EQCMeeting1of1DOC20000210

OREGON
ENVIRONMENTAL QUALITY
COMMISSION MEETING
MATERIALS 02/10/2000

State of Oregon
Department of Environmental Quality

Revised A G E N D A

ENVIRONMENTAL QUALITY COMMISSION MEETING

February 10-11, 2000
DEQ Conference Room 3A
811 S. W. Sixth Avenue
Portland, Oregon

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

Public Forum: The Commission will break the meeting at approximately **11:30 a.m. on Friday, February 11, 2000** for the Public Forum if there are people signed up to speak. The Public Forum is an opportunity for citizens to speak to the Commission on environmental issues and concerns not a part of the agenda for this meeting. The public comment period has already closed for the Rule Adoption items and, in accordance with ORS 183.335(13), no comments can be presented to the Commission on those agenda items. Individual presentations will be limited to 5 minutes. The Commission may discontinue this forum after a reasonable time if an exceptionally large number of speakers wish to appear.

Thursday, February 10
Beginning at 1:30 p.m.

A. **Approval of Minutes**

B. **Approval of Tax Credits**

C. **US Fish and Wildlife Services Request for a Waiver to the Total Dissolved Gas of the Water Quality Standard**

F. **Action Item:** Pollution Control Bonds

Friday, February 11

The Environmental Quality Commission will hold an executive session at 8:00 a.m. in Room 3B. The session will be to discuss current and likely litigation including EZ Drain v State of Oregon, No. 9809-06683; and Northwest Environmental Advocates and Northwest Environmental Defense Center v. Carol Browner, Administrator, EPA, and Associated Oregon Industries, Northwest Pulp and Paper Association, Oregon Forest Industries Council and State of Oregon, Department of Environmental Quality. The executive session is to be held pursuant to ORS 192.660(1)(h). Representatives of the media will not be allowed to report on any of the deliberations during the session.

Regular Meeting Beginning at 9:00 a.m.

D. **Informational Update:** Request for Revocation of the Umatilla Chemical Agent Facility Permits

E. **Informational Item:** Current Status of the Chemical Stockpile Emergency Preparedness Program (CSEPP)

G. **†Rule Adoption:** Heating Oil Tank Technical and Licensing Rule Revisions

H. **†Rule Adoption:** Marine Loading Vapor Control Rules

I. **†Temporary Rule Adoption:** Rules for Contested Case Hearings Conducted by the Hearing Office Panel (HB 2525)

J. **Informational Item:** 1999-2002 Water Quality Standards Review

K. **Action Item:** Approval of Hearing Order Regarding Assessment of Civil Penalty in the Matter of Cascade General, Inc., Case No. HW-NWR-97-176

L. **†Temporary Rule Adoption:** Rulemaking to Extend the Vehicle Inspection Program Hardship Waiver

M. **†Temporary Rule Adoption:** Amendment of the Expiration Date of New or Innovative Technology or Material Approvals Granted by the Director

N. **Commissioners' Reports**

O. **Director's Report**

†Hearings have already been held on the Rule Adoption items and the public comment period has closed. In accordance with ORS 183.335(13), no comments can be presented by any party to either the Commission or the Department on these items at any time during this meeting.

The Commission will have lunch at 12:00 noon on February 10 and 11, 2000. . No Commission business will be discussed.

The Commission will honor outgoing EQC member, Linda McMahan, before the meeting on February 10, 2000.

The Commission has set aside March 30-31, 2000, for their next meeting. The meeting will be in The Dalles, Oregon.

Copies of staff reports for individual agenda items are available by contacting the Director's Office of the Department of Environmental Quality, 811 S. W. Sixth Avenue, Portland, Oregon 97204, telephone 503-229-5301, or toll-free 1-800-452-4011. Please specify the agenda item letter when requesting.

If special physical, language or other accommodations are needed for this meeting, please advise the Director's Office, 503-229-5301 (voice)/503-229-6993 (TTY) as soon as possible but at least 48 hours in advance of the meeting.
February 18, 2000

Approved_____
Approved with Corrections__X__

Minutes are not final until approved by the EQC

Environmental Quality Commission
Minutes of the Two Hundred and Eightieth Meeting

November 18-19, 1999
Regular Meeting

On November 18-19, 1999, the regular meeting of the Environmental Quality Commission (EQC) was held at the Department of Environmental Quality (DEQ) headquarters, 811 SW Sixth, Portland, Oregon. The following Environmental Quality Commission members were present:

Melinda Eden, Vice Chair
Linda McMahan, Member
Tony Van Vliet, Member
Mark Reeve, Member

Also present were Larry Knudsen, Assistant Attorney General, Oregon Department of Justice (DOJ); Langdon Marsh, DEQ Director; and other staff from DEQ.

Note: The 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.

At 12:30 pm on November 18, 1999, a reception was given for Carol Whipple, outgoing Chair of the Commission. The regular meeting was called to order by Vice-Chair Eden at 1:30 p.m.

Commissioner Van Vliet made a motion to elect Vice-Chair Eden as Chair of the Commission. It was seconded by Commissioner McMahan and carried with four "yes" votes.

Work Session: The Department will brief the Commission on Portland General Electric Company's Independent Spent Fuel Storage Installation at the Trojan Nuclear Power Plant site in Rainer.

Please see attached verbatim transcript.

A. Approval of Minutes

The following correction was made: on the top of page 6, the first line, the law firm of Stoel Rives is misspelled. A motion was made by Commissioner Reeve to approve the minutes as corrected. Commissioner Van Vliet seconded the motion and it carried with four "yes" votes.

B. Approval of Tax Credits

Maggie Vandehey, Tax Credit Coordinator for DEQ, presented tax credit applications for approval, denial and rejection.

Approvals

Willamette Industries' applications numbered 4789, 4927, 4934, 4978, 4979, 4986, and 5020, were removed from the agenda at this time. Commissioner Reeve had asked staff questions regarding hazardous waste versus hazardous materials at the October 1, 1999, Commission meeting as it related to application number 4801. The application was pulled from the October meeting and now is included in this agenda Item. Ms. Vandehey further explained that controlling hazardous waste is an eligible tax credit purpose but that controlling hazardous materials is not. Basically, the former is storage of pre-production supplies and the later is containment of post-production

waste. The Department looks to the potential risk beyond the site not within the building structure. Commissioner Reeve asked if there was a separate law regarding air and water from hazardous waste. Ms. Vandehey answered, "yes, each type of tax credit has slightly different eligibility criteria." Dennis Cartier of SJO Engineering Consultants, a contractor for the Department, affirmed that hazardous materials used for production fall under a different set of codes. These are put in not because DEQ requires their installation but because the fire code requires their installation. Typically, they are inside the building where the floor itself would contain the material and you would not have a release to the environment. When asked if hazardous waste is temporar*ily* stored on-site prior to being transported off-site for final disposal or treatment, Mr. Cartier responded that typically it could be stored in drums or on a pad. They are required by the hazardous waste rules to have a secondary containment.

Counsel indicated that this issue can come up in two contexts. One issue is in the sole purpose/principal purpose context. The other is, after meeting the purpose test, it still has to be a prevention, control or reduction facility. To prevent pollution by doing one of several of things, including disposal, and elimination of a waste.

In reference to Willamette Industries' application #4928, Commissioner Reeve questioned how staff determines there is no available or useful commodity referencing the wood waste recovery system, indicating medium density fiberboard (MDF) is very much a useful or salable commodity. Staff indicated that in general, the reviewer looks at the commodity market to verify the value of the commodity. In this case, the accounting firm considered the value of the commodity in the return on investment calculation. It did not impact the percentage allocable to pollution control on this particular application.

Commissioner Reeve asked if return on investment (ROI) is a separate issue from salable or useful commodity. Staff indicated this is one of the five factors the Commission must consider when determining the percentage allocable to pollution control – its implementation is ambiguous. Under the material recovery portion of the tax credit law, they are required to produce a useable and salable commodity. However, the value of the commodity must be considered in the return on investment calculations. Commissioner Van Vliet commented the facility was probably taking material out of the waste stream that would produce air pollution if it were burned.

Counsel clarified that the standards are different for recycling programs, and the Department uses recovery of the salable product differently. The Legislative decision grants a tax credit to this type of facility. Past Commissions thought it would be inappropriate to use the feed stock as a return on investment. The Department also uses this as an indicator to help determine if a facility is an integral facility.

Regarding Willamette Industries' application #5227, Commissioner Reeve indicated he was not aware that the rules required an open chip *p*ile be covered for Principal Purpose eligibility. Lois Payne with SJO Consulting Engineers, the technical reviewer, said she needed more time for research. Counsel clarified that storm water permits are relatively new and industrial storm water sources are inching up on full coverage under the 402 program. This particular general permit was issued in 1997. With storm water permits, they incorporate individual plans for industrial facilities and it this may have been the plan. It was recommended that the application be removed from the agenda so staff could clarify the purpose of the facility and make the exact citation for eligibility.

Commissioner Reeve expressed concern over creating a secondary market for tax credits with Stafford Property Equipment Leasing's application #5257. He understood the applicant was a leasing company that is not operating the equipment. It was clarified that under the material recovery portion of the tax credit that either the lessee or the lessor may claim the facility. The party does not necessarily have to be the operator. When Commissioner Van Vliet asked if any leasing company that has a grinder in their possession could get a tax credit, Ms. Vandehey said that yes, if it were used in a material recovery process or if they were Pope & Talbot.

Chair Eden noted that on Boeing's application #4628 the number on the second page was missing a digit when compared to the number on the first page. Staff acknowledged the amount under the Director's Recommendation and as listed on the summary was the amount to be certified.

Chair Eden asked why the ductwork in Valmont Industries' application #4799 was not allowed if it was used to capture particulate and convey it. Staff indicated the ductwork was part of the enclosure system and the system as a whole was not allowable. Generally, ductwork is only allowable after it exits the building on its way to the scrubber.

Chair Eden asked if this was true even if the ductwork was installed specifically for this system. Ms. Vandehey said, "yes." Counsel said the theory is they would have to install the ductwork anyway to remove contamina*nants* from the building. It may be that it is specific to the pollution control equipment but they would have to have some kind of ductwork either way even if they were just discharging it to the outside atmosphere.

A motion was made by Commissioner Reeve to approve the tax credits listed in Attachment B to the Staff Report with the removals recommended by staff, with the corrections indicated by the Commission, and with the temporary removal of application #5227. Commissioner McMahan seconded the motion and it carried with four "yes" votes.

Denials

Maggie Vandehey asked the Commission to removed Willamette Industries' application #5167 and Sabroso's application #5197 from the denials.

Commissioner Reeve asked questions regarding the drain piping system on Mitsubishi's application #4834. If the pipe ruptures, is that hazardous waste that will run into the building? If the old pipe would have ruptured would that have presented a hazard to the environment? Mr. Cartier said Mitsubishi installed a single-walled pipe on the roof. A motion was made by Commissioner Van Vliet to approve the denials as presented in Attachment C with the removals requested by staff. Commissioner Reeve seconded the motion and it carried with four "yes" votes.

Rejections

Ms.Vandehey requested that applications #4570 and #4800 be removed from the rejections.

Commission Action

Action	App. No.	Applicant	Certified Cost	% Allocable	Value	Type
Approve	4628	Boeing Company	$ 3,704,836	100%	$1,852,418	Water
Approve	4799	Valmont Industries, Inc.	$ 109,876	100%	$ 54,938	Air
Approve	4928	Willamette Industries, Inc.	$ 723,654	100%	$ 361,827	SW
Approve	4966	Tokai Carbon U.S.A., Inc.	$ 554,310	100%	$ 277,155	Air
Approve	4977	Willamette Industries, Inc.	$ 640,186	100%	$ 320,093	Air
Approve	4987	Willamette Industries, Inc.	$ 45,872	100%	$ 22,936	Air
Approve	4996	Bushwhacker Saloon Corp.	$ 18,000	100%	$ 9,000	Water
Approve	5004	Widmere Brothers Brewing Company	$ 405,245	100%	$ 202,623	Water
Approve	5045	Mitsubishi Silicon America	$ 655,955	100%	$ 327,978	Air
Approve	5137	Intel Corporation and Subsidiaries	$ 192,077	100%	$ 96,039	HW
Approve	5138	Intel Corporation and Subsidiaries	$ 1,683,111	100%	$ 841,556	Water
Approve	5139	Intel Corporation and Subsidiaries	$ 1,858,452	100%	$ 929,226	Air
Approve	5156	JR Simplot Company	$ 757,749	100%	$ 378,875	Air
Approve	5174	Dynic USA Corporation	$ 511,501	100%	$ 255,751	Air
Approve	5178	Lamb-Weston, Inc.	$ 407,181	100%	$ 203,591	Air
Approve	5185	Cain Petroleum, Inc.	$ 197,978	94%	$ 93,050	USTs
Approve	5228	M&M Rentals Co	$ 126,288	92%	$ 58,092	USTs
Approve	5229	M&M Rentals Co	$ 169,962	87%	$ 73,933	USTs
Approve	5233	Hockema Coast Oil Co.	$ 133,477	90%	$ 60,065	USTs
Approve	5240	R Plastics, Inc. Inc.	$ 8,400	100%	$ 4,200	Plastics
Approve	5246	Mobile One-Stop/Dorothy Rofinot	$ 105,390	98%	$ 51,641	USTs
Approve	5249	BOWCO INC.	$ 105,000	100%	$ 52,500	Plastics
Approve	5254	Westmoreland Cleaners, Inc.	$ 2,500	100%	$ 1,250	Water
Approve	5257	Stafford Property Equipment Leasing	$ 510,000	100%	$ 255,000	SW
Approve	5258	Ken's Dry Cleaning	$ 33,382	100%	$ 16,691	Perc
Approve	5259	Sharp Auto & Paint Works	$ 3,290	100%	$ 1,645	Air

Approve	5260	Capitol Recycling & Disposal, Inc.	$	11,997	100%	$ 5,999	SW
Approve	5261	United Disposal Service, Inc.	$	5,781	100%	$ 2,891	SW
Approve	5263	Capitol Recycling & Disposal, Inc.	$	34,104	100%	$ 17,052	SW
Approve	5265	New China Laundry & Dry Cleaning	$	3,381	100%	$ 1,690	Water
Approve	5266	Happy Hangers Cleaners	$	3,300	100%	$ 1,650	Water
Approve	5268	Clemens Automotive, Inc.	$	4,399	100%	$ 2,200	Air
Approve	5272	Clarence Simmons Farm, Inc.	$	55,628	100%	$ 27,814	Burning
Approve	5273	Roger Eder	$	44,601	100%	$ 22,301	Burning
Approve	5275	Mars Enterprises, Inc.	$	149,753	100%	$ 74,877	Burning
Approve	5277	Don Worthington	$	49,820	100%	$ 24,910	USTs
Approve	5157	T. W. D., Inc.	$	165,596	93%	$ 77,002	USTs
Deny	4801	Valmont Industries, Inc.	$	407,722	100%	$ 203,861	HW
Deny	4834	Mitsubishi Silicon Amercia	$	158,667	100%	$ 79,334	Water
Deny	4980	Willamette Industries, Inc.	$	18,041	100%	$ 9,021	Air

An EQC phone meeting was scheduled for 9:00 a.m. on December 20, 1999. The Commission adjourned for the evening at 3:25 p.m. At 8:00 a.m., November 19, 1999, the Commission held an executive session in Room 3B of DEQ Headquarters regarding EZ Drain Company v. State of Oregon, Department of Environmental Quality, Case No. 9809-06683. The regular meeting was resumed at 8:40 a.m.

C. Informational Item: Update on the General Air Contaminant Discharge Permits (ACDP)

Andy Ginsburg, Acting Air Quality Division Administrator, and Scott Manzano, Acting Program Development Manager, provided the Commission with the update based on the Commission's request at the time the General ACDP rule was adopted in August 1998. These rules allow the Department to permit a large number of sources under one permit. This process eliminated the standard practice of permitting each source one permit at a time, and has likely saved hundreds of hours of permitting staff time. To date, the Department has written permits for two source categories: Chrome Electroplaters, and Halogenated Solvent Degreasers. The Department received no public comment or request for hearing during the public comment process, and has had no complaints regarding any of the sources that have signed on to these permits. These sources are treated no differently than other individually permitted sources with respect to enforcement and complaint response. The public can review the list of sources that have these general permits via the Department Internet. The Department was looking for other opportunities to use general permits in conjunction with a current initiative to re-evaluate how fees are charged to all ACDP sources. Historically, the Department has successfully used general permits to permit over 3000 sources through the Division of Water Quality, and Air Quality is very pleased with the use of this permitting vehicle thus far.

D. Action Item: Appeal of Hearing Order Regarding Assessment of Civil Penalty in the Matter of Cascade General, Inc., Case No. HW-NWR-97-176

A Notice of Assessment of Civil Penalty was issued to Cascade General on November 18, 1997 for two violations. The first was for failure to make a hazardous waste determination. The second was for the failure to properly manifest hazardous waste transported for disposal. The civil penalty amount was $14,500. On December 15, 1997, Cascade General appealed the Notice and a hearing was held on January 28, 1999.

The Hearing Officer held that Cascade General was required to complete a Hazardous Waste Manifest. He also concluded that independent tests done by Cascade General qualified as a Hazardous Waste Determination. Cascade General was liable for a civil penalty for the failure to properly manifest the waste transported for disposal but he reduced the civil penalty by changing the "P" factor and refusing to consider evidence of economic benefit.

Cascade General was represented before the Commission by John Schultz and Lori Irish Bauman. The Department was represented by Larry Shurr, an Environmental Law Specialist. The Department argued that:

(1) there was evidence in the record that Cascade General had four prior class two violations, which, according to law, is equivalent to two class one violations, and

(2) the hazardous waste rules set forth the procedures that must be followed to perform a hazardous waste determination. Cascade General failed to follow these requirements. The Department also requested the evidence regarding the economic benefit be allowed into the record.

Cascade General argued that the failure to make a hazardous waste determination does not mean the failure to make a correct determination and regardless of this, the product should be classified as 'used oil' and thus would be exempt from the requirements regarding hazardous waste. Cascade General requested the Commission allow into evidence an affidavit that provided proof that a significant amount, if not all, of the product was used prior to disposal. Cascade General agreed there was sufficient evidence in the record to support the "P" factor of +3 as originally set by the Department.

Commissioner Reeve made a motion for the Commission to uphold the hearing officer's decision in that the testing done by Cascade General did qualify as a hazardous waste determination and Cascade General was liable for a civil penalty for failing to properly manifest the waste transported for disposal. The civil penalty set by the hearing officer is to be changed to reflect the change in both the "P" and "EB" factors. Commissioner McMahan seconded the motion and it carried with four "yes" votes. Counsel was directed to prepare the Order.

Public Comment:

Two citizens signed up for public comment. They could not testify as it involved a rule adoption on the agenda. Andy Ginsburg and Lang Marsh presented Spence Erickson with a plaque on behalf of the Commission for his 25 years of service to the Department.

E. Rule Adoption: On site Sewage Disposal Fees

Stephanie Hallock, Interim Administrator for the On-Site Sewage Disposal Program and Dennis Illingworth, DEQ On-site Program, presented this item. The 1999 legislature gave the Department authority to increase staff resources in the on-site program. These new resources would be primarily used for compliance and enforcement efforts as requested by the on-site industry. Since the program does not receive state general or federal funds, an increase in fees is necessary to provide for the additional staff. The fees have not increased since 1994; and, therefore, inflation factors were also added into the proposed rule package. The proposed rule package would increase fees for a homeowner applying for a standard septic permit by approximately 38 percent. Fees for installer and pumper licenses would more than double. The legislature had been informed during the session fees would need to be raised if the additional resources were allocated. In addition to the fees, the rule package contains technical rule changes relating to new terminology and definitions; disposal trench installation in relation to groundwater depths and delaying implementation of examination for sewage disposal workers from January 2000 to January 2002.

There was discussion in regards to the proposed fee for innovative or alternative technology or material review (related to agenda item F). Staff explained with the few "innovative" products that have needed Department review, the proposed fee only begins to cover the costs. It was further explained that many products are not considered "innovative" or "alternative" technologies and therefore would not be subject to the fee.

A motion was made by Commissioner Van Vliet to adopt the rule package. It was seconded by Commissioner Reeve and carried with four "yes" votes.

F. Rule Adoption: Rules Establishing Review and Acceptance Criteria for New or Innovative Technologies and Materials for Application in the On-site Program

Just prior to presentation of the staff report, Counsel requested the Commission consider re-opening the public comment period to allow the opportunity for persons to submit additional comment on the proposal for rulemaking. Stephanie Hallock, Interim Administrator for the On-Site Sewage Disposal Program, presented a summary of the staff report. The Commission asked several questions about the alternatives and the performance testing protocol. It expressed that the performance testing should be conducted by other than the Department. After discussion, a motion was made by Commissioner Reeve to extend the public comment period through December 10, 1999, in order that additional written comment might be received and made a part of the record. It was seconded by Commissioner Van Vliet and carried with four "yes" votes. The Commission agreed to consider taking final action on the proposed rulemaking at their phone meeting scheduled for December 20, 1999.

G. Action Item: Reopen the Permit at the Umatilla Chemical Agent Disposal Facility (UMCDF) for Modifications with Respect to the Inclusion of the Carbon Filter System as Part of the Pollution Abatement System

Wayne C. Thomas, Umatilla Program Manager introduced the staff and summarized the issue. Larry Edelman, Assistant Attorney General, Department of Justice, presented the legal framework for causes of unilateral modification of a hazardous waste treatment permit and any findings the Commission may issue. The presentation was based on an August 4, 1999, memorandum to Chair Whipple. Ken Chapin, Environmental Engineer, was present to respond to any technical questions from the Commission.

Sue Oliver, Senior Hazardous Waste Specialist, presented the staff report which summarized the public comments into the following areas: completeness of the pollution abatement system/carbon filter system (PFS Design); use of a "fixed bed" design, The ability of carbon to adsorb chemical agent, PFS safety risks; operation of the PFS during "upset" conditions; the use of a five stage pollution abatement system; and exhibit "74".

The Department stated two recommendations:
1. The PFS be retained as part of the UMCDF design, and
2. The Commission send a letter to the Governor requesting OR-OSHA coordinate with Federal OSHA on the issue of worker safety as it applies to the carbon filters system.

The Commission asked several questions about chemical agent monitoring upstream and downstream of the Carbon Filter System.

Commissioner Van Vliet made a motion to accept the Department's report. It was seconded by Commissioner Reeve and carried with four "yes" votes. The Department will prepare a letter for Chair Eden's signature for transmittal to the Governor.

2:00 p.m. – Public Comment for this Agenda Item Only: UMCDF Permit Revocation Request Dated December 14, 1998 from GASP, et al.

Karyn Jones (GASP), Dr. Robert J. Palzer (Sierra Club), Stu Sugarman, and Richard Condit presented comments in support on the revocation request. Many of the comments focused on the September 15, 1999, industrial accident. The commenters expressed several concerns that if this could happen, how can the State of Oregon have confidence in the Army and Raytheon for the handling of chemical agent disposal operations.

Dr. Palzer commented on the availability of alternative technologies, particularly for the bulk mustard ton containers, which constitute 65 percent of the stockpile stored at the Umatilla Chemical Depot.

Loren Sharp, Raytheon Demilitarization Company Plant Manager, commented on the September 15, 1999 industrial accident that the cause currently under investigation is pepper spray. The FBI and the Army Criminal Investigation Division (CID) are now leading the investigation.

The public comment period will be open until December 17, 1999. No decision was reached on when the Department will return to the Commission with a staff report and recommendation

H. Commissioners' Reports

There were no reports from Commissioners.

I. Director's Report

As of November 15, 1999, DEQ has completed over 98 percent of the Y2K Readiness work. Contingency plans are in place for critical functions of emergency response, network & email services, and agency reception. All equipment with microprocessor chips has been evaluated, fixed, replaced or had work-around developed. Millennium weekend plans are in place to verify proper functioning of business applications and computer and building infrastructures at facilities statewide.

DEQ presented the final draft of the Upper Grande Ronde Total Maximum Daily Load (TMDL) to the Grande Ronde Water Quality Committee on November 4, 1999. This is the first subbasin level TMDL the Department is completing under its schedule for completing all subbasin level TMDLs by 2007. This TMDL is significant because it covers all

water quality limited waterbodies in the entire Upper Grande Ronde subbasin and addresses pollutant loads from both point and nonpoint sources. Federal and private forest land, urban and rural nonpoint sources, and public and private point sources are all covered by the TMDL. The Committee will be finalizing the Water Quality Management Plan (WQMP) in November 1999. DEQ plans to release both the TMDL and WQMP for public review and comment in early December 1999.

DEQ held three meetings with stakeholders during November (The Dalles, Eugene, and Portland). At the meetings, Lang Marsh discussed DEQ's future directions and solicited feedback and comment about stakeholder's issues and priorities. The feedback will be considered in the modification of DEQ's Strategic Plan, particularly for the 2001-2003 period.

The Health Division sent DEQ several letters in September and October expressing concern about the City of Ashland's proposed spray irrigation of treated effluent. Discussions are underway between DEQ and the Health Division to resolve this matter.

The City of Newport is in the process of designing a new sewage treatment plant to replace the old, poorly sited plant surrounded by homes and motels. The outcome of facilities planning was that the best alternative was to build a new plant which is in South Beach. The raw sewage would come to the existing plant location, be pumped to the new plant through a three mile long forcemain under Yaquina Bay, treated, and then sent back by gravity to the existing Pacific Ocean outfall. The key issue is: "Where do we put the pipes that carry the sewage and effluent to and from the existing plant location?" The initial proposal was to locate them in bedrock under the beach sand. DEQ viewed this as preferable to digging up city streets and the problems associated with other utilities, and were leaning towards approval. State Parks had to issue a permit for the beach alignment and did not think it should be allowed due to the precedent it would potentially set, as well as other technical problems regarding the geology of the beach/bluff interface. The City is now working on an alternative and could delay the project.

A Portland Harbor Cleanup workplan for the first major phase of Harbor-wide work -- the sediment investigation -- is underway. This investigation addresses the nature and extent of contamination, and the risk posed by the contamination. Technical and policy workgroups representing EPA, natural resource trustees, environmental groups, tribes, and industry, are advising DEQ through this process and will hold 18 meetings during workplan development. Site assessment work continues to identify additional responsible parties in the Harbor, and to advance the site-specific work at individual facilities. Also, discussions continue with the natural resource trustee agencies and interested tribes. EPA will not decide whether to list the site as an NPL until after March 2000.

The City of Portland is considering asking the EQC to amend the 1994 Amended Stipulated Final Order (ASFO) to extend the implementation timeline for reducing combined sewer overflows (CSOs) into the lower Willamette River. The Portland City Council and Mayor Vera Katz were advised by letter on October 28, 1999, that DEQ did not see a justification for such an extension. Since then, the City has held a council work session and another council meeting. The Commission has received a letter from the City's Bureau of Environmental Services.

There being no further business, the meeting was adjourned at 3:05 p.m.

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

WORK SESSION ON:

Portland General Electric
Company's independent spent fuel
storage installation at the
Trojan Nuclear Power Plant.

TRANSCRIPT OF PROCEEDINGS

November 18, 1999

BEFORE:

COMMISSIONERS

MELINDA EDEN, Chair
TONY VAN VLIET
LINDA McMAHAN
MARK REEVE

DIRECTOR:

LANGSTON MARSH

LARRY KNUDSEN
DEQ Counsel

Transcribed from electronic recording by

Patricia Morgan
16360 S. Neibur Road
Oregon City, OR 97045

Morgan Verbatim, Inc.
Official Transcriber
(503) 631-8885

INDEX

PROCEEDINGS	Page
Presentation by Ms. Vandehey	4
Statement by Mr. Stewart-Smith	6
Questions by the Commission	20
Comments by Ms. Vandehey	30
Questions by the Commission	34

CHAIR EDEN: Good afternoon. This is the regularly scheduled meeting of the Environmental Quality Commission, and we welcome you here.

I'm Melinda Eden. To my right are Linda McMahan and Tony Van Vliet, and to my left is Mark Reeve, our newest member. Harvey Bennett, unfortunately, is ill and unable to be with us today. So we are it.

And we have convened this afternoon to begin with a work session. On?

COMMISSIONER VAN VLIET: Madam Chair, I'd like to make a nomination right now.

CHAIR EDEN: Commissioner Van Vliet. That's right, we don't have a chair.

COMMISSIONER VAN VLIET: I would like to nominate Melinda Eden to be the chair of the Environmental Quality Commission commencing as soon as possible.

COMMISSIONER McMAHAN: Second.

CHAIR EDEN: It's been moved and seconded that Melinda Eden be elected chair of the Environmental Quality Commission. Is there any discussion? All those in favor signify by saying aye.

(Three aye votes)

CHAIR EDEN: Can I vote for myself? Aye.

All those opposed. There is no one. So, thank you very much for your confidence that I can run a meeting

responsibly, and I will do my best.

And now is the time schedule for a work session on Portland General Electric's company's independent spent fuel storage installation at the Trojan Nuclear Power Plant. And Maggie Vandehey is here and --

MS. TAYLOR: Chair Eden, maybe I could introduce Maggie Vandehey --

CHAIR EDEN: You may.

MS. TAYLOR: -- who will be presented the work session report to you along with David Stewart-Smith from the Department of Energy, who is an expert in this arena. And they'll both kind of describe the facility to you. And then Maggie will express to you the questions that the Department will be attempting to answer between now and next spring about the -- whether the facility qualifies for tax credit. And what we'd like from you today, of course, is to provide you with information but also if you have questions of us that you would like us to explore in the interim, we'd like to hear that today.

Know that there are members of the company here who would be more than willing to answer questions when our staff has completed their -- their information to you, if you have questions. If you do not, I'm sure they'll be available in the spring when we bring this item back to you.

CHAIR EDEN: Okay. Then let's proceed on that basis.

I would like to say ahead of time that it is not a time -- it's not a public hearing, so it's not a time for that; it's a time for the Department to make its presentation to us, but as Ms. Taylor said, if we have questions, I appreciate that there are company representatives here to assist us.

MS. VANDEHEY: Good afternoon, Madam Chair, Commissioners. As Lydia told you, my name's Maggie Vandehey, and I'm Tax Credit Coordinator for the DEQ. Dave Stewart-Smith on my right has timely agreed to be here today. He's the administrator of the Energy Resource Division with the Oregon Office of Energy. Dave is also the Secretary of the Energy Consulting Siting Council.

We're here today to talk about Portland General Electric proposed application for preliminary certification. The application is for certification of their independent spent fuel storage installation. PGE refers to it as the ISFSI. Because I have trouble getting that off of my lips I'll be referring to it in tax credit terms as "the facility."

PGE submitted the application under the Pollution Control Facility Tax Credit laws. The plant facility is located at the Trojan Nuclear Power Plant site in Ranier. To quote from PGE's application, "The sole purpose of the Trojan ISFSI is to control spent nuclear fuel and to prevent spills or unauthorized releases of radioactive materials to

the air, water and adjacent land during interim storage period pending final disposal."

PGE estimates the facility will cost $55 million. As Ms. Taylor told you, at this time, the Department is not prepared to offer a recommendation regarding the eligibility of the facility. We'll do that next spring. Our purpose today is to provide the Commission with an overview of the planned facility, background at the Trojan site, and a discussion of questions that we'll answer before finalizing the preliminary review report.

Before I talk about the specifics of the application, a brief chronology may be helpful in understanding why the facility is constructed. In 1976, Trojan Nuclear Power Plant began commercial production. In January of '93, PGE notified the Nuclear Regulatory Commission of their decision to cease operating the power plant. PGE bases this -- based this decision on the uncertainty of plant's reliability, the uncertainty about the cost of operation, particularly as related to the steam generators, and also about the availability of replacement power at a lower cost.

Once PGE made their decision to stop operating the nuclear power plant, NRC regulations requires them to completely decommission the plant within 16 years. In 1995, PGE moved four contaminated steam generators and a pressurizer to the regional commercial low level waste

disposal site at Hanford.

In '96, the NRC and the Oregon Energy Facility Siting Council approved the Trojan decommissioning of the plant. This year, PGE removed the reactor vessel to the disposal site at Hanford. Currently PGE is preparing the Trojan site for unrestricted use. Unrestricted use means that the property could be used for other industrial or recreational purposes. Finally, during the first quarter of the next century, the spent nuclear fuel will be moved to a yet unknown federal repository.

In a minute, I'll discuss the scope of the preliminary application with you. I'll also discussion questions that the staff will have to answer before we complete the review. At this time, Dave Stewart-Smith will provide information regarding the independent spent fuel storage installation, dry storage versus wet storage, air or water contaminants, decommissioning of Trojan, and the federal repository.

MR. STEWART-SMITH: Thank you, Madam Chair. For the record, my name is David Stewart-Smith, Secretary to the Oregon Energy Facility Siting Council. I'm pleased to be here today. I have some brief prepared notes that I will go over, and I would encourage the Commission to interrupt me at any time, in case I get a bit too oblique or I say something that needs to be clarified.

As Maggie mentioned the Trojan plant closed its commercial operations in 1993. Under the rules of the U.S. Nuclear Regulatory Commission they had -- first choice they had to make was whether or not they would put the plant into long-term storage and allow much of the radioactivity to decay, and the Nuclear Regulatory Commission refers to that option as Safe Store. Or whether they should decommission the plant in the near term, and they refer to that option as Decom.

Portland General Electric made the case to the NRC and to the Energy Facility Siting Council that, given the specifics in their situation, that immediate dismantlement was an appropriate option. The regulatory agencies agreed, and shortly thereafter PGE began preparations for decommissioning the plant.

They are well over halfway done with decommissioning at this point, having sent five large components, the -- the four steam generators and a pressurizer tank, off for disposal at our regional disposal site in 1995. And having sent the reactor vessel itself, without the spent fuel in it, to our regional low level waste disposal site in August of this year.

About 10 percent of the nonspent fuel radioactivity was disposed of with the large components: the steam generators and the pressurizer, something less than 10

percent. And about 90 percent of the nonspent fuel radioactivity was disposed of with the reactor vessel. The balance of the contamination on the Trojan site is in the form of contaminated concrete, piping, tanks, storage and radioactive waste treatment systems and similar pieces of equipment.

Once the site is decontaminated, the site can be released, as Maggie mentioned, for unrestricted use. It doesn't mean that all of the buildings will be gone. It means that what is left will not need to be restricted for reasons of radiation safety.

The process of site release is a -- is a complex and detailed one. PGE has broken some new ground in this area, being the first large commercial power plant to undergo decommissioning. There have been several of them a number of years older that that have undergone decommissioning, but this was a very different kind of decommissioning because of the size of the facility, and they will use many different measurements throughout the site and a sophisticated computer model to determine the potential pathway exposures to the public once the site is unrestricted. And based on their measurements and on the computer modeling, the company, along with the regulatory agencies will decide when the site is ready for unrestricted release.

Maggie also asked me to talk about the difference

between storing spent nuclear fuel in the spent fuel pool, as it is today, and storing it in dry spent fuel casks. Let me explain those a little bit. Since the plant began commercial operation, spent nuclear fuel which comes out of the plant -- an individual fuel bundle stays in the reactor for about -- in Trojan's case for about three years. Every year they had an annual refueling outage at which time about a third of the reactor core was removed, having spent three years in the reactor, and placed in the spent fuel pool.

