate the traffic assignment for base year data;

(F) software, or other appropriate procedures, to calculate emissions based on network flows and link speeds, and as necessary, to refine speed estimates from assigned traffic;

(G) software, or other appropriate procedures, to account for additional "off-model" transportation emissions; and

(H) estimates of future land uses sufficient to allow projections of future emissions.

~~(4) Areas which are not serious, severe, or extreme ozone nonattainment areas or serious carbon monoxide areas, or before January 1, 1995, or any area not covered by sections (2) or (3) of this rule.~~

~~(a) Procedures which satisfy some or all of the requirements of section (2) and (3) of this rule shall be used in all areas not subject to section (2) or (3) of this rule in which those procedures have been the previous practice of the MPO.~~

~~(b) Regional emissions may be estimated by methods which do not explicitly or comprehensively account for the influence of land use and transportation infrastructure on vehicle miles traveled and traffic speeds and congestion. Such methods must account for VMT growth by extrapolating historical VMT or projecting future VMT by considering growth in population and historical growth trends for vehicle miles traveled per person. These methods must also consider future economic activity, transit alternatives, and transportation system policies.~~

(4) PM10 from construction-related fugitive dust.

(a) For areas in which the implementation plan does not identify construction-related fugitive PM10 as a contributor to the nonattainment problem, the fugitive PM10 emissions associated with highway and Transit Project construction are not required to be considered in the regional emissions analysis.

(b) In PM10 nonattainment and Maintenance Areas with implementation plans which identify construction-related fugitive PM10 as a contributor to the nonattainment problem, the regional PM10 emissions analysis shall consider construction-related fugitive PM10 and shall account for the level of construction activity, the fugitive PM10 control measures in the Applicable Implementation Plan, and the dust-producing capacity of the proposed activities.

~~(5) Projects not from a conforming plan and TIP in non-metropolitan nonattainment and maintenance areas. This section applies to any nonattainment or maintenance area or any portion thereof which does not have a metropolitan transportation plan or TIP and whose projects are not part of the emissions analysis of any MPO's metropolitan transportation plan or TIP because, the nonattainment or maintenance area or portion thereof does not contain a metropolitan planning area or portion of a metropolitan planning area and is not part of a Metropolitan Statistical Area or a Consolidated Metropolitan Statistical Area which is or contains a nonattainment or maintenance area.~~

~~(a) Conformity demonstrations for projects in these areas may satisfy the requirements of OAR 340-20-910, 340-20-950, and 340-20-980 with one regional emissions analysis which includes all regionally significant projects in the nonattainment or maintenance area, or portion thereof.~~

~~(b) The requirements of OAR 340-20-910 shall be satisfied according to the procedures in OAR 340-20-910(c), with references to the "transportation plan" taken to mean the statewide transportation plan.~~

~~(c) The requirements of OAR 340-20-950 and 340-20-980 which reference "transportation plan" or "TIP" shall be taken to mean those projects in the statewide transportation plan or statewide TIP which are in the nonattainment or maintenance area, or portion thereof.~~

~~(d) The requirements of OAR 340-20-1000(2) shall be satisfied if:~~

~~(A) The project is included in the regional emissions analysis which includes all regionally significant highway and transportation projects in the nonattainment or maintenance area, or portion thereof, and supports the most recent conformity determination made according to the requirements of OAR 340-20-910, 340-20-950, 340-20-980, as modified by subsections (5)(b) and (5)(c) of this rule, as appropriate for the time period and pollutant; and~~

~~(B) The project's design concept and scope have not changed significantly from those which were included in the regional emissions analysis, or in a manner which would significantly impact use of the facility.~~

(5) Reliance on previous regional emissions analysis.

(a) The TIP may be demonstrated to satisfy the requirements of OAR 340-020-0890 ("Motor Vehicle Emissions Budget") or 340-020-0900 ("Emission reductions in areas without Motor Vehicle Emissions Budgets") without new regional emissions analysis if the regional emissions analysis already performed for the plan also applies to the TIP. This requires a demonstration that:

(A) The TIP contains all projects which must be started in the TIP's timeframe in order to achieve the highway and Transit system envisioned by the Transportation Plan;

(B) All TIP projects which are regionally significant are included in the Transportation Plan with Design Concept and Scope adequate to determine their contribution to the Transportation Plan's regional emissions at the time of the Transportation Plan's conformity determination; and

(C) The Design Concept and Scope of each Regionally Significant Project in the TIP is not significantly different from that described in the Transportation Plan.

(b) A project which is not from a conforming Transportation Plan and a conforming TIP may be demonstrated to satisfy the requirements of OAR 340-020-0890 or 340-020-0900 without additional regional emissions analysis if allocating funds to the project will not delay the
implementation of projects in the Transportation Plan or TIP which are necessary to achieve the highway and Transit system envisioned by the Transportation Plan, and if the project is either:

(A) Not regionally significant; or

(B) Included in the conforming Transportation Plan (even if it is not specifically included in the latest conforming TIP) with Design Concept and Scope adequate to determine its contribution to the Transportation Plan's regional emissions at the time of the Transportation Plan's conformity determination, and the Design Concept and Scope of the project is not significantly different from that described in the Transportation Plan.

~~(6) PM_{10} from construction-related fugitive dust.~~

~~(a) For areas in which the implementation plan does not identify construction-related fugitive PM_{10} as a contributor to the nonattainment problem, the fugitive PM_{10} emissions associated with highway and transit project construction are not required to be considered in the regional emissions analysis.~~

~~(b) In PM_{10} nonattainment and maintenance areas with implementation plans which identify construction-related fugitive PM_{10} as a contributor to the nonattainment problem, the regional PM_{10} emissions analysis shall consider construction-related fugitive PM_{10} and shall account for the level of construction activity, the fugitive PM_{10} control measures in the applicable implementation plan, and the dust-producing capacity of the proposed activities.~~

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-1020

Procedures for Determining Localized CO and PM_{10} Concentrations (Hot-Spot Analysis)

~~(1) In the following cases, CO hot-spot analysis must be based on the applicable air quality models, data bases, and other requirements specified in **40 CFR Part 51** Appendix W ("Guideline on Air Quality Models (Revised)" (1988), supplement A (1987) and supplement B (1993), EPA publication no. 450/2-78-027R), unless, after the interagency consultation process described in OAR 340-20-760 and with the approval of the EPA Regional Administrator, these models, data bases, and other requirements are determined to be inappropriate:~~

~~(a) For projects in or affecting locations, areas, or categories of sites which are identified in the applicable implementation plan as sites of current violation or possible current violation;~~
~~(b) For those intersections at Level of Service D, E, or F, or those that will change to Level of Service D, E, or F, because of increased traffic volumes related to a new FHWA/FTA funded or approved project in the vicinity;~~
~~(c) For any project involving or affecting any of the intersections which the applicable implementation plan identified as the top three intersections in the nonattainment or maintenance area based on the highest traffic volumes;~~
~~(d) For any project involving or affecting any of the intersections which the applicable implementation plan identified as the top three intersections in the nonattainment or maintenance area based on the worst Level of Service; and~~
~~(e) Where use of the "Guideline" models is practicable and reasonable given the potential for violations.~~
~~(f) For any project identified through interagency consultation pursuant to OAR 340-20-760 as a site of potential future violation.~~
~~(2) In cases other than those described in section (1) of this rule, other quantitative methods may be used if they represent reasonable and common professional practice.~~
~~(3) CO hot spot analyses must include the entire project, and may be performed only after the major design features which will significantly impact CO concentrations have been identified. The background concentration can be estimated using the ratio of future to current traffic multiplied by the ratio of the future to current emission factors.~~
~~(4) PM_{10} hot spot analysis must be performed for projects which are located at sites where violations have been verified by monitoring, and at sites which have essentially identical or higher vehicle and roadway emission and dispersion characteristics, including sites near ones where a violation has been monitored. The projects which require PM_{10} hot spot analysis shall be determined through the interagency consultation process required in OAR 340-20-760. In PM_{10} nonattainment and maintenance areas, new or expanded bus and rail terminals and transfer points which increase the number of diesel vehicle congregating at a single location require hot spot analysis. DOT may choose to make a categorical conformity determination on bus and rail terminals or transfer points based on appropriate modeling of various terminal sizes, configurations, and activity levels. The requirements of this paragraph for quantitative hot spot analysis will not take effect until EPA releases modeling guidance on this subject and announces in the Federal Register that these requirements are in effect.~~
~~(5) Hot spot analysis assumptions must be consistent with those in the regional emissions analysis for those inputs which are required for both analyses.~~
~~(6) PM_{10} or CO mitigation or control measures shall be assumed in the hot spot analysis only where there are written commitments from the project sponsor or operator to the implementation of such measures, as required by OAR 340-20-1040(1).~~
~~(7) CO and PM_{10} hot spot analyses are not required to consider construction related activities which cause temporary increases in emissions. Each site which is affected by construction-related activities shall be considered separately, using established "Guideline" methods. Temporary increases are defined as those which occur only during the construction phase and last five years or less at any individual site.~~

(1) CO Hot-Spot Analysis.

(a) The demonstrations required by OAR 340-020-0870 ("Localized CO and PM10 violations") must be based on quantitative analysis using the applicable air quality models, data bases, and other requirements specified in 40 CFR part 51, Appendix W (Guideline on Air Quality Models). These procedures shall be used in the following cases, unless different procedures developed through the interagency Consultation process required in OAR 340-020-0760 and approved by the EPA Regional Administrator are used:

(A) For projects in or affecting locations, areas, or categories of sites which are identified in the Applicable Implementation Plan as sites of violation or possible violation;

(B) For projects affecting intersections that are at Level-of- Service D, E, or F, or those that will change to Level-of-Service D, E, or F because of increased traffic volumes related to a new FHWA/FTA funded or approved project in the vicinity;

(C) For any project affecting one or more of the top three intersections in the nonattainment or Maintenance Area with highest traffic volumes, as identified in the Applicable Implementation Plan; and

(D) For any project affecting one or more of the top three intersections in the nonattainment or Maintenance Area with the worst level of service, as identified in the Applicable Implementation Plan.

(b) In cases other than those described in subsection (1)(a) of this rule, the demonstrations required by OAR 340-020-0870 may be based on either:

(A) Quantitative methods that represent reasonable and common professional practice; or

(B) A qualitative consideration of local factors, if this can provide a clear demonstration that the requirements of OAR 340-020-0870 are met.

(2) PM10 Hot-Spot Analysis .

(a) The hot-spot demonstration required by OAR 340-020-0870 must be based on quantitative analysis methods for the following types of projects:

(A) Projects which are located at sites at which violations have been verified by monitoring;

(B) Projects which are located at sites which have vehicle and roadway emission and dispersion characteristics that are essentially identical to those of sites with verified violations (including sites near one at which a violation has been monitored); and

(C) New or expanded bus and rail terminals and transfer points which increase the number of diesel vehicles congregating at a single location.

(b) Where quantitative analysis methods are not required, the demonstration required by OAR 340-020-0870 may be based on a qualitative consideration of local factors.

(c) The identification of the sites described in paragraphs (2)(a)(A) and (2)(a)(B) of this rule, and other cases where quantitative methods are appropriate, shall be determined through the interagency Consultation process required in OAR 340-020-0760. DOT may choose to make a categorical conformity determination on bus and rail terminals or transfer points based on appropriate modeling of various terminal sizes, configurations, and activity levels.

(d) The requirements for quantitative analysis contained in this section (2) will not take effect until EPA releases modeling guidance on this subject and announces in the Federal Register that these requirements are in effect.

(3) General requirements.

(a) Estimated pollutant concentrations must be based on the total emissions burden which may result from the implementation of the project, summed together with future background concentrations. The total concentration must be estimated and analyzed at appropriate receptor locations in the area substantially affected by the project.

(b) Hot-Spot Analyses must include the entire project, and may be performed only after the major design features which will significantly impact concentrations have been identified. The future background concentration should be estimated by multiplying current background by the ratio of future to current traffic and the ratio of future to current emission factors.

(c) Hot-Spot Analysis assumptions must be consistent with those in the regional emissions analysis for those inputs which are required for both analyses.

(d) PM10 or CO mitigation or control measures shall be assumed in the Hot-Spot Analysis only where there are Written Commitments from the project sponsor and/or operator to implement such measures, as required by OAR 340-020-1040(1).

(e) CO and PM10 Hot-Spot Analyses are not required to consider construction-related activities which cause temporary increases in emissions. Each site which is affected by construction-related activities shall be considered separately, using established "Guideline" methods. Temporary increases are defined as those which occur only during the construction phase and last five years or less at any individual site.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-1030
Using the Motor Vehicle Emissions Budget in the Applicable Implementation Plan (or Implementation Plan Submission)

(1) In interpreting an ~~a~~Applicable ~~i~~Implementation ~~p~~Plan, or implementation plan submission with respect to its Motor Vehicle Emissions Budget(s) ~~motor vehicle emissions budget(s)~~, the MPO and DOT may not infer additions to the budget(s) that are not explicitly intended by the implementation plan, or submission. Unless the implementation plan explicitly quantifies the amount by which motor vehicle emissions could be higher while still allowing a demonstration of compliance with the Milestone ~~milestone~~, attainment, or maintenance requirement and explicitly states an intent that some or all of this additional amount should be available to the MPO and DOT in the emission budget for conformity purposes, the MPO or ODOT may not interpret the budget to be higher than the implementation plan's estimate of future emissions. This applies in particular to ~~a~~Applicable ~~i~~Implementation ~~p~~Plans, or submissions, which demonstrate that after implementation of control measures in the implementation plan:

(a) Emissions from all sources will be less than the total emissions that would be consistent with a required demonstration of an emissions reduction Milestone ~~milestone~~;

(b) Emissions from all sources will result in achieving attainment prior to the attainment deadline or ambient concentrations in the attainment deadline year will be lower than needed to demonstrate attainment; or

(c) Emissions will be lower than needed to provide for continued maintenance.

(2) If an ~~a~~Applicable ~~i~~Implementation ~~p~~Plan submitted before November 24, 1993, demonstrates that emissions from all sources will be less than the total emissions that would be consistent with attainment and quantifies that "Safety Margin ~~safety margin~~," the State may submit a SIP revision which assigns some or all of this Safety Margin ~~safety margin~~ to highway and Transit ~~transit~~ mobile sources for the purposes of conformity. Such a SIP revision, once it is endorsed by the Governor and has been subject to a public hearing, may be used for the purposes of transportation conformity before it is approved by EPA.

(3) A conformity demonstration shall not trade emissions among budgets which the ~~a~~Applicable ~~i~~Implementation ~~p~~Plan, or implementation plan submission, allocates for different pollutants or precursors, or among budgets allocated to motor vehicles and other sources, ~~without a SIP revision or a SIP which~~ unless the implementation plan establishes mechanisms for such trades.

(4) If the ~~a~~Applicable ~~i~~Implementation ~~p~~Plan, or implementation plan submission, estimates future emissions by geographic subarea of the Nonattainment Area ~~nonattainment area~~, the MPO and DOT are not required to consider this to establish subarea budgets, unless the ~~a~~Applicable ~~i~~Implementation ~~p~~Plan, or implementation plan submission, explicitly indicates an intent to create such subarea budgets for purposes of conformity.

(5) If a Nonattainment Area ~~nonattainment area~~ includes more than one MPO, the SIP may establish Motor Vehicle Emissions Budgets ~~motor vehicle emissions budgets~~ for each MPO, or else the MPOs must collectively make a conformity determination for the entire Nonattainment Area ~~nonattainment area~~.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-1040
Enforceability of Design Concept and Scope and Project-Level Mitigation and Control Measures

(1) Prior to determining that a Transportation Project ~~transportation project~~ is in conformity, the MPO, ODOT, other recipient of funds designated under title 23 U.S.C. or the Federal Transit ~~Act~~ Laws, FHWA, or FTA must obtain from the project sponsor and/or operator Written Commitments ~~written commitments~~ to implement in the construction of the project and operation of the resulting facility or service any project-level mitigation or control measures which are identified as conditions for NEPA ~~p~~Process ~~c~~Completion with respect to local PM_{10} or CO impacts. Before ~~making~~ a conformity determinations is made, Written Commitments ~~written commitments~~ must also be obtained for project-level mitigation or control measures which are conditions for making conformity determinations for a Transportation Plan ~~transportation plan~~ or TIP and included in the project Design Concept ~~design concept~~ and Scope ~~scope~~ which is used in the regional emissions analysis required by sections OAR 340-020-0890 ("Motor Vehicle Emissions Budget") and 340-020-0900 ("Emission reductions in areas without Motor Vehicle Emissions Budgets") ~~through 340-20-910 and OAR 340-20-930 through 340-20-950~~ or used in the project-level Hot-Spot Analysis ~~hot spot analysis~~ required by OAR 340-020-0870 ~~and 340-20-920~~.

(2) Project sponsors voluntarily committing to mitigation measures to facilitate positive conformity determinations must comply with the obligations of such commitments.

(3) The implementation plan revision required in 40 CFR 51.390 shall provide that Written Commitments ~~commitments~~ to mitigation measures must be obtained prior to a positive conformity determination, and that project sponsors must comply with such commitments.

(4) ~~During the control strategy and maintenance periods, if~~ If the MPO, ODOT or project sponsor believes the mitigation or control measure is no longer necessary for conformity, the project sponsor or operator may be relieved of its obligation to implement the mitigation or control measure if it can demonstrate that the applicable hot-spot requirements of OAR 340-020-0870, emission budget requirements of 340-020-0890, and emission reduction requirements of 340-020-0900 are satisfied without the mitigation or control measure, and so notifies the agencies involved in the interagency Consultation ~~consultation~~ process required under OAR 340-020-0760. The MPO and DOT must ~~confirm~~ find that the Transportation Plan ~~transportation plan~~ and TIP still satisfy the applicable requirements of OAR 340-020-0890 and 340-020-0900 and that the project still satisfies the requirements of OAR 340-020-0870, and therefore that the conformity determinations for the Transportation Plan ~~transportation plan~~, TIP and project are still valid. This finding is subject to the applicable public Consultation requirements in OAR 340-020-0760(4) for conformity determinations for projects.

~~Stat.~~ Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-1050
Exempt Projects

Notwithstanding the other requirements of this rule, highway and Transit Projects ~~transit projects~~ of the types listed in Table 2 are exempt from the requirement ~~that a~~ to determine conformity ~~determination be made~~. Such projects may proceed toward implementation even in the absence of a conforming Transportation Plan ~~transportation plan~~ and TIP. A particular action of the type listed in Table 2 of this section is not exempt if the MPO or ODOT in Consultation ~~consultation~~ with other agencies under OAR 340-020-0760(3)(b)&(d), and the EPA, and the FHWA (in the case of a Highway Project ~~highway project~~) or the FTA (in the case of a Transit Project ~~transit project~~) concur that it has potentially adverse emissions impacts for any reason. States and MPOs must ensure that exempt projects do not interfere with TCM implementation. Table 2 follows:

Table 2 - Exempt projects

SAFETY
Railroad/highway crossing.
Hazard elimination program.
Safer non-Federal-aid system roads.
Traffic control devices and operating assistance other than signalization projects.
Shoulder improvements.
Increasing sight distance.
Safety improvement program. ~~other than signalization projects.~~
Railroad/highway crossing warning devices.
Guardrails, median barriers, crash cushions.
Pavement resurfacing and/or rehabilitation.
Pavement marking demonstration.
Emergency relief (23 U.S.C. 125).
Fencing.
Skid treatments.
Safety roadside rest areas.
Adding medians.
Truck climbing lanes outside the urbanized area.
Lighting improvements.
Widening narrow pavements or reconstructing bridges (no additional travel lanes).
Emergency truck pullovers.

MASS TRANSIT
Operating assistance to Transit ~~transit~~ agencies.
Purchase of support vehicles.
Rehabilitation of Transit ~~transit~~ vehicles.[1]
Purchase of office, shop, and operating equipment for existing facilities.
Purchase of operating equipment for vehicles (e.g., radios, fareboxes, lifts, etc.).
Construction or renovation of power, signal, and communications systems.
Construction of small passenger shelters and information kiosks.
Reconstruction of renovation of Transit ~~transit~~ buildings and structures (e.g., rail or bus buildings, storage and maintenance facilities, stations, terminals, and ancillary structures).
Rehabilitation or reconstruction of track structures, track, and trackbed in existing rights-of-way.
Purchase of new buses and rail cars to replace existing vehicles or for minor expansions of the fleet.[1]
Construction of new bus or rail storage/maintenance facilities categorically excluded in **23 CFR 771**.

AIR QUALITY

Continuation of ride-sharing and van-pooling promotion activities at current levels.
Bicycle and pedestrian facilities.

OTHER

Specific activities which do not involve or lead directly to construction such as:
- Planning and technical studies.
- Grants for training and research programs.
- Planning activities conducted pursuant to titles 23 and 49 U.S.C.
- Federal-aid systems revisions.

Engineering to assess social, economic, and environmental effects of the proposed action or alternatives to that action.
Noise attenuation.

Emergency or hardship ~~A~~advance land acquisitions (**23 CFR 712** or **23 CFR 771**).
Acquisition of scenic easements.
Plantings, landscaping, etc.
Sign removal.
Directional and informational signs.
Transportation enhancement activities (except rehabilitation and operation of historic transportation buildings, structures, or facilities).
Repair of damage caused by natural disasters, civil unrest, or terrorist acts, except projects involving substantial functional, locational or capacity changes.

Note: [1] In PM_{10} nonattainment or Maintenance Areas, such projects are exempt only if they are in compliance with control measures in the Applicable Implementation Plan.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-1060
Projects Exempt from Regional Emissions Analyses

Notwithstanding the other requirements of this rule, highway and Transit Projects ~~transit projects~~ of the types listed in Table 3 of this section are exempt from regional emissions analysis requirements. The local effects of these projects with respect to CO or PM-10 concentrations must be considered to determine if a Hot-Spot Analysis ~~hot spot analysis~~ is required prior to making a project-level conformity determination. These projects may then proceed to the project development process even in the absence of a conforming Transportation Plan ~~transportation plan~~ and TIP. A particular action of the type listed in Table 3 is not exempt from regional emissions analysis if the MPO or ODOT in Consultation ~~consultation~~ with other agencies (see OAR 340-020-0760), the EPA, and the FHWA (in the case of a Highway Project ~~highway project~~) or the FTA (in the case of a Transit Project ~~transit project~~) concur that it has potential regional impacts for any reason. Table 3 follows:

Table 3 - Projects Exempt From Regional Emissions Analyses

Intersection channelization projects.
Intersection signalization projects at individual intersections.
Interchange reconfiguration projects.
Changes in vertical and horizontal alignment.
Truck size and weight inspection stations.
Bus terminals and transfer points.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-1070
~~**Special Provisions for Nonattainment Areas Which are not Required to Demonstrate Reasonable Further Progress and Attainment**~~
Traffic Signal Synchronization Projects.

~~(1) Application. This section applies in the following areas:~~
~~(a) Rural transport ozone nonattainment areas;~~
~~(b) Marginal ozone areas;~~
~~(c) Submarginal ozone areas;~~
~~(d) Transitional ozone areas;~~
~~(e) Incomplete data ozone areas;~~
~~(f) Moderate CO areas with a design value of 12.7 ppm or less; and~~
~~(g) Not classified CO areas.~~
~~(2) Default conformity procedures. The criteria and procedures in OAR 340-20-930 through 340-20-950 will remain in effect throughout the control strategy period for transportation plans,~~

~~TIPs, and projects (not from a conforming plan and TIP) in lieu of the procedures in OAR 340-20-890 through 340-20-910, except as otherwise provided in section (3) of this rule. These default conformity procedures may not be used once a maintenance plan has been approved by the Environmental Quality Commission. Once a maintenance plan has been approved by the Environmental Quality Commission the area is required to meet the requirements applicable during the transitional period in accordance with OAR 340-20-720 (defining when the transitional period begins and Phase II of the interim period ends).~~

~~(3) Optional conformity procedures. The State or MPO may voluntarily develop an attainment demonstration and corresponding motor vehicle emissions budget like those required in areas with higher nonattainment classifications. In this case, the State must submit an implementation plan revision which contains that budget and attainment demonstration. Once EPA has approved this implementation plan revision, the procedures in OAR 340-20-890 through 340-20-910 apply in lieu of the procedures in OAR 34020-930 through 340-20-950.~~

Traffic signal synchronization projects may be approved, funded, and implemented without satisfying the requirements of OAR 340-020-0710 through 340-020-1070. However, all subsequent regional emissions analyses required by OAR 340-020-0890 and 340-020-0900 for Transportation Plans, TIPs, or projects not from a conforming plan and TIP must include such regionally significant traffic signal synchronization projects.

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 7-1995, f. & ef. 3-29-95

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-20-1080
~~Savings provisions~~
[Repealed]

~~The Federal conformity rules under **40 CFR Part 51 subpart T**, in addition to any existing applicable State requirements, establish the conformity criteria and procedures necessary to meet the requirements of Clean Air Act section 176(c) until EPA approves OAR 340-20-710 through 1080. Following EPA approval of OAR 340-20-710 through 1080, or a portion thereof, the approved, or approved portion of, the State criteria and procedures will govern conformity determinations and the Federal conformity regulations contained in **40 CFR Part 93** will apply only for the portion, if any, of the State's conformity provisions that is not approved by EPA. In addition, any previously applicable implementation plan requirements relating to conformity remain enforceable until the State revises its applicable implementation plan to specifically remove them and EPA approves those revisions.~~

Stat. Auth.: ORS Ch. 468 & 468A
Hist.: DEQ 9-1995, f. & ef. 5-1-1995

~~**[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-20-047.]**~~

Indirect Source Construction Permit Rules

DIVISION 20
GENERAL AIR POLLUTION CONTROL REGULATIONS

[**ED. NOTE:** These rules are included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-20-047 with the exception of OAR 340-020-0100 thru 340-020-0135 and 340-20-450 thru 340-20-660.]

340-020-0110
Definitions

As used in OAR 340-020-0100 through 340-020-0135:

~~(1) "Air Quality Maintenance Area (AQMA)" means any area that has been identified by the Department having the potential for exceeding any State ambient air quality standard.~~

~~(2) "Air Quality Maintenance Area (AQMA) Analysis" means an analysis of the impact on air quality in an AQMA of emissions from existing air contaminant sources and emissions associated with projected growth and development.~~

~~(3) "Aircraft Operations" means any aircraft landing or takeoff.~~

~~(4) "Airport" means any area of land or water which is used or intended for use for the landing and takeoff of aircraft, or any appurtenant areas, facilities, or rights-of-way such as terminal facilities, parking lots, roadways, and aircraft maintenance and repair facilities.~~

~~(5)~~ (1) "Associated Parking" means a ~~parking facility~~ Parking Facility or facilities owned, operated, and/or used in conjunction with an Indirect Source.

~~(6)~~ (2) "Average Daily Traffic" means the total traffic volume during a given time period in whole days greater than one day and less than one year divided by the number of days in that time period, commonly abbreviated as ADT.

~~(7)~~ (3) "Commence Construction" means to begin to engage in a continuous program of on-site construction or on-site modifications, including site clearance, grading, dredging, or landfilling in preparation for the ~~fabrication, erection~~ construction, installation, or modification of an Indirect Source. Interruptions and delays resulting from ~~acts of God~~ natural disasters, strikes, litigation, or other matters beyond the control of the owner shall be disregarded in determining whether a construction or modification program is continuous.

~~(8) "Commission" means Environmental Quality Commission.~~

~~(9)~~ (4) "Department" means the Department of Environmental Quality.

~~(10)~~ (5) "Director" means the Director of the Department or Regional Authority and authorized deputies or officers.

~~(11) "Expressway" means a divided arterial highway for through traffic with full or partial control of access and generally with grade separations at major intersections.~~

~~(12) "Freeway" means an Expressway as defined in section (9) of this rule with full control of access.~~

~~(13) "Highway Section" means a highway of substantial length between logical termini (major crossroads, population centers, major traffic generators, or similar major highway control elements) as normally included in a single location study or multi-year highway improvement program.~~

~~(14)~~ (6) "Indirect Source" means a facility, building, structure, or installation, or any portion or combination thereof, which indirectly causes or may cause ~~mobile source~~ Mobile Source activity that results in emissions of an air contaminant for which there is a ~~State standard~~ National Ambient Air Quality Standard. Such Indirect Sources shall include, but not be limited to:

~~(a) Highways and Roads;~~

~~(b)~~ (a) Parking Facilities;

~~(c)~~ (b) Retail, Commercial, and Industrial Facilities;

~~(d)~~ (c) Recreation, Amusement, Sports, and Entertainment Facilities;

~~(e) Airports;~~

~~(f)~~ (d) Office and Government Buildings;

~~(g) Apartments and Mobile Home Parks;~~

~~(h)~~ (e) Educational Facilities;

~~(i)~~ (f) Hospital Facilities;

~~(j) Religious Facilities.~~

~~(15)~~ (7) "Indirect Source Construction Permit" means a written permit in letter form issued by the Department or Regional Authority having jurisdiction, bearing the signature of the Director, which authorizes the permittee to ~~commence construction~~ Commence Construction of an Indirect Source under construction and operation conditions and schedules as specified in the permit.

~~(16)~~ (8) "Indirect Source Emission Control Program" or ~~("~~ISECP~~)~~" means a program which reduces Mobile Source emissions resulting from the use of the Indirect Source. An ISECP may include, but is not limited to:

(a) Posting transit route and scheduling information;

(b) Construction and maintenance of bus shelters and turn-out lanes;

(c) Maintaining mass transit fare reimbursement programs;

(d) Making a car pool matching system available to employees, shoppers, students, residents, etc.;

(e) Reserving ~~parking space~~ Parking Spaces for car pools;

(f) Making ~~parking space~~ Parking Spaces available for park-and-ride stations;

(g) Minimizing vehicle running time within parking lots through the use of sound parking lot design;

(h) Ensuring adequate gate capacity by providing for the proper number and location of entrances and exits and optimum signalization for such;

(i) Limiting traffic volume so as not to exceed the carrying capacity of roadways;

(j) Altering the level of service at controlled intersections;

(k) Obtaining a written statement of intent from the appropriate public agency(s) on the disposition of roadway improvements, modifications, and/or additional transit facilities to serve the individual source;

(l) Construction and maintenance of exclusive transit ways;

(m) Providing for the collection of air quality monitoring data at Reasonable Receptor and Exposure Sites;

(n) Limiting facility modifications which can take place without resubmission of permit application.

~~(17) "Indirect Source Operating Permit" means a written permit in letter form issued by the Department or Regional Authority having jurisdiction, bearing the signature of the Director or designee, which authorizes the permittee to operate an indirect source.~~

~~(18)~~ (9) "Mobile Source" means self-propelled vehicles, powered by internal combustion engines including, but not limited to, automobiles, trucks, motorcycles, and aircraft.

~~(19)~~ (10) "Off-Street Area or Space" means any area or space not located on a public road dedicated for public use.

~~(20) "Parking and Traffic Circulation Plan" means a plan developed by a city, county, or regional government or Regional Planning Agency, the implementation of which assures the attainment and maintenance of the state's ambient air quality standards.~~

~~(21)~~ (11) "Parking Facility" means any building, structure, lot, or portion thereof, designed and used primarily for the temporary storage of motor vehicles in designated ~~parking space~~ Parking Spaces.

~~(22)~~ (12) "Parking Space" means any Off-Street Area or~~f~~ Space below, above, or at ground level, open or enclosed, that is used for parking one motor vehicle at a time.

~~(23)~~ (13) "Person" means individuals, corporations, associations, firms, partnerships, joint stock companies, public and municipal corporations, political subdivisions, the State and any agencies thereof, and the federal government and any agencies thereof.

~~(24)~~ (14) "Population" means that population estimate most recently published by the Center for Population Research and Census, Portland State University, or any other population estimate approved by the Department.

~~(25)~~ (15) "Regional Authority" means a regional air quality control authority established under the provisions of ORS 468A.105.

~~(26) "Regional Planning Agency" means any planning agency which has been recognized as a substate clearinghouse for the purposes of conducting project review under the United States Office of Management and Budget Circular Number A-95, or other governmental agency having planning authority.~~

~~(27)~~ (16) "Reasonable Receptor and Exposure Sites" means locations where people might reasonably be expected to be exposed to air contaminants generated in whole or in part by the Indirect Source in question.

~~(28)~~ (17) "Sensitive Area" means locations which are actual or potential ~~air quality non-attainment~~ areas containing Carbon Monoxide hot-spots, as determined by the Department.

~~(29)~~ (18) "Vehicle Trip" means a single movement by a motor vehicle which originates or terminates at or uses an Indirect Source.

Stat. Auth.: ORS Ch. 468 & 468A

Stats. Implemented:ORS 468A.025

Hist.: DEQ 81, f. 12-5-74, ef. 12-25-74; DEQ 86, f. 3-11-75, ef. 4-11-75; DEQ 110(Temp), f. & ef. 3-1-76 thru 7-14-76; DEQ 118, f. & ef. 8-11-76; DEQ 17-1990, f.

& cert. ef. 5-25-90; DEQ 25-1992, f. 10-30-92, cert. ef. 11-1-92; DEQ 4-1993, f. & cert. ef. 3-10-93

340-020-0115
Indirect Sources Required to Have Indirect Source Construction Permits

~~(1)~~ The owner, operator, or developer of an Indirect Source identified in section (1) ~~(2)~~ of this rule shall not ~~commence construction~~ Commence Construction of such a source ~~after December 31, 1974,~~ without an approved Indirect Source Construction Permit issued by the Department or Regional Authority having jurisdiction.

~~(2)~~ (1) All Indirect Sources meeting the criteria of this section relative to type, location, size, and operation are required to apply for an Indirect Source Construction Permit:

~~(a) The following sources in or within five miles of the municipal boundaries of a municipality with a population of 50,000 or more including, but not limited to, Portland, Salem, and Eugene:~~ The following sources that are located within the boundaries of a Carbon Monoxide nonattainment area or maintenance area identified in the State Implementation Plan, provided that such areas include at least one city containing 50,000 or more Population within the city's municipal boundary, including but not limited to Portland, Salem, Medford and Eugene.

~~(A)~~ Any Parking Facility or other Indirect Source with Associated Parking being constructed or modified to create new or additional parking or Associated Parking, capacity of ~~250~~ 1000 or more Parking Spaces, except within the ~~municipal boundary~~ Central City area of Portland as defined in the Carbon Monoxide Maintenance Plan and Redesignation Request for the Portland (Metro) Area, where the minimum number of Parking Spaces associated with an Indirect Source requiring Department approval shall be ~~150;~~ 800.

~~(B) Any Highway Section being proposed for construction with an anticipated annual average daily traffic volume of 20,000 or more motor vehicles per day within ten years after completion, or being modified so that the annual Average Daily Traffic on that Highway Section will be 20,000 or more motor vehicles per day or will be increased by 10,000 or more vehicles per day within ten years after completion.~~

~~(b)(A) The following sources within the State Implementation Plan Medford Carbon Monoxide nonattainment area boundary defined as "Beginning at the intersection of Crater Lake Highway (Highway 62) south on Biddle Road to the intersection of Fourth Street, west on Fourth Street to Riverside Avenue (Highway 99); south on Riverside Avenue to Tenth Street; west on Tenth Street to the intersection with Oakdale Avenue; north on Oakdale Avenue to the intersection with Fourth Street; east on Fourth Street to Central Avenue; north on Central Avenue to Court Street; north on Court Street to the intersection with Crater Lake Highway (Highway 62); and east on Crater Lake Highway to the point of beginning, with extensions along McAndrews Road east from Biddle Road to Crater Lake Avenue, and along Jackson Street east from Biddle Road to Crater Lake Avenue";~~

~~(B) Any Parking Facility or other Indirect Source with Associated Parking being constructed or modified to create new or additional parking or Associated Parking, capacity of 250 or more parking spaces.~~

~~(c) Except as otherwise provided in this rule, the following sources within Clackamas, Lane, Marion, Multnomah, or Washington Counties and the municipal boundary of Medford: Any Parking Facility or other Indirect Source with Associated Parking being constructed or modified to create new or additional parking or Associated Parking, capacity of 500 or more parking spaces;~~

~~(d) The following sources within Clackamas, Jackson, Lane, Marion, Multnomah, or Washington Counties: Any Highway Section being proposed for construction with an anticipated annual Average Daily Traffic volume of 20,000 or more motor vehicles per day within ten years after completion, or being modified so that the annual Average Daily Traffic on that Highway Section will be 20,000 or more motor vehicles per day, or will be increased by 10,000 or more motor vehicles per day within ten years after completion;~~

~~(e) Except as otherwise provided in this rule, the following sources in all areas of the state:~~

~~(A) Any Parking Facility or other Indirect Source with Associated Parking being constructed or modified to create new or additional parking or Associated Parking, capacity of 1,000 or more parking spaces;~~

~~(B) Any Highway Section being proposed for construction with an anticipated annual Average Daily Traffic Volume of 50,000 or more motor vehicles per day within ten years after completion, or being modified so that the annual Average Daily Traffic on that Highway Section will be 50,000 or more motor vehicles per day, or will be increased by 25,000 or more motor vehicles per day, within ten years after completion.~~

~~(f) Any Airport being proposed for construction with projected annual aircraft operations of 50,000 or more within ten years after completion, or being modified in any way so as to increase the projected number of annual Aircraft operations by 25,000 or more within ten years after completion.~~

~~(3)~~ (2) Where an Indirect Source is constructed or modified in increments which individually are not subject to review under this rule, and which are not part of a program of construction or modification in planned incremental phases approved by the Director, all such increments commenced after January 1, 1975, shall be added together for determining the applicability of this rule.

~~(4)~~ (3) An Indirect Source Construction Permit may authorize more than one phase of construction where commencement of construction or modification of successive phases will begin over acceptable periods of time referred to in the permit; and thereafter construction or modification of each phase may be begun without the necessity of obtaining another permit.

~~(5)Persons applying for an Indirect Source Permit shall at the time of application pay the following fees:~~

~~(a) Filing Fee of $100;~~

~~(b) Basic Application Processing Fee of $500;~~

~~(c) Extended Analysis Processing Fee of $2,000 required of applicants with parking facilities of 1,000 or greater spaces or for those facilities locating in "sensitive areas" which are not part of an approved parking and circulation plan.~~

[OAR 340-030-0115(5) renumbered to 340-030-0120]

Stat. Auth.: ORS Ch. 468 & 468A

Stats. Implemented:ORS 468A.040
Hist.: DEQ 81, f. 12-5-74, ef. 12-25-74; DEQ 86, f. 3-11-75, ef. 4-11-75; DEQ 110(Temp), f. & ef. 3-1-76 thru 7-14-76; DEQ 118, f. & ef. 8-11-76; DEQ 6-1984(Temp), f. & ef. 4-17-84; DEQ 19-1984, f. & ef. 10-16-84; DEQ 17-1990, f. & cert. ef. 5-25-90; DEQ4-1993, f. & cert. ef. 3-10-93

340-020-0120

~~**Establishment of an Approved Parking and Traffic Circulation Plan(s) by a City, County, or Regional Government or Regional Planning Agency**~~

Indirect Source Permit Application Process

Persons applying for an Indirect Source Permit shall at the time of application pay the following fees:

(1) Filing Fee of $100;

(2) Basic Application Processing Fee of $500;

(3) Extended Analysis Processing Fee of $2000 may be required of applicants with parking facilities of 800 or greater spaces if those facilities are in Sensitive Areas.

~~(1)(a) Upon determination by the Department or Regional Authority that control of Parking Spaces and traffic circulation is necessary to ensure attainment and maintenance of State and National Ambient Air Quality Standards (S/NAAQS), the Department or Regional Authority shall notify the Commission of the geographic areas determined or projected to be in noncompliance. The basis for the Department's determination shall be the findings and conclusions of an Air Quality Maintenance Area (AQMA) Analysis, or similar air quality study. Upon submission of its findings to the Commission, the Department shall give notice to cities, counties, regional governmental unit, or Regional Planning Agencies located in geographic areas determined or projected to be in non-compliance with S/NAAQS, that a public hearing shall be held on the Department's findings related to the need to control Parking Spaces and Traffic Circulation. After reviewing the public hearing testimony and the Department's findings, the Commission shall determine if it is in concurrence with the Department's findings. Upon the Commission's concurrence of the Department's findings, the Department or Regional Authority shall so notify the city, county, regional government unit, or Regional Planning Agency of the geographic areas determined or projected to be in noncompliance;~~

~~(b) Within 120 days of receipt of such notification, the appropriate city, county, regional, or other local government unit or planning agency shall proceed, in accordance with a specific plan and time schedule agreed to by the appropriate governmental unit or planning agency and the Department to develop and implement a Parking and Traffic Circulation Plan. The Parking and Traffic Circulation Plan, where required, shall be developed in coordination with the local and regional comprehensive planning process pursuant to the requirements of ORS 197.005 et seq. The required plan shall be submitted to the Department or Regional Authority for approval within the agreed time schedule but shall not be more than three years after the appropriate city, county or regional government or Regional Planning Agency is notified of the necessity for a Parking and Traffic Circulation Plan for an area within its jurisdiction.~~

~~(2) Within 60 days of the notification that development and submittal of Parking and Traffic Circulation Plans are required under section (1) of this rule, each designated city,~~

~~county or regional government or Regional Planning Agency shall notify the Department or Regional Authority in writing the agency or department and individual responsible for coordination and development of Parking and Traffic Circulation Plans.~~

~~(3) The Department or Regional Authority having jurisdiction will include in its notification:~~

~~(a) The geographic area requiring the development of Parking and Traffic Circulation Plans;~~

~~(b) The time period over which the Plan shall attain and maintain S/NAAQS; and~~

~~(c) The air contaminants for which the plan is to be developed.~~

~~(4) The Parking and Traffic Circulation Plan shall include, but not be limited to:~~

~~(a) Legally identifiable plan boundaries;~~

~~(b) Total Parking Space capacity allocated to the plan area, where applicable;~~

~~(c) Measures as necessary to provide for the attainment and maintenance of S/NAAQS for the air contaminants for which the Parking and Traffic Circulation Plan area was identified;~~

~~(d) Duly enforceable rules, regulations, and ordinances that implement measures that provide for attainment and maintenance of S/NAAQS for a period to be specified by the Department or Regional Authority;~~

~~(e) A description of the air quality levels expected as a result of the implementation of the Parking and Traffic Circulation Plan;~~

~~(f) Other applicable information which would allow evaluation of the plan such as, but not limited to, scheduling of construction, emission factors, and criteria, guidelines, and zoning ordinances applicable to the plan area;~~

~~(g) A description of the administrative procedures to be used in implementing each control measure included in the Parking and Traffic Circulation Plan;~~

~~(h) A description of the enforcement methods used to ensure compliance with measures adopted as part of the Parking and Traffic Circulation Plan;~~

~~(i) Identification and responsibilities of each city, county, and regional government or Regional Planning Agency designated under section (1) or (10) of this rule to implement the Parking and Traffic Circulation Plan.~~

~~(5) The Department or Regional Authority having jurisdiction shall hold a public hearing on each Parking and Traffic Circulation Plan submitted and on each proposed revocation or substantial modification thereof, allowing at least 30 days for written comments from public and other interested agencies.~~

~~(6) Upon approval of a submitted Parking and Traffic Circulation Plan, the Plan shall be identified as the approved Parking and Traffic Circulation Plan, the appropriate governmental unit or planning agency shall be notified and the plan used for the purposes and implementation of this rule.~~

~~(7) The appropriate city, county, or regional government or Regional Planning Agency shall annually review an approved Parking and Traffic Circulation Plan to determine if the plan continues to be adequate for the maintenance of air quality in the plan area and shall report its conclusions to the Department or Regional Authority having jurisdiction.~~

~~(8) The Department or Regional Authority having jurisdiction shall initiate a review of an approved Parking and Traffic Circulation Plan if it is determined that the Parking and Traffic Circulation Plan is not adequately maintaining the air quality in the plan area.~~

~~(9) A city, county, or regional government or Regional Planning Agency may submit a Parking and Traffic Circulation Plan to the Department or Regional Authority having jurisdiction for approval without being required to do so as stated in section (1) of this rule.~~

~~(10) The City of Medford shall develop and implement a Parking and Traffic Circulation Plan. The Parking and Traffic Circulation Plan, where required, shall be developed in coordination with the local and regional comprehensive planning process pursuant to the requirements of ORS 197.005 et seq. The required plan shall be submitted to the Department for approval by August 25, 1984.~~

~~(11) Within 30 days of the notification that development and submittal of a Parking and Traffic Circulation Plan is required under section (10) of this rule, the City of Medford shall notify the Department in writing the agency or department and individual responsible for coordination and development of the Parking and Traffic Circulation Plan. The provisions of sections (3) - (9) of this rule shall be applicable.~~

Stat. Auth.: ORS Ch. 468 & 468A
Stats. Implemented:ORS 468A.040
Hist.: DEO 81, f. 12-5-74, ef. 12-25-74; DEO 110(Temp), f. & ef. 3-1-76 thru 7-14-76; DEO 118, f. & ef. 8-11-76; DEO 6-1984(Temp), f. & ef. 4-17-84; DEO 19-1984, f. & ef. 10-16-84

340-020-0125

~~Information and Requirements Applicable to Indirect Source(s) Construction Permit Applications Where an Approved Parking and Traffic Circulation Plan is on File~~

Indirect Source Construction Permit Application Requirements for Parking Facilities.

(1) ~~Application Information Requirements~~ For Parking Facilities subject to this regulation, the following information shall be submitted to the Department:

~~(a) Parking Facilities and Indirect Sources Other Than Highway Sections:~~

~~(A)~~ (a) A completed Short Form A~~a~~pplication ~~form~~;

~~(B)~~ (b) A map showing the location of the site;

~~(C)~~ (c) A description of the proposed and prior use of the site;

~~(D)~~ (d) A site plan showing the location and quantity of Parking Spaces at the Indirect Source and Associated Parking area, points of motor vehicle ingress and egress to and from the site and Associated Parking;

~~(E) A ventilation plan for subsurface and enclosed parking;~~

~~(F) A written statement from the appropriate planning agency that the Indirect Source in question is consistent with an approved Parking and Traffic Circulation Plan or any adopted transportation plan for the region;~~

~~(G) A reasonable estimate of the effect the project has on total parking approved for any specific grid area and Parking and Traffic Circulation Plan area.~~

~~(b) Highway Section(s):~~

~~(A) Items in paragraphs (1)(a)(A) through (C) of this rule;~~

~~(B) A written statement from the appropriate governmental unit or planning agency that the Indirect Source in question is consistent with an approved Parking and Traffic Circulation Plan and any adopted transportation plan for the region;~~

~~(C) A reasonable estimate of the effect the project has on total vehicle miles traveled within the Parking and Traffic Circulation Plan Area.~~

(e) An estimate of the annual average weekday Vehicle Trips generated by the movement of Mobile Sources to and from the Parking Facility and/or Associated Parking Facility for the first and fifth years after completion of each planned incremental phase of the Indirect Source;

(f) A description of the availability and type of mass transit presently serving or projected to serve the proposed Indirect Source. This description shall include mass transit operation within ¼ mile of the boundary of the Indirect Source;

(g) Such additional information as may be required when there is reasonable basis for concluding:

(A) That the Indirect Source may cause or contribute to a violation of the Clean Air Act Implementation Plan for Oregon; or

(B) That the Indirect Source may cause or contribute to a delay in the attainment of or a violation of any applicable ambient air quality standard; or

(C) That the information is necessary to determine whether the proposed Indirect Source may cause or contribute to any such delay or violation. The Department shall base such conclusion on any reliable information, including but not limited to ambient air monitoring, traffic volume, traffic speed, or air quality projections based thereon.

(D) The additional information that may be required as a condition precedent to issuance of a permit may include any of that information required to be submitted in a Long Form Application by section (2) of this rule.

(2) Additional Requirements for Sensitive Areas. For Indirect Sources proposed to be located within the boundaries of a Carbon Monoxide nonattainment area or maintenance area as specified in OAR 340-020-0115(1), the following Long Form Application information shall be submitted to the Department:

(a) All information required under section (1) of this rule;

(b) An estimate of the Average Daily Traffic, peak hour and peak eight hour traffic volumes for all roads, streets, and arterials within ¼ mile of the Indirect Source and for all freeways and expressways within ½ mile of the nearest boundary of the Indirect Source for the time periods stated in subsection (1)(e) of this rule as they exist at the time of application;

(c) An estimate of the gross emissions of carbon monoxide, Volatile Organic Compounds, and oxides of nitrogen based on information required by subsections (1)(e) and (2)(b) of this rule;

(d) Estimated carbon monoxide at Reasonable Receptor and Exposure Sites. Estimates shall be made for the first, fifth, and tenth years after the Indirect Source and Associated Parking are completed or fully operational. Such estimates shall be made for the average and, if applicable, peak operating conditions.

(e) Evidence of the compatibility of he Indirect Source with any adopted transportation plan for the area;

(f) An estimate of the additional residential, commercial, and industrial developments which may occur concurrent with or as the result of the construction and use of the I Indirect Source. This shall also include an air quality impact assessment of such development pursuant to subsection (2)(d) of this rule;

(g) A description of the Indirect Source Emission Control Program if such a program is necessary in order to be in compliance with the requirements of OAR 340-020-0130(5)(a), (b) and (c).

~~(2)~~ (3) Within 15 days after the receipt of an application for an Indirect Source Construction ~~p~~Permit or additions thereto, the Department or Regional Authority having jurisdiction shall advise the owner or operator of the Indirect Source in writing of any additional information required as a condition precedent to making a final determination to issue or deny ~~issuance of~~ a permit.

~~(3)~~ (4) An application shall not be considered complete until the required information is received by the Department or Regional Authority having jurisdiction. If no timely written request is made for additional information, the application shall be considered complete.

Stat. Auth.: ORS Ch. 468 & 468A

Stats. Implemented:ORS 468A.040

Hist.: DEQ 81, f. 12-5-74, ef. 12-25-74; DEQ 86, f. 3-11-75, ef. 4-11-75; DEQ 110(Temp), f. & ef. 3-1-76 thru 7-14-76; DEQ 118, f. & ef. 8-11-76

340-020-0129

~~**Information and Requirements Applicable to Indirect Source(s) Construction Permit Application Where No Approved Parking and Traffic Circulation Plan is on File**~~

~~(1) For all Indirect Sources for which an Indirect Source Construction Permit is required, other than Highway Sections and Airports, a completed Short Form Application shall be submitted containing the following information:~~

~~(a) A map showing the location of the site;~~

~~(b) A description of the proposed and prior use of the site;~~

~~(c) A site plan showing the location and quantity of Parking Spaces at the Indirect Source and Associated Parking area, point of motor vehicle ingress and egress to and from the site and Associated Parkings;~~

~~(d) A ventilation plan for subsurface and enclosed parkings;~~

~~(e) An estimate of the annual average and annual maximum daily vehicle trips detailed in the highest one and eight hour periods of the day, generated by the movement of mobile sources to and from the Parking Facility and/or Associated Parking Facility for the first and fifth years after completion of each planned incremental phase of the Indirect Source;~~

~~(f) A description of the availability and type of mass transit presently serving or projected to serve the proposed Indirect Source. This description shall only include mass transit operating within 1/4 mile of the boundary of the Indirect Source;~~

~~(g)(A) Within 15 days after the receipt of an application for an Indirect Source Construction Permit or any addition thereto, the Department or Regional Authority having jurisdiction shall mail or deliver to the applicant a written demand for any~~

~~additional information which the Department or Regional Authority having jurisdiction requires as a condition precedent to making a final determination to issue or deny a permit;~~

~~(B) An application shall not be considered complete until all the required information is received by the Department or Regional Authority having jurisdiction. If no timely written demand is made for additional information, then the application shall be considered complete;~~

~~*(C) Such additional information may be required when there is reasonable basis for concluding:*~~

~~(i) That the Indirect Source may cause or contribute to a violation of the Clean Air Act Implementation Plan for Oregon; or~~

~~(ii) That the Indirect Source may cause or contribute to a delay in the attainment of or a violation of any applicable ambient air quality standard after December 31, 1982; or~~

~~(iii) That the information is necessary to determine whether the proposed Indirect Source may cause or contribute to any such delay or violation. The Department shall base such conclusion upon any reliable information, including ambient air monitoring, traffic volume, traffic speed, and air quality projections based thereon, or on any other reliable information.~~

~~(D) The additional information that may be required as a condition precedent to issuance of a permit may include any of that information required to be submitted in a Long Form Application by section (2) of this rule.~~

~~(2) For Indirect Sources, other than Highway Sections and Airports, proposed to be constructed or modified to create new or additional parking capacity of 1,000 or more parking spaces in or within five miles of the municipal boundaries of Portland, Salem, Eugene, or Medford, the following Long Form Application information shall be submitted:~~

~~(a) All the information required by the Short Form Application by subsections (1)(a) through (g) of this rule;~~

~~(b) An estimate of the Average Daily Traffic, peak hour and peak eight hour traffic volumes for all roads, streets, and arterials within 1/4 mile of the Indirect Source and for all freeways and expressways within 1/2 mile of the nearest boundary of the Indirect Source for the time periods as stated in subsection (1)(e) of this rule and as exist at the time of application;~~

~~(c) An estimate of the gross emissions of carbon monoxide, lead, reactive hydrocarbons, and oxides of nitrogen based on the analysis performed in subsections (1)(e) and (2)(b) of this rule;~~

~~(d) Measured and estimated carbon monoxide and lead concentrations at Reasonable Receptor and Exposure Sites. Measurements shall be made prior to construction. Estimates shall be made for the first, fifth, and tenth years after the Indirect Source and Associated Parking are completed or fully operational. Such estimates shall be made for the average and peak operating conditions;~~

~~(e) Evidence of the compatibility of the Indirect Source with any adopted transportation plan for the area;~~

~~(f) An estimate of the additional residential, commercial, and industrial developments which may occur concurrent with or as the result of, the construction and use of the~~

~~Indirect Source. This shall also include an air quality impact assessment of such development pursuant to subsection (2)(d) of this rule;~~

~~(g) A description of the Indirect Source Emission Control Program if such a program is necessary in order to be in compliance with the requirements of OAR 340-020-0130(5)(a), (b) and (c).~~

~~(3) For Airports, the following information shall be submitted:~~

~~(a) OAR 340-020-0125(1)(a)(A) through (E);~~

~~(b) OAR 340-020-0125(2) and (3) shall be applicable;~~

~~(c) A map showing the topography of the area surrounding and including the site;~~

~~(d) Evidence of the compatibility of the Airport with any adopted Transportation Plan for the area;~~

~~(e) An estimate of the effect of the operation of the Airport on the total vehicle miles traveled;~~

~~(f) Estimates of the effect of the operation and use of the Airport on traffic patterns, volumes, and flow in, on, or within 1/4 mile of the Airport;~~

~~(g) An estimate of the average and maximum number of Aircraft Operations per day by type of aircraft in the first, fifth, and tenth years after completion of the Airport;~~

~~(h) Expected passenger loadings in the first, fifth, and tenth years after completion;~~

~~(i) Measured or estimated carbon monoxide and lead concentrations at Reasonable Receptor and Exposure sites. Measurements shall be made prior to construction and estimates shall be made for the first, fifth, and tenth years after the Airport and associated Parking are completed or fully operational. Such estimates shall be made for average and peak operating conditions;~~

~~(j) Alternative designs of the Airport, i.e., size, location, parking capacity, etc., which would minimize the adverse environmental impact of the Airport;~~

~~(k) An estimate of the additional residential, commercial, and industrial development which may occur within three miles of the boundary of the new or modified Airport as the result of the construction and use of the Airport;~~

~~(l) An estimate of the area wide air quality impact analysis for carbon monoxide, photo chemical oxidants, nitrogen oxides, and lead particulate. This analysis would be based on the emissions projected to be emitted from mobile and stationary sources within the Airport and from mobile and stationary source growth within three miles of the boundary of the Airport. Projections should be made for the first, fifth, and tenth years after completion;~~

~~(m) A description of the availability and type or mass transit presently serving or projected to serve the proposed Airport. This description shall only include mass transit operating within 1/4 mile of the boundary of the Airport.~~

~~(4) For Highway Sections, the following information shall be submitted:~~

~~(a) OAR 340-020-0125(1)(a)(A) through (C);~~

~~(b) OAR 340-020-0125(2) shall be applicable;~~

~~(c) A map showing the topography of the Highway Section and points of ingress and egress;~~

~~(d) The existing average and maximum daily traffic on the Highway Section proposed to be modified;~~

~~(e) An estimate of the maximum traffic levels for one and eight hour periods in the year in which the maximum air quality impact is projected and the first and last years the Highway Section is projected not to be in compliance with the requirements of OAR 340-020-0130(5)(a), (b), and (c);~~

~~(f) An estimate of vehicle speeds for average and maximum traffic volumes for the year in which the maximum air quality impact is projected and the first and last years Highway Section is projected not to be in compliance with the requirements of OAR 340-020-0130(5)(a), (b), and (c);~~

~~(g) A description of the general features of the Highway Section and associated right-of-way;~~

~~(h) An analysis of the impact of the Highway Section on the development of mass transit and other modes of transportation such as bicycling;~~

~~(i) Alternative designs of the Highway Section, i.e., size, location, etc. which would minimize adverse environmental effects of the Highway Section;~~

~~(j) The compatibility of the Highway Section with an adopted comprehensive transportation plan for the area;~~

~~(k) An estimate of the additional residential, commercial, and industrial development which may occur as the result of the construction and use of the Highway Section, including an air quality assessment of such development;~~

~~(l) Estimates of the effect of the operation and use of the Indirect Source on major shifts in traffic patterns, volumes, and flow in, on, or within 1/4 mile of the Highway Section;~~

~~(m) An analysis of the area-wide air quality impact for carbon monoxide, photochemical oxidants, nitrogen oxides, and lead particulates for the year in which maximum air quality impact is projected and the first and last years the Highway Section is projected not to be in compliance with the requirements of OAR 340-020-0130(5)(a), (b), and (c). This analysis would be based on the change in total vehicle miles traveled in the area selected for analysis;~~

~~(n) The total air quality impact (carbon monoxide and lead) of maximum and average traffic volumes. This analysis would be based on the estimates of an appropriate diffusion model at Reasonable Receptor and Exposure Sites. Measurements shall be made prior to construction and estimates shall be made for the year in which maximum air quality impact is projected and the first and last years the Highway Section is projected not to be in compliance with the requirements of OAR 340-020-0130(5) (a), (b), and (c);~~

~~(o) Where applicable and requested by the Department, a Department approved surveillance plan for motor vehicle related air contaminants.~~

Stat. Auth.: ORS Ch. 468 & 468A

Stats. Implemented:ORS 468A.040

Hist.: DEQ 81, f. 12-5-74, ef. 12-25-74; DEQ 86, f. 3-11-75, ef. 4-11-75; DEQ 110(Temp), f. & ef. 3-1-76 thru 7-14-76; DEQ 118, f. & ef. 8-11-76; DEQ 19-1978, f. & ef. 12-4-78; DEQ 4-1993, f. & cert. ef. 3-10-93

340-020-0130

Issuance or Denial of Indirect Source Construction Permits

(1) Issuance of an Indirect Source Construction Permit shall not relieve the permittee from compliance with other applicable provisions of the Clean Air Act Implementation Plan for Oregon.

(2) Within 20 days after receipt of a complete permit application, the Department or Regional Authority having jurisdiction shall:

(a) Issue a 20 day notice and notify appropriate newspapers and any interested ~~person~~ Person(s) who has requested to receive such notices in each region in which the proposed Indirect Source is to be constructed of the opportunity for written public comment on the information submitted by the applicant, the Department's evaluation of the proposed project, the Department's proposed decision, and the Department's proposed construction permit where applicable;

(b) Make publicly available in at least one location in each Department region in which the proposed Indirect Source would be constructed, the information submitted by the applicant, the Department's evaluation of the proposed project, the Department's proposed decision, and the Department's proposed construction permit where applicable.

(3) Within 60 days of the receipt of a complete permit application, the Department or Regional Authority having jurisdiction shall act to either disapprove a permit application or approve it with possible conditions.

(4) Conditions of an Indirect Source Construction Permit may include, but not be limited to:

(a) An Indirect Source Emission Control Program where it is necessary in order to be in compliance with the requirements of subsections (5)(a), (b), and (c) of this rule. The ISECP shall only contain control measures which have reasonably definable costs;

(b) Completion and submission of a Notice of Completion form prior to operation of the Indirect Source.

(5) An Indirect Source Construction Permit may be denied if:

(a) The Indirect Source will cause or contribute to a violation of the Clean Air Act Implementation Plan for Oregon;

(b) The Indirect Source will cause or contribute to a delay in the attainment of or cause or contribute to a violation of any ~~Clean~~ National Ambient Air Quality Standard;

(c) The Indirect Source causes or contributes to any violation of any ~~State~~ National Ambient Air Quality Standard by ~~an other~~ another Indirect Source or system of Indirect Sources;

(d) The applicable requirements for an Indirect Source Construction Permit application~~s~~ are not met.

(6) Any owner or operator of an Indirect Source operating without a permit required by this rule, or operating in violation of any of the conditions of an issued permit shall be subject to civil penalties and injunctions.

(7) Nothing in this rule shall preclude a Regional Authority authorized under OAR 340-020-0105 from setting the permit conditions for areas within its jurisdiction at levels more stringent than those detailed in OAR 340-020-0100 through 340-020-0135.

(8) If the Department shall deny, revoke, or modify an Indirect Source Construction Permit, it shall issue an order setting forth its reasons in essential detail.

(9) An Indirect Source Construction Permit shall be applied for at least 90 days in advance of the anticipated start of construction.

Stat. Auth.: ORS Ch. 468 & 468A
Stats. Implemented:ORS 468A.040
Hist.: DEQ 81, f. 12-5-74, ef. 12-25-74; DEQ 86, f. 3-11-75, ef. 4-11-75; DEQ 110(Temp), f. & ef. 3-1-76 thru 7-14-76; DEQ 118, f. & ef. 8-11-76; DEQ 4-1993, f. & cert. ef. 3-10-93

340-020-0135
Permit Duration

(1) An Indirect Source Construction Permit issued by the Department or a Regional Authority having jurisdiction shall remain in effect until modified or revoked by the Department or such Regional Authority.

(2) The Department or Regional Authority having jurisdiction may revoke the permit of any Indirect Source operating in violation of the construction, modification, or operation conditions set forth in this permit.

(3) An approved permit may be conditioned to expire if construction or modification is not commenced within 18 months after receipt of the approved permit; and, in the case of a permit granted covering construction ~~of~~ or modification in approved, planned incremental phases, a permit may be conditioned to expire as to any such phase as to which construction or modification is not commenced within 18 months of the time period stated in the initial permit for the commencing of construction of that phase. The Director may extend such time period upon a satisfactory showing by the permittee that an extension is justified.

Stat. Auth.: ORS Ch. 468 & 468A
Stats. Implemented:ORS 468A.040
Hist.: DEQ 81, f. 12-5-74, ef. 12-25-74; DEQ 86, f. 3-11-75, ef. 4-11-75; DEQ 110(Temp), f. & ef. 3-1-76 thru 7-14-76; DEQ 118, f. & ef. 8-11-76

~~**Parking Offsets in the Portland Central Business District**~~

340-020-0400
~~**Purpose**~~

~~OAR 340-020-0400 through 340-020-0430 allow the City of Portland, through application of transportation emission offsets, to meet new parking growth needs in the Central Business District without increasing carbon monoxide emissions.~~

~~Stat. Auth.: ORSCh. 468 & 468A~~
~~Stats. Implemented:ORS 468A.025~~
~~Hist.: DEQ 43-1990, f. & cert. ef. 12-19-90; DEQ 4-1993, f. & cert. ef. 3-10-93~~

~~**340-020-0405**~~
~~**Scope**~~

~~Subject to the provisions of OAR 340-020-0400 through 340-020-0430, the City of Portland may utilize motor vehicle emission offsets for the purpose of increasing off-street parking spaces by up to 1,370 spaces above the 43,914 parking space limit contained in the Portland carbon monoxide control strategy (Section 4.2 of the State Implementation Plan, OAR 340-020-0047). If further increases are needed, the City of~~

~~Portland shall make a request to the Department of Environmental Quality for an appropriate rule change and State Implementation Plan revision at least six months prior to the needed increase.~~

~~Stat. Auth.: ORSCh. 468 & 468A~~

~~Stats. Implemented:ORS 468A.025~~

~~Hist.: DEQ 43-1990, f. & cert. ef. 12-19-90; DEQ 4-1993, f. & cert. ef. 3-10-93~~

~~340-020-0410~~

~~Definitions~~

~~As used in OAR 340-020-0400 through 340-020-0430:~~

~~(1) "Category I" means a parking offset measure that would reduce vehicle emissions on a per vehicle trip basis.~~

~~(2) "Category II" means a parking offset measure that would reduce the number of vehicle trips.~~

~~(3) "Core Area" means Parking Sectors C, E, F, and G in the central business district of downtown Portland as identified in the 1985 Updated Downtown Parking and Circulation Policy adopted by the Portland City Council on February 26, 1986.~~

~~(4) "Department" means the Oregon Department of Environmental Quality.~~

~~(5) "Downtown Parking Inventory" means the total number of parking spaces authorized for use in the central business district of downtown Portland in the Portland carbon monoxide control strategy (Section 4.2 of the State Implementation Plan). The Downtown Parking Inventory is made up of existing spaces, spaces allocated to new development but not yet built, and reserve spaces available to be allocated.~~

~~(6) "Downtown Parking Management Plan" means the plan prepared by the Portland Office of Transportation in July 1990 and subsequently adopted by the Portland City Council on July 18, 1990. The Downtown Parking Management Plan provides direction for the management of parking resources in downtown Portland.~~

~~(7) "Long Term Parking Space" means any parking space where the parking duration is allowed to exceed four hours.~~

~~(8) "Motor Vehicle" means self-propelled vehicles powered by internal combustion engines including, but not limited to, automobiles, trucks and motorcycles.~~

~~(9) "Non-Core Area" means Parking Sectors A, B, D, H, J, K, and L in the central business district of downtown Portland as identified in the 1985 Updated Downtown Parking and Circulation Policy adopted by the Portland City Council on February 26, 1986.~~

~~(10) "Offsets Study" means the Air Quality Offsets for Parking Study prepared for the City of Portland by Cambridge Systematics, Inc. dated January 25, 1988.~~

~~(11) "Parking Emission Offset" means any emission reduction measure applied to motor vehicles which provides an equivalent or greater emission reduction prior to allowing an emission increase from motor vehicles using new off-street parking. Such emission reduction measures shall include but not be limited to the following measures from the Offsets Study:~~

~~(a) Fringe Parking (Category II);~~

~~(b) Alternative Work Schedules (Category I);~~

~~(c) Subsidy of Ridesharing (Category II);~~

~~(d) Increase Long-Term Parking Space Rates (Category II);~~
~~(e) Increase All-Parking Rates (Category II);~~
~~(f) Restrict Off-Street Parking Before 10 a.m. (Category I);~~
~~(g) Reserve Parking for Carpools (Category II);~~
~~(h) Park and Ride Remote Lots (Category II);~~
~~(i) Alternative Fuels (Category I);~~
~~(j) Enhanced Vehicle Inspection and Maintenance (Category I);~~
~~(k) Increased Transit Capacity (Category II);~~
~~(l) Traffic Flow Improvement (Category I);~~
~~(m) Bicycle Access (Category II).~~
~~(12) "Short Term Parking Space" means any parking space having a parking duration of up to four hours.~~
~~Stat. Auth.: ORS Ch. 468 & 468A~~
~~Stats. Implemented:ORS 468A.025~~
~~Hist.: DEQ 43-1990, f. & cert. ef. 12-19-90; DEQ 4-1993, f. & cert. ef. 3-10-93~~

~~340-020-0420~~
~~Requirements for Parking Offsets~~
~~(1) The baseline year for determining parking offset emission credits is 1987 with the following carbon monoxide emission and parking space equivalences identified in the Offsets Study:~~
~~(a) 122.5 grams per day for a core area off street parking space; and~~
~~(b) 107.8 grams per day for a non-core area off street parking space.~~
~~(2) In order to insure a net air quality benefit, the following ratios shall be used to calculate the number of additional parking spaces allowed:~~
~~(a) Category I parking offsets at a 1.2 ratio; and~~
~~(b) Category II parking offsets at a 1.2 to 2.0 ratio based on the type of parking offset and the relative locations (core versus non-core sectors) of the parking offsets and the new parking spaces.~~
~~(3) The City of Portland shall submit applications for parking emission offsets to the Department of Environmental Quality for approval. The application shall include at least the following elements:~~
~~(a) Proposed number and sector type (core or non-core) of additional parking spaces;~~
~~(b) Proposed offsets quantified according to calculation procedures in the Offsets Study and sections (1) and (2) of this rule;~~
~~(c) Documentation of permanence and enforceability of proposed offsets; and~~
~~(d) Monitoring plan to provide at least an annual assessment of whether the offset is maintaining its projected effectiveness.~~
~~Stat. Auth.: ORS Ch. 468 & 468A~~
~~Stats. Implemented:ORS 468A.025~~
~~Hist.: DEQ 43-1990, f. & cert. ef. 12-19-90; DEQ4-1993, f. & cert. ef. 3-10-93~~

~~340-020-0430~~
~~Overall Monitoring and Contingency Plan~~

~~(1) The City of Portland shall monitor the overall effectiveness of the Downtown Parking Management Plan. The City of Portland monitoring program shall include at least the following elements:~~

~~(a) A semi-annual report on the Downtown Parking Inventory;~~

~~(b) An every third year update of significant changes in parking utilization rates and parking lot types;~~

~~(c) Continuous monitoring of traffic volumes and speed approximations at 19 or more key locations in downtown beginning in January 1991;~~

~~(d) Annual to quarterly floating car speed runs on critical streets as requested by the Department;~~

~~(e) Annual evaluation of effectiveness of specific offset measures approved under these rules.~~

~~(2) Before any offsets are approved by the Department, the City of Portland shall guarantee the permanence of offset measures by providing the Department with a contingency plan adopted by resolution. In the event the offset monitoring required by OAR 340 020 0420(3)(d) indicates an offset measure is not providing the projected effectiveness and the City of Portland is unable to correct the deficiency within six months of notification by the Department, then the City of Portland shall commit through resolution to:~~

~~(a) Reduce the number of spaces in the reserve portion of the Downtown Parking Inventory by an equivalent number of spaces; or~~

~~(b) Reduce the hours of operation of City provided off street parking by delaying opening until 10 a.m. of an equivalent number of spaces as determined by calculation procedures in the Offsets Study; or~~

~~(c) Remove equivalent existing parking spaces.~~

~~Stat. Auth.: ORSCh. 468 & 468A~~

~~*Stats. Implemented:ORS 468A.025*~~

~~Hist.: DEQ 43 1990, f. & cert. ef. 12 19 90; DEQ 4 1993, f. & cert. ef. 3 10 93~~

Determining Conformity of General Federal Actions to State and Federal Implementation Plans

[Note: These rules are included in the State of Oregon Clean Air Act State Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-020-1500
Purpose

(1) The purpose of these rules is to implement Section 176(c) of the Clean Air Act (Act), (Public Law 88-206 as last amended by Public Law 101-549) and regulations under **40 CFR Part 51 subpart W (July 1, 1994)**, with respect to the conformity of general ~~federal actions~~ Federal Actions to the ~~applicable implementation plan~~ Applicable Implementation Plan. Under those authorities no department, agency or instrumentality of the federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an ~~applicable implementation plan~~ Applicable Implementation Plan. These rules set forth policy, criteria, and procedures for demonstrating and assuring conformity of such actions to the ~~applicable implementation plan~~ Applicable Implementation Plan.

(2) Under Section 176(c) of the Act and **40 CFR Part 51 subpart W (July 1, 1994)**, a ~~federal agency~~ Federal Agency must make a determination that a ~~federal action~~ Federal Action conforms to the ~~applicable~~ Applicable SIP in accordance with OAR ~~340-201-0500~~ 340-020-1500 through ~~340-201-0600~~ 340-020-1600 before the action is taken.

(3) Section (2) of this rule does not include ~~federal actions~~ Federal Actions where either:

(a) A National Environmental Policy Act (NEPA) analysis was completed as evidenced by a final environmental assessment (EA), environmental impact statement (EIS), or finding of no significant impact (FONSI) that was prepared prior to January 31, 1994; or

(b) the following has been completed:

(A) Prior to January 31, 1994, an EA was commenced or a contract was awarded to develop the specific environmental analysis;

(B) Sufficient environmental analysis is completed by March 15, 1994 so that the ~~federal agency~~ Federal Agency may determine that the ~~federal action~~ Federal Action is in conformity with the specific requirements and the purposes of the ~~applicable~~ Applicable SIP pursuant to the agency's affirmative obligation under Section 176(c) of the Act; and

(C) A written determination of conformity under Section 176(c) of the Act has been made by the ~~federal agency~~ Federal Agency responsible for the ~~federal action~~ Federal Action by March 15, 1994.

(4) Notwithstanding any provision of OAR 340-020-1500 through 340-020-1600, a determination that an action is in conformance with the ~~applicable~~

~~implementation plan~~ Applicable Implementation Plan does not exempt the action from any other requirements of the ~~applicable implementation plan~~ Applicable Implementation Plan, the NEPA, or the Act.

Stat. Auth.: ORS 468.020 & 468A.035

Stats. Implemented: ORS 468A.035

Hist.: DEQ 9-1995, f. & cert. ef. 5-1-95

340-020-1510

Definitions

As used in OAR 340-020-1500 through 340-020-1600:

(1) "Affected Federal ~~l~~Land ~~m~~Manager" means the federal agency or the federal official charged with direct responsibility for management of an area designated as Class I under the Act that is located within 100 km of the proposed federal action.

(2) "Applicable ~~I~~implementation ~~P~~plan" or "~~A~~applicable SIP" means the portion (or portions) of the applicable SIP or most recent revision thereof, which has been approved under Section 110 of the Act, or promulgated under Section 110(c) of the Act (Federal implementation plan), or promulgated under Section 301(d) of the Act which implements the relevant requirements of the Act.

(3) "Areawide ~~a~~Air ~~q~~Quality ~~m~~Modeling ~~a~~Analysis" ~~means~~ an assessment on a scale that includes the entire ~~nonattainment~~ Nonattainment Area or ~~maintenance area~~ Maintenance Area which uses an air quality dispersion model to determine the effects of emissions on air quality.

~~(4) "Attainment or Unclassifiable area" means any area designated as attainment under Section 107 of the Act and described in 40 CFR part 81 (July 1, 1994).~~

~~(5)~~ (4) "Cause or ~~c~~Contribute to ~~a~~Any ~~n~~New ~~v~~Violation of ~~a~~Any ~~s~~Standard in ~~a~~Any ~~a~~Area" means a ~~federal action~~ Federal Action that:

(a) Causes a new violation of a NAAQS at a location in a ~~nonattainment~~ Nonattainment Area or ~~maintenance area~~ Maintenance Area which would otherwise not be in violation of the standard during the future period in question if the ~~federal action~~ Federal Action were not taken; or

(b) Contributes, in conjunction with other reasonably foreseeable actions, to a new violation of a NAAQS at a location in a ~~nonattainment~~ Nonattainment Area or ~~maintenance area~~ Maintenance Area in a manner that would increase the frequency or severity of the new violation.

~~(c) Results in consumption of the PM_{10} PSD Increment, or causes visibility impairment in a federal Class I area protected under the Oregon Visibility Protection Program, as the result of prescribed burning actions in attainment/unclassifiable areas.~~

~~(6)~~ (5) "Caused ~~b~~By", as used in the terms "~~direct emissions~~ Direct Emissions" and "~~indirect emissions~~ Indirect Emissions," means emissions that would not otherwise occur in the absence of the ~~federal action~~ Federal Action.

~~(7)~~ (6) "Criteria ~~p~~Pollutant" ~~or standard~~" means any pollutant for which there is established a NAAQS at **40 CFR part 50 (July 1, 1994)**.

~~(8)~~ (7) "Direct ~~e~~Emissions" means those emissions of a ~~criteria pollutant~~ Criteria Pollutant or ~~its precursors~~ Precursors of a Criteria Pollutant that are caused

or initiated by the ~~federal action~~ Federal Action and occur at the same time and place as the action.

~~(9)~~ (8) "Emergency" means a situation where extremely quick action on the part of the Federal agencies involved is needed and where the timing of such federal activities makes it impractical to meet the requirements of OAR 340-020-1500 through 340-020-1600, such as natural disasters like hurricanes or earthquakes, civil disturbances such as terrorist acts, and military mobilizations.

~~(10)~~ (9) "Emissions ~~b~~Budgets" means those portions of the ~~applicable~~ Applicable SIP's projected emissions inventories that describe levels of emissions (mobile, stationary, area, etc.) that provide for meeting reasonable further progress ~~milestone~~ Milestones, attainment, or maintenance for any ~~criteria pollutant~~ Criteria Pollutant or ~~its precursors~~ Precursors of a Criteria Pollutant.

~~(11)~~ (10) "Emissions ~~o~~Offsets", for purposes of OAR 340-020-1570, means emissions reductions which are quantifiable, consistent with OAR 340-028-1960 through 340-028-1980, and the ~~applicable~~ Applicable SIP attainment and reasonable further progress demonstrations, surplus to reductions required by, and credited to, other SIP provisions, enforceable at both the state and federal levels, and permanent within the timeframe specified by the program.

~~(12)~~ (11) "Emissions ~~t~~That a ~~f~~Federal ~~a~~Agency ~~h~~Has a ~~c~~Continuing ~~p~~Program ~~r~~Responsibility ~~f~~For" means emissions that are specifically ~~caused by~~ Caused By an agency carrying out its authorities, and does not include emissions that occur due to subsequent activities, unless such activities are required by the Federal Agency. Where an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a nonfederal entity taking subsequent actions, such emissions are covered by the meaning of a continuing program responsibility.

~~(13)~~ (12) "EPA" means the United States Environmental Protection Agency.

~~(14)~~ (13) "Federal ~~a~~Action" means any activity engaged in by a department, agency, or instrumentality of the federal government, or any activity that a department, agency or instrumentality of the federal government supports in any way, provides financial assistance for licenses, permits, or approves under title 23 U.S.C. or the Federal Transit ~~Act~~ Laws (49 U.S.C. Chaper 53 ~~1601 et seq.~~). Where the ~~federal action~~ Federal Action is a permit, license, or other approval for some aspect of a nonfederal undertaking, the relevant activity is the part, portion, or phase of the nonfederal undertaking that requires the federal permit, license, or approval.

~~(15)~~ (14) "Federal ~~a~~Agency" means a federal department, agency, or instrumentality of the federal government.

~~(16)~~ (15) "Increase ~~t~~The ~~f~~Frequency or ~~s~~Severity of ~~a~~Any ~~e~~Existing ~~v~~Violation of ~~a~~Any ~~s~~Standard in ~~a~~Any ~~a~~Area" means to cause a ~~nonattainment area~~ Nonattainment Area to exceed a standard more often or to cause a violation at a greater concentration than previously existed or would otherwise exist during the future period in question, if the project were not implemented.

~~(17)~~ (16) "Indirect ~~e~~Emissions" means those emissions of a ~~criteria pollutant~~ Criteria Pollutant or ~~its precursors~~ Precursors of a Criteria Pollutant that:

(a) Are ~~caused by~~ Caused By the ~~federal action~~ Federal Action, but may occur later in time or may be farther removed in distance from the action itself but are still reasonably foreseeable; and

(b) The ~~federal agency~~ Federal Agency can practicably control and will maintain control over due to a continuing program responsibility of the ~~federal agency~~ Federal Agency.

~~(18)~~ (17) "Local ~~a~~Air ~~q~~Quality ~~m~~Modeling ~~a~~Analysis" means an assessment of localized impacts on a scale smaller than the entire ~~nonattainment~~ Nonattainment Area or ~~maintenance area~~ Maintenance Area, including, for example, congested roadway intersections and highways or transit terminals, which uses an air quality dispersion model to determine the effects of emissions on air quality.

~~(19)~~ (18) "Maintenance ~~a~~Area" means an area with a ~~maintenance plan~~ Maintenance Plan approved under Section 175A of the Act.

~~(20)~~ (19) "Maintenance ~~p~~Plan" means a revision to the ~~applicable~~ Applicable SIP, meeting the requirements of Section 175A of the Act.

~~(21)~~ (20) "Metropolitan Planning Organization" or "MPO" means that organization designated as being responsible, together with the state, for conducting the continuing, cooperative, and comprehensive planning process under 23 U.S.C. 134 and 49 U.S.C. 1607.

~~(22)~~ (21) "Milestone" has the meaning given in Sections 182(g)(1) and 189(c)(1) of the Act.

~~(23)~~ (22) "National ~~a~~Ambient ~~a~~Air ~~q~~Quality ~~s~~Standards" or "NAAQS" means those standards established pursuant to Section 109 of the Act and include standards for carbon monoxide (CO), lead (Pb), nitrogen dioxide (NO_2), ozone, particulate matter (PM_{10}), and sulfur dioxide (SO_2).

~~(24)~~ (23) "NEPA" means the National Environ-mental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.).

~~(25)~~ (24) "Nonattainment Area" means an area designated as nonattainment under Section 107 of the Act and described in **40 CFR part 81 (July 1, 1994)**.

~~(26)~~ (25) "Precursors of a ~~e~~Criteria ~~p~~Pollutant" means:

(a) For ozone, nitrogen oxides (NO_x), unless an area is exempted from NO_x requirements under Section 182(f) of the Act, and volatile organic compounds (VOC); and

(b) For PM_{10}, those pollutants described in the PM_{10} ~~nonattainment area~~ Nonattainment Area ~~applicable~~ Applicable SIP as significant contributors to the PM_{10} levels.

~~(27)~~ (26) "Reasonably ~~f~~Foreseeable ~~e~~Emissions" means projected future ~~indirect emissions~~ Indirect Emissions that are identified at the time the conformity determination is made; the location of such emissions is known and the emissions are quantifiable, as described and documented by the ~~federal agency~~ Federal Agency based on its own information and after reviewing any information presented to the ~~federal agency~~ Federal Agency.

~~(28)~~ (27) "Regional ~~w~~Water or ~~w~~Wastewater ~~p~~Projects" include construction, operation, and maintenance of water or wastewater treatment facilities, and water

storage reservoirs which affect a large portion of a ~~nonattainment~~ Nonattainment Area or ~~maintenance area~~ Maintenance Area.

~~(29)~~ (28) "Regionally ~~s~~Significant ~~a~~Action" means a ~~federal action~~ Federal Action for which the ~~direct~~ Direct Emissions and ~~indirect emissions~~ Indirect Emissions of any pollutant represent 10 percent or more of a ~~nonattainment~~ Nonattainment Area's or ~~maintenance area~~ Maintenance Area's emissions inventory for that pollutant.

~~(30)~~ (29) "Total of ~~d~~Direct and ~~i~~Indirect ~~e~~Emissions" means the sum of ~~direct~~ Direct Emissions and ~~indirect emissions~~ Indirect Emissions increases and decreases ~~caused by~~ Caused By the ~~federal action~~ Federal Action; i.e., the "net" emissions considering all ~~direct~~ Direct Emissions and ~~indirect emissions~~ Indirect Emissions. The portion of emissions which are exempt or presumed to conform under OAR 340-020-1520~~(5)~~ (4), ~~(6)~~ (5), ~~(7)~~ (6) or ~~(8)~~ (7) are not included in the "~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions." ~~The "total of direct and indirect emissions" includes emissions of criteria pollutants and emissions of precursors of criteria pollutants.~~

Stat. Auth.: ORS 468.020 & 468A.035
Stats. Implemented: ORS 468A.035
Hist.: DEQ 9-1995, f. & cert. ef. 5-1-95

340-020-1520
Applicability

(1) Conformity determinations for ~~federal actions~~ Federal Actions in a ~~nonattainment~~ Nonattainment Area or ~~maintenance area~~ Maintenance Area related to transportation plans, programs, and projects developed, funded, or approved under title 23 U.S.C. or the Federal Transit ~~Act~~ Laws (49 U.S.C. Chapter 53 ~~1601 et seq.~~) must meet the procedures and criteria for transportation conformity as set forth in OAR 340-020-0700 through 340-020-~~1080~~ 1070, in lieu of the procedures set forth in OAR 340-020-1500 through 340-020-1600.

(2) For ~~federal actions~~ Federal Actions in a ~~nonattainment~~ Nonattainment Area or ~~maintenance area~~ Maintenance Area not covered by section (1) of this rule, a conformity determination is required for each pollutant where the ~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions ~~caused by~~ Caused By a ~~federal action~~ Federal Action would equal or exceed any of the rates in sections ~~(4)~~ (3)(a) and (b) of this rule.

~~(3) For federal actions involving prescribed burning in an attainment or unclassifiable area, a conformity determination is required where the PM_{10} emissions generated by the prescribed burning would equal or exceed the rate specified in section (4)(c) of this section. The federal agency taking such action shall follow any guidance approved by the Department after consultation with affected federal agencies associated with determining emissions pursuant to section (4)(c) of this rule.~~

~~(4)~~ (3) The following emission rates apply to ~~federal actions~~ Federal Actions pursuant to sections (2) ~~and (3)~~ of this rule:

(a) For ~~nonattainment areas~~ Nonattainment Areas:

Pollutant — Tons per year

Ozone (VOCs or NO_x):
Serious NAAs —50
Severe NAAs — 25
Extreme NAAs —10
Other ozone NAAs (Outside an ozone transport region) — 100
Marginal & moderate NAAs (Inside an ozone transport region):
VOC — 50
NO_x — 100
Carbon Monoxide: All NAAs — 100
SO_2 or NO_2: All NAAs — 100
PM_{10}:
Moderate NAAs — 100
Serious NAAs —70
Pb: All NAAs —25

(b) For ~~maintenance area~~ Maintenance Areas:

Pollutant — Tons per Year

Ozone (NO_x), SO_2 or NO_2: All ~~maintenance area~~ Maintenance Areas — 100
Ozone (VOCs): ~~Maintenance area~~ Maintenance Areas
Inside ozone transport region — 50
Outside ozone transport region —100
Carbon Monoxide: All ~~maintenance area~~ Maintenance Areas — 100
PM_{10}: All ~~maintenance area~~ Maintenance Areas — 100
Pb: All ~~maintenance area~~ Maintenance Areas —25

~~(c) For prescribed burning in all attainment/unclassifiable areas:~~

~~**Pollutant — Tons per year**~~

~~**PM_{10}: — 100**~~

~~(5)~~ (4) The requirements of OAR 340-020-1500 through 340-020-1600 shall not apply to:

(a) Actions where the ~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions are below the emissions levels specified in subsection (b) of this section.

(b) The following actions which would result in no emissions increase or an increase in emissions that is clearly de minimis:

(A) Judicial and legislative proceedings.

(B) Continuing and recurring activities such as permit renewals where activities conducted will be similar in scope and operation to activities currently being conducted.

(C) Rulemaking and policy development and issuance.

(D) Routine maintenance and repair activities, including repair and maintenance of administrative sites, roads, trails, and facilities.

(E) Civil and criminal enforcement activities, such as investigations, audits, inspections, examinations, prosecutions, and the training or law enforcement personnel.

(F) Administrative actions such as personnel actions, organizational changes, debt management or collection, cash management, internal agency audits, program budget proposals, and matters relating to the administration and collection of taxes, duties and fees.

(G) The routine, recurring transportation of material and personnel.

(H) Routine movement of mobile assets, such as ships and aircraft, in home port reassignments and stations (when no new support facilities or personnel are required) to perform as operational groups or for repair or overhaul.

(I) Maintenance dredging and debris disposal where no new depths are required, applicable permits are required, and disposal will be at an approved site.

(J) Actions, such as the following, with respect to existing structures, properties, facilities and lands where future activities conducted will be similar in scope and operation to activities currently being conducted at the existing structures, properties, facilities, and lands; for example, relocation of personnel, disposition of federally owned existing structures, properties, facilities and lands, rent subsidies, operation and maintenance cost subsidies, the exercise of receivership and conservatorship authority, assistance in purchasing structures, and the production of coins and currency.

(K) The granting of leases, licenses such as for exports and trade, permits and easements where activities conducted will be similar in scope and operation to activities currently being conducted.

(L) Planning, studies, and provision of technical assistance.

(M) Routine operation of facilities, mobile assets and equipment.

(N) Transfer of ownership, interests, and titles in land, facilities and real and personal properties, regardless of the form or method of the transfer.

(O) The designation of empowerment zones, enterprise communities, or viticultural areas.

(P) Actions by any of the federal banking agencies of the Federal Reserve Banks, including actions regarding charters, applications, notices, licenses, the supervision or examination of depository institutions or depository institution holding companies, access to the discount window, or the provision of financial services to banking organizations or to any department, agency or instrumentality of the United States.

(Q) Actions by the Board of Governors of the Federal Reserve System or any Federal Reserve Bank to effect monetary or exchange rate policy.

(R) Actions that implement a foreign affairs function of the United States.

(S) Actions (or portions thereof) associated with transfers of land, facilities, title, and real properties through an enforceable contract or lease agreement where the delivery of the deed is required to occur promptly after a specific, reasonable condition is met, such as promptly after the land is certified as meeting the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and where the ~~federal agency~~ Federal Agency does not retain continuing authority to control emissions associated with the lands, facilities, title, or real properties.

(T) Transfers of real property, including land, facilities, and related personal property from a federal entity to another federal entity and assignments of real property, including land, facilities, and related personal property from a federal entity to another federal entity for subsequent deeding to eligible applicants.

(U) Actions by the Department of the Treasury to effect fiscal policy and to exercise the borrowing authority of the United States.

(c) The following actions where the emissions are not reasonably foreseeable:

(A) Initial Outer Continental Shelf lease sales which are made on a broad scale and are followed by exploration and development plans on a project level.

(B) Electric power marketing activities that involve the acquisition, sale and transmission of electric energy.

(d) Actions in ~~nonattainment~~ Nonattainment Areas or ~~maintenance area~~ Maintenance Areas which implement a decision to conduct or carry out a conforming program such as prescribed burning actions which are consistent with a conforming land management plan.

~~(6)~~ (5) Notwithstanding the other requirements of OAR 340-020-1500 through 340-020-1600, a conformity determination is not required for the following ~~federal actions~~ Federal Actions (or portion thereof):

(a) The portion of an action that includes major new or modified stationary sources that require a permit under the new source review (NSR) program (Section 173 of the Act) or the prevention of significant deterioration (PSD) program (Title I, part C of the Act).

(b) Actions in response to ~~emergencies~~ Emergencies or natural disasters such as hurricanes, earthquakes, etc., which are commenced on the order of hours or days after the ~~emergency~~ Emergency or disaster and, if applicable, which meet the requirements of section ~~(7)~~ (6) of this rule.

(c) Research, investigations, studies, demonstrations, or training, other than those exempted under section ~~(5)~~ (4)(b) of this rule, where no environmental detriment is incurred or the particular action furthers air quality research, as determined by the state agency primarily responsible for the ~~applicable~~ Applicable SIP.

(d) Alteration and additions of existing structures as specifically required by new or existing applicable environmental legislation or environmental regulations (e.g.hush houses for aircraft engines and scrubbers for air emissions).

(e) Direct ~~emissions~~ Emissions from remedial and removal actions carried out under the CERCLA and associated regulations to the extent such emissions either comply with the substantive requirements of the PSD/NSR permitting program or

are exempted from other regulation under the provisions of CERCLA and applicable regulations issued under CERCLA.

~~(7)~~ (6) ~~Federal actions~~ Federal Actions which are part of a continuing response to an ~~emergency~~ Emergency or disaster under section ~~(6)~~ (5)(b) of this rule and which are to be taken more than 6 months after the commencement of the response to the ~~emergency~~ Emergency or disaster under section ~~(6)~~ (5)(b) of this rule are exempt from the requirements of OAR 340-020-1500 through 340-020-1600 only if:

(a) The ~~federal agency~~ Federal Agency taking the actions makes a written determination that, for a specified period not to exceed an additional 6 months, it is impractical to prepare the conformity analyses which would otherwise be required and the actions cannot be delayed due to overriding concerns for public health and welfare, national security interests and foreign policy commitments; or

(b) For actions which are to be taken after those actions covered by subsection (a) of this section, the ~~federal agency~~ Federal Agency makes a new determination as provided in subsection (a) of this section.

~~(8)~~ (7) Notwithstanding other requirements of OAR 340-020-1500 through 340-020-1600, actions specified by individual federal agencies that have met the criteria set forth in section ~~(9)~~ (8) of this rule and the procedures set forth in section ~~(10)~~ (9) of this rule are presumed to conform, except as provided in section ~~(12)~~ (11) of this rule.

~~(9)~~ (8) The ~~federal agency~~ Federal Agency must meet the criteria for establishing activities that are presumed to conform by fulfilling the requirements set forth in either subsection (a) or (b) of this section:

(a) The ~~federal agency~~ Federal Agency must clearly demonstrate using methods consistent with this rule that the ~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions from the type of activities which would be presumed to conform would not:

(A) Cause or ~~e~~Contribute to ~~a~~Any ~~a~~New ~~v~~Violation of ~~a~~Any ~~s~~Standard in ~~a~~Any ~~a~~Area;

(B) Interfere with provisions in the ~~applicable~~ Applicable SIP for maintenance of any standard;

(C) Increase ~~t~~The ~~f~~Frequency or ~~s~~Severity of ~~a~~Any ~~e~~Existing ~~v~~Violation of ~~a~~Any ~~s~~Standard in ~~a~~Any ~~a~~Area;

(D) Delay timely attainment of any standard or any required interim emission reductions or other ~~milestone~~ Milestones in any area including, where applicable, emission levels specified in the ~~applicable~~ Applicable SIP for purposes of:

(i) A demonstration of reasonable further progress;

(ii) A demonstration of attainment; or

(iii) A ~~maintenance plan~~ Maintenance Plan; or

(b) The ~~federal agency~~ Federal Agency must provide documentation that the ~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions from such future actions would be below the emissions rates for a conformity determination that are established in section ~~(4)~~ (3) of this rule, based, for example, on similar actions taken over recent years.

~~(10)~~ (9) In addition to meeting the criteria for establishing exemptions set forth in section ~~(9)~~ (8) of this rule, the following procedures must also be complied with to presume that activities will conform:

(a) The ~~federal agency~~ Federal Agency must identify through publication in the Federal Register its list of proposed activities that are presumed to conform and the basis for the presumptions;

(b) The ~~federal agency~~ Federal Agency must notify the appropriate EPA Regional Office(s), state and local air quality agencies and, where applicable, the agency designated under section 174 of the Act and the MPO and provide at least 30 days for the public to comment on the list of proposed activities presumed to conform;

(c) The ~~federal agency~~ Federal Agency must document its response to all the comments received and make the comments, response, and final list of activities available to the public upon request; and

(d) The ~~federal agency~~ Federal Agency must publish the final list of such activities in the Federal Register.

~~(11)~~ (10) Notwithstanding the other requirements of OAR 340-020-1500 through 340-020-1600, when the ~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions of any pollutant from a ~~federal action~~ Federal Action does not equal or exceed the rates specified in section ~~(4)~~ (3) of this rule, but represents 10 percent or more of a non-attainment or ~~maintenance area~~ Maintenance Area's total emissions of that pollutant, the action is defined as a ~~regionally significant action~~ Regionally Significant Action and the requirements of 340-020-1500, and OAR 340-020-1540 through 340-020-1590 shall apply for the ~~federal action~~ Federal Action.

~~(12)~~ (11) Where an action otherwise presumed to conform under section ~~(8)~~ (7) of this rule is a ~~regionally significant action~~ Regionally Significant Action or does not in fact meet one of the criteria in section ~~(9)~~ (8)(a) of this rule, that action shall not be presumed to conform and the requirements of OAR 340-020-1500 and 340-020-1540 through 340-020-1590 shall apply for the ~~federal action~~ Federal Action.

~~(13)~~ (12) The provisions of OAR 340-020-1500 through 340-020-0600 shall apply in all non-attainment/maintenance ~~and attainment/un-classifiable~~ areas~~, where applicable~~.

Stat. Auth.: ORS 468.020 & 468A.035
Stats. Implemented: ORS 468A.035
Hist.: DEQ 9-1995, f. & cert. ef. 5-1-95

340-020-1530
Conformity Analysis

(1) Any federal department, agency, or instrumentality of the federal government taking an action subject to OAR 340-020-1520~~(4)~~ (3) must make its own conformity determination consistent with the requirements of OAR 340-020-1500 through 340-020-1600. In making its conformity determination, a ~~federal agency~~ Federal Agency must consider comments from any interested parties. Where multiple federal agencies have jurisdiction for various aspects of a project, a ~~federal agency~~ Federal Agency may choose to adopt the analysis of another ~~federal agency~~

Federal Agency or develop its own analysis in order to make its conformity determination.

~~(2) Federal actions involving prescribed burning in attainment or unclassifiable areas and subject to OAR 340-020-1520(4) shall follow any guidance approved by the Department after consultation with affected federal agencies for purposes of meeting the requirements of OAR 340-020-1500 through 340-020-1600. Such guidance may include applicability requirements in OAR 340-020-1520, conformity criteria in OAR 340-020-1570, and mitigation measures in OAR 340-020-1590.~~

Stat. Auth.: ORS 468.020 & 468A.035
Stats. Implemented: ORS 468A.035
Hist.: DEQ 9-1995, f. & cert. ef. 5-1-95

340-020-1570
Criteria for Determining Conformity of General Federal Actions

(1) An action required under OAR 340-020-1520 to have a conformity determination for a specific pollutant, will be determined to conform to the ~~applicable~~ Applicable SIP if, for each pollutant that exceeds the rates in OAR 340-020-1520~~(4)~~ (3), or otherwise requires a conformity determination due to the ~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions from the action, the action meets the requirements of section (3) of this rule, and meets any of the following requirements:

(a) For any ~~criteria pollutant~~ Criteria Pollutant, the ~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions from the action are specifically identified and accounted for in the ~~applicable~~ Applicable SIP's attainment or maintenance demonstration;

(b) For ozone or nitrogen dioxide, the ~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions from the action are fully offset within the same ~~nonattainment~~ Nonattainment Area or ~~maintenance area~~ Maintenance Area through a revision to the ~~applicable~~ Applicable SIP or a similarly enforceable measure that effects emission reductions so that there is no net increase in emissions of that pollutant;

(c) For any ~~criteria pollutant~~ Criteria Pollutant, except ozone and nitrogen dioxide, the ~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions from the action meet the requirements:

(A) Specified in section (2) of this rule, based on ~~areawide air quality modeling analysis~~ Areawide Air Quality Modeling Analysis and ~~local air quality modeling analysis~~ Local Air Quality Modeling Analysis; or

(B) Meet the requirements of subsection (e) of this section and, for ~~local air quality modeling analysis~~ Local Air Quality Modeling Analysis, the requirements of section (2) of this rule;

(d) For CO or PM_{10}:

(A) Where the Department or local air quality agency primarily responsible for the ~~applicable~~ Applicable SIP determines that an ~~areawide air quality modeling analysis~~ Areawide Air Quality Modeling Analysis is not needed, the ~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions from the action meet

the requirements specified in section (2) of this rule, based on ~~local air quality modeling analysis~~ Local Air Quality Modeling Analysis; or

(B) Where the Department or local air quality agency primarily responsible for the ~~applicable~~ Applicable SIP determines that an ~~areawide air quality modeling analysis~~ Areawide Air Quality Modeling Analysis is appropriate and that a ~~local air quality modeling analysis~~ Local Air Quality Modeling Analysis is not needed, the ~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions from the action meet the requirements specified in section (2) of this rule, based on areawide modeling, or meet the requirements of subsection (e) of this section.~~; or~~

~~(C) Where the Department or local air quality agency primarily responsible for the applicable SIP determines that, for federal actions involving prescribed burning in attainment or unclassifiable areas, the use of air quality modeling for prescribed burning is not appropriate, the PM_{10} emissions from the action meet the requirements specified in section (2) of this rule, based on an alternative air quality analysis approved by the Department pursuant to OAR 340-020-1580(3)(e).~~

(e) For ozone or nitrogen dioxide, and for purposes of subsections (c)(B) and (d)(B) of this section, each portion of the action or the action as a whole meets any of the following requirements:

(A) Where EPA has approved a revision to an area's attainment or maintenance demonstration after 1990 and the state makes a determination as provided in subparagraph (i) of this paragraph or where the state makes a commitment as provided in subparagraph (ii) of this paragraph:

(i) The ~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions from the action, or portion thereof, is determined and documented by the state agency primarily responsible for the ~~applicable~~ Applicable SIP to result in a level of emissions which, together with all other emissions in the ~~nonattainment~~ Nonattainment Area or ~~maintenance area~~ Maintenance Area, would not exceed the ~~emissions budgets~~ Emissions Budgets specified in the ~~applicable~~ Applicable SIP;

(ii) The ~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions from the action (or portion thereof) is determined and documented by the state agency primarily responsible for the ~~applicable~~ Applicable SIP to result in a level of emissions which, together with all other emissions in the ~~nonattainment~~ Nonattainment Area or ~~maintenance area~~ Maintenance Area, would not exceed the ~~emissions budget~~ Emissions Budget specified in the ~~applicable~~ Applicable SIP and the State Governor or the Governor's designee for SIP actions makes a written commitment to EPA which includes the following:

(I) A specific schedule for adoption and submittal of a revision to the ~~applicable~~ Applicable SIP which would achieve the needed emission reductions prior to the time emissions from the ~~federal action~~ Federal Action would occur;

(II) Identification of specific measures for incorporation into the ~~applicable~~ Applicable SIP which would result in a level of emissions which, together with all other emissions in the ~~nonattainment~~ Nonattainment Area or ~~maintenance area~~ Maintenance Area, would not exceed any ~~emissions budget~~ Emissions Budget specified in the ~~applicable~~ Applicable SIP;

(III) A demonstration that all existing ~~applicable~~ Applicable SIP requirements are being implemented in the area for the pollutants affected by the ~~federal action~~ Federal Action, and that local authority to implement additional requirements has been fully pursued;

(IV) A determination that the responsible federal agencies have required all reasonable mitigation measures associated with their action; and

(V) Written documentation including all air quality analyses supporting the conformity determination;

(iii) Where a ~~federal agency~~ Federal Agency made a conformity determination based on a state commitment under subparagraph (ii) of this paragraph such a state commitment is automatically deemed a call for a SIP revision by EPA under Section 110(k)(5) of the Act, effective on the date of the federal conformity determination and requiring response within 18 months or any shorter time within which the state commits to revise the ~~applicable~~ Applicable SIP;

(B) The action, or portion thereof, as determined by the MPO, is specifically included in a current transportation plan and transportation improvement program which have been found to conform to the ~~applicable~~ Applicable SIP under **40 CFR part 51, subpart T (July 1,1994)** or **40 CFR part 93, subpart A (July 1, 1994)**, and OAR 340-020-0700 through 340-020-~~1080~~ 1070.

(C) The action, or portion thereof, fully offsets its emissions within the same ~~nonattainment~~ Nonattainment Area or ~~maintenance area~~ Maintenance Area through a revision to the ~~applicable~~ Applicable SIP or an equally enforceable measure that effects emission reductions equal to or greater than the ~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions from the action so that there is no net increase in emissions of that pollutant;

(D) Where EPA has not approved a revision to the relevant SIP attainment or maintenance demonstration since 1990, the total direct and ~~indirect emissions~~ Indirect Emissions from the action for the future years (described in OAR 340-020-1580(4)) do not increase emissions with respect to the baseline emissions:

(i) The baseline emissions reflect the historical activity levels that occurred in the geographic area affected by the proposed ~~federal action~~ Federal Action during:

(I) Calendar year 1990;

(II) The calendar year that is the basis for the classification, or, where the classification is based on multiple years, the most representative year, if a classification is promulgated in **40 CFR part 81 (July 1, 1994)**; or

(III) The year of the baseline inventory in the PM_{10} ~~applicable~~ Applicable SIP;

(ii) The baseline emissions are the ~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions calculated for the future years (described in OAR 340-020-1580(4)) using the historic activity levels (described in subparagraph (i) of this paragraph) and appropriate emission factors for the future years; or

(E) Where the action involves ~~regional water or wastewater projects~~ Regional Water or Wastewater Projects, such projects are sized to meet only the needs of population projections that are in the ~~applicable~~ Applicable SIP.

(2) The ~~areawide~~ Areawide Air Quality Modeling Analysis or ~~local air quality modeling analyses~~ Local Air Quality Modeling Analysis must:

(a) Meet the requirements in OAR 340-020-1580;
and

(b) Show that the action does not:

(A) Cause or ~~e~~Contribute to ~~a~~Any ~~n~~New ~~v~~Violation of ~~a~~Any ~~s~~Standard in ~~a~~Any ~~a~~Area; or

(B) Increase ~~t~~The ~~f~~Frequency or ~~s~~Severity of ~~a~~Any ~~e~~Existing ~~v~~Violation of ~~a~~Any ~~s~~Standard in ~~a~~Any ~~a~~Area.~~; or~~

~~(C) As the result of prescribed burning actions in attainment/unclassifiable areas, causes the consumption of the PM_{10} PSD Increment, or causes visibility impairment in a federal Class I area protected under the Oregon Visibility Protection Program.~~

(3) Notwithstanding any other requirements of this rule, an action subject to OAR 340-020-1500 through 340-020-1600 may not be determined to conform to the ~~applicable~~ Applicable SIP unless the ~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions from the action is in compliance or consistent with all relevant requirements and ~~milestone~~ Milestones contained in the ~~applicable~~ Applicable SIP, such as elements identified as part of the reasonable further progress schedules, assumptions specified in the attainment or maintenance demonstration, prohibitions, numerical emission limits, and work practice requirements, and such action is otherwise in compliance with all relevant requirements of the ~~applicable~~ Applicable SIP.

(4) Any analyses required under this rule must be completed, and any mitigation requirements necessary for a finding of conformity must be identified in compliance with OAR 340-020-1590, before the determination of conformity is made.

Stat. Auth.: ORS 468.020 & 468A.035

Stats. Implemented: ORS 468A.035

Hist.: DEQ 9-1995, f. & cert. ef. 5-1-95

340-020-1580

Procedures for Conformity Determinations of General Federal Actions

(1) The analyses required under OAR 340-020-1570 and 340-020-1580 must be based on the latest planning assumptions.

(a) All planning assumptions must be derived from the estimates of current and future population, employment, travel, and congestion most recently approved by the MPO, or other agency authorized to make such estimates, where available.

(b) Any revisions to these estimates used as part of the conformity determination, including projected shifts in geographic location or level of population, employment, travel, and congestion, must be approved by the MPO or other agency authorized to make such estimates for the urban area.

(2) The analyses required under OAR 340-020-1570 and 340-020-1580 must be based on the latest and most accurate emission estimation techniques available as described below, unless such techniques are inappropriate. If such techniques are inappropriate and written approval of the EPA Regional Administrator is obtained for any modification of substitution, they may be modified or another technique

substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific ~~federal agency~~ Federal Agency program.

(a) For motor vehicle emissions, the most current version of the motor vehicle emissions model specified by EPA and available for use in the preparation or revision of SIPs in that state must be used for the conformity analysis as specified in subsections (A) and (B) of this section:

(A) The EPA must publish in the Federal Register a notice of availability of any new motor vehicle emissions model; and

(B) A grace period of three months shall apply during which the motor vehicle emissions model previously specified by EPA as the most current version may be used. Conformity analyses for which the analysis was begun during the grace period or no more than 3 years before the federal Register notice of availability of the latest emission model may continue to use the previous version of the model specified by EPA.

(b) For non-motor vehicle sources, including stationary and area source emissions, the latest emission factors specified by EPA in the **"Compilation of Air Pollutant Emission Factors (AP-42)"** must be used for conformity analysis unless more accurate emission data are available, such as actual stack test data from stationary sources which are part of the conformity analysis.

(3) The air quality modeling analyses required under OAR 340-020-1570 and 340-020-1580 must be based on the applicable air quality models, data bases, and other requirements specified in the most recent version of the **"Guideline on Air Quality Models (Revised)"(1986), including supplements (EPA publication no. 450/2-78-027R)**, unless:

(a) The guideline techniques are inappropriate, in which case the model may be modified or another model substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific ~~federal agency~~ Federal Agency program; and

(b) Written approval of the EPA Regional Administrator is obtained for any modification or substitution.~~; and~~

~~(c) For federal actions involving prescribed burning in attainment or unclassifiable areas, an alternative air quality analysis has been approved by the Department, in accordance with OAR 340-020-1530(2)~~.

(4) The analyses required under OAR 340-020-1570 and 340-020-1580 must be based on the ~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions from the action and must reflect emission scenarios that are expected to occur under each of the following cases:

(a) The Act mandated attainment year or, if applicable, the farthest year for which emissions are projected in the ~~maintenance plan~~ Maintenance Plan;

(b) The year during which the ~~total of direct and indirect emissions~~ Total of Direct and Indirect Emissions from the action for each pollutant is expected to be the greatest on an annual basis; and

(c) Any year for which the ~~applicable~~ Applicable SIP specifies an ~~emissions budget~~ Emissions Budget.

Stat. Auth.: ORS 468.020 & 468A.035

Stats. Implemented: ORS 468A.035
Hist.: DEQ 9-1995, f. & cert. ef. 5-1-95

340-020-1590
Mitigation of Air Quality Impacts

(1) Any measures that are intended to mitigate air quality impacts must be identified and the process for implementation and enforcement of such measures must be described, including an implementation schedule containing explicit timelines for implementation.

(2) Prior to determining that a ~~federal action~~ Federal Action is in conformity, the ~~federal agency~~ Federal Agency making the conformity determination must obtain written commitments from the appropriate persons or agencies to implement any mitigation measures which are identified as conditions for making conformity determinations. Such written comments shall describe the mitigation measures and the nature of the commitments in a manner consistent with section (1) of this rule.

~~(3) Mitigation measures related to federal actions involving prescribed burning in attainment or unclassifiable areas shall follow any guidance that has been approved by the Department after consultation with affected federal agencies, in accordance with OAR 340-020-1530(2).~~

~~(4)~~ (3) Persons or agencies voluntarily committing to mitigation measures to facilitate positive conformity determinations must comply with the obligations of such commitments.

~~(5)~~ (4) In instances where the ~~federal agency~~ Federal Agency is licensing, permitting or otherwise approving the action of another governmental or private entity, approval by the ~~federal agency~~ Federal Agency must be conditioned on the other entity meeting the mitigation measures set forth in the conformity determination, as provided in section (1) of this rule.

~~(6)~~ (5) When necessary because of changed circumstances, mitigation measures may be modified so long as the new mitigation measures continue to support the conformity determination. Any proposed change in the mitigation measures is subject to the reporting requirements of OAR 340-020-1540 and the public participation requirements of OAR 340-020-1550.

~~(7)~~ (6) Written commitments to mitigation measures must be obtained prior to a positive conformity determination and all such commitments must be fulfilled.

~~(8)~~ (7) After the Department revises its SIP to adopt its general conformity rules and EPA approves that SIP revision, any agreements, necessary for a conformity determination will be both state and federally enforceable. Enforceability through the ~~applicable~~ Applicable SIP will apply to all persons who agree to mitigate ~~direct~~ Direct Emissions and ~~indirect emissions~~ Indirect Emissions associated with a ~~federal action~~ Federal Action for a conformity determination.

Stat. Auth.: ORS 468.020 & 468A.035
Stats. Implemented: ORS 468A.035
Hist.: DEQ 9-1995, f. & cert. ef. 5-1-95

DIVISION 20

GENERAL AIR POLLUTION CONTROL REGULATIONS

340-020-0047
State of Oregon Clean Air Act Implementation Plan

(1) This implementation plan, consisting of Volumes 2 and 3 of the State of Oregon Air Quality Control Program, contains control strategies, rules and standards prepared by the Department of Environmental Quality and is adopted as the state implementation plan (SIP) of the State of Oregon pursuant to the federal **Clean Air Act**, Public Law 88-206 as last amended by Public Law 101-549.

(2) Except as provided in section (3) of this rule, revisions to the SIP shall be made pursuant to the Commission's rulemaking procedures in Division 11 of this Chapter and any other requirements contained in the SIP and shall be submitted to the United States Environmental Protection Agency for approval.

(3) Notwithstanding any other requirement contained in the SIP, the Department is authorized

(a) to submit to the Environmental Protection Agency any permit condition implementing a rule that is part of the federally-approved SIP as a source-specific SIP revision after the Department has complied with the public hearings provisions of **40 CFR 51.102 (July 1, 1992)**~~.~~ ; and

(b) to approve the standards submitted by a regional authority if the regional authority adopts verbatim any standard that the Commission has adopted, and submit the standards to EPA for approval as a SIP revision.

[**NOTE:** Revisions to the State of Oregon Clean Air Act Implementation Plan become federally enforceable upon approval by the United States Environmental Protection Agency. If any provision of the federally approved Implementation Plan conflicts with any provision adopted by the Commission, the Department shall enforce the more stringent provision.]
[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. 468.020
Stat. Implemented: ORS Ch. 468A.035
Hist.: DEQ 35, f. 2-3-72, ef. 2-15-72; DEQ 54, f. 6-21-73, ef. 7-1-73; DEQ 19-1979, f. & ef. 6-25-79; DEQ 21-1979, f. & ef. 7-2-79; DEQ 22-1980, f. & ef. 9-26-80; DEQ 11-1981, f. & ef. 3-26-81; DEQ 14-1982, f. & ef. 7-21-82; DEQ 21-1982, f. & ef. 10-27-82; DEQ 1-1983, f. & ef. 1-21-83; DEQ 6-1983, f. & ef. 4-18-83; DEQ 18-1984, f. & ef. 10-16-84; DEQ 25-1984, f. & ef. 11-27-84; DEQ 3-1985, f. & ef. 2-1-85; DEQ 12-1985, f. & ef. 9-30-85; DEQ 5-1986, f. & ef. 2-21-86; DEQ 10-1986, f. & ef. 5-9-86; DEQ 20-1986, f. & ef. 11-7-86; DEQ 21-1986, f. & ef. 11-7-86; DEQ 4-1987, f. & ef. 3-2-87; DEQ 5-1987, f. & ef. 3-2-87; DEQ 8-1987, f. & ef. 4-23-87; DEQ 21-1987, f. & ef. 12-16-87; DEQ 31-1988, f. 12-20-88, cert. ef. 12-23-88; DEQ 2-1991, f. & cert. ef. 2-14-91; DEQ 19-1991, f. & cert. ef. 11-13-91; DEQ 20-1991, f. & cert.

ef. 11-13-91; DEQ 21-1991, f. & cert. ef. 11-13-91; DEQ 22-1991, f. & cert. ef. 11-13-91; DEQ 23-1991, f. & cert. ef. 11-13-91; DEQ 24-1991, f. & cert. ef. 11-13-91; DEQ 25-1991, f. & cert. ef. 11-13-91; DEQ 1-1992, f. & cert. ef. 2-4-92; DEQ 3-1992, f. & cert. ef. 2-4-92; DEQ 7-1992, f. & cert. ef. 3-30-92; DEQ 19-1992, f. & cert. ef. 8-11-92; DEQ 20-1992, f. & cert. ef. 8-11-92; DEQ 25-1992, f. 10-30-92, cert. ef. 11-1-92; DEQ 26-1992, f. & cert. ef. 11-2-92; DEQ 27-1992, f. &cert. ef. 11-12-92; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 8-1993, f. & cert. ef. 5-11-93; DEQ 12-1993, f. & cert. ef. 9-24-93; DEQ 15-1993, f. & cert. ef. 11-4-93; DEQ 16-1993, f. & cert. ef. 11-4-93; DEQ 17-1993, f. & cert. ef. 11-4-93; DEQ 19-1993, f. & cert. ef. 11-4-93; DEQ 1-1994, f. & cert. ef. 1-3-94; DEQ 5-1994, f. & cert. ef. 3-21-94; DEQ 14-1994, f. & cert. ef. 5-31-94; DEQ 15-1994, f. 6-8-94, cert. ef. 7-1-94; DEQ 25-1994, f. & cert. ef. 11-2-94; DEQ 9-1995, f. & cert. ef. 5-1-95; DEQ 10-1995, f. & cert. ef. 5-1-95; DEQ 14-1995, f. & cert. ef. 5-25-95; DEQ 17-1995, f. & cert. ef. 7-12-95; DEQ 19-1995, f. & cert. ef. 9-1-95; DEQ 20-1995 (Temp), f. & cert. ef. 9-14-95; DEQ 8-1996(Temp), f. & cert. ef. 6-3-96; DEQ 15-1996, f. & cert. ef. 8-14-96; DEQ 19-1996, f. & cert. ef. 9-24-96; DEQ 22-1996, f. & cert. ef. 10-22-96; DEQ 23-1996, f. & cert. ef. 11-4-96; DEQ 24-1996, f. & cert. ef. 11-26-96

OREGON BULLETIN

VOLUME 37, No. 6
June 1, 1998

For April 16, 1998 - May 15, 1998

Published by
PHIL KEISLING
Secretary of State

**Auxiliary aids for persons with disabilities are available upon advance request.*
Rules Coordinator: Susan M. Greco
Address: Department of Environmental Quality, 811 SW 6th Avenue, Portland, Oregon 97213
Telephone: (503) 229-5213

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Date:	Time:	Location:
6-16-98	5 pm	Jackson County Public Works Auditorium 200 Antelope Road White City, Oregon

Hearing Officer: Mary Heath
Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 468A.035
Proposed Amendments: 340-020-0047, 340-028-1930, 340-028-1940, 340-030-0043
Last Date for Comment: 6-19-98 - 5 pm
Summary: The proposals are part of a plan to attain compliance with the federal air quality standards for particulate matter in the Medford-Ashland area. The plan includes the original measures presented to the Environmental Protection Agency in 1991 plus additional control measures recently recommended by an advisory committee. These additional measures include recommendations for unified wood stove curtailment ordinances, road dust control measures, modifications to the fugitive dust control measure requirements for industrial facilities and maintaining stringent new source review permit requirements regardless of changes in the air quality classification for the area.
**Auxiliary aids for persons with disabilities are available upon advance request.*
Rules Coordinator: Susan M. Greco
Address: Department of Environmental Quality, 811 SW 6th Avenue, Portland, Oregon 97213
Telephone: (503) 229-5213

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Date:	Time:	Location:
6-24-98	1 pm	Dept. of Environmental Quality Headquarters Rm 10A 811 SW 6th Ave. Portland, OR
6-24-98	1 pm	Jackson County Courthouse Auditorium 10 S Oakdale Medford, OR

Hearing Officer: DEQ Staff
Stat. Auth.: ORS 468.020 & 468A.025
Stats. Implemented: ORS 468A.025, 468A.035 & 468A.040
Proposed Amendments: 340-020-0047, 340-020-0110, 340-020-0115, 340-020-0120, 340-020-0125, 340-020-0129, 340-020-0130, 340-020-0135, 340-020-0710, 340-020-0720, 340-020-0730, 340-020-0750, 340-020-0760, 340-020-0770, 340-020-0780, 340-020-0790, 340-020-0800, 340-020-0810, 340-020-0820, 340-020-0830, 340-020-0840, 340-020-0850, 340-020-0860, 340-020-0870, 340-020-0880, 340-020-0890, 340-020-0900, 340-020-0910, 340-020-1000, 340-020-1010, 340-020-1020, 340-020-1030, 340-020-1040, 340-020-1050, 340-020-1060, 340-020-1070, 340-020-1500, 340-020-1510, 340-020-1520, 340-020-1530, 340-020-1570, 340-020-1580, 340-020-1590
Proposed Repeals: 340-020-0400, 340-020-0405, 340-020-0410, 340-020-0420, 340-020-0430, 340-020-0920, 340-020-0930, 340-020-0940, 340-020-0950, 340-020-0960, 340-020-0970, 340-020-0980, 340-020-0990, 340-020-1080
Last Date for Comment: 6-25-98 - 5 pm
Summary: The Department of Environmental Quality (DEQ) is proposing that the Environmental Quality Commission adopt rule amendments that will streamline and allow additional flexibility in several air quality programs: Transportation Conformity, Indirect Source Construction Permits, General Conformity, and processing of the State Implementation Plan. With the exception of the Indirect Source rules, these amendments (if adopted) will be submitted to the US Environmental Protection Agency (EPA) as revisions to OAR 340-020-0047 — the State Implementation Plan (SIP) — as required by the Clean Air Act.

Modifications to the Transportation Conformity rules add streamlining provisions recently allowed by federal regulations. Changes to General Conformity rules remove attainment areas from the program (as clarified by Congress). Revisions of the Indirect Source rules significantly reduce the permitting requirements for the construction of new parking facilities, and eliminate the requirements for highway projects since air pollution from these sources is now largely controlled under other regulations. Finally, amendment of the SIP rule will simplify the administrative requirements for submitting rules adopted by a regional air pollution authority for EPA approval when they are the same as rules previously adopted by the Commission.

Copies of the proposed rules and rule packages are available for review at the 11th Floor of DEQ Headquarters, 811 SW 6th Avenue, Portland, OR 97204 and at the following DEQ offices: 201 W. Main, Medford, OR 97501; 1102 Lincoln St., Suite 210, Eugene, OR 97401; 2020 SW 4th Avenue, Suite 400, Portland, OR 97201; 2146 NE 4th, #104, Bend, OR 97701; and, 750 Front St., NE, Suite 210, Salem, OR 97310. Copies are also available by calling (503) 229-5953.

Written comments should be submitted to the attention of Dave Nordberg at Oregon DEQ - 11th Floor, 811 SW 6th Avenue, Portland, OR 97204 or by FAX to (503) 229-5675.
**Auxiliary aids for persons with disabilities are available upon advance request.*
Rules Coordinator: Susan M. Greco
Address: 811 SW 6th Avenue, Portland, Oregon 97204
Telephone: (503) 229-5213

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Department of Forestry
Chapter 629

Date:	Time:	Location:
6-16-98	9 am	Oregon Department of Forestry 2600 State Street Salem, Oregon

Hearing Officer: Peter J. Norkeveck
Stat. Auth.: ORS 477.013, 477.515, 477.562, 477.980, 526.016, 526.041 & 526.350
Stats. Implemented: ORS 477.013, 477.210, 477.515, 477.552, 477.554, 477.556, 477.558, 477.560, 477.562, 477.980, 477.985, 477.993, 526.320, 526.324, 526.328 & 526.340
Proposed Amendments: 629-042-0005, 629-043-0040, 629-043-0041, 629-045-0005, 629-045-0010, 629-047-0060
Proposed Repeals: 629-041-0015, 629-043-0045, 629-043-0055, 629-043-0075, 629-045-0015
Last Date for Comment: 6-16-98
Summary: Amend burning permit requirements, forest protection requirements, forestland classification requirements and fire prevention enforcement limitations to incorporate new authorities provided by statute, to correct outdated language, to resolve conflicts with other requirements, to simplify existing requirements, and to clarify existing requirements. Delete obsolete requirements and those lacking statutory authorization.
**Auxiliary aids for persons with disabilities are available upon advance request.*
Rules Coordinator: Gayle Jones
Address: 2600 State Street, Salem, Oregon 97310
Telephone: (503) 945-7210

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Stat. Auth.: ORS 477.225, 526.016 & 526.041
Stats. Implemented: ORS 477.225
Proposed Adoptions: 629-041-0500, 629-041-0505, 629-041-0510, 629-041-0515, 629-041-0520, 629-041-0525, 629-041-0530, 629-041-0535, 629-041-0540, 629-041-0545, 629-041-0550, 629-041-0555, 629-041-0560, 629-041-0565, 629-041-0570, 629-041-0575
Last Date for Comment: 6-16-98
Summary: Establishes boundaries of forest protection districts.
Rules Coordinator: Gayle Jones
Address: 2600 State St., Salem, OR 97310
Telephone: (503) 945-7210

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Department of Human Resources, Adult and Family Services Division
Chapter 461

Date:	Time:	Location:
6-23-98	10 am	Human Resources Bldg 500 Summer St. NE Rm 254

Attachment B-2

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for

Rule Revisions applying to Transportation Conformity, Indirect Source Construction Permits, General Conformity and SIP Streamlining.

Fiscal and Economic Impact Statement

Introduction - Statement of overall degree of economic impact

Transportation Conformity: There may be a modest savings of administrative costs for Metropolitan Planning Organizations and the Oregon Department of Transportation.

Indirect Source Construction Permits: During the years 1993 through 1997 the Department issued 37 Indirect Source Permits at an estimated average cost to the applicant of $2600 to $3100 per permit. Under the revised rules, 34 of those permits (6.8 permits per year) would be unnecessary. These rule revisions therefore, may produce a total annual average cost savings of $12,480 to $21,080. ($2600 to $3100 times 6.8 permits per year savings.)

General Conformity: No fiscal or economic impact.

SIP Streamlining: Savings in administrative costs by avoiding duplicative rulemaking.

General Public

Transportation Conformity: No fiscal or economic impact.
Indirect Source Construction Permits: No fiscal impact.
General Conformity: No fiscal impact.
SIP Streamlining: No fiscal impact.

Small Business

Transportation Conformity: Some construction businesses may experience a modest economic benefit as a result of fewer transportation projects being delayed in the event of a conformity lapse. Such events are expected to be infrequent, however, and any potential benefit that could result from a possible decrease of delayed construction contract awards cannot be quantified.

Indirect Source Construction Permits: An unknown portion of the estimated average total annual cost savings of $12,480 to $21,080 could be expected to be realized by small businesses in Oregon.

General Conformity: No fiscal or economic impact.

SIP Streamlining: No fiscal or economic impact.

Large Business

Transportation Conformity: Some construction businesses may experience a modest economic benefit as a result of fewer transportation projects being delayed in the event of a conformity lapse. Such events are expected to be infrequent, however, and any potential benefit that could result from a possible decrease of delayed construction contract awards cannot be quantified.

Indirect Source Construction Permits: An unknown portion of the estimated average total annual cost savings of $12,480 to $21,080 could be expected to be realized by large businesses.

General Conformity: No fiscal or economic impact.

SIP Streamlining: No fiscal or economic impact.

Local Governments

Transportation Conformity: Metropolitan Planning Organizations (MPOs) may experience moderate savings in administrative costs as a result of the increased flexibility during a conformity lapse. Each conformity determination performed by Metro costs the agency approximately $50,000, and the agency estimates that under the new rules as many as two fewer conformity determinations may be required over the twenty year life of a transportation plan. The annualized savings for Metro then is expected to range from $0 to $5000. The annualized savings for the three remaining MPOs in Oregon (Rogue Valley Council of Governments, Lane Regional Council of Governments and the Mid-Willamette Valley Council of Governments) are expected to be less than Metro's because their conformity determinations are less complex due to their smaller transportation systems.

Indirect Source Construction Permits: A small portion of the estimated average total annual cost savings of $12,480 to $21,080 could be expected to be realized by local governments.

General Conformity: No fiscal or economic impact.

SIP Streamlining: No fiscal or economic impact.

State Agencies

Effects on DEQ:

Transportation Conformity: No fiscal impact.

Indirect Source Construction Permits: An average Indirect Source Construction Permit is estimated to require an average of eight hours for review and approval. Therefore, the rule revision is estimated to save the Department 55 hours of engineering effort per year, (8 times 6.8). Given that a typical permit provides the Department with $600 in application fees, the rule revision is also estimated to reduce the agency's average annual revenue by $4080.

General Conformity: No fiscal or economic impact.

SIP Streamlining: The Department estimates it will benefit from this rule revision by freeing up approximately 32 hours of staff time per year. This savings will be applied to work on other duties.

Other State Agencies:

Transportation Conformity: Oregon Department of Transportation predicts no fiscal impact on that agency. There will be no fiscal impact for other agencies.

Indirect Source Construction Permits: Some state agencies may realize a fraction of the total predicted cost benefit.

General Conformity: No fiscal or economic impact.

SIP Streamlining: No fiscal or economic impact.

Assumptions

Transportation Conformity: Rule revisions represent refinements to the existing Transportation Conformity program.

Indirect Source Construction Permits: The average number of Indirect Source Construction Permits issued during the last five years (1993 through 1997) are taken as the average number of

permits that would be issued in the future if the original thresholds (at which permits are required) were unchanged.

General Conformity: Changes to the rules represent no change of present practices.

SIP Streamlining: The rule revision is estimated to apply to approximately two groups of Lane Regional Air Pollution Control Authority SIP submittals per year.

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
Rule Revisions for Transportation Conformity

Land Use Evaluation Statement

1. Explain the purpose of the proposed rules.

These proposed rules modify the existing Transportation Conformity program that specifies criteria and procedures for determining that transportation plans, program, and projects funded or approved by a recipient of funds under title 23 of the Federal Transit Act conform with state or federal air quality implementation plans. The transportation conformity program is required by federal regulations; the proposed modifications incorporate revisions to the federal requirements that streamline the rules and allow increased flexibility in the implementation of the program.

Conformity to an implementation plan is defined in the federal Clean Air Act as conformity to an implementation plan's purpose of eliminating or reducing the severity or number of violations of the National Ambient Air Quality Standards (NAAQS) and achieving expeditious attainment. In addition, these activities may not cause or contribute to new violations of air quality standards, exacerbate existing violations, or interfere with timely attainment of required interim emission reductions toward attainment. This rule modifies certain elements of the process for determining conformity of highway and transit projects. Specifically, the rule revisions will provide non-metropolitan areas more options (such as the build/no-build test) for demonstrating conformity for the period of time beyond the 3 to 10 year focus of an air quality plan but within the 20 year timeframe of a transportation plan. Also, the rule revisions relax the requirements that apply during a lapse of conformity by allowing non-federal projects to move forward during a conformity lapse if those projects were included in the first three years of the previously conforming plan.

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:

Not applicable.

b. If yes, do the existing statewide goal compliance and local plan compatibility procedures adequately cover the proposed rules? ☐ Yes ☐ No (if no, explain):

Not applicable.

c. **If no, apply the following criteria to the proposed rules.**

Staff should refer to Section III, subsection 2 of the SAC document in completing the evaluation form. Statewide Goal 6 - Air, Water and Land Resources is the primary goal that relates to DEQ authorities. However, other goals may apply such as Goal 5 - Open Spaces, Scenic and Historic Areas, and Natural Resources; Goal 11 - Public Facilities and Services; Goal 16 - Estuarine Resources; and Goal 19 - Ocean Resources. DEQ programs and 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 involved 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 proposed rules are refinements that provide additional flexibility in meeting the requirements of existing rules that do affect land use. These rules may have a significant effect on the resources, objectives or areas identified in four statewide planning goals. Specifically, these rules may affect the interagency and public coordination responsibilities of government bodies established under Goals 1, 2, and 9. Second, the rules further the objectives of Goal 6 because they assist in the maintenance and improvement of air quality. Finally, the proposed rules may have a significant effect on Goal 12, since it may be necessary to reduce reliance on the single occupant automobile in order to reduce emissions, and the rules will assist in minimizing environmental impacts and costs.

This rule may indirectly affect future land uses identified in acknowledged comprehensive land use plans because transportation facilities or improvements found not to conform would lose federal funding and may be prohibited.

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.**

The existing conformity rules ensure compliance with the statewide planning goals because they further intergovernmental coordination requirements and help to assure maintenance of air

quality standards. Similarly, the Department is unaware of any provisions in these proposed rules that conflict with the goals or the administrative rules adopted by LCDC to implement the goals.

The conformity rules do not authorize the Department to certify or permit activities or otherwise take actions with respect to uses allowed under acknowledged comprehensive land use plans. Consequently, any effect on acknowledged land uses would be indirect. Moreover, existing state, regional and local transportation planning requirements (along with the coordination required under the proposed rules) are adequate to ensure that any indirect effects on land use will be consistent with land use plans and regulations.

Division	Intergovernmental Coordinator	Date
		5/13/98

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Rule Revisions Indirect Source Construction Permits

Land Use Evaluation Statement

1. **Explain the purpose of the proposed rules.**

The proposed rule amendments remove airports and highway sections from the Indirect Source Construction Permit program and increase the thresholds at which new parking facilities are required to have permits from 250 parking spaces to 1000 spaces (800 for central Portland). These changes are proposed because the problem the Indirect Source Permit program was meant to address has been addressed by other regulations. (Other controls include lowered carbon monoxide emission requirements for today's new vehicles and Oregon's transportation conformity program.) Proposed changes will eliminate provisions that now provide little or no additional air quality benefit by reducing the program to one that addresses only the large parking facilities that potentially could create a public health problem.

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:**

   Issuance of Indirect Source Construction Permits. OAR 340-018-0030.

   b. **If yes, do the existing statewide goal compliance and local plan compatibility procedures adequately cover the proposed rules?** ☒ **Yes** ☐ **No (if no, explain):**

Currently DEQ requires Indirect Source Construction Permits to go through the Land Use Compatibility review process with local governments to assure an activity is consistent with land use regulations.

   c. **If no, apply the following criteria to the proposed rules.**

Staff should refer to Section III, subsection 2 of the SAC document in completing the evaluation form. Statewide Goal 6 - Air, Water and Land Resources is the primary goal that relates to DEQ authorities. However, other goals may apply such as Goal 5 - Open Spaces, Scenic and Historic

Areas, and Natural Resources; Goal 11 - Public Facilities and Services; Goal 16 - Estuarine Resources; and Goal 19 - Ocean Resources. DEQ programs and 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 involved 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.

Not applicable.

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.

Not applicable.

Division	Intergovernmental Coordinator	Date
		5/13/98

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Rule Revisions for General Conformity

Land Use Evaluation Statement

1. Explain the purpose of the proposed rules.

The proposed revisions will align DEQ rules with federal rules by making General Conformity applicable only to nonattainment areas (areas that do not meet the National Ambient Air Quality Standards or NAAQS). These revisions will have no effect on existing practices, as implementation of General Conformity requirements in attainment areas was delayed pending the outcome of a federal determination of applicability.

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:

Not applicable.

b. If yes, do the existing statewide goal compliance and local plan compatibility procedures adequately cover the proposed rules? ☐ Yes ☐ No (if no, explain):

Not applicable.

c. If no, apply the following criteria to the proposed rules.

Staff should refer to Section III, subsection 2 of the SAC document in completing the evaluation form. Statewide Goal 6 - Air, Water and Land Resources is the primary goal that relates to DEQ authorities. However, other goals may apply such as Goal 5 - Open Spaces, Scenic and Historic Areas, and Natural Resources; Goal 11 - Public Facilities and Services; Goal 16 - Estuarine Resources; and Goal 19 - Ocean Resources. DEQ programs and 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 involved 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.

While the process for determining conformity of general federal actions arguably may have some effect on existing programs affecting land use, this effect will not be significant, and the proposed rule itself does not significantly affect the statewide land use goals or future land uses identified in acknowledged land use plans. The rule essentially mirrors existing federal conformity requirements.

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.**

Not applicable.

Division	Intergovernmental Coordinator	Date
		5/13/98

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Rule Revisions for SIP Streamlining

Land Use Evaluation Statement

1. Explain the purpose of the proposed rules.

This modification of the "SIP Rule" (OAR 340-020-0047) will eliminate unnecessary administrative requirements from the process of adding regulations adopted by a regional authority (such as Lane Regional Air Pollution Authority—LRAPA) to the SIP. The revision addresses only procedural requirements and applies only when a regional authority adopts regulations identical to existing rules adopted by the Environmental Quality Commission.

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:

Not applicable.

b. If yes, do the existing statewide goal compliance and local plan compatibility procedures adequately cover the proposed rules? ☐ Yes ☐ No (if no, explain):

Not applicable.

c. If no, apply the following criteria to the proposed rules.

Staff should refer to Section III, subsection 2 of the SAC document in completing the evaluation form. Statewide Goal 6 - Air, Water and Land Resources is the primary goal that relates to DEQ authorities. However, other goals may apply such as Goal 5 - Open Spaces, Scenic and Historic Areas, and Natural Resources; Goal 11 - Public Facilities and Services; Goal 16 - Estuarine Resources; and Goal 19 - Ocean Resources. DEQ programs and 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 involved 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.

Overall, the State Implementation Plan (SIP) encompasses some DEQ program activities that affect land use programs such as air quality permitting programs. However, these proposed rules address only procedural requirements and, as such, do not 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.**

Not applicable.

Division	Intergovernmental Coordinator	Date
		5/13/98

Questions to be Answered to Reveal
Potential Justification for Differing from Federal Requirements.

Rule Revisions for Transportation Conformity, Indirect Source Construction Permits, General Conformity and SIP Streamlining.

1. Are there federal requirements that are applicable to this situation? If so, exactly what are they?

Transportation Conformity: Yes. The proposed revisions to Oregon's transportation conformity rules mirror the federal requirements. The following questions therefore, are not applicable.

Indirect Source Construction Permits: No.

General Conformity: Yes. The proposed rule amendment aligns Oregon's rule with those federal requirements. The following questions therefore, are not applicable.

SIP Streamlining: Not precisely. The proposed rule addresses a narrow procedural issue concerning EQC approval of rules adopted by a regional air pollution authority and submittal of those rules to EPA for approval when the rules are identical to those adopted by the EQC.

2. Are the applicable federal requirements performance based, technology based, or both with the most stringent controlling?

Transportation Conformity: Not applicable.

Indirect Source Construction Permits: Not applicable.

General Conformity: Not applicable.

SIP Streamlining: 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?

Transportation Conformity: Not applicable.

Indirect Source Construction Permits: Not applicable.

General Conformity: Not applicable.

SIP Streamlining: 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?

Transportation Conformity: Not applicable.

Indirect Source Construction Permits: Not applicable.

General Conformity: Not applicable.

SIP Streamlining: Not applicable.

5. Is there a timing issue which might justify changing the time frame for implementation of federal requirements?

Transportation Conformity: Not applicable.

Indirect Source Construction Permits: No.

General Conformity: Not applicable.

SIP Streamlining: Not applicable.

6. Will the proposed requirement assist in establishing and maintaining a reasonable margin for accommodation of uncertainty and future growth?

Transportation Conformity: Not applicable.

Indirect Source Construction Permits: Not applicable.

General Conformity: Not applicable.

SIP Streamlining: Not applicable.

7. Does the proposed requirement establish or maintain reasonable equity in the requirements for various sources? (level the playing field)

Transportation Conformity: Not applicable.

Indirect Source Construction Permits: Not applicable.

General Conformity: Not applicable.

SIP Streamlining: Not applicable.

8. Would others face increased costs if a more stringent rule is not enacted?

Transportation Conformity: Not applicable.

Indirect Source Construction Permits: No.

General Conformity: Not applicable.

SIP Streamlining: 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?

Transportation Conformity: Not applicable.

Indirect Source Construction Permits: There are no federal requirements for an indirect source permit program. The proposed rule revisions represent a shift to a significantly relaxed program with relatively modest requirements to ensure that the construction of new parking facilities with more that 1,000 spaces (800 spaces in downtown Portland) does not unwittingly create a health hazard.

General Conformity: Not applicable.

SIP Streamlining: Not applicable.

10. Is demonstrated technology available to comply with the proposed requirement?

Transportation Conformity: Not applicable.

Indirect Source Construction Permits: Yes. The proposed rule revision to represents a significant reduction of an existing program.

General Conformity: Not applicable.

SIP Streamlining: 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?

Transportation Conformity: Not applicable.

Indirect Source Construction Permits: The proposed indirect source rules represent a stripped-down mechanism to efficiently ensure that large new parking facilities do not create a health hazard from high levels of carbon monoxide.

General Conformity: Not applicable.

SIP Streamlining: Not applicable.

State of Oregon
Department of Environmental Quality **Memorandum**

Date: May 20, 1998

To: Interested and Affected Public

Subject: Rulemaking Proposal and Rulemaking Statements - Rule Revisions for Transportation Conformity, Indirect Source Construction Permits, General Conformity, and SIP Streamlining.

This memorandum contains information on a proposal by the Department of Environmental Quality (Department) for streamlining and housekeeping amendments to Oregon Administrative Rules, Chapter 340, Division 20. The affected regulations are those pertaining to Transportation Conformity, Indirect Source Construction Permits, General Conformity, and Streamlining the SIP submittal process for regional air pollution control authorities. If adopted, these rules (with the exception of the Indirect Source regulations) will be submitted to the Environmental Protection Agency (EPA) for approval as revisions to OAR 340-020-0047 or the State Implementation Plan (SIP). Pursuant to ORS 183.335, this memorandum also provides information about the Environmental Quality Commission's proposal to adopt a rule.

This proposal would modify existing regulations as described below:

Transportation Conformity: Transportation conformity is the process of ensuring that air pollution associated with the construction of new transportation projects is consistent with an area's air quality goals. When transportation plans "conform" to air quality plans, new projects will not hinder an area's ability to achieve or maintain air quality standards. When transportation plans do not conform, the chance of violating air quality standards is increased, and the conformity rules prohibit the adoption of transportation plans and projects until the inconsistency is reconciled.

The transportation conformity program is required by federal regulations; the rule modifications proposed here adopt the federal revisions that streamline the rules and allow increased flexibility in the implementation of the program. While the revisions provide incremental adjustments to several requirements, the most significant effects are in the three areas described below.

The first significant modification affects conformity tests for non-metropolitan areas. Under existing transportation planning laws, the Oregon Department of Transportation (ODOT) must create a transportation plan for at least 20 years into the future. Generally, air quality plans cover 3 to 10 years, creating a mismatch of planning horizons. Under the current conformity rules, consistency between the amount allocated to vehicle emissions in an air quality plan must be demonstrated for the entire 20 year transportation planning horizon. For non-metropolitan areas the proposed amendments will allow ODOT (in consultation with DEQ) to demonstrate conformity for the years beyond the SIP time frame four different ways: 1) show consistency

with the emissions budget set for the last year of the SIP (existing requirement); 2) demonstrate conformity through dispersion modeling; 3) show reductions from 1990 levels; or 4) show that emissions from the build scenario will be less than the no-build scenario. This modification will allow the additional flexibility needed for non-metropolitan areas which typically experience few projects and have few opportunities to pursue mitigating measures.

The second significant issue concerns the number of projects that can proceed in the event of a conformity lapse. The rules require a demonstration at regular intervals that transportation plans and programs are consistent with the SIP. Inability to show conformity at those intervals creates a conformity lapse. Under existing Oregon rules, the only projects allowed to move forward during such a lapse are those that are grandfathered because they have completed the NEPA (National Environmental Protection Act) process or those that are exempt. Under the proposed revisions, non-federal projects will also be allowed to proceed during a conformity lapse if they were included in the first three years of the previously conforming plan. Incorporating this change to the rules will decrease the amount of planning disruption caused by a conformity lapse while maintaining the effectiveness of the program.

The third issue relates to the timeframe before areas are required to assess conformity using an emissions budget adopted by the EQC and submitted to EPA. The existing state rules are more stringent than the previous federal rule. The previous federal rule did not require conformity with an emissions budget until EPA approved the air quality plan. Under the Clean Air Act, EPA has up to 24 months to approve a submittal. Because the emissions budget is a more appropriate benchmark for evaluating future emissions, the EQC (upon recommendation from the advisory committee) required consistency with the emissions budget once it had been submitted to EPA. In the most recent revisions to the federal rule, EPA brought their requirements more in line with the existing state requirements. Under this proposal, EPA will have 45 days to review the adequacy of an emissions budget, and areas will be required to use the budget thereafter.

Indirect Source Construction Permits: The proposed rule amendments would remove airports and highway sections from the Indirect Source Construction Permit program and increase the thresholds at which new parking facilities are required to have permits. Parking facility thresholds would increase from 250 parking spaces to 1000 spaces (800 for central Portland).

General Conformity: Like transportation conformity (above) general conformity is the requirement that federal activities (such as the use of prescribed burning by the Forest Service) do not hinder an area's air quality goals. When federal activities "conform" to air quality plans, those activities will not lead or contribute to air quality standards violations. Like transportation conformity, general conformity rules are federally required. The proposed revisions will align Oregon's rules with a congressional clarification of the Clean Air Act requirements by making general conformity applicable only to nonattainment areas (areas that do not meet the National

Ambient Air Quality Standards or NAAQS).

SIP Streamlining: This modification of the "SIP Rule" (OAR 340-020-0047) will eliminate unnecessary administrative requirements from the process of adding regulations adopted by a regional authority (such as Lane Regional Air Pollution Authority—LRAPA) to the SIP. The revision applies only when a regional authority adopts regulations identical to existing Department rules.

The Department has the statutory authority to address these issues under ORS 468.020, and ORS 468A.025. These rules implement ORS 468A. 025 and ORS 468A. 035.

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 rules. (required by ORS 183.335)
Attachments B-1 thru B-4	Statements 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.

Due to the length of these modifications, the text of the rule amendments is not included as part of this package. If you would like to review the actual rule modifications, copies are available for inspection at the following DEQ Offices:

DEQ Portland HQ 811 SW 4th Ave., 11th Floor Portland, OR 97204	DEQ Medford 201 W. Main Medford, OR 97501	DEQ Eugene 1102 Lincoln St., Suite 210 Eugene, OR 97401
DEQ Northwest Region 2020 S. W. 4th Ave., Suite 400 Portland, OR 97201	DEQ Bend 2146 NE 4th, # 104 Bend, OR 97701	DEQ Salem 750 Front St., NE, Suite 210 Salem, OR 97310

Or you may request that a copy be mailed to you by calling Linda Fernandez at (503) 229-5359.