The spent fuel pool is a water cooling system. It has about eight-foot thick foundation built on basaltic bedrock. The plant itself is built on a bedrock outcropping next to the Columbia River. It's got about five-foot thick concrete walls. It maintains about 20 feet of water over -- at all times over the top of the spent fuel. The water provides not only cooling capacity, because, as these spent fuel bundles come out of the reactor, their degree of radioactivity is high enough that they generate a great deal of heat, but it also provides for the shielding. You can walk up to the edge of the spent fuel pool, look down through ultra-pure water that is a boric acid solution, and you can see the top of the spent fuel bundles and the racks that hold them.

The spent fuel pool has active pumping cooling and purification systems. That's the main -- other than the

difference between wet and dry -- that's the main difference between storing spent fuel and spent fuel pool -- I'm going to trip over that phrase, I know I am -- and storing it in dry concrete casks. The spent fuel pool relies on active cooling and maintenance in order to maintain its capabilities. Once the spent fuel is welded into stainless steel cylinders and placed inside concrete silos or concrete casks, it's basically a passive protective and cooling system.

Water is a better heat transfer medium than air convection, and as long as the fuel is less than five years out of the reactor, it must be cooled with water. All of the spent fuel at Trojan is greater than five years out of the reactor, having been closed in 1993. So this an appropriate spent fuel storage medium for fuel of this age.

The dry casks are massive structures. They provide not only radiation shielding capability with about 21 inches of concrete, high-density concrete as part of the concrete cask, but they provide for a very robust structurally sound storage medium. These concrete casks are placed on a concrete pad that's about 18 inches thick, and, as I recall seeing it before the concrete was poured, I think it has as much rebar in it as it has concrete. And this system is designed with enough mass and enough structural stability to withstand any credible earthquake.

The spent fuel pool was also designed to withstand an earthquake, but being open at the top, it was certainly less contained, if you will, than a dry concrete cask system.

I want to talk a little bit about air and water pathways of release of radioactive materials. A spent fuel pool is open to the environment. As I mentioned, you can walk up to the edge of it and you can look through the water and you can see the tops of the spent fuel assemblies. And it's housed in an industrial building. There are, because of -- because of the nature of spent nuclear fuel, the temperatures and pressures inherent in a commercial nuclear reactor are such that on the order of one half to one percent of the spent fuel pins that make up a fuel assembly that are sealed when the fuel assembly goes into the reactor become unsealed. That provides a small but a measurable pathway for radioactive materials to be released into the water of the spent fuel pool, hence the radioactive waste treatment systems that are built into that storage material.

COMMISSIONER REEVE: Excuse me. Did you pens?

MR. STEWART-SMITH: Pins.

COMMISSIONER REEVE: Pins.

MR. STEWART-SMITH: They're called pins. Each fuel assembly contains 144 pins that are about a centimeter in diameter and about 12 feet long, making up a fuel assembly. held together with brackets. But for a commercial nuclear

reactor, the need to maximize surface area to transfer the heat from the fuel to the water surrounding it means you need a lot of small pins rather than one large fuel rod. You'll often hear people talk about nuclear fuel rods. Well, the actual fuel assemblies for a commercial reactor are a 12 by 12 array of about one-centimeter diameter zircon tubes -- excuse me, zirconium alloy tubes filled with ceramic uranium fuel.

COMMISSIONER REEVE: Okay, so there -- you said some percentage of them -- of those -- are those the little tubes that actually --

MR. STEWART-SMITH: The tubes. Correct.

COMMISSIONER REEVE: Some percentage leak or --

MR. STEWART-SMITH: One or something less than one percent. They're sealed at each end. They're -- they're spring loaded at each end to keep the fuel pellets themselves held together and held in place, but in fact the seals at the ends of some small percentage of them become unsealed because of -- because of the conditions inherent in the core of a commercial reactor.

COMMISSIONER REEVE: Now, if that happens, what -- what is it that escapes? Is it actual physically the fuel or is it radiation or what --

MR. STEWART-SMITH: It's not the pellets themselves. And certainly there's a great deal of radiation that can

escape from the fuel pins, radiation being either high energy photons or particulate alpha particles, beta particles, different kinds of radiation. Some of that can escape from the fuel assemblies themselves.

What I'm talking about is a small amount of fission products. These are the -- usually radioactive isotopes left over from an individual atom or, in this case, countless individual atoms of uranium undergoing nuclear fission, becoming two smaller atoms. Some of those are gaseous in nature: Isotopes of krypton and xenon. Many of them -- most of them are not, but in any case, once the seal in the end of one of those spent fuel pools begins to leak, the annular space around -- between the zirconium tubing and the fuel pellets themselves can become filled with water, become contaminated, and a small amount of it can leak out through the leak in the seal at the end of the tube.

COMMISSIONER REEVE: Now, during this act that you described -- the current storage is kind of an active system in terms of the water being filtered and whatnot. Is there a system that actually is able to remove that from the water --

MR. STEWART-SMITH: Yes.

COMMISSIONER REEVE: -- as it circulates?

MR. STEWART-SMITH: Yes. There are radioactive waste treatment systems that remove the contamination that is

dissolved in the water; also remove the excess heat from that water and transfer it to another system, another industrial heat removal system (indiscernible) in the plant.

So those isotopes can be removed. There are, however, as I mentioned, some small amount of those isotopes that are gaseous in nature, and once they're released into that cooling water, the spent fuel pool may become airborne in the gaseous space above the spent fuel pool itself.

So there is a pathway, however, vanishingly small it might be. During normal storage of spent fuel for a small amount of radioactive material to be released into the cooling water and into the air surrounding the spent fuel pool all of which is tightly regulated under federal and state rules.

CHAIR EDEN: Excuse me, but that creates -- taking the radioactivity out of the water in the pool then creates another repository of --

MR. STEWART-SMITH: A more --

CHAIR EDEN: -- contamination.

MR. STEWART-SMITH: A more concentrated low-level radioactive waste which is in turn disposed of at our regional commercial low-level radioactive waste site.

CHAIR EDEN: So it does ultimately become low level through that -- through the systems that --

MR. STEWART-SMITH: Correct.

CHAIR EDEN: -- pull it out of the water?

MR. STEWART-SMITH: Correct.

CHAIR EDEN: In the most simple terms.

MR. STEWART-SMITH: The spent fuel itself is known as high-level radiation.

CHAIR EDEN: Right.

MR. STEWART-SMITH: But any resulting contamination or treatment system that works with the cooling water, any radioactive material resulting from that is -- is low level.

CHAIR EDEN: Thanks.

MR. STEWART-SMITH: As I -- as I mentioned there are small amounts, however vanishingly small, of radioactive material released from the spent fuel pool. In contrast, a -- a dry spent fuel storage system, the fuel has been -- has been vacuum dried and sealed inside a stainless steel container known -- you'll see references to it in some of the material Maggie has supplied you -- known as a basket. For the life of me I don't know why they would could something a basket. But if you see that term, that's what they're talking about.

The walls are about three-quarters of an inch thick stainless steel; there's a shielding and a structural lid that are -- that are more massive yet. And these are welded on so that the spent fuel becomes sealed inside this stainless steel cylinder known as a basket, and the

atmosphere around it, rather than being atmosphere as is around us, is replaced with an atmosphere of helium. The reason for that is that helium is a very good heat transfer gas, unlike nitrogen which is the bulk of the air around us.

So the dry spent fuel storage system is sealed, and even if the spent fuel pool was remarkable effective at -- at isolating radioactive materials from the environment, the dry spent fuel storage system theoretically, at least, is probably more effective yet, because of the nature of it being a dry storage medium and being welded shut.

In addition, under severe accident conditions, because the dry storage casks are sealed and massive, they should be able to withstand even more external forces, be it earthquake, be it some kind of intentional destructive force. The dry spent fuel storage system is probably more robust yet than the spent fuel pool that is in use at Trojan.

Portland General Electric, let me briefly explain what they have proposed. Let me preface that by saying that this system has been -- has been reviewed by the Nuclear Regulatory Commission, has been reviewed by the technical staff at the Oregon Office of Energy, approved by Oregon's Energy Facility Siting Council through a publicly accessible process.

The applicant in their tax credit application, I

believe, claimed 36 storage baskets to use within the concrete casks to store spent fuel. My understanding is their -- their current plans are to build 34. They -- they needed to leave themselves a little bit of flexibility earlier on in the process, and the first number, some years ago, is 36, but I believe there will be 34 double sealed sealed canisters that serve a rather unique purpose in the American nuclear industry: They are proposed to be both storage baskets and transport baskets. The only difference will be the shielding container that the basket is put into. It'll be stored in these concrete casks on site until the material is taken possession of by the U.S. Department of Energy at which time the transfer system that the company has built on site will be used to transfer the baskets in a shielded condition from the storage cask into a transport cask that will be loaded onto a rail car -- PGE being fortunate to have a rail line running through the middle of their plant site. They have easy access to rail. -- and shipped to wherever the final spent nuclear fuel disposal site will be for the country.

The baskets are about 15 feet tall, about five and a half feet in diameter. The outside of the basket is made of stainless steel, as I mentioned, and the internal structures inside the cylinder are made of high carbon steel, coated with a coating to prevent corrosion.

Each basket can store up to 24 spent fuel assemblies. That's the assemblies of 144 fuel pins each. And after the basket is loaded with the fuel assemblies, and all that loading happens in the spent fuel pool itself, by the way, so that the spent fuel can never be unshielded. It's much too radioactive to ever be in an unshielded condition. So the loading of the basket happens in the spent fuel pool. A shield lid and a structural lid are welded in place.

The applicant has also built a fuel transfer station and transfer cask assemblies. If they are going to decommission the spent fuel pool, which is their intention, once the independent spent fuel storage facility is finished, they will decommission the spent fuel pool. They have to have the ability in the unforeseen chance that there is a leak of one of those baskets to be able to -- or damage to one of the shield containers -- to be able to transfer that basket to an interim shield and then finally into a new shield. So that the transfer station and the transfer cask assemblies are something that the regulatory agencies have insisted beyond site if the spent fuel pool will no longer be there, because it would serve similar purposes.

The transfer cask and the -- and the transfer station will also be used when it comes time to ship the fuel off site, transferring these baskets into a shipping cask.

When the basket is removed from the transfer cask,

it's placed inside the dry spent fuel storage, the massive structure that I described before, the concrete cask, which is seventeen and a half feet tall and eleven feet in diameter. The cask is lined with carbon steel, and the walls are 29 inches thick to provide the massive shielding necessary to contain the spent fuel.

The casks will have their own temperature monitoring systems because the easiest way to determine whether or not all is well with this kind of a system is whether or not the temperature is going up. If the temperature goes up, that's some indication that the provision for natural convective cooling is somehow been interfered with, whether it's debris of some kind blowing into the vents at the bottom of the storage cask, preventing air from moving up the channels and out the top, or whatever it may be; that possibility is monitored for.

When loaded, these casks weight about 145 tons. They are -- there's an example of a cask over here, and you'll see on one of the examples a -- I believe the one in the middle has an air pallet on the bottom of it. An air pallet is essentially an inflatable heavy rubber circle open at the bottom; it's pressurized and then allows the cask to be repositioned floating on a cushion of air. Strap it to a -- to a truck, if you will, and move it around the site wherever they need it with the pressurized air pallets

inflated. It really is pretty amazing to see 100 pounds per square inch move 145 tons, but it works.

Then the concrete casks are placed on the -- on the storage pad, 170 feet by 105 feet, for its long-term storage until the U.S. Government is prepared to take it.

That's pretty much my explanation and presentation on the site. And at this point, I would be happy to answer any questions the Commission would have.

CHAIR EDEN: Thank you. Questions or comments from the Commission? Commissioner Van Vliet.

COMMISSIONER VAN VLIET: In the very last statement, you said, when the U.S. Government was prepared to take it.

MR. STEWART-SMITH: Correct.

COMMISSIONER VAN VLIET: Is it -- have they had a site really ready to go to accept these now at all in the future?

MR. STEWART-SMITH: No.

COMMISSIONER VAN VLIET: They do not?

MR. STEWART-SMITH: No.

COMMISSIONER VAN VLIET: The Nevada thing still is up in the air?

MR. STEWART-SMITH: It is -- the -- the U.S. Department of Energy is preparing an acceptance document for the President's signature. I don't believe that it's actually been signed yet, but the U.S. Department of Energy

has made it clear they feel there is no fatal flaw with the site. But the U.S. Nuclear Regulatory Commission must license this site, and site licensing is -- is some years off yet. I think an optimistic estimate of when that site might be available will be sometime after 2012, 2014.

COMMISSIONER VAN VLIET: So to use the current Trojan site, what you have to do is develop a series of these to store for a long period of time with guarded --

MR. STEWART-SMITH: Right.

COMMISSIONER VAN VLIET: -- fence around it and security and everything?

MR. STEWART-SMITH: Yes. That is PGE's plan. They could have left the spent fuel in the spent fuel pool. That's a perfectly adequate long-term storage system, but because of its active components, it -- it requires additional staff. It is a more detailed and expensive site to maintain over time, and, as I mentioned the dry spent fuel storage facility is more massive and is sort of inherently passively safe.

COMMISSIONER VAN VLIET: The legislature in this last session did not do anything, right, on this issue?

MR. STEWART-SMITH: To my knowledge there were -- other than -- other than the bill that was in to allow PGE to continue to recover a portion of its investment from the decommissioned plant, this session, I believe there were no

bills affecting storage of spent fuel on site.

Current state law requires that if spent fuel is stored on site, it must be stored under the auspices of both a license issued but a Nuclear Regulatory Commission and site certified issued by the Oregon Energy Facility Siting Council, (indiscernible), and we'll be maintaining those in the future.

COMMISSIONER VAN VLIET: And when the people of the State of Oregon voted to shut Trojan down, was there any provision in that at all as to the responsibility for the cost of the eventual decommissioning?

MR. STEWART-SMITH: Well, while there were three votes that I remember, the question of which was whether or not to shut down Trojan, none of them passed. And I don't believe any of them specifically dealt with the monetary issues. They were fairly simple measures that required the closure of the plant. They all were defeated by 60-40 percentages or better. So I don't -- I can't quote you chapter and verse on those initiatives --

COMMISSIONER VAN VLIET: Okay.

MR. STEWART-SMITH: -- but I do not believe that there were any financial --

COMMISSIONER VAN VLIET: That's my memory too.

MR. STEWART-SMITH: -- components to those. The company may be able to answer that more competently than I

can.

COMMISSIONER REEVE: What -- just one. You mentioned that there's a decommissioning plan that has been approved?

MR. STEWART-SMITH: Correct.

COMMISSIONER REEVE: That -- and that was approved by EFSC?

MR. STEWART-SMITH: Yes.

COMMISSIONER REEVE: Okay. Does the NRC review that, or is that really the State?

MR. STEWART-SMITH: The NRC reviewed and approved that plan as well, although under current NRC rules that have been promulgated after that approval, the Nuclear Regulatory Commission has changed their policy so that they no longer require a plan for NRC approval. They have a set of conditions that must be met by a utility with a closed nuclear reactor, and they will inspect against those conditions, but they no longer, for the next plant, for example, that closes will no longer require specific approval of the decommissioning of the plant, is my understanding.

COMMISSIONER REEVE: Okay, now, is the plant -- is the plan tied to the site certificate somehow?

MR. STEWART-SMITH: Yes. The plan -- the plan recognizes the existence of both state requirements and federal requirements (indiscernible). Most of our

requirements for the Trojan plant are in administrative rules. The site certificate itself is a one-page document signed by Governor McCall in 1971 and had no conditions. But it did require that the company comply with all future rules of the (indiscernible).

COMMISSIONER REEVE: Okay. So this decommissioning plan, does it require this dry storage?

MR. STEWART-SMITH: The decommissioning plan, as put together by the company, said they were going to do that, and the company has held essentially to what they said they were going to do. While there is no regulatory requirement for a dry spent fuel storage facility, either at the state or the federal level, other than tying the company to the commitments they made, the Nuclear Regulatory Commission has made it very clear that their preference for a closed reactor is dry interim storage of spent fuel, rather than an active spent fuel pool storage. They have not made that a mandatory requirement but they've made it clear that that's their strong preference.

COMMISSIONER REEVE: Okay, but in terms of the need for the company to meet its obligations to the Office of Energy, does PGE have to move forward and construct this dry storage facility?

MR. STEWART-SMITH: They do today because they made the commitment to do it. And we will hold them to their

commitment. Save for that, the Energy Facility Siting Council has no requirement for dry spent fuel storage per se.

COMMISSIONER REEVE: Per se, but if they were -- obviously they could come in and, with a proposal for a modification or amendment or some other type of storage, you'd have to review it --

MR. STEWART-SMITH: Correct.

COMMISSIONER REEVE: -- but as it stands today, they've committed, and it's an enforceable commitment?

MR. STEWART-SMITH: Correct.

COMMISSIONER REEVE: Okay. And the criteria under which that plan was approved, I take it they must be -- a number of criteria, a number of factors, public interest, health and safety, all those sorts of things, including water and air pollution?

MR. STEWART-SMITH: Correct.

COMMISSIONER REEVE: But not solely limited to water and air pollution?

MR. STEWART-SMITH: Correct. And those are contained in Condition 26 or OAR Chapter 345, rules of the Siting Council.

COMMISSIONER REEVE: Okay.

MR. STEWART-SMITH: The Siting Council promulgated criteria by which a decommissioning plan would be reviewed

and approved. Then the company submitted the decommissioning plan; that review was done; staff wrote a review of the plan and a recommendation to Council, and then Council did approve the decommissioning plan. By rule (indiscernible).

COMMISSIONER REEVE: Thanks.

CHAIR EDEN: Do we have any idea, or is appropriate to ask at this point, what the relative cost of the two systems is? Given -- given a finite date which I realize doesn't exist for removal -- final removal of the spent fuel?

MR. STEWART-SMITH: The company's decommissioning plan does keep track of both costs of decommissioning and ongoing operation and maintenance costs of both the plant and the independent spent fuel storage installation. And it -- the annual costs of maintaining the spent fuel pool are in that -- in that cost matrix is pegged, I believe, at about $10.4 million a year. The cost of maintaining the independent spent fuel storage installation is pegged at about $3.6 million a year. So while there's a higher initial cost, there is some point at which the costs are even and -- and/or, if stored on site long enough, the cost of storage in the spent fuel pool would have been more expensive.

CHAIR EDEN: And we as a State have no control move

when --

MR. STEWART-SMITH: No.

CHAIR EDEN: -- the federal facility is going to be ready?

MR. STEWART-SMITH: We do not. PGE has estimated that the last of their spent fuel will be off site in year 2018. Given U.S. Department of Energy record to meeting their deadlines, that may be optimistic in itself. It seems (indiscernible).

COMMISSIONER VAN VLIET: At the time that this fuel is safely stored, the value of that property now becomes both useable as real estate, and has it got any other projected uses at this current time?

MR. STEWART-SMITH: There are certainly possible uses for the site. It is currently a site served with a -- an active water right. It's a site with a switchyard and a 500 kilovolt power line to it. It has natural gas service on Highway 30 right outside the front gate of the plant. So it's a site that is situated both geographically and electrically, being near the major load centers of the state as an advantageous site for a power plant.

The company has considered putting in natural gas combustion turbines on that site. They have not made the decision yet to do that, but I believe it's still an option they are holding open. It is a good site for a power plant.

And they certainly -- given the expected load growth over the next 20 years, in order to maintain an healthy electrical transmission system, they would be well served by having electrical resources on the west side of the Cascades rather than the most on the east side of the Cascades with a line -- long -- very long transmission lines.

So, it's very possible that that site could be used in the future as a power plant again. The company has also offered to the Department of -- the State Department of Parks to delegate on the order of 500 acres of the 640 or so acre site as a state park which they currently maintain much of it as a state park and wildlife refuge. But they are going to be moving most of their equipment off the site, then they'll looking for somebody else to take over that responsibility.

So there are possible multiple uses for the site. But for the area inside the fence, it may be in the future redeveloped into a power plant, probably fueled by natural gas.

COMMISSIONER VAN VLIET: That's interesting, because in the '90's -- late '80's and '90's all we heard from the legislature was the abundance of electric power in the Pacific Northwest power grid, and all of a sudden now we're hearing that there's a substantial shortage, which means the advocates who were trying to shut down all the nuclear

plants in the world at the same time you're trying to get rid of dams and the hydroelectric part didn't quite have the scenario right as to what our needs were actually going to be as the population increased.

So now we're faced with the fact that we not only have to store this material, we no longer have the nuclear plant to provide the power which doesn't give us an option to do anything away with dams, but we'll have to bring additional power plants back on line.

MR. STEWART-SMITH: That is correct. There were power surpluses in the Pacific Northwest in the 1980's, but they were fairly well gone by 1992. And given the anticipated restructuring of the electric industry, new power plants will probably come on line as closely as possible to match load growth rather than building large -- very, very large, like Trojan was an 1130 megawatt electric generating station -- that's twice as big -- over twice as big as any power plant left in the state. Most of the plants that are being proposed now are either in the 260 megawatt range or the 500 megawatt range. And they'll come on line, you know, in a fashion that the market dictates they can build the plant and begin with a profit and not any time before that.

CHAIR EDEN: Other questions or comments? Are there any questions of the company representatives?

COMMISSIONER McMAHAN: Madam Chair --

MS. VANDEHEY: Madam Chair --

CHAIR EDEN: Maggie has a few more comments --

COMMISSIONER McMAHAN: Oh, sorry.

MS. VANDEHEY: Madam Chair -- Madam Chair, I would like to talk about the scope of the preliminary application review. When the Department reviews applications, whether it be preliminary or final to determine if a facility meets eligibility requirements (indiscernible), first we determine the purpose of the facility. Did DEQ or EPA require this facility? Or is the facility's only purpose for pollution control? If the answer's no to both of these questions, the facility does not meet (indiscernible).

Secondly, we determine the purpose of the installation is to prevent, control or reduce a substantial quantity of pollution. If it does not, the facility does not meet the eligibility criteria.

Thirdly, we determine if the pollution control is accomplished by one of the methods used listed in the statute. If the pollution control is not accomplished by one of those methods, the facility does not meet the eligibility criteria.

These three steps properly describe how the staff will review PGE's preliminary application. Personally, (indiscernible) purpose (indiscernible).

Portland General Electric Company submitted their

preliminary application a few days before the rules implementing 1995's legislation became effective. The legislation states that the Commission's approval of the preliminary application's prima facie evidence that the facility meets the facility eligibility criteria. The legislation also states that preliminary certification does not ensure that the facility will be (indiscernible).

Can staff rely upon the statute alone when there are no (indiscernible) rules. The answer to this question is an important one, because the findings (indiscernible) preliminary application (indiscernible). If staff were to review the preliminary application based upon the statutes alone, the staff would report possible benefits (indiscernible) PGE as a result of installing (indiscernible) facility. Staff would answer questions such as is there a reduced risk of liability to (indiscernible)? Does the facility provide increased health and safety benefits? Are fees, operations and maintenance costs or insurance costs reduced? Is there a reduction in on-site staff, inspections, reporting requirements, and monitoring requirements? Does the site's unrestricted use designation provide any benefits to the applicant? And finally, are these benefits sufficient enough to become the overriding purpose of the facility?

If staffs prepares the review, considering the rules

in effect at the time that PGE submitted their application, even (indiscernible) those rules did not include a provision for preliminary application. Staff would report on financial benefits that may accrue to the applicant in the final application phase.

Before I continue with the preliminary application, I would like to talk a little bit about what would be happening (indiscernible) final application when the Commission grants a preliminary certification. The final application would be -- would be received under the 1998 rules, the rules that came into effect just a few days before PGE filed for preliminary application. The rule states that if an applicant builds a facility as planned and approved under the preliminary certification, then the facility meets the definition of a pollution control facility --

COMMISSIONER McMAHAN: Say that again, please.

MS. VANDEHEY: If the applicant builds the facility as planned and approved under the preliminary application, then the facility meets the definition of a pollution control facility. All that remains to be -- to be performed during the final review is to verify that it was built according to plan and then to the permanent facility (indiscernible), and percentage of the cost allocable to pollution control.

Now, I'll continue with the preliminary application process. Staff then determines that the amount of pollution control prevented or eliminated is substantial. Does the installation that PGE claimed on their application control or prevent a substantial quantity of pollution above what (indiscernible) rule currently provides. The staff would ask these questions: Can all systems (indiscernible) determine if they meet eligible (indiscernible) criteria (indiscernible), transfer station, the concrete pads auxiliary systems.

If the facility passes the purpose of the of threshold eligibility criteria, the staff will then focus on how the pollution control is accomplished. PGE claims the facility as an air, water, and hazardous waste facility, (indiscernible) focus on the water quality portion (indiscernible). Any facility that qualifies as a water pollution control facility if -- if the pollution control is accomplished by the disposal or elimination of industrial waste and was accomplished by the use of (indiscernible) industrial waste. Tax credit statutes refer to water quality, control loss and (indiscernible). The terms of disposal and elimination are not defined under the water pollution control laws. Industrial waste is defined, and it includes radioactive waste. Treatment (indiscernible) is also defined. It includes facilities used to treat,

stabilize or hold waste.

In their review, staff will address questions such as: Does this interim storage constitute disposal or (indiscernible) of industrial waste? I also would ask how does PGE's facility compare to other facilities granted certification under the same eligibility criteria? It'll ask how does PGE's facility compare to other facilities (indiscernible) waste, (indiscernible) waste and dispose of that properly. Are their risks similar?

During the preliminary application review, staff will determine if the facility is a replacement facility. Legislative history of Senate Bill 112 shows that the purpose of a replacement facility were always to eliminate eligibility for facilities that have already received tax credits.

The purpose of the minimum is make sure that the tax credit (indiscernible) and was not (indiscernible). The definition of a replacement facility is not clearly defined, and it's not easy to determine whether a facility is a replacement facility. Staff researched the location of the planned facility, the source of control, the process and (indiscernible) control. These may help us determine if the planned facility (indiscernible).

The Commission certified seven pollution control facilities at the Trojan (indiscernible); it was certified

between 1983 and 1984 for over $40 million (indiscernible) costs. None of the previously certified facilities were (indiscernible). They were associated with painting the building, cooling tower, radioactive emissions (indiscernible), and a dechlorination facility. What (indiscernible).

Does the facility plan to have PGE on its preliminary application and replace the pollution control facilities previously certified to a fully functioning nuclear power plant? The Oregon legislature has not placed a limit on the amount or the number of tax credits for any one applicant or any one site may receive under its program.

Staff will address all of these questions that I've raised today in their review report, and I'll bring that before you again in the spring. PGE representatives will be here to answer any questions at the time, and Dave and I will be glad to answer any questions you may have.

CHAIR EDEN: Thank you. At the risk of jumping the gun, is it going back to Dave again --

MS. VANDEHEY: It's going back to you.

CHAIR EDEN: Okay. Does the Commission have any other questions or comments of staff or the company representatives who are here?

COMMISSIONER VAN VLIET: I think the most interesting question about this whole thing is who has the ultimate

responsibility at this time for controlling the pollution that has been generated by the plant. Company decision or is does the public still have a large interest in the responsibility of it? How much of it is really entailed in trying to make the site useful again? How much of it has a bearing on future mergers? All of these have some interesting aspects that I think will be interesting to have the company people talk to us about.

Whether the Committee wants to entertain that today, it seems to me we have to make a decision right now apparently on the preliminary, is that right?

COMMISSIONER McMAHAN: No.

MS. VANDEHEY: No.

COMMISSIONER VAN VLIET: Don't have to? Okay.

MS. VANDEHEY: No, this is a briefing --

COMMISSIONER McMAHAN: This is a work session.

MS. VANDEHEY: -- for you and the decision on the preliminary will be in the spring, and then subsequently when the facility's completed, you would have the -- it would come to you as an action for a final approval.

CHAIR EDEN: I perceive this work session as an opportunity for us to be introduced to some of the issues that we're going to face in the spring. But we don't have to do anything today.

Any other questions?

COMMISSIONER REEVE: Can I ask a procedural question? Just because you went over it fairly quickly, or at least too quickly for my mind, in terms of when the application was received and when these rules became effective? Is there a question that needs to be resolved, either today or in the spring, about whether we're operating under old rules or new rules?

MS. VANDEHEY: We -- we will address that before we bring the fin -- the preliminary application to you. We'll address that in our report to you.

COMMISSIONER REEVE: Okay. Do you know -- has staff taken a position, different than the applicant as far as that goes?

MS. VANDEHEY: We have not. We have not taken a position until we know all the details.

COMMISSIONER REEVE: Okay, has the applicant sort of said we're operating under new or old or do we know?

MS. VANDEHEY: We know that they submitted -- submitted the preliminary application under the pre-1998 rules.

COMMISSIONER REEVE: Okay.

MS. VANDEHEY: They're looking at the definition of sole purpose under the rules that were at the time, even though those rules would not -- did not address preliminary, (indiscernible) certain (indiscernible).

COMMISSIONER REEVE: Would that -- maybe I'm still a little slow on it --

MS. VANDEHEY: Okay, they --

COMMISSIONER REEVE: Would that make a difference in terms of procedurally how do we -- do we get to a preliminary first and then go to final, or are we -- is the applicant and the DEQ in agreement that this process of coming first to a preliminary --

MS. VANDEHEY: We're still exploring that procedurally.

MR. KNUDSEN: I think I may be able to answer some of those questions, though. The -- the rules that became effective after the applicant filed allow for the applicant to elect to go under the new rules. Right?

MS. VANDEHEY: That's correct.

MR. KNUDSEN: And they haven't done so, so that part has been answered. But -- at least today. But that doesn't necessarily or probably likely control the procedures that we're talking about, but it may affect some of the criteria or standards by which you evaluate the application, and that's what we're looking into.

COMMISSIONER REEVE: Okay.

MS. VANDEHEY: Thank you.

COMMISSIONER McMAHAN: And will that include a determination as to whether there's a substantial difference

between the definition of sole purpose under the old rules and the new rules?

MR. KNUDSEN: Yes.

CHAIR EDEN: Anything else from the Commission?

Or staff?

I think we're finished then with the work session.

MS. VANDEHEY: Thank you very much.

CHAIR EDEN: Thank you. Appreciate you explaining that all to us. And I look forward to hearing more.

(Requested portion concluded)

DECLARATION OF TRANSCRIBER

I, Patricia Morgan, of Morgan Verbatim, Inc., hereby certify that:

(A) I am an Official Transcriber for State of Oregon, and an Official Transcriber for the United States Court Administrator;

(B) that I personally transcribed the electronic recording of the proceedings had at the time and place hereinbefore set forth;

(C) that the foregoing pages, consisting of pages 1 through 39, represent an accurate and complete transcription of the entire record of the proceedings, as requested, to the best of my belief and ability.

WITNESS my hand at Oregon City, Oregon this 20th day of January, 2000.

Patricia Morgan
Official Transcriber

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

In re:

ON-SITE SEPTIC SYSTEM RULES

TRANSCRIPT OF PROCEEDINGS

November 19, 1999

BEFORE:

COMMISSIONERS

MELINDA EDEN, Chair
TONY VAN VLIET
LINDA McMAHAN
MARK REEVE

DIRECTOR:

LANGSTON MARSH

LARRY KNUDSEN
DEQ Counsel

Transcribed from electronic recording by **Morgan Verbatim, Inc.**

Patricia Morgan
16360 S. Neibur Road
Oregon City, OR 97045

Official Transcriber
(503) 631-8885

INDEX

PROCEEDINGS	Page
Presentation by Mr. Edelman	2
Statement and stipulation by Mr. Boles	3
Presentation by Stephanie Hallock	7
Questions by Commission	13

CHAIR EDEN: Are there any --

THE CLERK: Ray -- Larry's here.

CHAIR EDEN: Mr. Edelman.

MR. EDELMAN: Larry Edelman, Department of Justice. The issue that you're going to take up next, dealing with the on-site rules, has actually been on a fast track because of some litigation that we have been involved in. And in discussions with the plaintiff in that litigation yesterday and this morning, they have requested that you open -- reopen the public comment period for a short time to allow them to introduce some additional material into the public record for the rulemaking. And maybe we ought to take care of that now before we break because certainly counsel for the plaintiff would like to leave.

His client would like him to leave as well.

So we would pro -- what the Department would propose then is that you consider opening up the public record until, I think, December 10th is the date that we agreed upon, and then that would be the close of the reopened public comment period. December 20th, as I understand it, you have a telephone conference call in which you're going to be considering tax credit issues, and you might then, on December 20th, take up final action on the proposed rule that you're going to deliberate today.

CHAIR EDEN: Thank you. Is there --

COMMISSIONER McMAHAN: Just one question. Do you want on the record prior to that comment, do you want (indiscernible)?

MR. EDELMAN: I don't --

MR. KNUDSEN: I don't believe we need to have the staff presentation to -- for the Commission to make a decision on this item, although I think we probably should be quite clear in the record that we're talking only about submitting additional written material, correct?

UNIDENTIFIED: Yes.

MR. KNUDSEN: And that we also -- that we have a stipulation from the plaintiff in the -- in the case that they won't object to that or ask the Court to do anything about that delay.

MR. EDELMAN: Right, so I think Plaintiff's counsel should actually come up and make that stipulation on the record.

MR. KNUDSEN: Just because it's a little bit of an unusual process. Ordinarily, we would take this to the Court first.

CHAIR EDEN: All right.

MR. BOLES: Good morning. I'll be brief. Carson Boles for Easy Drain. We do stipulate to the extension of time for public comment. This is a court-imposed deadline that (indiscernible) rule. There were comments that we

believe should have been on the record. In discussion with Mr. Edelman, we agreed that the comment period can be opened up again for both us and the party which is involved in this case, (indiscernible) submit more comments.

And we strongly urge the Department to consider (indiscernible). As it stands now our company's probably will not be able to --

MR. KNUDSEN: Counsel, we don't want to get into those kinds of comments until they've made a decision on the record.

MR. BOLES: Correct, (indiscernible).

MR. KNUDSEN: Thank you.

CHAIR EDEN: And does your stipulation, Counsel, is it limited only to additional comments? That wasn't clear in what you said.

MR. BOLES: I don't know if it's (indiscernible). We're hoping not. We would prefer to (indiscernible) comment, but we will stipulate --

MR. KNUDSEN: But you understand that, at least at present, that motion is not in front of the Commission. It's just written --

MR. BOLES: I don't know. Is there any motion in front of the Commission?

MR. KNUDSEN: Well --

CHAIR EDEN: We wanted your stipulation first.

MR. KNUDSEN: -- they're considering.

MR. BOLES: Oh. I'd stipulate to the reasonable -- to whatever the person thinks is appropriate. We would like written (indiscernible).

MR. KNUDSEN: Okay.

MR. BOLES: Also, we also stipulate that we're going to have to submit a comment -- an order to the Judge to extend it, so it's actually in the judge's hands.

MR. KNUDSEN: All right. Thank you.

CHAIR EDEN: So is there a motion?

COMMISSIONER REEVE: I move -- I move that we extend the written comment period on this rule item until December 10th. Written.

MR. KNUDSEN: And that by doing so you recognize that you won't be able to take final action at today's meeting.

COMMISSIONER REEVE: Right.

MR. KNUDSEN: That probably should be in there as well. Thank you.

CHAIR EDEN: Are we committing in this motion also to take it up on December 20th?

MR. KNUDSEN: I think it's probably a good idea to do that, just so that we can have that clarity when -- when we present the motion to the Court.

CHAIR EDEN: Mr. Reeve, does your motion include --

COMMISSIONER REEVE: Amended or supplemented to

include that the Commission intends to hear -- make a decision on the rulemaking at their meeting on December 20th.

COMMISSIONER VAN VLIET: That's agreeable with a second on the motion.

CHAIR EDEN: Okay. There's a motion on the floor, I don't think I have to repeat it again. All those in favor signify by saying aye.

(Unanimous aye)

CHAIR EDEN: All those opposed.

With that done -- thank you very much. With that done, I would like to do the Director's and Commissioner's Reports now if we may, and then break for 20 minutes for lunch and take up Item --

MR. REEVE: G?

CHAIR EDEN: -- F. We're going to have staff presentation on Item F, but we have just committed to not taking any action on that today.

Is that acceptable, Director Lang, to get your report now?

* * *

CHAIR EDEN: All right, we're reconvening the session of the Environmental Quality Commission meeting, and we're at Item F.

MS. HALLOCK: Madam Chair, for the record, Stephanie

Hallock, Interim Administrator of the On-site Program, and with me today is Dennis Illingworth, Technical Manager, and Sherman Olson, is one of our senior staff members. I'm going to give you some background on Agenda Item F, although I understand that you're not taking any action on this; that action's been deferred until December 20th. We're obviously here to clarify and answer any questions you have today.

I do apologize for getting the staff support to you on such short notice, but as has been mentioned earlier, we were under a court order; we had very tight time lines to get rules out for public notice and still get things to you in a timely manner.

But I will give you a little bit of a background today, since you didn't have very much time to review it yourselves.

CHAIR EDEN: Than you.

MS. HALLOCK: The typical single-family residence, not on a sewer, that uses an on-site septic system, a standard on-site septic system includes a stone-filled trench. That's generally the standard in Oregon for -- which disposes -- treats and disposes the waste into the soil.

Any alternatives to the stone trench must be approved by the department director for use in Oregon. Prior to the rule before you today, approval of new on-site technologies

has been determined by comparison to the so-called standard stone trench using best professional judgment by DEQ staff, assisted by a review and recommendation from a technical review committee which consists of members from the industry and other technical experts. And that technical review committee is established by rule for this purpose. The director then issues the actual letters of approval.

In the case-- the court case, the company that -- the litigation was brought by a company called Easy Drain, and there is another product of interest here from a company called Infiltrator. And both of those companies had submitted products for review by DEQ drain field media, a new type of drain field media, and the DEQ evaluated those products against the standard stone trench as to whether or not they were equivalent in protecting human health and the environment, and both of those products were approved for use in Oregon on a foot-for-foot basis with the stone trench. But the configuration of each of the products is different.

The court case, as I said, was brought by Easy Drain who thought that their product during the process had not been treated fairly in this approval process, and consequently they are at a competitive disadvantage with Infiltrator as a result because of the product configuration in relation to sizing of the trench.

For some time we at the Department, and others as well, have known that the current rule essentially relying on best professional judgment does not provide sufficient criteria for approval of these newer innovative technologies, materials, design -- or designs on the on-site program. And we've intended to adopt -- for some time to adopt rules clarifying these criteria. We have not had the staff to do so, but we were certainly hoping to do that early in the year 2000, and the court case has simply moved up the time table for doing that.

And as you can imagine, the best professional judgment aspect of this rule has been extremely frustrating, both for the staff and for the companies who are trying to get their products approved, and it has raised, I believe, a real question of whether or not a state regulatory agency ought to even be in the business of getting this kind of product approval, but that certainly is a subject for another forum and another time.

Since we are today in the business of giving these approvals, our goal with this rule is to adopt a rule which will make that process go as smoothly and objectively as possible in the future, and will ensure that homeowners get a quality product, and that human health and the environment are protected.

The rule -- if the rule's adopted, it must live

beyond the specifics of the Infiltrator and the Easy Drain approvals and the resolution of the court case. We're asking that the Commission not only consider the concerns of Easy Drain and Infiltrator in evaluating the merits of the rule, but also to think about how well the rule will work when applied to other companies seeking approval from DEQ of new technologies in the future. We think that the rule will work.

The proposed rule offers two halves to approval of a new on-site technology. One is a prescriptive standard which spells out specifics for such things as trench length, depth of drain media in the trench, sidewall contact, et cetera. The second is a performance standard which includes either peer review, verifiable performance data under conditions comparable to Oregon or an actual performance evaluation completed within Oregon.

The applicant would propose and the Department would concur which approach would best fit the product. As stated in the rule, however, the Department hopes to make performance evaluation the preferred standard, although it is new to Oregon's on-site program. The current rules for residential on-site septic systems are primarily prescriptive.

Looking prospectively, those are the basic options for manufacturers of new on-site technologies seeking

approval in Oregon if the rule is adopted.

With regard to the court's direction to reevaluate alternative products which have applied for approval already, which is basically Easy Drain and Infiltrator, using the new standard, i.e., the rules that you're looking at today, three alternatives were considered. First of all, to simply review the products now against the rule when it is adopted. It is possible that one or both of the products could not comply with either the new prescriptive or the new performance standard, and their approvals would be repealed.

We do not recommend this option as we have tried to craft a solution which does not result in installers being stuck with volumes of unsold product, and which allows both companies time to come into compliance with the new rules while being protective of homeowners and the environment.

The second alternative considered is to give the companies until July 1st of year 2000 to either comply with the prescriptive standards or be in the process of conducting a performance evaluation. If the performance evaluation approach is chosen to allow the companies to market their products at their current DEQ-approved sizing while the evaluation is in process. After the evaluation is over, the product approval would be considered in relation to the evaluation results.

And the third alternative which the Department is

recommending is to give the companies until July 1st, 2000 to either comply with the prescriptive standard or be in the process of conducting a performance evaluation, and if a performance evaluation is in process, allow the companies to market their products with proposed manufacturer sizing as opposed to the current DEQ-approved sizing, if a warranty and bond or other financial assurance are provided to assure replacement or repair of defective systems.

The Department is recommending Alternative 3. We believe this alternative thus levels the playing field, if you will, between Easy Drain and Infiltrator in marketing their products while providing protection of public health and the environment.

And in closing, I would like to say that the Department has made a sincere effort to develop a rule that will facilitate future product approvals and is responsive to the Court's direction to revisit the approvals given to Easy Drain and Infiltrator products and which provides the companies with a level playing field.

The rule was developed in a very tight time frame, and if it were a perfect world, we would have liked more time. Even so, the proposed rule was reviewed and discussed at a joint meeting with the On-Site Rules Advisory Committee and the Technical Review Committee, and several changes were made to the rule as a result of comments received from the

advisory committees and the public.

And Dennis and Sherman will be happy to answer any questions.

CHAIR EDEN: Questions or comments from the Commission?

COMMISSIONER REEVE: (Indiscernible), I think in Attachment A to the staff report we have proposed rules that would effectively embody Alternative 3; is that right?

MS. HALLOCK: That's correct.

COMMISSIONER REEVE: Is Alternative 1 -- would Alternative 1 effectively be a subset of those rules, but it -- it would not have the part that deals with the length of -- the July date and the financial assurance, et cetera, but would still establish the prescriptive criteria?

MS. HALLOCK: Let me take a shot at that, Commissioner Reeve. Alternative 1 would mean that as soon as a decision was made, right now, today, as opposed to year 2000. The companies could bring forward whatever they wanted to bring forward for evaluation against the new rule. And that could be the same product that currently has an approval now, or it could be something of a different configuration, and that evaluation would be made right now, and our understanding -- Dennis can elaborate on this -- is it probably wouldn't be successful. Dennis, did I botch that up too bad?

MR. ILLINGWORTH: No, that's fine. Just one -- (indiscernible) a little bit more clarification, Commissioner. On Attachment A, page 27, about a third of the way down where it says, "Amend OAR 340-71-0130(2)," that is Alternative 3. The rest of the language would remain the same. If you dumped Alternative 1 or 2, it would just replace this particular section. If you -- if you put those over here instead.

COMMISSIONER REEVE: Okay, then Alternative 3, the part that makes Alternative 3 distinct starts really on page 27 onto page 28?

MR. ILLINGWORTH: Right. Right. And Alternatives 1 and 2 are in Attachment J and K. And you would just replace this language where it says "amend 340-71-0130(2)" with one of those others.

COMMISSIONER REEVE: Okay. Because from my reading of the court decision, there's a clear direction to us to both reevaluate and evaluate the alternative systems using clear and objective standards. Is it the Department's view that all three of the alternatives would do that?

MR. ILLINGWORTH: Yes, it is.

COMMISSIONER REEVE: Okay, because the standards themselves don't -- let's set aside the process by which the evaluation or reevaluation occurs -- the standards themselves are identical between the three alternatives.

MR. ILLINGWORTH: Yes, they are.

COMMISSIONER REEVE: Okay. Now, one thing I wanted to ask you, Mr. Illingworth, is in the court -- the judgment, and this is Attachment H, the bottom of page 3 of that judgment, the Court says, "There are areas in which the Agency must use its best professional judgment and expertise. One of these areas is in the setting of objective criteria used to evaluate the standard versus the alternative product, i.e., stone masking, the effective fill, (indiscernible) undisturbed sidewall, whether the top of the trench counts as important in filtrative capacity, the effect of a biomat on the bottom and sides."

Do those -- I had a hard time going from those criteria to the -- the proposed rules in terms of how those criteria fit into the proposed rules; that is, how -- how these alternatives would be evaluated as opposed to the standard of stone.

MR. ILLINGWORTH: I'll give it a shot.

COMMISSIONER REEVE: Okay.

MR. ILLINGWORTH: The prescriptive rule is where these would come into play.

COMMISSIONER REEVE: I figured that. Okay.

MR. ILLINGWORTH: Basically what we're trying to do in a prescriptive rule is say: You meet the same standard as the standard -- as a stone-filled trench; i.e., you have

undisturbed sidewall; you have the -- drain the whatever material it may be all the way to the top of where it should be. Not the top of the trench but the same depth as it would be otherwise in a stone trench -- in a stone-filled trench.

All of these -- stone masking is a more difficult thing to get to with the products that -- that don't necessarily have anything that relates to stone in them, but again, what we're doing in the prescriptive standard is we didn't have something there that wasn't -- that was stone in between the sidewall and that product you would have to put something in there that is comparable to the stone-filled trench. It's all under prescriptive.

Performance moves away from that. Performance says, "Let's see how your product works over a period of time in comparison to that stone trench." It may be that the filling of the sidewall with -- or, excuse me, the filling of the trench between the product and the sidewall with soil may or may not make the difference over a period of time. Let's try it and see. So it's a totally separate approach.

COMMISSIONER REEVE: Right. Is -- and I -- as I understood the prescriptive criteria in the proposed rule, is that what I see in the Attachment A, page 21, going on to 22 --

MS. HALLOCK: Yes.

COMMISSIONER REEVE: Okay.

CHAIR EDEN: I don't have a 22.

MR. OLSON: This is Sherman Olson with the on-site program, and it would be -- the prescriptive side would fall, beginning on page 21, and specifically for disposal trenches it would begin with Section 5.

COMMISSIONER REEVE: Right. Okay. So it's at Section 5. I don't see in there any -- any mention of biomat, and yet the Judge referred to biomat. Is that appropriately not part of our objective standards?

MR. OLSON: If I might --

MR. ILLINGWORTH: Would you like to take a shot at that?

MR. OLSON: Yes, I can do that.

The -- under the prescriptive standards, we put in -- Oregon uses the stone trench concept. We put in trenches that have a certain width; we place drain media within that that is level to the depth of the fill that the drain media is placed. And biomat is a byproduct of the use of that trench; as it is used, the trench often develops a biomat on the bottom, and over time the biomat becomes stronger and utilizes then more of a sidewall of the disposal trench.

The -- under the prescriptive side, when we're dealing with something that isn't drain media, something that is a packaged product that doesn't conform to the

dimensions of the trench, then the -- the issue of biomat is still going to be an issue that will pop up for those, but because under the prescriptive site we're going to be filling the voids rather than with soil, which we don't have a handle on how that fill is going to perform, we're going to fill it with drain media. If the product is only a foot wide, and we're using a two-foot trench, then that area between the product and the trench sidewall will be filled with drain media.

The biomat that forms will form the same as it does in the stone system. It'll still form on the bottom. It will still begin to form on the sidewalls. It's under the prescriptive side that we move away from those -- I'm sorry, the performance side that we move away from these issues of is stone masking an issue; is the biomat creation going to be different in one product than another? We move away from that, because under the performance side, the claim from the manufacturer is that they can put in so many feet of their product, and it will perform the same as so many feet of stone. Under the performance side, they will provide the data that shows that in fact they did that, using their construction techniques that may very well mean soil fill on the sides. It may mean some other factors, too, because we've only seen two proposals for substitution of drain media with other product and other configurations. We

have -- we know there are more out there, and they are going to be coming down the pike.

So in the -- under the performance side, because those factors -- those factors of biomat, of soil fill, of other factors that relate to how the product works compared to the stone trench, that will all be shown in the data that's provided that shows how they work.

Now, if they don't have that data, and right now we haven't seen sufficient data from any manufacturer that would suggest to us that they've run any kind of test to show how it performs, they would move into another proposed rule we have in there in the packet which is 340-071-0117, and there's a specific portion of that proposed rule that goes into performance testing protocol for disposal trenches.

In essence, it is the test being run in Oregon, and it would compare within a -- within a given system, it would be -- we contemplate there would be installed test cells; there would be stone trench and test cells that would be the alternative product, each fed the same quantity of waste water, and the net -- the test really is going to be does it perform the same, meaning, can it -- does it receive the waste water, does it handle the waste water, and does it pass the waste water out of the test cell, the same as the stone system.

Now, when we deal with the variability of trench length, we will work off of a fixed shortened trench length for the stone, and then, if the claim by the manufacturer is foot-for-foot, then the manufacturer's installation would also be the same length. If they say you can get by with a 40-percent reduction, their cell -- their should be 40 percent too. And the bottom line is, over the three-year test period, did they perform to the same level of receiving waste water within that one cell, and did the test cells all pass waste water out the other end at the same time.

COMMISSIONER REEVE: I personally have no -- I'm entirely in agreement, I think, with the overall policy of trying to encourage the performance, you know, (indiscernible) simply because with the data, we can get your tests done. I think we'd all be a lot more comfortable in terms of protecting human health and the environment, knowing better how these systems work, and how well they work, and whether, you know, the length can be reduced or not, or whether, you know, it should be increased, who knows.

The -- our struggle is -- as I'm sure you're well aware is getting from here to there, and it seems like there's a clear direction from the judge, if we can, to not only to lay out some objective criteria for a fairly prompt evaluation and reevaluation, and the prescriptive prong here

in the Section 5, I guess I'm better understanding it now if I understand that the alternative media would themselves be surrounded by rock or standard grading material.

MR. ILLINGWORTH: Rock, or standard grading material, or other grain media that may be equivalent to that.

COMMISSIONER REEVE: Okay.

MR. ILLINGWORTH: We don't have a specific -- we don't use specific terminology any longer that it has to be rock, it has to be -- it goes into -- it's a little bit broader than that to allow other products.

COMMISSIONER REEVE: One of the -- obviously, there are a number of negative comments to the proposed rules, and this was a very short rule making period which we've just extended a little bit, but it still won't be what it probably should have been to fully develop some of the technical issues. I notice a number of fairly critical comments. I don't notice that included with those comments are constructive proposals for amendments that would -- you know, essentially there are a lot of pot shots taken at what are being proposed without a lot of alternatives.

Frankly, during the rulemaking process, I like to see commenters who come in and say, "Well, we could do it a little better if we do it this way," and then you can have some back-and-forth. Has that gone on and I'm just not seeing it in the packets, or --?

MR. ILLINGWORTH: There were some constructive comments regarding the performance evaluation side.

COMMISSIONER REEVE: Okay.

MR. ILLINGWORTH: Relating to helping us with -- some of the language was too vague in some instances and too prescriptive in some instances. There were actually very good comments relating to that.

The -- the overall gist, I guess, of the comments were, as you noted, fairly negative, without a lot of substitute this language for that language, other than go back to the mathematical formula that we developed or somebody else uses where it would increase one product by X percent or it would decrease the other product by X percent, and then just go on and apply it from there.

CHAIR EDEN: Commissioner Van Vliet.

COMMISSIONER VAN VLIET: The whole intent is that we -- because we're dealing with smaller rock size and things like that, is to get at the heart of the creation of shorter drain fields over the old stone system mainly?

MR. ILLINGWORTH: No, that's not our intent at all, sir. The intent is to allow alternative products to be marketed that may -- that somebody may use in place of a stone trench for whatever particular reason: cost, ease of installation, difficult topography --

COMMISSIONER VAN VLIET: Well, I didn't mean it was

DEQ's objective; if I were the manufacturer, the objective is to be able to put in a drain field that will meet specifications that doesn't take as long or is more linear feet as a stone trench; is that correct?

MR. ILLINGWORTH: Generally, yes, but that doesn't -- I don't believe that they are after smaller lot sizes, either. That's not --

COMMISSIONER VAN VLIET: Well, I'd say that's coming on the horizon, right? We're working into the future where we're dealing --

MR. ILLINGWORTH: (indiscernible).

COMMISSIONER VAN VLIET: -- where we're dealing with land use and all of those kind of problems, and one of the things that's been plaguing us is you get down to the coast, and people want small lots, you're faced with either the sand filter problem where you got (indiscernible) but you don't have the drain field to put in there.

So now you come back to the performance part, and that sends off bells as to how you set that up from a scientific standpoint of making that a good test; you've got different types of soils which are addressed, and then you have different times of year as to whether the soil was saturated or not, since we have occasional areas that run into monsoon conditions, and we have also the fact that you have got surface vegetation that may make a difference, so

you're going to have to put probes and scientifically probe these as to the difference the drain fields are actually working over this three-year period. Is that correct? Is that accurate?

MR. ILLINGWORTH: We are trying to make it actually as simple -- in some regards, yes. We would not be going into very detailed probes. What we're looking at really overall is a failure analysis. When you put in test cell of a particular product next to a standard stone-filled trench, which one fails first? Really, that's what it gets down to. It's trying to be as simple as possible to limit the expense and time.

COMMISSIONER VAN VLIET: Now, you have three years in which to arrive at your data conclusions.

MR. ILLINGWORTH: Yes.

COMMISSIONER VAN VLIET: During that time, your proposal -- your third proposal is to provide some kind of bonding by the newer manufacturers that would cover any failed systems. Who takes on the responsibility of notifying -- let's say, one system fails, one of the new systems, who takes on the responsibility to officially notify the former homeowners that they have a failed system on their hands? Is that a DEQ responsibility or the responsibility of the manufacturer?

MR. ILLINGWORTH: I'm not sure if I follow you.

Generally if a system is failing, the homeowners notify us or the manufacturer. If it's truly failing out on the -- out on the ground.

MS. HALLOCK: Or, Mrs. Chair, it's common, whether we're running the program or the County's running the program, that someone will call. I mean, a homeowner will call or a neighbor will call or something and say "there's sewage on the ground or I don't think my neighbor's system works." I mean, that's -- that's typical -- or it's found and, as discussed in an earlier agenda item about getting some additional resources for compliance, and upon occasion we find them in inspections, although we certainly, with all the on-site systems in the state, don't do that on a routine basis.

COMMISSIONER VAN VLIET: At the time you're issuing this permit during this three-year period to a -- to an experimental system, do you plan to tell the people that they've got an experimental system?

MR. ILLINGWORTH: Definitely, yes. That particular system, when we talk about the failure analysis, we are not proposing that the entire system fails. We are proposing that the system goes in pretty much as any other system would go in, but ahead of it would be these test cells and designed in such a way that when they fail, it would overflow to the rest of the drain field. It would not be

failing on top of the ground.

On those 18 evaluated sites, on those 18 experimental performance sites that we're actually looking at, a drain field would actually go in according to the size of the -- the difference, since we took Alternative 3, would go in actually according to the size that the -- that the manufacturer recommended, but ahead of that drain field, between the septic tank and that drain field would be these test cells that would also be installed, and that's where the failure analysis would be performed. And those are designed in such a way that when they fail they just fail over into the rest of the drain field.

COMMISSIONER VAN VLIET: But you're talking --

MR. OLSON: And also the failure there is -- is -- it may be confusing. When we deal with serial distribution -- serial distribution is a method that we feed disposal trenches that are at different elevations, and as effluent goes into the top trench, that trench is utilized finally to its full capacity, and at that point, it overflows because of the way we have established the distribution method, it overflows to the next line of the disposal trench.

That is not a failure. That is just the trench being utilized to its full capacity. In this test protocol we are setting up the test cells in the same fashion. When they overflow, they're not failing, but they've been utilized to

the capacity that they're capable of receiving waste water. That isn't a failure. They flow to the rest of the system. The rest of the system is not undercut. It will not -- that system will not be classified as failure until the entirety of the system has gone to failure. That means -- failure means that it has caused sewage to come to the ground surface, or we have gone through some elaborate testing to establish that we've got a water pollution problem occurring.

COMMISSIONER VAN VLIET: Okay.

CHAIR EDEN: Other questions?

COMMISSIONER REEVE: Just quickly. Have you gotten some ballpark estimates of what the cost of one of these performance tests would be?

MR. OLSON: Well, I received a comment from one of the two parties that they thought the overall cost to them would be somewhere in the neighborhood of $300,000, but that was a verbal, over-the-telephone, no document-type of a discussion. We -- and I don't believe that we have -- anyone on the staff has gone through an analysis of what we -- what we believe it will cost over and above the cost of a system that would otherwise go in.

COMMISSIONER VAN VLIET: Do you know what factors they were putting into that figure such as the extended time or they're hedging their bets against the other systems that

they're putting in while that's waiting to be tested or what?

MR. OLSON: No idea.

MR. ILLINGWORTH: We really don't know.

MS. HALLOCK: Perhaps during the extended comment period they will submit some information in writing to you on that point.

CHAIR EDEN: Two things. One, at least two of us seem to be missing page 22 of Attachment A. At least one of us has it, but I don't quite know --

COMMISSIONER VAN VLIET: That's why he's asking questions; (indiscernible).

CHAIR EDEN: Two of us have it and two of us don't. So Commissioner Van Vliet and I need copies of page 22 for -- you know, taking home and -- thank you.

COMMISSIONER REEVE: I've got one.

CHAIR EDEN: He has one and --

COMMISSIONER McMAHAN: I've got one.

CHAIR EDEN: And can someone give me -- so that I can understand this a little better -- a 60-second dissertation on how you test the cell. In other words, you're not just looking for failure -- let's see, overflow is not failure. You're not just looking for sewage rising to the surface, but you're taking some -- some tests, some data. What are those, and what are you looking for?

MR. ILLINGWORTH: Basically what we'd be looking at is just the ponding of the effluent inside that trench, how high it's coming up over a period of time, in comparison between the two test cells as to when -- is the effluent in the one rising faster than the other.

CHAIR EDEN: And that goes to assimilative capacity of the construction --

MR. ILLINGWORTH: Yes, that's right. And then when they both get -- one or the other or both at the same time -- get up to the point where they both overflow, the test is completed.

MR. OLSON: Now, one thing on this test that maybe there's some confusion on this as well. We're not looking at treatment, because all of -- all of the technical folks seem to have some agreement that the treatment is going to occur in the soil. We're looking at the envelope that we're going to be discharging waste water to, the claim being so many feet of this is equivalent to so many feet of that. That means it can receive it, it can disburse that to the soil, and the soil does the treatment.

If the claim is incorrect in that a reduction, or whatever, the sizing that the manufacturer claims doesn't perform the same, then those test cells that use the manufactured product, sized in that proportion for standard trenching, they're going to overflow to the -- to the

monitoring box before the other cells, before the stone cells.

And, again, that -- it's going to be very important that the manufacturers, the developers of these products, have done some research to establish something realistic in their sizing because the test process isn't going to say their product's okay for 40 percent unless they set it up and they've already done a preliminary where they can show that 40 percent was a good ballpark guess on their part. If they do a shot in the dark and their systems fail in six months and the stone system's still going strong after a year, they're -- there isn't going to be a basis to establish what their percent of sizing ought to be under this test.

CHAIR EDEN: Okay.

COMMISSIONER McMAHAN: I've been wading through the comments, and, you know, most of the comments came from either Infiltrator or Easy Drain or their colleagues, close colleagues in some way. Can you summarize -- I'm having a hard time figuring out the other people -- you know, there were a number of other people who also provided comments, and sort of what the gist of those was, people not connected with Easy Drain or Infiltrator. If you can remember. I know that this --

MR. ILLINGWORTH: (Indiscernible).

COMMISSIONER McMAHAN: Because there -- the issues of Easy Drain and Infiltrator tend to deal with fairness and other things, and the others, I would assume, have -- would have some technical basis independent, so I'm just interested in the contract.

MR. OLSON: Okay, if I might, then. Mmm --

COMMISSIONER McMAHAN: And you'll have to do it one by one.

MR. OLSON: Ceigrist -- Robert Ceigrist was -- was, I believe, hired by Infiltrator to provide some comments, and he provided some good, constructive comments on the process. Dick Polson of Clackamas County, doesn't have a vested interest --

COMMISSIONER McMAHAN: Right.

MR. OLSON: -- and he was looking at what he thought would be reasonable. He -- he had a number of comments that -- a number of comments that he felt were needed to polish them a little better. I think he didn't understand part of (indiscernible), however.

The product -- the companies that provide materials to contractors, like Consolidated, Familian, and (indiscernible) Pipe & Supply, those companies may market as a distributor, I guess, the products that we're dealing with, one or both. And the comments that they had, and I think they're summarized in there generally, are they have

this product and they have it in stock, and they don't want to suffer repercussion by having stock on hand. If this Option 1 were adopted and they were stuck with the product (indiscernible). And also, I think two out of three of them suggested that they hadn't heard any complaints about the products, and so they weren't sure why (indiscernible).

Dan Bush is a consultant who does work at the county level and the state level, and he provided no comments on the technical merits, only questions whether the Department had resources, staff and otherwise, to use to carry out (indiscernible). And --

Dennis Gibbons with the Pressure-Light Septic Tank System (ph) installer, and he utilizes one of these products fairly extensively and felt that there were a lot of problems with stone systems with (indiscernible).

Steve Wert is another consultant, and I'm not really familiar with what he had written in there other than we did receive some comments that we ought to examine, the standards that are there for disposal trenches in general, that a number of folks suggested that why do we have a trench two feet wide, why do we use drain media that's a foot.

Some misconceptions were that a lot of our systems were really sized on sidewall, which is really incorrect. We have systems that are actually sized based on -- they're

all sized on linear footage, but some we have to account for the sidewall is the more dominant surface where infiltration after the system's matured and other systems that are rapidly drained that were feeding through pressurized distribution methods, the bottom was in fact the more dominant surface. So --

MR. ILLINGWORTH: To add that just a little bit, three -- two of the consultants, Steve Wert and John Smith and Richard -- and then the county person, Richard Polson also recommended that we put this off and put a committee together and review this for a period -- a long period. They -- someone suggested six months. And they also had some concerns that they -- if they were to go into a performance evaluation whether three years would be long enough.

COMMISSIONER McMAHAN: That has -- that was a concern to me. I did see those comments, and I'm glad to see they came from sort of independent people. I don't know how -- how we could satisfy that. I mean, it seems reasonable and yet we can't quite do that.

MS. HALLOCK: Because of the situation with the court --

COMMISSIONER McMAHAN: Right.

MS. HALLOCK: -- we can't.

COMMISSIONER VAN VLIET: Madam Chair.

CHAIR EDEN: Commissioner Van Vliet.

COMMISSIONER VAN VLIET: I guess my biggest concern is the policies problem, and that is should a regulatory agency be getting into the testing business of testing products that eventually they're going to have to regulate. If we could find -- I think I would feel more comfortable if we could find a third party testing unit that would test the fields, and I think it would have far more credibility also in the courts and any complaints against the system since you're going to be -- you know, the agency's got the job of regulating it.

An example is that many, many years ago a lot of different paint companies came to us and -- and said, "Would you test our paint on our test fences so you could see whether they weathered correctly or not under extreme conditions," and we had both an extreme condition chamber as well as outside testing. It gave a lot of credibility because, as an unbiased university, in this particular case, testing unit we had no axes to grind other than to evaluate the products. And it held up -- then you could go out and actually publish what paint did better and what -- which one didn't without repercussions also and put that into the hands of the manufacturer.

So that's something to think about, just from a public policy standpoint. That's probably my biggest

concern. I think getting in to get a performance test is a great idea because I think it's the most accurate way to do it, but I think if we're going to regulate it as an agency, I don't think we should be getting into the product testing.

MR. ILLINGWORTH: Commissioner, if I could maybe clarify a little bit. We -- I don't believe -- we are trying actually to stay out of the actual testing of this product.

COMMISSIONER VAN VLIET: Okay.

MR. ILLINGWORTH: We are putting that burden on the applicant, with a peer review evaluation of their -- of their proposed study. Third-party testing was considered at one time, and we just could not find third-party people that -- actually independent third-party folks that were willing to take any of this type situation on.

So what we have done is tried to make a -- the performance evaluation, the beginning of it, to have a peer review by neutral parties, three neutral parties, and then the actual performance evaluation is taken on by the applicant, and then a department reviews that study after it's completed.

COMMISSIONER VAN VLIET: Well, I'm not overly enthusiastic about that. You know what you get into in that kind of thing. The manufacturer's off to make claims that everything went just hunky dory, here's our data, and you

folks sit down and analyze it, and you really don't know the good scientific method that may have been covered under that.

So I would like to keep the manufacturer and the agency out of the test. I think you need to have an unbiased third party. Now, there's got to be somebody out there that, for the dollars, can go around and set up test plots in various soil types, and put down instrumentation that will do that for a price. You know, a lot of the engineering consultant firms around the Northwest, there ought to be some outfits that'll do it.

MS. HALLOCK: Commissioner Van Vliet, I think we can look at that. We have, over the years that we've been dealing with this issue, we did -- I think Director Marsh at one point in this whole process of trying to resolve this business between these two companies suggested that we try and bring in an independent third party early on. That was a couple years ago. And we called around the country actually to a number of universities and places. I think there were -- at that -- a slightly different twist on this, but they were concerned about liability, and they didn't want to get involved.

But I think -- what you're proposing may be a little bit different than what we were looking at that point. So we'll look and see if there's any possible way to

accommodate that.

CHAIR EDEN: Other questions or comments?

Thank you very much. As we decided earlier, we'll be taking up this as an action item on December 20th at our telephone conference call. And we'll have the comments -- additional comments if any, as soon as they come in, after December 10th.

MS. HALLOCK: Madam Chair and Council, that reminds me, I wanted to clarify for the December 20th meeting. Would that be written comments directly to the Commission? Or do they come -- do we do -- prepare response to comments? I need to know the process.

MR. KNUDSEN: It -- no, it should go to the Department, and you should prepare a response for comments. Although, I think we can ask the Commission if they would like to see the documents themselves in addition.

CHAIR EDEN: I think that depends, at least as far as I'm concerned, on the volume. If staff -- if we get, you know, four feet, then it's going to be difficult for staff and the Commission to evaluate those within 10 days.

MR. KNUDSEN: Okay. 'Cause for the -- just speaking for the record, what we typically do -- in fact, what the APA requires us to do is to summarize those comments, and then we make the original documents or copies of them available upon request, but we don't ordinarily send them to

the Commissioners, so --.

CHAIR EDEN: Thank you.

(Concluded)

DECLARATION OF TRANSCRIBER

I, Patricia Morgan, of Morgan Verbatim, Inc., hereby certify that:

(A) I am an Official Transcriber for State of Oregon, and an Official Transcriber for the United States Court Administrator;

(B) that I personally transcribed the electronic recording of the proceedings had at the time and place hereinbefore set forth;

(C) that the foregoing pages, consisting of pages 1 through 38, represent an accurate and complete transcription of the entire record of the proceedings, as requested, to the best of my belief and ability.

WITNESS my hand at Oregon City, Oregon this 20th day of January, 2000.

Patricia Morgan
Official Transcriber

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

Public comment on a request
to revoke the Umatilla Chemical
Weapons Depot permits.

TRANSCRIPT OF PROCEEDINGS

November 19, 1999

BEFORE:

COMMISSIONERS

MELINDA EDEN, Chair
TONY VAN VLIET
LINDA McMAHAN
MARK REEVE

DIRECTOR:

LANGSTON MARSH

LARRY KNUDSEN
DEQ Counsel

Transcribed from electronic recording by **Morgan Verbatim, Inc.**

Patricia Morgan
16360 S. Neibur Road
Oregon City, OR 97045

Official Transcriber
(503) 631-8885

INDEX

PROCEEDINGS	Page
Introduction by Mr. Thomas	2
Presentation by Ms. Jones	4
Presentation by Dr. Palzer	11
Statement by Mr. Condit	17
Staement by Ms. Jones	26
Statement by Loren Sharp	30

CHAIR EDEN: All right, we're reconvening at -- to consider -- well, we don't have an item name, but on our agenda at a time certain 2 o'clock, and it's now 2:08. We're taking public comment on a request to revoke the Umatilla Chemical Weapons Depot permits.

I would like to remind folks that if they wish to speak during this hearing they should sign up on -- the forms are on the table in the back of the room, and they need to do that as soon as possible.

MR. THOMAS: Thank you, Madam Chair. I'd just like to give an introduction. My name is Wayne Thomas. I'm the program manager for the Umatilla Program located in Hermiston, Oregon. In August 1997 a legal challenge to the Umatilla Chemical Disposal Facility permits was filed in Multnomah County by GASP, a local Hermiston organization, the Sierra Club of Oregon, Oregon Wildlife Federation, and 22 individual -- individuals collectively referred to as the petitioners.

The petitioners challenge the validity of the hazardous waste and air permits issued by the EQC and the DEQ in February 1997. Final judgment affirming the Agency's decisions to issue hazardous waste and air permits for UMCDF was entered in June 1999. In connection with the court case, EQC and DEQ made a commitment to the Court that a letter written by the petitioners to the Agencies on

December 14th, 1998 would be treated as a request for revocation of the permits under federal regulations.

As part of the process, we opened a public comment period on October 18th, 1999, and that public comment period will run through December 17th, 1999. Today is an opportunity for the petitioners and any members of the public to present oral testimony to the Commission. Through this process, the Department has provided one hour for GASP, the petitioners, to present their comments to the Commission. Thank you.

CHAIR EDEN: Thank you.

Do we have any folks who have signed up to talk?

MS. JONES: The folks that we have are members of GASP.

CHAIR EDEN: Okay, then those folks ought to come forward and identify themselves and talk to us. And we have someone on the telephone?

WOMAN: Richard (sic) Condit. Attorney, is that correct?

MS. JONES: Yes.

MR. CONDIT: Yes.

CHAIR EDEN: Mr. Condit, can you hear us?