Hearing Process Details

The Department is conducting two public hearings at which comments will be accepted either orally or in writing. The hearings will be held as follows:

Date:	June 24, 1998	**Date:**	June 24, 1998
Time:	1:00 PM	**Time:**	1:00 PM
Place:	10th Floor Conference Room DEQ Headquarters 811 SW 6th Avenue, Portland, OR 97204	**Place:**	Jackson County Courthouse Auditorium 10 South Oakdale, Medford, OR 97501

Deadline for submittal of Written Comments: June 25, 1998 at 5:00 PM

DEQ staff representatives will serve as Presiding Officers at the hearings.

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, 11th Floor, Attn: Dave Nordberg, 811 S.W. 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. Therefore, 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 be submitted as early as possible to allow for review and evaluation.

What Happens After the Public Comment Period Closes

Following close of the public comment period, the Presiding Officers 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 Officers' report. The public hearings will be tape recorded, but the tape will not be transcribed.

The Department will review and evaluate the rulemaking proposals 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 August 7, 1998. This date may be delayed if needed to provide additional time for evaluation and response to testimony received during 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 relevant "Interested Person" mailing list.

Background on Development of the Rulemaking Proposal

Why is there a need for the rules?

Transportation Conformity: Federal Transportation Conformity rule revisions require states to amend their regulations by August 15, 1998.

Indirect Source Construction Permits: With the successful implementation of Oregon's Transportation Conformity program, most requirements of the Indirect Source Permit program (affecting the construction of highways) became redundant. Intended changes will eliminate provisions that now provide little or no additional air quality benefit.

General Conformity: The Environmental Quality Commission adopted general conformity rules in 1995 pursuant to the federal Clean Air Act. These rules included requirements for prescribed burning activities in attainment areas. Subsequently, Congress amended the Clean Air Act to limit the requirements of general conformity to federal activities in nonattainment areas. Oregon needs to modify its regulations to reflect this change.

SIP Streamlining: Administrative requirements for adopting a regional control authority's regulations into the State Implementation Plan (SIP) can be greatly simplified when the authority adopts rules identical to those previously adopted by the EQC.

How were the rules developed?

Transportation Conformity: The Department convened the Transportation Conformity Advisory Committee to advise the agency on modifications to the Transportation Conformity rules originally adopted in 1995. The committee reflected the interests of state, local and regional agencies, transportation/land use groups, and environmental advocates. The committee focused its attention on the two primary issues: whether to increase the ways non-metropolitan areas can demonstrate conformity in the years beyond the timeframe of the SIP, and whether to allow more projects to advance during a conformity lapse.

The committee agreed to support DEQ's proposed rule change to incorporate the new flexibility permitted by the federal revisions for non-metropolitan areas. Several members expressed concern that the added flexibility might be less protective of air quality, because it might result in less mitigation and less VMT (Vehicle Miles Traveled) reduction than would otherwise be required. Others were concerned about the fairness of providing non-metropolitan areas greater flexibility than metropolitan areas. However, the committee agreed to support the added flexibility for the following reasons: 1) added flexibility is appropriate because fewer projects and opportunities for mitigation occur in these areas, 2) the build/no-build test (potentially the most lenient criterion) still requires a project to demonstrate an air quality improvement, 3) retaining the more stringent current rule will not necessarily reduce VMT, and 4) new regulations for PM2.5 (particulate matter smaller than 2.5 microns) being developed should create an opportunity to revisit the issue.

The committee also supported the additional flexibility of allowing non-federal projects included in the first three years of the previously conforming plan to move forward during a conformity lapse. There was one dissenting vote from a member who felt that no projects should be allowed to proceed in the event of a lapse. Another member agreed with the majority but requested that the Commission be advised that concern existed about agencies exchanging federal and non-federal funds for the purpose of avoiding conformity consequences. The committee proceeded with the assurances of ODOT and Metropolitan Planning Organization representatives that the proposed changes would not subvert the purpose of conformity because, in the event of a conformity lapse, it is highly unlikely that locally elected officials would change their support for previously agreed-to projects. The more likely result would be the mitigation of any negative effects through the adoption of new projects that benefit air quality.

Indirect Source Construction Permits: The Transportation Advisory Committee also addressed the proposed revisions to the Indirect Source Construction Permit program. The committee was advised that the problem this program was created to address (high concentrations of carbon monoxide or CO) is now largely controlled by other measures, such as the significant reductions resulting from federal requirements for new vehicles. The Department reported that its recent experience shows that only projects such as very large parking facilities are capable of producing a significant CO effect. The problem is also addressed by transportation conformity regulations that require overall CO emissions to be considered in transportation plans and provide for "hot-spot" analysis of the potential problem areas. Given these circumstances, the committee unanimously recommended that the program be greatly reduced to address only the largest parking facilities.

General Conformity: No advisory committee involvement was used in developing the rule revisions for general conformity because the revisions merely reflect changes in federal law.

SIP Streamlining: No advisory committee was used in developing the SIP Streamlining rule revision. The revision was developed by Department staff who recognized an opportunity to

shorten the Environmental Quality Commission Approval/SIP Revision process in certain circumstances.

Copies of the documents relied upon in the development of this rulemaking proposal (62 FR 43780 through 62 FR 43818 dated 8-15-98) can be reviewed at the Department of Environmental Quality's office at 811 S.W. 6th Avenue, Portland, Oregon. Please contact Linda Fernandez at (503) 229-5359 to learn times when the documents are available for review.

Who do these rules affect (including the public, regulated communities or other agencies) and how are they affected?

Transportation Conformity: The proposed rule modifications constitute modest relaxations of current requirements. As both the existing rules and proposed amendments establish requirements for the transportation planning process, Metropolitan Planning Organizations and the Oregon Department of Transportation will be primarily affected. The most significant modifications of the rules—increased flexibility during conformity lapses and broadening the ways non-metropolitan areas can demonstrate conformity during years beyond the scope of the SIP—will simplify management of the transportation planning process for these agencies.

Indirect Source Construction Permits: The primary effect of the rules will be that most developers of projects with new parking facilities will not have to get an Indirect Source permit. Consulting Engineering firms will also be affected due to the reduced need to prepare Indirect Source permit applications for clients.

General Conformity: These revisions will have no effect on existing practices, as implementation of General Conformity requirements in attainment areas was delayed pending the outcome of a federal determination of applicability.

SIP Streamlining: This modification will improve the Department's efficiency by reducing the time needed for LRAPA regulations to be approved and incorporated into the SIP.

How will the rules be implemented?

Transportation Conformity: The rule amendments will have no impact on the existing inter-agency consultation process. Eventually, the consultation functions performed by DEQ Headquarters staff are expected to be transferred to staff in DEQ's Regional offices for reasons independent of these proposed revisions.

Indirect Source Construction Permits: The modified program will be implemented as a change to the existing Indirect Source program.

General Conformity: General Conformity regulations are implemented by federal agencies. These amendments will cause no implementation changes in existing practices.

SIP Streamlining: The rule modification will be implemented by modifying existing Department procedures.

Are there time constraints?

Transportation Conformity: Rules must be amended and submitted to EPA as a SIP revision by August 15, 1998.

Indirect Source Construction Permits: There are no time constraints.

General Conformity: There are no time constraints.

SIP Streamlining: There are no time constraints.

Contact for More Information

If you would like more information on this rulemaking proposal, or would like to be added to the Interested Persons' mailing list, please contact:

Dave Nordberg
Oregon Department of Environmental
Quality - 11th Floor
811 S.W. 6th Avenue,
Portland, OR 97204
(503) 229-5519

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.

Attachment C

State of Oregon

Department of Environmental Quality Memorandum

Date: 6-24-98

To: Environmental Quality Commission

From: Dave Nordberg & Anna Kemmerer

Subject: Presiding Officers' Report for Rulemaking Hearings

Title of Proposal: Transportation Conformity, Indirect Source Construction Permits, General Conformity and SIP Streamlining.

Hearing No. 1

Hearing Officer: Dave Nordberg, DEQ
Date and Time: June 24, 1998, beginning at 1:00 PM
Location: Department of Environmental Quality
Headquarters Conference Rm. 10A,
811 SW 6th Ave.
Portland, OR 97225

The rulemaking hearing on the above titled proposal was convened at 1:00 PM. No members of the public attended and the hearing was closed at 1:30.

Hearing No. 2

Hearing Officer: Anna Kemmerer, DEQ
Date and Time: June 24, 1998, beginning at 1:00 PM
Location: Jackson County Courthouse
Auditorium
10 S. Oakdale
Medford, OR

The rulemaking hearing on the above titled proposal was convened at 1:00 PM. No members of the public attended and the hearing was closed at 1:45 PM.

Attachment D

DEPARTMENT'S EVALUATION OF PUBLIC COMMENT

Transportation Conformity, Indirect Source Construction Permits, General Conformity and SIP Streamlining

Proposed revisions to several regulations of Oregon Administrative Rules Chapter 340, Division 20 were opened to public comment from May 22, to June 25, 1998. During this period a single set of comments was submitted to the Department by Michael Hoglund, Transportation Planning Manager of Metro, the MPO for the Portland area. These comments and the Department's response are summarized below:

Comment: Metro offers general support for the proposed revisions to the Transportation Conformity and Indirect Source Construction Permits regulations and offers specific support for the modifications that will allow previously approved non-federal projects to proceed in the event of a conformity lapse.

Metro also requests that OAR 340-020-0760(1)(d) be amended to make MPOs responsible for conducting conformity determinations for their entire Air Quality Maintenance Areas—including the areas outside their normal jurisdictions. The commenter notes that inter-governmental agreements contemplated by OAR 340-020-0760 [and 23 CFR § 450.310] are often confusing to outlying small communities, and that reluctance on their part can delay the conformity process.

Response: The Department acknowledges this support, and appreciates the potential delay of the conformity determination process that could result if inter-governmental agreements required by Federal Highway Administration regulations (23 CFR § 450.310(f)) are not achieved in a timely fashion. Among other things, these agreements specify responsibility for various transportation conformity functions for areas outside the metropolitan planning area, but within the air quality control area. When no transportation projects are planned for a given outlying area, there may be little motivation for that area to enter into an agreement.

As proposed for adoption by the EQC, OAR 340-020-0760(1)(d)(D)(ii) is added to clarify that when an agreement with an outlying local jurisdiction is not currently in effect, the Metropolitan Planning Organization is responsible for conducting conformity determinations throughout the air quality control area.

Attachment E

Detailed Changes to Original Rulemaking Proposal
Made in Response to Public Comment

Transportation Conformity, Indirect Source Construction Permits,
General Conformity and SIP Streamlining

The following provides a comparison of the rule modification that was made upon evaluation of official comments:

As proposed for public comment, the paragraph assigning general responsibility for conducting conformity determinations to the MPOs did not address the circumstance in which an inter-governmental agreement for outlying areas is not in place. OAR 340-020-0760(1)(d)(D) began with:

(D) The MPO shall be responsible for:
(i) developing transportation plans and TIPs, and making corresponding conformity determinations, ...

Following evaluation, OAR 340-020-0760(1)(d)(D)(ii) is added to the proposal for adoption making the passage read as follows:

(D) The MPO shall be responsible for:
(i) developing transportation plans and TIPs, and making corresponding conformity determinations,
(ii) making conformity determinations for the entire nonattainment or maintenance area including areas beyond the boundaries of the MPO where no agreement is in effect as required by **23 CFR § 450.310(f).**

Attachment F

TRANSPORTATION CONFORMITY ADVISORY COMMITTEE 1998

Members

Annette Liebe Co-Chair	Oregon DEQ - 11th Floor 811 SW 6th Ave., Portland, OR 97204-1390 (503) 229-6919
Vince Carrow Co-Chair	Oregon DOT 1158 Chemeketa St. NE Salem, OR 97310 (503) 986-3485
Loretta Pickerell	Sensible Transportation Options for People 26370 SW 45th Dr. Wilsonville, OR 97070 (503) 638-6999
Keith Bartholomew	1000 Friends of Oregon 534 SW 3rd, Suite 300 Portland, OR 97204 (503) 223-4396
Mike Hoglund	Metro 6000 NE Grand Avenue, Portland, OR 97232-2736 (503) 797-1743
Mike Jaffe	Mid Willamette Valley Council Of Governments 105 High St., SE Salem, OR 97301 (503) 588-6177
Tyler Deke	Rogue Valley Council of Governments PO Box 3275 Central Point, OR 97502 (541) 664-6674
Tom Schwetz	Lane Council of Governments 125 E 8th Ave., Eugene, OR 97401 (541) 687-4283

Chris Hagerbaumer	Oregon Environmental Council 520 SW 6th Avenue, Suite 410 Portland, OR 97204 (503) 222-1963 ext. 102
Barbara Cole	Director, Lane Regional Air Pollution Authority 225 North 5th, Suite 501 Springfield, OR 97477-4671 (541) 726-2514
Dave Williams	Oregon DOT 9002 SE McLoughlin Blvd. Milwaukie, OR 97222 (503) 731-8231
Arthur J. Schlack	Association of Oregon Counties 1201 Court St., NE Salem, OR 97309 (503) 585-8351
G.B. Arrington	Tri-Met 4012 SE 17th Portland, OR 97202 (503) 238-4977
David Barenberg	League of Oregon Cities PO Box 928 Salem, OR 97308
Bernie Bottomly	Oregon Transit Association c/o Tri-Met 4012 SE 17th Portland, OR 97202 (503) 238-4890

Attachment G

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Transportation Conformity, Indirect Source Construction Permits,
General Conformity and SIP Streamlining

Rule Implementation Plan

Summary of the Proposed Rules

The rule amendments of this package represent modifications of existing programs. Changes to the proposed Transportation Conformity regulations streamline current requirements and provide additional flexibility. Modifications to the Indirect Source Construction Permit Program significantly reduce the number of sources required to have a permit and produce a sizable reduction in the program's activity. Changes to the General Conformity regulations narrow the range of Oregon's rules to align them with a congressional clarification of the program's scope. The proposed amendment of the SIP Rule will streamline the procedures for certain regional authority revisions to the State Implementation Plan.

Proposed Effective Date of the Rules

These measures will become effective as Oregon Administrative Rules shortly after adoption when they are officially filed with the Secretary of State. The Transportation Conformity, General Conformity and SIP Streamlining measures will be submitted to EPA as revisions to the State Implementation Plan. Those rules will become effective as part of the SIP following EPA's approval.

Proposal for Notification of Affected Persons

Parties affected by these programs are informed of the proposed modifications through involvement with the Transportation Conformity advisory committee and through the Department's participation in the Technical Advisory Committees of Metropolitan Planning Organizations. Further notification is given through the rulemaking "public comment" and "proposed adoption" mailings. Because these rules directly affect only limited groups of individuals, further notification efforts are not needed.

Proposed Implementing Actions

Existing programs for Transportation Conformity and General Conformity are implemented through inter-agency agreements and consultation processes. The Indirect Source Permit program is implemented through construction permit review, and the procedural requirements of the SIP rule are implemented as part of the SIP revision process. As the proposed amendments simply modify these ongoing programs, no additional implementation activities are necessary.

Proposed Training/Assistance Actions

No specific training or assistance is needed.

Environmental Quality Commission

☒ Rule Adoption Item
☐ Action Item
☐ Information Item

Agenda Item L
August 7, 1998 Meeting

Title:

Extend Title V Deferral for Certain Low Emitting Sources and Create General Air Contaminant Discharge Permit (ACDP) Category

Summary:

This proposal addresses two issues: extending the Title V deferral for certain low emitting sources and giving the Department the authority to issue general ACDP's.

1. Extending the Title V Deferral

EPA developed a transitional policy that allowed states to defer a source from Title V if the source had major potential to emit but their actual emissions were less than fifty percent of the major source threshold. The original deferral period was January, 1995 through January, 1997 and was extended to July, 1998. Recently, EPA extended the deferral to December, 1999 at which time EPA expects its rule on defining potential to emit for low emitting sources will be finalized. This proposal extends the Title V deferral for these sources until December, 1999. Once the deferral expires, deferred sources will need to apply for a Title V permit or be on a Synthetic Minor permit.

2. Authority to issue General ACDP

Currently individual ACDP's are issued for each facility subject to permitting. This approach makes sense for issuing permits to sources with different operating conditions that are subject to different requirements. However, this approach is not efficient where there are many sources in a category, with similar operations subject to the same set of requirements. In this case, one "general" permit with the same conditions applying to all sources in the category would suffice. This proposal will give the Department the authority to issue general ACDP's A general ACDP will be issued once for the source category and qualifying sources will subsequently "sign on" to the permit. Qualifying sources have low emissions, are subject to only the air quality requirements contained in the general ACDP, have a good compliance record and have minimal impact on air quality.

Department Recommendation:

The Department recommends that the Commission adopt the rules regarding extending the Title V deferral and giving the Department the authority to issue general ACDP's.

Report Author | Division Administrator | Director

Accommodations for disabilities are available upon request by contacting the Public Affairs Office at (503)229-5317(voice)/(503)229-6993(TDD).

State of Oregon
Department of Environmental Quality Memorandum

Date: July 21, 1998

To: Environmental Quality Commission

From: Langdon Marsh

Subject: Agenda Item L, EQC Meeting August 7, 1998

Extend Title V Deferral for certain Low Emitting Sources and create General Air Contaminant Discharge Permit (ACDP) Category

Background

On April 13, 1998, the Director authorized the Air Quality Division to proceed to a rulemaking hearing on proposed rules which will extend the Title V deferral for small sources to December 31, 1999, and give the Department the authority to issue general ACDP's to certain small sources.

Pursuant to the authorization, hearing notice was published in the Secretary of State's Bulletin on May 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 April 14, 1998.

A Public Hearing was held May 18, 1998 with Mark Fisher serving as Presiding Officer. The comment period closed on May 22, 1998, and no comments were received. The Presiding Officer's Report (Attachment C) summarizes the hearing which states that no oral testimony was presented at the hearing.

Issues the Proposal will Address

This proposal addresses two issues: extending the Title V deferral for certain low emitting sources and giving the Department the authority to issue general Air Contaminant Discharge Permits.

1. Extending the Title V Deferral

Sources that emit or have the potential to emit ≥ 100 tons per year of a regulated pollutant, or ≥ 10 tons per year of an individual hazardous air pollutant, or ≥ 25 tons per year of more than one hazardous air pollutant, are subject to Title V. EPA allowed states to defer sources from Title V if their potential to emit is at major levels but their actual emissions are less than fifty percent of the major source threshold. The original deferral period was January, 1995 through January, 1997 and was extended to July, 1998. Most recently EPA extended the deferral to December 31, 1999, at which time EPA expects its rule on defining potential to emit for low emitting sources will be final. The deferral period was to allow EPA time to develop rules and guidance for defining potential to emit for these sources. The deferral period was also to allow states time to address these sources. This proposal extends the Title V deferral for these sources until December 31, 1999.

An example of a source that could qualify for the deferral is a job shop that uses a variety of coatings. These shops are in the business of coating whatever the customer brings in; therefore, their emissions vary from coating to coating. The shop could well be a major source based on its capacity and the worst case coating, even though the actual emissions could be quite low based on customer demand. If the actual emissions were less than half of major source levels, the shop would qualify for the deferral.

Once the deferral expires, deferred sources will need to apply for a Title V permit or be on a Synthetic Minor permit.

2. Authority to issue General Air Contaminant Discharge Permits (ACDP's)

Currently, individual ACDP's are issued for each facility subject to permitting. This approach makes sense for issuing permits to sources with different operating conditions that are subject to different requirements.

However, this approach is not efficient where there are many sources in a category, with similar operations subject to the same set of requirements. In this case, one "general" permit with the same conditions applying to all sources in the category would suffice.

This proposal will give the Department the authority to issue general Air Contaminant Discharge Permits. A general ACDP will be issued once for the source category and qualifying sources will subsequently "sign on" to the permit. Issuing a general ACDP for a source category will be at the Department's discretion. Public notice will be issued once for the general ACDP, not as sources are assigned to the permit. Although public comment will not be taken when sources are assigned to an issued general ACDP, an updated list of assigned sources ACDP will be made available for public review.

Qualifying sources are those that have low emissions, are subject to only the air quality requirements contained in the general permit, have a good compliance record and have minimal impact on air quality. Chrome platers, for example, are subject to a set of unique requirements, and the Department would like to issue a general ACDP for that category. Another example could be a general ACDP that establishes synthetic minor conditions for job shops that are currently under the Title V deferral.

Relationship to Federal and Adjacent State Rules

This proposal is consistent with EPA guidance on allowing an extension to the Title V deferral. Most states are using the Title V deferral for low emitting sources. There are a few states such as California, that have chosen not to exercise the deferral and have issued Title V for such sources.

There is no federal requirement to create a general permit category, but it is federally allowed.

Authority to Address the Issue

The Commission has the authority to address this rulemaking under ORS 468.065 (Issuance of permits) and ORS 468.040 (Permits).

Process for Development of the Rulemaking Proposal (including Advisory Committee and alternatives considered)

The rulemaking for general ACDP's was developed by a workgroup consisting of air quality staff. Water quality staff were consulted to develop the general ACDP authority based on a general water quality permit approach. An advisory committee was not involved in these rulemakings but the proposed rules were presented at a stakeholders meeting on March 4, 1998 which included invitations to representatives from the public, industry and environmental interests.

Rulemaking Proposal Mailed to Interested Parties

The Department proposed to extend the deferral from Title V for sources with major potential to emit but operate with low actual emissions. The Department also proposed giving it the authority to issue general ACDP's for a source category where a number of qualifying sources have the same requirements. See Attachment B5 for the actual proposal mailed to interested parties.

Summary of Significant Public Comment and Changes Proposed in Response

There was one comment from EPA after the hearing authorization recommending a deferral date of December 31, 1999 be included in the rule language which was changed to include this date. The original rule proposal was silent on the expiration date because EPA had extended the deferral before, and there was an expectation this was not the last extension. Also, at the time of hearing authorization EPA had not officially decided on the final deferral expiration date. Other minor changes made to the original proposal are summarized in Attachment E.

Summary of How the Proposed Rule Will Work and How it Will be Implemented

Extending the Title V deferral date means sources who are under the deferral will need to apply for a Title V or Synthetic Minor permit prior to December 31, 1999. General ACDP's, including general Synthetic Minor permits, will be issued for certain source categories where there are a number of small emission sources sources subject to the same requirements. Training will be provided to permit writers on changes related to the rulemakings (see Attachment D for rule implementation plan).

Summary of How the Proposed Rule Will Work and How it Will be Implemented (continued)

A workshop will be conducted to provide technical assistance on general permits to area sources subject to NESHAP's (National Emission Standards for Hazardous Air Pollutants), which are planned to be the first general ACDP's issued.

Recommendation for Commission Action

It is recommended that the Commission adopt the rules/rule amendments regarding extending the Title V deferral for small sources, and creating a General ACDP as presented in Attachment A of the Department Staff Report.

Attachments

A. Rule Language 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. Rule Implementation Plan
E. Changes to Proposed Rule Language

Approved:

Section: Andrew Ginsburg

Division: Andrew Ginsburg for Greg Green

Report Prepared By: Kathleen Craig; 503-229-6833

Report prepared on July 17, 1998: tvdefeqcmemo.doc

Attachment A

Proposed Rules

DIVISION 28

STATIONARY SOURCE AIR POLLUTION CONTROL AND PERMITTING PROCEDURES

[ED. NOTE: These rules are included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-020-0047.]

340-028-0110
Definitions

As used in this Division:

(1) "Act" or "FCAA" means the Federal Clean Air Act, Public Law 88-206 as last amended by Public Law 101-549.

(2) "Activity" means any process, operation, action, or reaction (e.g., chemical) at a source that emits a regulated pollutant.

(3) "Actual emissions" means the mass emissions of a pollutant from an emissions source during a specified time period. Actual emissions shall be directly measured with a continuous monitoring system or calculated using a material balance or verified emission factor in combination with the source's actual operating hours, production rates, or types of materials processed, stored, or combusted during the specified time period.

(a) For purposes of determining actual emissions as of the baseline period:

(A) Except as provided in paragraph (B) of this subsection, actual emissions shall equal the average rate at which the source actually emitted the pollutant during a baseline period and which is representative of normal source operation;

(B) The Department may presume the source-specific mass emissions limit included in the permit for a source that was effective on September 8, 1981 is equivalent to the actual emissions of the source during the baseline period if it is within 10% of the actual emissions calculated under paragraph (A) of this subsection.

(b) For any source which had not yet begun normal operation in the specified time period, actual emissions shall equal the potential to emit of the source.

(c) For purposes of determining actual emissions for Emission Statements under OAR 340-028-1500 through 340-028-1520, Major Source Interim Emission Fees under OAR 340-028-2400 through 340-028-2550, and Oregon Title V Operating Permit Fees under OAR 340-028-2560 through 340-028-2740, actual emissions include, but are not limited to, routine process emissions, fugitive emissions, excess emissions from mainte-nance, startups and shutdowns, equipment malfunction, and other activities.

(4) "Affected source" means a source that includes one or more affected units that are subject to emission reduction requirements or limitations under Title IV of the FCAA.

(5) "Affected States" mean all States:

(a) Whose air quality may be affected by a proposed permit, permit modification or permit renewal and that are contiguous to Oregon; or

(b) That are within 50 miles of the permitted source.

(6) "Aggregate insignificant emissions" means the annual actual emissions of any regulated air pollutant from one or more designated activities at a source that are less than or equal to the lowest applicable level specified in this section. The total emissions from each designated activity and the aggregate emissions from all designated activities shall be less than or equal to the lowest applicable level specified in this section. The aggregate insignificant emissions levels are:

(a) One ton for total reduced sulfur, hydrogen sulfide, sulfuric acid mist, any Class I or II substance subject to a standard promulgated under or established by Title VI of the Act, and each criteria pollutant, except lead;

(b) 120 pounds for lead;

(c) 600 pounds for fluoride;

(d) 500 pounds for PM_{10} in a PM_{10} nonattainment area;

(e) The lesser of the amount established in OAR 340-032-0130, Table 1 or OAR 340-032-5400, Table 3, or 1,000 pounds;

(f) An aggregate of 5,000 pounds for all Hazardous Air Pollutants.

(7) "Air Contaminant" means a dust, fume, gas, mist, odor, smoke, vapor, pollen, soot, carbon, acid or particulate matter, or any combination thereof.

(8) "Air Contaminant Discharge Permit" or "ACDP" means a written permit issued, renewed, amended, or revised by the Department, pursuant to OAR 340-028-1700 through 340-028-1790 and includes the application review report.

(9) "Alternative method" means any method of sampling and analyzing for an air pollutant which is not a reference or equivalent method but which has been demonstrated to the Department's satisfaction to, in specific cases, produce results adequate for determination of compliance. An alternative method used to meet an applicable federal requirement for which a reference method is specified shall be approved by EPA unless EPA has delegated authority for the approval to the Department.

(10) "Applicable requirement" means all of the following as they apply to emissions units in an Oregon Title V Operating Permit program source, including requirements that have been promulgated or approved by the EPA through rule making at the time of issuance but have future-effective compliance dates:

(a) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by the EPA through rulemaking under Title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in **40 CFR Part 52** (July 1, 1996);

(b) Any standard or other requirement adopted under OAR 340-020-0047 of the State of Oregon Clean Air Act Implementation Plan, that is more stringent than the federal standard or requirement which has not yet been approved by the EPA, and other state-only enforceable air pollution control requirements;

(c) Any term or condition in an ACDP, OAR 340-028-1700 through 340-028-1790, including any term or condition of any preconstruction permits issued pursuant to OAR 340-028-1900 through 340-028-2000, New Source Review, until or unless the Department revokes or modifies the term or condition by a permit modification;

(d) Any term or condition in a Notice of Construction and Approval of Plans, OAR 340-028-0800 through 340-028-0820, until or unless the Department revokes or modifies the term or condition by a Notice of Construction and Approval of Plans or a permit modification;

(e) Any term or condition in a Notice of Approval, OAR 340-028-2270, until or unless the Department revokes or modifies the term or condition by a Notice of Approval or a permit modification;

(f) Any standard or other requirement under section 111 of the Act, including section 111(d);

(g) Any standard or other requirement under section 112 of the Act, including any requirement concerning accident prevention under section 112(r) (7) of the Act;

(h) Any standard or other requirement of the acid rain program under Title IV of the Act or the regulations promulgated thereunder;

(i) Any requirements established pursuant to section 504(b) or section 114(a)(3) of the Act;

(j) Any standard or other requirement governing solid waste incineration, under section 129 of the Act;

(k) Any standard or other requirement for consumer and commercial products, under section 183(e) of the Act;

(l) Any standard or other requirement for tank vessels, under section 183(f) of the Act;

(m) Any standard or other requirement of the program to control air pollution from outer continental shelf sources, under section 328 of the Act;

(n) Any standard or other requirement of the regulations promulgated to protect stratospheric ozone under Title VI of the Act, unless the Administrator has determined that such requirements need not be contained in an Oregon Title V Operating Permit; and

(o) Any national ambient air quality standard or increment or visibility requirement under part C of Title I of the Act, but only as it would apply to temporary sources permitted pursuant to section 504(e) of the Act.

(11) "Assessable Emission" means a unit of emissions for which the major source owner or operator will be assessed a fee. It includes an emission of a pollutant as specified in OAR 340-028-2420 or OAR 340-028-2610 from one or more emissions devices or activities within a major source.

(12) "Baseline Emission Rate" means the average actual emission rate during the baseline period. Baseline emission rate shall not include increases due to voluntary fuel switches or increased hours of operation that have occurred after the baseline period.

(13) "Baseline Period" means either calendar years 1977 or 1978. The Department shall allow the use of a prior time period upon a determination that it is more representative of normal source operation.

(14) "Best Available Control Technology" or "BACT" means an emission limitation, including, but not limited to, a visible emission standard, based on the maximum degree of reduction of each air contaminant subject to regulation under the Act which would be emitted from any proposed major source or major modification which, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such air contaminant. In no event shall the application of BACT result in emissions of any air contaminant which would exceed the emissions allowed by any

applicable new source performance standard or any standard for hazardous air pollutant. If an emission limitation is not feasible, a design, equipment, work practice, or operational standard, or combination thereof, may be required. Such standard shall, to the degree possible, set forth the emission reduction achievable and shall provide for compliance by prescribing appropriate permit conditions.

(15) "Calculated Emissions" as used in OAR 340-028-2400 through 340-028-2550 means procedures used to estimate emissions for the 1991 calendar year.

(16) "Categorically insignificant activity" means any of the following listed pollutant emitting activities principally supporting the source or the major industrial group. Categorically insignificant activities must comply with all applicable requirements.

(a) Constituents of a chemical mixture present at less than 1% by weight of any chemical or compound regulated under Divisions 020 through 032 of this chapter, or less than 0.1% by weight of any carcinogen listed in the U.S. Department of Health and Human Service's Annual Report on Carcinogens when usage of the chemical mixture is less than 100,000 pounds/year;

(b) Evaporative and tail pipe emissions from on-site motor vehicle operation;

(c) Distillate oil, kerosene, and gasoline fuel burning equipment rated at less than or equal to 0.4 million Btu/hr;

(d) Natural gas and propane burning equipment rated at less than or equal to 2.0 million Btu/hr;

(e) Office activities;

(f) Food service activities;

(g) Janitorial activities;

(h) Personal care activities;

(i) Groundskeeping activities including, but not limited to building painting and road and parking lot maintenance;

(j) On-site laundry activities;

(k) On-site recreation facilities;

(l) Instrument calibration;

(m) Maintenance and repair shop;

(n) Automotive repair shops or storage garages;

(o) Air cooling or ventilating equipment not designed to remove air contaminants generated by or released from associated equipment;

(p) Refrigeration systems with less than 50 pounds of charge of ozone depleting substances regulated under Title VI, including pressure tanks used in refrigeration systems but excluding any combustion equipment associated with such systems;

(q) Bench scale laboratory equipment and laboratory equipment used exclusively for chemical and physical analysis, including associated vacuum producing devices but excluding research and development facilities;

(r) Temporary construction activities;

(s) Warehouse activities;

(t) Accidental fires;

(u) Air vents from air compressors;

(v) Air purification systems;

(w) Continuous emissions monitoring vent lines;

(x) Demineralized water tanks;

(y) Pre-treatment of municipal water, including use of deionized water purification systems;

(z) Electrical charging stations;

(aa) Fire brigade training;

(bb) Instrument air dryers and distribution;

(cc) Process raw water filtration systems;

(dd) Pharmaceutical packaging;

(ee) Fire suppression;

(ff) Blueprint making;

(gg) Routine maintenance, repair, and replacement such as anticipated activities most often associated with and performed during regularly scheduled equipment outages to maintain a plant and its equipment in good operating condition, including but not limited to steam cleaning, abrasive use, and woodworking;

(hh) Electric motors;

(ii) Storage tanks, reservoirs, transfer and lubricating equipment used for ASTM grade distillate or residual fuels, lubricants, and hydraulic fluids;

(jj) On-site storage tanks not subject to any New Source Performance Standards (NSPS), including underground storage tanks (UST), storing gasoline or diesel used exclusively for fueling of the facility's fleet of vehicles;

(kk) Natural gas, propane, and liquefied petroleum gas (LPG) storage tanks and transfer equipment;

(ll) Pressurized tanks containing gaseous compounds;

(mm) Vacuum sheet stacker vents;

(nn) Emissions from wastewater discharges to publicly owned treatment works (POTW) provided the source is authorized to discharge to the POTW, not including on-site wastewater treatment and/or holding facilities;
(oo) Log ponds;
(pp) Storm water settling basins;
(qq) Fire suppression and training;
(rr) Paved roads and paved parking lots within an urban growth boundary;
(ss) Hazardous air pollutant emissions of fugitive dust from paved and unpaved roads except for those sources that have processes or activities that contribute to the deposition and entrainment of hazardous air pollutants from surface soils;
(tt) Health, safety, and emergency response activities;
(uu) Emergency generators and pumps used only during loss of primary equipment or utility service;
(vv) Non-contact steam vents and leaks and safety and relief valves for boiler steam distribution systems;
(ww) Non-contact steam condensate flash tanks;
(xx) Non-contact steam vents on condensate receivers, deaerators and similar equipment;
(yy) Boiler blowdown tanks;
(zz) Industrial cooling towers that do not use chromium-based water treatment chemicals;
(aaa) Ash piles maintained in a wetted condition and associated handling systems and activities;
(bbb) Oil/water separators in effluent treatment systems;
(ccc) Combustion source flame safety purging on startup;
(ddd) Broke beaters, pulp and repulping tanks, stock chests and pulp handling equipment, excluding thickening equipment and repulpers;
(eee) Stock cleaning and pressurized pulp washing, excluding open stock washing systems; and
(fff) White water storage tanks.
(17) "Certifying individual" means the responsible person or official authorized by the owner or operator of a source who certifies the accuracy of the emission statement.
(18) "CFR" means Code of Federal Regulations.
(19) "Class I area" means any Federal, State or Indian reservation land which is classified or reclassified as Class I area. Class I areas are identified in OAR 340-031-0120.
(20) "Commence" or "commencement" means that the owner or operator has obtained all necessary preconstruction approvals required by the Act and either has:
(a) Begun, or caused to begin, a continuous program of actual on-site construction of the source to be completed in a reasonable time; or
(b) Entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the source to be completed in a reasonable time.
(21) "Commission" or "EQC" means Environmental Quality Commission.
(22) "Constant Process Rate" means the average variation in process rate for the calendar year is not greater than plus or minus ten percent of the average process rate.
(23) "Construction":
(a) Except as provided in subsection (b) of this section means any physical change including, but not limited to, fabrication, erection, installation, demolition, or modification of a source or part of a source;
(b) As used in OAR 340-028-1900 through 340-028-2000 means any physical change including, but not limited to, fabrication, erection, installation, demolition, or modification of an emissions unit, or change in the method of operation of a source which would result in a change in actual emissions.
(24) "Continuous Monitoring Systems" means sampling and analysis, in a timed sequence, using techniques which will adequately reflect actual emissions or concentrations on a continuing basis in accordance with the Department's Continuous Monitoring Manual, and includes continuous emission monitoring systems and continuous parameter monitoring systems.
(25) "Criteria Pollutant" means nitrogen oxides, volatile organic compounds, particulate matter, PM_{10}, sulfur dioxide, carbon monoxide, or lead.
(26) "Department":
(a) As used in OAR 340-028-0100 through 340-028-2000 and OAR 340-028-2400 through 340-028-2550 means Depart-ment of Environmental Quality;
(b) As used in OAR 340-028-2100 through 340-028-2320 and OAR 340-028-2560 throughout 340-028-2740 means Department of Environmental Quality or in the case of Lane County, Lane Regional Air Pollution Authority.
(27) "Device" means any machine, equipment, raw material, product, or byproduct at a source that produces or emits a regulated pollutant.
(28) "Director" means the Director of the Department or the Director's designee.
(29) "Draft permit" means the version of an Oregon Title V Operating Permit for which the Department or Lane Regional Air Pollution Authority offers public participation under OAR 340-028-2290 or the EPA and affected State review under OAR 340-028-2310.

(30) "Effective date of the program" means the date that the EPA approves the Oregon Title V Operating Permit program submitted by the Department on a full or interim basis. In case of a partial approval, the "effective date of the program" for each portion of the program is the date of the EPA approval of that portion.

(31) "Emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the owner or operator, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.

(32) "Emission" means a release into the atmosphere of any regulated pollutant or air contaminant.

(33) "Emission Estimate Adjustment Factor" or "EEAF" means an adjustment applied to an emission factor to account for the relative inaccuracy of the emission factor.

(34) "Emission Factor" means an estimate of the rate at which a pollutant is released into the atmosphere, as the result of some activity, divided by the rate of that activity (e.g., production or process rate). Sources shall use an emission factor approved by EPA or the Department.

(35) "Emission Limitation" and "Emission Standard" mean a requirement established by a State, local government, or the EPA which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirements which limit the level of opacity, prescribe equipment, set fuel specifications, or prescribe operation or maintenance procedures for a source to assure continuous emission reduction.

(36) "Emission Reduction Credit Banking" means to presently reserve, subject to requirements of OAR 340-028-1900 through 340-028-2000, New Source Review, emission reductions for use by the reserver or assignee for future compliance with air pollution reduction requirements.

(37) "Emission Reporting Form" means a paper or electronic form developed by the Department that shall be completed by the permittee to report calculated emissions, actual emissions or permitted emissions for interim emission fee assessment purposes.

(38) "Emissions unit" means any part or activity of a source that emits or has the potential to emit any regulated air pollutant.

(a) A part of a source is any machine, equipment, raw material, product, or byproduct which produces or emits air pollutants. An activity is any process, operation, action, or reaction (e.g., chemical) at a stationary source that emits air pollutants. Except as described in subsection (d) of this section, parts and activities may be grouped for purposes of defining an emissions unit provided the following conditions are met:

(A) The group used to define the emissions unit may not include discrete parts or activities to which a distinct emissions standard applies or for which different compliance demonstration requirements apply, and

(B) The emissions from the emissions unit are quantifiable.

(b) Emissions units may be defined on a pollutant by pollutant basis where applicable.

(c) The term emissions unit is not meant to alter or affect the definition of the term "unit" for purposes of Title IV of the FCAA.

(d) Parts and activities shall not be grouped for purposes of determining emissions increases from an emissions unit under OAR 340-028-1930, OAR 340-028-1935, OAR 340-028-1940, or OAR 340-028-2270, or for purposes of determining the applicability of any New Source Performance Standard (NSPS).

(39) "EPA" or "Administrator" means the Administrator of the United States Environmental Protection Agency or the Administrator's designee.

(40) "Equivalent method" means any method of sampling and analyzing for an air pollutant which has been demonstrated to the Department's satisfaction to have a consistent and quantitatively known relationship to the reference method, under specified conditions. An equivalent method used to meet an applicable federal requirement for which a reference method is specified shall be approved by EPA unless EPA has delegated authority for the approval to the Department.

(41) "Event" means excess emissions which arise from the same condition and which occur during a single calendar day or continue into subsequent calendar days.

(42) "Excess emissions" means emissions which are in excess of a permit limit or any applicable air quality rule.

(43) "Federal Land Manager" means with respect to any lands in the United States, the Secretary of the federal department with authority over such lands.

(44) "Final permit" means the version of an Oregon Title V Operating Permit issued by the Department or Lane Regional Air Pollution Authority that has completed all review procedures required by OAR 340-028-2200 through 340-028-2320.

(45) "Fugitive Emissions":

(a) Except as used in subsection (b) of this section, means emissions of any air contaminant which escape to the atmosphere from any point or area that is not identifiable as a stack, vent, duct, or equivalent opening.

(b) As used to define a major Oregon Title V Operating Permit program source, means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

(46) "General permit":

(a) Except as provided in subsection (b) of this section, means an Oregon Air Contaminant Discharge Permit established under OAR 340-028-1725;

(b) As used in OAR 340-028-2100 through 340-028-2320 means an Oregon Title V Operating Permit ~~that meets the requirements of~~ established under OAR 340-028-2170.

(47) "Growth Allowance" means an allocation of some part of an airshed's capacity to accommodate future proposed major sources and major modifications of sources.

(48) "Immediately" means as soon as possible but in no case more than one hour after the beginning of the excess emission period.

(49) "Insignificant Activity" means an activity or emission that the Department has designated as categorically insignificant, or that meets the criteria of aggregate insignificant emissions.

(50) "Insignificant Change" means an off-permit change defined under OAR 340-028-2220(2)(a) to either a significant or an insignificant activity which:

(a) Does not result in a redesignation from an insignificant to a significant activity;

(b) Does not invoke an applicable requirement not included in the permit; and

(c) Does not result in emission of regulated air pollutants not regulated by the source's permit.

(51) "Interim Emission Fee" means $13 per ton for each assessable emission subject to emission fees under OAR 340-028-2420 for calculated, actual or permitted emissions released during calendar years 1991 and 1992.

(52) "Large Source" as used in OAR 340-028-1400 through 340-028-1450 means any stationary source whose actual emissions or potential controlled emissions while operating full-time at the design capacity are equal to or exceed 100 tons per year of any regulated air pollutant, or which is subject to a National Emissions Standard for Hazardous Air Pollutants (NESHAP). Where PSELs have been incorporated into the ACDP, the PSEL shall be used to determine actual emissions.

(53) "Late Payment" means a fee payment which is postmarked after the due date.

(54) "Lowest Achievable Emission Rate" or "LAER" means that rate of emissions which reflects: the most stringent emission limitation which is contained in the implementation plan of any state for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable; or the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent. In no event, shall the application of this term permit a proposed new or modified source to emit any air contaminant in excess of the amount allowable under applicable New Source Performance Standards (NSPS) or standards for hazardous air pollutants.

(55) "Maintenance Area" means a geographical area of the State that was designated as a nonattainment area, redesignated as an attainment area by EPA, and redesignated as a maintenance area by the Environmental Quality Commission in OAR Chapter 340, Division 31.

(56) "Maintenance Pollutant" means a pollutant for which a maintenance area was formerly designated a nonattainment area.

(57) "Major Modification" means any physical change or change of operation of a source that would result in a net significant emission rate increase for any regulated air pollutant. This criteria also applies to any pollutants not previously emitted by the source. Calculations of net emission increases shall take into account all accumulated increases and decreases in actual emissions occurring at the source since the baseline period, or since the time of the last construction approval issued for the source pursuant to the New Source Review Regulations in OAR 340-028-1900 through 340-028-2000 for that pollutant, whichever time is more recent. Emissions from insignificant activities shall be included in the calculation of net emission increases. Emission decreases required by rule shall not be included in the calculation of net emission increases. If accumulation of emission increases results in a net significant emission rate increase, the modifi-cations causing such increases become subject to the New Source Review requirements, including the retrofit of required controls.

(58) "Major Source":

(a) Except as provided in subsections (b) and (c) of this section, means a source which emits, or has the potential to emit, any regulated air pollutant at a Significant Emission Rate, as defined in this rule. Emissions from insignificant activities shall be included in determining if a source is a major source.

(b) As used in OAR 340-028-2100 through 340-028-2320, Rules Applicable to Sources Required to Have Oregon Title V Operating Permits, 340-028-2560 through 340-028-2740, Oregon Title V Operating Permit Fees, and OAR 340-028-1740, Synthetic Minor Sources, means any stationary source, (or any group of stationary sources that are located on one or more contiguous or adjacent properties and are under common control of the same person (or persons under common control)), belonging to a single major industrial grouping or is supporting the major industrial group and that are described in paragraphs (A), (B), or (C) of this subsection. For the purposes of this subsection, a stationary source or group of stationary sources shall be

considered part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources on contiguous or adjacent properties belong to the same Major Group (i.e., all have the same two-digit code) as described in the Standard Industrial Classification Manual (U.S. Office of Management and Budget, 1987) or support the major industrial group.

(A) A major source of hazardous air pollutants, which is defined as:

(i) For pollutants other than radionuclides, any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, in the aggregate, 10 tons per year (tpy) or more of any hazardous air pollutants which has been listed pursuant to OAR 340-032-0130, 25 tpy or more of any combination of such hazardous air pollutants, or such lesser quantity as the Administrator may establish by rule. Notwithstanding the preceding sentence, emissions from any oil or gas exploration or production well, with its associated equipment, and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources; or

(ii) For radionuclides, "major source" shall have the meaning specified by the Administrator by rule.

(B) A major stationary source of air pollutants, as defined in section 302 of the Act, that directly emits or has the potential to emit, 100 tpy or more of any regulated air pollutant, including any major source of fugitive emissions of any such pollutant. The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of section 302(j) of the Act, unless the source belongs to one of the following categories of stationary source:

(i) Coal cleaning plants (with thermal dryers);
(ii) Kraft pulp mills;
(iii) Portland cement plants;
(iv) Primary zinc smelters;
(v) Iron and steel mills;
(vi) Primary aluminum ore reduction plants;
(vii) Primary copper smelters;
(viii) Municipal incinerators capable of charging more than 250 tons of refuse per day;
(ix) Hydrofluoric, sulfuric, or nitric acid plants;
(x) Petroleum refineries;
(xi) Lime plants;
(xii) Phosphate rock processing plants;
(xiii) Coke oven batteries;
(xiv) Sulfur recovery plants;
(xv) Carbon black plants (furnace process);
(xvi) Primary lead smelters;
(xvii) Fuel conversion plants;
(xviii) Sintering plants;
(xix) Secondary metal production plants;
(xx) Chemical process plants;
(xxi) Fossil-fuel boilers, or combination thereof, totaling more than 250 million British thermal units per hour heat input;
(xxii) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;
(xxiii) Taconite ore processing plants;
(xxiv) Glass fiber processing plants;
(xxv) Charcoal production plants;
(xxvi) Fossil-fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input; or
(xxvii) All other stationary source categories regulated by a standard promulgated under section 111 or 112 of the Act, but only with respect to those air pollutants that have been regulated for that category.

(C) A major stationary source as defined in part D of Title I of the Act, including:

(i) For ozone nonattainment areas, sources with the potential to emit 100 tpy or more of VOCs or oxides of nitrogen in areas classified as "marginal" or "moderate," 50 tpy or more in areas classified as "serious," 25 tpy or more in areas classified as "severe," and 10 tpy or more in areas classified as "extreme"; except that the references in this paragraph to 100, 50, 25, and 10 tpy of nitrogen oxides shall not apply with respect to any source for which the Administrator has made a finding, under section 182(f)(1) or (2) of the Act, that requirements under section 182(f) of the Act do not apply;

(ii) For ozone transport regions established pursuant to section 184 of the Act, sources with the potential to emit 50 tpy or more of VOCs;

(iii) For carbon monoxide nonattainment areas:

(I) That are classified as "serious;" and

(II) In which stationary sources contribute significantly to carbon monoxide levels as determined under rules issued by the Administrator, sources with the potential to emit 50 tpy or more of carbon monoxide.

(iv) For particulate matter (PM_{10}) nonattainment areas classified as "serious," sources with the potential to emit 70 tpy or more of PM_{10}.

(c) as used in OAR 340-028-2400 through 340-028-2550, Major Source Interim Emission Fees, means a permitted stationary source or group of stationary sources located within a contiguous area and under common control or any stationary facility or source of air pollutants which directly emits, or is permitted to emit:

(A) One hundred tons per year or more of any regulated pollutant; or

(B) Fifty tons per year or more of a VOC and is located in a serious ozone nonattainment area.

(59) "Material Balance" means a procedure for determining emissions based on the difference in the amount of material added to a process and the amount consumed and/or recovered from a process.

(60) "Nitrogen Oxides" or "NO_x" means all oxides of nitrogen except nitrous oxide.

(61) "Nonattainment Area" means a geographical area of the State that exceeds any state or federal primary or secondary ambient air quality standard as designated by the Environmental Quality Commission in OAR Chapter 340, Division 031, or the EPA.

(62) "Nonattainment Pollutant" means a pollutant for which an area is designated a nonattainment area.

(63) "Normal Source Operation" means operations which do not include such conditions as forced fuel substitution, equipment malfunction, or highly abnormal market conditions.

(64) "Offset" means an equivalent or greater emission reduction which is required prior to allowing an emission increase from a proposed major source or major modification of a source.

(65) "Oregon Title V Operating Permit" means any permit covering an Oregon Title V Operating Permit source that is issued, renewed, amended, or revised pursuant to OAR 340-028-2100 through 340-028-2320.

(66) "Oregon Title V Operating Permit program" means a program approved by the Administrator under **40 CFR Part 70** (July 1, 1996).

(67) "Oregon Title V Operating Permit program source" means any source subject to the permitting requirements, OAR 340-028-2100 through OAR 340-028-2320, as provided in OAR 340-028-2110.

(68) "Ozone Season" means the contiguous 3 month period of the year during which ozone exceedances typically occur (i.e., June, July, and August).

(69) "Particulate Matter" means all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by an applicable reference method in accordance with the Department's **Source Sampling Manual**, (January, 1992).

(70) "Permit" means an Air Contaminant Discharge Permit or an Oregon Title V Operating Permit issued pursuant to this Division.

(71) "Permit modification" means a revision to a permit that meets the applicable requirements of OAR 340-028-1700 through 340-028-1790, OAR 340-028-1900 through 340-028-2000, or OAR 340-028-2240 through 340-028-2260.

(72) "Permit revision" means any permit modification or administrative permit amendment.

(73) "Permitted Emissions" as used in OAR 340-028-2400 through 340-028-2550, and OAR 340-028-2560 through 340-028-2740 means each assessable emission portion of the PSEL, as identified in an ACDP, Oregon Title V Operating Permit, review report, or by the Department pursuant to OAR 340-028-2640.

(74) "Permittee" means the owner or operator of the facility, in whose name the operation of the source is authorized by the ACDP or the Oregon Title V Operating Permit.

(75) "Person" means individuals, corporations, associations, firms, partnerships, joint stock companies, public and municipal corporations, political subdivisions, the state and any agencies thereof, and the Federal government and any agencies thereof.

(76) "Plant Site Emission Limit" or "PSEL" means the total mass emissions per unit time of an individual air pollutant specified in a permit for a source. The PSEL for a major source may consist of more than one assessable emission.

(77) "PM_{10}":

(a) When used in the context of emissions, means finely divided solid or liquid material, including condensible particulate, other than uncombined water, with an aerodynamic diameter less than or equal to a nominal 10 micrometers, emitted to the ambient air as measured by an applicable reference method in accordance with the Department's **Source Sampling Manual** (January, 1992);

(b) When used in the context of ambient concentration, means airborne finely divided solid or liquid material with an aerodynamic diameter less than or equal to a nominal 10 micrometers as measured in accordance with **40 CFR Part 50, Appendix J** (July, 1996).

(78) "Potential to emit" means the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or

processed, shall be treated as part of its design if the limitation is enforceable by the Administrator. This definition does not alter or affect the use of this term for any other purposes under the Act, or the term "capacity factor" as used in Title IV of the Act or the regulations promulgated thereunder. Secondary emissions shall not be considered in determining the potential to emit of a source.

(79) "Process Upset" means a failure or malfunction of a production process or system to operate in a normal and usual manner.

(80) "Proposed permit" means the version of an Oregon Title V Operating Permit that the Department or Lane Regional Air Pollution Authority proposes to issue and forwards to the Administrator for review in compliance with OAR 340-028-2310.

(81) "Reference method" means any method of sampling and analyzing for an air pollutant as specified in **40 CFR Part 60, 61 or 63** (July 1, 1996).

(82) "Regional Authority" means Lane Regional Air Pollution Authority.

(83) "Regulated air pollutant" or "Regulated Pollutant":

(a) As used in OAR 340-028-0100 through 340-028-2320 means:

(A) Nitrogen oxides or any VOCs;

(B) Any pollutant for which a national ambient air quality standard has been promulgated;

(C) Any pollutant that is subject to any standard promulgated under section 111 of the Act;

(D) Any Class I or II substance subject to a standard promulgated under or established by Title VI of the Act; or

(E) Any pollutant listed under OAR 340-032-0130 or OAR 340-032-5400.

(b) As used in OAR 340-028-2400 through 340-028-2550 means PM_{10}, Sulfur Dioxide (SO_2), Oxides of Nitrogen (NO_x), Lead (Pb), VOC, and Carbon Monoxide (CO); and any other pollutant subject to a New Source Performance Standard (NSPS) such as Total Reduced Sulfur (TRS) from kraft pulp mills and Fluoride (F) from aluminum mills.

(c) As used in OAR 340-028-2560 through 340-028-2740 means any regulated air pollutant as defined in 340-028-0110(78) except the following:

(A) Carbon monoxide;

(B) Any pollutant that is a regulated pollutant solely because it is a Class I or Class II substance subject to a standard promulgated under or established by Title VI of the Federal Clean Air Act; or

(C) Any pollutant that is a regulated air pollutant solely because it is subject to a standard or regulation under section 112(r) of the Federal Clean Air Act.

(84) "Renewal" means the process by which a permit is reissued at the end of its term.

(85) "Responsible official" means one of the following:

(a) For a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufac-turing, production, or operating facilities applying for or subject to a permit and either:

(A) The facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars); or

(B) The delegation of authority to such representative is approved in advance by the Department or Lane Regional Air Pollution Authority.

(b) For a partnership or sole proprietorship: a general partner or the proprietor, respectively;

(c) For a municipality, State, Federal, or other public agency: either a principal executive officer or ranking elected official. For the purposes of this Division, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a Regional Administrator of the EPA); or

(d) For affected sources:

(A) The designated representative in so far as actions, standards, requirements, or prohibitions under Title IV of the Act or the regulations promulgated thereunder are concerned; and

(B) The designated representative for any other purposes under the Oregon Title V Operating Permit program.

(86) "Secondary Emissions" means emissions from new or existing sources which occur as a result of the construction and/or operation of a source or modification, but do not come from the source itself. Secondary emissions shall be specific, well defined, quantifiable, and impact the same general area as the source associated with the secondary emissions. Secondary emissions may include, but are not limited to:

(a) Emissions from ships and trains coming to or from a facility;

(b) Emissions from off-site support facilities which would be constructed or would otherwise increase emissions as a result of the construction of a source or modification.

(87) "Section 111" means that section of the FCAA that includes Standards of Performance for New Stationary Sources (NSPS).

(88) "Section 111(d)" means that subsection of the FCAA that requires states to submit plans to the EPA which establish standards of performance for existing sources and provides for the implementation and enforcement of such standards.

(89) "Section 112" means that section of the FCAA that contains regulations for Hazardous Air Pollutants (HAP).
(90) "Section 112(b)" means that subsection of the FCAA that includes the list of hazardous air pollutants to be regulated.
(91) "Section 112(d)" means that subsection of the FCAA that directs the EPA to establish emission standards for sources of hazardous air pollutants. This section also defines the criteria to be used by the EPA when establishing the emission standards.
(92) "Section 112(e)" means that subsection of the FCAA that directs the EPA to establish and promulgate emissions standards for categories and subcategories of sources that emit hazardous air pollutants.
(93) "Section 112(r)(7)" means that subsection of the FCAA that requires the EPA to promulgate regulations for the prevention of accidental releases and requires owners or operators to prepare risk management plans.
(94) "Section 114(a)(3)" means that subsection of the FCAA that requires enhanced monitoring and submission of compliance certifications for major sources.
(95) "Section 129" means that section of the FCAA that requires the EPA to establish emission standards and other requirements for solid waste incineration units.
(96) "Section 129(e)" means that subsection of the FCAA that requires solid waste incineration units to obtain Oregon Title V Operating Permits.
(97) "Section 182(f)" means that subsection of the FCAA that requires states to include plan provisions in the State Implementation Plan for NO_x in ozone nonattainment areas.
(98) "Section 182(f)(1)" means that subsection of the FCAA that requires states to apply those plan provisions developed for major VOC sources and major NO_x sources in ozone nonattainment areas.
(99) "Section 183(e)" means that subsection of the FCAA that requires the EPA to study and develop regulations for the control of certain VOC sources under federal ozone measures.
(100) "Section 183(f)" means that subsection of the FCAA that requires the EPA to develop regulations pertaining to tank vessels under federal ozone measures.
(101) "Section 184" means that section of the FCAA that contains regulations for the control of interstate ozone air pollution.
(102) "Section 302" means that section of the FCAA that contains definitions for general and administrative purposes in the Act.
(103) "Section 302(j)" means that subsection of the FCAA that contains definitions of "major stationary source" and "major emitting facility."
(104) "Section 328" means that section of the FCAA that contains regulations for air pollution from outer continental shelf activities.
(105) "Section 408(a)" means that subsection of the FCAA that contains regulations for the Title IV permit program.
(106) "Section 502(b)(10) change" means a change that contravenes an express permit term but is not a change that:
(a) Would violate applicable requirements;
(b) Would contravene federally enforceable permit terms and conditions that are monitoring, recordkeeping, reporting, or compliance certification requirements; or
(c) Is a Title I modification.
(107) "Section 504(b)" means that subsection of the FCAA that states that the EPA can prescribe by rule procedures and methods for determining compliance and for monitoring.
(108) "Section 504(e)" means that subsection of the FCAA that contains regulations for permit requirements for temporary sources.
(109) "Significant Air Quality Impact" means an ambient air quality impact which is equal to or greater than those set out in **Table 1**. For sources of VOC or NO_x, a major source or major modification will be deemed to have a significant impact if it is located within 30 kilometers of an ozone nonattainment area or ozone maintenance area and is capable of impacting the nonattainment area or maintenance area.
(110) "Significant emission rate", except as provided in subsections (a) through (c) of this section, means emission rates equal to or greater than the rates specified in **Table 2**.
(a) For the Medford-Ashland Air Quality Maintenance Area, the Klamath Falls Urban Growth Area, and the Lakeview PM_{10} Nonattainment Area, the Significant Emission Rate for particulate matter is defined in **Table 3**. For the Klamath Falls Urban Growth Area, the Significant Emission Rates in Table 3 for particulate matter apply to all new or modified sources for which permit applications have not been submitted prior to June 2, 1989. For the Lakeview PM_{10} Nonattainment Area, the Significant Emission Rates in Table 3 for particulate matter apply to all new or modified sources for which complete permit applications have not been submitted to the Department prior to May 1, 1995.
(b) For regulated air pollutants not listed in Table 2 or 3, the Department shall determine the rate that constitutes a significant emission rate.
(c) Any new source or modification with an emissions increase less than the rates specified in Table 2 or 3 associated with a new source or modification which would construct within 10 kilometers of a Class I area, and would have an impact on such area equal to or greater than 1 ug/m^3 (24 hour average) shall be deemed to be emitting at a significant emission rate.

(111) "Significant Impairment" occurs when visibility impairment in the judgment of the Department interferes with the management, protection, preservation, or enjoyment of the visual experience of visitors within a Class I area. The determination shall be made on a case-by-case basis considering the recommen-dations of the Federal Land Manager; the geographic extent, intensity, duration, frequency, and time of visibility impairment. These factors will be considered with respect to visitor use of the Class I areas, and the frequency and occurrence of natural conditions that reduce visibility.

(112) "Small Source" means any stationary source with a regular ACDP (not an insignificant discharge permit, ~~or~~ a minimal source permit or a general ACDP) or an Oregon Title V Operating Permit which is not classified as a large source.

(113) "Source":

(a) Except as provided in subsection (b) of this section, means any building, structure, facility, installation or combination thereof which emits or is capable of emitting air contaminants to the atmosphere and is located on one or more contiguous or adjacent properties and is owned or operated by the same person or by persons under common control.

(b) As used in OAR 340-028-1900 through 340-028-2000, New Source Review, and the definitions of "BACT", "Commenced", "Construction", "Emission Limitation", Emission Standard", "LAER", "Major Modification", "Major Source", "Potential to Emit", and "Secondary Emissions" as these terms are used for purposes of OAR 340-028-1900 through 340-028-2000, includes all pollutant emitting activities which belong to a single major industrial group (i.e., which have the same two-digit code) as described in the **Standard Industrial Classification Manual**, (U.S. Office of Management and Budget, 1987) or are supporting the major industrial group.

(114) "Source category":

(a) Except as provided in subsection (b) of this section, means all the pollutant emitting activities which belong to the same industrial grouping (i.e., which have the same two-digit code) as described in the **Standard Industrial Classification Manual**, (U.S. Office of Management and Budget, 1987).

(b) As used in OAR 340-028-2400 through 340-028-2550, Major Source Interim Emission Fees, and OAR 340-028-2560 through 340-028-2740, Oregon Title V Operating Permit Fees, means a group of major sources determined by the Department to be using similar raw materials and having equivalent process controls and pollution control equipment.

(115) "Source Test" means the average of at least three test runs during operating conditions representative of the period for which emissions are to be determined, conducted in accordance with the Department's Source Sampling Manual or other Department approved methods.

(116) "Startup" and "shutdown" means that time during which an air contaminant source or emission-control equipment is brought into normal operation or normal operation is terminated, respectively.

(117) "State Implementation Plan" or "SIP" means the State of Oregon Clean Air Act Implementation Plan as adopted by the Commission under OAR 340-020-0047 and approved by EPA.

(118) "Stationary source" means any building, structure, facility, or installation that emits or may emit any regulated air pollutant.

(119) "Substantial Underpayment" means the lesser of ten percent (10%) of the total interim emission fee for the major source or five hundred dollars.

(120) "Synthetic minor source" means a source which would be classified as a major source under OAR 340-028-0110, but for physical or operational limits on its potential to emit air pollutants contained in an ACDP issued by the Department under OAR 340-028-1700 through 340-028-1790.

(121) "Title I modification" means one of the following modifications pursuant to Title I of the FCAA:

(a) A major modification subject to OAR 340-028-1930, Requirements for Sources in Nonattainment Areas;

(b) A major modification subject to OAR 340-028-1935, Requirements for Sources in Maintenance Areas;

(c) A major modification subject to OAR 340-028-1940, Prevention of Significant Deterioration Requirements for Sources in Attainment or Unclassified Areas;

(d) A change which is subject to a New Source Performance Standard under Section 111 of the FCAA; or

(e) A modification under Section 112 of the FCAA.

(122) "Total Suspended Particulate" or "TSP" means particulate matter as measured by the reference method described in **40 CFR Part 50, Appendix B** (July 1, 1996).

(123) "Total Reduced Sulfur" or "TRS" means the sum of the sulfur compounds hydrogen sulfide, methyl mercaptan, dimethyl sulfide, and dimethyl disulfide, and any other organic sulfides present expressed as hydrogen sulfide (H_2S).

(124) "Typically Achievable Control Technology" or "TACT" means the emission limit established on a case-by-case basis for a criteria pollutant from a particular emissions unit in accordance with OAR 340-028-0630. For existing sources, the emission limit established shall be typical of the emission level achieved by emissions units similar in type and size. For new and

modified sources, the emission limit established shall be typical of the emission level achieved by well controlled new or modified emissions units similar in type and size that were recently installed. TACT determinations shall be based on information known to the Department considering pollution prevention, impacts on other environmental media, energy impacts, capital and operating costs, cost effectiveness, and the age and remaining economic life of existing emission control equipment. The Department may consider emission control technologies typically applied to other types of emissions units where such technologies could be readily applied to the emissions unit. If an emission limitation is not feasible, a design, equipment, work practice, or operational standard, or combination thereof, may be required.

(125) "Unavoidable" or "could not be avoided" means events which are not caused entirely or in part by poor or inadequate design, operation, maintenance, or any other preventable condition in either process or control equipment.

(126) "Upset" or "Breakdown" means any failure or malfunction of any pollution control equipment or operating equipment which may cause an excess emission.

(127) "Verified Emission Factor" means an emission factor approved by the Department and developed for a specific major source or source category and approved for application to that major source by the Department.

(128) "Visibility Impairment" means any humanly perceptible change in visual range, contrast or coloration from that which would have existed under natural conditions. Natural conditions include fog, clouds, windblown dust, rain, sand, naturally ignited wildfires, and natural aerosols.

(129) "Volatile Organic Compounds" or "VOC" means any compound of carbon, excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides, or carbonates, and ammonium carbonate, which participates in atmospheric photochemical reactions.

(a) This includes any such organic compound other than the following, which have been determined to have negligible photochemical reactivity: methane; ethane; methylene chloride (dichloromethane); 1,1,1-trichloroethane (methyl chloroform); 1,1,1-trichloro-2,2,2-trifluoroethane (CFC-113); Trichloro-fluoromethane (CFC-11); dichlorodifluoromethane (CFC-12); chlorodifluoromethane (CFC-22); trifluoromethane (FC-23); 1,2-dichloro-1,1,2,2-tetrafluoroethane (CFC-114); chloropenta-fluoroethane (CFC-115); 1,1,1-trifluoro 2,2-dichloroethane (HCFC-123); 1,1,1,2-tetrafluoroethane (HFC-134a); 1,1-dichloro 1-fluoroethane (HCFC-141b); 1-chloro 1,1-difluoroethane (HCFC-142b); 2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124); HCFC 225ca and cb; HFC 43-10mee; pentafluoroethane (HFC-125); 1,1,2,2-tetrafluoroethane (HFC-134); 1,1,1-trifluoroethane (HFC-143a); 1,1-difluoroethane (HFC-152a); acetone; perchloroethylene; and perfluorocarbon compounds which fall into these classes:

(A) Cyclic, branched, or linear, completely fluorinated alkanes;

(B) Cyclic, branched, or linear, completely fluorinated ethers with no unsaturations;

(C) Cyclic, branched, or linear, completely fluorinated tertiary amines with no unsaturations; and

(D) Sulfur containing perfluorocarbons with no unsaturations and with sulfur bonds only to carbon and fluorine.

(b) For purposes of determining compliance with emissions limits, VOC will be measured by an applicable reference method in accordance with the Department's Source Sampling Manual, January, 1992. Where such a method also measures compounds with negligible photochemical reactivity, these negligibly-reactive compounds, as listed in subsection (a), may be excluded as VOC if the amount of such compounds is accurately quantified, and such exclusion is approved by the Department.

(c) As a precondition to excluding these compounds, as listed in subsection (a), as VOC or at any time thereafter, the Depart-ment may require an owner or operator to provide monitoring or testing methods and results demonstrating, to the satisfaction of the Department, the amount of negligibly-reactive compounds in the source's emissions.

[ED. NOTE: The Table(s) referenced in this rule is not printed in the OAR Compilation. Copies are available from the agency.]

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the EQC under OAR 340-020-047.]

Stat. Auth.: ORS 468.020

Stats. Implemented: ORS 468A.025

Hist.: DEQ 47, f. 8-31-72, ef. 9-15-72; DEQ 63, f. 12-20-73, ef. 1-11-74; DEQ 107, f. & ef. 1-6-76; Renumbered from 340-20-033.04; DEQ 25-1981, f. & ef. 9-8-81; DEQ 5-1983, f. & ef. 4-18-83; DEQ 18-1984, f. & ef. 10-16-84; DEQ 8-1988, f. &cert. ef. 5-19-88 (and corrected 5-31-88); DEQ 14-1989, f. & cert. ef. 6-26-89; DEQ 42-1990, f. 12-13-90, cert. ef. 1-2-91; DEQ 2-1992, f. & cert. ef. 1-30-92; DEQ 7-1992, f. & cert. ef. 3-30-92; DEQ 27-1992, f. & cert. ef. 11-12-92; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 12-1993, f. & cert. ef. 9-24-93; Renumbered from 340-20-145, 340-20-225, 340-20-305, 340-20-355, 340-20-460 & 340-20-520; DEQ 19-

1993, f. & cert. ef. 11-4-93; DEQ 20-1993(Temp), f. & cert. ef. 11-4-93; DEQ 13-1994, f. & cert. ef. 5-19-94; DEQ 21-1994, f. & cert. ef. 10-14-94; DEQ 24-1994, f. & cert. ef. 10-28-94; DEQ 10-1995, f. & cert. ef. 5-1-95; DEQ 12-1995, f. & cert. ef. 5-23-95; DEQ 22-1995, f. & cert. ef. 10-6-95; DEQ 19-1996, f. & cert. ef. 9-24-96; DEQ 22-1996, f. ; DEQ 9-1997, f. & cert. ef. 5-9-97

Requirement for Plant Site Emission Limits

340-028-1010

(1) PSELs shall be incorporated in all ACDPs and Oregon Title V Operating Permits, except as provided in Section (3) of this rule. ~~minimal source permits insignificant discharge permits~~, as a means of managing airshed capacity. Except as provided in OAR 340-028-1050 or 340-028-1060, all ~~s~~Sources subject to regular ~~p~~Permit requirements shall be subject to PSELs for all ~~r~~Regulated ~~p~~Pollutants. PSELs will be incorporated in ~~p~~Permits when ~~p~~Permits are ~~r~~Renewed, modified, or newly issued.

(2) The ~~e~~Emissions ~~l~~Limits established by PSELs shall provide the basis for:

(a) Assuring reasonable further progress toward attaining compliance with ambient air standards;

(b) Assuring that compliance with ambient air standards and Prevention of Significant Deterioration ~~i~~Increments are being maintained;

(c) Administering ~~o~~Offset, banking and bubble programs;

(d) Establishing the baseline for tracking consumption of Prevention of Significant Deterioration Increments.

(3) PSELs shall not be required for:

(a) Insignificant discharge ~~p~~Permits issued under OAR 340-028-1720(7);

(b) Minimal source ~~p~~Permits issued under OAR 340-028-1720(8); or

(c) General ~~p~~Permits issued under OAR 340-028-1725 for sources that:

(A) qualify for an insignificant discharge ~~p~~Permit or minimal ~~s~~Source ~~p~~Permit; or

(B) are not listed in OAR 340-028-1750 Table 4 but elect to obtain a ~~s~~Synthetic ~~m~~Minor ~~p~~Permit.

[**NOTE:** This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the EQC under OAR 340-020-0047.]
Stat. Auth.: ORS Ch. 468 & 468A
Stats Implemented: ORS 468.020 & 468A.025
Hist.: DEQ 25-1981, f. & ef. 9-8-81; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from OAR 340-020-0301, DEQ 13-1993, f. & ef. 9-24-93; DEQ 19-1993, f. & ef. 11-4-93; DEQ 22-1995, f. & ef. 10-6-95

General Air Contaminant Discharge Permits

340-028-1725

(1) Applicability. The Department may issue ~~g~~General ~~p~~Permits for categories of ~~s~~Sources where individual ~~p~~Permits are not necessary in order to adequately protect the environment. Before the Department can issue a ~~g~~General ~~p~~Permit, the following conditions must be met:

(a) There are several ~~s~~Sources which involve the same or substantially similar types of operations;

(b) All applicable requirements can be contained in a ~~g~~General ~~p~~Permit;

(c) The ~~e~~Emission ~~l~~Limitations, monitoring, recordkeeping, reporting and other enforceable conditions are the same;

(d) The pollutants emitted are the same; and

(e) A ~~p~~Plant ~~s~~Site ~~e~~Emission ~~l~~Limit is not required.

(2) Public notice. Prior to issuing a ~~g~~General ~~p~~Permit, the Department will provide public notice of the proposed ~~p~~Permit conditions for each ~~s~~Source ~~c~~Category according to the procedures outlined in OAR 340-028-1710 and the following:

(a) Notice shall be given by publication in a newspaper of general circulation in the state and in areas where potential applicants are known to be located, or in a Department publication designed to give general public notice, and by other means if necessary to ensure adequate public notice.

(b) The notice shall be provided to persons on a Department mailing list and others who submit a written request for notification.

(c) The notice shall include the information required by OAR 340-11-007 and the following:

(A) the name, address and telephone number of the Department contact from whom interested persons may obtain additional information;

(B) copies of the draft ~~p~~Permit or equivalent summary; and

(C) a brief description of the procedures to request a hearing or the time and place of any hearing that has been scheduled.

(3) Permit issuance.

(a) The Department will follow the ~~p~~Permit issuance procedures outlined in OAR 340-14-025 for issuing a ~~g~~General ~~P~~permit for a ~~s~~Source ~~c~~Category.