MR. CONDIT: I can hear you but faintly.

CHAIR EDEN: All right.

MS. JONES: Do you want me to go ahead or --?

CHAIR EDEN: I think we're working on the phone connection at this point.

All right, why don't we go ahead. Mr. Condit, if you -- if we completely disappear on you, please let us know so we can turn the volume up on something.

MR. CONDIT: If you disappear on me what? I'm sorry?

(Laughter)

CHAIR EDEN: Let us know so we can turn the volume up on something.

MR. CONDIT: All right. Thank you.

MS. JONES: I'll go ahead and start. My name is Karen Jones. I live in Hermiston, and I'm here representing myself and the organization GASP which, plain and simple is -- or is, rather, a vocal organization based out of Hermiston.

I'd first like to talk about the worker exposure incident at Umatilla and tie that into our comments on the permit. Ratheon and PMCD have not been able to identify the cause of the hospitalization of over 30 workers at the Umatilla Army Depot. We're concerned that if they can't ID the cause, then they can't demonstrate that it will not reoccur, that it does -- did not and does not continue to create a hazard to the workers and it does not pose a hazard to the community, and it does not pose a negative impact to the environment, and until they can, the Commission should

order an immediate cease and desist order for the construction site.

Some of our supporting arguments include that they really don't know what caused the exposure. A series of exposures over a six-day period (indiscernible) 30-some workers three days later, one inspector three days after that, two more workers outside the MDD building, including workers outside the munitions disposal building, indicates that whatever it was escaped the facility in enough volume to trigger symptoms outside the building. The symptoms still fit the latest theory of pepper spray.

According to several toxicologists which we have contacted and high ranking officers within the Soldiers Biological and Chemical Command Center, the symptoms of metallic taste, dizziness, respiratory distress, nausea and trembling do not match capsaicin or di-hydro-capsaicin exposure symptoms.

In our regional comments on the draft permit issues, we raised several -- we've raised (indiscernible) ability of Ratheon and PMCD to ensure safety to workers, citizens and the environment. This incident demonstrates that Ratheon -- excuse me -- demonstrates that the findings of the EQC-DEQ that permittees possessed such capabilities has now been shown to be incorrect.

The appropriateness of raising these issues in the

context of this comment period (indiscernible) of their original comments that are also specifically preserved through the petitioners' letter of December 14th, 1998. And just a few of the things that we stated in that letter -- I won't give you too many because there's a time problem. In particular these affidavits support petitioners' well-founded concerns that the EQC-DEQ failed to, one, thoroughly and properly assess the impacts of the army's proposed incineration facility, and, quote, "our client's intent to offer additional evidence regarding the issues raised herein when the EQC-DEQ advises us of the process they will employ to fully and fairly evaluate this information."

The very basis of which the EQC-DEQ issued this permit rests upon our belief only the permittees can manage -- excuse me, on the belief that permittees can manage, handle, monitor, identify, control and dispose of the most lethal chemicals on the planet. Yet the permittees' claim that they cannot identify chemicals released during the initial construction phase of -- of the facility is not a confidence builder.

We'd like to reference Oregon Revised State Statute 466.200 which provides authority to the EQC-DEQ to halt operations under the permit if there is reasonable cost or if there's a clear and immediate danger to the public health welfare or safety or to the environment from continued

facility operation. Petitioners remind the Commission that this permit also allows the construction of the Umatilla Chemical Demilitarization Facility, and thereby construction would fall under operation or the purposes defined in paragraph (I)(c)(3) of Oregon Revised State Statutes 466.200.

Now I'm going to briefly talk about the failure of the permittees to follow army standard operating procedures before the incident which did occur in September. Ratheon and PMCD violated standard operating procedures during the September 15th incident, putting affected workers, their families, other workers, health care providers and others at risk.

Now, some of the questions we've asked: Was there a cover-up or an attempted cover-up of the incident? Was the direct violation of the standard operating procedures done to minimize the potential of identifying the substances which debilitated the workers? What possible reason could there be for permittees to ignore these longstanding and supposedly well-understood standard operating procedures?

The chain of command is really clear that exists at the Umatilla Army Depot. In an incident the depot commander has ultimately -- has ultimate authority and is under the command of the Army Material Command General Coburg (ph). The chemical activity which exists at Umatilla is an

activity which includes the monitoring and storage of the chemical stockpile. This activity is overseen by the Chemical Activity Officer at Umatilla who then reports to the Depot Commander and is under the command of the Soldiers Biological and Chemical Command, General Doesburg, which is under the command of AMC, Army Material Command. You aren't going to follow this.

The Chemical Disposal Program which exists at Umatilla is then overseen by the Army Site Manager, Raj Maholtra and Ratheon's project manager, Jay Bluestein. The disposal program is also under the command of the Depot Commander, who regularly reports to the Program Manager for Chemical Demilitarization, who is Jim Baker -- Bacon.

The Chemical Disposal Program Army Site Manager, Raj Maholtra and Ratheon's Project Manager, Jay Bluestein, are required to immediately notify the Depot Commander or the Chief Civilian Officer at Umatilla or their deputies. The depot commander by his authority, under AMC, is to take command of the situation immediately and to also notify on post and off post emergent responders of the incident in order to deal with any broadly impacts which may occur.

The depot commander then follows these additional standard operating procedures which would require procedures including but not limited to identifying all of the individuals that were potentially impacted, restricting the

departure off post of any individuals until after they're interviewed and certified to be nonimpacted, protecting the incident scene to ensure all evidence is preserved to the utmost possible extent, providing adequate medical treatment for exposed individuals, bagging all clothing of exposed or potentially exposed individual.

But instead of that, these are a few of the things that actually took place. The depot commander was not immediately notified. No emergency responders either on or off post were immediately notified. Exposed individuals were not identified, and, in fact, some of them actually drove themselves to the hospital when they left the depot. The site was evacuated and more than 800 workers basically just drove off on their own. Adequate treatment was not provided on site. Clothing was not bagged from all exposed individuals. The incident scene was not adequately protected to preserve any traces that would have provided evidence of what the exposure was actually caused by.

Health care workers at the local hospital then experienced -- became symptomatic upon coming into close proximity with some of the exposed workers' clothing. The permittees were asked, by myself, actually, at a meeting that was held in October in Irrigon to provide the public with all the information surrounding this, and specifically we wanted to know why the (indiscernible) that have been

installed in the filtration systems in the building were (indiscernible) and it had already been used at another facility. That information has not been provided to us.

We also asked that a public repository be established and that all of the internal documents and documents from the army, the permittee, and various other state and federal agencies be immediately provided in that depository. And I've checked the public library several times, which is the number one depository in Hermiston, and none of those documents are there yet.

Now, I'd like to turn the time over to Stuart Sugarman.

MR. SUGARMAN: My apologies for arriving late. I do not have anything to present to you. We decided it would be probably most interesting for the Commission to hear from, first, local citizen Karen Jones and then from Robert Palzer, who is an expert who's also been involved with ACWA. Us lawyers before you today could keep going ad nauseam, which we've done in the past.

We have, of course, as you know, Richard Condit over the telephone to do that as briefly as possible. I'm here more as a ring leader and CE kind of person to be here to keep going smoothly, and I apologize, of course, for being late, (indiscernible) so far, but hopefully (indiscernible).

I think Ms. Jones has some concluding remarks about

the incident that happened in September as it relates to the future of how -- and I know this issue has come up before -- how the army and some of the agencies may react to a future event.

MS. JONES: Which I thought I was doing at the end, but that's fine, I can do it right now.

MR. SUGARMAN: Whenever you like, Karen. Actually, we (indiscernible).

MS. JONES: Oh, and then I'll conclude if that's all right with the Commission.

MR. SUGARMAN: And if it's okay with Counsel, then I would ask Bob Palzer to (indiscernible).

DR. PALZER: For the record, my name is Dr. Robert J. Palzer. I live in Ashland. And I'd like to thank Lang Marsh and each of you members of the Environmental Quality Commission for providing an opportunity to address you on a matter of deep concern. As you may know, this is far from my first time in this room, before this Commission and your predecessor.

Recently, Chair Whipple sent me a letter of thanks for my work in support of the Department's efforts as a member of the Grants Pass Air Quality Advisory Committee for which I'm most grateful. My colleague, Karen Jones, has raised some important issues that trouble me greatly.

I would like to address another aspect of this

matter. First I would like to briefly give you a little information about my interest in this issue and my professional background. After graduating with high honors I received a Ph.D. from the University of Wisconsin Madison School of Medicine. Throughout my career I have worked with and have personally known six Nobel laureates in medicine and chemistry. I take pride in having had the privilege of serving on the faculty of the University of Wisconsin, Madison; the University of California at Berkeley; and most recently Southern Oregon University in Ashland. I'm currently retired. I serve as a volunteer for the Sierra Club and chair its National Air Committee.

I am also Alternatives to Incineration coordinator for the Oregon Chapter of the Sierra Club, and have been elected to serve on its executive committee for most of the past decade. This is only second -- only the second lawsuit against the Department that I have been point person on. There was an earlier one involving -- involved organic compounds, and I'm optimistic that we will eventually prevail in this one.

The Sierra Club favors the use of alternatives to incineration whenever such alternatives exist. The Sierra Club not only points out problems but is equally committed to finding solutions. I'm here to tell you that there are alternatives to incineration for the entire chemical weapons

stockpile at Umatilla.

I represent the National Sierra Club on a dialogue on the Alternative Chemical Weapons Assessment more commonly known as ACWA. Wayne Thomas represents the Department on this same advisory committee as does Karen Jones who represents GASP. This dialogue was set up to carry out the objectives of public law 104.208 to look for not less than two alternatives to the incineration of assembled chemical weapons.

In addition, I am one of four dialogue members of the Citizens Advisory Technical Team, also know as the CATT that is providing an oversight and a disparate role in setting the criteria, testing conditions, evaluations, reports to Congress, et cetera, under the ACWA program.

During the past two and a half years I have missed many department full meetings and appearances before Judge Marcus on this issue because I've been deeply involved in the ACWA program. In two days I leave for a CATT meeting with Michael Parker, the manager of the ACWA program who last month received the Governmental Rank Award from President Clinton, largely for his work in managing the ACWA program. This is the highest honor that a federal government employee of his rank, which is the civilian equivalent of a two-star general, could receive.

According to the Department of Defense's Interim

Status Assessment for the Chemical Demilitarization Program dated 4-15-1996, of the seven hundred seventeen -- seven -- of the 3,717.38 tons of agent at Umatilla Army Depot 2,339.52 tons of HD is stored in 2,635 ton containers. This represents 62.9 percent of the stockpiled chemical weapons at Umatilla. For all intents and purposes, this is the same material that is stored in the same way as the HD that is currently being processed at Aberdeen Proving Grounds, at their Edgewood Facility using alternative technology that has been approved by the U.S. Army and the National Resource Council.

The first of several steps in this process uses neutralization of the mustard by a process developed by the U.S. Army. I'm aware that the Department and the Commission considered and rejected the use of this process at Umatilla because of water quality and other concerns. That was then, and this is now.

Others have also determined that the hydrolysis process alone is not satisfactory to demilitarize mustard or nerve agents, so additional secondary treatment methods have been developed. After the initial neutralization process, the effluent produced is subjected to a biological treatment process developed by Parsons Allied Signal. This process is not unlike that which is used for municipal sewage treatment throughout the U.S. with important modifications because of

the extreme toxicity of the HD hydrolosy.

There are additional steps involved, but the final products meet all regulatory and environmental standards. The water is tested before discharge, and it meets all regulatory and environmental requirements to be discharged for general use as safe water.

The products of the initial -- initial requirements -- I'm going to skip this portion. It's redundant.

I would like to address one other concern about water. In the past year the Maryland area has had a severe drought and water rationing was required. The alternative process that I've been talking about appears to require less water than is required in baseline incineration which is, of course, of major concern in the Umatilla area.

I think it is equally relevant to point out just where this alternative treatment process is now being used for HD. This alternative technology is being used at the Edgewood portion of the Aberdeen Proving Grounds. This is where Michael Parker and his ACWA personnel and PMCD are headquartered. These people work and live in this community, and I would doubt that these persons would have chosen an alternative over incineration at their own community unless they thought it was better, cheaper and safer.

I would also like to point out that this operation is

occurring within less than an hour's drive from Washington, D.C. The President, Congress, and the Pentagon are in fairly close proximity. I can understand why the citizens of Hermiston, Irrigon and others living in close proximity to Umatilla should not be able to share the benefits of this much safer and proven technology. Not only can you make this happen, you must make this happen.

I am well aware of M55 rockets, projectiles and other assembled chemical weapons that make up the rest of the stockpile at Umatilla. My written remarks will address how alternative technologies can be used for the rest of the Umatilla stockpile.

I would like to mention that the National Research Council recommendation No. 12 states, "The optimum system for a particular chemical weapons storage depot might include a combination of unit operations from the technology packages considered in this report," which is entitled A Review and Evaluation of Alternative Technologies for the Demilitarization of Assembled Chemical Weapons which was published in September of this year.

Thank you once again for the opportunity to address you today.

CHAIR EDEN: Thank you, Dr. Palzer.

MR. SUGARMAN: Thank you for your continued attention. I now ask Richard Condit to speak. He's going

to talk about the permanent application process, (indiscernible) Incinerator, and some other issues including residual waste. Richard.

MR. CONDIT: Thank you. Members of the Commission, I appreciate the opportunity to address you by telephone, and I certainly appreciate the comments by Ms. Jones and Mr. Palzer. They certainly make my job a lot easier in trying to identify and describe a few other issues that may be of significance and import to your consideration.

As Mr. Sugarman pointed out earlier, however, and I will emphasize here now, we are going to basically present the bulk of our information in support of this issue in the filing the written comments on December 17th of this year. But let me address a couple of points that you should be thinking about in the meantime.

One important point, I think, you should consider: I know that the Commission and the DEQ have undoubtedly felt embattled and to some extent and certainly felt like, for the lack of a better term, my clients or the petitioners as we have been commonly known lately, had a lot to quarrel with you about. I think it's important for you to understand that there's no desire on either my part or the part of my clients, including the persons sitting before you today to quarrel with either the DEQ or the Commission on how to handle this facility. We believe it is within your

power and it is your obligation to create a facility to deal with these weapons that is the best facility that Oregon can have to deal with this difficult problem. That's certainly what Mr. Palzer was telling you a little bit about and what his written comments will emphasize.

Our quarrels with the agencies, the Agency, excuse me, and the Commission come when we feel as though the issues that we are raising are not being properly or fully addressed, and that what's happening is, with all due respect, you're being bulldozed by the Army which has far more resources than all of us, has far more people with far more letters after their name than all of us, and a contractor who is equally resource rich.

We feel that we're more on your side, or can be, than we certainly are on the side of the Army and Ratheon when it comes to dealing with this most important facility in the Umatilla community.

I just want to point out, by making that statement, that we feel as though you can contribute a great deal, and that we can contribute a great deal to you in making good decisions and in holding the Army and Ratheon accountable for matters for which they need to be accountable for.

Having made that introductory statement, let me talk about a few specific issues. It is difficult to conceive, as I think I've said in comments before you not so long ago

regarding the (indiscernible) filter system, it's difficult to conceive of an application for a complex a facility of this nature that does not include a design of one of major pieces of pollution abatement. Now, I realize you probably made a decision on this issue already, but I do need to start off as a means of reminding you that this technology that is supposed to be so proven has not been proven at all. It's only proven in the minds of the Army compared to other technologies that are available as we speak, and were probably available at the time that the Commission first made the decision to permit the facility as it's allegedly going to be constructed.

Aside from the carbon filtration system for the pollution abatement unit, they're also concerned about the dunn, the dunnage incinerator. Well, you heard the Army yourself. The Army came in and started talking to you the last time I was there about how they were exploring alternatives, how they were thinking about other ways to handle the dunnage. They described a little bit to you about why they would do that. Well, of course, they couched everything in terms of, "Well, it's not that we're not able to create a dunnage incinerator as we suggested we would, but now -- now it's -- costs have come into play, and we're -- you know, we're concerned about costs, and we're trying to think about other ways to streamline the process."

Hogwash. We believe that the Army has known since 1995 that the dunnage incinerator would not work, could not work, and the fact that the Army has played this charade out this long is really unacceptable.

The same problems have occurred with other major pieces of the system. The binary reduction area is not functioning as the Tooele facility. It will likely not function or not function as planned at the Umatilla facility.

These are significant problems in a system that was supposed to be not only mature but proven out. This should trouble you. We believe as a matter of law in fact that these facts regarding the dunn, regarding the carbon filter system, regarding other major components of the facility, regarding an issue of agent toxicity, as another example, these facts that were not disclosed to you, that were not put into the application or amended in the application to you, demonstrate that you did not have the complete picture in front of you. And if you did not have the complete picture in front of you, you could not rule on whether this permit should be approved or not.

Now, if you decide to continue to go forward and if you reject our opportunity to reconsider this permit at this time, then you will see that issue in front of a court somewhere. That is not how we would like to proceed, but

that is certainly how we will proceed if we have no other choice.

Another issue that this Commission needs to be very concerned about is that we have reason to believe that aside from the fact that there will be an awful lot of hazardous waste created by this disposal facility, and I believe we've indicated to you in documents and previous correspondence that some of the data that we received from the Tooele facility at one point indicated something like a ratio of 15 pounds to every one pound of agent. That is 15 pounds of hazardous waste created to every one pound of agent destroyed. Where is all that going? That's one issue.

But here's an important second issue that you really need to get to the bottom of, and that is does the residual or created hazardous waste have agent in it when it's going off the site? We have reason to believe that the brine, the salts, and the ash from the activation (indiscernible) cyclone all have agent in them. Now, these are materials that are pretty routinely shipped off the site in Utah.

So does this Commission want to be responsible for essentially distributing agent around the state in various other forms, such as in brine liquid, brine salt, ash, or will it hold the Army accountable now before it gets to getting these things in operation to demonstrate without doubt that the material that it is producing in the context

of this incineration operations elsewhere is agent free?

And what about those metal parts? The process is supposed to include the fact that metal parts, once the agent is roughly extracted from it, go through a metal parts permit and that, at the end of that chain, when it's done being burned and everything's burned off and there's no agent and the metal parts can be recyclable or however the way they'll be dealt with, and we have reason to believe as well that metal parts come through the system still having agent on them. That is simply not acceptable.

When you deal with other technologies, what you have is a situation where we're able to verify before you release that you've taken care of the agent, and that you have a material coming out of the process that is either nontoxic or very close to nontoxic. Incineration simply does not allow you this option, and certainly the way incineration has been practiced by the Army as we understand it in Utah, that is not what happens.

Now, finally, I'd like to note that the Commission has very explicit authority to terminate or suspend this permit. The Commission has adopted standards similar to that of the United States Environmental Protection Agency, and in those standards which as they're codified by EPA at 40 CFR 270.43, the permittee's failure in the application or during the permit issuance process to disclose fully all

relevant facts or making misrepresentation is a basis for termination of the permit.

Similarly, if there's a determination that the permitted activity endangers human health and the environment in any way, then termination of the permit is also warranted. You've heard Ms. Jones speak a little earlier about a situation involving construction. We're not even dealing with the agent yet, and these folks can't properly manage a chemical event. I cannot imagine anything that should be more troubling than that, and yet it appears that the DEQ is satisfied and is allowing construction to go forward. That is simply not acceptable to my clients who live in an area that's categorized as the immediate response zone.

How would you like it if you lived in the immediate response zone and a chemical event of that nature occurred and the Army and Ratheon either didn't have their act or covered up what was going on such that people couldn't learn exactly what happened and why it happened.

This permit is the clearest method that you could send to these citizens and to the Army and Ratheon that you're serious is to stop this thing now, and to say, "Look, until you come to us and until we're satisfied, we don't care how many hours or days or weeks it takes, exactly what happened, how it happened and why it happened, and until

persons who did not follow procedure are fired or otherwise appropriately disciplined, guess what, you don't get to do this anymore." That to us would be a serious signal. This is a serious facility. It needs to be handled with -- not with kid gloves. Somebody needs to be punching out there and telling these folks they do not have the right to avoid the procedures, to avoid the things that they agreed to do, to compromise emergency preparedness and emergency response. That is not acceptable.

And this is a warning sign, an absolute warning sign, and if you don't stop it now and make sure that everything's in order before it goes another step, then you are ignoring that warning sign, and that would be very unfortunate.

(End Tape 9)

MR. CONDIT: And I thank you again for the opportunity to -- to speak to you on these issues. We will be presenting our comments more fully on December 17th, and we look forward to working with you on this issue.

I will note one more thing before I close, and that is that the other frustration that we face as citizens who have information and are concerned about this operation face is the fact that the DEQ and/or the Commission simply seems to refuse to want to give us a fair forum to get these issues out in the open. For instance, if we had a contested case process where we could get people under oath, where we

could put them in front of a hearing officer, in front of the Commission themselves, and find out what happened during this incident involving the workers that Ms. Jones described, or find out what happened with respect to what -- when did you know that the dump didn't work? And find out all these contested issues, we would go a lot further to resolving matters than we can -- we can go at the moment.

In essence, by not allowing us that process you've tied our hands. You're not allowing us to prove to you what we think we know and the basis for that knowledge. Sure, we can comment, we can provide some documents as we get them, we can do those sorts of things, but we're never going to convince you, obviously, that the Army or Ratheon is wrong unless you see and are able to compare and judge the credibility of the people and the evidence presented. We can't do that in this kind of notice and comment process. And it's simply not fair. It's too great a burden to place on citizen groups and individuals to -- and not give them some type of process where there's authority to issue subpoenas or other means to get to the bottom of controversial issues.

Now, I realize you probably avoided this contested process in order -- in the hopes that this process would be streamlined. Well, I think you're doing exactly the opposite, because at least if we have a fair contested case

process we can come away from it with a certain body of knowledge that we feel we know or don't know and that has been adequately tested and put through the paces. And that's not happened here thus far. And this incident that just happened with the workers, among other issues that we've raised, demonstrate that a contested case process has been warranted and is still warranted. It's not too late. I suggest you consider it. Thank you.

CHAIR EDEN: Thank you, Mr. Condit, we appreciate your remarks.

Is there anything further from the --

MR. SUGARMAN: Yes, Ms. Jones, I think, has some concluding remarks.

MS. JONES: I very simply just wanted to speak to you very briefly about different experiences I've had since the September incident at the depot. Because of my job in a dental office, I come in contact with members of not only Hermiston but in Umatilla County, Morrow County, and we also have many patients that come from the Tri-Cities and even the Walla Walla area. And it's been very surprising to me that people who in the past have been adamantly supportive of the activities of the Army, of Ratheon, of the incinerator, that they're now beginning to question and in some cases -- I know of at least two different families who are considering selling their property in Hermiston and

leaving; one is a neighbor of mine that's lived across the street for over 30 years now.

I can also tell you that I know a child in Irrigon, Oregon who's mother is a plaintiff, Cindy Beatty, and her son saved his money and a year or two ago asked his parents to drive him to an army surplus store in town. And they were not quite sure where he was headed with his, that he had been diligently saving his money. And they were somewhat horrified to learn that what Jarrod wanted to buy was a gas mask, and that he then proceeded to teach himself how to use it and questioned various people at the school, including my sister who was one of his teachers, to make sure that if there was an accident that he would know this and he would have time to get his gas mask on.

And I had encouraged a reporter to go talk to Cindy, actually, a few days ago, and I had forgotten about Jarrod and his gas mask. And Jarrod wanted to speak to the reporter, and Jarrod -- and they were talking, and Jarrod showed him his gas mask which he has in his little backpack that he takes to A.C. Houghton day. And he also told Matthew that he had been saving up for a full-body protective suit because he had decided the gas mask was not sufficient enough, and he went in and -- and he'd asked the army surplus gentlemen what's good, how much would it be for a full-body protective suit, and he was told the cost, and

so he told the reporter that he had decided it was too expensive, so since Christmas was coming up, that's what he had put on his Christmas list. And his parents don't really know what to do about that, how to calm his fears.

And that's just an example of the trauma. But I think the mindset has changed in the area. I know that there have been a few public meetings, and I did attend the meeting that was in Irrigon and I was out of town for the following meeting that was held in Hermiston -- I had to go to a Department of Energy meeting instead -- and my feeling is that with the contacts that I've had within the community that the mindset has changed; that people don't really feel that they're going to be listened to if they go to the public meetings. They don't see that changes have been made. They're very discouraged. There's a lack of faith within elected officials-- for elected officials, rather, and sorry to say for the Commission and for the DEQ.

And I hope that we'll be able to resolve this with -- without having to move forward to the court system, but I would like to reiterate that if you don't issue the cease and desist order, we will take every legal action that we have to stop this facility from going into operation, if that means continuing in state court, if that means going to federal court, we'll do whatever we have to do. We're the people who live there, and we're not going to walk away from

this situation. Thank you.

CHAIR EDEN: Thank you very much.

MR. SUGARMAN: We hope that you'll take all these concerns seriously. I don't want to dilute any of the powerful statements just made by Ms. Jones on behalf of the local citizens that have been going on for any length of time. We just hope that you will consider these warning signs that the local people already have, the people that are immediately downwind, and we will be submitting full comments on all these issues at the December 7th meeting.

Finally, I want to remind you that we did bring these up, the exposure, the alternatives, the misrepresentation, the endangering the human health, the lack of a fair public process, and other warning signs that occurred before this latest one in our December 14th letter, and we will continue to alert you of these (indiscernible). Thank you very much for your consideration -- obviously serious consideration (indiscernible). Thank you.

CHAIR EDEN: Thank you very much. Whether we like being sued or not, we recognize that what you're doing is part of the public process, and the process is very important. I also recognize that you disagree with the process that we're using, but we still want you to know that we appreciate your participation in it.

MR. SUGARMAN: Thank you.

CHAIR EDEN: Are there any questions or comments by the Commission while these folks are still here?

I guess not at this time.

MS. JONES: I did want you to know that, you know, some of my comments were complicated to follow the chain of command and (indiscernible) comments and I'll be submitting a chart so it'll be a little bit easier to see what actually should have occurred.

CHAIR EDEN: We appreciate that. And I did want to add that -- feel free to submit your comments anytime before Sept -- December 17th, if you want to. Thank you very much.

The only other person that I have a sign-up sheet for is Loren Sharp. Mr. Sharp, welcome.

MR. SHARP: Thank you. Madam Chair, my name is Loren Sharp, and I'm the Deputy Project Manager for Ratheon-Umatilla Chemical Depot. I'm also the Plant General Manager in the (indiscernible); I was plant general manager for them for the last 40 months.

Really more of a point of clarification I'd like to provide you an update on the September 15th incident. We have had a number of sources come out to assist us in our investigative effort. We've invited the Corps of Engineers who had an industrial hygienist professional on there on staff. We brought in a physician from PMCD from the Edgewood Headquarters area. We brought in our own

industrial hygienist from corporate headquarters as well as the vice-president of security for Ratheon Corporate.

We spent about a month going through all the different -- I'll call it (indiscernible), all the different contributors that were possible. We have expended a substantial amount of effort in sampling and analysis of all different compounds and what we've looked at. Near the middle -- or near the halfway point of that investigation we brought in an additional Ph.D., an industrial hygienist from the Boise area who has an additional 20 years of experience in the area.

As a consequence of that particular independent consultant we brought in, he recommended we do some additional testing which we pursued, and we recently got that result on November 10th time frame. It showed a concentration of capstan and di-hydro-capstan on all of the workers' clothing that we had sampled or the ones that were, I'll say, most affected and were hospitalized. And we had identified sources also in the general building vicinity from wipe samples, on an Agent 10 wipe sample that we'd done. So while not yet validated by an independent lab, it certainly is viewed by the professionals we brought in to be the most possible cause, but we're awaiting additional evaluation testing at this point.

Lieutenant Colonel Tom Olsen has brought in

additional help to -- to do additional investigation. At this point, I'd say the investigation is still underway. And that's really an assessment of where we are at this point.

CHAIR EDEN: Thank you. Are there questions or comments from the Commission?

COMMISSIONER VAN VLIET: Where would that kind of material be ordinarily in the plant site area?

MR. SHARP: We don't have anything on the plant site, either in the construction process. It's not carried by the depot guards. It's not used at the (indiscernible). It is not a compound that we would routinely have on the facility for construction. However, we don't believe it is also a prohibited item on the depot at this point either. And that's part of the continuing investigation, and research is ongoing.

COMMISSIONER VAN VLIET: That's why you have someone on security looking into it?

MR. SHARP: Yes.

MR. CONDIT: Could a member of the Commission ask the witness what the theory is of how pepper spray got on so many people within the work force?

CHAIR EDEN: Well, Mr. Condit, I was going to ask the witness if he had a response to Ms. Jones' allegation that people outside the room in which the greatest concentrations

were found might have had this substance on their clothing?

MR. SHARP: From our look at the film and the general facility where most of the affected people were present was in the lower portion of the building, what we call the lower munitions corridor. It kind of was a large open area, (indiscernible) storage area, the toxic material handling area, and the corridor that goes past the hydraulics room. The swipe samples were, again, taken in that area. The exhaust for the building flows through that area at a fairly high velocity and out the corridor. So essentially as the -- we had around 188 workers in the building at that time, as they would have exited out that path, they would have gone down the corridor, I believe, would have been subject to different concentrations depending on the time that they transitted that point.

Again, like I said, that's -- that's what we have found. We have not found any evidence of it being affected for people who were outside the building unless those that were in the building had previously exited out that path. Again, I need to point out that we did not sample the clothing of all of the folks outside because they were not viewed initially to be affected because of the responses that they had outside.

CHAIR EDEN: Is it possible that the substance could have been carried out the exhaust itself rather than just on

the clothing of people who passed through that airstream on their way out?

MR. SHARP: The industrial hygienist tells us it's a high molecule substance that settles; it's kind of like an oily dust, so if you walk through that, as it was settling out, you'd pick it up on your clothing. So that's how we would suggest that that -- the people that were affected walked through that (indiscernible).

CHAIR EDEN: But it wouldn't have been carried out the air out of -- you said it was a high-velocity exhaust system. It couldn't have gone out the exhaust fan or whatever it is that takes that air outside?

MR. SHARP: It would have transitted, you know, a little bit outside the building. Like I said, it's a high molecular substance. It wouldn't travel very far --

CHAIR EDEN: So it would just drop to the ground --

MR. SHARP: Right.

CHAIR EDEN: -- after it went out the building? Okay.

COMMISSIONER REEVE: Are there -- are there documents you have relating to that investigation that you referred to that are now or shortly will be part of the public record of publicly available for the committee?

MR. SHARP: I believe the answer to that is they will be available as soon as the investigation is complete. At

this point in time, Lieutenant Colonel of CID and FBI (indiscernible), until they're done, I don't believe they'll be released is my understanding.

COMMISSIONER REEVE: Okay, so part of this investigation involved possible criminal activity or --

MR. SHARP: That is (indiscernible), yes.

COMMISSIONER REEVE: Does that mean that we're not likely to see anything in our public -- in our record review, there's a public comments which close now on December 17th. Do you have any idea what the schedule for this is?

MR. SHARP: Well, I do know a little bit about the potential. We've asked to go to additional laboratories and do our research and analysis. We believe that it's possible to get an analysis done within about a week's time frame. Most of the clothing (indiscernible) laboratory and a chain of custody signature authority. The CID and FBI are going to get some samples of that clothing to (indiscernible) through their laboratory, the (indiscernible) laboratory, so my suspicion is it's possible you might still see those results in a fairly timely fashion.

CHAIR EDEN: Any other questions?

Just one more to follow up on my exhaust system theory: Were any wipe samples taken immediately below where that exhaust would have exited the building?

MR. SHARP: We -- we took wipe samples on the floor and on the walls of that general area which is where the exhaust would exit, and like I said, we found evidence on any attempt areas that we looked at. The exhaust system, you have to understand, is not totally in place because construction's still underway. The supply system is totally intact as we supply air to that facility, but essentially the exhaust system is going out the open doors or temporary fans we have installed.

CHAIR EDEN: Okay.

Any other questions of Mr. Sharp?

Thank you very much. We appreciate you coming.

At this point, unless we have other people who have signed up to give testimony, this hearing is done. And I proclaim it so, seeing no other people want to talk.

(Concluded)

DECLARATION OF TRANSCRIBER

I, Patricia Morgan, of Morgan Verbatim, Inc., hereby certify that:

(A) I am an Official Transcriber for State of Oregon, and an Official Transcriber for the United States Court Administrator;

(B) that I personally transcribed the electronic recording of the proceedings had at the time and place hereinbefore set forth;

(C) that the foregoing pages, consisting of pages 1 through 36, represent an accurate and complete transcription of the entire record of the proceedings, as requested, to the best of my belief and ability.

WITNESS my hand at Oregon City, Oregon this 20th day of January, 2000.

Patricia Morgan
Official Transcriber

Approved_____
Approved with Corrections__X__

Minutes are not final until approved by the EQC

Environmental Quality Commission
Minutes of the Two Hundred and Eighty-first Meeting

December 20, 1999
Special Phone Meeting

On December 20, 1999, a special phone meeting of the Environmental Quality Commission (EQC) was held at the Department of Environmental Quality (DEQ) headquarters, 811 SW Sixth, Portland, Oregon. The following Environmental Quality Commission members were present by phone:

Melinda Eden, Chair
Deirdre Malarkey, Member
Tony Van Vliet, Member
Mark Reeve, Member

Present in person were Harvey Bennett, EQC Member, Larry Knudsen, Assistant Attorney General, Oregon Department of Justice (DOJ); Langdon Marsh, Director, Department of Environmental Quality; and other staff from DEQ.

Note: The 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.

The Environmental Quality Commission held an executive session at 8:30 a.m. The Commission discussed pending litigation regarding EZ Drain Company v. State of Oregon, Department of Environmental Quality, Case No. 9809-06683 and Tidewater Barge Lines v. Department of Environmental Quality, Case No. A98545. The executive session was held pursuant to ORS 192.660(1)(h).

Chair Eden called the meeting to order at 9:10 a.m.

A. Approval of Tax Credits

Maggie Vandehey presented Agenda Item A and its Addendum, which included 39 tax credit applications for action under the Pollution Control Facility Tax Credit Program (37) and the Pollution Prevention Tax Credit Program (2).

The Department calls attention to specific applications in the staff report for one of three reasons:

- The applicant disagrees with the staff's recommendation,
- The Commission's action may set a new policy direction, or
- The reviewers can benefit from a clear policy statement.

Approvals

Ms. Vandehey presented the applications for certification approval. Two applications were from dry cleaners presented according to the Pollution Prevention statutes and rules. The remaining applications were presented according to the Pollution Control Facility Tax Credit statutes and rules. She also described deviations from the published Agenda Item for applications #4792, #4927, and #5223.

The Commission first discussed applications from Willamette Industries. Commissioner Van Vliet declared a conflict of interest because he owns shares in Willamette Industries, Inc.

Willamette Industries presented additional information for application #4792 documenting the fact that a non-allowable

amount of $9,892 for fire protection was actually for spark detection in the baghouse – an allowable cost. The facility cost recommended for certification should be adjusted to $71,523.