(b) The Department may revoke a ~~g~~General ~~p~~Permit if conditions or standards have changed so the ~~p~~Permit no longer meets the requirements of this rule.

(4) Source assignment.

(a) Any ~~s~~Source wishing to obtain a ~~g~~General ~~p~~Permit shall submit a written application on a form provided by the Department along with the fee specified in the ~~p~~Permit.

(b) The Department will assign a ~~s~~Source to a ~~g~~General ~~p~~Permit for the term of the ~~p~~Permit if:

(A) the ~~s~~Source meets the qualifications specified in the ~~p~~Permit;

(B) the Department determines that the ~~s~~Source has not had compliance problems; and

(C) the Department determines that the ~~s~~Source would be appropriately regulated by a ~~g~~General ~~p~~Permit.

(c) Assignment of a ~~s~~Source to a ~~g~~General ~~p~~Permit is not subject to public notice requirements, but the Department will make an updated list of ~~s~~Sources assigned to a ~~s~~Source ~~c~~Category available for public review.

(d) The Department may revoke a ~~s~~Source's assignment to a ~~g~~General ~~p~~Permit if the ~~s~~Source no longer meets the requirements of this rule or the conditions of the ~~p~~Permit.

[**NOTE:** This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the EQC under OAR 340-020-0047.]

Stat. Auth.: ORS Ch. 468 & 468A

340-028-1740
Synthetic Minor Sources

(1) Enforceable conditions to limit a ~~s~~Source's ~~p~~Potential ~~t~~To ~~e~~Emit shall be included in the ACDP for a ~~s~~Synthetic ~~m~~Minor ~~s~~Source. Enforceable conditions, in addition to the PSEL ~~established~~if required under OAR 340-028-1000 through 340-028-1060, shall include one or more of the following physical or operational limitations but in no case shall exceed the conditions used to establish the PSEL:

(a) Restrictions on hours of operation;

(b) Restrictions on levels of production;

(c) Restrictions on the type or amount of material combusted, stored, or processed;

(d) Additional air pollution control equipment; or

(e) Other limitations on the capacity of a ~~s~~Source to emit air pollutants.

(2) The reporting and monitoring requirements of the conditions which limit the potential to emit contained in the ACDP of synthetic minor sources shall meet the requirements of OAR 340-028-1100 through 340-028-1140.

(3) To avoid being required to submit an application for an Oregon Title V Operating Permit, the owner or operator of a major source shall obtain an ACDP or a modification to an ACDP containing conditions that would qualify the source as a synthetic minor source before the owner or operator would be required to submit an Oregon Title V Operating Permit application.

(4) Applications for synthetic minor source status shall be subject to notice procedures of OAR 340-028-1710.

(5) Synthetic minor source owners or operators who cause their source to be subject to the Oregon Title V Operating Permit program by requesting an increase in the source's potential to emit, when that increase uses the source's existing capacity and does not result from construction or modification, shall:

(a) Become subject to OAR 340-028-2100 through 340-028-2320;

(b) Submit an Oregon Title V Operating Permit application pursuant to OAR 340-028-2120; and

(c) Receive an Oregon Title V Operating Permit before commencing operation in excess of the enforceable condition to limit potential to emit.

(6) Synthetic minor source owners or operators who cause their source to be subject to the Oregon Title V Operating Permit program by requesting an increase in the source's potential to emit, when that increase is the result of construction or modification, shall:

(a) Submit an application for the modification of the existing ACDP;

(b) Receive the modified ACDP before beginning construction or modification;

(c) Become subject to OAR 340-028-2100 through 340-028-2320; and

(d) Submit an Oregon Title V Operating Permit application under OAR 340-028-2120 to obtain an Oregon Title V Operating Permit within 12 months after initial startup of the construction or modification.

(7) Synthetic minor sources that exceed the limitations on potential to emit are in violation of OAR 340-028-2110(1)(a).

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the EQC under OAR 340-020-0047.]

Stat. Auth.: ORS Ch. 468 &468A

Stats. Implemented: ORS Ch. 468 & 468A

Hist.: DEQ 12-1993, f. & cert. ef. 9-24-93; DEQ 19-1993, f. & cert. ef. 11-4-93; DEQ 22-1995, f. &cert. ef. 10-6-95

Fees and Permit Duration

340-028-1750 (1) All persons required to obtain a permit shall be subject to a three part fee consisting of a uniform non-refundable filing fee of $98, an application processing fee, and an annual compliance determination fee which are determined by applying Table 4, Part II. The amount equal to the filing fee, application processing fee, and the annual compliance determination fee shall be submitted as a required part of any application for a new permit. The amount equal to the filing fee and the application processing fee shall be submitted with any application for modification of a permit.

(2) The fee schedule contained in the listing of air contaminant sources in Table 4 shall be applied to determine the fees for ACDP user fees (Table 4, Part I.) and ACDP fees (Table 4, Part II.) on a Standard Industrial Classification (SIC) plant site basis.

(3) Modifications of existing, unexpired permits which are instituted by the Department or Regional Authority due to changing conditions or standards, receipts or additional information, or any other reason pursuant to applicable statutes and do not require refiling or review of an application or plans and specifications shall not require submission of the filing fee or the application processing fee.

(4) Applications for multiple-source permits received pursuant to OAR 340-028-1730 shall be subject to a single $98 filing fee. The application processing fee and annual compliance determination fee for multiple-source permits shall be equal to the total amounts required by the individual sources involved, as listed in Table 4.

(5) The annual compliance determination fee shall be paid at least 30 days prior to the start of each subsequent permit year. Failure to timely remit the annual compliance determination fee in accordance with the above shall be considered grounds for not issuing a permit or revoking an existing permit.

(6) If a permit is issued for a period less than one (1) year, the applicable annual compliance determination fee shall be equal to the full annual fee. If a permit is issued for a period greater than 12 months, the applicable annual compliance determination fee shall be prorated by multiplying the annual compliance determination fee by the number of months covered by the permit and dividing by twelve (12).

(7) In no case shall a permit be issued for more than ten (10) years, except for synthetic minor

source permits which shall not be issued for more than five (5) years.

(8) Upon accepting an application for filing, the filing fee shall be non-refundable.

(9) When an air contaminant source which is in compliance with the rules of a permit issuing agency relocates or proposes to relocate its operation to a site in the jurisdiction of another permit issuing agency having comparable control requirements, application may be made and approval may be given for an exemption of the application processing fee. The permit application and the request for such fee reduction shall be accompanied by:

(a) A copy of the permit issued for the previous location; and

(b) Certification that the permittee proposes to operate with the same equipment, at the same production rate, and under similar conditions at the new or proposed location. Certification by the agency previously having jurisdiction that the source was operated in compliance with all rules and regulations will be acceptable should the previous permit not indicate such compliance.

(10) If a temporary or conditional permit is issued in accordance with adopted procedures, fees submitted with the application for an ACDP shall be retained and be applicable to the regular permit when it is granted or denied.

(11) All fees shall be made payable to the permit issuing agency.

(12) Pursuant to ORS 468A.135, a regional authority may adopt fees in different amounts than set forth in Table 4 provided such fees are adopted by rule and after hearing and in accordance with ORS 468.065(2).

(13) Sources which are temporarily not conducting permitted activities, for reasons other than regular maintenance or seasonal limitations, may apply for use of a modified annual compliance determination fee in lieu of an annual compliance determination fee determined by applying Table 4. A request for use of the modified annual compliance determination fee shall be submitted to the Department in writing along with the modified annual compliance determination fees on or before the due date of the annual compliance determination fee. The modified annual compliance determination fee shall be $539.

(14) Owners or operators who have received Department approval for payment of a modified annual compliance determination fee shall obtain authorization from the Department prior to resuming permitted activities. Owners or operators shall submit written notification to the Department at least thirty (30) days before startup specifying the earliest anticipated startup date, and accompanied by:

(a) Payment of the full annual compliance determination fee determined from Table 4 if greater than six (6) months would remain in the billing cycle for the source, or

(b) Payment of 50% of the annual compliance determination fee determined from Table 4 if six (6) months or less would remain in the billing cycle.

(15) Fees for ~~g~~General ~~p~~Permits.

(a) The fees for ~~s~~Source assignment to a ~~g~~General ~~p~~Permit shall be seventy-five percent of the applicable fees in Table 4, OAR 340-028-1750 except as provided in Subsection (d) of this Section. Fees shall be specified in the ~~p~~Permit.

(b) The Department may provide in the ~~p~~Permit that the annual compliance determination fee in OAR 340-028-1750 Table 4 shall be paid annually or at less frequent intervals.

(c) For initial assignment to a ~~g~~General ~~p~~Permit, the fees shall be prorated to the next highest full year for the remaining life of the ~~p~~Permit.

(d) Exceptions.

(A) The filing fee and compliance determination fee required by OAR 340-028-1750 Table 4 shall not be reduced.

(B) The initial permitting or construction fees required in OAR 340-028-1750 Table 4 shall not apply.

[**NOTE:** This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the EQC under OAR

340-020-0047.]
Statutory Authority: ORS 468.020
Stat. Implemented: 468A.
Hist.: DEQ 47, f. 8-31-72, ef. 9-15-72; DEQ 63, f. 12-20-73, ef. 1-11-74; DEQ 107, f. & ef. 1-6-76; Renumbered from 340-020-0033.12; DEQ 125, f. & ef. 12-16-76; DEQ 20-1979, f. & ef. 6-29-79; DEQ 11-1983, f. & ef. 5-31-83; DEQ 6-1986, f. & ef. 3-26-86; DEQ 12-1987, f. & ef. 6-15-87; DEQ 17-1990, f. & cert. ef. 5-25-90; AQ 4-1992, f. & ef. 12-2-91; AQ 1-1993, f. & ef. 3-9-93; Renumbered from OAR 340-020-0165; AQ 9-1993, f & ef. 9-24-93; AQ 11-1993 Temp., f. & ef. 11-2-93; DEQ 13-1994, f. & ef. 5-19-94; DEQ 21-1994, f. & ef. 10-14-94; DEQ 22-1994, f. & ef. 10-14-94; DEQ 22-1995, f. & ef. 10-6-95

Applicability

340-028-2110

(1) OAR 340-028-2100 through 340-028-2320 apply to the following sources:

(a)Any major source;

(b)Any source, including an area source, subject to a standard, limitation, or other requirement under section 111 of the FCAA;

(c)Any source, including an area source, subject to a standard or other requirement under section 112 of the FCAA, except that a source is not required to obtain a permit solely because it is subject to regulations or requirements under section 112(r) of the FCAA;

(d)Any affected source under Title IV; and

(e)Any source in a source category designated by the Commission pursuant to OAR 340-028-2110.

(2) The owner or operator of a source with an Oregon Title V Operating Permit whose potential to emit later falls below the emission level that causes it to be a major source, and which is not otherwise required to have an Oregon Title V Operating Permit, may submit a request for revocation of the Oregon Title V Operating Permit. Granting of the request for revocation does not relieve the source from compliance with all applicable requirements or ACDP requirements.

(3) Synthetic minor sources.

(a)A source which would otherwise be a major source subject to OAR 340-028-2100 through 340-028-2320 may choose to become a synthetic minor source by limiting its emissions below the emission level that causes it to be a major source through production or operational limits contained in an ACDP issued by the Department under 340-028-1700 through 340-028-1790.

(b) The reporting and monitoring requirements of the emission limiting conditions contained in the ACDPs of synthetic minor sources issued by the Department under 340-028-1700 through 340-028-1790 shall meet the requirements of OAR 340-028-1100 through 340-028-1140.

(c) Synthetic minor sources who request to increase their potential to emit above the major source emission rate thresholds shall become subject to OAR 340-028-2100 through 340-028-2320 and shall submit a permit application under OAR 340-028-2120 in accordance with OAR 340-028-1740.

(d) Synthetic minor sources that exceed the limitations on potential to emit are in violation of OAR 340-028-2110(1)(a).

(4) Source category exemptions.

(a) The following source categories are exempted from the obligation to obtain an Oregon Title V Operating Permit:

(A) All sources and source categories that would be required to obtain a permit solely because they are subject to 40 CFR part 60, Subpart AAA - Standards of Performance for New Residential Wood Heaters; and

(B) All sources and source categories that would be required to obtain a permit solely because they are subject to 40 CFR part 61, Subpart M - National Emission Standard for Hazardous Air Pollutants for Asbestos, section 61.145, Standard for Demolition and Renovation

(b) Permit deferral. A sSource with the pPotential tTo eEmit at or above mMajor sSource thresholds need not apply for an Oregon Title V Operating Permit or obtain a sSynthetic mMinor pPermit before DecemberJuly 2531, 19989 if the sSource maintains aActual eEmissions below 50 percent of those

thresholds for every consecutive twelve month period ~~between~~since January 25, 1994 ~~and 1998,~~ and is not otherwise required to obtain an Oregon Title V Operating Permit or ~~s~~Synthetic ~~m~~Minor ~~p~~Permit.

(A) The owner or operator of a source electing to defer permitting under this paragraph shall maintain on site records adequate to demonstrate that actual emissions for the entire source are below 50 percent of major source thresholds.

(B) Recorded information shall be summarized in a monthly log, maintained for five years, and be available to Department and EPA staff on request.

(c) All sources listed in OAR 340-028-2110(1) that are not major sources, affected sources, or solid waste incineration units required to obtain a permit pursuant to section 129(c) of the FCAA, are exempted by the Department from the obligation to obtain an Oregon Title V Operating Permit.

(d) Any source listed in OAR 340-028-2110(1) exempt from the requirement to obtain a permit under this rule may opt to apply for an Oregon Title V Operating Permit.

(5) Emissions units and Oregon Title V Operating Permit program sources.

(a)For major sources, the Department shall include in the permit all applicable requirements for all relevant emissions units in the major source, including any equipment used to support the major industrial group at the site.

(b)For any nonmajor source subject to the Oregon Title V Operating Permit program under OAR 340-028-2110(1) and not exempted under OAR 340-028-2110(4), the Department shall include in the permit all applicable requirements applicable to emissions units that cause the source to be subject to the Oregon Title V Operating Permit program.

(6) Fugitive emissions. Fugitive emissions from an Oregon Title V Operating Permit program source shall be included in the permit application and the permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source.

(7) Insignificant activity emissions. All emissions from insignificant activities, including categorically insignificant activities and aggregate insignificant emissions, shall be included in the determination of the applicability of any requirement.

(8) Oregon Title V Operating Permit program sources that are required to obtain an ACDP, OAR 340-028-1700 through 340-028-1790, or a Notice of Approval, OAR 340-028-2270, because of a Title I modification, shall operate in compliance with the Oregon Title V Operating Permit until the Oregon Title V Operating Permit is revised to incorporate the ACDP or the Notice of Approval for the Title I modification.

Stat. Auth.: ORS Ch. 468 & 468A
Stats Imp.: ORS 468.020 & 468A.025
Hist.: DEQ 13-1993, f. & ef. 9-24-93; DEQ 24-1994, f. & ef. 10-28-94; DEQ 22-1995, f. & ef. 10-6-95; DEQ 24-1995, f. & ef. 10-11-95; DEQ 1-1997, f. & cert. ef. 01-21-97.

NOTICE OF PROPOSED RULEMAKING HEARING

Department of Environmental Quality

OAR Chapter 340-028-1010;340-028-1725;340-028-1740; 340-028-1750;340-028-2110

DATE:	TIME:	LOCATION:
May 18, 1998	3:00 p.m.	DEQ Headquarters: 811 SW 6th Rm 3a Portland, Oregon

HEARINGS OFFICER(s): Mark Fisher

STATUTORY AUTHORITY: ORS 468A.040 (Permits); ORS 468.065 (Issuance of permits)
or **OTHER AUTHORITY:**
STATUTES IMPLEMENTED: **ORS 468A.040; ORS 468.065**

ADOPT: 340-028-1725

AMEND: 340-028-1010; 340-028-1740; 340-028-1750; 340-028-2110

REPEAL:

RENUMBER:
(prior approval from Secretary of State REQUIRED)

AMEND & RENUMBER: **New number: 340-028-1725**
(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 rulemaking would 1) delete a Title V deferral expiration date of 7/25/98 from existing rules and 2) create a new "general" Air Contaminant Discharge permit category for low emitting sources.

LAST DATE FOR COMMENT: May 22, 1998 at 5:00 p.m.

AGENCY RULES COORDINATOR: Susan M. Greco, (503) 229-5213
AGENCY CONTACT FOR THIS PROPOSAL: Kathleen Craig (503) 229-6833
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.

Lydia Taylor
Signature

4/14/98
Date

Attachment B2

Fiscal and Economic Impact Statement

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for

Extension of Title V Deferral for Low Emitting Sources and
Creation of General Air Contaminant Discharge Permit Category

Introduction

The proposed rule changes will extend a Title V deferral for certain low emitting sources, and will allow the Department to issue a general Air Contaminant Discharge permit (ACDP) at a lower cost than existing permits to qualifying low emitting sources. Fees for general permits are based on an anticipated reduction in workload. General permit fees are proposed as follows:

Seventy-five percent of regular ACDP fees for the appropriate source category which currently ranges from $300 - 9000. The majority of regular ACDP sources is assessed between $1200 - 4000. General synthetic minor permit fees will be seventy-five percent of the current regular synthetic minor permit fee of $1900, with the same compliance determination fee of $1000. General permits will be assessed the same fees as regular ACDP sources for compliance determination and filing fees. General permits will not be assessed initial permitting or construction fees, which currently range from $2000 for a simple source to $22,000 for a complex source.

The fiscal and economic impact of creating a general ACDP permit category is difficult to quantify since the exact universe of sources that general ACDP permits could be applied to is unknown. Potential candidates for a general ACDP would include low emitting sources that are: unpermitted existing sources that require a permit, unpermitted new sources, and sources currently on minimal or regular synthetic minor permits. None of the numbers associated with any of these categories can be estimated with any certainty in advance. In addition, since an applicant can voluntarily request a general ACDP in lieu of another permit, it is difficult to know how many sources will qualify for a general ACDP, whether there will be a sufficient number in any source category to justify issuing a general ACDP, how many source categories will be issued a general ACDP or when in the permit cycle sources will be assigned to a general permit. General permit fees for unpermitted sources represents a cost to affected sources; but these fees will be assessed at a lower rate than what would have been assessed if these sources had been issued a minimal or regular synthetic minor permit.

The following outlines the general fiscal and economic impacts to the public, small and large businesses, local government, and state agencies including impacts to the Department.

General Public

No direct fiscal or economic impacts, although a reduced workload associated with general permits may allow the Department to use existing resources to address other high priority air quality work.

Small Business

The fiscal and economic impact of extending the Title V deferral is beneficial to small businesses that qualify for the deferral. The fiscal and economic impact of issuing a general permit is also beneficial to qualifying small businesses due to reduced permit fees.

Large Business

While general ACDP permits will be issued to low emitting sources which typically are small businesses, some low emitting sources may be large businesses, such as a source with major potential to emit that desires a synthetic minor permit. A general permit will benefit qualifying large businesses due to reduced permit fees.

Local Governments

Some local governments operate low emitting sources that could qualify for a general permit, such as schools with space heating boilers. Local governments that qualify for a general permit will benefit because of reduced permit fees.

State Agencies

DEQ:

This rule will be implemented through existing air quality permitting programs. Once established, issuance of general permits should decrease Department workload, which should offset any reduction in permit fees over existing fees thereby resulting in a revenue neutral action.

Other state agencies:

This rule is not anticipated to have fiscal or economic impacts on other state agencies relative to the existing permitting program.

Housing Cost Impact Statement

The Department has determined that this rulemaking will have no effect on the cost of development of a 6000 square foot parcel or the construction of a 1200 square foot detached single family dwelling on that parcel.

Attachment B3

Land Use Evaluation Statement

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for

Extension of Title V Deferral for Low Emitting Sources and
Creation of General Air Contaminant Discharge Permit Category

1. **Explain the purpose of the proposed rules.**

The Department proposes to adopt new rules to extend a deferral from Title V for certain low emitting sources, and to create a new Air Contaminant Discharge Permit (ACDP) "general" permit to be used for low emitting sources with the same applicable requirements.

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:**

   The Department's stationary source permitting program.

   b. **If yes, do the existing statewide goal compliance and local plan compatibility procedures adequately cover the proposed rules?**

   Yes X No __ (if no, explain):

   The proposed rules would be implemented through the Department's existing stationary source permitting program which requires a confirmation of a local government land use determination before a DEQ permit is issued.

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.**
   Not applicable

Gregory A. Green
Division

Intergovernmental Coord.

4/9/98
Date

Attachment B4

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?

Yes. EPA will allow states to continue deferring sources with major potential to emit but low actual emissions from Title V until December 31, 1999.

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?

Yes

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?

Yes. A part of the rulemaking would give the Department the authority to issue general ACDP permits which represent an efficient, cost effective permitting tool for sources with low emissions and good compliance records.

5. Is there a timing issue which might justify changing the time frame for implementation of federal requirements?

There are sources that are subject to permit requirements which could be issued a general ACDP. Issuing a general ACDP instead of a regular ACDP could streamline the permitting and minimize workload.

5. Is there a timing issue which might justify changing the time frame for implementation of federal requirements?

The Title V deferral expires on 7/25/98. If the deferral is not extended, a number of small businesses with major potential to emit would be subject to Title V and may face potential violations if a Title V application is not received by the deferral expiration date.

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)

Not applicable

8. Would others face increased costs if a more stringent rule is not enacted?

Sources presently under the deferral would face increased costs if this rule change was not adopted. In addition, sources that are subject to regular ACDP permits that could qualify for a general permit would face increased costs if the rule allowing the Department to issue a general permit is not adopted.

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?

Creating a general ACDP permit authority will give the Department a more efficient permit tool which may result in a reduced workload which could allow existing resources to be used for other high priority air quality work.

Attachment B5

State of Oregon
Department of Environmental Quality **Memorandum**

Date: April 13, 1998

To: Interested Parties and Affected Public

Subject: Rulemaking Proposal and Rulemaking Statements

Extend Title V deferral for small sources and create a "general" Air Contaminant Discharge (ACDP) Permit category

This memorandum contains information on a proposal by the Department of Environmental Quality (DEQ) to adopt new rules/rule amendments regarding an extension of a deferral from Title V permitting for certain low emitting sources and creating a general ACDP permit category. Pursuant to ORS 183.335, this memorandum also provides information about the Environmental Quality Commission's intended action to adopt a rule.

The U.S. Environmental Protection Agency (EPA) has indicated that it will allow states to continue deferring sources with major potential to emit but low actual emissions from Title V until the federal requirements for limiting potential to emit are clarified. Part of this rulemaking would delete the deferral expiration date of 7/25/98 which currently exists in the rules, to extend the deferral in Oregon. In addition, this rulemaking would create a new permit category for "general" ACDP permits that may be issued for a source category where the same requirements apply to a number of sources. General permits would be restricted to sources with low emissions and good compliance records.

General permits would be used to establish a source category with the same "synthetic minor" condition for a number of sources. In addition, general permits may be issued to other low emitting sources that presently qualify for minimal source or insignificant discharge permits. This would allow the issuance of one general permit per source category which could be applied to a number of qualifying sources, versus issuing a number of identical permits for these sources.

The Department has the statutory authority to address this issue under ORS 468A.040 (Permits) and ORS 468.065 (Issuance of Permits).

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).

Hearing Process Details

You are invited to review these materials and present written or oral comment in accordance with the following:

May 18, 1998, 3:00 p.m., DEQ Headquarters: 811 SW Sixth Avenue Rm 3a. Portland, Oregon

Deadline for submittal of Written Comments: May 22, 1998

In accordance with ORS 183.335(13), no comments from any party may 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.

Mark Fisher will be the Presiding Officer at the hearing. Following the 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 and all written comments submitted. The public hearing will be tape recorded, but the tape will not be transcribed.

If you wish to be kept advised of this proceeding and receive a copy of the recommendation that is presented to the EQC for adoption, you should request that your name be placed on the mailing list for this rulemaking proposal.

What Happens After the Public Comment Period Closes

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 August 7, 1998. *Please note that this date is tentative and may change.* If you want to be notified of the confirmed date/time/place, please contact the individual listed at the end of this report. 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 or ask to be notified of the proposed final action on this rulemaking proposal.

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 expects testimony and comment on proposed rules to be presented **during** the hearing process so that full consideration by the Department may occur before a final recommendation is made. In accordance with ORS 183.335(13), no comments can be accepted after the public comment period has closed by either the EQC or the Department. Thus the EQC strongly encourages people with concerns regarding the proposed rule to communicate those concerns to the Department prior to the close of the public comment period so that an effort may be made to understand the issues and develop options for resolution where possible.

Background on Development of the Rulemaking Proposal

Why is there a need for the rule?

There are two parts to this rulemaking. The first part extends a Title V deferral for certain small sources, and the second part creates a new "general" Air Contaminant Discharge Permit category.

Title V applies to major sources including sources that emit or have the potential to emit ≥ 100 tons per year (tpy) of a criteria pollutant, ≥ 10 tpy of any individual hazardous air pollutant or ≥ 25 tpy of any combination of hazardous air pollutants. There are a number of sources that have the potential to emit at major levels but historically have had low actual emissions, and are unlikely to emit at major levels due to operational constraints. These sources are subject to Title V unless they become synthetic minor sources by accepting enforceable limits on their potential to emit. EPA established a transitional policy to allow a deferral from Title V for these sources to give states time to incorporate them into the Title V program or to issue synthetic minor limitations. Oregon adopted the deferral with an expiration date of 7/25/98. This part of the rulemaking is needed to extend the deferral because more time is needed to issue synthetic minor or Title V permits for these small sources.

The second part of the rulemaking is needed to give the Department a more efficient tool to issue a general permit to a source category where the same requirements apply to a number of sources. Issuing individual permits makes sense for complicated sources with unique requirements, it is inefficient for small sources with the same requirements. General permits will only be used for source categories of sources where individual permits are not necessary in order to adequately protect the environment.

How was the rule developed

The rule was developed by Department staff based on a model of general permits in other DEQ programs. An advisory committee was not involved in the rulemaking, but the proposed rule was presented at a stakeholders meeting on March 4, 1998 which included invitations to representatives from the public, industry, and environmental interests. Copies of the documents relied upon in the development of this rulemaking proposal can be reviewed at DEQ's office at 811 SW Sixth Avenue, Portland, Oregon. Please contact the staff person noted at the end of this memo 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?

Deleting the expiration date of the Title V deferral provides a benefit to sources with the potential to emit at major levels, whose actual emissions are low. Until the deferral expires, these sources are not required to get a Title V permit. Establishing a general permit allows low emitting sources that qualify for a minimal or insignificant discharge permit, reduced permit fees and faster permit issuance. The public is affected by the proposed general permit with a change in the opportunity to comment. Currently the public has the opportunity to comment on individual permits. With a general permit, the public will be noticed, and will have opportunity to comment only when a source category is proposed, and will not be noticed as each source is "assigned" to a general permit.

How will the rule be implemented

A workgroup consisting of Department staff is involved in developing new guidance for 1) how to implement general permits and 2) calculating potential to emit for certain sources that may have potential to emit at major levels, but have low actual emissions. The results of the calculations will determine Title V applicability. In addition, existing guidance which specifies the tonnage threshold for sources that qualify for minimal permits, will be relied upon to determine which sources qualify for general permits. Training will be provided to permit writers when the new guidance is completed.

Are there time constraints

The Title V deferral language expires on 7/25/98. If the deferral is not extended, a number of small businesses, with major potential to emit yet low actual emissions may be subject to Title V, and could potentially face violations if Title V applications are not received by the deferral expiration deadline.

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 Kathleen Craig, Oregon Department of Environmental Quality, 811 SW Sixth Avenue, Portland, Oregon 97204 (503) 229-6833. In Oregon: 1-800-452-4011

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Attachment C

State of Oregon
Department of Environmental Quality Memorandum

Date: May 28, 1998

To: Environmental Quality Commission

From: Mark Fisher

Subject: Presiding Officer's Report for Rulemaking Hearing
Hearing Date and Time: May 18, 1998, beginning at 3:00 p.m.
Hearing Location: 811 SW 6th Ave. Room 10A, Portland, OR

Title of Proposal: Title V small source deferral and general permit

The rulemaking hearing on the above titled proposal was convened at 3:00 p.m.. The hearing officer and rule writer were both present but no one else showed up for the hearing.

There was no testimony and the hearing was closed at 3:30 p.m.

Attachment D

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal for
Extending the Title V Deferral and
Creating General Air Contaminant Discharge Permit (ACDP)

Rule Implementation Plan

Summary of the Proposed Rule

These rulemakings will extend a Title V deferral for certain small sources until December 31, 1999 and will create new authority for the Department to issue general ACDP's for small sources meeting certain criteria.

Proposed Effective Date of the Rule

August 7, 1998

Proposal for Notification of Affected Persons

State-wide public notice will be issued each time a general ACDP is proposed to allow for public comment. The Department will do an outreach to qualifying sources once a permit is issued.

Proposed Implementing Actions

The Department has developed the application forms, cover letter, public notice, assignment and compliance checklists for the first set of general ACDP's proposed to be issued. Computer support staff modified the Department's permit data system to accomodate general ACDP's and staff responsible for small business technical assistance will conduct workshops to brief sources on the first round of general ACDP's.

Proposed Training/Assistance Actions

Permit writers will be briefed on the general ACDP rules at the next regularly scheduled training meeting.

Attachment E
Changes to Proposed Rule Language
Since Hearing Authorization

Summary of changes since hearing authorization:

340-028-1740
Synthetic Minor Sources
(1) Enforceable conditions to limit a ~~s~~Source's ~~p~~Potential to ~~e~~Emit shall be included in the ACDP for a ~~s~~Synthetic ~~m~~Minor ~~s~~Source. Enforceable conditions, in addition to the PSEL ~~established~~ if required under OAR 340-028-1000 through 340-028-1060...

340-028-1750
Fees and Permit Duration
(15) Fees for ~~g~~General ~~p~~Permits
(b) The Department may provide in the ~~p~~Permit that the annual compliance determination fee...shall be paid ~~once every five years~~less frequently than annually.

340-028-2110
Applicability
(b) Permit Deferral. A ~~s~~Source with the ~~p~~Potential ~~t~~To ~~e~~Emit at or above ~~m~~Major ~~s~~Source thresholds need not apply for an Oregon Title V Operation ~~p~~Permit or obtain a ~~s~~Synthetic ~~m~~Minor ~~p~~Permit before December 31, 1999 if the ~~s~~Source maintains ~~a~~Actual ~~e~~Emissions below 50 percent of those thresholds for every consecutive twelve month period ~~beginning~~ since January 24, 1994...

The following changes include the above changes and include initial capitalization of defined terms:

Requirement for Plant Site Emission Limits

340-028-1010

(1) PSELs shall be incorporated in all ACDPs and Oregon Title V Operating Permits, except as provided in Section (3) of this rule. ~~minimal source permits insignificant discharge permits~~, as a means of managing airshed capacity. Except as provided in OAR 340-028-1050 or 340-028-1060, all ~~s~~Sources subject to regular ~~p~~Permit requirements shall be subject to PSELs for all ~~r~~Regulated ~~p~~Pollutants. PSELs will be incorporated in ~~p~~Permits when ~~p~~Permits are ~~r~~Renewed, modified, or newly issued.

(2) The ~~e~~Emissions ~~l~~Limits established by PSELs shall provide the basis for:

(a) Assuring reasonable further progress toward attaining compliance with ambient air standards;

(b) Assuring that compliance with ambient air standards and Prevention of Significant Deterioration ~~i~~Increments are being maintained;

(c) Administering ~~o~~Offset, banking and bubble programs;

(d) Establishing the baseline for tracking consumption of Prevention of Significant Deterioration Increments.

(3) PSELs shall not be required for:

(a) Insignificant discharge ~~p~~Permits issued under OAR 340-028-1720(7);

(b) Minimal source ~~p~~Permits issued under OAR 340-028-1720(8); or

(c) General ~~p~~Permits issued under OAR 340-028-1725 for sources that:

(A) qualify for an insignificant discharge ~~p~~Permit or minimal ~~s~~Source ~~p~~Permit; or

(B) are not listed in OAR 340-028-1750 Table 4 but elect to obtain a ~~s~~Synthetic ~~m~~Minor ~~p~~Permit.

[**NOTE:** This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the EQC under OAR 340-020-0047.]

Stat. Auth.: ORS Ch. 468 & 468A

Stats Implemented: ORS 468.020 & 468A.025

Hist.: DEQ 25-1981, f. & ef. 9-8-81; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from OAR 340-020-0301, DEQ 13-1993, f. & ef. 9-24-93; DEQ 19-1993, f. & ef. 11-4-93; DEQ 22-1995, f. & ef. 10-6-95

General Air Contaminant Discharge Permits

340-028-1725

(1) Applicability. The Department may issue ~~g~~General ~~p~~Permits for categories of ~~s~~Sources where individual ~~p~~Permits are not necessary in order to adequately protect the environment. Before the Department can issue a ~~g~~General ~~p~~Permit, the following conditions must be met:

(a) There are several ~~s~~Sources which involve the same or substantially similar types of operations;

(b) All applicable requirements can be contained in a ~~g~~General ~~p~~Permit;

(c) The ~~e~~Emission ~~l~~Limitations, monitoring, recordkeeping, reporting and other enforceable conditions are the same;

(d) The pollutants emitted are the same; and

(e) A ~~p~~Plant ~~s~~Site ~~e~~Emission ~~l~~Limit is not required.

(2) Public notice. Prior to issuing a ~~g~~General ~~p~~Permit, the Department will provide public notice of the proposed ~~p~~Permit conditions for each ~~s~~Source ~~c~~Category according to the procedures outlined in OAR 340-028-1710 and the following:

(a) Notice shall be given by publication in a newspaper of general circulation in the state and in areas where potential applicants are known to be located, or in a Department publication designed to give general public notice, and by other means if necessary to ensure adequate public notice.

(b) The notice shall be provided to persons on a Department mailing list and others who submit a written request for notification.

(c) The notice shall include the information required by OAR 340-11-007 and the following:

(A) the name, address and telephone number of the Department contact from whom interested persons may obtain additional information;

(B) copies of the draft ~~p~~Permit or equivalent summary; and

(C) a brief description of the procedures to request a hearing or the time and place of any hearing that has been scheduled.

(3) Permit issuance.

(a) The Department will follow the ~~p~~Permit issuance procedures outlined in OAR 340-14-025 for issuing a ~~g~~General P~~p~~ermit for a ~~s~~Source ~~c~~Category.

(b) The Department may revoke a ~~g~~General ~~p~~Permit if conditions or standards have changed so the ~~p~~Permit no longer meets the requirements of this rule.

(4) Source assignment.

(a) Any ~~s~~Source wishing to obtain a ~~g~~General ~~p~~Permit shall submit a written application on a form provided by the Department along with the fee specified in the ~~p~~Permit.

(b) The Department will assign a sSource to a gGeneral pPermit for the term of the pPermit if:

(A) the sSource meets the qualifications specified in the pPermit;

(B) the Department determines that the sSource has not had compliance problems; and

(C) the Department determines that the sSource would be appropriately regulated by a gGeneral pPermit.

(c) Assignment of a sSource to a gGeneral pPermit is not subject to public notice requirements, but the Department will make an updated list of sSources assigned to a sSource eCategory available for public review.

(d) The Department may revoke a sSource's assignment to a gGeneral pPermit if the sSource no longer meets the requirements of this rule or the conditions of the pPermit.

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the EQC under OAR 340-020-0047.]

Stat. Auth.: ORS Ch. 468 & 468A

340-028-1740
Synthetic Minor Sources

(1) Enforceable conditions to limit a sSource's pPotential tTo eEmit shall be included in the ACDP for a sSynthetic mMinor sSource. Enforceable conditions, in addition to the PSEL ~~established~~if required under OAR 340-028-1000 through 340-028-1060, shall include one or more of the following physical or operational limitations but in no case shall exceed the conditions used to establish the PSEL:

(a) Restrictions on hours of operation;

(b) Restrictions on levels of production;

(c) Restrictions on the type or amount of material combusted, stored, or processed;

(d) Additional air pollution control equipment; or

(e) Other limitations on the capacity of a sSource to emit air pollutants.

(2) The reporting and monitoring requirements of the conditions which limit the potential to emit contained in the ACDP of synthetic minor sources shall meet the requirements of OAR 340-028-1100 through 340-028-1140.

(3) To avoid being required to submit an application for an Oregon Title V Operating Permit, the owner or operator of a major source shall obtain an ACDP or a modification to an ACDP containing conditions that would qualify the source as a synthetic minor source before the owner or operator would be required to submit an Oregon Title V Operating Permit application.

(4) Applications for synthetic minor source status shall be subject to notice procedures of OAR 340-028-1710.

(5) Synthetic minor source owners or operators who cause their source to be subject to the Oregon Title V Operating Permit program by requesting an increase in the source's potential to emit, when that increase uses the source's existing capacity and does not result from construction or modification, shall:

(a) Become subject to OAR 340-028-2100 through 340-028-2320;

(b) Submit an Oregon Title V Operating Permit application pursuant to OAR 340-028-2120; and

(c) Receive an Oregon Title V Operating Permit before commencing operation in excess of the enforceable condition to limit potential to emit.

(6) Synthetic minor source owners or operators who cause their source to be subject to the Oregon Title V Operating Permit program by requesting an increase in the source's potential to emit, when that increase is the result of construction or modification, shall:

(a) Submit an application for the modification of the existing ACDP;

(b) Receive the modified ACDP before beginning construction or modification;

(c) Become subject to OAR 340-028-2100 through 340-028-2320; and

(d) Submit an Oregon Title V Operating Permit application under OAR 340-028-2120 to obtain an Oregon Title V Operating Permit within 12 months after initial startup of the construction or modification.

(7) Synthetic minor sources that exceed the limitations on potential to emit are in violation of OAR 340-028-2110(1)(a).

[NOTE: This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the EQC under OAR 340-020-0047.]

Stat. Auth.: ORS Ch. 468 &468A

Stats. Implemented: ORS Ch. 468 & 468A

Hist.: DEQ 12-1993, f. & cert. ef. 9-24-93; DEQ 19-1993, f. & cert. ef. 11-4-93; DEQ 22-1995, f. &cert. ef. 10-6-95

Fees and Permit Duration

340-028-1750 (1) All persons required to obtain a permit shall be subject to a three part fee consisting of a uniform non-refundable filing fee of $98, an application processing fee, and an annual compliance determination fee which are determined by applying Table 4, Part II. The amount equal to the filing fee, application processing fee, and the annual compliance determination fee shall be submitted as a required part of any application for a new permit. The amount equal to the filing fee and the application processing fee shall be submitted with any application for modification of a permit.

(2) The fee schedule contained in the listing of air contaminant sources in Table 4 shall be applied to determine the fees for ACDP user fees (Table 4, Part I.) and ACDP fees (Table 4, Part II.) on a Standard Industrial Classification (SIC) plant site basis.

(3) Modifications of existing, unexpired permits which are instituted by the Department or Regional Authority due to changing conditions or standards, receipts or additional information, or any other reason pursuant to applicable statutes and do not require refiling or review of an application or plans and specifications shall not require submission of the filing fee or the application processing fee.

(4) Applications for multiple-source permits received pursuant to OAR 340-028-1730 shall be subject to a single $98 filing fee. The application processing fee and annual compliance determination fee for multiple-source permits shall be equal to the total amounts required by the individual sources involved, as listed in Table 4.

(5) The annual compliance determination fee shall be paid at least 30 days prior to the start of each subsequent permit year. Failure to timely remit the annual compliance determination fee in accordance with the above shall be considered grounds for not issuing a permit or revoking an existing permit.

(6) If a permit is issued for a period less than one (1) year, the applicable annual compliance determination fee shall be equal to the full annual fee. If a permit is issued for a period greater than 12 months, the applicable annual compliance determination fee shall be prorated by multiplying the annual compliance determination fee by the number of months covered by the permit and dividing by twelve (12).

(7) In no case shall a permit be issued for more than ten (10) years, except for synthetic minor source permits which shall not be issued for more than five (5) years.

(8) Upon accepting an application for filing, the filing fee shall be non-refundable.

(9) When an air contaminant source which is in compliance with the rules of a permit issuing agency relocates or proposes to relocate its operation to a site in the jurisdiction of another permit issuing agency having comparable control requirements, application may be made and approval may be given for an exemption of the application processing fee. The permit application and the request for such fee reduction shall be accompanied by:

(a) A copy of the permit issued for the previous location; and

(b) Certification that the permittee proposes to operate with the same equipment, at the same production rate, and under similar conditions at the new or proposed location. Certification by the agency previously having jurisdiction that the source was operated in compliance with all rules and regulations will be acceptable should the previous permit not indicate such compliance.

(10) If a temporary or conditional permit is issued in accordance with adopted procedures, fees submitted with the application for an ACDP shall be retained and be applicable to the regular permit when it is granted or denied.

(11) All fees shall be made payable to the permit issuing agency.

(12) Pursuant to ORS 468A.135, a regional authority may adopt fees in different amounts than set forth in Table 4 provided such fees are adopted by rule and after hearing and in accordance with ORS 468.065(2).

(13) Sources which are temporarily not conducting permitted activities, for reasons other than

regular maintenance or seasonal limitations, may apply for use of a modified annual compliance determination fee in lieu of an annual compliance determination fee determined by applying Table 4. A request for use of the modified annual compliance determination fee shall be submitted to the Department in writing along with the modified annual compliance determination fees on or before the due date of the annual compliance determination fee. The modified annual compliance determination fee shall be $539.

(14) Owners or operators who have received Department approval for payment of a modified annual compliance determination fee shall obtain authorization from the Department prior to resuming permitted activities. Owners or operators shall submit written notification to the Department at least thirty (30) days before startup specifying the earliest anticipated startup date, and accompanied by:

(a) Payment of the full annual compliance determination fee determined from Table 4 if greater than six (6) months would remain in the billing cycle for the source, or

(b) Payment of 50% of the annual compliance determination fee determined from Table 4 if six (6) months or less would remain in the billing cycle.

(15) Fees for ~~g~~General ~~p~~Permits.

(a) The fees for ~~s~~Source assignment to a ~~g~~General ~~p~~Permit shall be seventy-five percent of the applicable fees in Table 4, OAR 340-028-1750 except as provided in Subsection (d) of this Section. Fees shall be specified in the ~~p~~Permit.

(b) The Department may provide in the ~~p~~Permit that the annual compliance determination fee in OAR 340-028-1750 Table 4 shall be paid annually or at less frequent intervals.

(c) For initial assignment to a ~~g~~General ~~p~~Permit, the fees shall be prorated to the next highest full year for the remaining life of the ~~p~~Permit.

(d) Exceptions.

(A) The filing fee and compliance determination fee required by OAR 340-028-1750 Table 4 shall not be reduced.

(B) The initial permitting or construction fees required in OAR 340-028-1750 Table 4 shall not apply.

[**NOTE:** This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the EQC under OAR 340-020-0047.]

Statutory Authority: ORS 468.020

Stat. Implemented: 468A.

Hist.: DEQ 47, f. 8-31-72, ef. 9-15-72; DEQ 63, f. 12-20-73, ef. 1-11-74; DEQ 107, f. & ef. 1-6-76; Renumbered from 340-020-0033.12; DEQ 125, f. & ef. 12-16-76; DEQ 20-1979, f. & ef. 6-29-79; DEQ 11-1983, f. & ef. 5-31-83; DEQ 6-1986, f. & ef. 3-26-86; DEQ 12-1987, f. & ef. 6-15-87; DEQ 17-1990, f. & cert. ef. 5-25-90; AQ 4-1992, f. & ef. 12-2-91; AQ 1-1993, f. & ef. 3-9-93; Renumbered from OAR 340-020-0165; AQ 9-1993, f & ef. 9-24-93; AQ 11-1993 Temp., f. & ef. 11-2-93; DEQ 13-1994, f. & ef. 5-19-94; DEQ 21-1994, f. & ef. 10-14-94; DEQ 22-1994, f. & ef. 10-14-94; DEQ 22-1995, f. & ef. 10-6-95

Applicability

340-028-2110

(1) OAR 340-028-2100 through 340-028-2320 apply to the following sources:

(a)Any major source;

(b)Any source, including an area source, subject to a standard, limitation, or other requirement under section 111 of the FCAA;

(c)Any source, including an area source, subject to a standard or other requirement under section 112 of the FCAA, except that a source is not required to obtain a permit solely because it is subject to regulations or requirements under section 112(r) of the FCAA;

(d)Any affected source under Title IV; and

(e)Any source in a source category designated by the Commission pursuant to OAR 340-028-2110.

(2) The owner or operator of a source with an Oregon Title V Operating Permit whose potential to

emit later falls below the emission level that causes it to be a major source, and which is not otherwise required to have an Oregon Title V Operating Permit, may submit a request for revocation of the Oregon Title V Operating Permit. Granting of the request for revocation does not relieve the source from compliance with all applicable requirements or ACDP requirements.

(3) Synthetic minor sources.

(a)A source which would otherwise be a major source subject to OAR 340-028-2100 through 340-028-2320 may choose to become a synthetic minor source by limiting its emissions below the emission level that causes it to be a major source through production or operational limits contained in an ACDP issued by the Department under 340-028-1700 through 340-028-1790.

(b) The reporting and monitoring requirements of the emission limiting conditions contained in the ACDPs of synthetic minor sources issued by the Department under 340-028-1700 through 340-028-1790 shall meet the requirements of OAR 340-028-1100 through 340-028-1140.

(c) Synthetic minor sources who request to increase their potential to emit above the major source emission rate thresholds shall become subject to OAR 340-028-2100 through 340-028-2320 and shall submit a permit application under OAR 340-028-2120 in accordance with OAR 340-028-1740.

(d) Synthetic minor sources that exceed the limitations on potential to emit are in violation of OAR 340-028-2110(1)(a).

(4) Source category exemptions.

(a) The following source categories are exempted from the obligation to obtain an Oregon Title V Operating Permit:

(A) All sources and source categories that would be required to obtain a permit solely because they are subject to 40 CFR part 60, Subpart AAA - Standards of Performance for New Residential Wood Heaters; and

(B) All sources and source categories that would be required to obtain a permit solely because they are subject to 40 CFR part 61, Subpart M - National Emission Standard for Hazardous Air Pollutants for Asbestos, section 61.145, Standard for Demolition and Renovation

(b) Permit deferral. A ~~s~~Source with the ~~p~~Potential ~~t~~To ~~e~~Emit at or above ~~m~~Major ~~s~~Source thresholds need not apply for an Oregon Title V Operating Permit or obtain a ~~s~~Synthetic ~~m~~Minor ~~p~~Permit before December~~July 25~~31, 199~~8~~9 if the ~~s~~Source maintains ~~a~~Actual ~~e~~Emissions below 50 percent of those thresholds for every consecutive twelve month period ~~between~~since January 25, 1994~~ and 1998,~~ and is not otherwise required to obtain an Oregon Title V Operating Permit or ~~s~~Synthetic ~~m~~Minor ~~p~~Permit.

(A) The owner or operator of a source electing to defer permitting under this paragraph shall maintain on site records adequate to demonstrate that actual emissions for the entire source are below 50 percent of major source thresholds.

(B) Recorded information shall be summarized in a monthly log, maintained for five years, and be available to Department and EPA staff on request.

(c) All sources listed in OAR 340-028-2110(1) that are not major sources, affected sources, or solid waste incineration units required to obtain a permit pursuant to section 129(c) of the FCAA, are exempted by the Department from the obligation to obtain an Oregon Title V Operating Permit.

(d) Any source listed in OAR 340-028-2110(1) exempt from the requirement to obtain a permit under this rule may opt to apply for an Oregon Title V Operating Permit.

(5) Emissions units and Oregon Title V Operating Permit program sources.

(a)For major sources, the Department shall include in the permit all applicable requirements for all relevant emissions units in the major source, including any equipment used to support the major industrial group at the site.

(b)For any nonmajor source subject to the Oregon Title V Operating Permit program under OAR 340-028-2110(1) and not exempted under OAR 340-028-2110(4), the Department shall include in the permit all applicable requirements applicable to emissions units that cause the source to be subject to the Oregon Title V Operating Permit program.

(6) Fugitive emissions. Fugitive emissions from an Oregon Title V Operating Permit program source shall be included in the permit application and the permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source.

(7) Insignificant activity emissions. All emissions from insignificant activities, including categorically insignificant activities and aggregate insignificant emissions, shall be included in the determination of the applicability of any requirement.

(8) Oregon Title V Operating Permit program sources that are required to obtain an ACDP, OAR 340-028-1700 through 340-028-1790, or a Notice of Approval, OAR 340-028-2270, because of a Title I modification, shall operate in compliance with the Oregon Title V Operating Permit until the Oregon Title V Operating Permit is revised to incorporate the ACDP or the Notice of Approval for the Title I modification.

Stat. Auth.: ORS Ch. 468 & 468A
Stats Imp.: ORS 468.020 & 468A.025
Hist.: DEQ 13-1993, f. & ef. 9-24-93; DEQ 24-1994, f. & ef. 10-28-94; DEQ 22-1995, f. & ef. 10-6-95; DEQ 24-1995, f. & ef. 10-11-95; DEQ 1-1997, f. & cert. ef. 01-21-97.

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LETTER OF AGENCY

August 3, 1998

This letter will confirm that John Eads is agent for William H. Ferguson in connection with an appeal from the Hearings Officer's Findings of Fact, Conclusions of Law and Final Order in the Matter of William H. Ferguson, Case No. AQAB-WR-96-351, scheduled for hearing before the State of Oregon, Department of Environmental Quality, August 7, 1998.

William H. Ferguson

State of Oregon
Department of Environmental Quality Memorandum

Date: July 21, 1998

To: Environmental Quality Commission

From: Langdon Marsh, Director

Subject: Agenda Item M, Appeal of Hearing Officer's Findings of Fact, Conclusions of Law and Final Order in the Matter of William H. Ferguson, Case No. AQAB-WR-96-351, EQC Meeting: August 7, 1998

Statement of Purpose

The Department of Environmental Quality (hereinafter "Department") appealed from the Hearing Officer's Findings of Fact and Conclusions of Law, dated December 11, 1997. In that order, the hearing officer found that William H. Ferguson (hereinafter "Ferguson") violated OAR 340-032-5620(1), OAR 340-032-5600(4), OAR 340-032-5650, OAR 340-033-0030(2) and OAR 340-033-0030(4) and was liable for a civil penalty in the amount of $1,000.

Background

On December 5, 1996 the Department issued a Notice of Assessment of Civil Penalty to Ferguson citing violations of:

(1) OAR 340-032-5620(1) for failing to employ required work practices for handling and removal of asbestos-containing waste material;
(2) OAR 340-032-5600(4) by openly accumulating asbestos-containing waste material;
(3) OAR 340-032-5650 by failing to properly dispose of asbestos-containing waste material;
(4) OAR 340-032-5620(1) by failing to notify the Department of an asbestos abatement project;
(5) OAR 340-033-0030(2) by allowing uncertified persons to perform asbestos abatement on property owned by Ferguson; and
(6) OAR 340-033-0030(4) by supervising an asbestos abatement project without being certified as an asbestos abatement project supervisor.

The Department imposed a civil penalty for violation #1 in the amount of $5400.

The Findings of Fact made by the hearing officer are summarized as follows:
On October 2, 1996 an Asbestos Control Analyst (Keith Tong) observed what appeared to be asbestos-containing material on a building renovation site in Medford. Ferguson owned the site. He informed the person in charge of the site, Joel Ferguson (Ferguson's son), that the material appeared to contain asbestos, that proper steps should be taken to accomplish the asbestos removal, and not to disturb the materials. Tong then left to attend a meeting. Joel Ferguson contacted his father who phoned a disposal company. The company informed him that the

material needed to be double bagged and secured. The material was then placed in bags by Joel Ferguson and stored in an utility trailer. The other renovation workers were sent home.

When Tong returned to the site, he noted that the materials had been moved. He also observed some still on the ground. After this meeting, the building was encapsulated and an abatement contractor was hired to remove the material. Testing of the material revealed that it contained 10 percent asbestos. Neither William or Joel Ferguson were licensed asbestos removal workers or project supervisors.

The hearing officer held that violations listed above are strict liability and that any "reasonableness" in Ferguson's conduct was irrelevant in determining if the violations had occurred. The hearing officer also concluded that since Ferguson did not know that the material could potentially contain asbestos until the site visit, liability for the violations did not attach until the visit. The hearing officer affirmed all the violations in the Assessment of Civil Penalty except violation #4, OAR OAR 340-032-5620(1) (failing to notify the Department of an asbestos abatement project). He then assessed a penalty of $1000 for violation #1. The hearing officer reduced the penalty by reclassifying the violation to a Class I, minor magnitude violation. The Department had classified the violation as a Class I, moderate magnitude violation because OAR 340-012-0090(1)(d)(D) allows for the magnitude to be raised by one level of magnitude if the percentage of asbestos content is greater than 5%. The hearing officer also reduced several other factors in the assessment calculation.

On January 8, 1998, the Department filed a timely appeal of the Hearing Officer's Findings of Fact, Conclusions of Law and Final Order. The Department filed the following exceptions to the Order:

(1) The hearing officer's finding that Ferguson was not liable for any violations until after the Department informed him that the material may contain insulation. The Department contends that liability attaches when the removal is commenced and strict liability should be applied.
(2) The hearing officer's reduction of the magnitude of the violation because of Ferguson's conduct was not intentional. The magnitude of the violation should be based on the percentage of asbestos in the material.
(3) The hearing officer's finding that the occurrence factor in the penalty calculation should be 0 because the violation occurred for only one day. The Department contends there were two separate violations during that day, the removal of the material from the building and the moving of the material to the trailer.
(4) The hearing officer's finding that Ferguson was cooperative and that the cooperativeness factor in the penalty assessment should be -2 instead of 0. The Department contends that Ferguson was not either wholly cooperative or uncooperative in correcting the violation.

Ferguson responded to the Department's exceptions by first requesting that the Environmental Quality Commission dismiss the Department's appeal since the exceptions and brief were not filed within the 30 day time limitation. Ferguson also requests that the Environmental Quality Commission extend the time for the filing of his brief. Ferguson then addressed each exception as follows:

(1) The finding that liability did not attach until he had notice that the material may be asbestos containing was correct since the Department has not sought to impose liability on other property owners who unknowingly encounter asbestos containing material.
(2) The hearing officer's reduction of the penalty was within his discretion and was proper since the Department has the option to raise the magnitude of the violation if the material contains more than 5% asbestos. Furthermore, it was not Ferguson's "conscious objective" to cause a violation so the violation was, at most, negligent and the zero value to the "O" factor was correct. Finally, the assignment of -2 to the "C" factor was correct since Ferguson took all necessary steps to comply with the law once it was known that the material contained asbestos.

The Department replied that the Commission does not have the authority to dismiss the Department's appeal based on a late filing of its brief, since the filing is not a jurisdictional requirement to the appeal. The Department has no objection to the request for an extension of time for Ferguson to file his brief provided the Commission also extend the time for the Department's filing.

Authority of the Commission with Respect to the Issue

The Commission has the authority to hear this appeal under OAR 340-11-132.

Alternatives

Late filing of briefs

The Commission can:

(1) Dismiss the Department's appeal, as requested by Ferguson, based on the Department's failure to timely file its exceptions and brief;
(2) Grant extensions to both the Department and Ferguson for filing of the briefs, as requested by the Department;
(3) Deny either or both requests for extension, in the Commission's discretion.

Appeal of Final Order

The Commission can:

(1) Reverse the conclusions of law finding that liability did not attach for violating the rules until Ferguson was informed of the materials potentially contained asbestos, and uphold the Department's assessment of civil penalty contained in the Notice of Assessment of Civil Penalty as requested by the Department;
(2) Uphold the Hearing Officer's Findings of Fact, Conclusions of Law and Order; or
(3) Remand the matter to the hearing officer for more preceedings as determined necessary by the Commission.

Attachments

A. Letter dated July 9, 1998 to William H. Ferguson and Jeff Bachman
B. Letter dated May 4, 1998 to William H. Ferguson and Jeff Bachman
C. Motion to Extend Time Limit and Reply to Respondent's Motions and Brief, dated April 21, 1998
D. Motion to Dismiss, Alternative Motion for Relief from Default and Respondent's Brief, dated April 1, 1998
E. Department's Exceptions and Brief, dated February 9, 1998
F. Letter dated January 13, 1998 to Jeff Bachman and William H. Ferguson
G. Department's Notice of Appeal, dated January 8, 1998
H Hearing Officer's Finding of Fact and Conclusion of Law, dated December 11, 1997
I. Hearing Officer's Final Order, dated December 11, 1997
J. Respondent's Post-Hearing Memorandum
K. Department's Hearing Memorandum, dated September 10, 1997
L. Exhibits from September 10, 1997 hearing, as follows:
    A. Request for Analysis and Test Results
    B. Photographs, dated October 2, 1996
    C. Letter from William H. Ferguson to Keith R. Tong, dated October 22, 1996
    1. Notice of Assessment of Civil Penalty, dated December 5, 1996
    2 . Answer and Request for Hearing, dated December 20, 1996
    3. Hearing Notice, dated August 14, 197
    4. Newspaper Article, dated August 28, 1997

Reference Documents (available upon request)

OAR Chapter 340, Division 11, 12, 32 and 33; Chapter ORS 468

Report Prepared By: Susan M. Greco
Phone: (503) 229-5213
Date Prepared: July 21, 1998

Oregon
John A. Kitzhaber, M.D., Governor

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

July 10, 1998

Via Certified Mail

William H. Ferguson
5200 Pioneer Road
Medford OR 97501

Jeff Bachman
Department of Environmental Quality
2020 S.W. 4th Avenue
Portland OR 97201

RE: William H. Ferguson
Case No. AQAB-WR-96-351

The appeal in the above referenced matter has been set for the regularly scheduled Environmental Quality Commission meeting on Friday, August 7, 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. As soon as the agenda and 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

Attachment A - 1 page

Oregon
John A. Kitzhaber, M.D., Governor

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

May 4, 1998

Via Certified Mail

William H. Ferguson
5200 Pioneer Road
Medford OR 97501

Jeff Bachman
Department of Environmental Quality
2020 S.W. 4th Avenue
Portland OR 97201

RE: William H. Ferguson
Case No. AQAB-WR-96-351

The appeal in the above referenced matter has been set for the regularly scheduled Environmental Quality Commission meeting on Thursday, June 11, 1998. The meeting will convene at 10:00 a.m. and this matter will be heard in the regular course of the meeting. The meeting will be held at the Smullin Education Center, 2825 Barnett Road, Medford, Oregon. Once the agenda has been finalized and 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

Attachment B- 1 page

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: WILLIAM H. FERGUSON, Respondent/Appellee	MOTION TO EXTEND TIME LIMIT AND REPLY TO RESPONDENT'S MOTIONS AND BRIEF No. AQAB-WR-96-315 JACKSON COUNTY

I. MOTION TO EXTEND TIME FOR FILING DEPARTMENT BRIEF

The Department of Environmental Quality (the Department or DEQ) moves the Environmental Quality Commission to extend the time for filing its Exceptions and Brief (Brief) in this case from February 9, 1998, to February 10, 1998. Oregon Administrative Rule (OAR) 340-011-132(4)(f) authorizes the Chair of the Commission to extend the time for filing of a Brief. The rule does not limit when such a request may be made or the Chair's discretion to grant an extension.

The Department was one day late in filing its Brief because its lay representative misinterpreted the rules establishing the time limit by confusing service of process with filing. OAR 340-011-005(6) defines "filing" "as receipt in the Office of the Director". The Department's Brief was served on the Commission on February 9, 1998, in accordance with OAR 340-011-097(2), when it was posted by certified mail that day. See Exhibit 1. The Brief, however, was not received in the Director's office until February 10. See Exhibit 1. Mr. Ferguson contends in his motion that the Department's Brief was not filed until February 11. The certified mail receipt, however, attached as Exhibit 1, indicates that the Department's Brief was received in the Director's Office on February 10.

While the Department was in error, it contends that the error was harmless because the Respondent, Mr. Ferguson, was not prejudiced in any manner as a result of the late filing, nor were the proceedings in this case unduly delayed.

///

///

Attachment C - 13 pages

II. REPLY TO RESPONDENT'S MOTION TO DISMISS THE DEPARTMENT'S APPEAL

Mr. Ferguson has moved the Commission to dismiss the Department's appeal because the Department missed the filing deadline for its Brief. Even if the Chair denies the Department's request for an extension of time to file its Brief, the Commission cannot dismiss the Department's appeal because the timely filing of the Brief is not a jurisdictional requirement. Jurisdiction attached when the Department filed its Notice of Appeal on January 9, 1998. Please see the attached Memorandum prepared by the Oregon Attorney General.

III. REPLY TO RESPONDENT'S ALTERNATIVE MOTION TO EXTEND TIME FOR FILING BRIEF

Mr. Ferguson was required, pursuant to OAR 340-011-132(4)(b), to file his Exceptions and Brief by March 13, 1998. Mr. Ferguson's Brief was not filed until April 1, 1998, and he has requested an extension of the time for filing. The Department does not oppose Respondent's request for extension if the Chair of the Commission grants the Department's request for extension, made above in Section I. If, however, the Chair denies the Department's request, the Department moves the Chair to also deny Respondent's request.

OAR 340-011-132(4)(f) grants the Chair complete discretion to grant or deny requests for extensions. In exercising her discretion, the Department suggests the Chair look to the Commission rules concerning late filings for guidance. The Commission, except as provided for in OAR 340-011-132, has adopted the Oregon Attorney's Model Rules of Procedure, OAR 137-003-0001 through -0093, governing contested case proceedings. See OAR 340-011-098. OAR 137-003-0003(1) states that a late filing may be accepted if the presiding officer determines that the cause of the failure to timely file "was beyond the reasonable control of the party".

Mr. Ferguson received the Department's Brief via certified mail on February 12, 1998. See Exhibit 2. Mr. Ferguson was expressly informed of the March 13, 1998 deadline for his Brief in a letter sent to him by Susan Greco, Rules Coordinator for the Department, on February 18, 1998. See Exhibit 3. After Mr. Ferguson missed the filing deadline, Ms. Greco sent him a second letter on March

18, 1998, which informed him that he had missed his deadline and giving him until April 1 to submit a Brief. See Exhibit 4. Mr. Ferguson filed his Brief on April 1.

In his motion, Mr. Ferguson states that he failed to timely file his appeal because he asked an employee to determine when a transcript of a contested case hearing would be available, and the employee failed to do so, and because he was preparing his family for a trip overseas, which took place from March 10 to March 27, 1998. His employee's negligence and his travel planning did not make timely filing of his Brief beyond Mr. Ferguson's reasonable control.

IV. REPLY TO RESPONDENT'S BRIEF

A. Liability Attached When Respondent First Disturbed Asbestos

Mr. Ferguson argues that he cannot be held liable for any violation of the asbestos rules which occurred when his son first disturbed the duct insulation because neither he nor his son had yet learned that the Department suspected that the insulation contained asbestos. Mr. Ferguson, however, bases his argument on different grounds than did the Hearing Officer. The flaws in the Hearing Officer's reasoning are addressed in the Department's Exceptions and Brief.

Mr. Ferguson claims that liability did not attach until the Department informed him of its suspicions, because the evidence at the contested case hearing allegedly showed that the Department does not assess property owners civil penalties for unknowing disturbance of asbestos-containing material (ACM). The evidence Mr. Ferguson introduced at the hearing was a newspaper article reporting that DEQ had not assessed a fine against the City of Medford for its failure to discover and report an underground storage tank release. Mr. Ferguson also elicited testimony from the Department's Keith Tong that ACM had also been disturbed during the same renovation that resulted in discovery of the UST leak.

From these scant facts, and these scant facts alone, Mr. Ferguson argues that the Department does not penalize parties for asbestos violations stemming from unknowing disturbance. At the hearing the Department offered to submit proof, in the form of other Notices of Civil Penalty Assessment, that it has in a number of instances assessed civil penalties for unwitting asbestos violations, but the Hearing Officer declined this offer of proof. The Department makes the same offer here and asks the

Commission to take notice of the cases listed in Exhibit 5. Copies of the Notices in these cases will be made available to the Commission at its request.

B. The Magnitude of the Violation is Moderate

Mr. Ferguson argues that it is within the Hearing Officer's discretion to reduce the magnitude, because in the Hearing Officer's opinion, the violation was not caused by Respondent's intentional conduct. As stated in the Department's Brief, the cause of the violation is a factor considered separately in the calculating the size of civil penalties. Causation is not a element in determining magnitude; magnitude is a measure of the actual or potential adverse environmental impact of the violation. See OAR 340-12-045(1)(a)(ii) and -045(1)(c)(D). The rules do not permit the Hearing Officer or the Department to consider causation when determining magnitude, and the Hearing's Officer decision to do so in this case was in error.

C. The Cause of the Violation was Mr. Ferguson's Intentional Conduct

In his Brief, Mr. Ferguson argues that the violation did not result from intentional conduct because it was not his "conscious objective" to cause a violation of any statute or rule. Mr. Ferguson misapplies the definition in OAR 340-12-030(9), which states that "intentional" means "conduct by a person with the conscious objective to cause the result of the conduct". Knowledge of legal requirements or prohibitions is an element of "flagrant" conduct, defined in OAR 340-12-030(7), not intentional conduct. To read a knowledge element into "intentional" conduct makes "flagrant" conduct redundant, which could not have been the intent of the Commission in enacting these definitions. To prove intentional conduct, all the Department must show is that Mr. Ferguson had the conscious objective for his son to further disturb the suspected ACM after it was removed from the building. Both Mr. Ferguson and Joel Ferguson testified that Mr. Ferguson, knowing that duct wrap was suspected ACM, told Joel to pick up the material, wrap it, and place it in the trailer.

Mr. Ferguson attempts to defend his conduct by arguing that it was reasonable. Even if reasonableness were a valid defense, Mr. Ferguson's actions were not reasonable. At the hearing, Mr. Tong testified that he instructed Joel Ferguson not to further disturb the material, but to cover it with a tarp until a licensed asbestos abatement contractor could be brought in to clean up the material. Joel

Ferguson testified that Mr. Tong did not so instruct him. Mr. Tong is the more credible witness as there is no evidence that he had a motivation to lie. Mitigation or elimination of the civil penalty, however, provides Joel Ferguson with a motivation to either lie or fail to remember Mr. Tong's instructions.

Mr. Ferguson also argues that his actions were reasonable because he relied on the advice of someone he terms an expert, Rogue Disposal and Recycling (Rogue Disposal), a solid waste disposal company, in deciding to further disturb the suspected ACM. Mr. Ferguson's reliance on the advice of Rogue Disposal was not reasonable. Rogue Disposal is not a licensed asbestos abatement contractor[1] or otherwise qualified to give Mr. Ferguson advice on asbestos abatement. When Mr. Ferguson directed Joel Ferguson to pick up the suspected ACM, he was engaged in asbestos abatement and only an asbestos abatement contractor or the Department is qualified to provide advice on proper handling of ACM.

Mr. Ferguson's conduct meets the definition of "intentional" set forth in OAR 340-12-030(9). Regardless of whether Mr. Tong instructed Joel Ferguson not to further disturb the suspected ACM, Mr. Ferguson's reliance on Rogue Disposal and his own judgment was not reasonable and in fact exacerbated the threat to public health and safety by increasing the risk that asbestos fibers were released into the open air.

4/21/98
Date

Jeffrey R. Bachman
Environmental Law Specialist

[1] The Department asks the Commission to take notice that there is no record in Department files of Rogue Disposal being licensed to perform asbestos abatement.

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: WILLIAM H. FERGUSON, Respondent/Appellee.	) MEMORANDUM OF AUTHORITIES IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS) No. AQAB-WR-96-315) JACKSON COUNTY

The literal language of the applicable administrative rules clearly indicates that Respondent's motion to dismiss has no legal foundation. The two pertinent subsections of OAR 340-011-132 are:

> (2)(b) — The timely filing and service of a Notice of Appeal is a *jurisdictional requirement* for the commencement of an appeal to the Commission and cannot be waived; a Notice of Appeal which is filed or served late shall not be considered and shall not affect the validity of the Hearing Officer's Final Order which shall remain in full force and effect;
>
> * * *
>
> (4)(f) — Extensions — The Chairman or a Hearing Officer, upon request, may extend any of the time limits contained in this section. Each extension shall be made in writing and be served upon each party. *Any request for an extension may be granted or denied in whole or in part.*

(Emphases added.)

The first subsection, OAR 340-011-132(2)(b), expressly states that the timely filing of the Notice of Appeal is a jurisdictional requirement that cannot be waived. By contrast, the second subsection, OAR 340-011-132(4)(f), states that the decision to grant an extension presumably on other matters, including the filing of a brief, is placed within the sound discretion of the EQC. The Notice of Appeal and the brief are separately filed. Timely Notice of Appeal establishes the jurisdiction of the Commission, and the brief becomes part of the administrative record. Thus, once the Notice of Appeal has established the parties' intent to appeal the decision, the EQC has discretion to grant necessary extensions for the filing of documents to the administrative record.

The best evidence of the purpose of a statute is its language, and the object to be accomplished. *Roberts v. Gray's Crane & Rigging, Inc.*, 73 Or. App. 29, 697 P2d 985

DEPARTMENT OF JUSTICE
1515 SW 5TH AVENUE, SUITE 410
PORTLAND, OREGON 97201
PHONE (503) 229-5725

(1985); *Sunshine Dairy v. Peterson* 183 Or. 305, 193 P2d 543 (1948). The same principles of statutory construction apply equally to administrative rules. In this case, there is nothing in the language of the applicable administrative rules to support Respondent's motion to dismiss. To the contrary, the rules make it clear that extension of the deadline for filing a brief is within the sound discretion of the EQC.

Administrative hearings do not match the rigors of a criminal or civil trial. Rather, the primary purpose of an administrative hearing is simply to create a complete and full record that will facilitate an informed decision. *Trueblood v. Health Division, Dep't of Human Resources*, 28 Or App 433, 559 P2d 931 (1977).

Our research of prior EQC/DEQ enforcement proceedings, as well as similar proceedings by other state agencies, revealed no instance in which a late brief has resulted in dismissal of a case.

In short, Respondent Ferguson's motion to dismiss has no basis in the applicable rules or in relevant administrative law.

DATED this 21st day of April, 1998.

Respectfully submitted,

HARDY MYERS
Attorney General

William R. Cook for

Michael B. Huston #75189
Assistant Attorney General
Of Attorneys for DEQ
Department of Justice
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201
Telephone: (503) 229-5725

MH:k/MBH0183.PLE

EXHIBIT
1

PENGAD-Bayonne, N. J.

CERTIFICATE OF MAILING

I hereby certify that I served Exceptions and Brief of Hearing Officer's Findings of Fact, Conclusions of Law, and Final Order No. AQAB-WR-96-315 upon

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

William H. Ferguson
5200 Pioneer Road
Medford, OR 97501

by mailing a true copy of the above by placing it in a sealed envelope, with postage prepaid at the U.S. Post Office in Portland, Oregon, on February 9, 1998.

Deborah Nesbit
Department of Environmental Quality

P 506 425 412

US Postal Service
Receipt for Certified Mail
No Insurance Coverage Provided.
Do not use for International Mail *(See reverse)*

SUSAN GRECO
ENVIRONMENTAL QUALITY COMM.
811 SW SIXTH AVENUE
PORTLAND OR 97204

Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	
Return Receipt Showing to Whom, Date, & Addressee's Address	
TOTAL Postage & Fees	$
Postmark or Date	

PS Form 3800, Apr

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write *"Return Receipt Requested"* on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):
1. ☒ Addressee's Address
2. ☐ Restricted Delivery
Consult postmaster for fee.

3. Article Addressed to:
SUSAN GRECO
ENVIRONMENTAL QUALITY COMMISSION
811 SW SIXTH AVENUE
PORTLAND OR 97204

4a. Article Number
P 506 425 412

4b. Service Type
☐ Registered ☒ Certified
☐ Express Mail ☐ Insured
☐ Return Receipt for Merchandise ☐ COD

7. Date of Delivery 2/10/98

5. Received By: *(Print Name)*

8. Addressee's Address *(Only if requested and fee is paid)*

6. Signature: *(Addressee or Agent)*
X

Is your RETURN ADDRESS completed on the reverse side?

PS Form 3811, December 1994 Domestic Return Receipt

Thank you for using Return Receipt Service.

EXHIBIT 2

PENGAD-Bayonne, N. J.

CERTIFICATE OF MAILING

I hereby certify that I served Exceptions and Brief of Hearing Officer's Findings of Fact, Conclusions of Law, and Final Order No. AQAB-WR-96-315 upon

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

William H. Ferguson
5200 Pioneer Road
Medford, OR 97501

by mailing a true copy of the above by placing it in a sealed envelope, with postage prepaid at the U.S. Post Office in Portland, Oregon, on February 9, 1998.

Deborah Nesbit
Department of Environmental Quality

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write *"Return Receipt Requested"* on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):
1. ☒ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
WILLIAM H FERGUSON
5200 PIONEER ROAD
MEDFORD OR 97501

4a. Article Number
P 506 425 411

4b. Service Type
☐ Registered ☒ Certified
☐ Express Mail ☐ Insured
☐ Return Receipt for Merchandise ☐ COD

7. Date of Delivery
2-12

5. Received By: *(Print Name)*
D Ferguson

6. Signature: *(Addressee or Agent)*
X D Ferguson

8. Addressee's Address *(Only if requested and fee is paid)*

Is your RETURN ADDRESS completed on the reverse side?

Thank you for using Return Receipt Service.

PS Form **3811**, December 1994 Domestic Return Receipt

P 506 425 411

US Postal Service
Receipt for Certified Mail
No Insurance Coverage Provided.
Do not use for International Mail *(See reverse)*

Sent to
WILLIAM H FERGUSON
Street & Number
5200 PIONEER ROAD
Post Office, State, & ZIP Code
MEDFORD OR 97501
Postage

Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	
Return Receipt Showing to Whom, Date, & Addressee's Address	
TOTAL Postage & Fees	$
Postmark or Date	

PS Form **3800**, April 1995

EXHIBIT
3

Oregon

DEPARTMENT OF
ENVIRONMENTAL
QUALITY

February 18, 1998

William H. Ferguson
5200 Pioneer Road
Medford, OR 97501-9314

RE: Case No. AQAB-WR-96-351

Dear Mr. Ferguson:

On February 11, 1998, the Environmental Quality Commission received the Department's Exceptions and Brief in the above referenced matter. Pursuant to OAR 340-11-132(4)(a), you must file an answer within thirty days from the filing of the Notice of Appeal (March 13, 1998). Once your answer has been received, the Department may file a reply brief.

To file your answer, 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 Jeff Bachman, Department of Environmental Quality, 2020 S.W. 4th Avenue, Suite 400, Portland, Oregon, 97201.

If you should have any questions or need further time to file your answer, please feel free to call me at (503) 229-5213 or (800) 452-4011 ext. 5213 within the state of Oregon.

Sincerely,

Susan M. Greco
Rules Coordinator

cc: Jeff Bachman, NWR

TO

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

DEQ-1

EXHIBIT
4

Oregon

DEPARTMENT OF ENVIRONMENTAL QUALITY

RECEIVED
MAR 19 1998

March 18, 1998

William H. Ferguson
5200 Pioneer Road
Medford, OR 97501-9314

RE: Case No. AQAB-WR-96-351

Dear Mr. Ferguson:

On February 18, 1998, I sent you a letter (see the attached copy) which stated that your answering brief in the above matter was due to the Environmental Quality Commission on March 13, 1998. Oregon Administrative Rule 340-011-0132(4)(b) requires your answering brief to be filed within 30 days of the filing of the appellant's exceptions and brief. To this date, I have not received your answering brief.

The rules do allow for extensions to be granted of any time limits in the rules but such a request must be in writing and should explain the reason for the delay in the filing of your brief. The Commission will consider the filing of your brief, if it is received prior to April 1, 1998, as a request for an extension to file the brief and may deny this request at a later time. If the Commission does not receive your brief before April 1, 1998, the Commission will schedule the matter for one of its regularly scheduled Commission meetings without inclusion of the brief in the record.

Your answering brief should be sent to: Susan Greco, Department of Environmental Quality, 811 S.W. 6th Avenue, Portland, Oregon, 97204 with a copy to Jeff Bachman, Department of Environmental Quality, 2020 S.W. 4th Avenue, Suite 400, Portland, Oregon, 97201.

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

Sincerely,

Susan M. Greco
Rules Coordinator

cc: Jeff Bachman, NWR

TO:

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

DEQ-1

Department's Exhibit 5
Case No. AQAB-WR-96-315

Barry Brey, AQAB-WR-96-015. Issued February 9, 1996.
Horton Brothers, Inc., AQAB-WR-96-014. Issued February 9, 1996.
Oregon Home Improvement Co., AQAB-NWR-96-080. Issued April 15, 1996
Pacific Wallboard & Plaster Co., AQAB-NWR-96-091. Issued May 17, 1996.
Daniel Riehl, AQAB-NWR-96-095. Issued May 30, 1996.
Lee Hafner, AQAB-WR-96-198. Issued September 18, 1996.
Grants Pass BPOE #1584, AQAB-WR-96-197. Issued September 18, 1996.
Columbia Excavating, Inc., AQAB-NWR-96-282
Ochoco Lumber Co., AQ/V-ER-97-179. Issued September 12, 1997.
Deans Enterprises, Inc., AQ/A-ER-97-191. Issued October 10, 1997.
Beverly Suniga, AQ/A-WR-97-217. Issued November 18, 1997.
Billy J. Blom, AQ/A-NWR-97-211. Issued November 26, 1997.
Eveready Ventures International, AQ/A-NWR-97-209. Issued November 26, 1997.

CERTIFICATE OF MAILING

I hereby certify that I served Motion to Extend Time Limit and Reply to Respondent's Motions and Brief in Case No. AQAB-WR-97-315 upon

William Ferguson
5200 Pioneer Road
Medford, OR 97501

by mailing a true copy of the above by placing it in a sealed envelope, with postage prepaid at the U.S. Post Office in Portland, Oregon, on April 21, 1998.

Department of Environmental Quality

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

In the matter of: William H. Ferguson, Respondent.	No. AQAB-WR-96-315 Jackson County

MOTION TO DISMISS; ALTERNATIVE MOTION FOR RELIEF FROM DEFAULT AND RESPONDENT'S BRIEF

Respondent, William H. Ferguson, moves the Commission for an order dismissing this appeal on the ground that appellant failed to file its "Exceptions and Brief" within the time required by OAR 340-11-132(4)(a). Alternatively, Respondent moves the Commission for relief from default from time to file respondent's brief.

MOTION TO DISMISS

On December 11, 1997, Hearings Officer Melvin M. Menegat issued "Findings of Fact and Conclusions of Law" and "Hearings Officer's [Final] Order" in the above-captioned case. (Ex 1). On January 9, 1998, the Environmental Quality Commission (the "Commission") received a Notice of Appeal from the Department of Environmental Quality (the "Department"). The Notice of Appeal was timely filed since it was filed within thirty (30) days of the date of the Hearings Officer's final order. OAR 340-11-132(2)(a).

OAR 340-11-132(4)(a) required the Department to file "...written exceptions, brief and proof of service" within thirty (30) days from the date of filing of the Notice of Appeal. Since the Notice of Appeal was filed January 9, 1998, the Department's exceptions and brief were required

to be filed by January 9 (the 30th day, January 8, fell upon a Sunday, a legal holiday). In fact, the Department's "Exceptions and Brief" were not filed with the Commission until February 11, 1998, thirty-two (32) days after the Notice of Appeal was filed. Accordingly, the appeal should be dismissed.

ALTERNATIVE MOTION TO EXTEND TIME FOR FILING RESPONDENT'S BRIEF

Alternatively, respondent moves the Commission for relief from default from the time to file respondent's answering brief and requests the Commission to accept respondent's brief, below, on the merits. This motion is based upon the fact that respondent anticipated the filing of a transcript of the proceedings before the Hearings Officer and instructed an employee to determine when the transcript might be available. The employee, who also had other tasks assigned, neglected for follow-up on my request. At the time, I was also busy preparing my family for a foreign trip. I was outside of the United States, in the middle-east, from March 10 to 27, 1998 and did not discover the failure the file a brief until my return.

RESPONDENT'S BRIEF ON THE MERITS

PROCEDURAL BACKGROUND

On December 5, 1996, the Director of the Department of Environmental Quality (the "Department") notified William H. Ferguson of the assessment of a civil penalty in the amount of $5,400, stemming from Ferguson's alleged removal and handling of "suspected asbestos-containing material" from a building in downtown Medford. Ferguson requested a hearing and one was held before Hearings Officer Melvin M. Menegat in Medford on September 10, 1997. Post-hearing briefs were submitted by the parties and, on December 11, 1997, the Hearings Officer issued findings of fact and conclusions of law along with his a proposed final order. After

reviewing the evidence in the record and considering the arguments of the parties, the Hearings Officer found that respondent violated OAR 340-32-5620(1), -5600(4)(4), -5650, OAR 340-33-030(2) and (4), and imposed a civil penalty of $1,000.

The Department, on January 9, 1998, filed a notice of appeal from the Hearings Officer's final order. On February 11, 1998, it filed its exceptions and brief and respondent submits this brief in response.

FACTS

The facts, as established by the findings of the Hearings Officer who heard and reviewed all of the evidence, are summarized as follows:

Respondent purchased the building in question (the "Morse" building) from the YMCA, which had received the property as a gift from the previous owners, Mr. and Mrs. Morse. During the time Mr. Morse was considering disposing of the property, he had obtained an environmental assessment at the request of the Salvation Army. When Mr. Ferguson purchased the property, he was neither given or shown a copy of the assessment. He was told however, both by Mr. Morse and by a member of the Board of Directors of the YMCA—that the report was "clean".

In late September, 1996, respondent began renovating to the building. In the process, on October 1, 1996, Ferguson's workers decided to remove old heat ducting from above the ceiling. The evidence showed, (1) that removal of the ducting was optional, and (2) that none of the personnel involved in the decision to remove the ducting—including the workers and the architect—knew or suspected that wrapping on the ducting contained asbestos. The Hearings Officer specifically found:

> "...respondent was not aware that there was any asbestos-containing materials in the building or that would be affected by the demolition or renovation..." Final Order, p 5.

Joel Ferguson, respondent's son, took down a short portion of wrapped ducting. The evidence showed that tiny portions of the wrap fell in the building and in the parking lot outside. All told, wrap was no more than perhaps 12 square feet in area, and most of it was still attached to the ducting. As the Hearings Officer specifically found,

> "[t]he type of wrap used on the length of duct work that had been removed was manufactured in asbestos-containing and non asbestos containing products, and the wrap had no distinguishing marks or colors to accurately determine whether it contained asbestos or not." *Id.*, p 3.

Mr. Tong walked by the building on his way to appointment. The Hearings Officer found

> "Tong stopped at the site, inspected the materials he had observed, and contacted Joel Ferguson who was in charge of the demolition project, and advised him that the duct wrap appeared to be asbestos-containing material, and that proper steps should be taken to accomplish the asbestos removal, and not to disturb the materials" *Id.*, p 2.

It is important to note that, according to Joel Ferguson, *Tong did not tell him that he could not seal and package the material.*

Joel Ferguson contacted respondent and informed him that Tong had "shut-down" the job. William Ferguson had dealt with Tong before when Tong had declared that material he found in the basement of Ferguson's office building, where DEQ rents space, contained asbestos. After much ado and at considerable expense to Ferguson, the material was found to have been ordinary dry wall.

William Ferguson immediately tried to contact Tong at the local DEQ office. Tong was not available. Ferguson decided that, if the wrapping in question did contain asbestos, it should not be left under a tarp in the parking lot approximately 30 feet from the public sidewalk. Unable to speak with Tong, Ferguson did two things. First, he caused a sample of the material to be sent to a local lab for analysis. Second, he called the local solid waste disposer, *Rogue Disposal and*

Recycling, and inquired how must dispose of material which might contain asbestos. He was told that the material should be double-wrapped in a specified thickness of plastic-wrap, then sealed with duct tape. William Ferguson instructed Joel Ferguson to secure the specified plastic and wrap and seal the material in question. Joel Ferguson did as told, even triple-wrapping the material. He then placed the plastic-wrapped material into respondent's mobile trash container on the property which was enclosed on all sides except the top.

When, later, it was confirmed that the duct wrapping did contain asbestos, respondent contacted *Alpha Environmental, Inc.*, ("Alpha") a licensed asbestos abatement contractor, and a professional environmental engineer. On October 4, 1996, Alpha provided DEQ with the appropriate notice and commenced removal of the asbestos. Ferguson paid approximately $5,160 for the asbestos removal and environmental engineering.

ARGUMENT

The Hearings Officer Properly Determined that no Liability Attached Until Respondent Was Given Notice of the Potential of Asbestos-Containing Material

The Department contends that the legislature intended Oregon's environmental liability laws to impose strict liability. Thus, it claims, the Hearings Officer erred when he found:

> "[p]rior to Mr. Tong's notification, respondent was not involved in an "Asbestos abatement project", notwithstanding the definition of the rule and the strict liability interpretation of its provisions. Prior to Mr. Tong's notification of potential asbestos-containing material, respondent had taken all reasonable and necessary steps to proceed with his demolition and remodeling project. Liability, in this case, did not attach prior to notification." Final Order, p 4.

According to the Department, the Hearings Officer should have held that liability attached when the asbestos-containing duct wrap was removed from the building.

The evidence before the Hearings Officer showed that the Department—at least in southern Oregon—has not sought to impose liability on property owners for unknowing

encounters with asbestos-containing materials. There was testimony during the hearing that the City of Medford, during excavation for a downtown parking structure, encountered both underground oil/petroleum tanks *and asbestos*. Respondent introduced a newspaper article in which local DEQ officials confirmed the department did not intend to pursue a fine against the City *because its discoveries were not made prior to demolition and excavation.*[1] While deference to agency expertise is not automatic or unreasoning, *Springfield Education Assn. V. School Dist.*, 290 Or 217, 621 P2d 547 (1980), it is proper to look to agency interpretations for guidance in discerning the meaning of DEQ rules:

> "...[I]n 'interpreting [an] administrative regulation whose meaning is in doubt, we must necessarily look to the construction given the regulation by the agency responsible for its promulgation.' *Bone v. Hibernia Bank*, 493 F2d 135 (9th Cir 1974). Agency rulings, interpretations and opinions '...do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' *Skidmore v. Swift and Co.*, 323 US 134, 65 S Ct 161, 164 L Ed 124 (1944)."

Aside from the obvious disparate treatment involved in imposing a civil penalty on the respondent but not the City of Medford, it is difficult to understand the relevance of the Department's argument. According to the Director's Notice of Assessment of Civil Penalty:

> "The Department imposes a civil penalty of $5,400 for the Violation of No. 1 in Section II, above. The findings and determinations of Respondent's civil penalty, pursuant to OAR 340-12-045, are attached and incorporated as Exhibit 1." Notice, p 2.

In short, the Director originally assessed respondent a civil penalty of $5,400 for *the first alleged violation only*—failing to employ required work practices for handling and removal of asbestos-containing was material in violation of OAR 340-32-5620(1).

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[1] Although the news clipping mentioned only the underground tanks, Tong testified that the City had also disturbed asbestos-containing material.

Despite his holding as to when liability attached, the Hearings Officer *agreed* that respondent violated OAR 340-32-5620(1). Final Order, p 3. The only alleged violation upon which the Hearings Officer *disagreed* with the Director was whether respondent violated OAR 340-32-5620(1) by failing to notify the Department of an asbestos abatement project. The Hearings Officer found no violation because of he concluded that respondent innocently encountered the material; the same conclusion the Department reached in the case involving the City of Medford. Thus, except for clarifying apparently inconsistent enforcement policies, the Hearings Officer's decision with respect to when liability attached is irrelevant until one addresses the appropriate civil penalty.

The Hearings Officer Properly Determined the Appropriate Civil Penalty to be $1,000

The Department objects to the Hearings Officer's final order to the extent it imposes a civil penalty of only $1,000. The Hearings Officer used the formula contained in OAR 340-12-045(c) and found the appropriate penalty to be:

Penalty = BP + [(.1 x BP) (P + H + O + R + C)] + EB.

The Hearings Officer assigned a value of $1,000 (minor magnitude) to the base penalty (BP), whereas the Department argues the base penalty should be $3,000 (moderate magnitude). In so doing, he found:

> "...While the Department does have the option of raising the magnitude of the violation one level under OAR 340-12-090(1)(d)(D), it is not appropriate to do so in this case. As discussed in the earlier paragraphs, respondent's involvement in this matter was not intentional and does not warrant increasing the magnitude of the violation in this matter." Final Order, p 6.

The Department contends that the Hearings Officer had no authority to reduce the magnitude of the violation from "moderate" to "minor" because the material was comprised of more than 5% asbestos.

The Department's argument ignores the permissive language of OAR 340-12-090(1)(d)(D):

> "The magnitude of the asbestos violation *may be increased* by one level if the material was comprised of more than five percent asbestos."

The rule does not *require* that the magnitude be increased; it provides that the magnitude *may* be increased. Anyone dealing with the rule—the Department or a Hearings Officer included—has discretion to determine when an increase in magnitude is appropriate. Respondent contends that the Hearings Officer acted well within his discretion in determining that the small amount of material, and respondent's prompt response to the unforeseen encounter with asbestos, should be considered and the discretionary increase in magnitude should be set aside.

The Department next argues that the Hearings Officer erred when he assigned a zero value to the "O" factor. Respondent contends that the Hearings Officer properly determined that the single violation for which the Department elected to assess respondent occurred on a single day and zero is the appropriate value to be assigned the "O" factor.

Next, the Department urges that the appropriate value for the "R" factor is 6, because respondent acted intentionally. This is based on Tong's report in which he indicated that he advised Joel Ferguson to lay a tarp over the suspect material until lab tests were returned. Further, Tong indicated that Joel Ferguson was told that only a licensed asbestos contractor could handle the material. Joel Ferguson testified differently; he said Tong did not tell him the material could not be wrapped nor that only a licensed contractor could handle the suspect material. Ironically, it was respondent's reliance on the advice of *Rogue Disposal and Recycling*, to wrap the material in multiple layers of plastic and bind it with duct tape upon which DEQ seized to employ the 6-fold multiplier. The evidence clearly shows that respondent was concerned that—if Tong was right this time—if the material in fact contained asbestos, it should be taken from harm's way rather than left within a few feet of a public sidewalk. Out of this caution, respondent relied upon expert advice and told his son to wrap and bind the material as directed. The

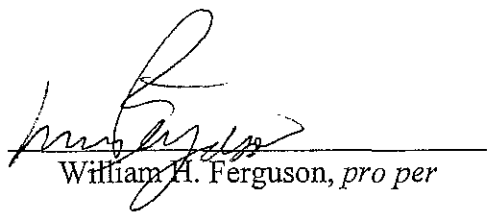
packaged material was not discarded, it was placed in a five-sided trailer and left at the site, available when Tong returned later on the day of October 1. Respondent's "conscious objective" was not to cause a violation of any statute or rule; rather it was to protect the public from exposure to what was only *suspected* at the time of being a potentially hazardous material. As the Hearings Officer—who was able to hear and assess all of the evidence—found, the correct value for "R" is "2", because respondent's actions were, at most, negligent.

The last issue concerns the appropriate value to be assigned the "C" factor. The Hearings Officer found that respondent was cooperative and assigned a value of -2 whereas the Department contends a factor of zero is appropriate because respondent was "neither wholly cooperative nor uncooperative". Respondent contends that the Commission should defer to the findings and conclusions of the Hearings Officer who had the opportunity to hear and assess all of the evidence. That evidence showed that respondent, after being advised that Tong suspected asbestos might be present, (1) took samples to be tested, and (2) contacted the local disposal company to determine how to wrap and dispose of the suspect material in order to protect the public. Moreover, once the material was positively identified, respondent took all necessary and appropriate steps to comply with the law, including the hiring to two experts to proceed with removal and clean-up. It is clearly overreaching for the Department to enhance the civil penalty in this case by failing to credit respondent for his cooperation.

CONCLUSION

For the reasons discussed above, the appeal should (1) be dismissed, or, in the alternative (2) the final order of the Hearings Officer should be adopted as the order of the Commission in this matter.

DATED: April 1, 1998.



William H. Ferguson, *pro per*

CERTIFICATES

I certify that I, (1) sent a copy of the above document by facsimile to the Department of Environmental Quality at 503-229-5850 on April 1, 1998; (2) filed the original with the Department of Environmental Quality, 811 S.W. 6th Avenue, Portland, OR 97204 by depositing the same with the United States Postal Service in Medford, Oregon, properly address and with postage thereon fully prepaid; and (3) served a copy, certified as true by me, upon Jeff Bachman, Department of Environmental Quality, 2020 S.W. 4th Avenue, Suite 400, Portland, Oregon 97201, 97204 by depositing the same with the United States Postal Service in Medford, Oregon, properly address and with postage thereon fully prepaid.

DATED: April 1, 998

William H. Ferguson, *pro per*

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: WILLIAM H. FERGUSON, Respondent/Appellee.	EXCEPTIONS AND BRIEF No. AQAB-WR-96-315 JACKSON COUNTY

Appellant, Department of Environmental Quality (the Department), excepts as follows to the findings and conclusions in the Hearing Officer's Findings of Fact, Conclusions of Law, and Order.

I. CASE HISTORY

On December 5, 1996, the Department issued Respondent a Notice of Assessment of Civil Penalty. The Notice assessed a civil penalty of $5,400 for violating Oregon Administrative Rule (OAR) 340-32-5620(1) by failing to follow the required work practices for asbestos abatement projects set forth in OAR 340-32-5640. The Notice also cited violations of, but did not assess penalties for, open accumulation of asbestos-containing waste material, OAR 340-32-5600(4); asbestos handling and disposal requirements, OAR 340-32-5650; asbestos abatement project notification requirements, OAR 340-32-5630; and asbestos abatement project worker and supervisor certification requirements, OAR 340-33-030(2 and (4).

On December 20, 1996, Respondent appealed the Notice of Assessment of Civil Penalty and requested a contested case hearing. On January 21, 1997, the Department held an informal discussion with Respondent. The discussion failed to resolve the case and a contested case hearing was held on September 10, 1997. In his decision, the Hearing Officer found that Respondent had violated OAR 340-32-5620(1), but reduced the penalty from $5,400 to $1,000.

II. RELEVANT FACTS

At the hearing, the Respondent testified to the following: Sometime before October 1, 1996, Respondent, a retired attorney who now engages in the purchase, management, and sale of real property, purchased a corner lot commercial building, known as the Morris Building, located at 421

Attachment E - 10 pages

West Sixth and 37 North Ivy Streets in Medford, Oregon. Respondent acquired the building from the Medford YMCA, which had received the property through a donation.

While the donation was still being considered, the YMCA requested that an environmental assessment be performed to identify any environmental liabilities associated with the property. The assessment was performed and a report of the results written and provided to the YMCA. Prior to Respondent's purchase of the property, the donor told him that an environmental assessment had been performed, and that the report found no "contamination". Respondent did not obtain a copy of, or otherwise review, the report prior to his purchase of the property, althou a copy was available to him.

After purchasing the property, Respondent commenced remodeling and renovating the building, during which asbestos-containing duct insulation was disturbed. When the Department began investigating the disturbance of the insulation, Respondent obtained a copy of the environmental assessment report and found that the report expressly stated that ducting in the Morris Building was wrapped with suspected asbestos-containing insulation.

At the hearing, Department Asbestos Control Analyst Keith Tong testified to the following: On October 2, 1996, Mr. Tong conducted an inspection of the Morris Building during renovation work being conducted by Respondent's son, Joel Ferguson. Mr. Tong observed torn pieces of suspected asbestos-containing corrugated duct insulation scattered on the property's parking area within 15 feet of the public sidewalk and street and still attached to duct work stacked nearby. Mr. Tong spoke with Joel Ferguson who told Mr. Tong that the insulation debris was generated when he removed the duct from the building. From the amount of duct removed, Mr. Tong estimated that approximately 60 square feet of insulation had been disturbed. He further observed that the insulation was dry.

Mr. Tong informed Joel Ferguson that the insulation probably contained asbestos and that it should be covered with a tarp and not disturbed further until a licensed asbestos abatement contractor could be brought in to remove and dispose of it properly. Mr. Tong then gave Joel Ferguson some asbestos hazard warning labels and asked him to cordon off the parking area, seal off the building, and post the warning labels. Joel Ferguson asked Mr. Tong if he could bag the insulation and place in it an

open trailer being used to dispose of demolition debris. Mr. Tong informed Joel Ferguson that it was highly likely the insulation contained asbestos, and if so, that it could only be further disturbed by a licensed asbestos abatement contractor. Mr. Tong then left the site.

Later that day, Mr. Tong returned to the site and found that the insulation had been picked up, wrapped in plastic, and placed in the open trailer. Mr. Tong asked Joel Ferguson why the material had been disturbed. Joel Ferguson told Mr. Tong that Respondent insisted that Joel wrap and place the insulation in the trailer. Mr. Tong observed that the insulation had not been wetted prior to placement in the plastic bags and that the bags were not at least 6 mils thick or labeled as containing asbestos waste. During the second inspection, Mr. Tong collected a sample of the insulation, which laboratory analysis on October 10, 1996, found to contain 10 percent asbestos.

From October 4 to October 18, 1996, Alpha Environmental, Inc., a licensed asbestos abatement contractor hired by Respondent completed removal of the insulation debris and decontamination of the property.

III. EXCEPTIONS

A. Liability Attached when Respondent Removed the Ducting from the Building and First Disturbed Asbestos

On page 4 of the Hearing Officer's Findings of Facts and Conclusions of Law, the Hearing Officer concluded that Respondent was not liable for any violations of the rules governing asbestos abatement projects until Mr. Tong informed Joel Ferguson that he suspected the duct insulation contained asbestos. The Hearing Officer's ruling is erroneous in that he failed to apply the standard of strict liability to Respondent's conduct. The Oregon Legislature's intent that violation of the state's environmental laws be strict liability is manifest in Oregon Revised Statute 468.140(1)(f), which makes the cause of a violation, whether an unavoidable accident, negligence, or an intentional act, a factor to be considered in calculation of civil penalties. Therefore, causation is a factor only in the size of a penalty for a violation, and not in determining whether a violation has occurred. Please also see Department's Memorandum of Authorities, attached.

The Hearing Officer did acknowledge that asbestos violations are strict liability, but expressly chose not to apply it because, in his opinion, "Respondent had taken all reasonable and necessary steps to proceed with his demolition and remodeling project". Page 4, Hearing Officer's Findings of Fact and Conclusion of Law. In so doing, the Hearing Officer applied a negligence standard for liability under the asbestos abatement rules. The Hearing Officer exceeded his authority. He cannot reject the strict liability standard established by the Oregon Legislature and substitute his own negligence standard.

Even if the standard for liability were negligence, Respondent would still be liable for the violations that occurred prior to Mr. Tong's arriving at the Morris Building. The Hearing Officer states that "Respondent is an experienced property owner and manager who has been involved in the acquisitions, renovation, and maintenance of commercial properties. He has been involved in situations potential asbestos-containing materials..." Page 4, Hearing Officer's Findings of Fact and Conclusions of Law. Before purchasing the building, Respondent was aware of the existence of the environmental assessment report, but did not obtain a copy. If he had reviewed the report himself, Respondent would have learned that the consultant who prepared the report suspected that the duct insulation contained asbestos. By failing to obtain and review a copy of the report prior to commencing demolition and renovation at the Morris Building, Respondent, a retired attorney and experienced property investor and manager, failed to exercise reasonable care and was therefore, at a minimum, negligent.

B. <u>The Hearing Officer Does not have the Authority to Reduce the Magnitude of Respondent's Violation</u>

On page 6 of his Findings of Fact and Conclusion of Law, the Hearing Officer reduced the magnitude of Respondent's violation from moderate to minor. In calculating the civil penalty, the Department, in accordance with Oregon Administrative Rule (OAR) 340-12-090(1)(d)(D), elevated the magnitude from minor to moderate because the material involved in the violation contained more than 5 percent asbestos. The Hearing Officer ruled that elevation of the magnitude was "not appropriate" because "respondent's involvement in this matter was not intentional".

Oregon Administrative Rule (OAR) 340-12-090(1)(d)(D) states "The magnitude of the asbestos violation may be increased by one level if the material was comprised of more than 5 percent asbestos." The rule does not require the Department to prove that the cause of the violation was Respondent's intentional conduct in order to elevate the magnitude. Under the plain language of the rule, the Department is only required to prove that the material involved in the violation contained more than 5 percent asbestos, which it did in this case. If the Commission wanted the cause of the violation to be considered in determining magnitude for asbestos violations, it would have said so in OAR 340-12-090(1)(d)(D). Instead, the Commission chose to make causation a factor to be considered separately from magnitude in calculating civil penalties. See OAR 340-12-045. The rules do not authorize the Hearing Office or the Department to consider causation when determining magnitudes for asbestos violations and his decision to do so in this case was improper.

C. Respondent's Violated OAR 340-32-5620(1) on Two Separate Occasions on the Same Day and the "O" Value is Therefore 2

On page 6 of his Findings of Fact and Conclusions of Law, the Hearing Officer ruled that the "O" or occurrence factor in the calculation of Respondent's civil penalty should be 0 because the "occurrence that results in the violation and penalty occurred during a period in one day where material were moved and stored.". The Hearing Officer's ruling is in error.

Oregon Administrative Rule.340-12-045(1)(c)(C)(ii) provides that the value for the O factor shall be 2 "if the violation occurred for more than one day or if it recurred on the same day. In this case, the violation recurred on the same day". The initial violation occurred when, on October 2, 1996, Joel Ferguson removed the insulated duct work from the building and disturbed the asbestos-containing insulation. See Paragraph III.A above. The violation recurred when Joel Ferguson disturbed the insulation a second time when, after learning the insulation was suspected asbestos-containing material, he picked it up, put it in plastic bags, and placed it in an open trailer.

D. The Cause of the Violation was Respondent's Intentional Conduct and the Correct Value for the "R" Factor is 6

On page 6 of the Hearing Officer's Findings of Fact and Conclusions of Law, he ruled that the "R" or causation factor in Respondent's civil penalty should be assigned a value of 2 because he "was at most negligent for the purposes of this element". The correct value for the R factor in Respondent's penalty is 6, pursuant to OAR 340-12-45(1)(c)(D)(iii), because the cause of the violation was Respondent's intentional conduct.

Oregon Administrative Rule 340-12-030(9) states that "intentional" "means conduct by a person with a conscious objective to cause the result of the conduct". This definition does not require that a person have a conscious intent to violate the law, or to know that they are dealing with regulated material, only that a person intend to cause the result of their conduct. Respondent directed Joel Ferguson to disturb the asbestos-containing insulation by bagging it and putting it in the trailer after Mr. Tong had told Joel Ferguson not to further disturb the material. Mr. Tong expressly directed Joel Ferguson not to bag the material and place it in the trailer, but to cover it with a tarp until a licensed asbestos abatement contractor could clean up the material. Respondent, intended the result of his conduct which was to have his son further disturb the material, which Respondent then knew was suspected of containing asbestos, and by so doing increased the risk that asbestos fibers were released to the open air. Respondent's conduct meets the definition set forth in the Commission's rule and the correct value for the R factor is therefore 6.

E. Respondent was Neither Cooperative nor Uncooperative in Correcting the Violation and the Correct Value for the "C" Factor is 0

On page 6 of the Hearing Officer's Findings of Fact and Conclusions of Law, he ruled that the "C" or cooperativeness factor in the calculation of Respondent's civil penalty should be -2 because Respondent was "cooperative after it was determined that the materials were asbestos-containing". The correct value for the C factor is 0 because Respondent was neither wholly cooperative nor uncooperative in correcting the violation.

Oregon Administrative Rule 340-12-045(1)(c)(E) sets forth the following possible values for the C factor: -2 if the Respondent was cooperative and took reasonable efforts to correct the violation or minimize the effects of the violation; 0 if there is insufficient information to make a finding, or if the violation or the effects of the violation could not be corrected; or 2 if Respondent was uncooperative and did not take efforts to correct the violation or minimize the effects of the violation." While acknowledging that Respondent continued to disturb the insulation after being directed not to by Mr. Tong, the Hearing Officer nevertheless found him to be cooperative because Respondent "took what he felt were reasonable steps to minimize the effects of the violation".

The Hearing Officer's reasoning is disturbing because it would in essence approve a member of the regulated community's decision to substitute his judgment for the Department's as to what action is necessary to protect public health and the environment. Respondent disturbed the asbestos a second time after being instructed by the Department's asbestos specialist not to do so. That is not being cooperative, nor did Respondent's actions minimize the effects of the violation. Instead, Respondent's conduct exacerbated the risk to public health because he increased the risk that fibers would be released by disturbing the insulation a second time without following required work practices. Furthermore, the actions the Hearing Officer describes as being cooperative constituted the violation for which he was penalized, disturbing the insulation after being instructed not to by Mr. Tong.

The Hearing Officer also stated that the C factor should be -2 because "Respondent was cooperative after it was determined that the materials were asbestos containing". If upheld, this reasoning also places public health and the environment at greater risk of harm. Under this interpretation, a person who has been informed that he or she may be in violation would not be required to cooperate with the Department until the violation is confirmed. If Respondent was truly cooperative, he would have complied with the Department's direction immediately upon being informed that the insulation was suspected of containing asbestos.

The proper value for the C factor is 0. While Respondent initially ignored the Department's direction to leave the insulation undisturbed until a licensed asbestos abatement

contractor could be brought in, he later hired a licensed contractor who cleaned up the property and properly disposed of the asbestos waste. Because Respondent was neither wholly uncooperative nor wholly cooperative, 0 is the most appropriate value for the O factor.

IV. ALTERNATIVE CONCLUSION OF LAW AND ORDER

The Department requests that the Commission reverse the Hearing Officer's conclusion of law that Respondent was not liable for violating the asbestos abatement rules until he was informed by Mr. Tong that the insulation was suspected of containing asbestos. In the alternative, the Department asks that the Department find Respondent liability attach from the moment that Respondent first disturbed the insulation by removing the ducting from the Morris building.

The Department further requests the Commission reverse the Hearing Officer's conclusions of law regarding calculation of Respondent's civil penalty, uphold the $5,400 civil penalty assessed Respondent, and as calculated by the Department in the Notice of Assessment of Civil Penalty, and issue a Final Order to that effect.

2/9/98
Date

Jeffrey R. Bachman
Environmental Law Specialist

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: WILLIAM H. FERGUSON, Respondent/Appellee,	)))))	MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEQ'S EXCEPTIONS AND BRIEF No. AQAB-WR-96-315 JACKSON COUNTY

A. <u>A Showing of Negligence Not Required, Liability Attaches as a Matter of Law</u>.

In the context of asbestos related violations, the EQC has previously examined the issue of negligence only as an aggravating factor, not as a precurser to liability. ***DEQ v. Fuel Processors Inc.***, No. AQAB-NWR-90-81, 1992 WL 474576 (March 20, 1992). The Commission is not required to define negligence by rule for violations within the statutory framework of ORS chapter 468. *See* ***Pratt v. Real Estate Division***, 76 OrApp 483 (1985).

ORS chapter 468 was not enacted to codify tort law, and negligence is a standard by which DEQ may aggravate the penalty, not one upon which penalty assessment is based. ***DEQ v. Excel Environmental Inc.***, No. AQAB-NWR-89-215, 1990 WL 117933 (May 25, 1990). Where a statute applies a strict liability standard, "knowledge or intent is relevant only regarding the amount of the penalty." ***In The Matter of David McInnis***, No. WQIW-NWR-94-311, 1996 WL 465204 (January 18, 1996).

B. <u>Strict Liability Statues Should be Construed as Written</u>.

ORS 174.010 directs the courts "not to insert what has been omitted" when they interpret a statute. That rule of construction applies equally to agencies when they interpret an agency's administrative rules and regulations. *See* ***Columbia Steel Castings Co. v. City of Portland***, 314 Or 424, 430, 840 P2d 71 (1992). In construing statutes the court's task is to "discern the intent of the legislature" and "construe provisions of a statute so as to give

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DEPARTMENT OF JUSTICE
1515 SW 5TH AVENUE, SUITE 410
PORTLAND, OREGON 97201
PHONE (503) 229-5725

effect to each." ***Henderson v. Dept of Agriculture***, 128 Or App 169,176-177, 875 P2d 487 (1993).

Respectfully submitted,

HARDY MYERS
Attorney General

Michael B. Huston #75189
Assistant Attorney General
Of Attorneys for DEQ
Department of Justice
1515 SW Fifth Avenue, Suite 410
Portland, Oregon 97201
Telephone: (503) 229-5725

TEB0064.MEM

Oregon

DEPARTMENT OF
ENVIRONMENTAL
QUALITY

January 13, 1998

Jeff Bachman
Department of Environmental Quality
2020 SW 4th Avenue, #400
Portland OR 97201

RE: Case No. AQAB-WR-96-351

Dear Mr. Bachman:

On January 9, 1998, the Environmental Quality Commission received the Department of Environmental Quality's timely request for administrative review by the Commission in this matter.

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 (February 9, 1998). The exceptions must specify those findings and conclusions that you object to and include alternative proposed findings. Once your exceptions have been received, William H. Ferguson may file an answer brief. The Department will then be allowed to file a reply brief to their answer.

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 William H. Ferguson, 5200 Pioneer Road, Medford, Oregon 97501.

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: William H. Ferguson
5200 Pioneer Road
Medford OR 97501-9314

Attachment F- 1 page

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

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: WILLIAM H. FERGUSON	NOTICE OF APPEAL OF HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER No. AQAB-WR-96-351 JACKSON COUNTY

Pursuant to Oregon Administrative Rule 340-11-132(2) the Department of Environmental Quality hereby provides notice that the Department intends that the Environmental Quality Commission review the Hearings Officer's Findings of Fact, Conclusions of Law, and Final Order in Case No. AQAB-WR-96-351.

DATED this 8th Day of January, 1998

Jeffrey Bachman
Environmental Law Specialist
Department of Environmental Quality
Representative for Appellant

State of Oregon
Department of Environmental Quality
RECEIVED
JAN 09 1998
OFFICE OF THE DEPUTY DIRECTOR

Attachment G - 1 page

Ref No.: G50087

Mailed by: BGS

STATE OF OREGON

Dec Mailed: 12/12/97
Case No: 97-GAP-00027
Case Type: DEQ

HEARING DECISION

WILLIAM H. FERGUSON
5200 PIONEER RD

MEDFORD OR 97501 9314

DEPART. OF ENVIRONMENTAL QUALITY
811 SW 6TH AVE

PORTLAND OR 97204 1334

JEFF BACHMAN, DEQ ENFORCEMENT

2020 SW 4TH STE 400
PORTLAND OR 97201

The following **HEARING DECISION** was served to the parties at their respective addresses.

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

Attachment A - 9 pages

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF THE NOTICE OF VIOLATION AND ASSESSMENT OF CIVIL PENALTY FOR FAILURE TO FOLLOW REQUIRED WORK PRACTICES FOR ASBESTOS ABATEMENT	)))))	HEARING OFFICER'S FINDING OF FACT AND CONCLUSION OF LAW No. AQFB-WR-96-351 Jackson County, Oregon
WILLIAM H. FERGUSON Respondent.	))	

Background

William H. Ferguson has appealed from a December 5, 1996 Notice of Violation and Assessment of Civil Penalty issued pursuant to Oregon Revised Statutes (ORS) Chapter 468, ORS Chapter 183, and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12. The Department of Environmental Quality (Department, DEQ) alleged that respondent violated OAR 340-32-5620(1) by failing to employ required work practices for handling and removal of asbestos-containing waste material; that respondent violated OAR 340-32-5600(4) by opening accumulating asbestos-containing waste material; that respondent violated OAR 340-32-5650 by failing to properly dispose of asbestos-containing waste material; that respondent violated OAR 340-32-5620(1) by failing to notify the Department of an asbestos abatement project; that respondent violated OAR 340-33-030(2) by allowing uncertified persons to perform asbestos abatement; and that respondent violated OAR 340-33-030(4) by supervising an asbestos abatement project without being certified.

A civil penalty of $5,400 was assessed pursuant to OAR 340-12-045.

William H. Ferguson requested a hearing on December 20, 1996.

A hearing was conducted in Medford, Oregon on September 10, 1997. The respondent William H. Ferguson appeared with witnesses Joel Ferguson, A. K. Morris, April Sevack, Gary Breeden, and William Corelle. Jeff Bachman represented the Department with witness Keith Tong.

RESPONDENT'S CONTENTIONS

Respondent William H. Ferguson contends that he had taken reasonable steps to assure the property was free from contaminants when he purchased the property, that he was not aware there were asbestos-containing materials in the building when he started the renovation, and that when he became aware that there might be a problem he took reasonable measures to protect the public and others from exposure, and that once he determined the materials were asbestos-containing he complied with all statutes and rules regarding the removal of such materials.

FINDINGS OF FACT

1. On October 2, 1996, Keith Tong (Tong), Department Asbestos Control Analyst, was driving by a building renovation project being conducted at 421 W. Sixth Street-37 North Ivy Street, Medford, Oregon, when he observed what appeared to be asbestos-containing material on the site.

2. Tong stopped at the site, inspected the materials he had observed, and contacted Joel Ferguson who was in charge of the renovation project, and advised him that the duct wrap appeared to be asbestos-containing material, and that proper steps should be taken to accomplish the asbestos removal, and not to disturb the materials.

3. Tong was on his way to a meeting and advised Joel Ferguson that he would return after the meeting and conduct a more detailed inspection, and left the premises.

4. After Tong left, Joel Ferguson called his father, William H. Ferguson, respondent herein, and reported his contact with Tong.

5. Respondent contacted the disposal company that was authorized to dispose of asbestos-containing materials and was advised that the materials needed to be double bagged and the bags secured for disposal.

6. Respondent went to the renovation project and obtained a sample of the material and took it in for testing.

7. Respondent advised Joel Ferguson to bag the material so that there would be no further disbursement of the materials if it was asbestos-containing and not to remove further ducting.

8. Joel Ferguson placed the ducting in double black plastic bagging and placed it in a utility trailer on the premises and also sent other workers home until it could be determined whether the duct wrap did contain asbestos.

9. When Tong returned after the meeting he found that the ducting and wrap containing what appeared to be asbestos-containing material had been removed from where he first observed it and placed in black plastic garbage bags and placed in a utility trailer on the premises.

10. Tong did observe pieces of the material on the ground where the ducting had been located.

11. After the second meeting with Tong, respondent and Joel Ferguson did encapsulate the building and taped off the premises from public passage.

12. The materials did test positive for asbestos and respondent contracted for the services of an abatement engineer and then with an abatement contractor for the actual removal of the material.

13. Respondent paid approximately $5,160 for the services of the engineer and actual removal of the material.

14. Joel Ferguson is not a certified asbestos removal worker.

15. Respondent is not certified as an asbestos abatement project supervisor.

16. When respondent purchased the property, the environmental investigation and study of the building did not reveal any active or current contamination problems although did indicate that there could be asbestos on the premises.

17. Respondent had removed a false ceiling and was removing a length of old heating duct so that new heating ducts could be installed, when the asbestos-containing material was discovered by Tong.

18. The ducting situation had been reviewed by the heating and air-conditioning contractor and the contractor who worked with respondent on a number of renovation or construction projects and

neither observed any conditions or materials that caused them concern that asbestos was a factor in the renovation project.

19. The type of wrap used on the length of duct work that had been removed was manufactured in asbestos-containing and non asbestos containing products, and the wrap had no distinguishing marks or colors to accurately determine whether it contained asbestos or not.

20. Respondent had been involved in the renovation of another building where a similar type of wrap was suspected of containing asbestos, but after testing, it was determined that it in fact did not.

21. Respondent did not believe that the duct wrap was asbestos containing, but wanted to take some precautions in case it was and had directed Joel Ferguson to bag the wrapped ducting and to put it in the trailer.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction.

2. William H. Ferguson violated OAR 340-32-5620(1), OAR 340-32-5600(4), OAR 340-32-5650, OAR 340-33-030(2) and OAR 340-33-030(4).

3. William H. Ferguson is subject to a civil penalty of $1,000.

OPINION

1. The Commission has jurisdiction.

The Environmental Quality Commission is directed by ORS Chapters 468 and 468A to adopt rules and policies to establish an asbestos abatement program that assures the proper and safe abatement of asbestos hazards through contractor licensing and worker training and to establish work practice standards regarding the abatement of asbestos hazards and the handling and disposal of waste materials containing asbestos. The Commission did that, and these proceedings are under those rules. The Commission has jurisdiction to proceed with the notice of violation herein and the assessment of civil penalty.

2. William H. Ferguson violated OAR 340-32-5620(1) by failing to employ required work practices for handling and removal of asbestos-containing waste.

OAR 340-32-5620(1) provides that any person conducting an asbestos abatement project shall comply with notification and asbestos abatement work practices and procedures of OAR 340-32-5630 and OAR 340-32-5640 (1) through (11).

OAR 340-032-5590(3) defines an "Asbestos abatement project" as any demolition, renovation, repair, construction or maintenance activity of any public or private facility that involves the repair, enclosure, encapsulation, removal, salvage, handling or disposal of any asbestos-containing material with the potential of releasing asbestos fibers from asbestos-containing material into the air.

OAR 340-32-5640(1) provides that if asbestos containing materials were not discovered prior to demolition, upon discovery of the materials, the owner should stop demolition work immediately, notify the department of the occurrence, keep the exposed material adequately wet until a licensed abatement contractor begins removal, and have a licensed asbestos abatement contractor remove and dispose of the materials.

Respondent is an experienced property owner and manager who has been involved in the acquisition, renovation and maintenance of commercial properties. He has been involved in situations involving potential asbestos-containing materials, and took reasonable steps to assure that the building in question was free from any hazardous materials or contaminants that would cause costs for removal or containment. He was not aware of the nature of the duct work above the false ceiling, and when the false ceiling was removed, took additional steps to assure that he was not dealing with any materials that would require special handling or removal processes. He was conducting the demolition portion of the renovation project accordingly.

Respondent became aware of there might be concerns when Mr. Tong informed respondent's son that the insulation wrap on some of the duct work that had been removed might contain asbestos. Upon becoming aware of Mr. Tong's concerns, he immediately took a sample to a testing laboratory to be tested and did advise his son to place the removed ducting in plastic bags and put them in a trailer that was on the site. He also advised his son to stop all removal operations.

Prior to Mr. Tong's notification, respondent was not involved in an "Asbestos abatement project", notwithstanding the definition of the rule and the strict liability interpretation of its provisions. Prior to Mr. Tong's notification of potential asbestos-containing material respondent had taken all reasonable and necessary steps to proceed with his demolition and remodeling project. Liability, in this case, did not attach prior to notification.

It is clear from the testimony and evidence that respondent was aware of the problems associated with properties with contaminates or other materials that would require special handling or removal procedures, and that he probably would not have acquired this particular property had he been aware of any potential problems. Further, he had dealt specifically with potential asbestos-containing materials and took further steps to assure that the insulation wrap on the ducting was not asbestos-containing material. Respondent was not attempting to avoid compliance with the law and rules regarding the removal of asbestos-containing material.

Mr. Tong gave notice of potential asbestos-containing material. At that point liability attached. While there was still question at that point as to whether the wrap was asbestos-containing material or not, until it was determined that it was not, respondent was required to conform to the provisions of the rule regarding asbestos abatement projects. At that point, respondent was required to immediately stop the demolition, notify the Department, and keep the suspected asbestos-containing materials in a wetted condition until such time as a licensed asbestos abatement contractor could begin removal.

Respondent immediately stopped the demolition. The Department, although not formally notified of the project as provided by the rule, was aware of the project through Mr. Tong's involvement. Respondent, after stopping the demolition, however, continued to handle the suspected asbestos-containing material in violation of the rule.

While respondent's actions may have been a good faith effort to protect the public, the statutes and rules involving the removal and disposal of asbestos-containing materials impose a strict liability on the property owner, and non-compliance, even based on good faith effort does not excuse violation of the rules.

Respondent's testing of the sample was reasonable. Mr. Tong's observations were hurried and in passing, and there was no definitive means by which to visually determine whether that particular type of insulation wrap contained asbestos or not. Further, respondent had been recently involved in a situation where a similar appearing wrap of suspected asbestos-containing material turned out not to contain asbestos. Notwithstanding the reasonableness of the testing and the delay in notification or contact with an asbestos removal engineer or contractor, the strict liability of the rule required that nothing transpire with the material other than wetting down the material and keeping it in that condition until removal.

The respondent did not do that and is in violation of the rule.

The respondent, in proceeding with the bagging and removal of the duct work with the wrap from where it was stacked to the trailer also violated the following provisions of the rules.

William H. Ferguson violated OAR 340-32-5600(4) by openly accumulating asbestos-containing waste material.

OAR 340-32-5600(4) provides that open accumulation of friable asbestos-containing waste material is prohibited.

Again, the stacking of the material, prior to Mr. Tong's notification does not result in liability in this specific case. However, once the notice was given respondent was responsible to conform to the rule. The insulating wrap materials were not bagged and sealed in accordance with the rule and therefore created an open accumlation of those materials.

William H. Ferguson violated OAR 340-32-5650 by failing to properly package and store asbestos-containing waste material.

OAR 340-32-5650 provides for standards for the packaging, storage, transport and disposal of asbestos-containing waste material and requires that all asbestos-containing waste material shall be adequately wetted to ensure that they remain wet until disposed of and packaged in leak-tight containers such as two plastic bags each with a minimum thickness of 6 mil and labeled as provided in the rule.

Respondent did call the disposal company and then triple bagged the materials as was suggested, however the materials were not wetted and respondent did not use the 6 mil bags required by the rule. Respondent did not properly package and store the asbestos-containing materials.

William H. Ferguson did not violate OAR 340-32-5620(1) by failing to notify the Department of an asbestos abatement project.

OAR 340-32-5620(1) requires that any person who conducts an asbestos abatement project shall comply with OAR 340-032-5630 which requires that any person conducting such project shall provide notification within a specific time prior to the abatement project being started.

In this case, respondent was not aware that there was any asbestos-containing materials in the building or that would be affected by the demolition or renovation, and then, other than the bagging and moving of the materials was not actively involved in the actual abatement project that was conducted through the abatement engineer and abatement contractor. At the time of the bagging and removal to the trailer it had not been determined that the materials were in fact asbestos-containing. It is not appropriate to assess violation under this provision of the rule.

William H. Ferguson violated OAR 340-33-030(2) by allowing uncertified persons to perform asbestos abatement.

OAR 340-33-030(2) provides than an owner of a facility shall not allow any person who is not certified to removal asbestos-containing waste material to perform asbestos abatement projects.

Joel Ferguson was not a certified asbestos abatement worker.

William H. Ferguson violated OAR 340-33-030(4) by supervising an abatement project without being certified.

OAR 340-33-030(4) provides that each person acting as a supervisor for any asbestos abatement project must be certified.

Respondent was not a certified asbestos abatement project supervisor.

3. William H. Ferguson is subject to a civil penalty of $1000.

Violation 1. Failing to employ required work practices for handling and removal of asbestos containing waste.

Penalty = BP +[(.1 x BP) (P + H + O + R + C)] + BE.

"BP" is the base penalty which is $1000 for a Class I, minor magnitude violation. "P" is respondent's prior violations. "H" is the past history of the respondent in taking all feasible steps or procedures necessary to correct any prior violations. "O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation. "R" is the cause of the violation. "C" is the respondent's cooperativeness. "EB" is the approximated dollar sum of the economic benefit that respondent gained through noncompliance.

The Department classified the magnitude of the violation as moderate because of the asbestos content of the materials involved. While the Department does have the option of raising the magnitude of the violation one level under OAR 340-12-090(1)(d)(D), it is not appropriate in this case to do so. As discussed in the earlier paragraphs, respondent's involvement in this matter was not intentional and does not warrant increasing the magnitude of the violation in this matter.

The Department assigned a values of 0 to "P" and "H", because respondent had no prior violations or past history regarding violations.

The Department assigned "O" a value of 2 because the violation occurred for more than one day. As far as this decision, it is found that the occurrence that results in the violation and penalty occurred during a period in one day where materials were moved and stored. "O" is assigned a value of 0 for this penalty calculation.

The Department assigned a value of 6 for "R" on the basis that violation was intentional. As set forth earlier, for the purposes of this decision, liability did not attach until respondent was notified that the material might contain asbestos. At that time, respondent to steps to ascertain whether the material in fact contained asbestos and also took steps which he felt were appropriate to protect the public if it were asbestos-containing. He was at most negligent for the purposes of this element and "R" is assigned a value of 2.

The Department assigned "C" a value of 0 because respondent continued abatement proceedings after being advised that the materials might contain asbestos. The rule provides for a value of -2 if a respondent was cooperative and took reasonable efforts to correct the violation or minimize the effects of the violation. Respondent was skeptical. He had taken steps to assure that the building did not contain contaminates. He had been involved with suspected asbestos-containing materials before which had been tested and found not to contain asbestos. Notwithstanding those facts, he did stop demolition immediately, took what he felt were reasonable steps to minimize the effects of the violation, and then hired an engineer and contractor to perform the removal and disposal tasks. "C" is assigned a value of -2. Respondent was cooperative after it was determined that the materials were asbestos-containing.

"EB" is assigned a value of $0 because respondent did not gain any economic benefit by his actions after determining that the materials were asbestos-containing.

The rule is specific as to the values to be assigned under the varying circumstance and there is no provision for assigning values other that those set forth in the rule.

The civil penalty as calculated under the rule for violation 1 is $1,000.

Penalties are not calculated or assessed for the additional violations because each is based on the same fact situation and circumstances that resulted in the penalty assessment for the penalty above, and it is not appropriate to assess further penalty in this matter.

The requirements for establishing a penalty have been met. The values assigned and the calculations are set forth above. William H. Ferguson is liable for a civil penalty of $1,000.

Dated this 11th day of December 1997.

Environmental Quality Commission

Melvin M. Menegat

Melvin M. Menegat
Hearings Officer.

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF THE NOTICE OF VIOLATION AND ASSESSMENT OF CIVIL PENALTY FOR FAILURE TO FOLLOW REQUIRED WORK PRACTICES FOR ASBESTOS ABATEMENT	)	HEARING OFFICER'S ORDER No. AQFB-WR-96-351 Jackson County, Oregon
WILLIAM H. FERGUSON Respondent.	)	

The Commission, through its hearings officer, finds that the Commission has subject matter and personal jurisdiction in this proceeding: That William H. Ferguson violated OAR 340-32-5620(1) by failing to employ required work practices for handling and removal of asbestos-containing waste material; OAR 340-32-5600(4) by opening accumulating asbestos-containing waste material; OAR 340-32-5650 by failing to properly dispose of asbestos-containing waste material; OAR 340-33-030(2) by allowing uncertified persons to perform asbestos abatement; and OAR 340-33-030(4) by supervising an asbestos abatement project without being certified; and that respondent is liable for a $1,000 civil penalty.

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

Dated this 11th day of December 1997.

Environmental Quality Commission

Melvin M. Menegat

Melvin M. Menegat
Hearings Officer.

Notice: If you disagree with this Order you may request review by the Environmental Quality Commission. Your request must be in writing directed to the Environmental Quality Commission, 811 S.W. Sixth Avenue, Portland, Oregon 97204. The request must be received by the Environmental Quality Commission within 30 days of the date of mailing or personal service of this Order. If you do not file a request for review within the time allowed, this order will become final and thereafter shall not be subject to review by any agency or court.

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

Attachment I - 1 page

William H. Ferguson
5200 Pioneer Road
Medford, OR 97501
541-772-9545

Melvin M. Menegat
P O Box 1027
Eugene, OR 97440

Jeff Bachman
Department of Environmental Quality
2020 SW Fourth Avenue
Suite 400
Portland, OR 97201-4987

Re: *DEQ v. William H. Ferguson*
AQAB-WR-96-315
Jackson County

Gentlemen:

Enclosed herewith for Mr. Menegat is the original of Respondent's Post-hearing Brief in the above- captioned matter. A copy is being sent Mr. Bachman as well. Copies were also sent each of you by FAX this date.

Very truly yours,

WILLIAM H. FERGUSON

WHF.me
Encl. (1)

Attachment J - 10 pages

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

In the matter of: William H. Ferguson, Respondent.	**Respondent's Post-Hearing Memorandum** No. AQAB-WR-96-315 Jackson County

INTRODUCTION

On December 5, 1997, the Director of the Department of Environmental Quality ("DEQ") notified William H. Ferguson of the assessment of a civil penalty in the amount of $5,400, stemming from Ferguson's alleged removal and handling of "suspected asbestos-containing material" from a building in downtown Medford. Ferguson requested a hearing and one was held before Hearings Officer Melvin M. Menegat in Medford on September 10, 1997.

At the conclusion of the hearing, Jeff Bachman, representing DEQ, asked for the opportunity to submit a post-hearing brief addressing various legal and factual issues raised by Ferguson during the hearing. Subsequently, Bachman submitted a document entitled "Hearing Memorandum", bearing the same date as the hearing. Although the memorandum does not address any of the legal issues raised during the hearing, Ferguson assumes that it was intended to serve as DEQ's post-hearing memorandum and offers this reply.

FACTS

DEQ's memorandum—to the extent it purports to recite facts—is based entirely upon the written report of Keith Tong, the DEQ employee who investigated and reported the incident. As

the Hearings Officer will recall however, the evidence adduced during the hearing differed in significant respects from Tong's report.

Respondent Acquires and Begins Renovation of Structure

Respondent Ferguson purchased the building in question from the YMCA, which had been gifted the property by the previous owners, Mr. and Mrs. Morse. During the time Mr. Morse was considering disposing of the property, he had obtained an environmental assessment at the request of the Salvation Army. When Mr. Ferguson purchased the property, he was not given or shown a copy of the assessment. He was merely told—both by Mr. Morse and by a member of the Board of Directors of the YMCA—that the report was "clean".

In late September, 1996, Ferguson began renovations to the building. In the process, on October 1, 1996, Ferguson's workers decided to remove old heat ducting from above the ceiling. The evidence showed, (1) that removal of the ducting was optional, and (2) that none of the personnel involved in the decision to remove the ducting—including the workers and the architect—knew or suspected that wrapping on the ducting contained asbestos.

Joel Ferguson, William Ferguson's son, took down a short portion of wrapped ducting. The evidence showed that tiny portions of the wrap fell in the building and in the parking lot outside. All told, the area of the removed wrap constituted no more than, perhaps, 12 square feet, almost all of which was still attached to the ducting.

By apparent coincidence, Keith Tong walked by the building and spotted what he thought might be asbestos-containing wrap. He told Joel Ferguson that he suspected the material might contain asbestos and instructed Ferguson to cease work, close-off the building, and lay a plastic tarp over the pieces of wrap in the parking lot. It is important to note that, according to Ferguson, *Tong did not tell him that he could not seal and package the material.*

Joel Ferguson contacted respondent and informed him that Tong had "shut-down" the job. William Ferguson had dealt with Tong before when Tong had declared that material he found in the basement of Ferguson's office building, where DEQ rents space, contained asbestos. After much ado and at considerable expense to Ferguson, the material was found to have been ordinary dry wall.

William Ferguson immediately tried to contact Tong at the local DEQ office. Tong was not available. Ferguson reasoned that, if the wrapping in question did contain asbestos it should not be left under a tarp in the parking lot, approximately 30 feet from the public sidewalk. Unable to speak with Tong, Ferguson did two things. First, he caused a sample of the material to be sent to a local lab for analysis. Second, he called the local solid waste disposer, *Rogue Disposal and Recycling*, and inquired how one could dispose of material which might contain asbestos. He was told that the material should be double-wrapped in a specified thickness of plastic-wrap, then sealed with duct tape. William Ferguson instructed Joel Ferguson to secure the specified plastic and wrap and seal the material in question. Joel Ferguson did as told, even triple-wrapping the material. He then placed the plastic-wrapped material into respondent's mobile trash container on the property which was enclosed on all sides except the top.

Later that day, respondent obtained a copy of the environmental assessment from Mr. Morse and took the report to Mr. Tong's office. Tong refused to look at the report, saying it did not matter. Respondent and one of Mr. Tong's assistants continued to review the report. To respondent's surprise, buried in the report was a passage suggesting that one of the ducts might contain asbestos. Respondent immediately contacted *Alpha Environmental, Inc.*, ("Alpha") a licensed asbestos abatement contractor, and a professional environmental engineer. On October 4, 1996, Alpha provided DEQ with the appropriate notice and commenced removal of the

asbestos. Ferguson paid approximately $5,160 for the asbestos removal and environmental engineering.

Notice of Assessment of Civil Penalty

By notice dated December 5, 1996, DEQ advised respondent of six (6) violations arising from the incident. The alleged violations were:

1. Failing to employ required work practice (OAR 340-32-5620(1));
2. open accumulation of asbestos-containing waste material (OAR 340-32-5600(4));
3. failure to properly dispose of asbestos-containing waste material (OAR 340-32-5650);
4. failure to notify DEQ of an asbestos abatement project (OAR 340-32-5620(1));
5. allowing uncertified persons to perform asbestos abatement (OAR 340-33-030(2));
6. supervising asbestos abatement project without being certified (OAR 340-33-030(4)).

DEQ imposed a civil penalty of $5,400 for the first alleged violation only. The $5,400 figure was arrived at as follows:

1. The alleged violation was adjudged a Class I violation pursuant to OAR 340-12-050(1)(o). That determination triggered application of the $10,000 matrix of OAR 340-12-0042(1).
2. DEQ judged that alleged violation to be of "moderate" magnitude. Although the amount of asbestos-containing material was found to be less than 80 square feet—an amount determined to involve only a violation of "minor" magnitude—DEQ took advantage of permissive language in OAR 340-12-090(1)(d)(D) to increase the

magnitude by one level because the material was allegedly comprised of more than 5% asbestos.[1]

3. The base penalty for a Class I violation of moderate magnitude is $3,000. To the base penalty, DEQ's added $2,400 after multiplying 10% of the base penalty by a factor of eight ($300 x 8 = $2,400). The factor of eight was arrived at by adding an "O" value of two (because the alleged violation occurred for two days), and an "R" value of six for an intentional violation (because "...Respondent continued asbestos abatement after his son relayed to him a warning by a Department staff member that the asbestos-containing material (ACM) should only be handled by a licensed contractor.").

RESPONDENT'S ARGUMENT

Asbestos Was Not Discovered Before Demolition of the Heat Ducting

It is essential to remember that respondent did not *know* of the presence of asbestos-containing material until the results of laboratory tests were provided. The evidence shows that the presence of asbestos was not discovered when Tong spoke to Joel Ferguson; Tong only suspected the presence of such material. Respondent was justifiably uncertain whether asbestos was present. First, he had been told by the previous owners of the building that the environmental assessment had indicated the building was "clean". Second, Tong had previously erred—at respondent's expense—when he thought ordinary dry wall contained asbestos.

By the time respondent "knew" of the presence of asbestos-containing material, he did everything required under OAR 340-32-5640. That is, he stopped work, hired an environmental engineer and an asbestos removal contractor. The contractor notified DEQ, properly treated the

[1] OAR 340-12-090(1)(d)(D) says the magnitude of an asbestos violation "...*may* be increased by one level if the

exposed asbestos-containing material, and removed and disposed of the material as required by law.

DEQ Does Not Fine Owners for Unanticipated Encounters with Asbestos-Containing Materials

DEQ's memorandum implies that liability for penalties is a matter of strict liability. However, that's not what the statutes or rules say. Moreover, the evidence shows that the DEQ has interpreted the statutes and rules so as not to fine property owners who encounter asbestos-containing materials during the course of demolition.

The Hearings Officer will recall the hearing testimony regarding the City of Medford's downtown parking structure project. During excavation, Medford encountered both underground oil/petroleum tanks *and asbestos*. Respondent introduced a newspaper article in which local DEQ officials confirmed the department did not intend to pursue a fine against the City because its discoveries were not made prior to demolition and excavation.[2]

While deference to agency expertise is not automatic or unreasoning, *Springfield Education Assn. V. School Dist.,* 290 Or 217, 621 P2d 547 (1980), it is proper to look to agency interpretations for guidance in discerning the meaning of DEQ rules:

> "...[I]n 'interpreting [an] administrative regulation whose meaning is in doubt, we must necessarily look to the construction given the regulation by the agency responsible for its promulgation.' *Bone v. Hibernia Bank*, 493 F2d 135 (9th Cir 1974). Agency rulings, interpretations and opinions '...do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' *Skidmore v. Swift and Co.*, 323 US 134, 65 S Ct 161, 164 L Ed 124 (1944)."

Not only has DEQ interpreted its rules not to impose strict liability upon a property owner who encounters asbestos-containing materials, respondent affirmatively demonstrated the

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material was comprised of more than five percent asbestos". (Emphasis added)

contrary. The hearing in this case was held in the Medford offices of DEQ. There was ample opportunity for DEQ staff to offer evidence to show that it typically assesses fines to owners who unintentionally encounter and disturb asbestos-containing material. DEQ did not do so. On this record, it would clearly be inequitable for DEQ to assess a $5,400 fine against respondent for encountering asbestos in this case when it chose not to pursue a fine against the City of Medford for a similar encounter.

Assuming Respondent is Subject to Fine for this Encounter, the Fine was Excessive Under DEQ Rules

Even assuming DEQ could, consistent with its interpretation and application of the rules and statutes, assess respondent a fine for this encounter, the proposed fine of $5,400 is excessive. First, OAR 340-12-090(1)(d)(C) specifies that an asbestos violation is of only "minor" magnitude if it involves less that 80 square feet of asbestos-containing material. The base fine for a "minor" magnitude Class I violation is $1,000, rather than the $3,000 used in this case.

Although OAR 340-12-090(1)(d)(D) provides that the magnitude *may* be increased one level (in this case, to "moderate") if the material was comprised of more than 5% asbestos, respondent suggests that a 300% increase in the base fine (from $1,000 to $3,000) in this case in unwarranted. The small amount of material and respondent's prompt response to the unforeseen encounter with asbestos should be considered and the discretionary increase in magnitude should be set aside.

The next unwarranted increase in the fine occurred when DEQ multiplied the 10% of base fine by a factor of 6. Recall that this multiplier resulted from DEQ's determination that

[2] Although the news clipping mentioned only the underground tanks, Tong testified that the City had also disturbed asbestos-containing material.

respondent's violation was "intentional". OAR 340-12-030(9) defines "intentional" as "...conduct by a person with a conscious objective to cause the result of the conduct".

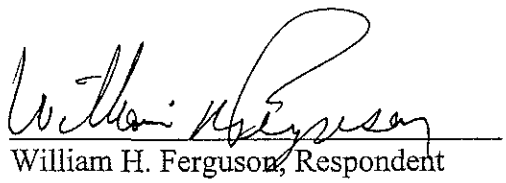
The record clearly indicates that DEQ's determination of "intentional" was based solely on Tong's report in which he indicated that he advised Joel Ferguson to lay a tarp over the suspect material until lab tests were returned. Further, Tong indicated that Joel Ferguson was told that only a licensed asbestos contractor could handle the material. Joel Ferguson testified differently; he said Tong did not tell him the material could not be wrapped nor that only a licensed contractor could handle the suspect material. Ironically, it was respondent's reliance on the advice of *Rogue Disposal and Recycling*, to wrap the material in multiple layers of plastic and bind it with duct tape upon which DEQ seized to employ the 6-fold multiplier. The evidence clearly shows that respondent was concerned that—if Tong was right this time—if the material in fact contained asbestos, it should be taken from harm's way rather than left within a few feet of a public sidewalk. Out of this caution, respondent relied upon expert advice and told his son to wrap and bind the material as directed. The packaged material was not discarded, it was placed in a five-sided trailer and left at the site, available when Tong returned later on the day of October 1. Respondent's "conscious objective" was not to cause a violation of any statute or rule; rather it was to protect the public from exposure to what was only *suspected* at the time of being a potentially hazardous material.

Under this analysis of the facts, the only appropriate fine would have been no more than $1,200 (= $1,000 + [($100) x (2)] + $0)—not the $5,400 fine imposed by DEQ. Respondent urges the Hearings Officer to impose this lower fine if, after considering DEQ's interpretation of the statutes and rules in the *City of Medford* case, he determines than any fine is appropriate.

CONCLUSION

For the reasons fully discussed above, respondent respectfully requests the Hearings Officer to find and conclude that no fine should be imposed upon the facts of this case. Alternatively, if some fine is appropriate, it should not exceed $1,200 for the reasons set forth herein.

Respectfully submitted,



William H. Ferguson, Respondent

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: WILLIAM H. FERGUSON	HEARING MEMORANDUM No. AQAB-WR-96-315 JACKSON COUNTY

This Hearing Memorandum is offered in support of the Notice of Civil Penalty Assessment (Notice) No. AQAB-WR-96-315, issued December 5, 1996, to William H. Ferguson (Mr. Ferguson) by the Department of Environmental Quality (the Department).

I. APPLICABLE STATUTES AND ADMINISTRATIVE RULES

1. Oregon Administrative Rule (OAR) 340-32-105(2) states that:

> "The owner or operator of the following types of sources shall comply with the applicable standards set forth in ...OAR 340-32-5500 through 340-32-5650.
> ...(f) any area source of hazardous air pollutant for which a standard has been adopted.

2. OAR 340-32-120(4) states that "area source" means:

> "any stationary source which has the potential to emit hazardous air pollutants but is not a major source of hazardous air pollutants".

3. OAR 340-32-5620(1) states that:

> "Any person who conducts an asbestos abatement project shall comply with OAR 340-32-5630 and OAR 340-32-5640(1) through (11).

4. Oregon Revised Statute (ORS) 468A.700(4) states that "asbestos abatement project" means:

> "any demolition, renovation, repair, construction, or maintenance activity of any public or private facility that involves the repair, enclosure, encapsulation, removal, salvage, handling, or disposal of any material with the potential of releasing asbestos fibers from asbestos-containing materials into the air".

5. OAR 340-32-5640 states that:

> "The following procedures shall be employed during an asbestos abatement project to prevent emissions of particulate asbestos material into the ambient air:

Attachment K - 9 pages

(1) Remove asbestos containing materials before any wrecking or dismantling that would break up the materials or preclude access to the materials for subsequent removal ...

(2) Asbestos-containing materials shall be adequately wetted when they are being removed."

6. OAR 340-32-5590(1) states that "adequately wet";

"Means to sufficiently mix or penetrate asbestos-containing material with liquid to prevent the release of particulate asbestos materials. The absence of visible emissions is not sufficient evidence of being adequately wet."

7. OAR 340-32-5600(4) states that:

"Open accumulation of friable asbestos-containing material or asbestos-containing waste material is prohibited."

8. OAR 340-32-5590(21) states that "open accumulation":

"Means any accumulation, including storage of friable asbestos-containing waste material, other than material securely enclosed and stored as required by OAR 340-32-5650."

9. OAR 340-32-5650 states that:

"The owner or operator of a source or an activity covered under the provisions of OAR 340-32-5600 through OAR 340-32-5650 or any other source of friable asbestos containing waste material shall meet the following standards:

...(2) All asbestos containing waste materials shall be adequately wetted to ensure that they remain wet when disposed of, and:

(a) Processed into non-friable pellets or other shapes; or
(b) Packaged in leak tight containers such as two plastic bags with a minimum thickness of 6 mil., or fiber or metal drum.

...(4) The interim storage of asbestos-containing waste material shall protect the waste from dispersal into the environment and provide physical security from tampering by unauthorized persons."

10. OAR 340-32-5630 states that:

"Written notification of any asbestos abatement project shall be provided to the Department on a Department form..."

11. ORS 468A.730(1) states that:

"... [N]o worker shall work on an asbestos abatement project unless the person holds a certificate issued by the Department of Environmental Quality or the department's authorized representative..."

12. OAR 340-33-030(4) states that:

"Each person acting as the supervisor for any asbestos abatement project must be certified by the Department as a supervisor under the provisions of OAR 340-33-050.

II. FACTS AND EVIDENCE

13. Sometime before October 1, 1996, Mr. Ferguson purchased a corner lot commercial building located at 421 West Sixth and 37 North Ivy Streets in Medford, Oregon. Mr. Ferguson acquired the building from the local YMCA who had received the property through a donation. While the donation was still being considered, the YMCA requested that an environmental assessment be performed to identify any environmental liabilities associated with the property. The assessment was performed and a report of the results written and provided to the YMCA. Prior to Mr. Ferguson's purchase of the property, the donor told him that an assessment had been performed and that the report found no environmental liabilities. Mr. Ferguson did not obtain a copy of or otherwise review the report prior to his purchase of the property. After purchasing the property, Mr. Ferguson commenced remodeling and renovating the building.

On October 2, 1996, Keith Tong, an Asbestos Control Analyst in the Department's Medford office, conducted an inspection of the property. Mr. Tong observed torn pieces of suspected asbestos-containing corrugated duct work insulation scattered on the property's parking area in close proximity to the public sidewalk and street. Mr. Tong spoke with Joel Ferguson, William Ferguson's son, who had been working on the renovation. Joel Ferguson told Mr. Tong that the insulation debris was generated during removal of duct work inside the building. From the amount of duct work removed, Mr. Tong estimated that approximately 60 square feet of insulation had been disturbed. He further observed that the insulation was dry.