Willamette Industries sent a letter dated December 8, 1999, disagreeing with staff's recommendation on application #4927. They claimed a pneumatic conveying system as part of the air pollution control facility. Staff did not allow the cost because its primary function is material handling within the manufacturing process, and it does not meet the definition of an air-cleaning device as required by statute.

Commissioner Van Vliet asked if Willamette Industries was in violation of any pollution laws at the time of the upgrade to the facility. Jim Aden of Willamette Industries indicated he could not speak to that specific question though his general knowledge was they were in compliance at the Eugene facility before it went from particleboard to medium density fiberboard (MDF) and, thus, was not in violation. Ms. Vandehey said staff had reviewed the December 8, 1999, letter and it did not change the recommendation.

Commissioner Van Vliet noted the facility on application #4934 was a replacement and asked Willamette Industries if they would have installed the facility if they were not getting a tax credit. Ms. Vandehey clarified that only one component (ET-1) was a replacement, not the entire claimed facility. The applicant discussed the new dryers and their function. Chair Eden asked if the replacement cost was removed from the facility cost. Ms. Vandehey stated that the entire amount was not subtracted only the non-allowable amount according to statute and rule.

Commissioner Van Vliet asked Willamette Industries if the facility in application #4978 was installed due to a requirement imposed by LRAPA and if they were in violation. Maureen Weathers of Willamette Industries indicated there was an SFO.

Commissioner Van Vliet referenced the non-allowable costs in application #4986, specifically what appeared to be an inflated facility cost. Ms. Weathers indicated the claimed facility was part of a larger project and there may have been a misinterpretation in terms of what was claimed and what was not. Willamette Industries did not dispute the reviewer's representation of the allowable versus non-allowable costs since the final facility cost was correct.

Ms. Vandehey asked the Commission to remove Cascade General, Inc.'s application #5223 from the staff report for consideration at this time.

Commissioner Reeve asked how the cost savings are accounted for in Arden, Inc.'s application #5243 and if there is a threshold that the Department has to surpass before there is an impact on the percent allocable. It was explained that the cost savings are considered in the return-on-investment calculation; however, in this application the cost savings did not make an impact on the percentage allocable to pollution control.

Regarding application #5274 from Leroy and Lowell Kroft, Chair Eden asked if it was true that the animal feed has no value, if it was not being sold to somebody, or if somebody was not being charged for hauling it off? The reviewer for this application did not place a value on it. Chair Eden asked staff to verify this in the future for grass-seed-cleaning facilities, explaining that in her experience it does have an animal-feed value. Ms. Vandehey agreed to this direction.

In considering application #5329 from Bryce Cruickshank, Commissioner Bennett asked how facilities that market materials report their profit. Ms. Vandehey said it was reported in their annual cash flow, which is part of the return on investment (ROI) consideration. If the ROI is high enough then the percentage allocable to pollution control will be reduced. She clarified that this was the method for facilities costing over $50,000.

Commissioner Van Vliet described two factors that have implications on how people are going to look at tax credits in the future.

1) If costs are thrown into the pot that are not allowable or do not contribute to pollution control
2) If applicants claim a facility that would have ordinarily been installed without any tax credits

Ms. Vandehey discussed the trend for accounting firms to solicit companies to develop their tax credit applications and partially basing their fee on the tax credit they could obtain. This over-inflated cost is a challenge for the reviewers.

Ms. Vandehey committed to developing a clearer presentation when Chair Eden stated the calculation on UST applications is confusing.

Commissioner Reeve moved to approve items in Attachment B recommended for approval with the exception of the Willamette Industries applications and application #5233. Commissioner Bennett seconded the motion and Director Marsh polled the Commission: Commissioner Bennett, yes; Commissioner Malarkey, yes; Commissioner Van Vliet, yes; Commissioner Reeve, yes; and Chair Eden, yes. The motion carried with five "yes" votes.

Commissioner Reeve moved to approve the Willamette Industries applications as recommended by the Department with the changes in the figures on application #4792. Commissioner Malarkey seconded the motion and Director Marsh polled the Commission: Commissioner Reeve, yes; Commissioner Malarkey, yes; Commissioner Bennett, yes; Chair Eden, yes; and Commissioner Van Vliet, abstained. The motion carried with four "yes" votes.

DENIALS

There had been no contacts from the applicants regarding the denials. Commissioner Van Vliet moved to deny applications #4714 and #4845 as recommended by staff. Commissioner Reeve seconded the motion and Director Marsh polled the Commission: Commissioner Van Vliet, yes; Commissioner Reeve, yes; Commissioner Malarkey, yes; Commissioner Bennett, yes; and Chair Eden, yes. The motion carried with five "yes" votes.

REJECTIONS

Ms. Vandehey stated the Department recommends the Commission reject application #4570 from Willamette Industries and application #4864 from Georgia Pacific because the applicants submitted the applications over two years after their facility was substantially completed.

Willamette Industries does not agree with the Department's recommendation to reject application #4570. She added the tax credit statute does not allow staff to allow an exception to the deadline for filing an application. Staff is very supportive of the role this facility plays in lightening the load on our landfills; however, the merits of the facility or if the facility would have been otherwise eligible is not the question. The question is: "Was it complete to perform its purpose?"

Prior to their December 8, 1999 letter (shown with the Review Report) the applicant argued that the facility was not substantially complete until the lease was signed, regardless of whether the lessee was operating the facility. In that letter Willamette Industries also argues that the facility was not substantially complete until the dust filter system was installed. However, the fact that the dust filter was not installed until later did not prevent the facility from operating. The applicant mentions that the Toledo Platform Scale was essential for the material recovery facility to perform its function. The scales are used to calculate payments to suppliers. Ms. Vandehey stated this new argument did not change the Department recommendation, stressing that staff and Willamette Industries agree the facility was operating for its intended purpose before December 26, 1993. Staff does not consider that the dust filter and the scales prevented the facility from operating prior to their installation.

Commissioner Eden asked what were the overriding factors in making the determination about whether construction of the facility is substantially completed? When did it begin operating verses when the lease was signed? Counsel advised the Commission that the statute and the applicable rule require the Commission reject the application if they determine it was substantially complete. That determination involves determining whether or not there was any part of it that was essential to the function or operation that was missing. In the past, the Commission has taken the view that if a facility can be operated then essential components are not missing. This was the position the Department recommended the Commission continue to take. Counsel advised that ultimately it is up to the Commission how to interpret and apply their rule. Chair Eden asked staff if the Department followed the rule in asking for additional material in time. Ms. Vandehey affirmed that staff did not ask for the additional information within the 30 days set out in the rule.

Counsel interjected that it may be helpful for the Commission to understand that the two different deadlines function differently, and the remedies for not meeting a deadline are different. If the Department fails to act in a timely manner, the remedy is to get a writ ordering the Department to act. Counsel explained the Commission cannot grant all tax credits merely because the Department fails to act in a timely fashion as this would be inconsistent with the statute. The question about what to do when the applicant fails to provide the information is a different issue. Historically and legally, the Department has taken the position that if the applicant fails to act in a timely manner, the remedy is to reject the application.

Commissioner Bennett asked if the rules had changed between 1993 and the present. He also asked if there were benefits of one set of rules over the other. Staff indicated new rules went into effect on May 1, 1998, expanding the Department's deadline to request additional information to 60 days and reducing the applicant's deadline to provide the additional information to 60 days. However, the submittal deadline did not change. The fees increased with the May 1998 rules and applicants with applications in process could choose to apply under the May 1998 rule.

Commissioner Reeve asked Willamette Industries about what happened in September 1993 and how the facility was operated. Rece Bly of Miller Nash, LLP, appearing on behalf of Willamette Industries talked about the date the lease was signed and that all essential elements for the facility were not completed until after December 30, 1993. Commission Eden asked Mr. Bly to provide a discussion of the fact that the facility was operating in September 1993. Mr. Bly stated the law does not speak in terms of operating the facility. Mr. Bly also indicated that the filter system is needed for the safety of the forklift operators. It was designed into the facility for the safety of the people working in the facility and to keep the dust off the equipment. When asked if the forklifts were operating in the building in September 1993, Mr. Bly said, "There were forklifts and it wasn't the way it was suppose to be. It didn't comply with the way the thing had been designed. They were struggling to get it up and get it the way it was suppose to be and took them an extra couple three months to get it up and running. There were forklifts but it wasn't running the way it had to and if we hadn't done what we did OSHA or somebody else would have been smashing us for operating un-safely. This is an important thing this filter. Just because you can operate it in a substandard way doesn't mean you *lose* a tax credit."

Commissioner Bennett asked about the role of the scales and when billing began. Mr. Bly said the scales determine how much to pay suppliers. He said that from Willamette's perspective, billing began January 1, 1994, because that is when the lease first went into place.

Mr. Bly said, "...There seems to be some confusion on staff's part. And first of all let me tell you that staff is not unanimous on this. Last week the man handling this file, Mr. Bree, recommended that this be approved, as it should be. This facility should be certified and he so opined last week in a memorandum. So its important that the Commission be aware of that."

Commissioner Van Vliet reiterated that he had a conflict of interest but stated this facility is probably as close to a pollution control facility of any of the tax credits presented today. Because one of the people working on the review said it should have been approved would mean it would be very difficult to defend the rejection. Ms. Vandehey said she was not aware Mr. Bree had presented an opinion to Willamette Industries and that staff had not had an opportunity to discuss this. Commissioner Reeve asked if the Commissioners had a record of the memorandum or opinion from Mr. Bree? The Commissioners confirmed they had not seen the memorandum or opinion.

The Commission explored setting the application over until a later meeting. Mr. Bly emphatically disagreed since the Department had over four years to make the decision to approve the application. Director Marsh reminded the Commission that the Department had tried to schedule this review for other meetings but Willamette Industries has not been available to come to the table. Ms. Vandehey addressed the inability to make a decision to approve the tax credit since staff did not look at the individual elements of the claimed facility because of the timing issues. Staff brought the recommendation to reject the application based upon the timing issue and did not complete an accounting review. Chair Eden said she was torn on this because of the fact that the facility began operating in September of '93. She voiced concern over the ramifications for any other decisions that might come before the Commission on the issue of what is substantially complete. On the other hand, all facilities don't get up and running 100 percent, and of all the tax credits before the Commission at this meeting, this is the facility that in a merit system deserves it. She stated that the timing issue is an unfortunate one.

A discussion of the ability of the facility to bill ensued. Commissioner Reeve asked Mr. Bly if the business was able to bill when it was operating from September to December 1993? Mr. Bly said Willamette Industries was not able to bill and did not bill for this leasehold facility until January 1, 1994, because they did not have a lease in place. Counsel clarified the question as not whether Willamette Industries could bill but whether or not the lessee that was operating the facility was able to bill. Chair Eden asked if the lessee was paid? Mr. Bly restated that Willamette Industries is the applicant and the facility was not done in Willamette's mind and wasn't ready for any kind of billing to a tenant until January 1, 1994. Counsel stated the billing dialog had been constructive because what staff is considering is the functionality in what is essential for the operator of the facility to operate the facility. Commissioner Reeve stated he believed that the statutory definition of substantially complete is clear. He thought the application should be rejected on the basis that the facility was operating; therefore it was substantially complete.

Commissioner Reeve moved to reject application #4570. Chair Eden seconded the motion and Director Marsh polled the Commission: Commissioner Van Vliet, Abstained: Commissioner Malarkey, no; Commissioner Bennett, no, Commissioner Reeve, yes; Chair Eden, yes. The motion failed. As a result of the vote, Counsel said the application should be treated as a set over where the Department would be prepared to provide testimony or submit affidavits. This tax credit application will be included in the tax credit staff report for the February 10-11, 2000, EQC meeting. If there is a memo written by Bill Bree as referenced by Mr. Bly, the Commission would like to see it before February.

A motion was made by Commissioner Reeve to reject Georgia Pacific application #4864. Commissioner Van Vliet seconded the motion and Director Marsh Polled the Commission: Commissioner Van Vliet, yes; Commissioner Reeve; Commissioner Malarkey; Commissioner Bennett, yes; and Chair Eden, yes. The motion carried with five "yes" votes.

Transfers

Commissioner Van Vliet moved to transfer the certificates listed in Attachment E and the Addendum of the staff report. Commissioner Bennett seconded the motion and Director Marsh polled the Commission: Commissioner Van Vliet, yes; Commissioner Malarkey, yes; Commissioner Bennett, yes; Commissioner Reeve, yes; and Chair Eden, yes. The motion carried with five "yes" votes.

Action	App. No.	Applicant	Certified Cost	Percentage	Type	Value
Approve	4789	Willamette Industries, Inc.	$1,045,564	100%	Air	$522,782
Approve	4792	Willamette Industries, Inc.	$71,523	100%	Air	$30,816
Approve	4905	Willamette Industries, Inc.	$91,098	100%	Water	$45,549
Approve	4906	Willamette Industries, Inc.	$35,904	100%	Water	$17,952
Approve	4927	Willamette Industries, Inc.	$1,155,228	100%	Air	$577,614
Approve	4934	Willamette Industries, Inc.	$1,398,042	100%	Air	$699,021
Approve	4978	Willamette Industries, Inc.	$1,423,208	100%	Air	$711,604
Approve	4986	Willamette Industries, Inc.	$402,848	100%	Air	$201,424
Approve	5020	Willamette Industries, Inc.	$542,210	100%	Water	$271,105
Approve	5191	Russell Oil Company	$23,320	100%	USTs	$11,660
PULLED	5223	Cascade General, Inc.	$1,935,351	100%	Water	$967,676
Approve	5227	Willamette Industries, Inc.	$118,175	100%	Air	$59,087
Approve	5243	Arden, Inc.	$201,782	100%	Air	$100,891
Approve	5255	CO-GEN II, LLC	$687,653	100%	Air	$343,827
Approve	5256	CO-GEN Co., LLC	$588,507	100%	Air	$294,254
Approve	5274	Leroy & Lowell Kropf	$81,742	100%	Air	$40,871
Approve	5291	Truax Harris Energy LLC	$194,027	89%	USTs	$86,342
Approve	5292	Truax Harris Energy LLC	$317,343	94%	USTs	$149,151
Approve	5293	Nadim & Lama Yaqoub	$87,767	88%	USTs	$38,617
Approve	5294	Exxon of Woodburn LLC	$277,277	93%	USTs	$128,934
Approve	5305	John Tea	$36,000	100%	Dry Clean	$18,000
Approve	5306	Tomlin's Auto Service	$37,697	100%	USTs	$18,849
Approve	5307	Delbert Folk	$68,195	99%	USTs	$33,757
Approve	5323	Bob VanValin Enterprises, Inc.	$67,089	100%	USTs	$33,545
Approve	5324	Chan T. Him	$35,000	100%	Dry Clean	$17,500
Approve	5325	Larry A. Isom	$5,500	100%	Field	$2,750
Approve	5329	Bryce D. Cruickshank	$115,724	92%	Field	$53,233
Approve	5334	Larry M. and Mary Lou Neher	$47,995	100%	Field	$23,998
Approve	5337	Clough Oil Company	$78,988	100%	USTs	$39,494
Approve	5339	Jim R. Titus and Freda J. Titus	$138,404	100%	USTs	$69,202
Approve	5340	Clough Oil Company	$26,019	100%	USTs	$13,009

Approve	5341	Larry Craig	$83,794	87%	USTs	$36,450
Approve	5342	Ferrell's Fuel Network, Inc.	$88,613	99%	USTs	$43,863
Deny	4714	Portland General Electric	$4,859	100%	Water	$2,430
Deny	4845	Integrated Device Technology	$801,096	100%	Air	$400,548
SET	4570	Willamette Industries, Inc.	$2,596,818	100%	Solid Waste	$1,298,409
Reject	4800	Willamette Industries, Inc.	$110,418	100%	Air	$55,209
Reject	4864	Georgia-Pacific Corp.	$538,859	100%	Air	$269,430

C. Tidewater Barge Lines Tax Credit Applications

Larry Knudsen discussed the issue before the Commission as a choice of whether to issue a tax credit to Tidewater Barge as settlement of a pending Court of Appeals case. He advised the Commission that if they made that motion, he would ask that it be subject to the execution of a written formal settlement agreement between Tidewater and the EQC. The settlement needed to provide for the dismissal of the court case upon acceptance of the certificate by the Department of Revenue. He also advised the Commission to authorize the Director to sign the settlement agreement and certificate on their behalf.

Commissioner Van Vliet made a motion to accept the offer of settlement and Director Marsh be authorized to sign the settlement and certificate on the Commission's behalf. Commissioner Bennett seconded the motion and Director Marsh polled the Commission: Commissioner Bennett, yes; Commissioner Malarkey, yes; Commissioner Bennett, yes; Commissioner Reeve, yes; and Chair Eden, yes. The motion carried with five "yes" votes.

B. Rule Adoption of Proposed Rules Establishing Review and Acceptance Criteria for New or Innovative Technologies and Materials for Application in the On-Site Program.

Stephanie Hallock, Interim Administrator for the On-Site Sewage Disposal Program, and Dennis Illingworth On-site program staff presented a summary of the staff report. Written testimony that had been submitted during the extension of public comment was reviewed. The Commission asked questions about the alternatives and the performance testing protocol. Commissioner Malarkey pointed out a spelling error in the proposed rules. Counsel recommended an implementation date of March 1, 2000.

A motion was made by Commissioner Van Vliet to adopt the proposed rule package as presented with the spelling correction and implementation date of March 1, 2000. Commissioner Malarkey seconded the motion and Director Marsh polled the Commission: Commissioner Bennett, yes; Commissioner Malarkey, yes; Commissioner Reeve, yes; Commissioner Van Vliet, yes; and Chair Eden, yes. The motion carried with five "yes" votes.

There being no further business, the meeting was adjourned at 11:30 a.m.

State of Oregon
Department of Environmental Quality Memorandum

Date: February 3, 2000
To: Environmental Quality Commission

From: Langdon Marsh, Director

Subject: Addendum
Agenda Item B, February 10, 2000, EQC Meeting
Tax Credit Applications

On February 2, 2000, Komatsu Silicon America, Inc. requested an extension of time to file a pollution control tax credit application for the reasons expressed in the attached letter.

Statute and rule provide for an extension as follows:

> ORS 468.165(6) in part states: "The commission may grant an extension of time to file an application for circumstances beyond the control of the applicant that would make a timely filing unreasonable. However, the period for filing an application shall not be extended to a date beyond December 31, 2003."
>
> OAR 340-016-0010 (2) defines "Circumstances Beyond the Control of the Applicant" as "... facts, conditions and circumstances which the applicant's due care and diligence would not have avoided."

Previous Commissions have allowed extensions for records destroyed by fire; and the death of a business owner where the heirs requested an extension. The Commission has not approved extensions for changes in key personnel or for an inability to locate records. Staff recommends the Commission be consistent with previous policy direction.

KOMATSU

KOMATSU SILICON AMERICA, INC.

February 1, 2000

Environmental Quality Commission
811 SW Sixth Avenue
Portland, OR 97204-1390

Dear Commissioners;

Komatsu Silicon America (KSA) would like to request an extension to the two-year period allowed for the submittal of environmental tax credit applications. During June 1998, KSA completed the installation of Phase II wastewater treatment systems. Also, during July of the same year, KSA completed the installation of several air pollution control scrubbers.

Phase II, the silicon crystal growing and wafer production facility, was to be started in January 1999. Starting in September 1998, the decision was made to stop all Phase II manufacturing activities indefinitely. By November 1998, all Phase II manufacturing activities had ended. Phase I activities, epitaxial (EPI) growth operations ended a short time later. The only remaining activities were minimal facilities maintenance and customer sales and service. There were no plans as to when, or even if, KSA would start back up. The plant is still shut down. Last month, KSA's Japanese parent company, Komatsu Limited, indicated there is a possible startup of limited production.

KSA is requesting a six-month extension in order to properly prepare air quality and water quality environmental tax credit applications. The applications were not prepared up to this point because of the uncertainty as to whether KSA would ever bring the facility into operation again. The additional time is needed to locate the documents to verify the actual costs of the pollution control equipment.

Thank you for your time to consider this request.

Sincerely,

Dennis Carson
Facility Manager

25300 NW EVERGREEN HILLSBORO, OREGON 97124
CORPORATE 503 640 7000 FACSIMILE 503 640 7019

Fact Sheet
PGE Preliminary Application
Pollution Control Facility Tax Credit
Nov. 18, 1999

BACKGROUND: Portland General Electric Co. (PGE) is building a facility to store spent nuclear fuel at its Trojan Nuclear Power Plant site in Rainier, Oregon. The facility, known as the Independent Spent Fuel Storage Installation, will provide dry storage for spent fuel being removed from the storage pool as part of the decommissioning effort at the Trojan site. It will also provide for transfer of the spent fuel waste to a yet-to-be-determined federal disposal site. PGE estimates that its Independent Spent Fuel Storage Installation will cost $55 million.

PGE is seeking preliminary certification that the Independent Spent Fuel Storage Installation qualifies as a pollution control facility, for tax credit purposes. Under Oregon's Pollution Control Facility Tax Credit Program, any Oregon taxpayer who makes a capital investment in a pollution control facility may qualify for a tax credit.

PGE is seeking the tax credit as qualifying under the program's provision that allows tax credits for facilities that are constructed for the sole purpose to control, prevent, or reduce pollution. The facility was not required by DEQ.

DESCRIPTION OF FACILITY: The Independent Spent Fuel Storage Installation is located on the 634-acre Trojan site five miles south of Rainier, Ore. The company has decided to dismantle the spent fuel storage pool and make the spent fuel readily transferable to a disposal site. The facility is designed to isolate radioactive materials from the environment by enclosing them in sealed steel canisters. These canisters will be placed inside of concrete casks resting on a reinforced concrete pad.

The facility is designed as a temporary storage site until permanent storage becomes available. The maximum license duration for the facility would be 20 years, but PGE can apply for license renewal. (The facility is designed for 40 years of use.) Radiation levels at the facility would be monitored during storage of spent nuclear fuel to ensure that the system is performing as designed.

The facility is modular, consisting of canisters, concrete casks, a reinforced concrete pad, and a transfer station. The concrete pad can support up to 36 concrete and steel storage casks. The casks are designed to store intact spent fuel, failed fuel, and fuel debris, held in a steel canister at the center of each cask. The casks provide structural support, shielding, and natural circulation cooling for the canisters.

The transfer station provides the capability to safely transfer the sealed containers directly in shipping casks to the yet-to-be-selected federal repository. Within the transfer station, canisters are transferred via transfer casks between concrete casks, shipping casks, or basket overpacks in the event of a leaking basket.

WHAT TYPE OF TAX CREDIT MIGHT PGE GET IF ITS APPLICATION IS DEEMED ELIGIBLE?: Pollution Control Facility Tax Credit applicants such as PGE may take up to 50 percent of the certified cost of the facility as a credit to reduce their Oregon tax liability upon final certification. The actual amount of the tax credit depends on how much of the facility cost can be attributed to pollution control. That means that if PGE's Independent Spent Fuel Storage Installation costs $55 million, the owners could take up to $27.5 million in a tax credit spread over 10 years.

DEQ AND OREGON ENVIRONMENTAL QUALITY COMMISSION (EQC) ROLES: Companies may file an optional preliminary application for tax credit with DEQ any time before completion of their facility. An application for a final tax credit must be filed with the DEQ within the first two years after purchase or completion of the facility.

DEQ is responsible for reviewing applications to determine if they're eligible for the tax credit and to determine the percentage of the cost that contributes to pollution control. In looking at applications such as PGE's, DEQ determines if the "sole and exclusive" purpose of the facility is pollution control. DEQ must consider any benefits that the applicant might receive as a result of building their facility.

For example, reviewers consider:

- Whether the applicant decreases its risk of financial or personal liability by building the facility.
- Whether the facility improves industrial health and safety as opposed to controlling pollution.
- Whether the applicant experiences a reduction in fees, operation and maintenance costs, or insurance costs, as a result of building the facility.
- Whether the facility will result in a reduction of on-site staff, a reduction in the number of inspections, and a reduction in the level of reporting and monitoring requirements.

After review, DEQ then makes a recommendation to the EQC. The EQC is responsible for approving or denying certification of pollution control facilities.

Note: DEQ is NOT making any recommendation on PGE's application at this time. A recommendation is expected sometime in spring 2000.

BACKGROUND OF PAST TAX CREDITS FOR PGE: The EQC has issued 147 tax credit certificates to PGE since the Pollution Control Facility Tax Credit Program began in 1967. A few of these were issued jointly. The certified facility cost of these tax credits totals $153 million. The maximum amount that could be claimed against Oregon tax liability would be about one-half that amount, or $76.5 million. The EQC certified seven pollution control facilities--four water pollution and three air pollution control facilities--at the Trojan site in 1983 and 1984. The certified cost of those facilities totaled about $48 million. Half that amount would have been available for tax credit purposes.

###

Environmental Quality Commission

☐Rule Adoption Item
X Action Item
☐Information Item

Agenda Item B
February 10, 2000 Meeting

Title: Tax Credit Applications

Summary: Staff recommends the following actions regarding tax credits:

		Certified Cost	*Value*
Approve			
Pollution Control Facility Tax Credit			
Air (2 applications)		$649,407	$324,704
Solid Waste (17 applications)		$819,727	$409,864
	19 applications	$1,469,135	$734,567
Pollution Prevention Tax Credit	*2 applications*	$69,797	$34,899
	Approve 21 applications	**$1,538,932**	**$769,466**
Reject			
Pollution Control Facility Tax Credit			
Air (6 applications)		$831,166	$415,583
Solid Waste (1 application)		$2,812,715	$1,406,358
Water (1 application)		$1,599,606	$799,803
	Reject 8 applications	**$5,242,487**	**$2,621,744**

Approve issuance of tax credit certificates for the applications presented in Attachment B.
Reject issuance of a tax credit certificates for applications as presented in Attachment D.

Margaret Vandehey — Report Author
for Helen Lottridge — Division Administrator
Director

January 24, 2000

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

State of Oregon
Department of Environmental Quality Memorandum

Date: January 24, 2000

To: Environmental Quality Commission

From: Langdon Marsh, Director

Subject: Agenda Item B, February 10, 2000, EQC Meeting
Tax Credit Applications

Statement of the Need for Action

This staff report presents the staff analysis of pollution control facility, and pollution prevention tax credit applications and the Department's recommendation for Commission action on these applications.

- All applications are summarized in Attachment A of this staff report.
- Applications recommended for Approval are presented in detail in Attachment B.
- Applications recommended for Commission Rejection are presented in Attachment C.

According to the Commission's direction, this letter only calls out applications that may require background information not contained in the Review Reports, where staff seeks the Commission's policy direction.

Background APPROVALS: Attachment B

The applications presented for approval in Attachment B:

1. Meet the eligibility requirements for approval Pollution Control Facility Tax Credit and the Pollution Prevention Tax Credit programs.
2. Do not represent any Preliminary Approvals for the Pollution Control Tax Credit Program.
3. Are organized in application number sequence.

Background COMMISSION REJECTIONS – Attachment C

The applications presented for rejection in Attachment C:

1. Do not meet the timing requirements set forth in the Pollution Control Facility Tax Credit statute.
2. Do not represent any Preliminary Approvals for the Pollution Control Tax Credit Program.
3. Are organized in application number sequence.

Staff recommends the rejection of an application presented for certification if the Oregon taxpayer fails to file a final Pollution Control Facility Tax Credit Application within two years after construction of the facility is substantially completed.

Staff's recommendation to reject these applications is based on ORS 468.165(6).

ORS 468.165 (6)
The application shall be submitted after construction of the facility is substantially completed and the facility is placed in service and within two years after construction of the facility is substantially completed. Failure to file a timely application shall make the facility ineligible for tax credit certification.

Submitted means the date that the application is received at the Department of Environmental Quality. The DEQ Business Office date-stamps the application upon receipt.

Substantial Completion, as defined in OAR 340-016-0010 (11), means the completion of the erection, installation, modification, or construction of all elements of the claimed facility, which are essential to perform its purpose.

Facility The term "facility" as it is used in the pollution control facility tax credit statutes does not refer to the plant site, the entire construction project or the business endeavor. It refers to the eligible pollution control components as defined in ORS 468.155, shown below in abbreviated form.

ORS 468.155 (1)(a)
As used in ORS 468.155 to 468.190, unless the context requires otherwise, "pollution control facility" or "facility" means any land, structure, building, installation, excavation, machinery, equipment or device, ... reasonably used, erected, constructed or installed by any person if:

Purpose The term "purpose" means either the principal or sole purpose of the facility not how the pollution control is accomplished. The eligible purposes are:

Principal purpose means the applicant is required to comply with a requirement imposed by the Department of Environmental Quality, the federal Environmental Protection Agency or regional air pollution authority. It means they are require to "prevent, control or reduce air, water or noise pollution or solid or hazardous waste or to recycle or provide for the appropriate disposal of used oil..."

Sole purpose means that the exclusive purpose of facility is "to prevent, control or reduce a substantial quantity of air, water or noise pollution or solid or hazardous waste or to recycle or provide for the appropriate disposal of used oil."

In addition to defining a "facility, the statute defines what is not a facility.

ORS 468.155 (2)
"Pollution control facility" or "facility" does not include:...(d) Any distinct portion of a pollution control facility that makes an insignificant contribution to the ... sole purpose of the facility.

Placed in Service There is no definition of "placed in service" in the Pollution Control Facility Tax Credit statutes or rules. The Department relies on the common IRS definition, which states an asset is *"'placed in service" when it is in a condition or state of readiness and availability for its assigned function; it is not essential that the asset be put into actual use."*

Willamette Industries, Inc. - Application Number 4570

On Tax Credit application number 4570, Willamette Industries, Inc. claimed a facility with the "sole purpose" of controlling, reducing or eliminating a substantial quantity of solid waste.

Willamette Industries entered into a lease with Far West Fibers, on January 1, 1994. However, Far West Fibers began operating the claimed facility three months prior to the execution of the lease on September 27, 1993. The date that Far West Fibers began operating the facility for "the purpose to prevent, control or reduce a substantial quantity of solid waste" is not in dispute. Both Far West Fiber's plant personnel and Jim Aden of Willamette Industries have stated this as fact.

The Department and Willamette Industries have different interpretations of the phrase "submitted within two years after construction of the facility is substantially completed" as outlined below.

1. Lease or Operational Date

   The applicant claimed that the date of substantial completion of the facility should be the effective date of the lease, which is January 1, 1994. Subscribing to this interpretation, the application submitted on December 26, 1995 would meet the filing deadline.

   Staff determined that the date the facility actually began operating for its pollution control purpose was the date of substantial completion. Far West Fibers began operating the facility for its pollution control purpose on September 27, 1993 and Willamette Industries submitted the application on December 26, 1995. General Counsel advised staff that it is doubtful that the court would sustain a determination based upon a single factor, such as the date of the leasehold or the date on which a company began to claim depreciation for tax purposes.

2. Essential Elements

   On December 8, 1999 and December 10, 1999, Willamette Industries presented information that had not been previously presented to the Department. Willamette Industries presented this information over two years after they received a copy of the finalized Review Report.

   The applicant claims that **"all"** elements of the claimed facility that are essential to perform its purpose were not in place; therefore, the facility was not substantially complete.

They claimed that two essential elements had not been completed until after December 31, 1, 1993.

- DCE dust filter system: The applicant did not begin installation of the dust filtration system until February of 1994, after the lease had been was signed. "The DCE dust filter system lowers the level of dust in the building, keeps dust out of the work area and off the equipment, and helps insure safe driving conditions for forklift operators in the facility." (*Affidavit of Marc W. Olsen, Willamette Industries, Inc., Project Manager, East Multnomah County Recycling, December 8, 1999.*)

  Rece Bly, Partner, Miller Nash, LLP, appearing before the EQC on December 20, 1999 on behalf of Willamette, stated the filter was not completed until April 94. He affirmed Mr. Olsen's affidavit that the system is needed for the safety of the forklift operators, that it was designed into the facility for the safety of the people working in the facility, and to keep the dust off the equipment. He confirmed that forklifts were operating within the building but that the filters "...didn't comply with the way the thing had been designed. They were struggling to get it up and get it the way it was suppose to be and took them an extra couple three months to get it up and running. There were forklifts but it wasn't running the way it had to and if we hadn't done what we did OSHA or somebody else would have been smashing us for operating un-safely. This is an important thing this filter. Just because you can operate it in a substandard way doesn't mean you loose a tax credit."

  From the evidence presented by the applicant in this additional information, staff acknowledges that the dust filter system was not installed in the manner it was intended to run until after the lease had been signed. Staff also acknowledges that the dust filter system provides for safe driving conditions for the forklift operators and to keep dust off the equipment.

  Staff determined that the dust filter system was **not essential** for the facility to perform its "sole purpose to control, reduce, or eliminate a substantial quantity of solid waste." This is based upon the fact that Far West Fibers began operating the facility for its pollution control purpose on September 27, 1993 and the purpose of the dust filter system is for industrial safety and for site maintenance.

- Willamette Industries stated that the 10-ton Toledo scale was not installed until after December 22, 1993. According to Mr. Aden of Willamette Industries, "This scale is used to weigh the barrels of loose paper waste and bales of corrugated cardboard in order to calculate payment to the suppliers."

  On December 20, 1999, the Commission asked Mr. Bly about the role of the scales. He answered, "Suppliers are paid by a unit of weight to know how much to pay suppliers."

Staff was not able to determine the exact date that construction of the scales was substantially complete. Staff determined that the scales were **not essential** for the facility to perform its "sole purpose to control, reduce, or eliminate a substantial quantity of solid waste." This is evidenced by the fact that Far West Fibers began operating the facility for its pollution control purpose on September 27, 1993. Staff determined that the purpose of the scales is for billing purposes.

In his December 20, 1999 testimony before the Environmental Quality Commission, Mr. Bly stated that the law does not speak in terms of operating the facility when asked to provide a discussion of the fact that the facility was operating in September of '93. General Counsel has advised the Department that both the language and the context of the rules make it clear that staff's recommendation may be based upon whether the facility was being "operated" for its intended pollution control purpose.

Staff recommends the rejection of application number 4570 for certification as a pollution control facility because the applicant failed to file their Pollution Control Facility Tax Credit Application within two years after construction of the facility is substantially completed.

Mitsubishi Silicon America
Applications Numbered 5049, 5100, 5101, 5102, 5103, 5104, and 5105
The applicant concurs with the Department's determination that the applications presented in Attachment D were submitted beyond two years after the date that construction was substantially completed.

Conclusions
The recommendations for action on the attached applications are consistent with statutory provisions and administrative rules related to the pollution control facility, pollution prevention and reclaimed plastic product tax credit programs.

Recommendation for Commission Action
The Department recommends the Commission approve certification for the tax credit applications as presented in Attachment B of the Department's Staff Report.

The Department recommends the Commission rejects Applications Numbered 4570, 5049, 5100, 5101, 5102, 5103, 5104, 5105 as presented in Attachment C of the Department's Staff Report.

Intended Follow-up Actions
Staff will notify applicants the Environmental Quality Commission's action. The Department will notify applicants with denied or rejected applications or applications with a facility cost reduced from the amount claimed on the application by Certified Mail. Staff will notify Department of Revenue of any Issued, Transferred or Revoked certificates.