Mr. Tong collected a sample of the insulation, which laboratory analysis on October 10, 1996, found to contain 10 percent asbestos. After collecting the sample, Mr. Tong informed Joel Ferguson that the insulation probably contained asbestos and that it should be covered with a tarp and not disturbed further until a licensed asbestos abatement contractor could be brought in to remove and dispose of it properly. Mr. Tong then gave Joel Ferguson some asbestos hazard warning labels and asked him to cordon off the parking area, seal off the building, and post the

warning labels. Joel Ferguson asked Mr. Tong if he could bag the insulation and place in it an open trailer being used to dispose of demolition debris. Mr. Tong informed Joel Ferguson that it was highly likely the insulation contained asbestos, and if so, that it could only be further disturbed by a licensed asbestos abatement contractor. Mr. Tong then left the site.

Later that day, Mr. Tong returned to the site and that found that the insulation had been picked up, wrapped in plastic, and placed in the open trailer. Mr. Tong asked Joel Ferguson why the material had been disturbed. Joel Ferguson told Mr. Tong that he relayed Mr. Tong's instructions to his father, William Ferguson, but that William Ferguson insisted that Joel wrap and place the insulation in the trailer. Mr. Tong observed that the insulation had not been wetted prior to placement in the plastic bags and that the bags were not at least 6 mils thick or labeled as containing asbestos waste.

Sometime on October 2, 1996, William Ferguson obtained a copy of the environmental assessment report for the building from the YMCA. Mr. Tong reviewed the report with Mr. Ferguson and that the report did state that the duct work's insulation contained asbestos. From October 4 to October 18, 1996, Alpha Environmental, Inc., a licensed asbestos abatement contractor completed removal of the insulation debris and decontamination of the property.

III. VIOLATIONS

14. On or about October 2, 1996, William Ferguson violated OAR 340-32-5620(1) by failing to employ required work practices for handling and removal of asbestos-containing waste material. Specifically, William Ferguson failed to follow the work practices set forth in OAR 340-32-5640(1) and (2) when conducting an asbestos abatement project at buildings he owned at the corner of West Sixth Street and North Ivy Street (421 W. Sixth and 37 N. Ivy), Medford. The improper abatement resulted in potential public exposure to asbestos or release of asbestos fibers into the air. This is a Class I violation pursuant to OAR 340-12-050(1)(o).

15. On or about October 2, 1996, William Ferguson violated OAR 340-32-5600(4) by openly accumulating asbestos-containing waste material. Specifically, William Ferguson failed to properly contain asbestos-containing waste material generated in accordance with the requirements

of OAR 340-32-5650, creating the potential for public exposure to asbestos or the release of asbestos fibers to the air. This is a Class I violation pursuant to OAR 340-12-050(1)(p).

16. On or about October 2, 1996, William Ferguson violated OAR 340-32-5650 by failing to properly dispose of asbestos-containing waste material . Specifically, William Ferguson failed to dispose of asbestos-containing waste material, generated by removal of asbestos duct insulation removed from the building in accordance with the provisions of OAR 340-32-5650, creating the potential for public exposure to asbestos or the release of asbestos fibers to the air. This is a Class I violation pursuant to OAR 340-12-050(1)(s).

17. On or about October 2, 1996, William Ferguson violated OAR 340-32-5620(1) by failing to notify the Department of an asbestos abatement project. Specifically, William Ferguson failed to comply with the notification requirements of OAR 340-32-5630 prior to removing asbestos-containing insulation from the building. This is a Class II violation pursuant to OAR 340-12-050(2)(j).

18. On or about October 2, 1996, William Ferguson violated OAR 340-33-030(2) by allowing uncertified persons to perform asbestos abatement on property owned by William Ferguson. Specifically, William Ferguson allowed persons not certified as asbestos abatement workers to perform asbestos abatement at the building. This is a Class II violation pursuant to OAR 340-12-050(2)(i).

19. On or about October 2, 1996, William Ferguson violated OAR 340-33-030(4) by supervising an asbestos abatement project without being certified as an asbestos abatement project supervisor. This is a Class II violation pursuant to OAR 340-12-050(2)(i).

IV. CASE ANALYSIS

20. Violation No. 1 alleges that William Ferguson violated OAR 340-32-5620(1) by failing to employ required work practices when performing an asbestos abatement project. ORS 468A.700(4) defines an asbestos abatement project as, among other things, any "demolition" or "renovation" activity that involves the "removal" or "handling" of "any material that has the potential of releasing asbestos fibers from asbestos-containing material into the air". William Ferguson performed two separate and distinct asbestos abatement projects on his property. The

first consisted of the removal of the duct work, and the associated disturbance of the asbestos-containing insulation on the duct work The second occurred when the insulation that was scattered with other demolition debris during the removal of the duct work was handled by Joel Ferguson in the process of bagging it and putting it into the open trailer. The second asbestos abatement project occurred after Mr. Tong expressly instructed Joel Ferguson not to further disturb the insulation scattered about William Ferguson's property.

The required work practices for all asbestos abatement projects are set forth in OAR 340-32-5640(1) through (11). These practices include OAR 340-32-5640(1), which requires that asbestos containing material be removed before any wrecking or dismantling activities that would break up the material, and -5640(2) that requires asbestos containing materials be adequately wetted prior to their removal. William Ferguson failed to employ either of this practices when the duct work and insulation was removed. When Mr. Tong inspected the site on October 2, 1996, he observed torn insulation scattered about and pieces of insulation still attached to the dismantled duct work. Mr. Tong further observed that the insulation was dry. When he returned to the site later in the day, he found that the torn insulation had been picked up, placed in plastic bags and put in the open trailer. When he examined the insulation in the trailer it was also dry.

21. Violation No. 2 of the Notice alleges William Ferguson violated OAR 340-32-5600(4) by openly accumulating asbestos containing waste material. OAR 340-32-5590(21) defines "open accumulation" as any accumulation, including storage, of friable asbestos-containing waste material that is not securely enclosed and stored as required by OAR 340-32-5650. OAR 340-32-5650(2) requires that material be wetted in a manner which assures that the material will remain wet until disposal, that the material be placed in leak-tight containers, such as double bagging it in plastic bags at least 6 mils thick. or in fiber or metal drums, and that asbestos hazard warning labels be affixed to the containers. OAR 340-32-5640(4) requires that during interim storage before final disposal, asbestos-containing waste material must be physically secured from tampering by unauthorized persons.

When Mr. Tong inspected the William Ferguson's property on October 2, 1996, pieces of dry friable asbestos-containing waste material in the form of duct insulation were scattered in the parking area and attached to duct work that had been removed from the building. The material was not wet, placed in leak-proof containers, or secured against tampering. By failing to comply with the requirements of OAR 340-32-5650, William Ferguson openly accumulated asbestos-containing waste material.

22. Violation No. 3 alleges that William Ferguson violated OAR 340-32-5650 by failing to employ required practices for the packing and storage of asbestos-containing waste material. The relevant practices are describe above. After his initial inspection on October 2, 1996, Mr. Tong left the site to attend to other business. When he returned later that day, Mr. Tong found the insulation had been picked up, placed in plastic bags, and placed in an open trailer by Joel Ferguson at William Ferguson's direction. The material was not wet, the bags were not thick enough to be leak proof, the bags did not have asbestos hazard warning labels, and the trailer did not prevent physical security against tampering, as required by OAR 340-32-5650(2) and (4).

23. Violation No. 4 alleges that William Ferguson violated OAR 340-32-5620(1) by failing to notify the Department of an asbestos abatement project in accordance with the requirements of OAR 340-32-5630. The Department has no record of receiving a notice of an asbestos abatement project to be performed at 421 West Sixth and 37 North Ivy Streets in Medford.

24. Violation No. 5 alleges that William Ferguson violated ORS 468A.730(1) by using an uncertified worker to perform asbestos abatement. Joel Ferguson was not certified by DEQ as an asbestos abatement project worker on October 2, 1996, when he removed and handled asbestos-containing duct insulation.

25. Violation No. 6 alleges that William Ferguson violated OAR 340-33-030(4) by supervising an asbestos abatement project without being certified as an asbestos abatement project supervisor. William Ferguson was not certified as an asbestos abatement project supervisor on October 2, 1996 when he directed the work which included the removal and subsequent handling of asbestos-containing duct insulation.

V. CIVIL PENALTY CALCULATION

26. Exhibit 1 of the Notice sets forth the calculation of the $5,400 civil penalty assessed William Ferguson for Violation No. 1, failing to employ required work practices for asbestos abatement projects. The exhibit identifies the violation as a Class I violation pursuant to OAR 340-12-050(1)(o). The magnitude of the violation was elevated from minor to moderate pursuant to OAR 340-12-090(1)(d)(D). While a minor magnitude quantity of asbestos-containing waste material was openly accumulated, 60 square feet, that material contained 10 percent asbestos fiber. OAR 340-12-090(1)(d)(D) provides that if the asbestos content is greater than 5 percent, the Department may elevate the magnitude by one level. The base penalty for a Class I, moderate magnitude violation of an air quality rule is $3,000 pursuant to OAR 340-12-042(1).

Pursuant to OAR 340-12-045, the Department applied two aggravating factors.

The "O" or occurrence factor. Pursuant to OAR 340-12-045(1)(c)(C)(ii), the Department aggravated William Ferguson's civil penalty by a factor of 2 because the violation "recurred on the same day. In the case of William Ferguson, the violation recurred on the same day. The initial violation occurred when, on October 2, 1996, Joel Ferguson removed the insulated duct work from the building and disturbed the asbestos-containing insulation. The violation recurred when Joel Ferguson disturbed the insulation a second time when, after learning the insulation was suspected asbestos-containing material, he picked up, put it in plastic bags, and placed it in an open trailer.

The "R" or causation factor. Pursuant to OAR 340-12-45(1)(c)(D)(iii) the Department aggravated William Ferguson's civil penalty by a factor of 6 because it found the cause of the violation to be William Ferguson's intentional conduct. OAR 340-12-030(9) states that "intentional" "means conduct by a person with a conscious objective to cause the result of the conduct". This definition does not require that a person have a conscious intent to violate the law, only that a person consciously engage in the conduct that constitutes a violation. William Ferguson consciously engaged in the renovation and remodeling project, including the duct work removal that resulted in the violation. Furthermore, William Ferguson directed Joel Ferguson to

disturb the asbestos-containing insulation a second time, even though Joel Ferguson told him that Mr. Tong had said that only a licensed asbestos abatement contractor could clean up the material.

9/10/97
Date

Jeff Bachman
Environmental Law Specialist
Oregon Department of Environmental Quality

EXHIBIT A1

DEPARTMENT OF ENVIRONMENTAL QUALITY
Request for Analysis

Laboratory No. 960847

Location/Site: Corner Ivy + 6th Medford Date: 20ct 96 Date Received Lab:

Collected By: Keith Tong Program: WRM Asbestos Date Reported: OCT 18 1996

Purpose: Asbestos Enforcement Report Data To:

Comments:

lab prepared

* Basic (P) unpreserved; Nutrient (R) add H_2SO_4 in field; Metals (Tm) HNO_3 added in lab--don't rinse; Organic(X) mason jar

Item No.	Sampling Point Description (include time)	*Sample Container (bottle) #'s Nutrients Basic	DO BOD	Metals Organic		Test Required
1	By Sidewalk card board debris 1:20PM				1	Asbestos content
2	In trailer duct wrap 1:25PM				2	Asbestos content
3						
4						
5						
6						

Laboratory comments

RECEIVED
OCT 24 1996
Dept. Environmental Quality
MEDFORD

Attachment 2

DEPARTMENT OF ENVIRONMENTAL QUALITY LABORATORI

Analytical Records Report

FRIDAY OCTOBER 11th, 1996

CASE NAME: 960847 MEDFORD, CORNER OF IVY AND 6TH
SUBMITTER: Tong, Keith COLLECTOR: Tong, Keith
FUND CODE: 1432 Asbestos Control

ITEM #	RESULT	UNITS	TEST
001	Cardboard debris by sidewalk 10/02/96 @ 13:20		
	Attached		Microscopic exam.
002	Duct wrap in trailer 10/02/96 @ 13:25		
	Attached		Microscopic exam.

DEPARTMENT OF ENVIRONMENTAL QUALITY

LABORATORIES AND APPLIED RESEARCH
INORGANIC/NONMETALS SECTION
MICROSCOPIC TEST RESULTS

Site: Corner of Ivy and 6th Medford	Laboratory No: 960847 Program Code: 1432
Collected by: Keith Tong	Date Completed: 10-10-96
Date Collected: 10-01-96	Analyst: LE

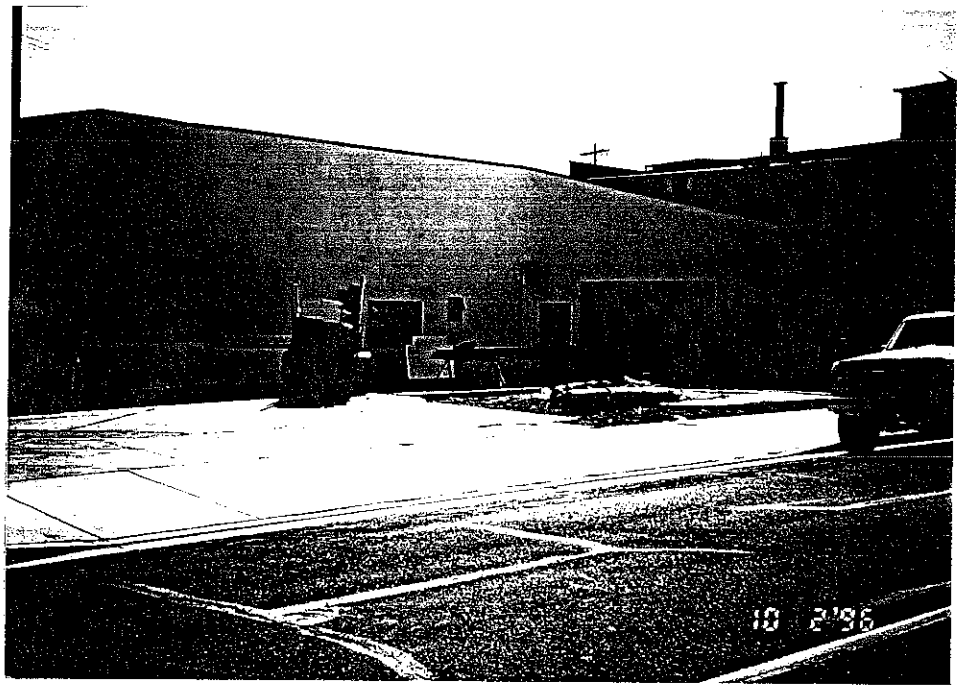
1.	1	Macro:	Brown, corrugated, paper-like material.
		Micro:	10% chrysotile asbestos 40% plant fiber minerals
2.	2	Macro:	Brown, corrugated, paper-like material.
			10% chrysotile asbestos 40% plant fiber minerals

Comments: Preliminary results by E-mail 10-10-96. LE

Asb847
Word/asbform (4.3.96)

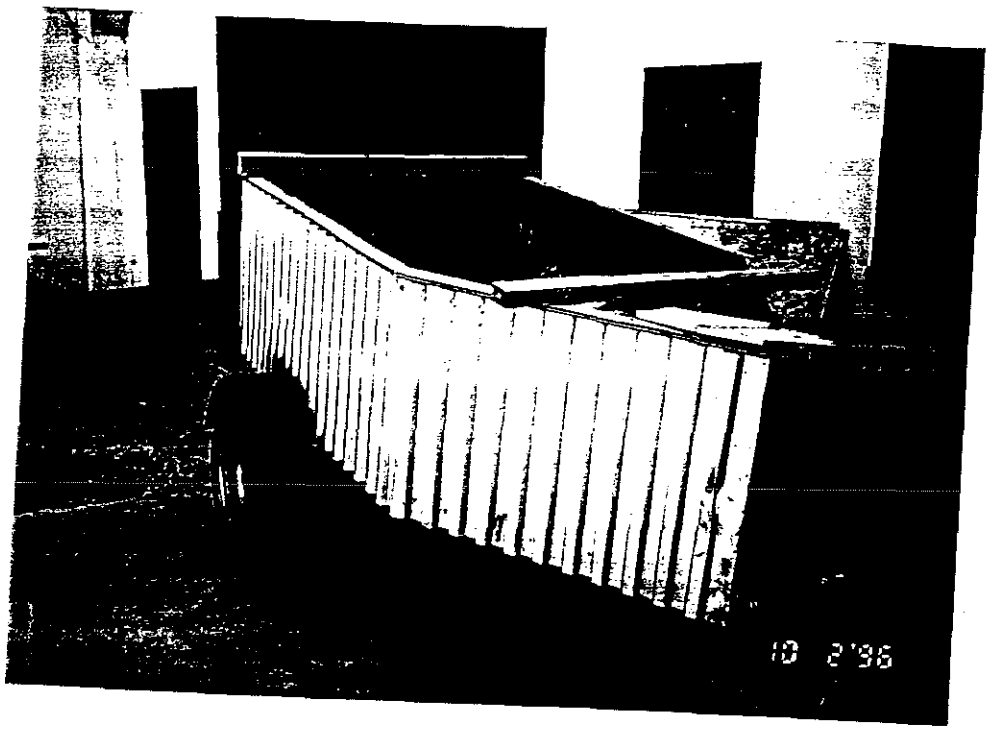
EXHIBIT B.

SITE NAME: 6th and Ivy, Medford
DATE: 02 OCT 96 TIME: 1:20 PM PHOTOGRAPHER: TONG PHOTO #: 1
COMMENTS: Photo from center of intersection shows parking lot. Asbestos insulated ducting was adjacent to sidewalk to left of truck. Note the duct work to right of photo center.



SITE NAME: 6th and Ivy, Medford
DATE: 02 OCT 96 TIME: 1:20 PM PHOTOGRAPHER: TONG PHOTO #: 2
COMMENTS: In the parking lot pieces of torn duct insulation were found. This piece became sample 1, contained 10% asbestos and was taken about a foot from the sidewalk shown in photo 1.

SITE NAME: 6th and Ivy, Medford
DATE: 02 OCT 96 TIME: 1:25 PM PHOTOGRAPHER: TONG PHOTO #: 3
COMMENTS: Photo of trailer where wrapped ductwork was placed under instruction from William Ferguson. The trailer can be seen in photo 1 toward the right and next to the building.



SITE NAME: 6th and Ivy, Medford
DATE: 02 OCT 96 TIME: 1:25 PM PHOTOGRAPHER: TONG PHOTO #: 4
COMMENTS: Closeup of plastic wrapped duct insulation found in the trailer at the site during my second visit. Sample 2 was taken here and contained 10% asbestos.

October 22, 1966

DEQ
201 W. Main 2-D
Medford, OR 97501

Attn.: Mr.Keith R. Tong

Dear Mr. Tong:

I received your letter of October 18, 1996.

Some facts have been confused, perhaps by the passage of 16 days between the incident and your letter. Please let me correct them at this time:

1) Joel Ferguson did not ask if he could wrap up the duct work and put it into a trailer. That concept was solely my thought, as if this was actually asbestos bearing material I did not want it left exposed to the public. I had been advised by City Sanitary to double wrap any suspect material in 30mm plastic bags, which we did, and await the test results on the piece I had taken to the lab for analysis.

2) Joel had no objection to following my directive other than to say you had asked him only to cover it up with plastic, and that double wrapping it and placing it in a trailer with four-foot sides was more protection for the public than you required awaiting test results.

3) The determination that the ducting contained asbestos was done by the lab based on my sample later the same day at approximately 5:00 p.m..

4) When sold the property by the YMCA, I was told they had, at the time the property was gifted to them, a clean environmental report that was to have cost about $10,000. They did not provide me with a copy which I now find was provided to them by the donor.

5) When I contacted the Donor, he thought the property was clean, based on the report I picked up from him and provided to you. A careful reading showed asbestos in the ducts. Had we known asbestos existed then, we would have left the ceiling in place, as there was no need to remove it.

Dept. Exhibit C

6) You came by the project within 30 minutes of the workers starting to tear down the suspected ducts, and work was stopped in that area immediately, and the building sealed with black plastic, per your request, even before the material was shown to contain 10% asbestos as in your report.

7) The abatement was started and completed on the outside of the building on the 4th by Alpha Environmental who will complete the inside of the building October 23.

8) The workers did not abate the asbestos, they simply protected the public by encapsulating it until the abatement contractors could come.

I thought I should clear up these misunderstandings at this time, rather than at some administrative hearing.

Sincerely,

William H. Ferguson
5200 Pioneer Road
Medford, OR 97501
(541) 772-9545

EXHIBIT 1

DEC 0 5 1996

Oregon

DEPARTMENT OF
ENVIRONMENTAL
QUALITY

CERTIFIED MAIL P 335 735 614

William H. Ferguson
5200 Pioneer Road
Medford, OR 97501

Re: Notice of Assessment of
Civil Penalty
No. AQAB-WR-96-315
Jackson County

On October 2, 1996, Department Asbestos Control Analyst Keith Tong inspected the site of an ongoing building renovation project being performed by you on property you own at 421 W. Sixth Street-37 North Ivy Street, Medford. Among the debris generated by the renovation project, Mr. Tong found suspected asbestos-containing material (ACM) in the form of duct wrap. Laboratory analysis of a sample of the material confirmed that it contained 10 percent asbestos. During his inspection, Mr. Tong observed ACM that had been removed from the buildings' duct work scattered in the parking lot and in the structures.

Your removal and handling of the ACM at your property resulted in the following violations of Oregon law:

(1) Failure to employ required work practices for removal of ACM,
(2) Open accumulation of asbestos-containing waste material,
(3) Failure to properly dispose of asbestos-containing waste material,
(4) Failure to notify the Department of an asbestos abatement project,
(5) Use of uncertified workers to perform an asbestos abatement project, and
(6) Supervision of an asbestos abatement project without being a certified supervisor.

Violations 1, 2, and 3 are Class I violations. Violations 4, 5, and 6 are Class II violations.

Exposure to asbestos is a serious health hazard and can result in incurable lung disease, including cancer. There is no known safe level of exposure to asbestos. To protect the public and the environment, the state legislature has enacted statutes and the Department has promulgated rules strictly controlling the removal, handling, storage, and disposal of ACM. Your failure to comply with these rules created a significant risk to public health and the environment. Mr. Tong's inspection determined that asbestos-containing waste material was being openly accumulated in an area in close proximity to a city street and sidewalk and was easily accessible to passers-by.

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

You are liable for a civil penalty assessment because you violated Oregon environmental law. In the enclosed Notice, I have assessed a civil penalty of $5,400 for one of the violations cited therein. 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 determination are attached to the Notice as Exhibit 1.

Your penalty was substantially increased because the Department found the cause of the violation to be your intentional conduct. At the conclusion of his inspection, Mr. Tong advised your son, Joel Ferguson, to cover the asbestos, not disturb it further, and bring in a licensed abatement contractor to properly clean it up and dispose of it. Joel Ferguson asked Mr. Tong if he could double wrap the ACM and place it in a trailer on the property. Mr. Tong informed him that asbestos required special handling and that it should not be further disturbed except by a professional. When Mr. Tong returned to the site later that day, he found that ACM had been wrapped and placed in the trailer. Joel Ferguson told Mr. Tong that he had advised you of Mr. Tong's instructions, but that you insisted he disturb the material anyway.

Appeal procedures are outlined in Section IV of 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 your request to your appeal. Your request to discuss this matter with the Department will not waive your right to a contested case hearing.

I look forward to your cooperation in complying with Oregon environmental law in the future. However, if any additional violations occur, you may be assessed additional civil penalties.

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 (SEPs). If you have any questions about this action, please contact Jeff Bachman with the Department's Enforcement Section in Portland at 229-5950 or toll-free at 1-800-452-4011, Enforcement extension 5950.

Sincerely,

Langdon Marsh
Director

e:\winword\letters\fergltr.doc
Enclosures
cc: Western Region, Medford Office, DEQ
Air Quality Division, DEQ

Department of Justice
Environmental Protection Agency
Environmental Quality Commission
Jackson County District Attorney

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: WILLIAM H. FERGUSON, Respondent.	)	NOTICE OF ASSESSMENT OF CIVIL PENALTY No. AQAB-WR-96-315 JACKSON COUNTY

I. AUTHORITY

This Notice of Assessment of Civil Penalty (Notice) is issued to Respondent, William H. Ferguson, 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. VIOLATIONS

1. On or about October 1 and 2, 1996, Respondent violated OAR 340-32-5620(1) by failing to employ required work practices for handling and removal of asbestos-containing waste material. Specifically, Respondent failed to follow the work practices set forth in OAR 340-32-5640 when removing asbestos-containing duct wrap from buildings he owned at the corner of West Sixth Street and North Ivy Street (421 W. Sixth and 37 N. Ivy, hereinafter "the buildings"), Medford. The removal resulted in potential public exposure to asbestos or release of asbestos fibers into the air. This is a Class I violation pursuant to OAR 340-12-050(1)(o).

2. On or about October 1 and 2, 1996, Respondent violated OAR 340-32-5600(4) by openly accumulating asbestos-containing waste material. Specifically, Respondent failed to properly contain asbestos-containing waste material generated from the removal of asbestos duct wrap from the buildings. This is a Class I violation pursuant to OAR 340-12-050(1)(p).

3. On or about October 1 and 2, 1996, Respondent violated OAR 340-32-5650 by failing to properly dispose of asbestos-containing waste material. Specifically, Respondent failed to dispose of asbestos-containing waste material generated by removal of asbestos duct wrap removed from the building in accordance with the provisions of OAR 340-32-5650, creating the potential for public exposure to asbestos or the release of asbestos fibers to the air. This is a Class I violation pursuant to OAR 340-12-050(1)(s).

4. On or about October 1 and 2, 1996, Respondent violated OAR 340-32-5620(1) by failing to notify the Department of an asbestos abatement project. Specifically, Respondent failed to comply with the notification requirements of OAR 340-32-5630 prior to removing asbestos duct wrap from the buildings. This is a Class II violation pursuant to OAR 340-12-050(2)(j).

5. On or about October 1 and 2, 1996, Respondent violated OAR 340-33-030(2) by allowing uncertified persons to perform asbestos abatement on property owned by Respondent. Specifically, Respondent allowed persons not certified as asbestos abatement workers to perform asbestos abatement at the buildings. This is a Class II violation pursuant to OAR 340-12-050(2)(i).

6. On or about October 1 and 2, 1996, Respondent violated OAR 340-33-030(4) by supervising an asbestos abatement project without being certified as an asbestos abatement project supervisor. Specifically, Respondent supervised the asbestos abatement at the buildings without being certified. This is a Class II violation pursuant to OAR 340-12-050(2)(i).

III. ASSESSMENT OF CIVIL PENALTIES

The Department imposes a civil penalty of $5,400 for the Violation No. 1 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 1.

IV. OPPORTUNITY FOR CONTESTED CASE HEARING

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

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

1. Factual matters not controverted shall be presumed admitted;

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

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

Send the request for hearing and Answer to: **DEQ Rules Coordinator, Office of the Director, 811 S.W. Sixth Avenue, Portland, Oregon 97204.** Following receipt of a request for hearing and an Answer, Respondent will be notified of the date, time and place of the hearing.

Failure to file a timely request for hearing and Answer may result in the entry of a Default Order for the relief sought in this Notice. Failure to appear at a scheduled hearing or meet a required deadline may result in a dismissal of the request for hearing and also an entry of a Default Order. The Department's case file at the time this Notice was issued may serve as the record for purposes of entering the Default Order.

V. OPPORTUNITY FOR INFORMAL DISCUSSION

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

VI. PAYMENT OF CIVIL PENALTY

The civil penalty is due and payable ten (10) days after an Order imposing the civil penalty becomes final by operation of law or on appeal. Respondent may pay the penalty before that time. Respondent's check or money order in the amount of $5,400 should be made payable to "State Treasurer, State of Oregon" and sent to the **Business Office, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.**

Dec. 5, 1996
Date

Langdon Marsh
Langdon Marsh, Director

EXHIBIT 1

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

VIOLATION: Failure to follow required work practices for asbestos abatement in violation of OAR 340-32-5620(1).

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

MAGNITUDE: The magnitude of the violation is moderate. The amount of asbestos-containing material involved in the violation was less than 80 square feet. However, because the asbestos content of the material was greater than 5%, the magnitude is elevated, pursuant to OAR 340-12-090(1)(d)(D), from minor to moderate.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: $BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$

"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 as Respondent has no prior significant action(s).

"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 as Respondent has no prior significant action(s).

"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 as the violation occurred for more than one day.

"R" is the cause of the violation and receives a value of 6 as the cause of the violation was intentional in that Respondent acted with the conscious objective to cause the result of his conduct. Furthermore, Respondent continued asbestos abatement after his son relayed to him a warning by a Department staff member that the asbestos-containing material (ACM) should only be handled by a licensed contractor.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 as Respondent was neither wholly cooperative nor wholly uncooperative. Respondent continued asbestos abatement after being advised to stop by a Department inspector. After a second warning, however, Respondent hired a licensed contractor to remove and dispose of the ACM.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of 0 as Respondent incurred greater cost in correcting the violation than the cost he avoided by not complying.

PENALTY CALCULATION:

Penalty = BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $3,000 + [(0.1 x $3,000) x (0 + 0 + 2 + 6 + 0)] + $5,400
= $3,000 + [($300) x (8)] + $0
= $3,000 + $2,400 + 0
= $5,400

EXHIBIT 2

State of Oregon
Department of Environmental Quality
RECEIVED
DEC 23 1996
OFFICE OF THE DEPUTY DIRECTOR

December 20, 1996

DEQ Rules Coordinator
Office of the Director
811 S.W. Sixth Avenue
Portland, OR 97204

ATTENTION: Langdon Marsh

Re: DEQ v. Ferguson
No. AQAB-WR-96-315

Dear Mr. Marsh:

Enclosed find my Answer and Request for Hearing to the Notice of Civil Penalty. It also contains my request for production of documents and the request for an informal hearing.

I would like to have all of the hearings in Medford, being the situs of the matter in question, and be provided with discovery prior to the informal hearing or further pleading.

Sincerely,

William H. Ferguson

WHF:ns
Enc.

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: WILLIAM H. FERGUSON, Respondent.	ANSWER AND REQUEST FOR HEARING TO THE NOTICE OF CIVIL PENALTY No. AQAB-WR-96-315 JACKSON COUNTY

COMES NOW the Respondent and by way of answer and request for hearing admits, denies and alleges as follows:

I.

Denies each and every allegation and thing contained in the plaintiff's Notice of Assessment and the whole thereof.

II.

Respondent further alleges that he has no knowledge of the matters contained in the allegations made in the Notice of Assessment as may be discovered as a result of examination of the file and investigation by the Environmental Quality Commission as such has not been provided to Respondent as of the date of this answer. Respondent hereby demands a full and complete copy of all such material contained in said file and all related files used by the plaintiff Commission to make said allegation in said Notice of Assessment of Civil Penalty.

III.

Respondent further reserves the right to further and more

completely answer the allegation of the Commission's Notice of Assessment of Civil Penalty after the Commission's full disclosure as set forth above in this answer and after discovery is completed by Respondent and the right to allege affirmative matters, if any.

Having answered the Commission's Notice of Assessment of Civil Penalty Respondent prays said complaint be dismissed and Respondent recover his costs, disbursements and reasonable attorneys fees in defense thereof.

DATED this 20th day of December, 1996.

Respondent

Pursuant to paragraph V of said notice Respondent requests informal discussion with the Department by this written request attached to the answer.

Respondent

file EXHIBIT 3

Oregon

EMPLOYMENT DEPARTMENT

August 14, 1997

William H. Ferguson
5200 Pioneer Road
Medford, Or 97501

Jeff Bachman
DEQ Enforcement Section
2020 S.W. 4th, Suite 400
Portland, Oregon 97201

Re: Notice of Assessment of Civil Penalty
Case No. AQFB-WR-96-315
Jackson County

The contested case hearing in the above matter has been scheduled as follows:

Date: Wednesday, September 10, 1997
Time: 9:00 a.m. PDT
Location: 201 West Main Street, Suite 2-D
Medford, Oregon

The issues to be addressed at hearing are: Whether William H. Ferguson, hereinafter called respondent, violated OAR 340-32-5620(1) by failing to employ required work practices for handling and removal of asbestos-containing waste; whether respondent violated OAR 340-32-5600(4) by openly accumulating asbestos-containing waste material; Whether respondent violated OAR 340-32-5650 by failing to properly dispose of asbestos-containing waste material,; Whether respondent violated OAR 340-12-5620(1) by failing to notify the Department of an asbestos abatement project; Whether respondent violated OAR 340-33-030(2) by allowing uncertified persons to perform asbestos abatement on property owned by respondent; whether respondent violated OAR 340-33-030(4) by supervising an asbestos abatement project without being certified; and whether respondent is subject to a civil penalty of $5,400.

The specific acts and violations are set forth in Department Order dated December 5, 1996

If you have questions, please call me at (541) 686-7960.

Melvin M. Menegat

MELVIN M. MENEGAT
Hearings Officer

mm/d7009

John A. Kitzhaber
Governor

875 Union St. NE
Salem, OR 97311
(503) 378-8420

EXHIBIT 4

Gas leaks won't stall parking lot

Urban renewal hit with big cleanup bill

By DOUG IRVING
of the Mail Tribune

Medford's mucky past has stalled construction of a parking garage for about a week and cost the city's urban renewal agency about $200,000.

Workers with Takenaka USA discovered a well filled with motor oil and gasoline as they excavated the site at Sixth and Riverside several weeks ago. They also discovered two old gasoline tanks.

The state Department of Environmental Quality determined the tanks had been leaking gas for as long as 70 years, said Byron Peterson, who helped investigate the site for DEQ.

Old gasoline had also contaminated the northeast corner of the site, said Don Burt, director of the Medford Urban Renewal Agency.

"The contamination pretty well goes clear across the parking lot," Peterson said. "We're just kind of dealing with all the history of Medford in one fell swoop."

Workers loaded up more than 2,000 cubic yards of contaminated dirt, Burt said. That amount of dirt would fill a large five-bedroom home, he said.

Rogue Disposal will treat the dirt for contamination and then use it in its landfills, Peterson said.

Some low-level contamination probably remains at the site, Peterson said. But that's not enough to be a concern, he said.

DEQ issued no citations for the contamination. Takenaka acted quickly when it discovered the problem, calling DEQ and an environmental consultant, Peterson said.

"They just wanted to build a parking garage, and kept running into all this," he said. "We don't like people for stumbling into something."

Cleanup probably knocked the project back a week, although Takenaka is still trying to assess how much time it lost, said site supervisor Jack Raquel.

"We conquered that," he said. "We're right back on track."

Removing the contaminated dirt probably cost Medford at least $200,000, Burt said. The city is still adding up all the costs.

But the Urban Renewal Agency had built extra money into the project budget to deal with unexpected costs, Burt said.

The total budget is $5.3 million, while the actual project cost is $4.7 million. That left $500,000 to deal with problems such as contaminated soils.

The Urban Renewal Agency budgets for small cleanup operations whenever it builds in the city, Burt said. Most downtown sites are contaminated to some degree, he said. Few are contaminated to this degree.

"Wherever you go (downtown), you're going to have some contamination," he said.

That probably doesn't represent a major environmental threat now, said Terry Baker, the environmental consultant called in by Takenaka. He said the contamination probably stayed on the site.

"No one has had a problem with it in the past," he said. "I don't expect it to be a problem in the future."

"hole" let happenin' at the

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: The Notice of Violation, Department Order, and Assessment of Civil Penalty for Discharging Wastes Without a Permit and for Reducing Water Quality.	)	FINAL CONTESTED CASE ORDER
CITY OF COOS BAY,	)	No. WQMW-WR-96-277
Respondent.	)	Coos County, Oregon

The Commission finds that the Commission has subject matter and personal jurisdiction in this proceeding:

Final Order

A. The City of Coos Bay, Oregon, violated ORS 468B.050(1)(a) by discharging wastes into the waters of the state without a permit; violated ORS 468B.025(1)(b) by discharging wastes that reduce the quality of state waters below the water quality standard established by the Environmental Quality Commission; and violated ORS 468B.025(2) by violating a condition of its National Pollutant Discharge Elimination System Permit.

B. The City of Coos Bay, Oregon, is liable for a civil penalty of $5,400.

C. The City of Coos Bay, Oregon, is ordered to provide plans for the permanent repair of the pipeline, or "as built" plans, if repaired, within 20 days of the date of this order and further to effect permanent repair within 45 days after the submission of those plans.

DATED this _____ day of _____, 1998.

Environmental Quality Commission

By: _____
Langdon Marsh, Director
Department of Environmental Quality

Notice of Right to Judicial Review: You have the right to appeal this Order to the Oregon Court of Appeals pursuant to ORS 183.482. To appeal you must file a petition for judicial review with the Court of Appeals within 60 days from the day this Order was served on you. If this Order was personally delivered to you, the date of service is the day you received the Order. If this Order was mailed to you, the date of service is the day it was *mailed*, not the day you received it. If you do not file a petition for judicial review within the 60 day time period, you will lose your right to appeal.

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF THE NOTICE OF VIOLATION, DEPARTMENT ORDER, AND ASSESSMENT OF CIVIL PENALTY FOR DISCHARGING WASTES WITHOUT A PERMIT AND FOR REDUCING WATER QUALITY.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION
CITY OF COOS BAY,	No. WQMW-WR-96-277 Coos County, Oregon
Respondent.	

BACKGROUND

Respondent, City of Coos Bay, hereinafter called City, has appealed from a November 4, 1996 Notice of Violation, Department Order, and Assessment of Civil Penalty issued pursuant to Oregon Revised Statutes (ORS) Chapter 468, ORS Chapter 183, and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12. The Department of Environmental Quality (Department, DEQ) alleged that the City violated ORS 468B.050(1)(a) by discharging wastes that reduce the quality of state waters below water quality standard established by the Environmental Quality Commission (Commission); and that the City violated a condition for its National Pollutant Discharge Elimination System Permit by allowing sewage to bypass treatment facilities. The Department ordered the City to immediately initiate actions necessary to correct the violation, prepare plans for permanent repair of the pressure pipe and a pressure pipe leak detection system, and to complete the permanent repair and implement a detection system within 45 days.

A civil penalty of $5,400 was assessed pursuant to OAR 340-012-045.

The City requested a hearing on November 21, 1996.

A hearing was conducted by telephone on May 8, 1997 by Melvin M. Menegat, the Commission's Hearings Officer. The City was represented by attorney C. Randall Tosh with two witnesses. Jeff Bachman represented the Department with three witnesses.

DEPARTMENT OF JUSTICE
1515 SW 5TH AVENUE, SUITE 410
PORTLAND, OREGON 97201
PHONE (503) 229-5725

The Hearings Officer issued an Order and Finding of Fact and Conclusion of Law on December 19, 1997.

The Department filed a timely Notice of Appeal and exceptions to the Hearings Officer's decision. The City filed timely cross-exceptions. The Commission considered these exceptions and the oral and written arguments of the Department and City during its regularly-scheduled meeting on June 11, 1998.

FINDINGS OF FACT

1. The City of Coos Bay, Oregon, is a municipal corporation of the State of Oregon.

2. The City operates a sewage disposal system for its residents and businesses as part of its corporate function.

3. The City has been granted NPDES Permit No. 100669 for the operation of its sewage disposal system.

4. The permit provides general and specific operating conditions for the system.

5. Part of the City system includes Treatment Plant No. 1; it partially treats sewage which is then pumped through a pressure pipeline located in an earthen dike, to a facultative sludge lagoon where the balance of the treatment takes place.

6. The treatment plant treats and digests the sewage to a sludge that has approximately 50 percent volatility.

7. Approximately every other day, for about ½ hour, the treated sewage is pumped through a pressure pipeline to an outflow in the center of the lagoon.

8. The sewage is aerated at that point and falls in to the lagoon with the heavier particles falling closest to the input pipe.

9. The settled sludge is capped with three to five feet of water.

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PHONE (503) 229-5725

10. The pressure pipeline is flushed after every use with primary effluent water that remains in the pipeline when it is not in use.

11. On December 22, 1994, an elbow in the pressure pipeline ruptured and approximately 5,600 gallons of partially-treated sewage was spilled.

12. The sewage spilled from the pipeline rupture which was located in a covered dike area and flowed into the marshlands that drain into the Marshfield Slough and into the rest of the bay.

13. The pipeline rupture was probably as a result of rodents burrowing under a thrust block upon which an elbow in the pipeline rested, the block dropping in to the burrows or weakened areas and away from its pipeline support position leaving the failed elbow without support and allowing it to separate from the rest of the pipeline.

14. As soon as the break was discovered, corrective action was taken; the pump was shut down, the input pipe in the lagoon was capped so the water and sludge could not drain back from the lagoon, and then a sleeve was put over the break, thrust restricters placed on the pipe, and the support reestablished.

15. The pressure pipeline is a glued line with thrust restricters at elbows, and is buried in the top of a dike that separates a tidal wetlands known as the "W-Marsh" from a wetland area that is now used by the school district as a wetland project area.

16. The spill was reported to the Department by a letter dated December 22, 1994, from Public Works Director, Ralph Dunham (Mr. Dunham); the City at that time indicated that temporary repairs had been made and that the City was investigating the need for additional thrust restraint and/or material to be added to the dike to prevent settlement and that final repairs would include restraining glands to the pipe which would be added when the material was received by the City.

17. At the time of the temporary repair after the December 22, 1994 break, some concern was expressed because the elbow that had separated or failed was closer to the

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marshland edge of the dike because of the manner in which the bends or change of directions were made, but soil stabilization or dike extension was not a major consideration in the repair plan.

18. The sleeve, thrust restricters on the pipe and galvanized pipe behind the pipe, clamps on the pipe to secure the sleeves, and a check valve at the lagoon end of the pressure pipeline were the extent of the temporary repairs of the pipeline break.

19. Commercial shellfish beds located in the bay would be affected by a sludge spill in the area where the spill occurred because of the backflushing of the tidal waters over the shellfish beds.

20. On March 20, 1995, the Department conducted a regular annual inspection of the City's sewage facilities and noted in the inspection report that the permanent repairs had not been made because the wrong parts had been received by the City and that the correct parts had been reordered.

21. On April 17, 1995, a Notice of Noncompliance (NON) was issued to the city because of various system deficiencies, and the notice stated that the repairs to the sludge line had not been completed because of the problem in obtaining the correct parts, and that repairs to the sludge line were to be given top priority so that repair could be completed before another spill occurred.

22. Mr. Dunham, the public works director and later city engineer, understood that parts had been ordered and that permanent repairs would be made in the very near future and that repairs had not been completed because the wrong parts had initially been shipped.

23. In March or April 1996, the sewage treatment supervisor made Mr. Dunham aware that there might be a problem with the stability of the dike in which the pressure pipeline was located because the school district wetlands project on that side of the dike had raised the water level considerably and the resulting additional water flow through the dike could cause it to destabilize.

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24. The water level in the school district project had been raised gradually over the years but had recently been raised about three feet to flood a growth of non-indigenous grasses in the project.

25. At that time, Mr. Dunham started the design process to stabilize the dike.

26. The City did not attach any urgency to the planning and design of the strengthened dike project that began March or April of 1996, because they were approaching the summer months and the water levels would be lower.

27. The City did not request an extension of time within which to make permanent repair or consult with the Department regarding the timetable of the proposed repair.

28. A geotechnical investigation was conducted or received and a structure was designed to resolve the problem of the additional wetland waters and to provide more stable support for the pressure pipeline.

29. Mr. Dunham completed the plans for the repair to the dike on or about May 7, 1996, and forwarded them to Kevin Cupples (Mr. Cupples), Planning Administrator for the City, for further review and action pursuant to the City of Coos Bay Ordinance No. 93, the City of Coos Bay land development ordinance, and the Coos Bay Estuary Management Plan.

30. Mr. Cupples determined that wetland fill permits might be required from the Corps of Engineers (Corps) and the Oregon Division of State Lands.

31. The Department conducted its regular inspection of the City's sewage disposal facilities on June 13, 1996 and then the Department inspector met with the City Administrator on June 19, 1996 and again expressed concern that permanent repairs to the pipeline had not been made.

32. A June 24, 1996 letter documenting inspection findings again set forth that the permanent repairs had not been made and that the permanent repair was to receive immediate attention.

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33. When the City Engineer was made aware in June 1996 that the repair had not been made, no sense of urgency attached because the City was in the permit process and would begin the work as soon as it received the proper authorization.

34. On or about August 6, 1996, Mr. Cupples submitted a joint fill permit to the Corps and the Division for repair and restoration mitigation required for permanent repair of the pressure line in the dike.

35. A permit application was prepared and dated August 6, 1996 and both Mr. Cupples and Mr. Denham signed off on the permit as it conformed to the regulatory requirements set forty by the ordinances and Estuary Management Plan.

36. On September 6, 1996, the pressure pipeline ruptured at or about the same spot and approximately 2,000 to 5,000 gallons of sludge was spilled into the marshlands adjacent to the dike upon which the pipeline was resting.

37. The City, upon becoming aware of the pipeline rupture, stopped pumping and made temporary repairs to the pipeline which included additional thrust restricters on the pipeline and additional galvanized pipe driven into the dike as additional thrust restriction, and then concrete was poured over the joint that had again failed.

38. The spill was immediately reported to the Department and to the Oregon Emergency Response System.

39. Based on the information that up to 5,000 gallons of partially-treated sewage spilled into the marshland, the Oregon Department of Agriculture ordered a two-day harvesting closure of three shellfish growing beds because of the tidal action and the backwashing of the shellfish growing areas with the partially-treated sewage.

40. The spill was considered a threat to the public safety in that the public could be harmed by consuming shellfish contaminated by the spill.

41. The City had not yet received final approval for any proposed dike stabilization repair work that it had proposed.

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42. On or about September 26, 1996, the Department served the city with a NON, alleging the failure of the pressure line was a violation of ORS 164.785(1), ORS 468B.025(1)(b), OAR 340-041-325(2)(e)(A)(ii) and NPDES Permit No. 100699 General Condition, Section B(3).

43. On or about October 23, 1996, the Corps informed Mr. Cupples that due to the second failure of the line, the repair to the dike and pressure line could be considered an emergency repair, thereby eliminating the requirement that the City obtain a wetland fill permit.

44. On or about October 29, 1996, the Division informed the City that a wetland fill permit would not be required by the Division due to the amount of fill material which was to be utilized by Mr. Dunham's plans.

45. On or about November 7, 1996, the City received a Notice of Violation, Department Order, and Assessment of Civil Penalty in Case No. WQMW-WR-96-277 based upon the September 6, 1996 spill. The Notice states that the City violated ORS 468B.050(1)(d) by discharging sewage sludge without a permit, violated ORS 468B.025(1)(b) by reducing the quality of waters of the state below the applicable water quality standards, and violated ORS 468B.025(2) by failing to comply with a condition of its NPDES permit. The Order required the City to initiate corrective action in the form of permanent repairs to the pressure line and by installing a leak-detection system. Finally, the Department assessed civil penalties of $3,900 for the violation of ORS 468B.050(1), and $1,500 for the violation of ORS 468B.025(1)(b).

46. The city does have prior significant actions in the following matters:

One Class I violation and one Class II violation in Case No. WQMW-WR-95-114,
One Class I violation in Case No. WQMW-WR-94-293,
One Class II violation in Case No. WQ-SWR-90-254 and
One Class I violation in Case No. WQ-SWR-89-177.

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CONCLUSIONS OF LAW

1. The Commission has jurisdiction.

2. The City of Coos Bay violated ORS 468B.025(1)(b), ORS 468B.025(2) and ORS 468B.050(1)(a).

3. The City of Coos Bay is subject to a civil penalty of $5,400.

OPINION

1. **The Commission has jurisdiction.** The EQC is directed by ORS Chapters 468 and 468B to adopt rules and policies to prevent pollution and to abate pollution and to assure that public health and safety is not compromised by the unpermitted discharge of waste into the waters of the state. The Commission has jurisdiction to proceed with the notice of violation herein, enter the Department order, and to assess a civil penalty.

2. **Violations.** The threshold question is whether the City incurs liability under the statute and rules because of violations due to its failure to effect permanent repairs to the pressure pipeline prior to the September 6, 1996 rupture and spill. It does. The City did review and evaluate the situation when the pipeline ruptured on December 22, 1994, and at that time proposed a permanent repair. Temporary repairs were effected at the time of the break, and then apparently nothing was done between the time of the initial break and temporary repair and the subsequent break, other than to prepare plans for dike stabilization prompted by the raised water level in the school district wetland project. The City had not revisited or addressed the temporary repairs, or effected the proposed permanent repairs.

The dike stabilization plans and project, while adding stabilization to the dike area and very probably to the pipeline as well, were to address a general problem of the additional water pressure on the school district side of the dike and the movement of water through the dike, and not the problem that caused the earlier spill and which resulted in the temporary repair and the NON notation for not having it repaired. While Mr. Dunham may

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have thought that the permanent repair had been made, that does not relieve the city from the responsibility to, in fact, make the permanent repair.

The December 6, 1996 spill into the waters of the state resulted from the City's failure to make permanent repairs to the December 22, 1994 pipeline break.

The Department and City presented testimony and evidence to the Hearings Officer on the length of time it would take to investigate a project, prepare a plan, and have it ready to permit, and the actual time that the City spent in its investigation, plan preparation, permit application, permit withdrawal and other processes.

The fact is, permanent repair did not require the proposed stabilization project, and the proposed stabilization project was not to address permanent repair of the December 22, 1994 pipeline break. The additional galvanized pipe thrust restricters, additional flanges, and the concrete used to repair the September 6, 1996 break may well have been an adequate permanent repair for the December 22, 1994 break, had the City chosen to follow up and make that permanent repair.

The Department and City argued the application and effect of the statues and rules, and whether there were actual violations for which penalties could be imposed or deficiencies for which repairs or avoidance steps could be ordered. The City operates a sewage disposal plant. The treatment and disposal of sewage is an operation that can be hazardous to the health and welfare of the public if there are no deviations from requirement or rules. In this case, partially-treated sewage entered the waters of the state and was affected by the tidal action of the estuary. The Department was required to take action to address the spill and the Department of Agriculture was required to take immediate action to avoid potential harm. Notwithstanding the fact that the City did not intentionally direct the partially-treated sewage into the bay, its acts or omissions were the cause of the sewage entering the bay, and were sufficient to meet any "placement," "cause pollution" or "discharge" requirements of the statutes or rules.

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The City's permit provides that there will be no diversion of waste streams from any portion of the conveyance system or treatment facility. Again, the City is operating a sewage disposal system that is potentially hazardous to the health and welfare of the public, and is responsible for actions that would compromise that health or welfare. The City temporarily repaired the December 22, 1994 break, and could reasonably anticipate that a temporary repair is less likely to maintain the integrity of the system than a permanent repair. The City chose not to make a permanent repair and the diversion of the sewage sludge and effluent waters into the waters of the state is a violation of its NPDES permit.

It should be noted that the Department did not proceed to formal notice of violation and civil penalty on the December 22, 1994 break and discharge. In that instance, it appears that the City had engineered the pipeline, prepared for reasonably-expected eventualities, operated the pipeline as designed, and then had some unanticipated intervening force that caused or contributed to the failure. The City was given opportunity to address that failure and restore the system to its initial standards. It chose not to.

The City violated ORS 468B.050(1) b discharging wastes into the waters of the state without a permit authorizing such discharge.

ORS 468B.050(1) provides in relevant part:

> "without first obtaining a permit from the Director of Department of Environmental Quality, which permit shall specify applicable effluent limitations, no person shall: (a) Discharge any wastes into the waters of the state from any industrial or commercial establishment or activity or disposal system."

This statute prohibits all discharges except those covered by a permit that specifies applicable effluent limitations.

The City has an NPDES permit issued by the Director. The permit authorizes the discharge of properly treated wastewater from the sewage treatment plant. The permit specifies the outfall or discharge point for the discharge, the receiving waters (Coos Bay) and effluent limitations. The September 6, 1996 spill at issue here involved the discharge of

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partially treated sewage sludge onto a wetland area adjacent to Coos Bay. This was not a discharge authorized by the permit, a discharge at a location authorized in the permit or a discharge subject to effluent limitations in the permit. Accordingly, the City had no permit authorizing the discharge.

The City argues that so long as it has "a permit" that allows "a discharge" it cannot be held to violate ORS 468B.050(1). This interpretation is inconsistent with the express language in the statute, noted above, and the statutory scheme as whole. ORS 468B.015(3); ORS 468B.020(2).

The City further argues that the Department must prove *mens rea* or a "culpable mental state." *Cf.* ORS 161.085(6). Specifically, the City maintains that intent to violate the statute must be established. The City infers this requirement from the use of term "discharge" in the statute.

The Commission finds no such legislative intent either in the term "discharge" nor the context in which it is used. The longstanding practice of the Commission and Department has been to treat violations of ORS 468B.050(1) as strict liability violations. The strict liability standard for administrative violations follows from ORS 468.130(2)(f). This statutory provision specifies that in determining the amount of the civil penalty, the Department must consider "[w]hether the cause of the violation was an avoidable accident, negligence or an intentional act." Further, when the legislature has intended to require a culpable mental state, it has generally done so expressly. *See, e.g.*, ORS 468.140(3). Finally, the a strict liability interpretation is more consistent with the general legislative policies governing water quality protection. ORS 468B.010(2), 468B.015 and 468B.020.

Violation of ORS 468B.050(1) is a Class I violation of moderate magnitude.

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The City violated ORS 468B.025(1)(b) by discharging wastes that reduce the quality of state waters below the water quality standard established by the Commission.

ORS 468B.025(1)(b) provides that no person shall discharge any wastes into the waters of the state if the discharge reduces the quality of such waters below the water quality standards established by rule for such waters by the Commission.

OAR 340-41-325(2)(f) provides that no wastes shall be discharged and no activities shall be conducted which either alone or in combination with other wastes or activities will cause bacterial pollution or other conditions deleterious to waters used for domestic purposes, livestock watering, irrigation, bathing, or shellfish propagation, or otherwise injurious to public health.

Two thousand to 5,000 gallons of partially-treated sewage flowed into the waters of the state because of the September 6, 1996 rupture of the pressure line between the treatment plant and the sewage lagoon. The City, by and through the operation of the sewage disposal system, caused the sewage sludge to discharge into the bay. The City is strictly liable for the operation of the disposal system and any adverse impact it may have on the health and welfare of the public.

ORS 468B.015 declares that pollution of the waters of the state is a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water, and it further declares that it is the public policy of the state to protect, maintain and improve the quality of the waters of the state for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, municipal, recreational and other legitimate beneficial uses.

Based on this policy statement, it is clear that the purpose and intent of the rule is to protect the public health and welfare. OAR 340-41-325(2)(f) meets that test and is applicable in this matter. The City violated ORS 468B.025(1)(b) in that sewage, deleterious to public

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health and welfare, was discharged into the waters of the state that would or could be ingested by shellfish in nearby growing areas, and ultimately consumed by the public, had harvesting been allowed to take place during he threat period.

Again, the City argues that proof of intent to discharge is required to establish a violation of the statute. The City's argument is based upon the use of the term "discharge" as well as what it perceives to be a statutory scheme wherein a violation of ORS 468B.025(1)(a) requires proof of negligence and ORS 468B.025(1)(b) requires proof of intent. The City finds support for this purported legislative scheme in the use of the verbs "cause," "discharge" and "violate" in the different subsections of the statute. The City also argues that a culpable mental state should be inferred because the violations are also declared to be public nuisances in ORS 468B.025(3).

The City's arguments are not persuasive. Nothing in the plain ordinary meaning of either "cause" or "discharge" requires or even suggests that proof of intent, recklessness or negligence is an element of the violation. Similarly, nothing in the context, "legislative scheme" or legislative history leads to that conclusion.

ORS 468B.025 and 468B.050 were enacted in 1967. Or Laws 1967, chapter 426, sections 4 and 6. A number of preexisting statutes, however, already prohibited the discharge of pollutants or placement of pollutants in a location where they were likely to enter waters of the state using language that is identical or similar to ORS 468B.025(1). *See, e.g., former* ORS 449.105, 449.110, 449.130, 449.325, and 449.505 to 449.580. A few of these provisions expressly required mental culpability, but most did not. *See, e.g., former* ORS 449.105(3).

When ORS 468B.025 and 468B.050 were adopted, the statutes allowed the Sanitary Authority (EQC's predecessor) to enforce the law by issuing administrative orders, seeking judicial abatement of violations that were declared to be public nuisances, or criminal penalties. *Former* ORS 449.097 to 449.100. In 1971, the DEQ was given authority to

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impose civil penalties for violations of its statutes and rules. Still later in 1973, the statue authorizing nuisance abatement proceedings, *former* ORS 449.100 was repealed and replaced by other provisions. Most notably, ORS 468.100 which authorized the EQC to pursue "legal and equitable remedies" to enforce the statutes and its rules. This amendment, in turn, preserved the rights of *third parties* to pursue legal or equitable remedies against private or public nuisances.

Accordingly, the Commission finds no relevance in the fact that ORS 468B.025(3) specifies that these violations are also public nuisances. Further, characterization of the prohibited conduct in ORS 468B.025 as public nuisance does not limit the Department's administrative enforcement authority under ORS 468.126 to 468.140 or require the Department to prove the existence of a culpable mental state, *i.e.*, intent, recklessness or negligence. ORS 468.100. The legal authority relied upon by the City applies only to tort suits brought by a private party to recover money damages. *Raymond v. Southern Pacific Co.*, 259 Or 629 (1971).

The term "nuisance" covers a number separate legal theories. *Raymond*, *supra* at 633. These include private causes of action for wrongful interference with real property rights, ORS 105.505, and several types of proceedings based on unreasonable interference with rights held in common by the public. Governmental authorities may define nuisances. ORS 203.065(3); ORS 221.915; *Sanitary Authority v. Pac. Meat Co.*, 226 Or 494, 1961. Governmental authorities may also petition the courts to enjoin or abate these latter "public" nuisances. *Sanitary Authority*, *supra*, at 497. In some instances, statutes or local ordinances also impose criminal penalties on persons who maintain a nuisances. *See*, *e.g.*, *State v. Anderson*, 242 Or 457 (1966).

In certain circumstances, a private party may petition a court to abate a public nuisance or may sue to recover damages caused by the nuisance. In these tort cases, the courts may require the proof of a culpable mental state. *Raymond*, *supra*. These cases,

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however, do not require a culpable mental state be part of the definition of a particular public nuisance nor do they require the proof a culpable mental state when a state agency imposes administrative penalties for actions that violate a state statute or administrative rule.

Violation of ORS 648.025(1)(b) is a Class II violation of moderate magnitude.

The City violated ORS 468B.025(2) by violating a condition of its NPDES Permit.

ORS 468B.025(2) provides that no person shall violate the conditions of any waste discharge permit issued under ORS 468B.050.

ORS 468B.050 provides that a permit issued by the Director shall be obtained before a person can discharge any wastes into the waters of the state from any industrial or commercial establishment or activity or any disposal system.

The City's NPDES Permit provides that the City was authorized to operate a collection, treatment, control and disposal system and discharge to public waters adequately-treated wastewaters only from the authorized discharge points. The permit further provides that diversion of waste streams from any portion of the conveyance system is prohibited except under certain emergency conditions. The City violated the conditions of that permit by allowing the sewage sludge from the pressure pipeline to enter the waters of the state at or about the area of the pipeline separation.

Violation of ORS 468B.025(2) is a Class II violation of moderate magnitude.

3. **The City is subject to a civil penalty of $5,400.**

Violation 1. The City violated ORS 468B.050(1) by discharging wastes into the waters of the state without a permit authorizing the discharge.

$$\text{Penalty} = BP + [\,(\,.1 \times BP\,)\,(\,P + H + O + R + C\,] + BE$$

"BP" is the base penalty which is $3,000 for a Class I, moderate magnitude violation. "P" is the City's prior violations. "H" is the past history of the City in taking all feasible steps or procedures necessary to correct any prior violations. "O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of

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violation. "R" is the cause of the violation. "C" is the City's cooperativeness. "EB" is the approximated dollar sum of the economic benefit that the City gained through noncompliance.

OAR 340-12-090 provides that the value of "P" shall be 5 if the City has had the equivalent of four Class I violations. The City did have three Class I violations and two Class II violations.

The Department assigned a value of –2 to "H," because the City had taken all feasible steps to correct the violations contained in the prior significant actions.

The Department assigned "O" a value of 0 because the violation was a single occurrence.

The Department assigned a value of 2 for "R" on the basis that violation was due to the City's negligence. The City knew that permanent repair was required and did not complete that repair. Notwithstanding that fact, the City did not intend that the pipeline would again rupture and the sewage spill into the waters of the state. The City was negligent in that it failed to exercise reasonable care to avoid the foreseeable risk of the harm occurring.

The Department assigned "C" a value of 0 because the violation could not be corrected once it had occurred.

"EB" is assigned a value of $0 because there is not sufficient evidence upon which to base a finding of whether the City gained any economic benefits by noncompliance.

The rule is specific as to the values to be assigned under the varying circumstances and there is no provision for assigning values other than those set forth in the rule.

The civil penalty as calculated under the rule for violation of ORS 468B.050(1) is $3,900.

Violation 2. The City discharged wastes that reduced the quality of state waters below the water quality standard established by the Commission.

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"BP" is the base penalty which is $1,000 for a Class II, moderate magnitude violation. "P" is the City's prior violations. "H" is the past history of the City in taking all feasible steps or procedures necessary to correct any prior violations. "O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of violation. "R" is the cause of the violation. "C" is the City's cooperativeness. "EB" is the approximated dollar sum of the economic benefit that the City gained through noncompliance.

OAR 340-12-090 provides that the value of "P" shall be 5 if the City has had the equivalent of four Class I violations. The City did have three Class I violations and two Class II violations.

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The Department assigned "O" a value of 0 because the violation was a single occurrence.

The Department assigned a value of 2 for "R" on the basis that violation was due to the City's negligence. The City knew that permanent repair was required and did not complete that repair. Notwithstanding that fact, the City did not intend that the pipeline would again rupture and the sewage spill into the waters of the state. The City was negligent in that it failed to exercise reasonable care to avoid the foreseeable risk of the harm occurring.

The Department assigned "C" a value of 0 because the violation could not be corrected once it had occurred.

"EB" is assigned a value of $0 because there is not sufficient evidence upon which to base a finding of whether the City gained any economic benefits by noncompliance.

The rule is specific as to the values to be assigned under the varying circumstances and there is no provision for assigning values other than those set forth in the rule.

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The civil penalty as calculated under the rule for violation of ORS 468B.050(1)(b) is $1,500.

Violation 3. The Department elected not to assess a penalty for violation of ORS 468.025(2), violating a condition of the discharge permit.

Total. The requirements for establishing a penalty have been met. The values assigned and the calculations are set forth above. The City is liable for a civil penalty of $5,400.

4. **Department Order.** The November 4, 1996 Department Order required the City to immediately initiate actions to correct the cited violations of failing to obtain a permit to discharge partially-treated sewage into the waters of the state, discharging waste into the waters of the state reducing the water quality, and for bypassing the disposal system. The City, at the time of hearing, had effected repairs to the system that responded to those immediate concerns, and is not specifically ordered to correct those deficiencies.

The Department Order further provided that the City prepare plans for the permanent repair of the pressure pipe and a leak detection system and submit those plans to the Department. At the time of hearing, the City had prepared plans for stabilization of the dike and replacement of the dike materials washed away by the two spills; however, the City had not specifically addressed the thrust restraint or support in the area where the elbow separated and the spill occurred. Again, repairs were made after the September 6, 1996 break which included additional thrust restraint in the form of additional galvanized pipe driven adjacent to the pipeline and concrete poured over the elbow that had separated in both of the breaks. While the dike stabilization and fill replacement may be a necessary element of permanent repair, what was or is actually necessary to permanently repair the pipeline was not established at hearing. The City shall be ordered to prepare a plan for permanent repair, or if repaired, an "as built" showing the permanent repair, and submit those plans to the Department. The City has been reviewing this matter since December 22, 1994 and it is

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reasonable to expect either the plan for permanent repair, or an "as built" plan to be submitted within 20 days of the date of this Order.

The City submitted an affidavit of an engineer stating that it is not practical to provide leak detection on the sludge pipeline. That affidavit is not persuasive from either the technical or practical standpoint. The pipeline failure could well affect the health and safety of the public, and the City is strictly liable for breach of their responsibility for that protection. In this instance, however, the second spill occurred because the City did not effect permanent repairs to the initial break, rather than the sludge transmission being an inherently dangerous activity. The pipeline was designed and engineered not to break or rupture and repair can be designed and engineered to prevent further ruptures and spills. The City will not be ordered to prepare plans for a leak detection system for the sludge pressure pipeline, or to implement a detection system.

Permanent repair of the pipeline break may well be completed by the date of this Order. If permanent repair has not been completed, it is reasonable to require repair to be made within 45 days of the submission of the above referred to plans.

DATED this ___ day of _____, 1998.

ENVIRONMENTAL QUALITY COMMISSION

By: _____
Langdon Marsh, Director
Department of Environmental Quality

LK:kt/LJK0824.PLE

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Addendum to Item O

This Addendum adds the following recommendations for consideration by the Commission.

1. On June 19, 1998, DEQ's Solid Waste Section suggested deleting extraneous words from two proposed Class II waste-tire classifications (OAR 340-12-066) to make them more consistent with the text of the applicable substantive rules:

- "Hauling waste tires in a vehicle not identified in a waste tire carrier ~~operating~~ permit or failing to display required decals as described in a permittee's waste tire carrier permit;"
- "Violation of a condition or term of a Letter ~~of~~ Authorization;"

2. On June 30, 1998, DEQ's Solid Waste Section suggested changing a term used in a proposed Class II solid waste classification to make it consistent with the text of the applicable substantive rule: "Failure to follow a Department **Construction** Quality Assurance~~/Quality Control (QA/QC)~~ **(CQA)** plan when constructing a waste cell;"

3. On June 30, 1998, DEQ's Solid Waste Section asked to withdraw the proposed Class II solid-waste classification (OAR 340-12-065) for "~~Transferring ownership of a registered or permitted solid waste disposal site without prior notification to the Department;~~" The Attorney General's Office had advised that there is no substantive rule establishing the violation on which this classification would be based. If the Commission adopts a future substantive rule prohibiting that transfer, the violation would still be Class II by operation of the default classification.

4. On August 4, 1998, DEQ's Eastern Region Office suggested that the proposed definition of "Formal Enforcement Action" (OAR 340-12-030(8) be changed as follows:

> "Formal Enforcement Action" means an action signed by the Director or a Regional Administrator or authorized representatives or deputies which is issued to a Respondent for a documented violation. Formal enforcement actions may require the Respondent to take action within a specified time frame, and/or state the consequences for the violation or continued noncompliance. "Formal enforcement action" includes Notices of Permit Violation, Civil Penalty Assessments, Mutual Agreement and Orders, and other Orders that may be appealed through the contested-case process**; but does not include Notices of Noncompliance issued pursuant to OAR 340-12-041(1)**.

5. On August 4, 1998, the Eastern Region Office of DEQ suggested that the proposed rule change for OAR 340-12-042(1)(c) be clarified as follows: "Any violation related to ORS 164.785 and water quality statutes, rules, permits ~~by a person having or needing a Water Pollution Control Facility permit~~, or orders, **violations by a person having or needing a Water Pollution Control Facility permit,** violations of ORS Chapter 454 and on-site sewage disposal rules by a person performing sewage disposal services;"

6. The Commission asked that each word having a particular definition be capitalized when used in the rules to alert the reader that the word has a particular definition. The Department proposes to capitalize, in Division 12, those words defined in OAR 340-12-030.

Environmental Quality Commission

☒ Rule Adoption Item
☐ Action Item
☐ Information Item

Agenda Item O
August 7, 1998 Meeting

Title:

Proposed amendments to Oregon Administrative Rules Chapter 340, Division 12 concerning Enforcement Procedures and Civil Penalties.

Summary:

This rulemaking proposal is mostly housekeeping in nature and relates to how the Department allocates its enforcement resources. These changes include additions or revisions to classifications of violations, implementation of enforcement in expanded program areas, removal of rules for program areas not enforced by the Department, and clarification of existing rules.

One proposed change gives the Director the authority to assess smaller penalties if the violation is self-reported. While the Director currently has the authority to lower a previously-assessed penalty if it is self-reported, the rules do not currently allow the Director to initially assess the lower penalty.

One proposed change provides the Director the authority to use discretion in assessing a penalty based only on the economic benefit gained through noncompliance without assessing the class-and-magnitude based portion of the penalty.

One proposed change moves certain violations of water quality statutes or rules from the $2,500 civil penalty matrix to the $10,000 civil penalty matrix.

Department Recommendation:

Adopt the rule revisions regarding the Department's Enforcement Procedures and Civil Penalties as presented in Attachment "A" of the Staff Report.

Report Author | Division Administrator | Director

Accommodations for disabilities are available upon request by contacting the Public Affairs Office at (503)229-5317(voice)/(503)229-6993(TDD).

State of Oregon
Department of Environmental Quality **Memorandum**

Date: July 6, 1998

To: Environmental Quality Commission

From: Langdon Marsh

Subject: Agenda Item O, August 7, 1998, EQC Meeting

Background

On February 13, 1998, the Director authorized the Enforcement Section to proceed to a rulemaking hearing on proposed rules which would amend Oregon Administrative Rules Chapter 340, Division 12 concerning Enforcement Procedures and Civil Penalties.
Pursuant to the authorization, hearing notice was published in the Secretary of State's Bulletin on March 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 February 25, 1998.

A Public Hearing was held March 24, 1998, with Jenny Root serving as Presiding Officer. Written comment was received through March 30, 1998. The Presiding Officer's Report (Attachment C) summarizes the hearing and lists all the written comments received. (A copy of the comments is available upon request.)

Department staff have evaluated the comments received (Attachment D). Based upon that evaluation, modifications to the initial rulemaking proposal are being recommended by the Department. These modifications are summarized below and detailed in Attachment E.

Internal discussions within the Department resulted in some additional minor changes to the proposed rules (Attachment F).

The following sections summarize:
1. The issue that this proposed rulemaking action is intended to address,
2. Relationship to Federal and Adjacent State Rules,
3. The authority to address the issue,
4. The process for development of the rulemaking proposal including alternatives considered,

5. A summary of the rulemaking proposal presented for public hearing,
6. A summary of the significant public comments and the changes proposed in response to those comments,
7. A summary of how the rule will work and how it is proposed to be implemented, and
8. A recommendation for Commission action.

1. Issue this Proposed Rulemaking Action is Intended to Address

This rulemaking proposal is mostly housekeeping in nature and relates to how the Department allocates its enforcement resources by:

a. Adding or revising classifications of violations to enable the Department to focus on the most efficient and effective use of its enforcement resources, and to assess appropriate penalties based on seriousness of violation,
b. Implementing enforcement in expanded program areas,
c. Removing rules for program areas that are not enforced by DEQ,
d. Providing the Director the authority to consider whether a violation was self-reported in assessing a civil penalty,
e. Providing the Director the authority to use discretion in assessing a penalty based only on the economic benefit gained through noncompliance without the class-and-magnitude based portion of the penalty, and
f. Providing greater clarity on existing rules.

2. Relationship to Federal and Adjacent State Rules

In so far as EPA's delegation of some programs for state implementation depends on the state having the ability to enforce the state program, we believe these changes are consistent with EPA requirements. These rules do not have any effect on or relationship to adjacent states rules.

3. Authority to Address the Issue

The Commission has the authority to address these issues under ORS. 454, 456, 459.995, 465, 466, 467, 468.020, 468.035, 468.100, 468.126, 468.130, 468.140, 468.996, 468A and 468B.

4. Process for Development of the Rulemaking Proposal (including Advisory Committee and alternatives considered)

The Department's Enforcement Advisory Committee was used in 1988 during the development of the Division 12 Enforcement Rules. An advisory committee was again used in 1993 when the Department last revised Division 12. In accordance with ORS 183.335(2)(b)(E), an advisory

committee was not used in drafting the current proposed revisions as they are mostly housekeeping in nature and relate to how the Department allocates its enforcement resources. The current amendments have been proposed by various Department staff who apply these rules in their daily course of work.

5. Summary of Rulemaking Proposal Presented for Public Hearing and Discussion of Significant Issues Involved.

One proposed change gives the Director the authority to assess smaller penalties if the violation is self-reported. While the Director currently has the authority to lower a previously-assessed penalty if it is self-reported, the rules do not currently allow the Director to initially assess the lower penalty.

One proposed change provides the Department the authority to assess the economic benefit portion of a civil penalty whether or not it applies the gravity and magnitude-based portion of the civil penalty.

One proposed change moves violations of water quality statutes or rules by persons having or needing a Water Pollution Control Facility Permit, from the $2,500 civil penalty matrix to the $10,000 civil penalty matrix.

The remainder of the amendments are changes to the classifications of violations which reflect the Department's perspective on how its enforcement resources should be used and which may change the dollar value of the related penalty.

6. Summary of Significant Public Comment and Changes Proposed in Response

The Department received written comments from six organizations. The three principle comments were:

- General support of the Department's proposal to authorize the Director to consider assessing a smaller penalty when a violation is self-reported and corrected. However, commenters recommended that the actual penalty reductions available be included in the Division 12 rules, and that the Department adopt the same penalty reduction percentages as those in EPA's self-disclosure policy. The Department disagrees with this recommendation as detailed on pages 3 and 4 of Attachment D.

- A recommendation that the Division 12 rules require the Department to provide public notice before issuing a formal enforcement action for water quality violations, an opportunity for public comment, a public hearing, and public's right to appeal the action. This recommendation is beyond the scope of this rulemaking as detailed on page 5 of Attachment D.

- A recommendation that the Department add a requirement to Division 12 that the Department will use upon request of the respondent, the "US EPA BEN" computer model to determine the economic benefit portion of a civil penalty. The computer model considers the compliance costs that are avoided or delayed in light of applicable interest rates, tax rates, deductions and other factors. The Department now generally uses that computer model as allowed in the rules and therefore agrees to add this recommendation as detailed on Page 2 of Attachment D, and page 1 of Attachment E.

7. Summary of How the Proposed Rule Will Work and How it Will be Implemented

The Department implements the Division 12 Enforcement rules through a document called the "*Enforcement Guidance for Field Staff*." This document explains to the regional staff how violations are classified and what necessary actions must be taken for that class of violation. Following adoption of the Division 12 rules, the *Enforcement Guidance* must be redrafted to incorporate the rule changes. The redraft will include involvement from the regional staff. Once the *Enforcement Guidance* revision is complete, Enforcement staff will visit regional field offices to conduct training on the changes.

8. Recommendation for Commission Action

It is recommended that the Commission adopt the rules/rule amendments regarding Enforcement Procedure and Civil Penalties 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. Additional Detailed Changes
G. Rule Implementation Plan

Reference Documents (available upon request)

- Written Comments Received (listed in Attachment C)
- ORS Chapters 183, 459, 468, 468A and 468B.
- ORS 468A.585, statute directing the Department to enter into a Memorandum of Understanding to relinquish the duties of the field burning program to the Department of Agriculture.
- OAR Chapter 340, Division 12

Approved:

Section: _____

Division: _____

Report Prepared By: Les Carlough

Phone: 229-5422

Date Prepared: July 6, 1998

DIVISION 12

ENFORCEMENT PROCEDURE

AND CIVIL PENALTIES

340-012-0030

Definitions

Unless otherwise required by context, as used in this Division:

(1) "Class One Equivalent" or "Equivalent", which is used only for the purposes of determining the value of the "P" factor in the civil penalty formula, means two Class Two violations, one Class Two and two Class Three violations, or three Class Three violations.

(2) "Commission" means the Environmental Quality Commission.

(3) "Compliance" means meeting the requirements of the Commission's and Department's statutes, rules, permits or orders.

(4) "Director" means the Director of the Department or the Director's authorized deputies or officers.

(5) "Department" means the Department of Environmental Quality.

(6) "Documented Violation" means any violation which the Department or other government agency records after observation, investigation or data collection.

(7) "Flagrant" means any documented violation where the Respondent had actual knowledge of the law and had consciously set out to commit the violation.

(8) "Formal Enforcement Action" means an action signed by the Director or a Regional Administrator or authorized representatives or deputies which is issued to a Respondent for a documented violation. Formal enforcement actions may require the Respondent to take action within a specified time frame, and/or state the consequences for the violation or continued noncompliance. "Formal enforcement action" includes Notices of Permit Violation, Civil Penalty Assessments, Mutual Agreement and Orders, and other Orders that may be appealed through the contested-case process.

(9) "Intentional" means conduct by a person with a conscious objective to cause the result of the conduct.

(10) "Magnitude of the Violation" means the extent and effects of a violator's deviation from the Commission's and Department's statutes, rules, standards, permits or orders. In determining magnitude the Department shall consider all available applicable information, including such factors as: Concentration, volume, percentage, duration, toxicity, and the extent of the effects of the violation. Deviations shall be categorized as major, moderate or minor as set forth in OAR 340-12-045(1)(a)(B).

(11) "Negligence" or "Negligent" means failure to take reasonable care to avoid a foreseeable risk of committing an act or omission constituting a violation.

(12) "Order" means:

(a) Any action satisfying the definition given in ORS Chapter 183; or

(b) Any other action so designated in ORS Chapters 454, 459, 465, 466, 467, 468, 468A, or 468B.

( ) "Penalty Demand Notice" means a written notice issued by a representative of the Department to a party demanding payment of a stipulated penalty pursuant to the terms of an agreement entered into between the party and the Department.

(13) "Person" includes, but is not limited to, individuals, corporations, associations, firms, partnerships, joint stock companies, public and municipal corporations, political subdivisions, states and their agencies, and the Federal Government and its agencies.

(14) "Prior Significant Action" means any violation established either with or without admission of a violation by payment of a civil penalty, or by a final order of the Commission or the Department, or by judgment of a court.

(15) "Reckless" or "Recklessly" means conduct by a person who is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of care a reasonable person would observe in that situation.

(16) "Residential Open Burning" means the open burning of any domestic wastes generated by a single family dwelling and conducted by an occupant of the dwelling on the dwelling premises. This does not include the open burning of materials prohibited by OAR 340-023-0042(2).

(17) "Respondent" means the person to whom a formal enforcement action is issued.

(18) "Risk of Harm" means the individual or cumulative possibility of harm to public health or the environment caused by a violation or violations. Risk of harm shall be categorized as major, moderate or minor.

(19) "Systematic" means any documented violation which occurs on a regular basis.

(20) "Violation" means a transgression of any statute, rule, order, license, permit, or any part thereof and includes both acts and omissions. Violations shall be categorized as Class One (or I), Class Two (or II) or Class Three (or III), with Class One designating the most serious class of violation.

Stat. Auth.: ORS Ch. 468

Stats. Implemented: ORS

Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94

340-012-0040

Notice of Permit Violations and Exceptions

(1) Prior to assessment of a civil penalty for a violation of the terms or conditions of ~~an Air Contaminant Discharge Permit,~~ National Pollutant Discharge Elimination System Permit, Water Pollution Control Facilities Permit, or Solid Waste Disposal Permit, the Department shall provide a Notice of Permit Violation to the permittee. The Notice of Permit Violation shall be in writing, specifying the violation and stating that a civil penalty will be imposed for the permit violation unless the permittee submits one of the following to the Department within five working days of receipt of the Notice of Permit Violation:

(a) A written response from the permittee acceptable to the Department certifying that the permitted facility is complying with all terms of the permit from which the violation is cited. The certification shall include a sufficient description of the information on which the permittee is certifying compliance to enable the Department to determine that compliance has been achieved; or

(b) A written proposal, acceptable to the Department, to bring the facility into compliance with the permit. An acceptable proposal under this rule 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;

(C) A statement that the permittee has reviewed all other conditions and limitations of the permit and no other violations of the permit were discovered.

(c) In the event that any compliance schedule to be approved by the Department pursuant to subsection (1)(b) of this rule provides for a compliance period of greater than six months, the Department shall incorporate the compliance schedule into an Order described in OAR 340-012-0041(4)(b)(C) which shall provide for stipulated penalties in the event of any noncompliance therewith. The stipulated penalties shall not apply to circumstances beyond the reasonable control of the permittee. The stipulated penalties shall be set at amounts consistent with those established under OAR 340-012-0048;

(d) The certification allowed in subsection (1)(a) of this rule shall be signed by a Responsible Official based on information and belief after making reasonable inquiry. For purposes of this rule "Responsible Official" of the permitted facility means one of the following:

(A) For a corporation, a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation; or the manager of one of more manufacturing, production, or operating facilities if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures;

(B) For a partnership or sole proprietorship, a general partner or the proprietor, respectively;

(C) For a municipality, State, Federal, or other public agency, either a principal executive officer or appropriate elected official.

(e) For the purposes of this section, when a regional authority issues an NPV, different acceptability criteria may apply for subsections (a) and (b) of this section.

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

(a) The violation is intentional;

(b) The water or air violation would not normally occur for five consecutive days; or

(c) The permittee has received a Notice of Permit Violation, or other formal enforcement action with respect to any violation of the permit within 36 months immediately preceding the documented violation;

(d) The permittee is subject to the federal operating permit program under ORS 468A.300 to 468A.320 (Title V of the Clean Air Act of 1990) and violates any rule or standard adopted or permit or order issued under ORS Chapter 468A and applicable to the permittee;

(e) The permittee is a solid waste permit holder subject to federal solid waste management requirements contained in 40 CFR, Part 258 as of the effective date of these rules ("Subtitle D"), and violates any rule or standard adopted or permit or order issued under ORS Chapter 459 and applicable to the permittee;

(f) The permittee has an air contaminant discharge permit and violates any State Implementation Plan requirement contained in the permit;

(g) The requirement to provide such notice would disqualify a state program from federal approval or delegation;

(h) For purposes of this section, "permit" includes permit renewals and modifications and no such renewal or modification shall result in the requirement that the Department provide the permittee with an additional advance warning if the permittee has received a Notice of Permit Violation, or other formal enforcement action with respect to the permit within 36 months.

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the Department of Environmental Quality.]

Stat. Auth.: ORS Ch. 468

Stats. Implemented: ORS

Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 25-1979, f. & ef. 7-5-79; DEQ 22-1984, f. & ef. 11-8-84; DEQ 16-1985, f. & ef. 12-3-85; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94

340-001-0041

Enforcement Actions

(1) Notice of Noncompliance (NON):

(a) Informs a person of a violation, and the consequences of the violation or continued non-compliance. The notice may state the actions required to resolve the violation and may specify a time by which compliance is to be achieved and that the need for formal enforcement action will be evaluated;

(b) Shall be issued under the direction of a Manager or authorized representative;

(c) Shall be issued for all classes of documented violations, unless the violation is a continuing violation for which the person has received a prior NON and the continuing violation is documented pursuant to a Department-approved investigation plan or Order, and the person is in compliance with the Department-approved investigation plan or Order.

(2) Notice of Permit Violation (NPV):

(a) Is issued pursuant to OAR 340-012-0040;

(b) Shall be issued by a Regional Administrator or authorized representative;

(c) Shall be issued for the first occurrence of a documented Class One violation which is not excepted under OAR 340-012-0040(2), or the repeated or continuing occurrence of documented Class Two or Three violations where a NON has failed to achieve compliance or satisfactory progress toward

compliance. A permittee shall not receive more than three NONs for Class Two violations of the same permit within a 36 month period without being issued an NPV.

(3) Notice of Civil Penalty Assessment (CPA):

(a) Is issued pursuant to ORS 468.130, and OAR 340-012-0042 and 340-012-0045;

(b) Shall be issued by the Director ~~or authorized representative~~;

(c) May be issued for the occurrence of any Class of documented violation that is not limited by the NPV requirement of OAR 340-012-0040(2).

(4) Order:

(a) Is issued pursuant to ORS Chapters 183, 454, 459, 465, 466, 467, 468, 468A, or 468B;

(b) May be in the form of a Commission or Department Order, or any written order that has been consented to in writing by the parties adversely affected thereby including but not limited to a ~~Stipulation and Final~~ Mutual Agreement and Order (~~SFO~~MAO):

(A) Commission Orders shall be issued by the Commission, or the Director on behalf of the Commission;

(B) Department Orders shall be issued by the Director ~~or authorized representative~~;

(C) All other Orders:

(i) May be negotiated;

(ii) Shall be signed by the Director ~~or authorized representative~~ and the authorized representative of each other party.

(c) May be issued for any Class of violation.

(5) The enforcement actions described in sections (1) through (4) of this rule in no way limit the Department or Commission from seeking legal or equitable remedies as provided by ORS Chapters 454, 459, 465, 466, 467, 468, 468A, and 468B.

Stat. Auth.: ORS Ch. 454, 459, 465, 466, 467, 468, 468A & 468B

Stats. Implemented: ORS

Hist.: DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94

340-012-0042

Civil Penalty Schedule Matrices

In addition to any liability, duty, or other penalty provided by law, the Director may assess a civil penalty for any violation pertaining to the Commission's or Department's statutes, rules, permits or orders by service of a written notice of assessment of civil penalty upon the Respondent. Except for civil penalties assessed under OAR 340-012-0048 and 340-012-0049, the amount of any civil penalty shall be determined through the use of the following matrices in conjunction with the formula contained in OAR 340-012-0045:

(1) $10,000 Matrix

<----------Magnitude of Violation

Class of Major Moderate Minor

Violation

Class I $6000 $3000 $1000

Class II $2000 $1000 $ 500

Class III $ 500 $ 250 $ 100

(a) No civil penalty issued by the Director pursuant to this matrix shall be less than $50 dollars or more than $10,000 dollars for each day of each violation. This matrix shall apply to the following

(b) Any violation related to air quality statutes, rules, permits or orders, except for the selected open burning violations listed in section (3) below;

(c) Any violation related to ORS 164.785 and water quality statutes, rules, permits by a person having or needing a Water Pollution Control Facility permit, or orders, violations of ORS Chapter 454 and on-site sewage disposal rules by a person performing sewage disposal services;

(d) Any violation related to underground storage tanks statutes, rules, permits or orders, except for failure to pay a fee due and owing under ORS 466.785 and 466.795;

(e) Any violation related to hazardous waste management statutes, rules, permits or orders, except for violations of ORS 466.890 related to damage to wildlife;

(f) Any violation related to oil and hazardous material spill and release statutes, rules, or orders, except for negligent or intentional oil spills;

(g) Any violation related to polychlorinated biphenyls management and disposal statutes;

(h) Any violation of ORS Chapter 465 or environmental cleanup rules or orders;

(i) Any violation of ORS Chapter 467 or any violation related to noise control rules or orders;

(j) Any violation of ORS Chapter 459 or any violation related to solid waste statutes, rules, permits, or orders;

(k) Any violation of ORS Chapter 459A, except as provided in section (4) of this rule and except any violation by a city, county or metropolitan service district of failing to provide the opportunity to recycle as required by law; and

(2) In addition to any other penalty provided by law, any person causing an oil spill through an intentional or negligent act shall incur a civil penalty of not less than $100 dollars or more than $20,000 dollars. The amount of the penalty shall be determined by doubling the values contained in the matrix in section (1) of this rule in conjunction with the formula contained in OAR 340-12-045.

(3) $2,500 Matrix

<----------Magnitude of Violation

Class of Major Moderate Minor

Violation

Class I $2500 $1000 $500

Class II $ 750 $ 500 $200

Class III $ 250 $ 100 $ 50

(a) No civil penalty issued by the Director pursuant to this matrix shall be less than $50. The total civil penalty may exceed $2,500 for each day of each violation, but shall not exceed $10,000 for each day of each violation. This matrix shall apply to the following:

(~~b~~A) ~~This matrix shall be applied to a~~ Any violation related to on-site sewage statutes, rules, permits, or orders, other than violations by a person performing sewage disposal services or by a person having or needing a Water Pollution Control Facility permit;

(B) Any ~~and for~~ violations of the Department's Division 23 open burning rules, excluding all industrial open burning violations, and violations of OAR 340-23-042(2) where the volume of the prohibited materials burned is greater than or equal to twenty-five cubic yards. In cases of the open burning of tires, this matrix shall apply only if the number of tires burned is less than fifteen. The matrix set forth in section (1) of this rule shall be applied to the open burning violations excluded from this section.

(4) $1,000 Matrix

<---------- Magnitude of Violation

Class of Major Moderate Minor

Violation

Class I $1,000 $750 $500

Class II $ 750 $500 $250

Class III $ 250 $150 $ 50

(a) No civil penalty issued by the Director pursuant to this matrix shall be less than $50 or more than $1,000 for each day of each violation.

(b) This matrix shall apply to any violation of laws, rules or orders relating to rigid plastic containers; except for violation of the labeling requirements under OAR 459A.675 through 459A.685 and for rigid pesticide containers under OAR 340-109-020 which shall be subject to the matrix set forth in section (1) of this rule.

(5) $500 Matrix

<----------Magnitude of Violation

Class of Major Moderate Minor

Violation

Class I $400 $300 $200

Class II $300 $200 $100

Class III $200 $100 $ 50

(a) No civil penalty issued by the Director pursuant to this matrix shall be less than $50 dollars or more than $500 dollars for each day of each violation. This matrix shall apply to the following types of violations:

(b) Any violation of laws, rules, orders or permits relating to woodstoves, except violations relating to the sale of new woodstoves;

(c) Any violation by a city, county or metropolitan service district of failing to provide the opportunity to recycle as required by law; and

(d) Any violation of ORS 468B.480 and 468B.485 and rules adopted thereunder relating to the financial assurance requirements for ships transporting hazardous materials and oil.

Stat. Auth.: ORS Ch. 454, 459.995, 456, 465, 466, 467, 468.020, 468.035, 468.869, 468.870, 468.996, Ch. 468A & 468B

Stats. Implemented: ORS 459.995, 459A.655, 459A.660, 459A.685 & 468.035

Hist.: DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 33-1990, f. & cert. ef. 8-15-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 9-1996, f. & cert. ef. 7-10-96

340-012-0045

Civil Penalty Determination Procedure

(1) When determining the amount of civil penalty to be assessed for any violation, other than violations of ORS 468.996, which are determined according to the procedure set forth below in OAR 340-012-049(8), the Director ~~or authorized representative~~ shall apply the following procedures:

(a) Determine the class and the magnitude of each violation:

(A) The class of a violation is determined by consulting OAR 340-012-050 to 340-012-073;

(B) The magnitude of the violation is determined by first consulting the selected magnitude categories in OAR 340-012-0090. In the absence of a selected magnitude, the magnitude shall be moderate unless:

(i) If the Department finds that the violation had a significant adverse impact on the environment, or posed a significant threat to public health, a determination of major magnitude shall be made. In making a determination of major magnitude, the Department shall consider all available applicable information including such factors as: The degree of deviation from the Commission's and Department's statutes, rules, standards, permits or orders, concentration, volume, percentage, duration, toxicity, and the extent of the effects of the violation. In making this finding, the Department may consider any single factor to be conclusive for the purpose of making a major magnitude determination;

(ii) If the Department finds that the violation had no potential for or actual adverse impact on the environment, nor posed any threat to public health, or other environmental receptors, a determination of minor magnitude shall be made. In making a determination of minor magnitude, the Department shall consider all available applicable information including such factors as: The degree of deviation from the Commission's and Department's statutes, rules, standards, permits or orders, concentration, volume, percentage, duration, toxicity, and the extent of the effects of the violation. In making this finding, the Department may consider any single factor to be conclusive for the purpose of making a minor magnitude determination.

(b) Choose the appropriate base penalty (BP) established by the matrices of OAR 340-012-0042 after determining the class and magnitude of each violation;

(c) Starting with the base penalty, determine the amount of penalty through application of the formula:

$BP + [(.1 \times BP) (P + H + O + R + C)] + EB$

where:

(A) "P" is whether the Respondent has any prior significant actions relating to statutes, rules, orders and permits pertaining to environmental quality or pollution control. A violation is deemed to have become a Prior Significant Action on the date of the issuance of the first Formal Enforcement Action in which it is cited. For the purposes of this determination, violations that were the subject of any prior significant actions that were issued before the effective date of the Division 12 rules as adopted by the Commission in March 1989, shall be classified in accordance with the classifications set forth in the March 1989 rules to ensure equitable consideration of all prior significant actions. The values for "P" and the finding which supports each are as follows:

(i) 0 if no prior significant actions or there is insufficient information on which to base a finding;

(ii) 1 if the prior significant action is one Class Two or two Class Threes;

(iii) 2 if the prior significant action(s) is one Class One or equivalent;

(iv) 3 if the prior significant actions are two Class One or equivalents;

(v) 4 if the prior significant actions are three Class Ones or equivalents;

(vi) 5 if the prior significant actions are four Class Ones or equivalents;

(vii) 6 if the prior significant actions are five Class Ones or equivalents;

(viii) 7 if the prior significant actions are six Class Ones or equivalents;

(ix) 8 if the prior significant actions are seven Class Ones or equivalents;

(x) 9 if the prior violations significant actions are eight Class Ones or equivalents;

(xi) 10 if the prior significant actions are nine Class Ones or equivalents, or if any of the prior significant actions were issued for any violation of ORS 468.996;

(xii) In determining the appropriate value for prior significant actions as listed above, the Department shall reduce the appropriate factor by:

(I) A value of 2 if the date of issuance of all the prior significant actions are greater than three years old ~~but less than five years old~~; or

(II) A value of 4 if the date of issuance of all the prior significant actions are greater than five years old.

(III) In making the above reductions, no finding shall be less than zero.

(xiii) Any prior significant action which is greater than ten years old shall not be included in the above determination;

(xiv) A permittee, who would have received a Notice of Permit Violation, but instead received a civil penalty or Department Order because of the application of OAR 340-012-0040(2)(d), (e), (f), or (g) shall not have the violation(s) cited in the former action counted as a prior significant action, if the permittee fully complied with the provisions of any compliance order contained in the former action.

(B) "H" is ~~past history of the Respondent in taking all feasible steps or procedures necessary or appropriate to correct any violation cited in any~~ Respondent's history in correcting prior significant actions or taking reasonable efforts to minimize the effects of the violation. In no case shall the combination of the "P" factor and the "H" factor be a value less than zero. In such cases where the sum of the "P" and "H" values is a negative numeral the finding and determination for the combination of these two factors shall be zero. The values for "H" and the finding which supports each are as follows:

(i) -2 if Respondent took all feasible steps to correct ~~each violation contained in~~ the majority of all ~~any~~ prior significant actions;

(ii) 0 if there is no prior history or if there is insufficient information on which to base a finding.

(C) "O" is whether the violation was repeated or continuous. The values for "O" and the finding which supports each are as follows:

(i) 0 if the violation existed for one day or less and did not recur on the same day, or if there is insufficient information on which to base a finding;

(ii) 2 if the violation existed for more than one day or if the violation recurred on the same day.

(D) "R" is whether the violation resulted from an unavoidable accident, or a negligent, intentional or flagrant act of the Respondent. The values for "R" and the finding which supports each are as follows:

(i) 0 if an unavoidable accident, or if there is insufficient information to make a finding;

(ii) 2 if negligent;

(iii) 6 if intentional; or

(iv) 10 if flagrant.

(E) "C" is the Respondent's cooperativeness and efforts to correct the violation. The values for "C" and the finding which supports each are as follows:

(i) -2 if Respondent was cooperative and took reasonable efforts to correct a ~~the~~ violation, took reasonable affirmative efforts to ~~or~~ minimize the effects of the violation, or took extraordinary efforts to ensure the violation would not be repeated;

(ii) 0 if there is insufficient information to make a finding, or if the violation or the effects of the violation could not be corrected;

(iii) 2 if Respondent was uncooperative and did not take reasonable efforts to correct the violation or minimize the effects of the violation.

(F) "EB" is the approximated dollar sum of the economic benefit that the Respondent gained through noncompliance. The Department or Commission may assess "EB" whether or not it applies the civil penalty formula above to determine the gravity and magnitude-based portion of the civil penalty, ~~increase the penalty by the approximated dollar sum of the economic benefit~~, provided that the sum penalty does not exceed the maximum allowed for the violation by rule or statute. ~~After determining the base penalty and applying the civil formula penalty above to determine the gravity and magnitude-based portion of the civil penalty,~~ "EB" is to be determined as follows:

(i) Add to the formula the approximate dollar sum of the economic benefit gained through noncompliance, as calculated by determining both avoided costs and the benefits obtained through any delayed costs, where applicable;

(ii) The Department need not calculate nor address the economic benefit component of the civil penalty when the benefit obtained is de minimis;

(iii) In determining the economic benefit component of a civil penalty, the Department may use the U.S. Environmental Protection Agency's BEN computer model, as adjusted annually to reflect changes in marginal tax rates, inflation rate and discount rate. With respect to significant or substantial change in the model, the Department shall use the version of the model that the Department finds will most accurately calculate the economic benefit gained by Respondent's noncompliance. Upon request of the Respondent, the Department will provide Respondent the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model. The model's standard values for income tax rates, inflation rate and discount rate shall be presumed to apply to all Respondents unless a specific Respondent can demonstrate that the standard value does not reflect that Respondent's actual circumstance. Upon request of the Respondent, the Department will use the model in determining the economic benefit component of a civil penalty;

(iv) As stated above, under no circumstances shall the imposition of the economic benefit component of the penalty result in a penalty exceeding the statutory maximum allowed for the violation by rule or statute. When a violation has extended over more than one day, however, for determining the maximum penalty allowed, the Director may treat the violation as extending over at least as many days as necessary to recover the economic benefit of noncompliance. When the purpose of treating a violation as extending over more than one day is to recover the economic benefit, the Department has the discretion not to impose the gravity and magnitude-based portion of the penalty for more than one day.

(2) In addition to the factors listed in section (1) of this rule, the Director may consider any other relevant rule of the Commission and shall state the effect the consideration had on the penalty. On review, the Commission shall consider the factors contained in section (1) of this rule and any other relevant rule of the Commission.

( ) In determining a civil penalty, the Director may reduce any penalty by any amount the Director deems appropriate when the person has voluntarily disclosed the violation to the Department. In deciding whether a violation has been voluntarily disclosed, the Director may take into account any conditions the Director deems appropriate, including whether the violation was:

(a) Discovered through an environmental auditing program or a systematic compliance program;

(b) Voluntarily discovered;

(c) Promptly disclosed;

(d) Discovered and disclosed independently of the government or a third party;

(e) Corrected and remedied;
(f) Prevented from recurrence;
(g) Not repeated;
(h) The cause of significant harm to human health or the environment; and
(i) Disclosed and corrected in a cooperative manner.

(3) The Department or Commission may reduce any penalty based on the Respondent's inability to pay the full penalty amount. If the Respondent seeks to reduce the penalty, the Respondent has the responsibility of providing to the Department or Commission documentary evidence concerning Respondent's inability to pay the full penalty amount:

(a) When the Respondent is currently unable to pay the full amount, the first option should be to place the Respondent on a payment schedule with interest on the unpaid balance for any delayed payments. The Department or Commission may reduce the penalty only after determining that the Respondent is unable to meet a long-term payment schedule;

(b) In determining the Respondent's ability to pay a civil penalty, the Department may use the U.S. Environmental Protection Agency's ABEL computer model to determine a Respondent's ability to pay the full civil penalty amount. With respect to significant or substantial change in the model, the Department shall use the version of the model that the Department finds will most accurately calculate the Respondent's ability to pay a civil penalty. Upon request of the Respondent, the Department will provide Respondent the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model;

(c) In appropriate circumstances, the Department or Commission may impose a penalty that may result in a Respondent going out of business. Such circumstances may include situations where the violation is intentional or flagrant or situations where the Respondent's financial condition poses a serious concern regarding the ability or incentive to remain in compliance.

Stat. Auth.: ORS Ch. 468

Stats. Implemented: ORS

Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94

340-012-0048

Stipulated Penalties

Nothing in OAR Chapter 340, Division 12 shall affect the ability of the Commission or Director to include stipulated penalties in a ~~Stipulation and Final~~ Mutual Agreement and Order, Consent Order, Consent Decree or any other agreement issued under ORS Chapters 183, 454, 459, 465, 466, 467, 468, 468A, or 468B.

Stat. Auth.: ORS Ch. 454, 459.995, Ch. 465, 466, 467, 468.020, 468.996, Ch. 468A & 468B

Stats. Implemented: ORS

Hist.: DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92

340-012-0050

Air Quality Classification of Violations

Violations pertaining to air quality shall be classified as follows:

(1) Class One:

(a) Violation of a requirement or condition of a Commission or Department Order, or variance;

(b) Constructing or operating a source without the appropriate permit;

(c) Modifying a source with an Air Permit without first notifying and receiving approval from the Department;

( ) Failure to install control equipment or meet performance standards as required by New Source Performance Standards under OAR 340 Division 25 or National Emission Standards for Hazardous Air Pollutant Standards under OAR 340 Division 32;

(d) Violation of a compliance schedule in a permit;

(e) Exceeding ~~an allowable~~ a hazardous air pollutant emission limitation~~level of a hazardous air pollutant~~;

(f) Exceeding an ~~emission or~~ opacity or criteria pollutant emission limitation in a permit, rule or order ~~limitation for a criteria pollutant,~~ by a factor of greater than or equal to two times the limitation~~, within ten kilometers of either a Non-Attainment Area or a Class I Area for that criteria pollutant~~;

(g) Exceeding the annual emission limitations of a permit, rule or order;

(h) Failure to perform testing, or monitoring, required by a permit, rule or order that results in failure to show compliance with an emission limitation or a performance standard;

(i) Systematic failure to keep records required by a permit, rule or order;

(j) Failure to submit semi-annual Compliance Certifications or Oregon Title V Annual Operating Report;

(k) Failure to file a timely application for an Oregon Title V Operating Permit pursuant to OAR 340-028-2120;

(l) Exceedances of operating limitations that limit the potential to emit of a synthetic minor source and that result in emissions above the Oregon Title V Operating Permit permitting thresholds pursuant to OAR 340-028-0110;

(m) Causing emissions that are a hazard to public safety;

(n) Failure to comply with Emergency Action Plans or allowing excessive emissions during emergency episodes;

(o) Violation of a work practice requirement for asbestos abatement projects which causes a potential for public exposure to asbestos or release of asbestos into the environment;

(p) Storage or accumulation of friable asbestos material or asbestos-containing waste material from an asbestos abatement project which causes a potential for public exposure to asbestos or release of asbestos into the environment;

(q) Visible emissions of asbestos during an asbestos abatement project or during collection, processing, packaging, transportation, or disposal of asbestos-containing waste material;

(r) Conduct of an asbestos abatement project by a person not licensed as an asbestos abatement contractor;

(s) Violation of a disposal requirement for asbestos-containing waste material which causes a potential for public exposure to asbestos or release of asbestos into the environment;

(t) Advertising to sell, offering to sell or selling a non-certified woodstove;

(u) ~~Illegal o~~Open burning of materials which are prohibited from being open burned anywhere in the State ~~by in violation of~~ OAR 340-023-0042(2);

~~(v) Causing or allowing open field burning without first obtaining a valid open field burning permit;~~

~~(w) Causing or allowing open field burning or stack burning where prohibited by OAR 340-026-0010(7) or 340-026-0055(4);~~

~~(x) Causing or allowing any propane flaming which results in visibility impairment on any Interstate Highway or Roadway specified in OAR 837-110-0080(1) and (2);~~

~~(y) Failing to immediately and actively extinguish all flames and smoke sources when any propane flaming results in visibility impairment on any Interstate Highway or Roadway specified in OAR 837-110-0080(1) and (2);~~

~~(z) Causing or allowing propane flaming of grass seed or cereal grain crops, stubble, or residue without first obtaining a valid propane flaming burning permit;~~

~~(aa) Stack or pile burning grass seed or cereal grain crop residue without first obtaining valid stack or pile burning permit;~~

~~(bb) Open field burning, propane flaming, stack or pile burning when State Fire Marshal restrictions are in effect;~~

~~(cc) Causing or allowing propane flaming which results in sustained open flame in a fire safety buffer zone along any Interstate Highway or Roadway specified in OAR 837-110-0080(1) or (2);~~

(dd) Failure to install vapor recovery piping in accordance with standards set forth in OAR Chapter 340, Division 150;

(ee) Installing vapor recovery piping without first obtaining a service provider license in accordance with requirements set forth in OAR Chapter 340, Division 160;

(ff) Submitting falsified actual or calculated emission fee data;

(gg) Failure to provide access to premises or records when required by law, rule, permit or order;

(hh) Any violation related to air quality which causes a major harm or poses a major risk of harm to public health or the environment.

(2) Class Two:

(a) Unless otherwise classified, ~~E~~exceeding an emission limitations, other than an annual emission limitation, or exceeding an opacity limitations by more than five percent opacity in permits or rules;

(b) Violating standards in permits or rules for fugitive emissions, particulate deposition, or odors;

(c) Failure to submit a complete Air Contaminant Discharge Permit application 60 days prior to permit expiration or prior to modifying a source;

(d) Failure to maintain on site records when required by a permit to be maintained on site;

(e) Exceedances of operating limitations that limit the potential to emit of a synthetic minor source that do not result in emissions above the Oregon Title V Operating Permit permitting thresholds pursuant to OAR 340-028-0110;

( ) Failure to perform testing or monitoring required by a permit, rule or order unless otherwise classified.

(f) Illegal open burning of agricultural, commercial, construction, ~~and/or~~ demolition, and/or ~~agricultural waste~~ industrial waste except for open burning in violation of OAR 340-023-0042(2);

(g) Failing to comply with notification and reporting requirements in a permit;

(h) Failure to comply with asbestos abatement licensing, certification, or accreditation requirements;

(i) Failure to provide notification of an asbestos abatement project;

( ) Violation of a work practice requirement for asbestos abatement projects that does not cause a potential for public exposure to asbestos and does not release asbestos into the environment;

( ) Violation of a disposal requirement for asbestos-containing waste material that does not cause a potential for public exposure to asbestos and does not release asbestos into the environment;

( ) Failure to perform a final air clearance test or submit an asbestos abatement project air clearance report for an asbestos abatement project.

(j) Failure to display permanent labels on a certified woodstove;

(k) Alteration of a permanent label for a certified woodstove;

(l) Failure to use Department-approved vapor control equipment when transferring fuel;

(m) Operating a vapor recovery system without first obtaining a piping test performed by a licensed service provider as required by OAR Chapter 340, Division 160;

(n) Failure to obtain Department approval prior to installing a Stage II vapor recovery system not already registered with the Department as specified in Department rules;

~~(o) Failure to actively extinguish all flames and major smoke sources from open field or stack burning when prohibition conditions are imposed by the Department or when instructed to do so by an agent or employee of the Department;~~

~~(p) Causing or allowing a propane flaming operation to be conducted in a manner which causes or allows an open flame to be sustained;~~

(q) Installing, servicing, repairing, disposing of or otherwise treating automobile air conditioners without recovering and recycling chlorofluoro-carbons using approved recovery and recycling equipment;

(r) Selling, or offering to sell, or giving as a sales inducement any aerosol spray product which contains as a propellant any compound prohibited under ORS 468A.655;

(s) Selling any chlorofluorocarbon or halon containing product prohibited under ORS 468A.635;

(t) Failure to pay an emission fee;

~~(u) Substantial underpayment of an emission fee;~~

(v) Submitting inaccurate emission fee data;

(w) Violation of OAR 340-022-0740 or 340-022-0750(1), by a person who has performed motor vehicle refinishing on 10 or more on-road motor vehicles in the previous 12 months.

(x) Any violation related to air quality which is not otherwise classified in these rules.

(3) Class Three:

( ) Failure to perform testing, or monitoring required by a permit, rule or order where missing data can be reconstructed to show compliance with standards, emission limitations or underlying requirements;

(a) Illegal residential open burning;

(b) Improper notification of an asbestos abatement project;

( ) Failure to submit a completed renewal application for an asbestos abatement license in a timely manner;

(c) Failure to display a temporary label on a certified woodstove;

(d) Exceeding opacity limitation in permits or rules by five percent opacity or less.

(e) Violation of OAR 340-022-0740 or 340-022-0750(1), by a person who has performed motor vehicle refinishing on fewer than 10 on-road motor vehicles in the previous 12 months.

Stat. Auth.: ORS Ch. 468A

Stats Implemented: ORS 468.020 & 468A.025

Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 5-1980, f. & ef. 1-28-80; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 31-1990, f. & cert. ef. 8-15-90; DEQ 2-1992, f. & cert. ef. 1-30-92; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1993, f. & cert. ef. 11-4-93; DEQ 20-1993(Temp), f. & cert. ef. 11-4-93; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 13-1994, f. & cert. ef. 5-19-94; DEQ 21-1994, f. & cert. ef. 10-14-94; DEQ 22-1996, f. & cert. ef. 10-22-96

340-012-0052

Noise Control Classification of Violations

Violations pertaining to noise control shall be classified as follows:

(1) Class One:

(a) Violation of a requirement or condition of a Commission or Department order or variance;

(b) Violations that exceed noise standards by ten decibels or more;

(c) Exceeding the ambient degradation rule by five decibels or more; or

(d) Failure to submit a compliance schedule required by OAR 340-035-0035(2);

(e) Operating a motor sports vehicle without a properly installed or well-maintained muffler or exceeding the noise standards set forth in OAR 340-035-0040(2);

(f) Operating a new permanent motor sports facility without submitting and receiving approval of projected noise impact boundaries;

(g) Failure to provide access to premises or records when required by law, rule, or order;

(h) Violation of motor racing curfews set forth in OAR 340-035-0040(6);

(i) Any violation related to noise control which causes a major harm or poses a major risk of harm to public health or the environment.

(2) Class Two:

(a) Violations that exceed noise standards by three decibels or more;

(b) Advertising or offering to sell or selling an uncertified racing vehicle without displaying the required notice or obtaining a notarized affidavit of sale;

(c) Any violation related to noise control which is not otherwise classified in these rules.

(3) Violations that exceed noise standards by one or two decibels are Class III violations.

Stat. Auth.: ORS 459.995, Ch. 466, 467, 468.020 & 468.996

Stats. Implemented: ORS

Hist.: DEQ 101, f. & ef. 10-1-75; DEQ 22-1984, f. & ef. 11-8-84; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92

340-012-0055

Water Quality Classification of Violations

Violations pertaining to water quality shall be classified as follows:

(1) Class One:

(a) Violation of a requirement or condition of a Commission or Department Order;

( ) Causing pollution of waters of the State;

( ) Reducing the water quality of waters of the State below water quality standards;

(b) Any discharge of waste that enters waters of the state, either without a waste discharge permit or from a discharge point not authorized by a waste discharge permit;

(c) Failure to comply with statute, rule, or permit requirements regarding notification of a spill or upset condition which results in a non-permitted discharge to public waters;

(d) Violation of a permit compliance schedule;

(e) Any violation of any pretreatment standard or requirement by a user of a municipal treatment works which either impairs or damages the treatment works, or causes a major harm or poses a major risk of harm to public health or the environment;

( ) Operation of a disposal system without first obtaining a Water Pollution Control Facility Permit;

(f) Failure to provide access to premises or records when required by law, rule, permit or order;

(g) Failure of any ship carrying oil to have financial assurance as required in ORS 468B.300 - 468B.335 or rules adopted thereunder;

(h) Any violation related to water quality which causes a major harm or poses a major risk of harm to public health or the environment.

( ) Unauthorized changes, modifications, or alterations to a facility operating under a WPCF or NPDES permit.

( ) Intentionally submitting false information;

( ) Operating or supervising a wastewater treatment system without proper certification;

(2) Class Two:

~~(a) Operation of a disposal system without first obtaining a Water Pollution Control Facility Permit;~~

(b) Failure to submit a report or plan as required by rule, permit, or license, except for a report required by permit compliance schedule;

(c) Any violation of OAR Chapter 340, Division 49 regulations pertaining to certification of wastewater system operator personnel unless otherwise classified;

(d) Placing wastes such that the wastes are likely to enter public waters by any means;

(e) Failure by any ship carrying oil to keep documentation of financial assurance on board or on file with the Department as required by ORS 468B.300 - 468B.335 or rules adopted thereunder;

( ) Failing to connect all plumbing fixtures to, or failing to discharge wastewater or sewage into, a Department-approved system unless otherwise classified in OAR 340-12-055 or 340-12-060;

( ) Any violation of a management, monitoring, or operational plan established pursuant to a waste discharge permit, that is not otherwise classified in these rules.

(f) Any violation related to water quality which is not otherwise classified in these rules.

(3) Class Three:

(a) Failure to submit a discharge monitoring report on time;

(b) Failure to submit a complete discharge monitoring report;

(c) Exceeding a waste discharge permit biochemical oxygen demand (BOD), carbonaceous biochemical oxygen demand (CBOD), or total suspended solids (TSS) limitation by a concentration of 20 percent or less, or exceeding a mass loading limitation by ten percent or less;

(d) Violation of a removal efficiency requirement by a factor of less than or equal to 0.2 times the number value of the difference between 100 and the applicable removal efficiency requirement (e.g., if the requirement is 65 percent removal, 0.2 (100-65) = 0.2(35) = 7 percent; then 7 percent would be the maximum percentage that would qualify under this rule for a permit with a 65 percent removal efficiency requirement);

(e) Violation of a pH requirement by less than 0.5 pH.

Stat. Auth.: ORS 459.995, Ch. 466, 467, 468.020 & 468.996

Stats. Implemented: ORS

Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 22-1984, f. & ef. 11-8-84; DEQ 17-1986, f. & ef. 9-18-86; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92

340-012-0060

On-Site Sewage Disposal Classification of Violations

Violations pertaining to On-Site Sewage Disposal shall be classified as follows:

(1) Class One:

(a) Violation of a requirement or condition of a Commission or Department order;

(b) Performing, advertising or representing one's self as being in the business of performing sewage disposal services without first obtaining and maintaining a current sewage disposal service license from the Department;

(c) Installing or causing to be installed an on-site sewage disposal system or any part thereof, or repairing any part thereof, without first obtaining a permit;

(d) Disposing of septic tank, holding tank, chemical toilet, privy or other treatment facility contents in a manner or location not authorized by the Department;

( ) Operating or using an on-site sewage disposal system that is failing by discharging sewage or effluent;

(e) Failure to provide access to premises or records when required by law, rule, permit or order;

(f) Any violations related to on-site sewage disposal which cause major harm or pose a major risk of harm to public health, welfare, safety or the environment.

(2) Class Two:

(a) Installing or causing to be installed an on-site sewage disposal system, or any part thereof, or the repairing of any part thereof, which fails to meet the requirements for satisfactory completion within 30 days after written notification or posting of a Correction Notice at the site;

(b) Operating or using a nonwater-carried waste disposal facility without first obtaining a letter of authorization from the Agent;

(c) Operating or using a newly constructed, altered or repaired on-site sewage disposal system, or part thereof, without first obtaining a Certificate of Satisfactory Completion;

(d) Providing any sewage disposal service in violation of any statute, rule, license, or permit, provided that the violation is not otherwise classified in these rules;

(e) Failing to obtain an authorization notice from the Agent prior to affecting change to a dwelling or commercial facility that results in the potential increase in the projected peak sewage flow from the dwelling or commercial facility in excess of the sewage disposal system's peak design flow;

(f) Installing or causing to be installed a nonwater-carried waste disposal facility without first obtaining written approval from the Agent;

(g) Failing to connect all plumbing fixtures to, or failing to discharge wastewater or sewage into, a Department approved on-site system;

~~(h) Operating or using an on-site sewage disposal system which is failing by discharging sewage or effluent onto the ground surface or into surface public water;~~

(i) Any violation related to on-site sewage disposal which is not otherwise classified in these rules.

(3) Violations where the sewage disposal system design flow is not exceeded, placing an existing system into service, or changing the dwelling or type of commercial facility, without first obtaining an authorization notice are Class Three violations.

Stat. Auth.: ORS 459.995, Ch. 454, 466, 467, 468.020, 468.996 & Ch. 468B

Stats. Implemented: ORS

Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 4-1981, f. & ef. 2-6-81; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92

340-012-0065

Solid Waste Management Classification Of Violations

Violations pertaining to the management, recovery and disposal of solid waste shall be classified as follows:

(1) Class One:

(a) Violation of a requirement or condition of a Commission or Department Order;

(b) Establishing, expanding, maintaining or operating a disposal site without first obtaining a registration or permit;

(c) Accepting solid waste for disposal in a permitted solid waste unit or facility that has been expanded in area or capacity without first submitting plans to the Department and obtaining Department approval;

( ) Disposing of or authorizing the disposal of a solid waste at a location not permitted by the Department to receive that solid waste;

(d) Violation of the freeboard limit which results in the actual overflow of a sewage sludge or leachate lagoon;

(e) Violation of the landfill methane gas concentration standards;

(f) Violation of any federal or state drinking water standard in an aquifer beyond the solid waste boundary of the landfill, or an alternative boundary specified by the Department;

(g) Violation of a permit-specific groundwater concentration limit, as defined in OAR 340-040-0030(3) at the permit-specific groundwater concentration compliance point, as defined in OAR 340-040-0030(2)(e);

(h) Failure to perform the groundwater monitoring action requirements specified in OAR 340-040-0030(5), when a significant increase (for pH, increase or decrease) in the value of a groundwater monitoring parameter is detected;

(i) Impairment of the beneficial use(s) of an aquifer beyond the solid waste boundary or an alternative boundary specified by the Department;

(j) Deviation from the Department approved facility plans which results in an ~~actual~~ safety hazard, public health hazard or damage to the environment;

(k) Failure to properly construct and maintain groundwater, surface water, gas or leachate collection, treatment, disposal and monitoring facilities in accordance with the facility permit, the facility environmental monitoring plan, or Department rules;

(l) Failure to collect, analyze and report ground-water, surface water or leachate quality data in accordance with the facility permit, the facility environmental monitoring plan, or Department rules;

(m) Violation of a compliance schedule contained in a solid waste disposal or closure permit;

(n) Failure to provide access to premises or records when required by law, rule, permit or order;

(o) Knowingly disposing, or accepting for disposal, materials prohibited from disposal at a solid waste disposal site by statute, rule, permit or order ~~used oil, in single quantities exceeding 50 gallons, or lead acid batteries~~;

(p) Accepting, handling, treating or disposing of clean-up materials contaminated by hazardous substances by a landfill in violation of the facility permit and plans as approved by the Department or the provisions of OAR 340-093-0170(3);

(q) Accepting for disposal infectious waste not treated in accordance with laws and Department rules;

(r) Accepting for treatment, storage or disposal wastes defined as hazardous under ORS 466.005, et seq., or wastes from another state which are hazardous under the laws of that state without specific approval from the Department;

(s) Mixing for disposal or disposing of principal recyclable material that has been properly prepared and source separated for recycling;

( ) Receiving special waste in violation of or without a Department approved Special Waste Management Plan;

( ) Failure to follow a Department approved Quality Assurance/Quality Control (QA/QC) plan when constructing a waste cell;

( ) Failure to comply with a Department approved Remedial Investigation Workplan developed in accordance with OAR 340-40-040;

( ) Failure to establish and maintain financial assurance as required by statute, rule, permit or order;

( ) Open burning in violation of OAR 340-023-0042(2);

(t) Any violation related to the management, recovery and disposal of solid waste which causes major harm or poses a major risk of harm to public health or the environment.

(2) Class Two:

(a) Violation of a condition or term of a Letter of Authorization;

~~(b) Knowingly accepting for disposal or disposing of a material banned from land disposal under ORS 459.247, except those materials specified as Class I violations;~~

(c) Failure of a permitted landfill, solid waste incinerator or a municipal solid waste compost facility operator or a metropolitan service district to report amount of solid waste disposed in accordance with the laws and rules of the Department;

(d) Failure to accurately report weight and type of material recovered or processed from the solid waste stream in accordance with the laws and rules of the Department;

(e) Failure of a disposal site to obtain certification for recycling programs in accordance with the laws and rules of the Department prior to accepting solid waste for disposal;

(f) Acceptance of solid waste by a permitted disposal site from a person that does not have an approved solid waste reduction program in accordance with the laws and rules of the Department;

(g) Failure to comply with any solid waste permit requirement pertaining to permanent household hazardous waste collection facility operations;

(h) Failure to comply with landfill cover requirements, including but not limited to daily, intermediate, and final covers, and limitation of working face size;

(i) Unless otherwise classified Ffailure to comply with any plan approved by the Department;

( ) Transferring ownership of a registered or permitted solid waste disposal site without prior notification to the Department;

(j) Failure to submit a permit renewal application 180 days prior to the expiration date of the existing permit ~~in accordance with the laws and rules of the Department~~;

( ) Failure to establish and maintain a facility operating record for a municipal solid waste landfill;

(k) Any violation related to solid waste, solid waste reduction, or any violation of a solid waste permit not otherwise classified in these rules.

(3) Class Three:

(a) Failure to post required signs;

(b) Failure to control litter;

( ) Unless otherwise classified failure to notify the Department of any name or address change of the owner or operator of the facility within ten days of the change.

Stat. Auth.: ORS Ch. 459.995, 466, 468.020, 466.996 & 468.020

Stats. Implemented: ORS 459.205

Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 1-1982, f. & ef. 1-28-82; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 26-1994, f. & cert. ef. 11-2-94; DEQ 9-1996, f. & cert. ef. 7-10-96

340-012-0066

Solid Waste Tire Management Classification of Violations

Violations pertaining to the storage, transportation and management of waste tires or tire-derived products shall be classified as follows:

(1) Class One:

(a) Violation of a requirement or condition of a Commission or Department Order;

( ) Establishing, expanding, or operating a waste tire storage site without first obtaining a permit;

( ) Systematic failure to maintain written records of waste tire generation and disposal as required;

(b) Disposing of waste tires or tire-derived products at an unauthorized site;

(c) Violation of the compliance schedule or fire safety requirements of a waste tire storage site permit;

(d) Hauling waste tires or advertising or representing one's self as being in the business of a waste tire carrier without first obtaining a waste tire carrier permit as required by laws and rules of the Department;

(e) Hiring or otherwise using an unpermitted waste tire carrier to transport waste tires;

( ) Failure to establish and maintain financial assurance as required by statute, rule, permit or order;

(f) Failure to provide access to premises or records when required by law, rule, permit or order;

(g) Any violation related to the storage, transportation or management of waste tires or tire-derived products which causes major harm or poses a major risk of harm to public health or the environment.

(2) Class Two:

(a) Violation of a waste tire storage site or waste tire carrier permit other than a specified Class One or Class Three violation;

(_) Failure to submit a permit renewal application prior to the expiration date of the existing permit within the time required by statute, rule, or permit;

(_) Hauling waste tires in a vehicle not identified in a waste tire carrier operating permit or failing to display required decals as described in a permitee's waste tire carrier permit;

(_) Violation of a condition or term of a Letter of Authorization;

~~(b) Establishing, expanding, or operating a waste tire storage site without first obtaining a permit;~~

(c) Any violation related to the storage, transportation or management of waste tires or tire-derived products which is not otherwise classified in these rules.

(3) Class Three:

(a) Failure to submit required annual reports in a timely manner;

(b) Failure to keep required records on use of vehicles;

(c) Failure to post required signs;

(d) Failure to submit a permit renewal application in a timely manner;

(e) Failure to submit permit fees in a timely manner;

(f) Failure to maintain written records of waste tire disposal and generation.

Stat. Auth.: ORS 459.995, Ch. 466, 467, 468.020 & 468.996

Stats. Implemented: ORS

Hist.: DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92

340-012-0067

Underground Storage Tank and Heating Oil Tank Classification of Violations

Violations pertaining to Under-ground Storage Tanks and cleanup of petroleum contaminated soil at heating oil tanks shall be classified as follows:

(1) Class One:

(a) Violation of a requirement or condition of a Commission or Department Order;

(b) Failure to report a release or suspected release from an under-ground storage tank or a heating oil tank as required by statute, rule or permit;

(c) Failure to initiate and complete the investigation or cleanup of a release from an underground storage tank or a heating oil tank;

(d) Failure to prevent a release from an underground storage tank;

(e) Failure to submit required reports from the investigation or cleanup of a release from an underground storage tank or heating oil tank;

(f) Failure to provide access to premises or records when required by law, rule, permit or order;

(g) Placement of a regulated material into an unpermitted underground storage tank;

(h) Installation of an underground storage tank in violation of the standards or procedures adopted by the Department;

(i) Failure to initiate and complete free product removal in accordance with OAR 340-122-0235;

~~(j) Failure to initiate and complete the investigation or cleanup of a release from a heating oil tank;~~

(k) Providing installation, retrofitting, decommissioning, or testing services on an underground storage tank or providing cleanup of petroleum contaminated soil at an underground storage tank facility without first registering or obtaining an underground storage tank service providers license;

(l) Supervising the installation, retrofitting, decommissioning, or testing of an underground storage tank or supervising cleanup of petroleum contaminated soil at an underground storage tank facility without first obtaining an underground storage tank supervisors license;

(m) Any other violation related to underground storage tanks or heating oil tanks or cleanup of petroleum contaminated soil at heating oil tanks which poses a major risk of harm to public health and the environment.

(2) Class Two:

(a) Failure to conduct required underground storage tank monitoring and testing activities;

(b) Failure to conform to operational standards for underground storage tanks and leak detection systems;

(c) Failure to obtain a permit prior to the installation or operation of an underground storage tank;

( ) Decommissioning, installing, or retrofitting an underground storage tank or conducting a soil matrix cleanup without first providing the required notifications to the Department;

(d) Failure to properly decommission an underground storage tank;

(e) Providing installation, retrofitting, decommissioning or testing services on a regulated underground storage tank or providing cleanup of petroleum contaminated soil at a regulated underground storage tank that does not have a permit;

(f) Failure by a seller or distributor to obtain the tank permit number before depositing product into the underground storage tank or failure to maintain a record of the permit numbers;

(g) Allowing the installation, retrofitting, decommissioning, or testing of an underground storage tank or cleanup of petroleum contaminated soil at an underground storage tank by any person not licensed by the department;

(h) Allowing cleanup of petroleum contaminated soil at a heating oil tank by any person not licensed by the Department;

(i) Providing petroleum contaminated soil cleanup services at a heating oil tank without first registering or obtaining a ~~heating oil tank~~ soil matrix cleanup service provider license;

(j) Providing supervision of petroleum contaminated soil at a heating oil tank without first registering or obtaining a ~~heating oil tank~~ soil matrix cleanup supervision license;

(k) Supervising petroleum contaminated soil cleanup services at a heating oil tank without first registering or obtaining a ~~heating oil tank~~ soil matrix cleanup supervisor license;

(l) Failure to submit a corrective action plan (CAP) in accordance with the schedule or format established by the Department pursuant to OAR 340-122-0250;

(m) Failure by the tank owner to provide the permit number to persons depositing product into the underground storage tank;

~~(n) Failure to report a suspected release from an underground storage tank;~~

(o) Any other violation related to underground storage tanks or heating oil tanks or cleanup of petroleum contaminated soil at a heating oil tank that is not otherwise classified in these rules.

(3) Class Three:

(a) Failure of a new owner of an underground storage tank to submit an application for a permit modification or a new permit ~~when an underground storage tank is acquired by a new owner~~;

(b) Failure of a tank seller or product distributor to notify a tank owner or operator of the Department's permit requirements;

~~(c) Decommissioning, installing, or retrofitting an underground storage tank or conducting a soil matrix cleanup without first providing the required notifications to the Department;~~

(d) Failure to provide information to the Department regarding the contents of an under-ground storage tank;

(e) Failure to maintain adequate decommissioning records.

Stat. Auth.: ORS Ch. 466

Stats. Implemented: ORS

Hist.: DEQ 2-1988, f. 1-27-88, cert. ef. 2-1-88; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 15-1991, f. & cert. ef. 8-14-91; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94

340-012-0068

Hazardous Waste Management and Disposal Classification of Violations

Violations pertaining to the management and disposal of hazardous waste, including universal wastes, shall be classified as follows:

(1) Class One:

(a) Violation of a requirement or condition of a Department or Commission order;

(b) Failure to make a complete and accurate hazardous waste determination of a residue as required by OAR 340-102-011 ~~carry out waste analysis for a waste stream or to properly apply "knowledge of process"~~;

( ) Failure to have a waste analysis plan as required by 40 CFR 265.13;

(c) Operation of ~~ing~~ a hazardous waste treatment, storage or disposal facility (TSD) without first obtaining a permit or without having interim status pursuant to ~~meeting the requirements of~~ OAR 340-105-0010(2)(a);

(d) Accumulation of hazardous waste on site for longer than twice the applicable generator allowable on-site accumulation period ~~Failure to comply with the 90 day storage limit by a fully regulated generator or the 180 day storage limit for a small quantity generator where there is a gross deviation from the requirement~~;

(e) Transporting or offering for transport ~~Shipment of~~ hazardous waste for off-site shipment without first preparing a manifest;

( ) Accepting for transport hazardous waste which is not accompanied by a manifest;

(f) Systematic failure of a hazardous waste generator to comply with the manifest system requirements;

(g) Failure to submit a manifest discrepancy report or exception report~~satisfy manifest discrepancy reporting requirements~~;

(h) Failure to prevent the unknown entry or prevent the possibility of the unauthorized entry of person or livestock into the waste management area of a TSD facility;

(i) Failure to manage ~~properly handle~~ ignitable, reactive, or incompatible hazardous wastes as required under 40 CFR Part 264 and 265.17(b)(1), (2), (3), (4) and (5);

(j) Illegal disposal of hazardous waste;

(k) Disposal of hazardous waste in violation of the land disposal restrictions;

( ) Failure to contain waste pesticide or date containers of waste pesticide as required by OAR 340-109-010(2);

( ) Treating or diluting universal wastes in violation of 40 CFR 273.11, 273.31 or OAR 340-113-030(5);

( ) Use of empty non-rigid or decontaminated rigid pesticide containers for storage of food, fiber or water intended for human or animal consumption;

(l) Mixing, solidifying, or otherwise diluting hazardous waste to circumvent land disposal restrictions;

(m) Incorrectly certifying a hazardous waste for disposal/ treatment in violation of the land disposal restrictions;

(n) Failure to submit a Land Disposal notifications~~/~~, demonstration or certifications with a shipment of hazardous waste ~~as required by land disposal restrictions~~;

(_) Shipping universal waste to a site other than an off-site collection site, destination facility or foreign destination in violation of 40 CFR 273.18 or 273.38;

(o) Failure to comply with the hazardous waste tank integrity assessments and certification requirements;

(p) Failure of an owner/operator of a TSD facility to have a closure and/or post closure plan and/or cost estimates;

(q) Failure of an owner/operator of a TSD facility to retain an independent registered professional engineer to oversee closure activities and certify conformity with an approved closure plan;

(r) Failure of an owner/operator of a TSD facility to establish or maintain financial assurance for closure and/or post closure care;

(s) Systematic failure of an owner/operator of a TSD facility or a generator of hazardous waste to conduct ~~unit specific and general~~ inspections;

(_) Failure of an owner/operator of a TSD facility or generator to promptly ~~as required or to~~ correct any hazardous conditions discovered during an ~~those~~ inspections;

(_) Failing to prepare a Contingency Plan;

(t) Failure to follow an emergency procedures contained in a Contingency Plan or other emergency response plan when failure could result in serious harm;

(u) Storage of hazardous waste in a containers which is ~~are~~ leaking or presenting a threat of release;

(_) Storing more than 100 containers of hazardous waste without complying with the secondary containment requirements at 40 CFR 264.175;

(v) Systematic failure to follow hazardous waste container labeling requirements or lack of knowledge of container contents;

(w) Failure to label a hazardous waste containers where such failure could cause an inappropriate response to a spill or leak and substantial harm to public health or the environment;

(x) Failure to date a hazardous waste containers with a required accumulation date or failure to document length of time hazardous waste was accumulated;

(y) Failure to comply with the export requirements for hazardous wastes;

(z) Violation of any TSD facility permit, provided that the violation is equivalent to any Class I violation set forth in these rules;

(aa) Systematic failure to comply with ~~OAR 340-102-0041,~~ hazardous waste generator annual reporting requirements, Treatment, Storage, Disposal and Recycling facility annual reporting requirements and ~~OAR 340-102-0012,~~ annual registration information;

~~(bb) Systematic failure to comply with OAR 340-104-0075, Treatment, Storage, Disposal and Recycling facility annual reporting requirements and OAR 340-102-0012, annual registration information;~~

~~(cc) Construct or operate a new treatment, storage or disposal facility without first obtaining a permit;~~

(dd) Failure to properly install ~~Installation of inadequate~~ groundwater monitoring wells such that detection of hazardous waste or hazardous constituents that migrate from the waste management area cannot be immediately be detected;

(ee) Failure to install any groundwater monitoring wells;

(ff) Failure to develop and follow a groundwater sampling and analysis plan using proper techniques and procedures;

( ) Generating and treating, storing, disposing of, transporting, and/or offering for transportation, hazardous waste without first obtaining an EPA Identification Number;

( ) Systematic failure of a large-quantity hazardous waste generator or TSD facility to properly control volatile organic hazardous waste emissions

(gg) Failure to provide access to premises or records when required by law, rule, permit or order;

(hh) Any violation related to the generation, management and disposal of hazardous waste which causes major harm or poses a major risk of harm to public health or the environment.

(2) Class two:

( ) Failure to keep a copy of the documentation used to determine whether a residue is a hazardous waste;

( ) Failure to label a tank or container of hazardous wastes with the words "Hazardous Waste," "Pesticide Waste," "Universal Waste" or with other words as required that identify the contents;

( ) Failure to comply with hazardous waste generator annual reporting requirements, Treatment, Storage, Disposal and Recycling facility annual reporting requirements and annual registration information, unless otherwise classified;

( ) Failing to keep a container of hazardous waste closed except when necessary to add or remove waste;

( ) Failing to inspect areas where containers of hazardous waste are stored, at least weekly;

( ) Failure of a hazardous waste generator to maintain aisle space adequate to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination;

( ) Accumulating hazardous waste on-site, without fully complying with the Personnel Training requirements;

( ) Failure to manage universal waste in a manner that prevents releases into the environment;

( ) Failure to comply with the empty pesticide container management requirements unless otherwise classified;

( ) Failure of a dry cleaner subject to ORS 465, to comply with the waste minimization requirements in ORS 465.505(1)(a-g);

( ) Failure of a dry cleaner subject to ORS 465, to comply with the waste minimization reporting requirements in ORS 465.505(3);

( ) Failure of a dry cleaner subject to ORS 465, to immediately report any release of dry cleaning solvent in excess of 1 pound;

( ) Any violation pertaining to the generation, management and disposal of hazardous waste which is not otherwise classified in these rules is a Class Two violation.

(3) Class three:

( ) Accumulation of hazardous waste on site by a large-quantity generator for less than ten days over the allowable on-site accumulation period;

( ) Accumulation of hazardous waste on site by a small-quantity generator for less than twenty days over the allowable on-site accumulation period;

( ) Failure of a large-quantity generator of hazardous waste to retain signed copies of manifests for at least three years when less than 5% of the reviewed manifests are missing and the facility is able to obtain copies during the inspection;

( ) Failure of a small-quantity generator of hazardous waste to retain signed copies of manifests for at least three years when only 3 of the reviewed manifests are missing and the facility is able to obtain copies and submit them to the Department within 10 days of the inspection;

( ) Failure to label only one container or tank which is less than 60 gallons in volume and in which hazardous waste was accumulated on site, with the required words "Hazardous Waste," "Pesticide Waste," "Universal Waste" or with other words as required that identify the contents;

( ) Failure of a large-quantity generator to retain copies of land disposal restriction notifications, demonstrations, or certifications when less than 5% of the reviewed land disposal restriction notices are missing and the facility is able to obtain copies during the inspection;

( ) Failure of a small-quantity generator to retain copies of land disposal restriction notifications, demonstrations, or certifications when 3 or fewer of the reviewed land disposal restriction notices missing and the facility is able to obtain copies and submit them to the Department within 10 days of the inspection;

( ) Failure to keep a container of hazardous waste located in a "satellite accumulation area" closed except when necessary to add or remove waste, when only one container is open;

( ) Failure to properly label a container of pesticide-containing material for use or reuse as required by OAR 340-109-010(1).

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the Department of Environmental Quality.]

Stat. Auth.: ORS 459.995, Ch. 466, 467, 468.020 & 468.996

Stats. Implemented: ORS

Hist.: DEQ 1-1982, f. & ef. 1-28-82; DEQ 22-1984, f. & ef. 11-8-84; DEQ 9-1986, f. & ef. 5-1-86; DEQ 17-1986, f. & ef. 9-18-86; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92

340-012-0069

Oil and Hazardous Material Spill and Release Classification of Violations

Violations pertaining to spills or releases of oil or hazardous materials shall be classified as follows:

(1) Class One:

(a) Violation of a requirement or condition of a Commission or Department Order;

(b) Failure to provide access to premises or records when required by law, rule, permit or order;

(c) Failure by any person having ownership or control over oil or hazardous materials to immediately cleanup spills or releases or threatened spills or releases;

(d) Failure by any person having ownership or control over oil or hazardous materials to immediately report all spills or releases or threatened spills or releases in amounts equal to or greater than the reportable quantity;

(e) Any violation related to the spill or release of oil or hazardous materials which causes a major harm or poses a major risk of harm to public health or the environment;

(f) Any spill or release of oil or hazardous materials which enters waters of the state.

( ) Failure to have a spill response or contingency plan; or failure to follow emergency procedures contained in a spill response or contingency plan when the plan is required by permit, rule, or order; or failure to follow emergency requirements at OAR 340-108-020(2); when failure could result in serious harm;

(2) Any violation related to the spill or release of oil or hazardous materials which is not otherwise classified in these rules is a Class Two violation.

Stat. Auth.: ORS Ch. 466

Stats. Implemented: ORS

Hist.: DEQ 18-1986, f. & ef. 9-18-86; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94

340-012-0070 [Renumbered to 340-012-0046]

340-012-0071

PCB Classification of Violations

Violations pertaining to the management and disposal of polychlorinated biphenyls (PCB) shall be classified as follows:

(1) Class One:

(a) Violation of a requirement or condition of a Commission or Department Order;

(b) Treating or disposing of PCBs anywhere other than at a permitted PCB disposal facility;

(c) Establishing, constructing or operating a PCB disposal facility without first obtaining a permit;

(d) Failure to provide access to premises or records when required to by law, rule, permit or order;

(e) Any violation related to the management and disposal of PCBs which causes a major harm or poses a major risk of harm to public health or the environment.

(2) Class Two:

(a) Violating a condition of a PCB disposal facility permit;

(b) Any violation related to the management and disposal of PCBs which is not otherwise classified in these rules.

Stat. Auth.: ORS 459.995, Ch. 466, 467, 468.020 & 468.996

Stats. Implemented: ORS

Hist.: DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92

340-012-0072

Used Oil Management Classification of Violations

Violations pertaining to the management of used oil shall be classified as follows:

(1) Class One:

( ) Violation of a requirement or condition of a Department or Commission Order;

(a) Using ~~untested~~ used oil as a dust suppressant or pesticide, or otherwise spreading ~~untested~~ used oil directly in the environment~~, if the quantity of oil spread exceeds 50 gallons per event~~;

~~(b) Spreading used oil contaminated with hazardous waste or failing to meet the limits for materials set in OAR 340-111-0030;~~

( ) Collecting, processing, storing, disposing of, and/or transporting, used oil without first obtaining an EPA Identification number;

( ) Burning used oil with less than 5,000 Btu/pound for the purpose of "energy recovery" in violation of OAR 340-111-110(3)(b);

( ) Offering for sale used oil as specification used oil-fuel when the used oil does not meet used oil-fuel specifications;

( ) Offering to sell off-specification used oil fuel to facility not meeting the definition of an industrial boiler or furnace, or failing to obtain proper certification under 40 CFR 179.75;

( ) Burning off-specification used oil in a device not specifically exempted under 40 CFR 279.60(a) that does not meet the definition of an industrial boiler or furnace

( ) Storing or managing used oil in a surface impoundment;

( ) Storing used oil in containers which are leaking or present a threat of release;

( ) Failure by a used oil transporter or processor to determine whether the halogen content of used oil exceeds that permissible for used oil;

( ) Failure to develop and follow a written waste analysis plan when required by law;

( ) Failure by a used-oil processor or transporter to manage used-oil residues as required under 40 CFR 279(10)(e);

(c) Any violation related to the management of used oil which causes major harm or poses a major risk of harm to public health or the environment;

(d) Failure to provide access to premises or records when required to do so by law, rule, permit or order.

(2) Class Two:

~~(a) Failure to notify the Department of activities relating to spreading used oil;~~

( ) Failure to close or cover used oil tanks or containers as required by OAR 340-111-032(2);

( ) Failing to submit annual used oil handling reports;

( ) Failure by a used-oil transfer facility, processors, or off-specification used-oil burners to store used oil within secondary containment;

( ) Failure to label each container or tank in which used oil was accumulated on site with the words "used oil";

( ) Failure of a used-oil processor to keep a written operating record at the facility in violation of 40 CFR 279.57;

( ) Failure by a used-oil processor to prepare and maintain a preparedness and prevention plan;

( ) Failure by a used-oil processor to close out used-oil tanks or containers when required by 40 CFR 279.54(h);

(b) Any violation related to the management of used oil which is not otherwise classified in these rules is a Class two violation.

(3) Class three:

( ) Failure to label one container or tank in which used oil was accumulated on site, when there are five or more present, with the required words "used oil."

Stat. Auth.: ORS 459.995, 468.020, 468.869, 468.870 & 468.996

Stats. Implemented: ORS

Hist.: DEQ 33-1990, f. & cert. ef. 8-15-90; DEQ 21-1992, f. & cert. ef. 8-11-92

340-012-0073

Environmental Cleanup Classification of Violations

Violations of ORS 465.200 through 465.420 and related rules or orders pertaining to environmental cleanup shall be classified as follows:

(1) Class One:

(a) Violation of a requirement or condition of a Commission or Department order;

(b) Failure to provide access to premises or records when required to do so by law, rule, permit or order;

(c) Any violation related to environmental investigation or cleanup which causes a major harm or poses a major risk of harm to public health or the environment.

(2) Class Two:

(a) Failure to provide information under ORS 465.250;

(b) Any violation related to environmental investigation or cleanup which is not otherwise classified in these rules.

Stat. Auth.: ORS 459.995, Ch. 466, 467, 468.020 & 468.996

Stats. Implemented: ORS

Hist.: DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92

340-012-0075 [Renumbered to 340-012-0047]

340-012-0080 [Renumbered to 340-012-0028]

340-012-0090

Selected Magnitude Categories

(1) Magnitudes for select violations pertaining to Air Quality may be determined as follows:

(a) Opacity limitation violations:

(A) Major -- Opacity measurements or readings of more than 40 ~~25~~ percent opacity over the applicable limitation;

(B) Moderate -- Opacity measurements or readings ~~from~~ between greater than 10 percent and ~~to~~ 40 ~~25~~ percent or less opacity over the applicable limitation;

(C) Minor -- Opacity measurements or readings of ten percent or less opacity over the applicable limitation.

(b) Steaming rates, performance standards, and fuel usage limitations:

(A) Major -- Greater than 1.3 times any applicable limitation;

(B) Moderate -- From 1.1 up to and including 1.3 times any applicable limitation;

(C) Minor -- Less than 1.1 times any applicable limitation.

(c) Air contaminant emission limitation violations for selected air pollutants:

(A) Magnitude determination shall be made based upon the following table:

Pollutant	Amount
Carbon Monoxide	100 tons
Nitrogen Oxides	40 tons
Particulate Matter	25 tons See note
(A) TSP	25 tons
(B) PM 10	15 tons
Sulfur Dioxide	40 tons
Volatile Organic Compounds	40 tons See note
Lead	1200 lbs.
Mercury	200 lbs.
Beryllium	0.8 lbs.
Asbestos	14 lbs.
Vinyl Chloride	1 ton
Fluorides	3 tons
Sulfuric Acid Mist	7 tons
Hydrogen Sulfide	10 tons
Total Reduced Sulfur (including hydrogen sulfide)	10 tons
Reduced Sulfur Compounds (including hydrogen sulfide)	10 tons

NOTE: For the nonattainment portions of the Medford-Ashland Air Quality Maintenance Area, and the Klamath Falls Urban Growth Area, the numbers to be used for Particulate Matter (both TSP and PM 10) shall be five tons, and for Volatile Organic Compounds shall be 20 tons.

(B) Major:

(i) Exceeding the annual amount as established by permit, rule or order by more than the above amount;

(ii) Exceeding the monthly amount as established by permit, rule or order by more than ten percent of the above amount;

(iii) Exceeding the daily amount as established by permit, rule or order by more than 0.5 percent of the above amount;

(iv) Exceeding the hourly amount as established by permit, rule or order by more than 0.1 percent of the above amount.

(C) Moderate:

(i) Exceeding the annual amount as established by permit, rule or order by an amount from 50 up to and including 100 percent of the above amount;

(ii) Exceeding the monthly amount as established by permit, rule or order by an amount from five up to and including ten percent of the above amount;

(iii) Exceeding the daily amount as established by permit, rule or order by an amount from 0.25 up to and including 0.50 percent of the above amount;

(iv) Exceeding the hourly amount as established by permit, rule or order by an amount from 0.05 up to and including 0.10 percent of the above amount.