Attachments
A. Summary
B. Approvals

C. Rejections

Reference Documents (available upon request)

1. ORS 468.150 through 468.190.
2. OAR 340-016-0005 through 340-016-0050.
3. ORS 468A.095 through 468A.098.
4. OAR 340-016-0100 through 340-016-0125.
5. ORS 468.451 through OAR 468.491.
6. OAR 340-017-0010 through 340-017-0055.

Approved:

Section: _____

Division: _____

Report Prepared by: Margaret Vandehey
Phone: (503) 229-6878
Date Prepared: January 24, 1999

0002_EQC_Preparation.doc

Attachment A

Summary

February 10, 2000
Tax Credit Summary

Recommendation	App. No.	Applicant	Certified Cost	Percentage Allocable	Type	Value
Approve	4979	Willamette Industries, Inc.	$615,050	100%	Air	$307,525
Approve	5179	Capitol Recycling & Disposal, Inc.	$16,882	100%	SW	$8,441
Approve	5264	Capitol Recycling & Disposal, Inc.	$171,113	100%	SW	$85,556
Approve	5267	United Disposal Service, Inc.	$28,281	100%	SW	$14,141
Approve	5269	United Disposal Service, Inc.	$46,603	100%	SW	$23,301
Approve	5279	Forrest Paint Company	$34,357	100%	Air	$17,179
Approve	5281	United Disposal Service, Inc.	$14,307	100%	SW	$7,154
Approve	5287	Capitol Recycling & Disposal, Inc.	$18,106	100%	SW	$9,053
Approve	5288	Capitol Recycling & Disposal, Inc.	$52,131	100%	SW	$26,066
Approve	5290	Capitol Recycling & Disposal, Inc.	$42,890	100%	SW	$21,445
Approve	5296	Grabhorn, Inc.	$300,565	100%	SW	$150,283
Approve	5308	United Disposal Service, Inc.	$8,243	100%	SW	$4,122
Approve	5322	Capitol Recycling & Disposal, Inc.	$4,420	100%	SW	$2,210
Approve	5328	United Disposal Service, Inc.	$9,538	100%	SW	$4,769
Approve	5338	Capitol Recycling & Disposal, Inc.	$26,919	100%	SW	$13,460
Approve	5343	Capitol Recycling & Disposal, Inc.	$32,744	100%	SW	$16,372
Approve	5344	United Disposal Service, Inc.	$24,680	100%	SW	$12,340
Approve	5347	Weldon's Enterprises, Inc.	$64,052	100%	Perc	$32,026
Approve	5349	Environmental Waste Systems,	$7,273	100%	SW	$3,636
Approve	5351	United Disposal Service, Inc.	$8,243	100%	SW	$4,122
Approve	5352	Keller Drop Box, Inc.	$6,789	100%	SW	$3,395
Approve	5354	Steve A. Kenner	$5,745	100%	Perc	$2,873
Reject	4570	Willamette Industries, Inc.	$2,812,715	100%	SW	$1,406,358
Reject	5049	Mitsubishi Silicon America	$278,399	100%	Air	$139,200
Reject	5100	Mitsubishi Silicon America	$1,599,606	100%	Water	$799,803
Reject	5101	Mitsubishi Silicon America	$37,358	100%	Air	$18,679
Reject	5102	Mitsubishi Silicon America	$95,170	100%	Air	$47,585
Reject	5103	Mitsubishi Silicon America	$145,824	100%	Air	$72,912
Reject	5104	Mitsubishi Silicon America	$146,236	100%	Air	$73,118
Reject	5105	Mitsubishi Silicon America	$128,179	100%	Air	$64,090

Attachment B

Approvals

Tax Credit Review Report

EQC 9912

Director's Recommendation:	**APPROVE**
Applicant	**Willamette Industries, Inc.**
Application No.	**4979**
Facility Cost	**$615,050**
Percentage Allocable	**100%**
Useful Life	**7 years**

Pollution Control Facility: Air
Final Certification
ORS 468.150 – 468.190
OAR 340-016-0005 – 340-016-0050

Applicant Identification

The applicant is a C corporation operating as a **particleboard manufacturer.** Their taxpayer identification number is 93-0312940. The applicant's address is:

KorPine Division
1300 SW Fifth Avenue, Suite 3800
Portland, OR 97201

Facility Identification

The certificate will identify the facility as:

A Wellons Electrostatic Precipitator (ESP)

The applicant is the owner of the facility located at:

55 SW Division
Bend, OR 97702

Technical Information

The claimed facility consists of:

Phase I: The applicant claimed the components listed below from their September of 1995 installation. This installation failed to meet the emission requirements in all operating conditions of applicant's air permit. The maximum emission limit allowed in the air permit for boiler #1 was 0.20 gr/dscf and for boiler #2 was 0.10 gr/dscf.

- Installation of computerized combustion controls on boilers #1 and #2 to minimize emissions by improving combustion efficiency. Boiler #1 is fired with either sanderdust or natural gas, boiler #2 with sanderdust (with a natrual gas pilot light).
- Installation of exhaust ductwork rerouting boiler #1 to finish dryer #4 and boiler #2 to finish dryers # 1 & #2, routing emissions through the dryers to the dryer scrubbers,
- Overhaul of the star feeder on boiler #1 to improve collection efficiency of the multiclone.

Phase II: In September of 1996, the applicant completed installation of the Wellons Model #7 ESP to control particulate emissions from both boilers when fired on sanderdust. The applicant claimed the Modification of the boiler exhaust ductwork and installation of a new Wellon's #7 dry ESP to control emissions from boiler #1 and boiler #2. The applicant states that emission levels are now less than 0.075 gr/dscf under all firing conditions.

The dry type Wellon ESP has a design inlet gas flow rate of 60,000 acf/min and a rated efficiency of 65%. Exhaust from each boiler is routed through a multiclone to the inlet of the Wellons ESP. Hot exhaust from the ESP is used in cold weather to heat one or more of the final dryers and otherwise is discharged into the atmosphere.

ESPs are considered best available control technology for controlling particulate emissions and opacity.

Eligibility

ORS 468.155 (1)(a) The **principal purpose** of this **new equipment and installation** is to control and reduce a substantial quantity of air pollution. DEQ imposes the requirement under ACDP #09-0002 issued 10/4/95 and Mutual Agreement Order #AOP-ER-96-017 dated 4/26/96.

ORS 468.155 (1)(b)(B) The ESPs are an air cleaning device, which **controls** air pollution by **disposing** of the **air contaminants**.

Timeliness of Application

Phase I of the claimed facility **does not** meet the requirement within ORS 468.165 (6) that stipulates that the application must be submitted **within two years** after construction is substantially complete. Phase 1 was not submitted within the required time. **Phase II** of the claimed facility meets this requirement.

Application Received		**4/2/98**
Additional Information Requested		**6/3/98**
Additional Information Received		**10/13/98**
Application Substantially Complete		**7/29/99**
Phase I	*Construction Started*	**5/1/95**
	Construction Completed	**9/1/95**
	Placed into Operation	**9/1/95**
Phase II	*Construction Started*	**2/12/96**
	Construction Completed	**9/15/96**
	Placed into Operation	**9/16/96**

Facility Cost

	Claimed	Non-Allowable	Allowable
Phase I			
Computer Combustion controls	$ 36,643		
Installed to optimize combustion efficiency and reduce fuel consumption – not pollution control.		$ 36,643	$ 0
Air piping and installation	$ 128,444		
Western Pneumatics (6/5/95) Fabrication and Installation of the Boiler Exhaust – no reduction in pollution.		$ 62,998	
Western Pneumatics (9/25/95) Fabrication and Installation of a 36" damper – no reduction in pollution.		3,785	
Western Pneumatics (7/28/95) Fabrication of Pipe Fittings		3,061	
E.J. Bartells Co (7/19/95) Insulate hot flue gas duct and steam & condensate piping- no reduction in pollution.		58,600	$ 0
Phase II			
Excavation/concrete	$ 15,265		
Doug Thompson, General Contractor (6/19/96) Extra concrete for slab edge and labor			6,836
Unsubstantiated amount:		8,429	
Engineering/environmental testing	17,026		
Unsubstantiated amount:		17,026	
			0
ESP equipment and installation	595,000	0	
Wellons (2/23/96) Equipment & Services for installation of ESP			595,000
Ancillary equpment and installation	52,156		
Ancillary equipment included installing the exhaust ductwork from the boiler to the ESP and hooking up the ESP to the boiler. Pacific Power (9/27/96) Relocation of overhead power lines is ineligible because it provides no pollution control.		20,291	
Unsubstantiated amount:		31,865	0
Air piping and installation	89,118		
Air systems included exhausting the two boilers to the ESP and exhausting the ESP to the dryers. Western Pneumatics 6/24/96 Invoice. Fab & Install Conveyor Negative Air Piping, Expansion Joints, and ESP Piping		62,569	
Unsubstantiated amount:		26,549	0
Electric supply equipment and installation	44,910		
ESCO Electric Supplies (6/25/96).			13,213
Eoff Electric Co (9/6/96) Gardner Bender B2000 Cycone Bender		5,152	
Unsubstantiated amount:		26,544	
Miscellaneous Supplies - Various	3,641		
Unsubstantiated amount:		3,641	0
Totals	**$ 982,203**	**$ 367,153**	**$ 615,050**

A certified public accountant's statement was not provided because the claimed costs exceed $500,000. Maggie Vandehey performed the accounting review on behalf of the Department.

Facility Cost Allocable to Pollution Control

Since the facility cost exceeds $50,000, according to ORS.190 (1) the following factors were used to determine the percentage of the facility cost allocable to pollution control.

Factor	Applied to This Facility
ORS 468.190(1)(a) Salable or Usable Commodity	No salable or useable commodity.
ORS 468.190(1)(b) Return on Investment	The useful life of the facility used for the return on investment consideration is 7 years. No gross annual revenues associated with this facility.
ORS 468.190(1)(c) Alternative Methods	Previous short-term strategies were attempted but failed. Other ESPs were evaluated, but the Wellons was selected for its capacity to control both boilers and maintain lower emission levels on a long-term basis.
ORS 468.190(1)(d) Savings or Increase in Costs	No savings or increase in costs.
ORS 468.190(1)(e) Other Relevant Factors	No other relevant factors.

Compliance

The applicant states that the facility is in compliance with Department rules and statutes and with EQC orders. The following DEQ permits have been issued to the Korpine Division plant:

ACDP 09-0002, issued 10/4/95
Storm water 1200-Z, issued 11/17/97

Reviewers: Lois L. Payne, P.E., SJO Consulting Engineers, Inc.
Dennis E. Cartier, Associate, SJO Consulting Engineers, Inc.
Maggie Vandehey, DEQ

Tax Credit Review Report

EQC 0002

Director's Recommendation: **APPROVE**

Applicant **Capitol Recycling & Disposal, Inc.**
Application No. **5179**
Facility Cost **$16,882**
Percentage Allocable **100%**
Useful Life **5 years**

Pollution Control Facility: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

Organized As: **a C corporation**
Business: **solid waste & recycling collection facility**
Taxpayer ID: **931197641**

The applicant's address is:

1890 16th Street SE
Salem, OR 97302

Facility Identification

The certificate will identify the facility as:

Twenty 6-yd front load cardboard collection cages, serial #s 144286 thru 144305, and twenty 4 yard front load cardboard collection cages, serial#s 144441 thru 144460.

The applicant is the owner of the facility located at:

1890 16th Street SE
Salem, OR 97302

Technical Information

These cages are used for the collection of source separated cardboard from multi-family residential and commercial collection customers in the City of Salem and Marion County.

Eligibility

ORS 468.155 (1)(a) The **sole purpose** of this **new equipment** is to prevent, control or reduce a substantial quantity of solid waste. These containers will be used exclusively for the collection of recyclable cardboard.

ORS 468.155 (1)(b)(D) The use of a **material recovery process** which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.005.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165(6).

Application Received	**03/18/99**
Application Substantially Complete	**12/29/99**
Construction Started	**04/10/97**
Construction Completed	**05/21/97**
Facility Placed into Operation	**06/05/97**

Facility Cost

Facility Cost		**$16,882**
Salvage Value	$	-
Government Grants	$	-
Other Tax Credits	$	-
Insignificant Contribution ORS 468.155(2)(d)	$	-
Eligible Facility Cost		**$16,882**

The facility cost does not exceed $50,000. An independent accounting review was not required. However, invoices or canceled checks substantiated the cost of the facility.

Facility Cost Allocable to Pollution Control

The facility cost does not exceed $50,000. According to ORS 468.190(3), the only factor used in determining the percentage allocable to pollution control is the percentage of time the facility is used for pollution control. Therefore, the percentage of the facility cost allocable to pollution control is **100%**.

Compliance and Other Tax Credits

The facility is in compliance with Department rules and statutes and with EQC orders. There were no DEQ permits issued to facility.

Reviewers: William R Bree

Tax Credit Review Report

EQC 0002

Director's Recommendation: **APPROVE**

Applicant **Capitol Recycling & Disposal, Inc.**
Application No. **5264**
Facility Cost **$171,113**
Percentage Allocable **100%**
Useful Life **5 years**

Pollution Control Facility: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

Organized As: **a C corporation**
Business: **Solid waste collection and recycling facility**
Taxpayer ID: **93-11197641**

The applicant's address is:

1890 16th Street S.E.
Salem, OR 97302

Facility Identification

The certificate will identify the facility as:

3,750 ninety gallon yard debris collection carts.

The applicant is the owner of the facility located at:

1890 16th Street S.E.
Salem, OR 97302

Technical Information

These carts are used for the curbside collection of yard debris residential collection service customers in the City of Salem and Marion County.

Eligibility

ORS 468.155 (1)(a) The **sole purpose** of this **new equipment** is to prevent, control or reduce a substantial quantity of **solid waste**. These carts are used solely for collecting compostable yard debris.

ORS 468.155 (1)(b)(D) The use of a **material recovery process** which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.005.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165 (6).

Application Received	**09/17/99**
Application Substantially Complete	**12/29/99**
Construction Started	**04/01/97**
Construction Completed	**04/30/97**
Facility Placed into Operation	**03/01/98**

Facility Cost

Facility Cost	**$171,113**
Salvage Value	$ -
Government Grants	$ -
Other Tax Credits	$ -
Insignificant Contribution ORS 468.155(2)(d)	$ -
Eligible Facility Cost	**$171,113**

The facility cost exceeds $500,000. Theodore R. Ahre, CPA provided cetrtification of the cost of the claimed facility. The applicant also provided a copy of the invoice and check for purchase of the carts.

Facility Cost Allocable to Pollution Control

The facility cost exceeds $50,000. According to ORS 468.190(1), the factors listed below were considered in determining the percentage of the facility cost allocable to pollution control. The percentage of the facility cost allocable to pollution control is **100%**.

Factor	Applied to This Facility
ORS 468.190(1)(a) Salable or Usable Commodity	This truck is used to collect recyclable material that is subsequently processed into a salable and useable commodity.
ORS 468.190(1)(b) Return on Investment	The useful life of the facility used for the return on investment consideration is 5 years. The average annual cash flow for the facility is $22,140. This results in a return on investment factor of 7.73 and a 0% return on investment. Therefore the portion of cost allocable to pollution control is 100%.
ORS 468.190(1)(c) Alternative Methods	No alternative investigated.
ORS 468.190(1)(d) Savings or Increase in Costs	No savings or increase in costs.
ORS 468.190(1)(e) Other Relevant Factors	No other relevant factors.

Compliance and Other Tax Credits

The facility is in compliance with Department rules and statutes and with EQC orders. There were no DEQ permits issued to facility.

Reviewers: William R Bree

Tax Credit Review Report

EQC 0002

Director's Recommendation: **APPROVE**

Applicant	**United Disposal Service, Inc.**
Application No.	**5267**
Facility Cost	**$28,281**
Percentage Allocable	**100%**
Useful Life	**10 years**

Pollution Control Facility: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

Organized As: **a C corporation**
Business: **a recycling facility**
Taxpayer ID: **93-0625022**

The applicant's address is:

2215 N Front Street
Woodburn, OR 97071

Facility Identification

The certificate will identify the facility as:

Ten 30-yard SC style drop boxes, serial #s 11149 through 11158.

The applicant is the owner of the facility located at:

2215 N Front Street
Woodburn, OR 97071

Technical Information

These drop boxes are used for the collection of recyclable material from commercial and industrial collection service customers

Eligibility

ORS 468.155 (1)(a) The **sole purpose** of this **new equipment** is to prevent, control or reduce a substantial quantity of solid waste.

ORS 468.155 (1)(b)(D) The use of a **material recovery process** which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.005.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165 (6).

Application Received	**09/22/99**
Application Substantially Complete	**12/29/99**
Construction Started	**05/15/99**
Construction Completed	**06/25/99**
Facility Placed into Operation	**06/30/99**

Facility Cost

Facility Cost		**$28,281**
Salvage Value	$	-
Government Grants	$	-
Other Tax Credits	$	-
Insignificant Contribution ORS 468.155(2)(d)	$	-
Eligible Facility Cost		**$28,281**

The facility cost does not exceed $50,000. An independent accounting review was not required. However, invoices or canceled checks substantiated the cost of the facility.

Facility Cost Allocable to Pollution Control

The facility cost does not exceed $50,000. According to ORS 468.190 (3), the only factor used in determining the percentage allocable to pollution control is the percentage of time the facility is used for pollution control. Therefore, the percentage of the facility cost allocable to pollution control is **100%**.

Compliance and Other Tax Credits

The facility is in compliance with Department rules and statutes and with EQC orders. There were no DEQ permits issued to facility.

Reviewers: William R Bree

Tax Credit Review Report

EQC 0002

Director's Recommendation: **APPROVE**

Applicant	**United Disposal Service, Inc.**
Application No.	**5269**
Facility Cost	**$46,603**
Percentage Allocable	**100%**
Useful Life	**5 years**

Pollution Control Facility: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

Organized As: **a C corporation**
Business: **a recycling facility**
Taxpayer ID: **93-0625022**

The applicant's address is:

2215 N Front Street
Woodburn, OR 97071

Facility Identification

The certificate will identify the facility as:

One new 1999 International Model 4700 LP Cab/ chassis Vin 1HTSLAAL9XH614798, engine: DT466E, Serial #001128315

The applicant is the owner of the facility located at:

2215 N Front Street
Woodburn, OR 97071

Technical Information

This truck is used by the applicant to collect recyclable materials such as glass, cans, newspaper, cardboard, scrap paper, metal and, used oil placed at the curb by residential garbage service collection customers in the cities of Woodburn and Wilsonville and Marion County. Collected material is sent to end use markets and is subsequently recycled into new products.

Eligibility

ORS 468.155 (1)(a) The **sole purpose** of this **new equipment** is to prevent, control or **reduce** a substantial quantity of **solid waste**. The applicant claims that the truck will not be used for any purpose other than the collection of source separated recyclable materials.."

OAR 340-16-025(g)(B) **Replacement:** The applicant received certification of nine recycling or yard debris collection trucks over the last five years. The truck claimed on this application is not a replacement for one previously certified. This new on-route collection truck replaced a different type of vehicle that was taken out of service. That replaced vehicle was not previously certified.

ORS 468.155 (1)(b)(D) The use of a **material recovery process** which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.005.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165 (6).

Application Received	**09/25/99**
Application Substantially Complete	**12/29/99**
Construction Started	**06/30/98**
Construction Completed	**10/13/98**
Facility Placed into Operation	**01/07/99**

Facility Cost

Facility Cost	**$46,603**
Salvage Value	
Eligible Facility Cost	**$46,603**

The facility cost does not exceed $50,000. An independent accounting review was not required. However, invoices or canceled checks substantiated the cost of the facility.

Facility Cost Allocable to Pollution Control

The facility cost does not exceed $50,000. According to ORS 468.190 (3), the only factor used in determining the percentage allocable to pollution control is the percentage of time the facility is used for pollution control. Therefore, the percentage of the facility cost allocable to pollution control is **100%**.

Compliance and Other Tax Credits

The facility is in compliance with Department rules and statutes and with EQC orders. There were no DEQ permits issued to facility.

Reviewers: William R Bree

Tax Credit Review Report

EQC 0002

Director's Recommendation:	**APPROVE**
Applicant	**Forrest Paint Co.**
Application No.	**5279**
Facility Cost	**$34,357**
Percentage Allocable	**100%**
Useful Life	**7 years**

Pollution Control Facility Tax Credit: Air
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

The applicant is an S corporation and a **manufacturer of powder coatings.** Their taxpayer identification number is 93-0612986. The applicant's address is:

1011 McKinley
Eugene, OR 97402

Facility Identification

The certificate will identify the facility as:

One Baghouse

The applicant is the owner of the facility located at:

990 McKinley
Eugene, OR 97402

Technical Information

The claimed facility consists of a jet-pulse baghouse, identified as CD-7/JP-3. It is installed to filter and control particulate created in the powder coating manufacturing process. The baghouse is sized for 5,500 acfm and has a rated efficiency of 99.9%.

Without this system, the particulate created would be ventilated out of the building, thereby emitting 1,080 pounds of particulate per year into the atmosphere. Aproximately 1.1 pounds of particulate per year is being emitted with the baghouse installed. The system is considered the best available technology for this application.

Eligibility

ORS 468.155 (1)(a)(B) The **principal purpose** of this **installation of equipment** is to **control** a substantial quantity of air pollution. This requirement is imposed by Lane Regional Air Pollution Authority under permit 202805 Rules 32-020 and 32-015.

ORS 468.155 (1)(b)(B) The control is accomplished by the **ellimination of air pollution** and the use of the baghouse which meet the air cleaning device definition in ORS 468A.005.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165 (6).

Application Received	**10/13/99**
Additional Information Requested	**11/16/99**
Additional Information Received	**12/29/99**
Application Substantially Complete	**1/3/00**
Construction Started	**6/28/99**
Construction Completed	**7/25/99**
Facility Placed into Operation	**7/25/99**

Facility Cost

Claimed Facility Cost	**$ 34,357**
Eligible Facility Cost	**$34,357**

The facility cost does not exceed $50,000. An independent accounting review was not required. Copies of invoices were provided which substantiated the claimed facility cost.

Facility Cost Allocable to Pollution Control

The facility cost does not exceed $50,000. According to ORS 468.190 (3), the only factor used in determining the percentage allocable to pollution control is the percentage of time the facility is used for pollution control. Therefore, the percentage of the facility cost allocable to pollution control is 100%.

Compliance

The applicant states the facility is in compliance with Department rules and statutes and with EQC orders. LRAPA permits issued to facility: Title V Operating Permit No. 202805.

Reviewers: Lois L. Payne, P.E., SJO Consulting Engineers
Dennis Cartier, Associate, SJO Consulting Engineers
Maggie Vandehey, DEQ

Tax Credit Review Report

EQC 0002

Director's Recommendation: **APPROVE**

Applicant	**United Disposal Service, Inc.**
Application No.	**5281**
Facility Cost	**$14,307**
Percentage Allocable	**100%**
Useful Life	**10 years**

Pollution Control Facility: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

Organized As: **a C corporation**
Business: **a recycling facility**
Taxpayer ID: **93-0625022**

The applicant's address is:

2215 N Front Street
Woodburn, OR 97071

Facility Identification

The certificate will identify the facility as:

Six 20-yard SC style drop boxes, serial #s 11205 through 11210

The applicant is the owner of the facility located at:

2215 N Front Street
Woodburn, OR 97071

Technical Information

These drop boxes are used to collect recyclable materials from commercial and industrial collection service customers

Eligibility

ORS 468.155 (1)(a) The **sole purpose** of this **new equipment** is to prevent, control or reduce a substantial quantity of solid waste.

ORS 468.155 (1)(b)(D) The use of a **material recovery process** which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.005.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165 (6).

Application Received	**10/19/99**
Application Substantially Complete	**12/29/99**
Construction Started	**05/20/99**
Construction Completed	**07/18/99**
Facility Placed into Operation	**08/01/99**

Facility Cost

Facility Cost		**$14,307**
Salvage Value	$	-
Government Grants	$	-
Other Tax Credits	$	-
Insignificant Contribution ORS 468.155(2)(d)	$	-
Eligible Facility Cost		**$14,307**

The facility cost does not exceed $50,000. An independent accounting review was not required. However, invoices or canceled checks substantiated the cost of the facility.

Facility Cost Allocable to Pollution Control

The facility cost does not exceed $50,000. According to ORS 468.190 (3), the only factor used in determining the percentage allocable to pollution control is the percentage of time the facility is used for pollution control. Therefore, the percentage of the facility cost allocable to pollution control is **100%**.

Compliance and Other Tax Credits

The facility is in compliance with Department rules and statutes and with EQC orders. There were no DEQ permits issued to facility.

Reviewers: William R Bree

Tax Credit Review Report

EQC 0002

Director's Recommendation: **APPROVE**

Applicant **Capitol Recycling & Disposal, Inc.**
Application No. **5287**
Facility Cost **$18,106**
Percentage Allocable **100%**
Useful Life **5 years**

Pollution Control Facility: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

Organized As: **a C corporation**
Business: **solid waste & recycling collection facility**
Taxpayer ID: **931197641**

The applicant's address is:

1890 16th Street SE
Salem, OR 97302

Facility Identification

The certificate will identify the facility as:

Twenty 6 yard expanded metal cardboard recycling containers, with lids and no casters, serial #s 153541 through 153560, and twenty 4 yard front load expanded metal cardboard recycling containers, with lids and casters, serial #s 153351 through 153370.

The applicant is the owner of the facility located at:

1890 16th Street SE
Salem, OR 97302

Technical Information

These containers are used for the collection of source separated cardboard from commercial and multi-family collection customers in the City of Salem and Marion County.

Eligibility

ORS 468.155 (1)(a) The **sole purpose** of this **new equipment** is to prevent, control or reduce a substantial quantity of solid waste. These containers are used exclusively for the

collection of recyclable material.

ORS 468.155 (1)(b)(D) The use of a **material recovery process** which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.005.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165(6).

Application Received	**10/25/99**
Application Substantially Complete	**12/29/99**
Construction Started	**06/01/98**
Construction Completed	**06/28/98**
Facility Placed into Operation	**07/15/98**

Facility Cost

Facility Cost		**$18,106**
Salvage Value	$	-
Government Grants	$	-
Other Tax Credits	$	-
Insignificant Contribution ORS 468.155(2)(d)	$	-
Eligible Facility Cost		**$18,106**

The facility cost does not exceed $50,000. An independent accounting review was not required. However, invoices or canceled checks substantiated the cost of the facility.

Facility Cost Allocable to Pollution Control

The facility cost does not exceed $50,000. According to ORS 468.190(3), the only factor used in determining the percentage allocable to pollution control is the percentage of time the facility is used for pollution control. Therefore, the percentage of the facility cost allocable to pollution control is **100%**.

Compliance and Other Tax Credits

The facility is in compliance with Department rules and statutes and with EQC orders. There were no DEQ permits issued to facility.

Reviewers: William R Bree

Tax Credit Review Report

EQC 0002

Director's Recommendation: **APPROVE**

Applicant **Capitol Recycling & Disposal, Inc.**
Application No. **5288**
Facility Cost **$52,131**
Percentage Allocable **100%**
Useful Life **5 years**

Pollution Control Facility: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

Organized As: **a C corporation**
Business: **Solid waste collection and recycling facility**
Taxpayer ID: **93-11197641**

The applicant's address is:

1890 16th Street S.E.
Salem, OR 97302

Facility Identification

The certificate will identify the facility as:

One new 1998 International model 4700 LP cab/chassis, vin: 1HTSLAAL9WH571532, engine: DT266E 230HP, serial # 001084773

The applicant is the owner of the facility located at:

1890 16th Street S.E.
Salem, OR 97302

Technical Information

This truck is used for curbside collection of recyclable material from residential and commercial collection service customers in the City of Salem and Marion County.

Eligibility

ORS 468.155 (1)(a)	The **sole purpose** of this **new equipment** is to prevent, control or reduce a substantial quantity of **solid waste**. This truck is used solely for collecting recyclable material.
ORS 468.155 (1)(b)(D)	The use of a **material recovery process** which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.005.
OAR 340-16-025(g)(B)	**Replacement:** This new truck is used for a new service and did not replace an existing vehicle.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165 (6).

Application Received	**10/25/99**
Application Substantially Complete	**12/29/99**
Construction Started	**01/15/98**
Construction Completed	**04/08/98**
Facility Placed into Operation	**06/01/98**

Facility Cost

Facility Cost	**$52,131**
Eligible Facility Cost	**$52,131**

The facility cost exceeds $500,000. The applicant requested a waiver of the independent accountant's certification. The applicant provided a copy of the invoice for purchase of the truck.

Facility Cost Allocable to Pollution Control

The facility cost exceeds $50,000. According to ORS 468.190(1), the factors listed below were considered in determining the percentage of the facility cost allocable to pollution control. The percentage of the facility cost allocable to pollution control is **100%.**

Factor	Applied to This Facility
ORS 468.190(1)(a) Salable or Usable Commodity	This truck is used to collect recyclable material that is subsequently processed into a salable and useable commodity.
ORS 468.190(1)(b) Return on Investment	The useful life of the facility used for the return on investment consideration is 5 years. The calculated return on investment is 0%. Therefore the portion of cost allocable to pollution control is 100%.
ORS 468.190(1)(c) Alternative Methods	No alternative investigated.
ORS 468.190(1)(d) Savings or Increase in Costs	No savings or increase in costs.
ORS 468.190(1)(e) Other Relevant Factors	No other relevant factors.

Compliance and Other Tax Credits

The facility is in compliance with Department rules and statutes and with EQC orders. There were no DEQ permits issued to facility.

Reviewers: William R Bree

Tax Credit Review Report

EQC 0002

Director's Recommendation: **APPROVE**

Applicant **Capitol Recycling & Disposal, Inc.**
Application No. **5290**
Facility Cost **$42,890**
Percentage Allocable **100%**
Useful Life **5 years**

Pollution Control Facility: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

Organized As: **a C corporation**
Business: **solid waste & recycling collection facility**
Taxpayer ID: **931197641**

The applicant's address is:

1890 16th Street SE
Salem, OR 97302

Facility Identification

The certificate will identify the facility as:

One hundred 4-yard front load expanded metal cardboard recycling containers, sixty with lids and casters, serial #s 153977 through 154016, 153772 through 153791 and 153829 through 153868.

The applicant is the owner of the facility located at:

1890 16th Street SE
Salem, OR 97302

Technical Information

These containers are used for the collection of source separated cardboard from commercial and multi-family collection customers in the City of Salem and Marion County.

Eligibility

ORS 468.155 (1)(a) The **sole purpose** of this **new equipment** is to prevent, control or reduce a substantial quantity of **solid waste**. These bins are used exclusively for the collection of recyclable material.

ORS 468.155 (1)(b)(D) The use of a **material recovery process** which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.005.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165(6).

Application Received	**10/26/99**
Application Substantially Complete	**12/29/99**
Construction Started	**07/05/98**
Construction Completed	**07/22/98**
Facility Placed into Operation	**08/01/98**

Facility Cost

Facility Cost		**$42,890**
Salvage Value	$	-
Government Grants	$	-
Other Tax Credits	$	-
Insignificant Contribution ORS 468.155(2)(d)	$	-
Eligible Facility Cost		**$42,890**

The facility cost does not exceed $50,000. An independent accounting review was not required. However, invoices or canceled checks substantiated the cost of the facility.

Facility Cost Allocable to Pollution Control

The facility cost does not exceed $50,000. According to ORS 468.190(3), the only factor used in determining the percentage allocable to pollution control is the percentage of time the facility is used for pollution control. Therefore, the percentage of the facility cost allocable to pollution control is **100%**.

Compliance and Other Tax Credits

The facility is in compliance with Department rules and statutes and with EQC orders. There were no DEQ permits issued to facility.

Reviewers: William R Bree

Tax Credit Review Report

EQC 0002

Director's Recommendation: **APPROVE**

Applicant **Grabhorn, Inc.**
Application No. **5296**
Facility Cost **$300,565**
Percentage Allocable **100%**
Useful Life **7 years**

Pollution Control Facility: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

Organized As: **a S corporation**
Business: **Limited purpose landfill operator**
Taxpayer ID: **93-0573980**

The applicant's address is:

14930 SW Vandermost Road
Beaverton, OR 97007

Facility Identification

The certificate will identify the facility as:

B-L Pegson Eurotrack jaw crusher, serial # AX818/P015

The applicant is the owner of the facility located at:

14930 SW Vandermost Road
Beaverton, OR 97007

Technical Information

This crusher is operated adjacent to a limited purpose landfill that is permitted to receive mainly construction and demolition type debris. This crusher is used to process waste concrete into useful aggregate products. Prior to installation of this crushed waste concrete was disposed of in the landfill as solid waste. The aggregate product is used for both on-site and off-site construction projects. An estimated annual 1,400 tons of concrete was disposed of in this landfill prior to installation of the crusher. The applicant projects up to 10,000 tons of concrete for processing per year by 2000.

Eligibility

ORS 468.155 (1)(a) The **sole purpose** of this **new equipment** is to prevent, control or reduce a substantial quantity of **solid waste**. This crusher is used solely to process material that would have otherwise been solid waste.

ORS 468.155 (1)(b)(D) The use of a **material recovery process** which obtains useful material from material that would otherwise be **solid waste** as defined in ORS 459.005.

OAR 340-16-025(g)(B) **Replacement:** This is new equipment and does **not** replace any existing equipment. There was no salvage and no salvage value claimed.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165 (6).

Application Received	**10/29/99**
Application Substantially Complete	**12/29/99**
Construction Started	**10/27/98**
Construction Completed	**10/27/98**
Facility Placed into Operation	**10/27/98**

Facility Cost

Facility Cost	**$300,565**
Salvage Value	$ -
Government Grants	$ -
Other Tax Credits	$ -
Insignificant Contribution ORS 468.155(2)(d)	$ -
Eligible Facility Cost	**$300,565**

The facility cost exceeds $50,000 but is less than $500,000. The applicant has requested a waiver of the reqirement for an independent accountant's certification of the facility cost. The applicant has provided a copy of the invoice and check for purchase of the claimed facility

Facility Cost Allocable to Pollution Control

The facility cost exceeds $50,000. According to ORS 468.190(1), the factors listed below were considered in determining the percentage of the facility cost allocable to pollution control. The percentage of the facility cost allocable to pollution control is **100%**.

Factor	Applied to This Facility
ORS 468.190(1)(a) Salable or Usable Commodity	This crusher is used to process waste material into a salable and useable commodity.
ORS 468.190(1)(b) Return on Investment	The useful life of the facility used for the return on investment consideration is 7 years. The calculated return on investment for the facility is 0%. Therefore the portion of cost allocable to pollution control is 100%. The applicant included both the loss of disposal tipping fees and income from crusher site tipping fees in the return on investment calculations. The applicant also included the income from sale of product both on and off site and the saving from use

	on in-house product on-site in the calculation of the return on investment.
ORS 468.190(1)(c) Alternative Methods	No alternative investigated.
ORS 468.190(1)(d) Savings or Increase in Costs	No savings or increase in costs.
ORS 468.190(1)(e) Other Relevant Factors	No other relevant factors.

Compliance and Other Tax Credits

The facility is in compliance with Department rules and statutes and with EQC orders. There were no DEQ permits issued to facility.

Reviewers: William R Bree

Tax Credit Review Report

EQC 0002

Director's Recommendation: **APPROVE**

Applicant	**United Disposal Service, Inc.**
Application No.	**5308**
Facility Cost	**$8,243**
Percentage Allocable	**100%**
Useful Life	**10 years**

Pollution Control Facility: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

Organized As: **a C corporation**
Business: **a recycling facility**
Taxpayer ID: **93-0625022**

The applicant's address is:

2215 N Front Street
Woodburn, OR 97071

Facility Identification

The certificate will identify the facility as:

Twenty 4 yard front load cardboard recycling containers with comp lids, serial #s 160847 to 160866.

The applicant is the owner of the facility located at:

2215 N Front Street
Woodburn, OR 97071

Technical Information

These containers are use for the collection of corrugated cardboard from commercial and industrial collection service customers

Eligibility

ORS 468.155 (1)(a) The **sole purpose** of this **new equipment** is to prevent, control or reduce a substantial quantity of solid waste.

ORS 468.155 (1)(b)(D) The use of a **material recovery process** which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.005.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165 (6).

Application Received	**11/09/99**
Application Substantially Complete	**12/29/99**
Construction Started	**06/05/99**
Construction Completed	**07/14/99**
Facility Placed into Operation	**07/30/99**

Facility Cost

Facility Cost		**$8,243**
Salvage Value	$	-
Government Grants	$	-
Other Tax Credits	$	-
Insignificant Contribution ORS 468.155(2)(d)	$	-
Eligible Facility Cost		**$8,243**

The facility cost does not exceed $50,000. An independent accounting review was not required. However, invoices or canceled checks substantiated the cost of the facility.

Facility Cost Allocable to Pollution Control

The facility cost does not exceed $50,000. According to ORS 468.190 (3), the only factor used in determining the percentage allocable to pollution control is the percentage of time the facility is used for pollution control. Therefore, the percentage of the facility cost allocable to pollution control is **100%**.

Compliance and Other Tax Credits

The facility is in compliance with Department rules and statutes and with EQC orders. There were no DEQ permits issued to facility.

Reviewers: William R Bree

Tax Credit Review Report

EQC 0002

Director's Recommendation: **APPROVE**

Applicant **Capitol Recycling & Disposal, Inc.**
Application No. **5322**
Facility Cost **$4,420**
Percentage Allocable **100%**
Useful Life **10 years**

Pollution Control Facility: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

Organized As: **a C corporation**
Business: **solid waste & recycling collection facility**
Taxpayer ID: **931197641**

The applicant's address is:

1890 16th Street SE
Salem, OR 97302

Facility Identification

The certificate will identify the facility as:

One thousand red 14-gallon recycling bins without serial numbers.

The applicant is the owner of the facility located at:

1890 16th Street SE
Salem, OR 97302

Technical Information

These bins are used for the collection of source separated recyclable materials from residential collection customers in the City of Salem and Marion County.

Eligibility

ORS 468.155 (1)(a) The **sole purpose** of this **new equipment** is to prevent, control or reduce a substantial quantity of **solid waste**. These bins are used exclusively for the collection of recyclable material.

ORS 468.155 (1)(b)(D) The use of a **material recovery process** which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.005.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165(6).

Application Received	**11/10/99**
Application Substantially Complete	**12/29/99**
Construction Started	**06/15/98**
Construction Completed	**07/28/98**
Facility Placed into Operation	**08/15/98**

Facility Cost

Facility Cost		**$4,420**
Salvage Value	$	-
Government Grants	$	-
Other Tax Credits	$	-
Insignificant Contribution ORS 468.155(2)(d)	$	-
Eligible Facility Cost		**$4,420**

The facility cost does not exceed $50,000. An independent accounting review was not required. However, invoices or canceled checks substantiated the cost of the facility.

Facility Cost Allocable to Pollution Control

The facility cost does not exceed $50,000. According to ORS 468.190(3), the only factor used in determining the percentage allocable to pollution control is the percentage of time the facility is used for pollution control. Therefore, the percentage of the facility cost allocable to pollution control is **100%**.

Compliance and Other Tax Credits

The facility is in compliance with Department rules and statutes and with EQC orders. There were no DEQ permits issued to facility.

Reviewers: William R Bree

Tax Credit Review Report

EQC 0002

Director's Recommendation: **APPROVE**

Applicant	**United Disposal Service, Inc.**
Application No.	**5328**
Facility Cost	**$9,538**
Percentage Allocable	**100%**
Useful Life	**10 years**

Pollution Control Facility: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

Organized As: **a C corporation**
Business: **a recycling facility**
Taxpayer ID: **93-0625022**

The applicant's address is:

2215 N Front Street
Woodburn, OR 97071

Facility Identification

The certificate will identify the facility as:

Four 20 yard standard drop boxes, serial #s 11211 through 11214

The applicant is the owner of the facility located at:

2215 N Front Street
Woodburn, OR 97071

Technical Information

These drop boxes are for the collection of recyclable material from commercial collection customers.

Eligibility

ORS 468.155 (1)(a) The **sole purpose** of this **new equipment** is to prevent, control or reduce a substantial quantity of **solid waste** by the collection of recyclable material from commercial customers.

ORS 468.155 (1)(b)(D) The use of a **material recovery process** which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.005.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165 (6).

Application Received	**11/23/99**
Application Substantially Complete	**12/29/99**
Construction Started	**07/30/99**
Construction Completed	**08/11/99**
Facility Placed into Operation	**09/01/99**

Facility Cost

Facility Cost		**$9,538**
Salvage Value	$	-
Government Grants	$	-
Other Tax Credits	$	-
Insignificant Contribution ORS 468.155(2)(d)	$	-
Eligible Facility Cost		**$9,538**

The facility cost does not exceed $50,000. An independent accounting review was not required. However, invoices or canceled checks substantiated the cost of the facility.

Facility Cost Allocable to Pollution Control

The facility cost does not exceed $50,000. According to ORS 468.190 (3), the only factor used in determining the percentage allocable to pollution control is the percentage of time the facility is used for pollution control. Therefore, the percentage of the facility cost allocable to pollution control is **100%**.

100%.

Compliance and Other Tax Credits

The facility is in compliance with Department rules and statutes and with EQC orders. There were no DEQ permits issued to facility.

Reviewers: William R Bree

Tax Credit Review Report

EQC 0002

Director's Recommendation: **APPROVE**

Applicant **Capitol Recycling & Disposal, Inc.**
Application No. **5338**
Facility Cost **$26,919**
Percentage Allocable **100%**
Useful Life **5 years**

Pollution Control Facility: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

Organized As: **a C corporation**
Business: **solid waste & recycling collection facility**
Taxpayer ID: **931197641**

The applicant's address is:

1890 16th Street SE
Salem, OR 97302

Facility Identification

The certificate will identify the facility as:

Twenty 6 yard expanded metal cardboard recycling containers with lids and casters, serial #s 153809 through 153828 and forty 4 yard front load expanded metal cardboard recycling containers with lids and casters, serial #s 154349 through 154398.

The applicant is the owner of the facility located at:

1890 16th Street SE
Salem, OR 97302

Technical Information

These containers are used for the collection of source separated cardboard from commercial collection customers in the City of Salem and Marion County.

Eligibility

ORS 468.155 (1)(a) The **sole purpose** of this **new equipment** is to prevent, control or reduce a substantial quantity of **solid waste**. These bins are used exclusively for the

collection of recyclable material.

ORS 468.155 (1)(b)(D) The use of a **material recovery process** which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.005.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165(6).

Application Received	**12/03/99**
Application Substantially Complete	**12/29/99**
Construction Started	**07/10/98**
Construction Completed	**08/24/98**
Facility Placed into Operation	**09/05/98**

Facility Cost

Facility Cost		**$26,919**
Salvage Value	$	-
Government Grants	$	-
Other Tax Credits	$	-
Insignificant Contribution ORS 468.155(2)(d)	$	-
Eligible Facility Cost		**$26,919**

The facility cost does not exceed $50,000. An independent accounting review was not required. However, invoices or canceled checks substantiated the cost of the facility.

Facility Cost Allocable to Pollution Control

The facility cost does not exceed $50,000. According to ORS 468.190(3), the only factor used in determining the percentage allocable to pollution control is the percentage of time the facility is used for pollution control. Therefore, the percentage of the facility cost allocable to pollution control is **100%**.

Compliance and Other Tax Credits

The facility is in compliance with Department rules and statutes and with EQC orders. There were no DEQ permits issued to facility.

Reviewers: William R Bree

Tax Credit Review Report

EQC 2000

Director's Recommendation: **APPROVE**

Applicant **Capitol Recycling & Disposal, Inc.**
Application No. **5343**
Facility Cost **$32,744**
Percentage Allocable **100%**
Useful Life **10 years**

Pollution Control Facility: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

Organized As: **a C corporation**
Business: **solid waste & recycling collection facility**
Taxpayer ID: **931197641**

The applicant's address is:

1890 16th Street SE
Salem, OR 97302

Facility Identification

The certificate will identify the facility as:

Six 20-yard drop boxes, serial #s 10821 through 10826 and four 48.9 yard drop boxes, serial #s 1-817 through 10820..

The applicant is the owner of the facility located at:

1890 16th Street SE
Salem, OR 97302

Technical Information

These drop boxes are used to collect and store recyclable materials at the new drop off recycling center for the use by the public in the City of Salem and Marion County.

Eligibility

ORS 468.155 (1)(a) The **sole purpose** of this **new equipment** is to prevent, control or reduce a substantial quantity of solid waste. These drop boxes will be used exclusively for the collection of recyclable materials.

ORS 468.155 (1)(b)(D) The use of a **material recovery process** which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.005.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165(6).

Application Received	**12/06/99**
Application Substantially Complete	**12/29/99**
Construction Started	**09/20/98**
Construction Completed	**11/12/98**
Facility Placed into Operation	**06/15/99**

Facility Cost

Facility Cost		**$32,744**
Salvage Value	$	-
Government Grants	$	-
Other Tax Credits	$	-
Insignificant Contribution ORS 468.155(2)(d)	$	-
Eligible Facility Cost		**$32,744**

The facility cost does not exceed $50,000. An independent accounting review was not required. However, invoices or canceled checks substantiated the cost of the facility.

Facility Cost Allocable to Pollution Control

The facility cost does not exceed $50,000. According to ORS 468.190(3), the only factor used in determining the percentage allocable to pollution control is the percentage of time the facility is used for pollution control. Therefore, the percentage of the facility cost allocable to pollution control is **100%**.

Compliance and Other Tax Credits

The facility is in compliance with Department rules and statutes and with EQC orders. There were no DEQ permits issued to facility.

Reviewers: William R Bree

Tax Credit Review Report

EQC 0002

Director's Recommendation: **APPROVE**

Applicant	**United Disposal Service, Inc.**
Application No.	**5344**
Facility Cost	**$24,680**
Percentage Allocable	**100%**
Useful Life	**10 years**

Pollution Control Facility: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

Organized As: **a C corporation**
Business: **a recycling facility**
Taxpayer ID: **93-0625022**

The applicant's address is:

2215 N Front Street
Woodburn, OR 97071

Facility Identification

The certificate will identify the facility as:

One new Caterpillar lift truck, Model DP25-D, Serial# 5BM01642

The applicant is the owner of the facility located at:

2215 N Front Street
Woodburn, OR 97071

Technical Information

This lift truck is used to unload containers of recyclable materials from collection trucks and to load processed recyclable material for shipment to markets. The applicant claims the forklift is used solely for this purpose.

Eligibility

ORS 468.155 (1)(a) The **sole purpose** of this **new equipment** is to prevent, control or reduce a substantial quantity of **solid waste**. The applicant states that the lift truck will not be used for any purpose other than material recovery.

ORS 468.155 (1)(b)(D) OAR 340-16- The use of a **material recovery process** which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.005. **Replacement:** This fork lift does not replace any equipment which has been

025(g)(B) previously certified. There has been no equipment taken out of service, no salvage and no salvage value stated on the application.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165 (6).

Application Received	**12/09/99**
Application Substantially Complete	**12/29/99**
Construction Started	**08/04/99**
Construction Completed	**09/01/99**
Facility Placed into Operation	**09/14/99**

Facility Cost

Facility Cost		**$24,680**
Salvage Value	$	-
Government Grants	$	-
Other Tax Credits	$	-
Insignificant Contribution ORS 468.155(2)(d)	$	-
Eligible Facility Cost		**$24,680**

The facility cost does not exceed $50,000. An independent accounting review was not required. However, invoices or canceled checks substantiated the cost of the facility.

Facility Cost Allocable to Pollution Control

The facility cost does not exceed $50,000. According to ORS 468.190 (3), the only factor used in determining the percentage allocable to pollution control is the percentage of time the facility is used for pollution control. Therefore, the percentage of the facility cost allocable to pollution control is **100%**.

Compliance and Other Tax Credits

The facility is in compliance with Department rules and statutes and with EQC orders. There were no DEQ permits issued to facility.

Reviewers: William R Bree

Application No. 5347

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT
POLLUTION PREVENTION PILOT PROGRAM

---

1. Applicant

Weldon's Enterprises, Inc.
PO Box 4008
Medford, Oregon 97501

The applicant owns and operates a perchloroethylene dry-cleaning shop located at 711 Stewart Avenue, Medford, Oregon.

Application was made for tax credit for an air pollution prevention facility.

2. Description of Facility

The claimed facility new generation five non-venting dry-to-dry perc dry-cleaning equipment which was installed as a replacement for old generation three perc dry-to-dry fully closed looped machines. The new perc equipment reduces perc usage to less than 140 gallons per year. Reduced usage equates to reduced air emissions.

Claimed Facility Cost: $ 64,050

3. Procedural Requirements

The facility is governed by ORS 468A.095 through 468A.098, and by OAR Chapter 340, Division 16.

The facility met all regulatory deadlines in that:

Installation of the pollution prevention facility was substantially completed on November 26, 1999. The Department on December 14, 1999 received the application for final certification. The application was found to be complete on January 5, 2000, within one year of installation of the facility.

4. Evaluation of Application

Rationale For Eligibility

(1) The pollution prevention facility is eligible because it meets the requirement of avoiding the substantive requirements of the National Emission Standard for Hazardous Air Pollutants (NESHAP), specifically 40 CFR 63.320 to 63.325 national perchloroethylene air emissions standard for dry cleaning facilities.

The facility does not qualify for a pollution control tax credit under ORS 468.165 and 468.170.

(2) The owner installed equipment, which resulted in perchloroethylene use of less than 140 gallons per year, and the dry cleaning facility qualifies as a small area source under the NESHAP.

(3) The dry cleaning facility is registered under the Clean Air Act Title III National Emissions Standards for Hazardous Air Pollutants.

5. Summation

a. The pollution prevention facility was constructed in accordance with all regulatory deadlines.

b. The facility is eligible for final tax credit certification in that it meets the definition of a pollution prevention facility for this pilot program.

c. The applicant indicated that the tax credit program was a determining factor in installing this equipment.

6. Director's Recommendation

Based upon these findings, it is recommended that a Pollution Prevention Facility Certificate bearing the cost of $ 64,052 is issued for the facility claimed in Tax Credit Application No. 5347.

DPK
T5347.doc 01/05/00 11:00 AM

Tax Credit Review Report

EQC 0002

Director's Recommendation: **APPROVE**

Applicant **Environmental Waste Systems, Inc.**
Application No. **5349**
Facility Cost **$7,273**
Percentage Allocable **100%**
Useful Life **5 years**

Pollution Control Facility: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

Organized As: **a C corporation**
Business: **a solid waste collection and recycling company**
Taxpayer ID: **93-0938511**

The applicant's address is:

58597 Old Portland Road
St. Helens, OR 97051

Facility Identification

The certificate will identify the facility as:

Nineteen 2-yard cardboard collection containers, serial number 149627 – 149632, 149836 – 149843, and 153575 – 153579.

The applicant is the owner of the facility located at:

58597 Old Portland Road
St. Helens, OR 97051

Technical Information

These containers are used for the collection of recyclable cardboard from commercial collection service customers.

Eligibility

ORS 468.155 (1)(a) The **sole purpose** of this **new equipment** is to prevent, control or reduce a substantial quantity of **solid waste**.

ORS 468.155 (1)(b)(D) The use of a **material recovery process** which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.005.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165 (6).

Application Received	**12/20/99**
Application Substantially Complete	**01/04/00**
Construction Started	**01/15/98**
Construction Completed	**06/30/98**
Facility Placed into Operation	**06/30/98**

Facility Cost

Facility Cost		**$7,273**
Salvage Value	$	-
Government Grants	$	-
Other Tax Credits	$	-
Insignificant Contribution ORS 468.155(2)(d)	$	-
Eligible Facility Cost		**$7,273**

The facility cost does not exceed $50,000. An independent accounting review was not required. However, invoices or canceled checks substantiated the cost of the facility.

Facility Cost Allocable to Pollution Control

The facility cost does not exceed $50,000. According to ORS 468.190 (3), the only factor used in determining the percentage allocable to pollution control is the percentage of time the facility is used for pollution control. Therefore, the percentage of the facility cost allocable to pollution control is **100%**.

Compliance and Other Tax Credits

The facility is in compliance with Department rules and statutes and with EQC orders. There were no DEQ permits issued to facility.

Reviewers: William R Bree

Tax Credit Review Report

EQC 0002

Director's Recommendation: **APPROVE**

Applicant	**United Disposal Service, Inc.**
Application No.	**5351**
Facility Cost	**$8,243**
Percentage Allocable	**100%**
Useful Life	**5 years**

Pollution Control Facility: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

Organized As: **a C corporation**
Business: **a recycling facility**
Taxpayer ID: **93-0625022**

The applicant's address is:

2215 N Front Street
Woodburn, OR 97071

Facility Identification

The certificate will identify the facility as:

Twenty 4 yard front load cardboard recycling containers with comp lids.

The applicant is the owner of the facility located at:

2215 N Front Street
Woodburn, OR 97071

Technical Information

These containers are used for the collection of recyclable cardboard from commercial collection service customers

Eligibility

ORS 468.155 (1)(a) The **sole purpose** of this **new equipment** is to prevent, control or reduce a substantial quantity of **solid waste.**

ORS 468.155 (1)(b)(D) The use of a **material recovery process** which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.005.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165 (6).

Application Received	**12/22/99**
Application Substantially Complete	**01/04/00**
Construction Started	**09/15/99**
Construction Completed	**10/18/99**
Facility Placed into Operation	**11/01/99**

Facility Cost

Facility Cost		**$8,243**
Salvage Value	$	-
Government Grants	$	-
Other Tax Credits	$	-
Insignificant Contribution ORS 468.155(2)(d)	$	-
Eligible Facility Cost		**$8,243**

The facility cost does not exceed $50,000. An independent accounting review was not required. However, invoices or canceled checks substantiated the cost of the facility.

Facility Cost Allocable to Pollution Control

The facility cost does not exceed $50,000. According to ORS 468.190 (3), the only factor used in determining the percentage allocable to pollution control is the percentage of time the facility is used for pollution control. Therefore, the percentage of the facility cost allocable to pollution control is **100%**.

Compliance and Other Tax Credits

The facility is in compliance with Department rules and statutes and with EQC orders. There were no DEQ permits issued to facility.

Reviewers: William R Bree

Tax Credit Review Report

EQC 0002

Director's Recommendation: **APPROVE**

Applicant	**Keller Drop Box Inc.**
Application No.	**5352**
Facility Cost	**$6,789**
Percentage Allocable	**100%**
Useful Life	**10 years**

Pollution Control Facility: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

Organized As: **a C corporation**
Business: **a recycling collection company and facility**
Taxpayer ID: **93-0775047**

The applicant's address is:

10295 S.W. Ridder Road, Suite 2
Wilsonville, OR 97070

Facility Identification

The certificate will identify the facility as:

Two SC style 40 yard drop boxes, serial numbers 10671 & 10622.

The applicant is the owner of the facility located at:

10295 S.W. Ridder Road
Wilsonville, OR 97070

Technical Information

These drop boxes are used for the collection of recyclable materials from industrial and commercial collection service customers.

Eligibility

ORS 468.155 (1)(a) The **sole purpose** of this **new equipment** is to prevent, control or reduce a substantial quantity of **solid waste**.

ORS 468.155 (1)(b)(D) The use of a **material recovery process** which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.005.

Timeliness of Application

The application was submitted within the timing requirements of ORS 468.165 (6).

Application Received	**12/22/99**
Application Substantially Complete	**01/04/00**
Construction Started	**05/10/98**
Construction Completed	**08/03/98**
Facility Placed into Operation	**08/10/98**

Facility Cost

Facility Cost		**$6,789**
Salvage Value	$	-
Government Grants	$	-
Other Tax Credits	$	-
Insignificant Contribution ORS 468.155(2)(d)	$	-
Eligible Facility Cost		**$6,789**

The facility cost does not exceed $50,000. An independent accounting review was not required. However, invoices or canceled checks substantiated the cost of the facility.

Facility Cost Allocable to Pollution Control

The facility cost does not exceed $50,000. According to ORS 468.190 (3), the only factor used in determining the percentage allocable to pollution control is the percentage of time the facility is used for pollution control. Therefore, the percentage of the facility cost allocable to pollution control is **100%**.

Compliance and Other Tax Credits

The facility is in compliance with Department rules and statutes and with EQC orders. There were no DEQ permits issued to facility.

Reviewers: William R Bree

State of Oregon
Department of Environmental Quality

TAX RELIEF APPLICATION REVIEW REPORT
POLLUTION PREVENTION PILOT PROGRAM

---

1. Applicant

Steve A. Kenner
SK Products Mfg.
20050 SW Chapman Road
Sherwood, OR 97140

The applicant owns and operates a machine shop, for manufacturing metal parts for various applications, located at 20050 SW Chapman Road, Sherwood, OR.

Application was made for tax credit for an air pollution prevention facility.

2. Description of Facility

The claimed pollution prevention facility is a high-pressure hot aqueous cleaning system, which was installed in lieu of a halogenated solvent cleaning process. The new cleaning process uses water, instead of solvents, which prevents emission of regulated pollutants to the atmosphere.

Claimed Facility Cost: $ 5,745

3. Procedural Requirements

The facility is governed by ORS 468A.095 through 468A.098, and by OAR Chapter 340, Division 16.

The facility met all regulatory deadlines in that:

Installation of the pollution prevention facility was substantially completed on December 1, 1999. The Department on December 29, 1999 received the application for final certification. The application was found to be complete on January 5, 2000, within one year of installation of the facility.

4. Evaluation of Application

Rationale For Eligibility

(1) The pollution prevention facility is eligible because it meets the requirement of avoiding the National Emission Standard for Hazardous Air Pollutants (NESHAP), specifically 40 CFR 63.460 to 63.469 national emission standards for halogenated solvent cleaning.

The facility was installed between January 1, 1996 and December 31, 1999.

The facility does not qualify for a pollution control tax credit under ORS 468.165 and 468.170.

(2) The applicant installed an aqueous parts washer in lieu of a halogenated solvent cleaning system using.

(3) The facility is not required to register under the Clean Air Act Title III National Emissions Standards for Hazardous Air Pollutants because the pollution prevention system was installed in lieu of a system, which would have required registration.

5. Summation

a. The pollution prevention facility was constructed in accordance with all regulatory deadlines.

b. The facility is eligible for final tax credit certification in that it meets the definition of a pollution prevention facility for this pilot program.

c. The applicant indicated that the tax credit program was not a determining factor in installing this equipment.

6. Director's Recommendation

Based upon these findings, it is recommended that a Pollution Prevention Facility Certificate bearing the cost of $ 5,745 is issued for the facility claimed in Tax Credit Application No. 5354.

DPK
T5354.doc 01/05/00 10:37 AM

Attachment C

Rejections

Director's Recommendation:	**REJECT** **Untimely Submittal**
Applicant	**Willamette Industries, Inc**
Application No.	**4570**
Claimed Facility Cost	**$2,812,715**
Claimed % Allocable	**100%**
Useful Life	**20 years**

Tax Credit Review Report

EQC 0002

Pollution Control Facility Tax Credit: Solid Waste
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

The applicant is a C Corporation, a **manufacture of linerboard and bagpaper**. The taxpayer's identification number 93-0312940.

The applicant's address is:

3800 First Interstate Tower
Portland, OR 97201

Facility Identification

The facility is identified as:

Enterprise Baler (Model 16-ezrrb-200), Kraus Baler Conveyor (93KRACONV0050) Krause Sorting Conveyer (93KRACONV0050), Michigan Wheel Loader (SN L-70v61201), Mitsubishi 6Mlb Fork Trk (SNAF89A-00546), Mitsubishi 6Mlb Fork Trk(SNAF89A-00529), etc.

The claimed facility is **owned** by the applicant, Willamette Industries, Inc. and leased to an independent facility operator, Far West Fibers. The facility is located at:

12820 NE Marx Street
Portland, OR 97230

Technical Information

The claimed facility is a wastepaper collection, processing and storage facility. The facility receives waste paper from independent collectors who recover the waste paper from residential and commercial generators. The waste paper deliveries are received, weighed, and transported to temporary storage areas, separated by type of paper. The paper is removed from storage and transported to a processing area where it is goes through a sorting process, often with the use of a sorting conveyor system. Sorted paper is transported from the sorting system to a baler where it is baled. The paper bales are weighted, labeled, and transported to a bale storage area, again separated

by type of paper. Eventually bales are removed from storage and loaded into trucks or shipping containers, the loads are weighed and transported to paper mills to be recycled into new paper products.

The claimed facility consists of the following components:

- **Building, including the receiving and shipping areas:**

At the time of application the facility received, processed and shipped approximately 3,000 tons per month of waste paper. The 50,000 square foot building is used to receive the loads of loose waste paper, store both loose and baled papers and house all of the processing activities. This is the sole purpose for which the building is used. The new portion of this structure, 21,000 square feet is identified as part of the claimed facility. The receiving area, on the floor inside the building, and the shipping area, 8 loading docks are used solely to handle waste paper.

- **Sorting and processing equipment:**

Most of the waste paper is sorted through a Krause sorting system that includes feed and sorting conveyors, platform with sorting stations, and steel sorting containers. Sorted paper is baled using an Enterprise baler equipped with a feed conveyor, ruffler, dust filter, and auto-tie system. Finished bales are weighted, labeled, and stored in stacks for future shipment.

- **Material handling equipment**

The claimed facility includes a variety of material handling equipment necessary to move loose sorted and unsorted waste paper, waste paper bales, and steel sorting containers. This includes one wheel loader for moving loose paper and two fork lift trucks for moving bales and sorting containers. Equipment for the forklift trucks includes a lift truck rotator for dumping sorting containers. Sorting containers include Cascade steel containers and DeWald steel boxes.

Material handling equipment also includes two scales. The 100 ton Toledo truck scales is used to weigh incoming loads of loose paper and outgoing shipments of baled paper. The 10 ton Toledo platform scales are used to weigh sorted waste paper in boxes and individual paper bales.

Eligibility

First Level Eligibility

ORS 468.155 (1)(a) The **sole purpose** of this **new building, machinery and equipment** is to prevent, control or reduce a substantial quantity of solid waste.

ORS 468.155 (1)(a) The "purpose" of the fire protection system is not to prevent, control or reduce a substantial quantity of solid waste.

ORS 468.155 (1)(a) The "purpose" of the DCE dust filter system is not to prevent, control or reduce a substantial quantity of solid waste. As stated in the Affidavit of Marc W. Olsen, Willamette Industries, Inc., Project Manager, East Multnomah County Recycling, dated December 8, 1999: "The DCE dust filter system lowers the level of dust in the building, keeps dust out of the work area and off the equipment, and helps insure safe driving conditions for forklift operators in the facility." This

component is not eligible as an air pollution control facility since it fails the definition of an air pollution control facility for tax credit purposes.

ORS 468.155 (1)(a) The "purpose" of the scales is not to prevent, control, or reduce a substantial quantity of solid waste. The purpose of the scales is used by Far West Fibers to bill their suppliers.

ORS 468.155 (1)(b)(D) The sole purpose of the facility is accomplished by a **material recovery process** which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.

Timeliness of Application

The application was not submitted within the timing requirements of ORS 468.165 (6). Far West Fibers, an independent recycling company, began operating the facility on September 27, 1993, over three months before the lease was signed. The Far West Fibers plant personnel affirmed September 27, 1993, as the date the facility began operating for pollution control purposes; therefore, the Department considers September 27, 1993 as the date construction was completed.

Application Received	**12/26/1995**
Additional Information Requested	**06/12/96**
Letter Requesting Additional Time to Provide Additional Information	**12/2/96**
Reminder of Expiration of 180 Period to Provide Additional Info	**05/01/97**
Additional Information Provided	**5/30/97**
Application Complete	**10/12/1997**
Scheduled Before Commission	**11/21/97**
"	**12/11/98**
"	**11/18/99**
"	**12/20/99**
Additional Information Provided	**12/8/99**
Additional Information Provided	**12/10/99**
Additional Information Provided – Cost Documentation	**1/06/99**
Construction Started	**05/01/1993**
Construction Completed	**9/27/1993**
Facility Placed into Operation	**9/27/1993**

The applicant claims the date of substantial completion of the facility is January 1, 1994, the date the lease was signed. As the lessor of the facility and the fact that there was no lease between Far West Fibers and the Willamette Industries until January 1, 1994, the date of substantial completion of the facility should be determined to be the effective date of the lease. This date is within the two-year period to file an application after substantial completion of the facility construction.

On December 8, 1999 and December 10, 1999, Willamette Industries presented information that had not been previously presented to the Department – two years after they received a copy of the finalized Review Report and beyond the 180 days in which they had to submit additional information. They claimed that two elements had not been completed until after December 31, 1, 1993; therefor, the facility was not substantially complete.

Facility Cost

Claimed Cost		**$2,596,818**
Unclaimed Allowable Cost		358,600
Fire Protection System allocated to EMR	($47,215)	
DCE Dust Filter System	(25,352)	
Scales	(58,557)	
Misc. (Signs, curbs, fences, landscaping)	(11,579)	
Non-Allowable	($142,703)	($142,703)
Allowable Facility Cost		**$2,812,715**

		Amount	Invoice Number	Invoice Date
Fire	$	8,500.00	4586	6/21/93
Protection	$	6,500.00	4623	7/23/93
	$	14,626.80	4650	8/25/93
	$	2,775.00	4674	9/24/93
	$	14,813.20	4656	9/20/93
	$	1,390.00	4764	12/22/93
	$	**47,215.00**		
DCE Dust	$	8,404.00	5736	8/12/93
Control	$	8,265.03	7497	12/16/93
	$	4,341.50	1208	2/18/94
	$	4,341.50	1219	3/21/94
	$	**25,352.03**		
Morris Scale	$	17,333.33	061893-1	6/16/93
	$	2,690.00	19982	9/23/93
	$	17,333.33	51093-02	5/10/93
	$	17,333.33	102093-1	10/20/93
	$	2,500.00	F10840	12/7/93
	$	1,367.00	21094-02	2/10/94
	$	**58,556.99**		

Invoices and vouchers substantiated the facility cost. Overhead was allocated by an acceptable method. Maggie Vandehey performed the accounting review on behalf of the Department. KPMG Peat Marwick, LLP provided the accounting review on behalf of the applicant.

Facility Cost Allocable to Pollution Control

The facility as claimed on the application does not meet the definition of a facility integral to operation of the applicant business based on the factors listed in OAR 340-16-030(1)(g). Therefore, the Department considered the factors in ORS.468.190 (1) to determine the percentage of the facility

cost allocable to pollution control. Considering these factors, the percentage allocable to pollution control is 100%.

Factor	Applied to This Facility
ORS 468.190(1)(a) Salable or Usable Commodity	The facility is used exclusively to process recyclable material. The percent allocable by using this factor is 100%.
ORS 468.190(1)(b) Return on Investment	The average annual cash flow for the facility is determined by the lease amount stated in the facility lease. The average annual income from the lease is $135,000. Only 93%, or $125,550, of the lease payment is allocable to the claimed facility because a portion includes office and other space not included in the claimed facility. The applicant did not include income associated with the sale of recovered material or expenditures incurred during the recovery process. This information is not available to them as the lessor of the facility and was not considered in determining the return on investment. Using lease payments only, the return on investment of 0% is calculated by using the allowable facility cost ($2,812,715), the useful life of the facility (20 years), and average annual income of $125,550 according to OAR 340, Division 16. This resulted in the determination that 100% of the facility cost is properly allocable to pollution control.
ORS 468.190(1)(c) Alternative Methods	The applicant considered other methods for reducing solid waste and determined that this method was environmentally acceptable and economically feasible. It is the Department's determination that the claimed facility is an acceptable method of achieving the material recovery objective.
ORS 468.190(1)(d) Savings or Increase in Costs	No savings or increase in costs. Willamette Industries purchases material from this material recovery process at a fair market value.
ORS 468.190(1)(e) Other Relevant Factors	No other relevant factors.

Compliance

The facility is in compliance with Department rules and statutes and with EQC orders.

Reviewers: William R Bree, DEQ;
M.C.Vandehey, DEQ

Tax Credit Review Report

EQC 0002

Director's Recommendation:	**REJECT Untimely Submittal**
Applicant	**Mitsubishi Silicon America**
Application No.	**5049**
Claimed Facility Cost	**$278,399**
Claimed % Allocable	**100%**
Useful Life	**10 years**

Pollution Control Facility: Air
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

The applicant is a C corporation operating as a **supplier of electronic grade silicon wafers** taking tax relief under taxpayer identification number 94-1687933. The applicant's address is:

1351 Tandem Ave. N.E.
Salem, OR 97303

Facility Identification

The certificate will identify the facility as:

An EPI B2 OTE Scrubber System

The applicant is the owner of the facility located at:

1351 Tandem Ave. NE
Salem, OR 97303

Technical Information

The claimed facility consists of an OTE venturi wet scrubber used for treating hydrogen chloride from the silicon epitaxial process (EPI). Other dopant gases produced include phosphine, diborane, trichlorosilane, and hydrochloric acid.

The OTE scrubber system effectively removes 99% of the HCL gases associated with the EPI process.

Eligibility

ORS 468.155 (1)(a)(A)	The **principal purpose** of this **new equipment installation** is to **control** a substantial quantity of air pollution as required by the applicants air permit.
ORS 468.155 (1)(b)(B)	The control is accomplished by the **elimination of air contaminants** and the use of an air cleaning device as defined in ORS 468A.005.

Timeliness of Application

The application was not submitted within the timing requirements of ORS 468.165 (6). The application was submitted more than two years after completion of construction.

Application Received	**07/27/1998**
Additional Information Requested	**01/04/1999**
Additional Information Received	**03/17/1999**
Additional Information Received	**11/12/1999**
Application Substantially Complete	**12/06/1999**
Construction Started	**04/29/1996**
Construction Completed	**07/19/1996**
Facility Placed into Operation	**08/01/1996**

Facility Cost

Claimed Facility Cost	**$ 278,399**
Ineligible Costs	
Eligible Facility Cost	

A copy of the project cost ledger from the contractor was provided which substantiated $271,400. The facility cost was greater than $50,000 but less than $500,000; therefore, **Symonds, Evans & Larson, P.C., C.P.A.**, provided an accounting report on behalf of the applicant according to Department guidelines.