(D) Minor:

(i) Exceeding the annual amount as established by permit, rule or order by an amount less than 50 percent of the above amount;

(ii) Exceeding the monthly amount as established by permit, rule or order by an amount less than five percent of the above amount;

(iii) Exceeding the daily amount as established by permit, rule or order by an amount less than 0.25 percent of the above amount;

(iv) Exceeding the hourly amount as established by permit, rule or order by an amount less than 0.05 percent of the above amount.

(d) Asbestos violations:

(A) Major -- More than 260 lineal feet or more than 160 square feet or more than 35 cubic feet of asbestos-containing material;

(B) Moderate -- From 40 lineal feet up to and including 260 lineal feet or from 80 square feet up to and including 160 square feet or from 17 cubic feet up to and including 35 cubic feet of asbestos-containing material;

(C) Minor -- Less than 40 lineal feet or 80 square feet or less than 17 cubic feet of asbestos-containing material;

(D) The magnitude of the asbestos violation may be increased by one level if the material was comprised of more than five percent asbestos.

~~(e) Asbestos air clearance violations:~~

~~(A) Major -- More than .1 fibers per cubic centimeter;~~

~~(B) Moderate -- More than .05 fibers per cubic centimeter up to and including .1 fibers per cubic centimeter;~~

~~(C) Minor -- More than .01 fibers per cubic centimeter up to and including .05 fibers per cubic centimeter.~~

(f) Open burning violations:

(A) Major -- Initiating or allowing the initiation of ~~O~~open burning of material constituting more than five cubic yards in volume;

(B) Moderate -- Initiating or allowing the initiation of ~~O~~open burning of material constituting from one up to and including five cubic yards in volume, or if the Department lacks sufficient information on which to base a determination;

(C) Minor -- Initiating or allowing the initiation of ~~O~~open burning of material constituting less than one cubic yard in volume;

(D) For the purposes of determining the magnitude of a violation only, five tires shall be deemed the equivalent in volume to one cubic yard.

(2) Magnitudes for select violations pertaining to Water Quality ~~wastewater discharge limitations~~ may be determined as follows:

(a) Violating wastewater discharge limitations:

(~~A~~a) Major:

(i~~A~~) Discharging more than 30% outside ~~Greater than 1.6 times~~ any applicable range for ~~maximum~~ flow rate, concentration limitation, or ~~any applicable~~ mass limitation, except for toxics, pH, and bacteria; or

~~(B) Greater than 50 percent below any applicable minimum concentration limitation; or~~

(ii) Discharging more than 10% over any applicable concentration limitation or mass load limitations for toxics; or

(iii~~C~~) Discharging wastewater having a pH of more than 1.5 ~~Greater than 2 pH units~~ above or below any applicable pH range; or

(iv) Discharging more than 1,000 bacteria per 100 milliliters (bact./100 mls) over the effluent limitation; or

(v~~D~~) Discharging wastes having more than 10% ~~Greater than ten percentage points~~ below any applicable removal rate.

(B~~b~~) Moderate:

(iA) Discharging from 10% to 30% outside ~~From 1.3 up to and including 1.6 times~~ any applicable range for ~~maximum~~ flow rate, concentration limitation, or ~~any applicable~~ mass limitation, except for toxics, pH, and bacteria; or

~~(B) From 25 up to and including 50 percent below any applicable minimum concentration limitation; or~~

(ii) Discharging from 5% to 10% over any applicable concentration limitation or mass load limitations for toxics; or

(iiiC) Discharging wastewater having a pH ~~F~~from 0.5 to 1.5 ~~one up to and including 2 pH units~~ above or below any applicable pH range; or

(iv) Discharging from 500 to 1,000 bact./100 mls over the effluent limitation; or

(vD) Discharging wastewater having ~~F~~from 5% to 10% ~~five up to and including ten percentage points~~ below any applicable removal rate.

(Ce) Minor:

(iA) Discharging ~~L~~less than 10% outside ~~1.3 times~~ any applicable range for ~~maximum~~ flow rate, concentration limitation or ~~any applicable~~ mass limitation, except for toxics, pH, and bacteria; or

~~(B) Less than 25 percent below any applicable minimum concentration limitation; or~~

(ii) Discharging less than 5% over any applicable concentration limitation or mass load limitations for toxics; or

(iiiC) Discharging wastewater having a pH of ~~L~~less than 0.5 ~~1 pH unit~~ above or below any applicable pH range; or

(iv) Discharging less than 500 bact. /100 mls over the effluent limitation; or

(vD) Discharging wastewater having less than 5% ~~Less than five percentage points~~ below any applicable removal rate.

(b) Causing violation of numeric water-quality standards:

(A) Major:

(i) Reducing or increasing any criteria by 25% or more of the standard except for toxics, pH, and turbidity;

(ii) Increasing toxics by any amount over the acute standard or by 100% or more of the chronic standard;

(iii) Reducing or increasing pH by 1.0 pH unit or more from the standard;

(iv) Increasing turbidity by 50 nephelometric turbidity units (NTU) or more of the standard;

(B) Moderate:

(i) Reducing or increasing any criteria by more than 10% but less than 25% of the standard, except for toxics, pH, and turbidity;

(ii) Increasing toxics by more than 10% but less than 100% of the chronic standard;

(iii) Reducing or increasing pH by more than 0.5 pH unit but less than 1.0 pH unit from the standard;

(iv) Increasing turbidity by more than 20 but less than 50 NTU over the standard;

(C) Minor:

(i) Reducing or increasing any criteria by 10% or less of the standard, except for toxics, pH, and turbidity;

(ii) Increasing toxics by 10% or less of the chronic standard;

(iii) Reducing or increasing pH by 0.5 pH unit or less from the standard;

(iv) Increasing a turbidity standard by 20 NTU or less over the standard;

(D) The magnitude of the violation may be increased one level if the reduction or increase:

(i) Occurred in a stream which is water-quality limited for that criterium; or

(ii) For oxygen or turbidity in a stream where salmonids are rearing or spawning; or

(iii) For bacteria in shell-fish growing waters or during period June 1 through September 30.

(3) Magnitudes for select violations pertaining to Hazardous Waste may be determined as follows:

(a) Failure to make a hazardous waste determination:

(A) Major -- Failure to make the determination on five or more waste streams;

(B) Moderate -- Failure to make the determination on three or four waste streams;

(C) Minor -- Failure to make the determination on one or two waste streams;

(D) The magnitude of the violation may be increased by one level, if more than 1,000 gallons of hazardous waste is involved in the violation;

(E) The magnitude of the violation may be decreased by one level, if less than 250 gallons of hazardous waste is involved in the violation.

~~(b) Operating a hazardous waste storage facility without a permit by failing to meet the 40 CFR 262.34 and OAR Chapter 340, Division 102 generator requirements:~~

~~(A) Major -- Failure to comply with five or more requirements listed in paragraph (D) of this subsection, or any mismanagement of hazardous waste when more than 2,000 gallons of hazardous waste are involved in the violation;~~

~~(B) Moderate -- Failure to comply with three or four requirements listed in paragraph (D) of this subsection, or any mismanagement of hazardous waste when from 500 up to and including 2,000 gallons of hazardous waste are involved in the violation;~~

~~(C) Minor -- Failure to comply with two or fewer of the requirements listed in paragraph (D) of this subsection, or any mismanagement of hazardous waste when less than 500 gallons of hazardous waste are involved in the violation;~~

~~(D) Failure to comply with:~~

~~(i) 40 CFR 262.34(a)(2) (accumulation date);~~

~~(ii) 40 CFR 262.34(a)(3) (marked as hazardous waste);~~

~~(iii) 40 CFR 265.171 (container condition);~~

~~(iv) 40 CFR 265.173 (container management);~~

~~(v) 40 CFR 265.191 (tank system integrity assessment);~~

~~(vi) 40 CFR 265.191 (tank leak response);~~

~~(vii) Exceeding the applicable storage time limits;~~

~~(viii) Non-compliance with three or more 40 CFR 262.34 standards not listed above.~~

(c) Hazardous Waste disposal violations:

(A) Major -- Disposal of more than 150 gallons of hazardous waste, or the disposal of more than three gallons of acutely hazardous waste, or the disposal of any amount of hazardous waste or acutely hazardous waste that has a substantial impact on the local environment into which it was placed;

(B) Moderate -- Disposal of 50 to 150 gallons of hazardous waste, or the disposal of one to three gallons of acutely hazardous waste;

(C) Minor -- Disposal of less than 50 gallons of hazardous waste, or the disposal of less than one gallon of acutely hazardous waste when the violation had no potential for or had no more than de minimis actual adverse impact on the environment, nor posed any threat to public health, or other environmental receptors.

(d) Hazardous waste management violations:

(A) Major -- Failure to comply with hazardous waste management requirements when more than ~~2,000~~ 1,000 gallons of hazardous waste, or more than ~~40~~ 20 gallons of acutely hazardous waste, are involved in the violation;

(B) Moderate -- Failure to comply with hazardous waste management requirements when ~~500~~ 250 to ~~2,000~~ 1,000 gallons of hazardous waste, or when ~~10~~ 5 to ~~40~~ 20 gallons of acutely hazardous waste, are involved in the violation;

(C) Minor -- Failure to comply with hazardous waste management requirements when less than ~~500~~ 250 gallons of hazardous waste, or 10 gallons of acutely hazardous waste are involved in the violation.

(4) Magnitudes for select violations pertaining to Solid Waste may be determined as follows:

(a) Operating a solid waste disposal facility without a permit:

(~~A~~a) Major -- If the volume of material disposed of exceeds 400 cubic yards;

(~~B~~b) Moderate -- If the volume of material disposed of is between 40 and 400 cubic yards;

(~~C~~e) Minor -- If the volume of materials disposed of is less than 40 cubic yards;

(Dd) The magnitude of the violation may be raised by one magnitude if the material disposed of was either in the floodplain of waters of the state or within 100 feet of waters of the state.

( ) Failing to accurately report the amount of solid waste received.

(A) Major -- If the amount of solid waste is underreported by more than 15% of the amount received;

(B) Moderate -- If the amount of solid waste is underreported by from 5% to 15% of the amount received;

(C) Minor -- If the amount of solid waste is underreported by less than 5% of the amount received;

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the Department of Environmental Quality.]

Stat. Auth.: ORS Ch. 468

Stats. Implemented: ORS

Hist.: DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94

Secretary of State

NOTICE OF PROPOSED RULEMAKING HEARING

A Statement of Need and Fiscal Impact accompanies this form.

DEQ - Enforcement Section
Agency and Division

Chapter 340
Administrative Rules Chapter Number

Susan M. Greco
Rules Coordinator

(503) 229-5213
Telephone

811 S.W. 6th Avenue, Portland, OR 97213
Address

March 24, 1998 1:30 p.m. 811 SW 6th Avenue, Portland, Conference Room 10A Jenny Root
Hearing Date Time Location Hearings Officer

Are auxiliary aids for persons with disabilities available upon advance request?
XYes No

RULEMAKING ACTION

AMEND:

OAR 340-12-030, OAR 340-12-040, OAR 340-12-041, OAR 340-12-042, OAR 340-12-045, OAR 340-12-048, OAR 340-12-050, OAR 340-12-052, OAR 340-12-055, OAR 340-12-060, OAR 340-12-065, OAR 340-12-066, OAR 340-12-067, OAR 340-12-068, OAR 340-12-069, OAR 340-12-071, OAR 340-12-072, OAR 340-12-073, and OAR 340-12-090.

Stat. Auth.: ORS Ch. 454, 459.995, 456, 465, 466, 467, 468.020, 468.035, 468.100, 468.126, 468.130, 468.140, 468.996, and Ch. 468A and 468B.

Stats. Implemented: ORS Ch. 454, 459.995, 456, 465, 466, 467, 468.020, 468.035, 468.100, 468.126, 468.130, 468.140, 468.996, and Ch. 468A and 468B.

RULE SUMMARY

OAR 340-12-030 is proposed to be amended to clarify the definition of "Formal Enforcement Action," and to define "Penalty Demand Notice."

OAR 3240-12-040 is proposed to be amended to remove the words "Air Contaminant Discharge Permit" as a general housekeeping measure.

OAR 340-12-041 is proposed to be amended to provide an exception for issuing Notices of Noncompliance (NONs) when the violation is a continuing violation for which a prior NON was issued and the continuing violation is documented pursuant to a Department-approved

investigation plan or Order, and the person is in compliance with the Department approved plan or Order. The rule also contains general housekeeping changes.

OAR 340-12-042 is proposed to be amended to include in the $10,000 civil penalty matrix, violations of water quality statutes or rules by persons having or needing a Water Pollution Control Facility Permit, and violations of the rigid pesticide containers rules under OAR 340-109-020.

OAR 340-12-045 is proposed to be amended in the following ways:

1. Provides clarification on use of the "P" (prior significant action) and "H" (history) factors of the civil penalty formula.
2. Provides the Department the authority to assess the economic benefit portion of a civil penalty whether or not it applies the gravity and magnitude-based portion of the civil penalty.
3. Provides the Director the authority to consider whether a violation was self-reported when assessing a civil penalty.

OAR 340-12-050, 340-12-052, 340-12-055, 340-12-060, 340-12-065, 340-12-066, 340-12-067, 340-12-068, 340-12-069, 340-12-071, 340-12-072, and 340-12-073 are proposed to be amended to include additional or revised classifications of violations, and to remove classifications for program areas that are no longer enforced by the Department.

OAR 340-12-090 is proposed to be amended to include additional or revised selected magnitude determinations and to remove selected magnitudes for program areas that are no longer enforced by the Department.

March 30, 1998
Last Day for Public Comment

Authorized Signer and Date

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Proposed Amendments to Enforcement Civil Penalty Assessment Procedures

Fiscal and Economic Impact Statement

Introduction

The proposed amendments are to the Department's current enforcement rules that have been considered on two occasions by the Department's Enforcement Advisory Committee. The rules were previously amended in July 1992 and March 1994. The fiscal and economic impact statements prepared at those times and the prior 1990 fiscal and economic impact statement generally still apply. The current amendments have the following fiscal and economic impacts:

General Public, Small Business, Large Business, Local Governments & Other State Agencies

Potential Costs:

The proposed amendments will have no significant fiscal or economic cost to the general public, small businesses, large businesses, local governments or state agencies unless the entity or person is issued a Notice of Violation and Civil Penalty Assessment, as defined in the rules, for a violation of state environmental laws or rules. Significant adverse fiscal and economic impact may result from the assessment and imposition of civil penalties in accordance with the rules. Specific adverse fiscal and economic effects to violators that may result from these proposed revisions to current enforcement rules include:

1. Increasing the potential penalty amount assessable for violations made by someone having or needing a Water Pollution Control Facility Permit may result in some, generally larger, generally commercial operations being assessed larger penalties upon violation of a statute or regulation related to Water Pollution Control Facility Permits.

2. Implementing the additional flexibility given to the Director to assess a penalty in the amount of the economic benefit of noncompliance alone may result in larger civil penalty assessments for some facilities. Currently, the rules allow the Director to use "prosecutorial discretion" to abstain from assessing any penalty, and the rules allow the Director to assess the economic benefit of noncompliance as long as he also assesses a class-and-magnitude based penalty. However, the rules do not allow the

Director to assess the economic benefit of noncompliance without assessing the class-and-magnitude based portion of the penalty. In some cases, where the Director would prefer to use prosecutorial discretion in not assessing a class-and-magnitude based penalty (*e.g.*, in cases where he is assessing penalties for many violations or repeated or overlapping violations, or when there are significant issues of equity), the violator may still have gained a significant economic benefit through the violation. This proposal allows the director to assess the economic benefit without the class-and-magnitude based portion when he otherwise may have abstained from issuing any penalty on that violation. In other cases, it may reduce the penalty; see benefits below.

3. The addition or movement of some violations from one class to a higher class, and the addition or amendment of some selected magnitudes may increase the penalty for those violations over current rules. In other cases, it may reduce the penalty; see benefits below.

Potential Benefits:

1. Implementing the additional flexibility given to the Director to assess a penalty in the amount of the economic benefit of noncompliance may result in smaller civil penalty assessments for some facilities. Currently, the rules allow the Director to use "prosecutorial discretion" to abstain from assessing any penalty, and the rules allow the Director to assess the economic benefit of noncompliance as long as he also assesses a class-and-magnitude based penalty. However, the rules do not allow the Director to assess the economic benefit of noncompliance without assessing the class-and-magnitude based portion of the penalty. In some cases, when it would be more appropriate for the Director to use prosecutorial discretion in not assessing a class-and-magnitude based penalty, the violator may still have gained a significant economic benefit through the violation. This proposal would allow the Director to refrain from assessing the class-and-magnitude portion of the penalty while still maintaining a "level playing field" by assessing a penalty for the economic benefit of noncompliance.

2. Implementing the additional flexibility given to the Director to consider whether an alleged violator voluntarily disclosed the violation may result in smaller civil penalty assessments for some facilities. In addition, this reduction in penalty and enforcement consequences will encourage facilities to engage in more auditing and environmental management systems. Earlier detection and correction of violations will benefit the violator by allowing prompt response before the problem worsens and by reducing the transaction costs associated with emergency reporting, clean-up, and enforcement response. Implementation of the flexibility is also expected to encourage pollution prevention alternatives which can lower costs of raw materials, operations, and disposal costs, and therefore increase the fiscal efficiency of the person undertaking the pollution prevention.

3. The proposed changes to classifying the violations will clarify which violations will receive the most attention and highest penalty from the Department. This information will be useful to the regulated community in determining which alternative compliance options to take, and will encourage the community to take steps to avoid violation and enforcement. Although the financial benefits gained through this deterrence effect are difficult to quantify, we believe that, by allowing businesses to

consider the Department's classification scheme, the community will be better able to conduct enforcement-risk analysis to avoid penalty assessment.

The Department of Environmental Quality

Neutral Financial and Economic Effects:

1. The proposed amendments are not expected to increase net costs of operation of enforcement, nor require additional FTE. However, because there is a shift in the classification of violations, there may be a slight shift in which violations receive more attention. The Department expects to use its "prosecutorial discretion" in determining how to use its available enforcement resources in meeting new needs conceived in these amendments.

2. Although these amendments will increase the penalties assessed for some violations and reduce that assessed for others, the Department expects a slight increase in net penalties assessed as a result of these rules. This potential increase will not impact the Department, but may increase revenues to the State because most penalties collected through the Department's enforcement program are paid to the General Fund of the State Treasury.

Assumptions

The above analysis assumes that the Department will continue using its "prosecutorial discretion" in a similar and consistent manner.

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
Amendments to the Department's Rules Concerning Enforcement and Civil Penalty Assessment Procedures

Land Use Evaluation Statement

1. **Explain the purpose of the proposed rules.**

   a. Minor changes to classification of violation on which the Department bases its use of enforcement resources and which is used to calculate penalties,
   b. Implementation of enforcement in expanded program areas,
   c. Removal of rules for program areas that are not enforced by DEQ,
   d. Provide the Director the authority to consider whether a violation was self-reported in assessing a civil penalty,
   e. Provide the Director authority to use discretion in only assessing economic benefit without the class-and-magnitude based portion of the penalty,
   f. Provide greater clarity on existing rules.

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.**

The proposed rules are not considered actions or programs affecting land use because they are not specifically referenced in the statewide planning goals, nor are they reasonably expected to have significant effects on either:

a. resources, objectives or areas identified in the statewide planning goals, or
b. present or future land uses identified in acknowledged comprehensive plans.

The criteria for this determination are contained in the DEQ State Agency Coordination (SAC) Program, approved by the Environmental Quality Commission on August 10, 1990, and certified by the Land Conservation and Development Commission on December 13, 1990. The criteria appear in Section III.2, at pages 21 to 22 of the SAC Program document.

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.**

Dan A. Kollias
Division

Intergovernmental Coord.

2/13/98
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?

The applicable federal requirement is that Oregon must have and maintain adequate enforcement of the delegated programs in order to maintain delegation.

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?

No. Federal delegation of the programs gave Oregon considerable latitude in tailoring the enforcement program to meet the needs of it citizens and regulated community.

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?

Yes. The proposed amendments clarify which violations will receive the most attention and highest penalty. This information will be useful to the regulated community in determining which alternative compliance options to take, and will encourage the community to take steps to avoid violation and enforcement.

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)

Yes. The penalty-calculation formula in Division 12 requires DEQ to collect, as part of the penalty, the economic benefit of noncompliance. The proposed amendment will continue to allow DEQ to collect economic benefit.

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?

Not applicable. The proposed amendments will change rules governing the Department's enforcement program. These rules do not change any procedure, reporting or monitoring requirement.

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?

Yes. The proposed amendments give the Director flexibility to reduce the enforcement consequences of noncompliance by considering whether the violator discovered the violation in an environmental management system or audit and whether the violator self-reported the violation. Reduction in penalties and enforcement is intended to encourage facilities to do more auditing and self-reporting. The Department believes earlier identification and correction of violations through auditing and self-reporting will stimulate cost-effective environmental gains by addressing problems before they become aggravated with time. This will also allow auditing facilities to avoid some costs of enforcement, and will allow the Department to allocate its enforcement resources toward more-deserving facilities.

State of Oregon
Department of Environmental Quality **Memorandum**

Date: February 23, 1998

To: Interested and Affected Public

Subject: Rulemaking Proposal and Rulemaking Statements - Enforcement and Civil Penalty Assessment Procedures

This memorandum contains information on a proposal by the Department of Environmental Quality (Department) to adopt new rules/rule amendments regarding Oregon Administrative Rule (OAR) Chapter 340, Division 12, Rules Concerning Enforcement and Civil Penalty Assessment Procedures. Pursuant to ORS 183.335, this memorandum also provides information about the Environmental Quality Commission's intended action to adopt a rule.

This proposal would make minor changes to classification and selected magnitude determinations of violations, remove rules for program areas that are not enforced by the Department, give the Director the authority to consider whether a violation was self-reported when assessing a civil penalty and to give the Department the authority to assess the economic benefit portion of a civil penalty whether or not it applies the gravity and magnitude-based portion of the penalty. This proposal also includes some general housekeeping changes.

The Department has the statutory authority to address this issue under and is implementing ORS Ch. 454, 456, 459.995, 465, 466, 467, 468.020, 468.035, 468.100, 468.126, 468.130, 468.140, 468.996, 468A and 468B.

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.

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: March 24, 1998
Time: 1:30 p.m.
Place: Department of Environmental Quality - Headquarters
811 SW 6th Avenue, Portland, OR
Conference Room 3A

Deadline for submittal of Written Comments: March 30, 1998

Jenny Root 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 date above. Comments should be sent to: Department of Environmental Quality, Attn: Les Carlough, Enforcement Section, 2020 SW Fourth Avenue, Suite 400, Portland, OR 97201.

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 June 26, 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?

The rule is needed to:

1. Add or revise classifications of violations to enable the Department to focus on the most efficient and effective use of its enforcement resources, and to assess appropriate penalties based on seriousness of violation,
2. Implement enforcement in expanded program areas,
3. Remove rules for program areas that are not enforced by DEQ,
4. Provide the Director the authority to consider whether a violation was self-reported in assessing a civil penalty,
5. Provide the Director the authority to use discretion in only assessing economic benefit without the class-and-magnitude based portion of the penalty,
6. Provide greater clarity on existing rules.

How was the rule developed

The Department's Enforcement Advisory Committee was used in 1988 during the development of the Division 12 Enforcement Rules. An advisory committee was again used in 1993 when the Department last revised Division 12. In accordance with ORS 183.335(2)(b)(E), an advisory committee was not used in drafting the current proposed revisions as they are mostly housekeeping in nature and relate to how the Department allocates its enforcement resources. The current amendments have been proposed by various Department staff who apply these rules in their daily course of work.

The documents relied upon in the development of this rulemaking proposal include:

- ORS Chapters 183, 459, 468, 468A and 468B.
- ORS 468A.585, statute directing the Department to enter into a Memorandum of Understanding to relinquish the duties of the field burning program to the Department of Agriculture.
- OAR Chapter 340, Division 12

Copies of the above documents are available for review at the Department of Environmental

Quality, Northwest Region office at 2020 SW Fourth Avenue, Suite 400, Portland Oregon. Please contact Deborah Nesbit at (503) 229-5340 for times when the documents are available for review or to request a copy of the proposed rules.

Whom does this rule affect including the public, regulated community or other agencies, and how does it affect these groups?

The rules affect persons who violate Oregon's environmental statutes, rules, permits or Department orders and who are thereby subject to civil enforcement actions by the Department and the Environmental Quality Commission.

How will the rule be implemented

The Department implements the Division 12 Enforcement rules through a document called the "*Enforcement Guidance for Field Staff.*" This document explains to the regional staff how violations are classified and what necessary actions must be taken for that class of violation. Following adoption of these rules, the *Enforcement Guidance* must be redrafted to incorporate the rule changes. The redraft will include involvement from the regional staff.

Contact for more information

If you would like a copy of the proposed rules, additional information on this rulemaking proposal, or would like to be added to the mailing list, please contact: Deborah Nesbit, (503) 229-5340.

State of Oregon

Department of Environmental Quality Memorandum

Date: April 7, 1998

To: Environmental Quality Commission

From: Jenny Root JR

Subject: Presiding Officer's Report for Rulemaking Hearing

Hearing Date and Time:	March 24, 1998, beginning at 1:30 p.m.
Hearing Location:	811 SW 6th Avenue, Room 3A, Portland, Oregon
Title of Proposal:	Amendments to Enforcement and Civil Penalty Assessment Procedures, Oregon Administrative Rules, Chapter 340, Division 12

The rulemaking hearing on the above titled proposal was convened at 1:30 p.m. on March 24, 1998. The Notice of Proposed Rulemaking Hearing was sent by mail on February 25, 1998 to the Department's general rulemaking list and each division's rulemaking list, and was advertised in the Secretary of State's Bulletin on March 1, 1998. No member of the public attended. At 2:00 p.m., I closed the hearing and posted a sign beside the door notifying the public where written testimony could be sent, and that the deadline for submittal was March 30, 1998.

List of Written Comments Received

1. John P. Buckinger
   Miller Paint Co.
   Portland, Oregon

2. Phillip M. Stenbeck
   Planner
   Douglas County Planning Department
   Roseburg, Oregon

3. W.L. Briggs
   President
   Fuel Processors Inc.
   Portland, Oregon

4. John Ledger
   Legislative Representative
   Donald A. Haagensen
   Chairman
   Environmental Audit and Enforcement Task Force
   Associated Oregon Industries
   Salem, Oregon

5. P.B. "Lynn" Walker
   Senior Environmental Counsel
   Waste Management, Inc.
   Lakewood, Colorado

6. Janet Gillaspie
   Executive Director
   Oregon Association or Clean Water Agencies
   Portland, Oregon

Department's Evaluation of Public Comment

COMMENT: Commenter no. 1 recommended that DEQ add the following rules to Division 12:

i) It is DEQ's responsibility to identify those who might become liable for penalties and to provide them all of DEQ's regulations that may be pertinent to their activities;

ii) It is the responsibility of DEQ, when asked, to provide clear explanations of DEQ regulation that requesting individual or company may not thoroughly understand; and

iii) No penalty may be assessed by DEQ if these responsibilities have not been fulfilled.

RESPONSE: DEQ does not agree with these recommendations and offers the following responses:

i) DEQ does not have sufficient resources to inventory the regulations specifically-applicable to each person and every company that conducts business in Oregon, nor can DEQ predict in what directions companies will expand and become subject to additional requirement.

ii) DEQ does provide technical assistance upon request through its Small Business Assistance Program, through its Waste Reduction Assistance Programs, through targeted public outreach efforts, and in response to citizen phone calls. DEQ also conducts educational workshops and develops and distributes pamphlets and brochures to provide information on the regulations.

iii) While DEQ works to educate those who seek assistance and balances its inspection and enforcement programs with non-enforcement assistance programs and initiatives, DEQ cannot be responsible for assuring regulatory compliance of each person or company. DEQ relies on each citizen to take the initiative to identify and comply with applicable laws. Toward that end we believe a fair and consistent enforcement program is necessary to stimulate that initiative, to ensure compliance and to ensure that those who spend the resources to comply with the laws are not economically disadvantaged by those who do not.

COMMENT: Commenter no. 1 recommended that DEQ add rules to Division 12 which prohibit DEQ from assessing civil penalties for spills or discharges that are caused by the employee of a company that provides annual training for spill prevention, hazardous waste management, and for spills caused by an outside agent, or act of god.

RESPONSE: DEQ does not agree with this recommendation. DEQ generally is prohibited from assessing penalties for violations resulting from acts of war, sabotage or nature. However, the comment seems to suggest changing, for DEQ, established principles of employee and agency law. Companies are strictly liable for preventing spills and discharges caused by their employees, and should take whatever actions reasonably necessary to prevent such spills. Required training is one step that a company should take to prevent spills. Other reasonable steps would include appropriate company policies and incentives, proper maintenance of equipment, and careful operation.

COMMENT: Commenter no. 3 recommended that the rules provide that contested case hearings and disputes to be heard by an impartial board, rather than DEQ.

RESPONSE: DEQ's contested case hearings are already heard by an impartial third party. In addition, DEQ tries to avoid the need for an adversarial proceeding. When a party appeals a civil penalty assessment or department order, DEQ always offers to meet with the party to informally discuss the facts surrounding the violation(s), the regulations involved, and the civil penalty determination and procedures. If an agreement cannot be reached on the facts and law, a contested case hearing is held. An Administrative Law Judge, who is not an employee of DEQ, presides over the hearing and acts as the trier of fact and decision maker. Adverse decisions made by the hearings officer are reviewed by the Environmental Quality Commission, and adverse decisions of that body are appealable to the Court of Appeals.

COMMENT: Commenter no. 4 recommended that DEQ add a rule prohibiting DEQ from issuing a Notice of Noncompliance or formal enforcement action for Class III violations that are corrected during a Department inspection, or when the violation is voluntarily disclosed and corrected within thirty days.

RESPONSE: DEQ does not agree with this recommendation. DEQ's practice is to give repeated warnings for Class III violations before assessing any penalty. Furthermore, if a penalty is assessed for a Class III violation, DEQ's rules direct that Class III violations shall receive only the smallest penalty, reflecting that these violations are the least significant. Nonetheless, DEQ must maintain its ability to assess penalties for repeated or continuous Class III violations. The commenter's suggestion would make Class III violations unenforceable unless they were committed with criminal intention.

COMMENT: Commenter no. 4 recommended that DEQ not include the economic benefit component of a civil penalty assessment for Class II and Class III violations which are not systematic.

RESPONSE: DEQ does not agree with this recommendation. The penalty formula in the rules combines a portion based on the significance of the violation to the regulatory program or to the environment (Class) and a part based on the gain the violator realized through the violation (economic benefit). Because the economic benefit portion is designed to ensure that the value of the penalty exceeds the value of noncompliance, there is no rational reason to refrain from assessing economic benefit for any violation. Class II and III penalties are smaller than those for Class I. Therefore, for these violations, there is an increased likelihood that a person could save money through violation, pay the penalty, and still gain a net economic advantage. For these smaller violations, the Department believes that economic benefit is more important to ensure there is no incentive for noncompliance.

COMMENT: Commenter no. 4 recommended that DEQ amend OAR 340-012-0045(1)(c)(F)(iii), to include a statement that DEQ will use the US EPA BEN computer model to determine the economic benefit component of a civil penalty upon request of the Respondent.

RESPONSE: DEQ agrees with this recommendation because we believe the US EPA BEN model is the best tool, which is reasonably-available, to calculate economic benefit of noncompliance.

COMMENT: Commenter nos. 4 and 5 recommended that the actual penalty reductions available for self-disclosed violations (OAR 340-012-0045) be included in the enforcement rules to provide

certainty in the law and to provide maximum encouragement for regulated entities to self-report violations. The commenters additionally recommended that DEQ adopt the same penalty reduction percentages as those in EPA's self-disclosure policy.

RESPONSE: The purpose of this rule and implementing guidance is to authorize the Director to consider additional factors in assessing smaller penalties where the violator self-discovers, reports, and corrects the violation. The smaller penalty assessed would provide an incentive for self-reporting and correcting, while encouraging informal settlement and allowing DEQ to use its resources on other cases. The rule allows the Director to consider certain criteria in assessing a penalty. We attached a copy of the proposed internal guidance to the rule package to demonstrate the manner in which we anticipate the Director will use his flexibility in carrying out the authority of the rule. In relevant part, DEQ's proposed reduction and EPA's self-disclosure policy differ as follows:

Penalty Reduction Circumstance	EPA Policy Reduction	DEQ Proposed Reduction
Self-reported and corrected violation	75%	50%
Envtl. Mngmt. System, reported and corrected	100%	80%
Reported and corrected plus pollution prevention	no extra reduction	up to 100%

We believe the percentage reductions proposed under DEQ's proposal support enforcement's goal of deterrence while encouraging self reporting and pollution prevention. DEQ's long-standing practice and policy is to use its limited enforcement resources on the most significant violations. As a result, it issues warning letters for all documented violations, but only assesses penalties on the 21% most-significant violations (average for last 3 years). The self-disclosure proposal at issue does not change that Department practice – we anticipate assessing a nominal penalty on significant violations, even if subsequently reported by the violator, to act as the deterrent for causing significant violations in the first place. The reason for the lower percentage reductions under DEQ's proposal is to gain that deterrence. However, if a violator self-identifies, self-reports, and self-corrects a violation, DEQ has less interest in spending its resources on the contested-case process and would prefer to assess a smaller penalty to encourage settlement. We also believe that violations identified through an Environmental Management System should receive further reduction as an incentive. In addition, we are willing to "trade" the deterrent effect of the reduced penalty for pollution reduction that benefits the environment.

DEQ disagrees with the commenters' recommendation to place the percentage reductions in the rule for two reasons. First, because DEQ has no experience with the application of the self-disclosure reductions, we wish to maintain the flexibility to make changes in its terms should change be needed to meet the goals discussed above. Second, DEQ will carry out the implementation of the rule according to the stated internal guidance. However, We are concerned that placing the details of the guidance into the rule could create unwarranted defenses for the Respondent and unnecessary burdens on Department staff during the appeal process.

DEQ believes that its proposed self-disclosure rule and implementing guidance allows DEQ to appropriately balance its resources to reach our enforcement goals of environmental improvement, deterrence of violations, and fairness. Furthermore, we believe that our proposal is consistent with federal incentives to conduct environmental audits, although we reach those incentives through alternative means.

COMMENT: Commenter nos. 4 and 5 expressed concern that hazardous waste treatment, storage and disposal (TSD) facilities are receiving disparate treatment from hazardous waste large-quantity generators in the "Hazardous Waste Management and Disposal Classifications" (OAR 340-012-0068), whereby violations of failure to retain hazardous waste manifests for three years, or land disposal restriction notifications, demonstrations or certifications where 5% or less of the information is missing, are Class III violations for generators. These violations are Class I or II violations for TSDs, resulting in higher penalty. Commenters suggest that the federal government makes generators the focus of liability for cleanup of hazardous substances under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and therefore that generators should not be treated differently regarding penalties assessed for violations under the Resource Conservation and Recovery Act (RCRA).

RESPONSE: DEQ disagrees with this recommendation. DEQ agrees that generators should be the focus of liability for cleanup of hazardous substances under cleanup laws, and should be responsible for penalty for recording-keeping under the state's hazardous waste laws. However, DEQ believes that TSDs should be held to a higher standard for their own hazardous-waste record-keeping violations because TSD facilities hold themselves out to the public as professional experts in the hazardous waste management and documentation systems and are paid to properly manage, and store or dispose of hazardous wastes.

COMMENT: Commenter no. 4 recommended that "Failure to comply with hazardous waste generator annual reporting requirements, Treatment, Storage, Disposal and Recycling facility annual reporting requirements and annual registration information where the noncompliance is unintentional inaccuracies or omissions in four or fewer particulars in the report or registration," should be added to the list of Class III violations.

RESPONSE: DEQ does not agree with this recommendation for several reasons. First, without the change, these violations are Class II violations. For Class II violations, DEQ's practice is to request information on the missing particulars before initiating any formal order or penalty process. Second, the proposed rule is too broad; while some inaccuracies may be insignificant, others may be significant. Third, the proposal would require DEQ to make a showing of the mental state of the violator (something otherwise only applicable to environmental crimes) and therefore would add an unnecessary additional burden on the state.

COMMENT: Commenter no. 6 recommended that the Division 12 rules require DEQ to provide public notice before issuing a formal enforcement action for water quality violations, an opportunity for public comment, a public hearing, and public's right to appeal the action.

RESPONSE: At this time DEQ makes no determination on this recommendation because it is beyond the scope of this rulemaking. DEQ believes that such a rule change – if such rules were determined to be appropriately placed in Division 12 – should be fully-subject to public notice and comment. No such proposed rule change was part of the package placed before the public.

COMMENT: Commenter no. 3 suggested that the proposed Class I violation for "Burning off-specification used oil in a device not meeting the definition of an industrial boiler or furnace" was not a violation as stated.

RESPONSE: DEQ agrees that this classification could be better worded, and proposes the following alternative language: "Burning off-specification used oil in a device not specifically exempted under 40 CFR 279.60(a) that does not meet the definition of an industrial boiler or furnace" as a Class I violation.

COMMENT: Commenter nos. 2, 3, and 4 expressed general approval and support of DEQ's Division 12 amendments.

RESPONSE: DEQ appreciates the support and thanks all who took time to review the proposal and provide comments.

Detailed Changes to Original Rulemaking Proposal Made in Response to Public Comment

340-12-045(1)(c)(F)(iii)

Recommended: In determining the economic benefit component of a civil penalty, the Department may use the U.S. Environmental Protection Agency's BEN computer model, as adjusted annually to reflect changes in marginal tax rates, inflation rate and discount rate. With respect to significant or substantial change in the model, the Department shall use the version of the model that the Department finds will most accurately calculate the economic benefit gained by Respondent's noncompliance. Upon request of the Respondent, the Department will provide Respondent the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model. The model's standard values for income tax rates, inflation rate and discount rate shall be presumed to apply to all Respondents unless a specific Respondent can demonstrate that the standard value does not reflect that Respondent's actual circumstance. Upon request of the Respondent, the Department will use the model in determining the economic benefit component of a civil penalty;

Hearing Proposal: none.

Reason: DEQ considers the US EPA BEN model to be the best tool, which is reasonably-available, to calculate economic benefit of noncompliance. A respondent should be entitled to its use upon request.

340-12-072(1)

Recommended: Burning off-specification used oil in a device not specifically exempted under 40 CFR 279.60(a) that does not meet the definition of an industrial boiler or furnace

Hearing Proposal: Burning off-specification used oil in a device not meeting the definition of an industrial boiler or furnace

Reason: The classification, as proposed, could be read to include some actions that are not prohibited. The change clarifies the circumstances when this classification would apply.

Additional Detailed Changes made to Original Rulemaking Proposal

1. DEQ Enforcement Section recommended adding "judgment of a court" to the definition of "prior significant action" at OAR 340-12-030. This change would add to the definition violations established by court judgment in criminal proceedings when there is no final agency order.

2. DEQ Tank Managers suggested changing the "failure to report a suspected release" from a Class II violation to a Class I violation of the Underground Storage Tank rules at OAR 340-12-067 because it is a Class I violation in the oil and hazardous material spill program, which applies to most spills in the other program areas. This change would make this violation of underground storage tank rules comparable to other programs.

3. DEQ Hazardous Waste Program recommended adding the following as Class II violations in the Hazardous Waste Classification of violations at OAR 340-12-068(2):
   i) Failure of a dry cleaner subject to ORS 465, to comply with the waste minimization requirements in ORS 465.505(1)(a-g).
   ii) Failure of a dry cleaner subject to ORS 465, to comply with the waste minimization reporting requirements in ORS 465.505(3).
   iii) Failure of a dry cleaner subject to ORS 465, to immediately report any release of dry cleaning solvent in excess of 1 pound.

   These changes would not alter the status of these violations as Class II. However, their addition would clarify any ambiguity that might otherwise exist about which program to which these violations belong.

4. DEQ's Hazardous Waste Managers suggested that one proposed Class III violation created ambiguity and recommended changing the wording of it to "failure to keep a container of hazardous waste located in a 'satellite accumulation area' closed except when necessary to add or remove waste, when only one container is open."

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Enforcement Procedures and Civil Penalty Rules

Rule Implementation Plan

Summary of the Proposed Rule

The proposed rules:

- Give the Director the authority to assess smaller penalties if the violation is self-reported.
- Provide the Department the authority to assess the economic benefit portion of a civil penalty whether or not it applies the gravity and magnitude-based portion of the civil penalty.
- Include in the $10,000 civil penalty matrix, violations of water quality statutes or rules by persons having or needing a Water Pollution Control Facility Permit.
- Make minor changes to classification of violations, remove rules for program areas that are not enforced by the Department, and are generally housekeeping in nature.

Proposed Effective Date of the Rule

Upon filing with the Secretary of State.

Proposal for Notification of Affected Persons

Notice of the rulemaking proposal was mailed to persons on the agency's rulemaking mailing lists on February 25, 1998. No further notification is contemplated as the rules affect future violators and the Department is unable to predict who those individuals will be.

Proposed Implementing Actions

The Department implements the Division 12 Enforcement rules through a document called the "*Enforcement Guidance for Field Staff.*" This document explains to the regional staff how violations are classified and what necessary actions must be taken for that class of violation. Following adoption of the Division 12 rules, the *Enforcement Guidance* must be redrafted to incorporate the rule changes. The redraft will include involvement from the regional staff.

Proposed Training/Assistance Actions

Once the *Enforcement Guidance* revision is complete, Enforcement staff will visit regional field offices to conduct training on the changes.

Department of Environmental Quality
Memorandum

DATE: August 7, 1998

TO: Environmental Quality Commission

FROM: Langdon Marsh

RE: Director's Report

Contaminated Sediment Issues

The Department is in the process of developing a comprehensive statewide plan for managing contaminated sediments. The plan will incorporate a tiered approach where the least contaminated sediments will be eligible for in water disposal or confined in water disposal, the next level, upland disposal and seriously contaminated sediments to an appropriate hazardous waste landfill.

Recent news articles regarding disposal of dredged spoils at the Ross Island site in the Portland area points out how this issue has been evolving over time. The Governor will convene a series of meetings among federal and state agencies to focus on contaminated sediment management issues. DEQ has been working with EPA to develop guidance and expects to receive a draft to review shortly.

Clean Air Action Days

DEQ has declared four clean air action days (CAADs) so far this summer in the Portland metropolitan area. On these days people are asked to make air quality protective choices about their transportation to work, lawn mowing, delaying painting and other projects that might contribute to air problems. So far this year we have exceeded the new 8-hour ozone standard level of 0.08 ppm at two sites in the Portland metropolitan area and once in Salem. The new standard is the 3 year average of the 4th highest ozone value at a site, which is not to exceed .08 ppm. It isn't possible to determine whether or not the standard has been violated without three years of data.

During the recent Clean Air Action days C-Tran's ridership was up 13%. They provide free bus transportation to and from Vancouver on CAADs.

Over 400 businesses voluntarily promote air quality pollution prevention activities at their work sites on these days.

Gasoline Terminals Public Hearing Comments

The first hearings were held on draft Title V air quality permits for five gasoline terminals located in northwest Portland and for the ESCO facility. The Title V permits will replace existing air contaminant discharge permits. The Title V permits by themselves do not create new requirements, but are shells that incorporate all of the state and federal air quality requirements from our rules and laws. DEQ will be responding to comments over the next two months and then preparing the permits to go to EPA for final review and approval.

Comments included concerns about benzene concentrations and whether the oil terminals or ESCO were impacting a high poverty level and/or high minority concentration neighborhood. DEQ is in the process of responding to these comments as well as written comments where submitted during the comment period.

Portland Area Pollution Prevention Outreach (P2O) Team

The Portland Pollution Prevention Outreach Team is a group comprised of representatives from six local governments and DEQ that was established in 1993 to promote pollution prevention in the Portland metropolitan area through coordinated efforts. The P2O Team has demonstrated how government agencies can work together to convey unified educational message in an efficient manner. The P2O team has developed and implemented

three major outreach efforts that have reached hundreds of small businesses and thousands of households in the region since 1995.

The Team's pilot project is a pilot recognition program for local automotive service businesses. Called the Eco-Logoical Business Program," it is designed to encourage these small firms to strive for exemplary environmental performance. Automotive facilities implementing a series of best management practices (BMPs) will be eligible to receive a window sticker and certificate to highlight their accomplishments. An advisory committee with representatives from two automotive businesses, a local trade association, AAA, and OSPIRG, has been working with agency staff to develop a program that will be widely accepted by both businesses and consumers. All seven P2O member agencies have committed to provide technical assistance and conduct the verification visits necessary to ensure the auto facilities are in conformance with the BMPs.

River Road Santa Clara Sewer Project Remains Unresolved

The Oregon Supreme Court has refused to review a decision of the Oregon court of Appeals, which ruled six to three that the City of Eugene had exceeded its authority in compelling connection to the sewer system. The City required individual property owners outside city limits to obtain the sewer connections after the EQC made the determination that connecting to sewers was necessary for public health and the environment.

Previously separate studies of the groundwater in the River Road-Santa Clara area had documented nitrate and fecal bacteria contamination and identified septic systems as the main source of that contamination. The EPA standard for fecal coliform bacteria was exceeded in virtually every well sampled in the area.

In response to the study, the EQC directed DEQ to obtain agreements from local governments to develop a master sewerage plan and provide the service. A $6 million grant form EPA in 1984 was predicated upon the schedule of connection that included 100% connection by the year 2000.

The Court of Appeals ruling was limited to the matter of connection authority. The City's authority to build the sewer, collect assessment fees, or charge monthly sewer user fees is not affected. Out of 8,000 hookups , 230 remain to be completed. The City continues to explore options to ensure 100% connection to the system.

EPA Provides Funding for Monitoring at Ten Mile Lakes

Last October, a natural toxin was first detected at Ten Mile Lakes. Health official spotted the lakes as off limits for drinking, swimming, or other contact. The water was contaminated by a toxic blue-green algae known as microsystis, which is toxic at high concentration levels. The warning was lifted in December. The City of Lakeside recently raised concerns about the possibility of return of the algae this year and asked DEQ to help with monitoring to determine the extent of the problems. Western Regional staff have been working with the local watershed council on the issue. The lakes are not only a tourist attraction, but are also a source of drinking water.

DEQ applied for and received a $11,000 grant from EPA to carry out that monitoring through October 1, 1998. If the monitoring shows a problem, DEQ will apply for funding to carry out more extensive work to determine sources of nutrient loads causing the algae bloom.

Water Quality Program Dilution Rule

The Water Quality program will review the Agency's dilution rule during the next periodic rule review which is required under ORS 183.545. This review will occur, covering all DEQ rules, in the fall of 1999.

Wellhead Protection

DEQ certified the cities of Coburg and Junction City for their plans to protect the cities' drinking water supplies. Both cities worked with advisory committees to develop their plans. They used volunteers to develop pamphlets for farmers and rural residents, flyers for the local newspaper, household hazardous waste collection events, stormwater catch basin stenciling programs and display posters about groundwater protection. The cities were among the first to receive Wellhead Protection Certification from DEQ.

Recognition of Warm Springs Tribe as a State for CWA Purposes

The natural resource agencies are reviewing the proposed action by EPA of recognizing the Warm Springs Tribe as a state for purposes of developing water quality standards and issuing permits related to facilities on the tribes' reservation land. DEQ and other agencies have only raised one question regarding the application and that relates to where the boundaries of the tribal lands are that include the Deschutes and Metolious rivers. The agencies are

proposing to EPA that a separate agreement be completed with the Tribes to maintain the existing Water Resources Department agreement and approach with the Tribes to not try to define the exact boundary, but rather to reach agreements managing these waters.

Outstanding Work by DEQ Staff

The Department is using a prototype suction hose for VIP program designed by Tim Brown which reduces the stooping and bending by inspectors in the program. It is a very good design which is simple and sturdy. Tim designed and developed the prototype at home on his own time.

Mike Anderson and Laurie McCulloch received compliments and thanks from Christopher C. Wohlers, of Wohlers Environmental Services, for their efforts in working with the Technical Workgroup charged to assist in completing revisions and additions to the underground storage tank regulations. Both staff kept the group informed of critical issues and provided technical expertise. Special credit for Mike's skill as a facilitator was remarked.

Ken Lucas, Eastern Region, suggested DEQ purchase one Blue Book per floor for the agency, rather than randomly as requested by individual staff. This suggestion will save the DEQ about $1,000 a year. The suggestion was noted by the Department of Administrative Services as a possibility for all state agencies to have savings.

Chronology of Events
Re: WQ 401 disposal on Ross Island

1990 - Port applies to Corps for Section 10 permit for Terminals 1,2,4,& 5. Corps issues Section 10 for disposal near Sauvie Island on Morgan Bar after not hearing from DEQ (according to Corps). Corps assumes DEQ waived 401. Permit allows disposal on Morgan Bar of up to 30,000 cubic yards of spoils per year until 2001. Only non-contaminated soils can be disposed of under Section 10 otherwise Corps 404 permit is needed.

1992 - New and separate 401 authorized, with conditions, to do maintenance dredging to restore the Swan Island Ship Repair yard (dry dock number 4) to design depth of -65 feet and dispose of soils on Ross Island with

1994 - On October 14, 1994 another separate 401 issued for deposition of 20,000 cubic yards of material from dry dock number 3 to deepen to design depth of -57 feet. Disposal to Ross Island with 1 foot cap.

1993/94 - Port and EPA accept consent decree concerning clean-up of "pencil-pitch" from Terminal 4. DEQ not involved in lawsuit. EPA determined with Corps that 404 was not necessary -that Nationwide hazardous waste permit could be used. Monitoring required by consent decree. DEQ approached by Port asking for guidance on monitoring. DEQ copied on monitoring reports to EPA.

1995 - DEQ issues 401 in response to Corps 404 to allow continued disposal of non-contaminated sediment to Morgan's Bar. Renewal of disposal part of 1990 Section 10 permit.

1996 - Port requests 401 for disposal of dredging spoils from Terminal 6 (Columbia River) to Ross Island. 401 granted on October 15, 1996. Port subsequently determined that dredging spoils did not require containment and could be disposed of in some place other than Ross Island.

1997 - Port requests to dispose of dredging material from Terminal 4 to Ross Island. Spoils come from deepening project and not from "pencil pitch"area. In response to a phone request from the Port DEQ sends letter, signed by Mike Llewelyn on October 20, 1997, with DEQ concerns and suggestions (letter incorporates concerns from WMCD). Letter not legally binding on Port though Corps incorporates part of DEQ letter into a permit they later issued to Port.

On December 11, 1997, DEQ receives letter from Corps stating that Port is proposing to modify its Section 10 permit to dispose of spoils in Ross Island. Letter goes to several agencies (not specifically addressed to DEQ) and simply asks for comments - it is NOT a 401 request. DEQ asks Corps whether a 404 is required. Answer is no. 401 NOT issued by DEQ on latest disposal project. Corps does not implement DEQ suggestions concerning monitoring.

Approved_____
Approved with Corrections____

Minutes are not final until approved by the EQC

Environmental Quality Commission
Minutes of the Two Hundred and Seventieth Meeting

August 6-7, 1998
Regular Meeting

The Environmental Quality Commission convened it's regular meeting at 1:05 p.m. on Thursday, August 6, 1998, at the Department of Environmental Quality Headquarters, 811 SW Sixth, Portland, Oregon. The following members were present:

Melinda Eden, Member
Linda McMahan, Member
Mark Reeve, Member

Also present were Larry Edelman, Shelley McIntyre and Larry Knudsen, Assistant Attorney Generals, 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.

Commissioner McMahan called the meeting to order. The following items were addressed:

A. Update on Spring Creek Hatchery Release

Gene Foster, DEQ-WQ, presented information to the Commission on the results of the U.S. Fish & Wildlife (USFWS) Spring Creek Fish Hatchery release. The USFWS released 7,727,000 juvenile fall Chinook from the Spring Creek Fish Hatchery on March 13, 1998. The release began at 8:00am and ended at 12:30pm. Spill began at 8:00pm on March 13 and ended on March 23. Spill was limited to the volume that produced 110% TDG. Effects of the spill were monitored by collecting fish on March 14, 16, and 17 downstream of Bonneville Dam. Chinook salmon, large scale suckers and mountain whitefish were collected and examined for gas bubble disease. There were no signs of gas bubble disease in the fish collected. The actual average flow during the release was 188,300 cfs. The estimated survival rate at 80,000cfs spill (120% TDG) would have been 93.28% and at 70,000 cfs (110% TDG) would have been 92.96%. This would have resulted in a loss of about 24,727 juvenile fish that would equate to 272 adults.

B. Update on the City of Portland Combined Sewer Overflow (CSO) Project

Dean Marriott, Director of the City of Portland's Bureau of Environmental Services (BES), presented this item. He explained the full scope of BES activities, including the operation of two sewage treatment plants, the Mid-County Sewer Project and various watershed enhancement projects. Using charts and slides, he made a presentation on the background and current status of the CSO program. He described the progress made in implementing the "Cornerstone Projects" which are intended to remove stormwater from the sewer system and which have already reduced the volume of overflows from about 6 billion gallons per year in 1991 to about 3.4 billion gallons at present. The initiation of construction of the

Columbia Slough Consolidation Conduit and related facilities will capture and treat overflows to Columbia Slough by the Year 2000, and the "Willamette Pre-Design" process will define in detail the capture and treatment facilities for overflows to the Willamette River. To date, the City has spent $123 million on the CSO program. The BES has begun to work on an "Integrated Watershed Approach" and would be reexamining the CSO program from this perspective. The City hoped to visit with the Commission again in 1999 to discuss the matter further. Following the presentation, Commission members, Mr. Marriott and Director Marsh briefly discussed the CSO program and expenditures for it in relation to other water quality objectives

C. Update on the Umatilla Chemical Depot

Mr. Wayne Thomas, DEQ Umatilla Program Manager, updated the Commission on the status of the hazardous waste incineration facility being constructed at the Umatilla Chemical Depot near Hermiston. The facility is approximately 25% complete, and there have been numerous permit modification requests from the U.S. Army. The Commission requested that the Department arrange for a briefing from the Attorney General's office on the status of the lawsuit against the Commission and the Department related to the decision to issue the required permits.

D. Update on the 401 Certification Program for Livestock Grazing

Michael Llewelyn, Water Quality Administrator; Russell Harding, Manager, Watershed/Basin Section, Water Quality Division, and Debra Sturdevant, Natural Resource Specialist, briefly reported on the implementation of the Clean Water Act Section 401 grazing program since DEQ and ODA adopted rules in February. Staff also informed the Commission that in late July, the Ninth Circuit Court of Appeals reversed the decision of the District Court and ruled that 401 certifications are not required for grazing or other nonpoint sources of pollution.

The EQC was not asked to take action at this time. Staff will wait to find out whether there will be further legal action on the case before moving to repeal the pertinent Oregon administrative rules. DEQ will not take formal action to cancel the 401s that were issued prior to the Circuit Court Decision, but will not enforce the certifications as long as the current ruling is in effect.

After hearing this item, the Commission recessed for the evening. The meeting was resumed at 8:35 a.m. on August 7 with the following commissioners present:

Carol Whipple, Chair
Melinda Eden, Member
Linda McMahan, Member
Mark Reeve, Member
Tony Van Vliet, Member

E. Approval of Minutes

Commissioner Reeve made the following correction to the June 11-12, 1998 minutes: on page 5, paragraph 5, line 5, the line should read "affirmed the hearings officer's finding of facts but *amended* the conclusions of law. The motion was." Commissioner Eden then made the following correction: on page 10, first full paragraph, line 4, the words after "Dilution Rule" should be removed. Commissioner Eden moved the minutes be approved as amended. The motion was seconded by Commissioner Reeve and carried with five "yes" votes.

G. Revision to the PM10 Attainment Plan for the Medford-Ashland Air Quality Maintenance Area

Greg Green, Air Quality Administrator, and David Collier, Nonattainment Area Specialist, Air Quality Division, presented this item. Mr. Collier summarized the local advisory committee process used to develop the plan, key plan elements, and changes in EPA guidance on modeling and plan development. The proposed plan was a combination of existing strategies and additional new proactive strategies aimed at preventing air quality problems for both PM10 and the new fine particulate standard (PM2.5). The plan had been recommended by a majority of the local advisory committee and goes beyond the minimum effort required by EPA. Mr. Collier summarized public testimony; how the plan satisfied many of the comments made in testimony; and how the on-going advisory committee process in Medford will address other concerns raised by the public. Commissioner Van Vliet moved to accept the revisions as indicated in Attachment A. Commissioner Reeve seconded the motion and it carried with five "yes" votes.

Several Commissioners commented that the Medford-Ashland advisory committee, and the people of the Medford-Ashland area should be commended for their willingness to be proactive and go beyond the minimum effort required. Commissioner Whipple stated there was something positive to learn from this effort and it should be held up as a model for future work. The Commission was interested in finding some way to give proper credit to the people of the Medford-Ashland area. The Commission also asked that a work session be done at a future meeting to look at additional ozone issues.

H. Revision to the Prevention of Significant Deterioration (PSD) Requirements Under the New Source Review (NSR) Program for New and Expanding Major Industry in the Medford-Ashland Air Quality Maintenance Area (AQMA)

Greg Green and David Collier presented this item. The proposal is a companion piece to the Medford-Ashland PM10 Plan. The local advisory committee recommended the proposal to ensure no backsliding of requirements on new or expanding major industry in the Medford-Ashland area. The proposal will retain the current stringent nonattainment area control and analysis requirements for new or expanding major industry in place of less stringent requirements that would become effective once the nonattainment designation for the Medford-Ashland area is revoked. EPA commented that major sources with emissions greater than established federal PSD thresholds could not be exempt from the PSD requirement to evaluate air quality impacts on Class I wilderness areas. This particular analysis is not part of the suite of nonattainment area control and analysis requirements. The proposal has been modified to accommodate EPA's comment. The new proposal would subject sources to both nonattainment area requirements and the impact analysis on Class I wilderness areas. Commissioner Reeve asked that Table 3, OAR 340-028-110 and the text of the rule be consistent when referring to particulate matter or PM10. It was agreed to strike the words "particulate matter or" from the table. Commissioner Reeve moved to approve the requirements with the change noted. Commissioner Eden seconded the motion and it was carried with five "yes" votes.

I. Medford Area Carbon Monoxide (CO) Maintenance Plan and Designations of Nonattainment and Maintenance Areas

Greg Green and Kevin Downing, Airshed Planner, Air Quality Division, presented this item. The Medford area had violated the federal carbon monoxide air quality standards on numerous occasions in the 1970s and 1980s. A combination of strategies implemented at the federal, state and local levels has succeeded in reducing ambient exposures to safe levels. To remove the nonattainment classification triggered by these historic exceedances an area, under federal Clean Air Act requirements, must also present a plan that will ensure continued maintenance of the standard for at least ten years. The Commission was asked to adopt the maintenance plan and supporting emission inventories that would provide the basis for a request to the Environmental Protection Agency to reclassify the Medford area in compliance with the carbon monoxide standard.

Commissioner Eden asked if there was clarification on why local residents were so concerned about the use of methyl tertiary butyl ether (MTBE) in oxygenated fuels considering the presence of other toxic chemicals in gasoline. Mr. Downing replied that MTBE replaces benzene reducing the carcinogenic risks otherwise associated with gasoline. Greg Green stated much of the concern focused on potential water quality impacts and the Department, through the underground storage tank program, was monitoring for MTBE at tank cleanup sites. It was asked whether older vehicles could be exempted from the oxygenated fuel requirements, and Mr. Downing replied it would be logistically difficult. When asked for clarification on several oxygenated fuel program requirements and questioned whether the Department would be able to track gasoline constituents outside of the oxygenated fuel season, Mr. Green stated the Department currently tracked air toxics through the hazardous air pollutant program.

Commissioner Eden moved that the maintenance plan, emission inventories and supporting rule amendments be adopted as presented in the staff report. Commissioner Van Vliet seconded the motion and it was carried with five "yes" votes.

J. New Source Review Amendment for Carbon Monoxide (CO) Maintenance Areas

Greg Green and Kevin Downing presented this item. Under current rules, new or expanding major industrial sources in air quality maintenance areas are subject to Best Available Control Technology (BACT) for air emissions, and any remaining emissions must either be accommodated within a growth allowance or offset by reductions elsewhere. The Medford carbon monoxide maintenance plan was developed without a growth allowance and there were no offsets available in the area, the Medford air quality advisory committee recommended creating another option. The proposed rule amendment would allow major industrial sources of carbon monoxide in maintenance areas to model the proposed increase to show there would be no significant impact.

Commissioner Van Vliet asked whether the standards for evaluating what is best available control technology reflected prototype systems. Mr. Downing replied BACT determinations were based on inventories of established control technologies that took into account various environmental impacts and economic costs. Mr. Green added that if.the systems failed to provide the emission reduction predicted then the Department could require additional controls to be installed. When asked whether these modeling processes and techniques were familiar to sources and Department staff, Mr. Downing replied that industrial sources, consultants and Department staff were familiar with these techniques as they have also been required for new or expanding sources in attainment areas. He also indicated carbon monoxide impacts from industrial sources are very small, the limits allowed under the proposal are very low and that cumulative impacts can be assessed through the emission tracking program established in the maintenance plan.

Commissioner Reeve moved to adopt the proposal as presented in the staff report and was seconded by Commissioner Van Vliet. The motion carried with five "yes" votes.

K. Rule Revisions for Transportation Conformity, Indirect Sources, General Conformity and State Implementation Plan (SIP) Streamlining

Greg Green and Dave Nordberg, State Implementation Plan Coordinator, briefly explained the proposed rule amendments. In response to questions from the commission pertaining to Transportation Conformity, Airshed Planning Manager Annette Liebe indicated "conformity lapses" have occurred twice in Oregon, and during such events federal highway funds are not lost from a state's highway budget.

Regarding the second group of proposed rules, staff clarified for the Commission that the Indirect Source Construction Permits program addresses only the pollutant carbon monoxide, and the program differs from the Transportation and General Conformity programs in that the latter address ozone and particulate matter in addition to carbon monoxide.

On the subject of General Conformity, Commissioner Whipple questioned why the proposed rules remove controls on prescribed burning on federal lands outside nonattainment and maintenance areas. Annette Liebe explained that for state conformity rules to be more restrictive than the federal measures they must apply equally to federal and nonfederal activities, and the Department lacks the resources needed to control diverse nonfederal sources. She also indicated that the newly adopted Medford Maintenance Plan does not establish a budget for the emission of particulate matter, but the Oregon Smoke Management Plan does provide goals for emissions from prescribed burning and such emissions are reported annually to the department.

Commissioner Van Vliet moved that the four groups of rule amendments be adopted. The motion was seconded by Commissioner McMahan and carried with five "yes" votes.

L. Sunset of Title V Small Source Deferral and Establishing a "General" Air Contaminant Discharge Permit (ACDP) Category

Greg Green and Kathleen Craig, Environmental Specialist, Air Quality Division, presented the two rule actions. The Title V deferral applies to sources whose actual emissions are 50% of major thresholds, yet have the potential to emit at major levels. The original Title V deferral period was January, 1995 through January, 1997 and was extended to July, 1998. This action extends the deferral to December 31, 1999, which is consistent with a recent extension allowed by EPA. Once the deferral expires, deferred sources will need to apply for a Title V or Synthetic Minor permit.

Regular Air Contaminant Discharge Permits are issued to individual facilities. This approach is reasonable for issuing permits for facilities with different requirements, but is not efficient when many facilities are subject to the same requirements. Establishing a general ACDP will give the Department the authority to issue one General ACDP per source category, with a standard set of requirements applying to all sources in the category. Qualifying sources have low emissions, minimal impact to the environment, good compliance records and are subject to only those requirements contained in the General ACDP. A distinguishing feature of a General ACDP is one public notice will be issued for a General ACDP versus public notices each time a facility is issued a regular ACDP; however, an updated list of sources assigned to a General ACDP is available for public review. The Commission asked that the Department report back to the Commission after the first of the year with a list of whom general permits were issued.

A motion was made by Commissioner Van Vliet to accept the rule action regarding the Title V Small Source Deferral. The motion was seconded by Commissioner Reeve and carried with five "yes" votes. A motion was made by Commissioner Reeve to accept the recommendation to establish a general ACDP category. The motion was seconded by Commissioner Eden and carried with four "yes" votes. One Commissioner voted "no" on this motion.

Public Comment

Joseph Higgins and Corinne Weber representing the Maplewood and Hayhurst Neighborhood Associations in Portland presented public comment on the contamination of Vermont and Fanno Creek due to the building of the Community Center adjacent to Gabriel Park. Bob Baumgartner, Water Quality Manager, Northwest Region, responded from the Department.

M. Appeal of Hearing Officer's Findings of Fact, Conclusions of Law and Final Order in the Matter William H. Ferguson, Case No. AQAB WR 96-351

The Department appealed the Hearing Officer's Findings of Fact and Conclusions of Law. In that order, the hearing officer found that Mr. Ferguson was liable for a civil penalty in the amount of $1,000, a reduction of the originally assessed penalty of $5,400. Mr. Ferguson was not present for the EQC meeting and authorized Mr. John W. Eads, Jr. to represent him. It was determined Mr. Eads was neither

a licensed attorney at law nor did he meet the definition of an authorized representative for a contested case hearing.

The Commission made preliminary rulings on several outstanding procedural motions. Commissioner Eden moved to deny Mr. Ferguson's motion to dismiss the appeal based on the late filing of the Department's exceptions and brief. Commissioner McMahan seconded the motion and it carried with five "yes" votes. Carol Whipple, the Commission Chair, granted the Department's and Mr. Ferguson's motions for an extension for filing briefs. The Commission then considered whether it should reopen the case, on its own motion to consider the applicability of OSHA regulations to this matter. The Commission declined to reopen the case. Commissioner Van Vliet moved to set this agenda item over to the September meeting. Commissioner Eden seconded the motion and it passed with five "yes" votes.

N. Appeal of Hearing's Officer's Findings of Fact, Conclusions of Law and Final Order in the Matter of the City of Coos Bay, Case No. WQMW-WR-96-277

Larry Knudsen, Assistant Attorney General, presented the Findings of Fact, Conclusions of Law and Commission's Opinion for approval. There being no further discussion, Commissioner Reeve moved to adopt the order. It was seconded by Commissioner Eden and approved with five "yes" votes.

O. Amendments to the Department's Division 12 Rules Concerning Enforcement and Civil Penalty Assessment Procedures

Les Carlough, Enforcement Manager, and Jenny Root, Environmental Law Specialist, presented this item. The proposed changes included moving violations of water quality statutes or rules by persons having or needing a Water Pollution Control Facility (WPCF) Permit, from the $2,500 civil penalty matrix to the $10,000 civil penalty matrix, granting the Director the authority to assess smaller penalties for violations that are self-reported, granting the Director the authority to use discretion in assessing a penalty based only on the economic benefit gained through noncompliance without assessing the class-and-magnitude based portion of the penalty, and housekeeping changes such as additions and revisions to classifications of violations and clarification of existing rules. The public notice was sent to all persons on the agency's rulemaking list, and each division's rule making list.

Commissioner Eden asked whether removing "Air Contaminant Discharge Permit" from the Notice of Permit Violation requirement meant the person or facility would not know an enforcement action was pending before receiving the action in the mail. Mr. Carlough explained enforcement actions are always preceded by a Notice of Noncompliance, regardless of whether there is a Notice of Permit Violation.

Commissioner Reeve requested the word "not" be added to (h) of the self- disclosure rule (OAR 340-12-0045(2)(h)), so (h) reads, "Not the cause of significant harm to human health or the environment." A motion was made by Commissioner Eden to adopt the rules as presented in Attachment A of the Staff Report, including the Addendum and with the additional change suggested by Commissioner Reeve. Commissioner Van Vliet seconded the motion and it carried with five "yes" votes.

P. Commissioners' Reports

No reports were given.

Q. Director's Report

The Department is in the process of developing a comprehensive statewide plan for managing contaminated sediments. The plan will incorporate a tiered approach where the least contaminated sediments will be eligible for in water disposal or confined in water disposal, the next level, upland disposal and seriously contaminated sediments to an appropriate hazardous waste landfill. Recent news

articles regarding disposal of dredged spoils at the Ross Island site in the Portland area points out how this issue has been evolving over time. The Governor will convene a series of meetings among federal and state agencies to focus on contaminated sediment management issues. A chronology was handed out regarding Ross Island and the article from The Oregonian entitled "Port buries toxic silt at Ross Island."

DEQ has declared four clean air action days (CAADs) so far this summer in the Portland metropolitan area. The new 8-hour ozone standard level of 0.08 ppm has been exceeded at two sites in the Portland metropolitan area and once in Salem. The new standard is the 3 year average of the 4th highest ozone value at a site, which is not to exceed .08 ppm. Over 400 businesses voluntarily promote air quality pollution prevention activities at their work sites on these days.

The first hearings were held on draft Title V air quality permits for five gasoline terminals located in northwest Portland and for the ESCO facility. The Title V permits will replace existing air contaminant discharge permits. The Title V permits by themselves do not create new requirements, but are shells that incorporate all of the state and federal air quality requirements from our rules and laws. DEQ will be respond to comments over the next two months and then prepare the permits to go to EPA for final review and approval.

The Portland Pollution Prevention Outreach (P2O) Team is a group comprised of representatives from six local governments and DEQ that was established in 1993 to promote pollution prevention in the Portland metropolitan area through coordinated efforts. The P2O Team has demonstrated how government agencies can work together to convey unified educational message in an efficient manner. The P2O Team has developed and implemented three major outreach efforts that have reached hundreds of small businesses and thousands of households in the region since 1995.

The Team's pilot project is a recognition program for local automotive service businesses. Called the Eco-Logoical Business Program," it is designed to encourage these small firms to strive for exemplary environmental performance. Automotive facilities implementing a series of best management practices (BMPs) will be eligible to receive a window sticker and certificate to highlight their accomplishments. An advisory committee with representatives from two automotive businesses, a local trade association, AAA, and OSPIRG, has been working with agency staff to develop a program that will be widely accepted by both businesses and consumers.

The Oregon Supreme Court has refused to review a decision of the Oregon Court of Appeals, which ruled six to three that the City of Eugene had exceeded its authority in compelling connection to the sewer system. The City required individual property owners outside city limits to obtain the sewer connections after the EQC made the determination that connecting to sewers was necessary for public health and the environment. Previously separate studies of the groundwater in the River Road-Santa Clara area had documented nitrate and fecal bacteria contamination and identified septic systems as the main source of that contamination. The EPA standard for fecal coliform bacteria was exceeded in virtually every well sampled in the area. In response to the study, the EQC directed DEQ to obtain agreements from local governments to develop a master sewerage plan and provide the service. A $6 million grant form EPA in 1984 was predicated upon the schedule of connection that included 100% connection by the year 2000. The Court of Appeals ruling was limited to the matter of connection authority. The City's authority to build the sewer, collect assessment fees, **or** charge monthly sewer user fees is not affected. Out of 8,000 hookups , 230 remain to be completed. The City continues to explore options to ensure 100% connection to the system.

Last October, a natural toxin was first detected at Ten Mile Lakes. Health official spotted the lakes as off limits for drinking, swimming, or other contact. The water was contaminated by a toxic blue-green algae known as microsystis, which is toxic at high concentration levels. The warning was lifted in December. The City of Lakeside recently raised concerns about the possibility of return of the algae this year and asked DEQ to help with monitoring to determine the extent of the problems. Western Regional staff have been working with the local watershed council on the issue. The lakes are not only a tourist attraction,

but are also a source of drinking water. DEQ applied for and received a $11,000 grant from EPA to carry out the monitoring through October 1, 1998. If the monitoring shows a problem, DEQ will apply for funding to carry out more extensive work to determine sources of nutrient loads causing the algae bloom.

The Water Quality program will review the Agency's dilution rule during the next periodic rule review which is required under ORS 183.545. This review will occur, covering all DEQ rules, in the fall of 1999.

DEQ certified the cities of Coburg and Junction City for their plans to protect the cities' drinking water supplies. Both cities worked with advisory committees to develop their plans. They used volunteers to develop pamphlets for farmers and rural residents, flyers for the local newspaper, household hazardous waste collection events, stormwater catch basin stenciling programs and display posters about groundwater protection. The cities were among the first to receive Wellhead Protection Certification from DEQ.

The natural resource agencies are reviewing the proposed action by EPA of recognizing the Warm Springs Tribe as a state for purposes of developing water quality standards and issuing permits related to facilities on the tribes' reservation land. DEQ and other agencies have raised the question regarding the application that relates to where the boundaries of the tribal lands are that include the Deschutes and Metolious rivers. The agencies are proposing to EPA that a separate agreement be completed with the Tribes to maintain the existing Water Resources Department agreement and approach with the Tribes to not try to define the exact boundary, but rather to reach agreements managing these waters.

There being no further business, the meeting was adjourned at 3:05 p.m.