Facility Cost Allocable to Pollution Control

According to ORS.190 (1), the facility cost exceeds $50,000; therefore, the following factors were used to determine the percentage of the facility cost allocable to pollution control. Considering these factors, the percentage allocable to pollution control is 100%.

Factor	Applied to This Facility
ORS 468.190(1)(a) Salable or Usable Commodity	No salable or useable commodity. The resulting hydrochloric acid from the scrubbers is discharged to the acid waste neutralization system.
ORS 468.190(1)(b) Return on Investment	The useful life of the facility used for the return on investment consideration is 10 years. No gross annual revenues were associated with this facility.
ORS 468.190(1)(c) Alternative Methods	No alternatives were investigated.
ORS 468.190(1)(d) Savings or Increase in Costs	No savings or increase in costs.
ORS 468.190(1)(e) Other Relevant Factors	No other relevant factors.

Compliance

The applicant states the facility is in compliance with Department rules and statutes and with EQC orders. The following DEQ permits have been issued to the facility: Storm Water 12001L issued March 1993;Air Contaminant Discharge Permit #D-24-4437 issued May 1996

Reviewers: Lois L. Payne, P.E., SJO Consulting Engineers, Inc.
Gordon Chun, SJO Consulting Engineers, Inc.
Maggie Vandehey, DEQ

Tax Credit Review Report

EQC 0002

Director's Recommendation:	**REJECT Untimely Submittal**
Applicant	**Mitsubishi Silicon America**
Application No.	**5100**
Claimed Facility Cost	**$1,599,606**
Claimed % Allocable	**100%**
Useful Life	**10 years**

Pollution Control Facility: Water
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

The applicant is a C corporation operating as a **supplier of electronic grade silicon wafers** taking tax relief under taxpayer identification number 94-1687933. The applicant's address is:

1351 Tandem Ave. NE
Salem, OR 97303

Facility Identification

The certificate will identify the facility as:

Acid Waste Neutralization (AWN) and Solids Removal System

The applicant is the owner of the facility located at:

3950 Fairview Industrial Drive SE
Salem, OR 97302

Technical Information

The claimed facility consists of an **acid waste neutralization system** in the central utilities building and a **solids removal system**, which consists of a clarifier and solids processing equipment.
All acidic waste water (hydroflouric, nitric, and acetic acids) and slurry wastes from the Mod 3A, 3B, and 5 buildings and silicon slurry wastes generated within the 3A and 3B operating areas are routed to the solids removal system. The solids removal system removes solids from the wastewater, which is then treated in the AWN system in accordance with their permit prior to being discharged. Both systems are highly effective in reducing water pollution.

In the absence of this facility, unacceptable acidic wastewater would be discharged to the city of Salem's waste water conveyance and treatment system.

Eligibility

ORS 468.155 (1)(a)(A) The **principal purpose** of this **new installation of equipment** is to **control** a substantial quantity of water pollution. The requirement is imposed by the applicants wastewater permit #3674-3, issued 12/31/97.

ORS 468.155 (1)(b)(A) The control is accomplished by the **elimination of industrial waste** and the use of treatment works for industrial waste as defined in ORS 468B.005.

Timeliness of Application

The application was not submitted within the timing requirements of ORS 468.165 (6). The application was submitted more than two years after completion of construction.

Application Received	**10/20/98**
Additional Information Requested	**3/15/99**
Additional Information Received	**4/1/99**
Additional Information Received	**11/12/99**
Application Substantially Complete	**12/6/99**
Construction Started	**7/20/95**
Construction Completed	**3/8/96**
Facility Placed into Operation	**10/20/96**

Facility Cost

Claimed Facility Cost	**$ 1,599,606**
Ineligible Costs	
Eligible Facility Cost	

A copy of the project cost ledger from the contractor was provided that substantiated $1,599,606. In addition, **Symonds, Evans, & Larson** provided the certified public accountant's statement on behalf of the applicant. The facility cost exceeds $500,000 therefore, Maggie Vandehey performed an accounting review on behalf of the department.

Facility Cost Allocable to Pollution Control

According to ORS.190 (1), the facility cost exceeds $50,000 and therefore, the following factors were used to determine the percentage of the facility cost allocable to pollution control. Considering these factors, the percentage allocable to pollution control is 100%.

Factor	Applied to This Facility
ORS 468.190(1)(a) Salable or Usable Commodity	There is no salable or usable commodity resulting from this facility.
ORS 468.190(1)(b) Return on Investment	The useful life of the facility used for the return on investment consideration is 10 years. No gross annual revenues are associated with this facility.
ORS 468.190(1)(c) Alternative Methods	No other alternatives were considered.
ORS 468.190(1)(d) Savings or Increase in Costs	The cost of operations, materials, and maintenance result in an increase in cost.
ORS 468.190(1)(e) Other Relevant Factors	No other relevant factors.

Compliance

The applicant states that the facility is in compliance with Department rules and statutes and with EQC orders. DEQ permits issued to facility:

Waste water #3674-3, issued 12/31/97
Storm Water 1200L, issued 7/22/97.

Reviewers: Lois L. Payne, P.E. SJO Consulting Engineers, Inc.
Dennis Cartier, Associate, SJO Consulting Engineers, Inc.
Maggie Vandehey, DEQ

Tax Credit Review Report

EQC 0002

Director's Recommendation:	**REJECT**
	Untimely Submittal
Applicant	**Mitsubishi Silicon America**
Application No.	**5101**
Claimed Facility Cost	**$37,358**
Claimed % Allocable	**100%**
Useful Life	**10 years**

Pollution Control Facility: Air
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

The applicant is a C corporation operating as a supplier of electronic grade silicon wafers taking tax relief under taxpayer identification number 94-1687933. The applicant's address is:

1351 Tandem Ave. NE
Salem, OR 97303

Facility Identification

The certificate will identify the facility as:

MOD 3B Torit dust collector

The applicant is the owner of the facility located at:

3950 Fairview Industrial Drive SE
Salem, OR 97302

Technical Information

The claimed facility consists of a Torit dust collector, model DFT3-36. The dust collector is rated for 20,000 cfm and is used to capture dry particulate from the slicing/polishing processes within the polished wafer building. The captured particulate is collected in a barrel and later transferred to a landfill.

Eligibility

ORS 468.155 (1)(a) The applicant claimed that the **principal purpose** of this **new installation of equipment** is to **control** a substantial quantity of air pollution. The requirement is imposed by their ACDP 24-0001, issued 2/5/97.

ORS 468.155 (1)(b)(B) The applicant claimed the control is accomplished by the **elimination of air contaminants** and the use of an air cleaning device as defined in ORS 468A.005.

Timeliness of Application

The application was not submitted within the timing requirements of ORS 468.165 (6).The application was submitted more than two years after completion of construction.

Application Received	**10/20/98**
Additional Information Requested	**02/09/99**
Additional Information Received	**04/08/99**
Additional Information Received	**11/12/99**
Application Substantially Complete	**12/6/99**
Construction Started	**10/10/95**
Construction Completed	**06/11/96**
Facility Placed into Operation	**10/20/96**

Facility Cost

Claimed Facility Cost	**$ 37,358**
Ineligible Facility Cost	
Eligible Facility Cost	

A copy of the project cost ledger from the contractor was provided that substantiated the cost of the claimed facility. The facility cost does not exceed $50,000 however, **Symonds, Evans, & Larson** provided a certified public accountant's statement on behalf of Mitsubishi Silicon America.

Facility Cost Allocable to Pollution Control

According to ORS.190 (3), the facility cost does not exceed $50,000, therefore the only factor used to determine the percentage of the facility cost allocable to pollution control is the percentage of time the facility is used for pollution control. The percentage of time this facility is used for pollution control and therefore the percentage allocable to pollution control, is 100%.

Compliance

The applicant states that the facility is in compliance with Department rules and statutes and with EQC orders. DEQ permits issued to facility:
Air Contaminant Discharge Permit 24-0001 issued 2/5/97.

Reviewers: Lois L. Payne, P.E. SJO Consulting Engineers, Inc.
Dennis Cartier, Associate, SJO Consulting Engineers, Inc.
Maggie Vandehey, DEQ

Tax Credit Review Report

EQC 0002

Director's Recommendation:	**REJECT Untimely Submittal**
Applicant	**Mitsubishi Silicon America**
Application No.	**5102**
Claimed Facility Cost	**$95,170**
Percentage Allocable	**100%**
Useful Life	**10 years**

Pollution Control Facility: Air
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

The applicant is a C corporation operating as a supplier of electronic grade silicon wafers taking tax relief under taxpayer identification number 94-1687933. The applicant's address is:

1351 Tandem Ave. NE
Salem, OR 97303

Facility Identification

The certificate will identify the facility as:

CUB Acid Exhaust Scrubber

The applicant is the owner of the facility located at:

3950 Fairview Industrial Drive SE
Salem, OR 97302

Technical Information

The claimed air pollution control facility consists of an acid exhaust scrubber, model PSH-102-5. The facility is used to capture and treat all fugitive fumes from the central utilities building (CUB) chemical storage tank vents. Corrosive fumes from the acid storage tanks are vented to the acid scrubber for treatment prior to discharge to the environment. This is a new operating plant. Without the scrubber, untreated acid fumes would be discharged to the atmosphere.

Eligibility

ORS 468.155 (1)(a) The applicant claimed the **principal purpose** of this **new installation of equipment** is to prevent, control or reduce a substantial quantity of air pollution as imposed by the applicants air permit.
The requirement is imposed by the Uniform Mechanical Code.

Timeliness of Application

The application was not submitted within the timing requirements of ORS 468.165 (6). The application was submitted more than two years after completion of construction.

Application Received	**10/20/98**
Additional Information Requested	**2/17/99**
Additional Information Received	**4/8/99**
Application Substantially Complete	**12/6/99**
Construction Started	**7/20/95**
Construction Completed	**3/8/96**
Facility Placed into Operation	**10/20/96**

Facility Cost

Claimed Facility Cost	**$ 95,170**
Ineligible Cost	
Eligible Facility Cost	

Copies of invoices were not provided to substantiate the claimed facility cost. The facility cost is greater than $50,000 but less than $500,000, therefore **Symonds, Evans, & Larson** provided the certified public accountant's statement in accordance with Department guidelines on behalf of Mitsubishi Silicon America.

Facility Cost Allocable to Pollution Control

According to ORS.190 (1), the facility cost exceeds $50,000 and therefore, the following factors were used to determine the percentage of the facility cost allocable to pollution control. Considering these factors, the percentage allocable to pollution control is 100%.

Factor	Applied to This Facility
ORS 468.190(1)(a) Salable or Usable Commodity	The facility is not used to recover and convert waste products into a salable or usable commodity.
ORS 468.190(1)(b) Return on Investment	The useful life of the facility used for the return on investment consideration is 10 years. No gross annual revenues were associated with this facility.
ORS 468.190(1)(c) Alternative Methods	Alternative methods, equipment and costs were not considered to achieve the same objective.
ORS 468.190(1)(d) Savings or Increase in Costs	There is an increase in operating costs as a result of installing this facility.
ORS 468.190(1)(e) Other Relevant Factors	No other relevant factors.

Compliance

The applicant states that the facility is in compliance with Department rules and statutes and with EQC orders. DEQ permits issued to facility:
Air Contaminant Discharge Permit 24-0001 issued 2/5/97.

Reviewers: Lois L. Payne, P.E. SJO Consulting Engineers, Inc.
Dennis Cartier, Associate, SJO Consulting Engineers, Inc.
Maggie Vandehey, DEQ

Tax Credit Review Report

EQC 0002

Director's Recommendation:	**REJECT Untimely Submittal**
Applicant	**Mitsubishi Silicon America**
Application No.	**5103**
Claimed Facility Cost	**$145,824**
Claimed % Allocable	**100%**
Useful Life	**10 years**

Pollution Control Facility: Air
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

The applicant is a C corporation operating as a supplier of electronic grade silicon wafers taking tax relief under taxpayer identification number 94-1687933. The applicant's address is:

1351 Tandem Ave. NE
Salem, OR 97303

Facility Identification

The certificate will identify the facility as:

MOD 3B Ammonia Scrubber

The applicant is the owner of the facility located at:

3950 Fairview Industrial Drive SE
Salem, OR 97302

Technical Information

The claimed air pollution control facility consists of a Harrington ammonia exhaust scrubber, model ECH 4 4-5 LB. The facility is used to treat all ammonia process fumes from the polished wafer building. Corrosive ammonia fumes from various process exhaust lines are routed to the ammonia scrubber for treatment prior to discharge to the environment. This is a new operating plant. Without the scrubber, untreated ammonia fumes would be discharged to the atmosphere.

Eligibility

ORS 468.155 (1)(a)(A) The applicant claimed the **principal purpose** of this **new installation of equipment** is to **control** a substantial quantity of air pollution. The requirement is imposed by their ACDP 24-0001, issued 2/5/97.

ORS 468.155 (1)(b)(B) The applicant claimed the control is accomplished by the elimination of air contaminants and the use of an air cleaning device as defined in ORS 468A.005.

Timeliness of Application

The application was not submitted within the timing requirements of ORS 468.165 (6). The application was submitted more than two years after completion of construction.

Application Received	**10/20/98**
Additional Information Requested	**2/17/99**
Additional Information Received	**4/8/99**
Additional Information Received	**11/12/99**
Application Substantially Complete	**12/6/99**
Construction Started	**10/10/95**
Construction Completed	**6/11/96**
Facility Placed into Operation	**10/20/96**

Facility Cost

Claimed Facility Cost	**$ 145,824**
Ineligible Facility Cost	
Eligible Facility Cost	

A copy of the project cost ledger from the contractor was provided to substantiate the claimed facility cost. The facility cost is greater than $50,000 but less than $500,000, therefore **Symonds, Evans, & Larson** provided the certified public accountant's statement in accordance with Department guidelines on behalf of Mitsubishi Silicon America.

Facility Cost Allocable to Pollution Control

According to ORS.190 (1), the facility cost exceeds $50,000 and therefore, the following factors were used to determine the percentage of the facility cost allocable to pollution control. Considering these factors, the percentage allocable to pollution control is 100%.

Factor	Applied to This Facility
ORS 468.190(1)(a) Salable or Usable Commodity	The facility is not used to recover and convert waste products into a salable or usable commodity.
ORS 468.190(1)(b) Return on Investment	The useful life of the facility used for the return on investment consideration is 10 years. No gross annual revenues were associated with this facility.
ORS 468.190(1)(c) Alternative Methods	Alternative methods, equipment and costs were not considered to achieve the same objective.
ORS 468.190(1)(d) Savings or Increase in Costs	There is an increase in operating costs as a result of installing this facility.
ORS 468.190(1)(e) Other Relevant Factors	No other relevant factors.

Compliance

The applicant states that the facility is in compliance with Department rules and statutes and with EQC orders. DEQ permits issued to facility:
Air Contaminant Discharge Permit 24-0001 issued 2/5/97.

Reviewers: Lois L. Payne, P.E. SJO Consulting Engineers, Inc.
Dennis Cartier, Associate, SJO Consulting Engineers, Inc.
Maggie Vandehey, DEQ

Tax Credit Review Report

EQC 0002

Director's Recommendation:	**REJECT Untimely Submittal**
Applicant	**Mitsubishi Silicon America**
Application No.	**5104**
Claimed Facility Cost	**$146,236**
Claimed % Allocable	**100%**
Useful Life	**10 years**

Pollution Control Facility: Air
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

The applicant is a C corporation operating as a supplier of electronic grade silicon wafers taking tax relief under taxpayer identification number 94-1687933. The applicant's address is:

1351 Tandem Ave. NE
Salem, OR 97303

Facility Identification

The certificate will identify the facility as:

MOD 3B NOX Scrubber

The applicant is the owner of the facility located at:

3950 Fairview Industrial Drive SE
Salem, OR 97302

Technical Information

The claimed air pollution control facility consists of a Harrington MOD 3B NOX scrubber, model ECH 3 3-8 LB and ECH 3 3-9 LB, serial number S-081995-1. The facility is used to treat nitric acid process fumes. Corrosive fumes from various process exhaust lines are routed to the MOD 3B NOX scrubber for treatment prior to discharge to the environment. This is a new operating plant. Without the scrubber, untreated nitric acid fumes would be discharged to the atmosphere and would result in visible emissions.

Eligibility

ORS 468.155 (1)(a) The applicant claimed the **principal purpose** of this **new installation of equipment** is to **control** a substantial quantity of air pollution. The requirement is imposed by their ACDP 24-0001, issued 2/5/97.

ORS 468.155 (1)(b)(B) The applicant claimed the control is accomplished by the elimination of air contaminants and the use of an air cleaning devices as defined in ORS 468A.005.

Timeliness of Application

The application was not submitted within the timing requirements of ORS 468.165 (6). The application was submitted more than two years after completion of construction.

Application Received	**10/20/98**
Additional Information Requested	**2/16/99**
Additional Information Received	**4/8/99**
Additional Information Received	**11/12/99**
Application Substantially Complete	**12/6/99**
Construction Started	**10/10/95**
Construction Completed	**6/11/96**
Facility Placed into Operation	**10/20/96**

Facility Cost

Claimed Facility Cost	**$ 146,236**
Ineligible Facility Cost	
Eligible Facility Cost	

A copy of the project cost ledger from the contractor was provided to substantiate the claimed facility cost. The facility cost is greater than $50,000 but less than $500,000, therefore **Symonds, Evans, & Larson** provided the certified public accountant's statement in accordance with Department guidelines on behalf of Mitsubishi Silicon America.

Facility Cost Allocable to Pollution Control

According to ORS.190 (1), the facility cost exceeds $50,000 and therefore, the following factors were used to determine the percentage of the facility cost allocable to pollution control. Considering these factors, the percentage allocable to pollution control is 100%.

Factor	Applied to This Facility
ORS 468.190(1)(a) Salable or Usable Commodity	The facility is not used to recover and convert waste products into a salable or usable commodity.
ORS 468.190(1)(b) Return on Investment	The useful life of the facility used for the return on investment consideration is 10 years. No gross annual revenues were associated with this facility.
ORS 468.190(1)(c) Alternative Methods	Alternative methods, equipment and costs were not considered to achieve the same objective.
ORS 468.190(1)(d) Savings or Increase in Costs	There is an increase in operating costs as a result of installing this facility.
ORS 468.190(1)(e) Other Relevant Factors	No other relevant factors.

Compliance

The applicant states that the facility is in compliance with Department rules and statutes and with EQC orders. DEQ permits issued to facility:
Air Contaminant Discharge Permit 24-0001 issued 2/5/97.

Reviewers: Lois L. Payne, P.E. SJO Consulting Engineers, Inc.
Dennis Cartier, Associate, SJO Consulting Engineers, Inc.
Maggie Vandehey, DEQ

Tax Credit Review Report

EQC 0002

Director's Recommendation: **REJECT**
Untimely Submittal

Applicant	**Mitsubishi Silicon America**
Application No.	**5105**
Claimed Facility Cost	**$128,179**
Claimed % Allocable	**100%**
Useful Life	**10 years**

Pollution Control Facility: Air
Final Certification
ORS 468.150 -- 468.190
OAR 340-016-0005 -- 340-016-0050

Applicant Identification

The applicant is a C corporation operating as a supplier of electronic grade silicon wafers taking tax relief under taxpayer identification number 94-1687933. The applicant's address is:

1351 Tandem Ave. NE
Salem, OR 97303

Facility Identification

The certificate will identify the facility as:

Two MOD 3B Acid Exhaust Scrubbers

The applicant is the owner of the facility located at:

3950 Fairview Industrial Drive SE
Salem, OR 97302

Technical Information

The claimed facility consists of two Harrington MOD 3B acid exhaust scrubbers, both model ECH 8 5-5 LB and serial numbers S-081895-1 and -2, and their associated Harrington HPCA 3300 fans. The facility is used treat acid process fumes from the polished wafer building. Corrosive fumes from various process exhaust lines are routed to the two MOD 3B Acid Exhaust scrubbers prior to discharge to the environment. This is a new operating plant. Without the scrubber, untreated acid fumes would be discharged to the atmosphere.

Eligibility

ORS 468.155 (1)(a) The applicant claimed the **principal purpose** of this **new installation of equipment** is to **control** a substantial quantity of air pollution. The requirement is imposed by their ACDP 24-0001, issued 2/5/97.

ORS 468.155 (1)(b)(B) The applicant claimed the control is accomplished by the **elimination of air contaminants** and the use of an air cleaning device as defined in ORS 468A.005.

Timeliness of Application

The application was not submitted within the timing requirements of ORS 468.165 (6). The application was submitted more than two years after substantial completion of construction.

Application Received	**10/20/98**
Additional Information Requested	**2/18/99**
Additional Information Received	**4/8/99**
Additional Information Received	**11/12/99**
Application Substantially Complete	**12/6/99**
Construction Started	**10/10/95**
Construction Completed	**6/11/96**
Facility Placed into Operation	**10/20/96**

Facility Cost

Claimed Facility Cost	**$ 128,179**
Ineligible Facility Cost	
Eligible Facility Cost	

A copy of the project cost ledger from the contractor was provided to substantiate the claimed facility cost. The facility cost is greater than $50,000 but less than $500,000, therefore **Symonds, Evans, & Larson** provided the certified public accountant's statement in accordance with Department guidelines on behalf of Mitsubishi Silicon America.

Facility Cost Allocable to Pollution Control

According to ORS.190 (1), the facility cost exceeds $50,000 and therefore, the following factors were used to determine the percentage of the facility cost allocable to pollution control. Considering these factors, the percentage allocable to pollution control is 100%.

Factor	Applied to This Facility
ORS 468.190(1)(a) Salable or Usable Commodity	The facility is not used to recover and convert waste products into a salable or usable commodity.
ORS 468.190(1)(b) Return on Investment	The useful life of the facility used for the return on investment consideration is 10 years. No gross annual revenues were associated with this facility.
ORS 468.190(1)(c) Alternative Methods	Alternative methods, equipment and costs were not considered to achieve the same objective.
ORS 468.190(1)(d) Savings or Increase in Costs	There is an increase in operating costs as a result of installing this facility.
ORS 468.190(1)(e) Other Relevant Factors	No other relevant factors.

Compliance

The applicant states that the facility is in compliance with Department rules and statutes and with EQC orders. DEQ permits issued to facility: Air Contaminant Discharge Permit 24-0001 issued 2/5/97.

Reviewers: Lois L. Payne, P.E. SJO Consulting Engineers, Inc.
Dennis Cartier, Associate, SJO Consulting Engineers, Inc.
Maggie Vandehey, DEQ

State of Oregon

Department of Environmental Quality Memorandum

Date: February 1, 2000

To: Environmental Quality Commission

From: Langdon Marsh, Director

Subject: Agenda Item C, U.S. Fish & Wildlife's Request for a Variance to the Total Dissolved Gas Water Quality Standard, EQC Meeting February 10, 2000

Statement of Purpose

The purpose of this report is to provide an historical background to the requests you will be considering at your February 10, 2000 meeting. The requests are to provide variances to the water quality standard for total dissolved gas. Two variance requests have been received. The first is from the U.S. Fish and Wildlife Service for spill at Bonneville Dam in conjunction with the release of eight million juvenile fall Chinook smolts from the Spring Creek National Fish Hatchery. The second request is from the U.S. Army Corps of Engineers for spills at John Day Dam in order to test the hydraulic performance characteristics of flow deflectors installed in 1997.

A copy of the U.S. Fish and Wildlife Service's 1999 annual report is attached.

Background

The Endangered Species Act

In 1992, the National Marine Fisheries Service (NMFS), using authorities under the federal Endangered Species Act (ESA), determined that three Snake River salmonid species were threatened or endangered. At that time, the listed species were:

1. sockeye;
2. spring/summer Chinook; and
3. fall Chinook.

Table 1 shows the total number of species in the Columbia and Willamette basins currently listed under the ESA.

Table 1: Federally Listed Species Under the Endangered Species Act.

Species	Snake River	Upper Columbia	Mid Columbia	Lower Columbia	Willamette
Steelhead	X	X	X	X	X
Sockeye	X				
Spring/Summer Chinook	X	X			
Fall Chinook	X			X	X
Chum				X	

Source: http://www.nwr.noaa.gov/1salmon/salmesa/pubs/1pg999.pdf

In addition, there is a federal listing for bull trout throughout its range. This includes parts of the Snake/Columbia/Willamette system. State listings also include Lower Columbia Coho.

On March 2, 1995, NMFS released a Biological Opinion on the operation of the Federal Columbia River Power System, pursuant to Section 7 of the ESA. The Biological Opinion established a number of reasonable and prudent alternatives designed to improve the operation and configuration of the federal hydropower system to meet the requirements of the ESA, and to meet the trust responsibilities of the United States to uphold tribal treaty fishing rights.

A number of reasonable and prudent alternatives relate to juvenile fish migration. There are four principal methods of fish migration through the hydropower system:

1. via turbines;
2. via fish passage facilities;
3. via spillway;
4. via barge.

Each of these passage routes involves risk. Generally, the risks are as follows:

1. turbines cause mortality or physical harm through physical contact, or due to the extreme pressure drop during turbine passage. Physical contact may occur with the turbine itself, or with the turbine chamber wall. Water taken into the turbine enters at depth with its associated hydrostatic pressure. Turbines discharge close to the surface. Fish proceeding via this route experience a corresponding sudden loss of hydrostatic pressure;
2. fish passage facilities pose the risk of exposure to higher temperature. Temperatures have, in the past, climbed alarmingly in fish passage facilities. The most dramatic was the fish kill at McNary Dam in 1994;
3. spillway passage carries the risk of elevated total dissolved gas levels;

4. barging carries risks associated with handling, crowding, disease and temperature. There is evidence that barged salmon also experience difficulty locating spawning streams upon their return.

NMFS view is that this risk should be spread over all four passage modes. In other words, all four passage modes should be utilized, rather than relying on only one or two of them. In the Biological Opinion, NMFS has established a goal of 80 percent fish passage efficiency. This means that 80 percent of juvenile migrants pass via non-turbine methods, or conversely, no more than 20 percent of fish should proceed via turbines.

The Clean Water Act

The purpose of the Clean Water Act is to protect all the beneficial uses of water. This includes salmonid spawning, rearing and passage. To this end, a number of water quality standards are established in administrative rule designed to protect beneficial uses. One such standard is the total dissolved gas standard. This standard has been established to protect aquatic life. Elevated total dissolved gas is not a threat to human health.

The total dissolved gas standard applicable to the Columbia River at Bonneville Dam is contained at OAR 340-41-0205(2)(n)(A), and reads as follows:

> The concentration of total dissolved gas relative to atmospheric pressure at the point of sample collection shall not exceed 110 percent of saturation, except when stream flow exceeds the ten-year, seven-day average flood. However, for Hatchery receiving waters and waters of less than two feet in depth, the concentration of total dissolved gas relative to atmospheric pressure at the point of sample collection shall not exceed 105 percent of saturation;
> (B) The Commission may modify the total dissolved gas criteria in the Columbia River for the purpose of allowing increased spill for salmonid migration. The Commission must find that:
> (i) Failure to act would result in greater harm to salmonid stock survival through in-river migration than would occur by increased spill;
> (ii) The modified total dissolved gas criteria associated with the increased spill provides a reasonable balance of the risk of impairment due to elevated total dissolved gas to both resident biological communities and other migrating fish and to migrating adult and juvenile salmonids when compared to other options for in-river migration of salmon;
> (iii) Adequate data will exist to determine compliance with the standards; and
> (iv) Biological monitoring is occurring to document that the migratory salmonid and resident biological communities are being protected.
> (C) The Commission will give public notice and notify all known interested parties and will make provision for opportunity to be heard and comment on the

> evidence presented by others, except that the Director may modify the total dissolved gas criteria for emergencies for a period not exceeding 48 hours;
> (D) The Commission may, at its discretion, consider alternative modes of migration.

The 110 percent of atmospheric saturation standard is based on a great deal of research, and ultimately mirrors U.S. Environmental Protection Agency guidance criteria.

Total Dissolved Gas Effects on Fish

In the current context, elevated gas levels are caused by water spilling over spillways at dams. As water passes over the face of the spillway it entrains air bubbles. These bubbles are carried into deep water at the bottom of the dam (the stilling basin, designed to reduce the kinetic energy of the water). At the higher hydrostatic pressures found in the stilling basin, the air bubbles are forced into solution. Fish "ingest" this water as a normal part of respiration. If a fish that has taken in supersaturated water subsequently swims higher in the water column, i.e. in lower pressure water, the dissolved gases can come out of solution and take on their previous gaseous state. In this form they manifest themselves as bubbles in the fins and midline of the fish, and in extremes may pop out eyes and burst swim bladders.

The standard is set to avoid these effects.

The Endangered Species Act and the Clean Water Act

The overlap between the above two acts is what gives rise to this issue. In order to meet the 80 percent fish passage efficiency required under the Biological Opinion, water needs to be spilled at hydroelectric projects which will result in total dissolved gas levels in excess of 110 percent of saturation. Research, monitoring and literature in recent years indicates that short-term exposures to supersaturated water at 120 percent of saturation in the tailwater of the spilling dam and 115 percent in the forebay of the next dam downstream is protective of migrating juveniles. On this basis, the Commission has considered variations to the total dissolved gas standards since 1994.

Within this period, two instances stand out. In conjunction with the variance, the Commission usually imposes conditions, including a biological trigger, which if reached, requires the Director to halt the spill program. This level was reached in 1994, and the Director halted the program in mid-season. In 1995, the Commission declined a request from the U.S. Fish and

Wildlife Service for spill over Bonneville Dam for outmigrating Spring Creek Hatchery smolts. This denial was based on two major grounds:

1. that the U.S. Fish and Wildlife Service did a poor job in explaining the benefits of spill for fish, and that the report was filed at a very late stage, resulting in insufficient time for the public to digest it; and
2. that it applied to hatchery fish, not threatened and endangered species listed under the ESA.

In every other instance, the Commission has approved a variation to the total dissolved gas standard to provide for spill.

Voluntary Versus Involuntary Spill

Water spilled to assist outmigrating smolts under the Biological Opinion is referred to as voluntary spill. This label has been ascribed because there is control over the quantity of water spilled, and the configuration of the dam. Involuntary spill refers to those instances in which water is spilled over a dam for one of three reasons:

1. total river flow exceeds the hydraulic capacity of the dam to hold the water back;
2. insufficient power market. In this instance there is insufficient demand for electricity, the result of which is that water is not put through the turbines, and is instead spilled over the spillway;
3. breakdowns or maintenance at the dam requires that water be diverted away from turbines for repair or maintenance, and consequently water is spilled over spillways.

Both types of spill result in elevated dissolved gas levels. The requests for variances to date have only addressed voluntary spills for fish.

Gas Abatement

There are a number of operational and technological solutions that can reduce dissolved gas. One of the more prominent technologies has been flow deflectors, or "flip lips." These devices installed at the bottom of the spillway deflect water vertically in an attempt to prevent it from falling to depth and creating higher dissolved gas levels. One of the variances you will be considering is to allow for testing flow deflectors installed at John Day Dam in 1997. The U.S. Army Corps of Engineers intends to conduct tests at John Day dam to verify the hydraulic performance of the flow deflectors. Estimated spill quantities last year were unable

to be met due to dissolved gas levels. The tests are being conducted to ascertain spill quantities and their resultant dissolved gas levels.

Authority of the Commission with Respect to the Issue

As you see from the rule language reproduced above, the Commission has the authority to grant a variance to the total dissolved gas standard, provided the following findings can be supported:

> (i) Failure to act would result in greater harm to salmonid stock survival through in-river migration than would occur by increased spill;
> (ii) The modified total dissolved gas criteria associated with the increased spill provides a reasonable balance of the risk of impairment due to elevated total dissolved gas to both resident biological communities and other migrating fish and to migrating adult and juvenile salmonids when compared to other options for in-river migration of salmon;
> (iii) Adequate data will exist to determine compliance with the standards; and
> (iv) Biological monitoring is occurring to document that the migratory salmonid and resident biological communities are being protected.

Alternatives and Evaluation

Granting the requested variances will:

1. for the U.S. Fish and Wildlife Service ensure the survival of a greater number of hatchery fall Chinook smolts; and
2. for the U.S. Army Corps of Engineers will provide more precise data on the spill and gas exchange characteristics of the recently installed "flip lips."

Summary of Public Input Opportunity

The Department received the application from the U.S. Fish and Wildlife Service on January 7, 2000, and issued a public notice. A public hearing is scheduled for February 2, 2000, and written comments will be accepted until February 4, 2000. Following this, the Department will prepare a further report evaluating the specific request and incorporating public comments received, and will make a recommendation to the Commission on February 10, 2000.

Intended Future Actions

A specific report on the requested variances by the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers will be prepared following the conclusion of the public comment period and will be forwarded prior to the EQC meeting.

Department Recommendation

It is recommended that the Commission accept this report as background information to its deliberations on variations to the State's total dissolved gas standard. Staff will be available at the meeting to answer questions arising from this background document.

Attachments

U.S. Fish and Wildlife Service (2000) *Monitoring Report for March 18-28, 1999 Spills at Bonneville Dam*, U.S. Fish and Wildlife Service, Vancouver, WA, January.

Approved:

Section: _____

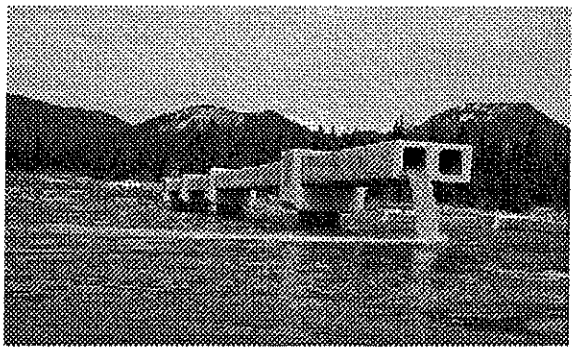
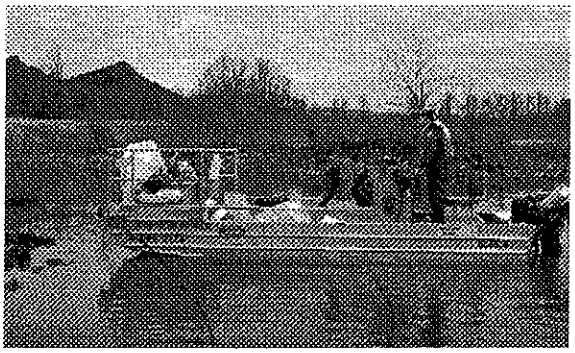
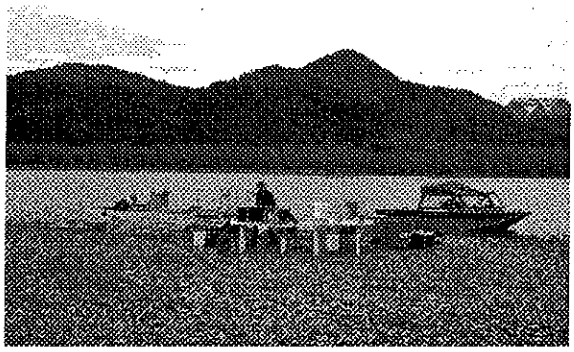
Division: _____

Report Prepared By: Russell Harding

Phone: (503) 229-5284

Date Prepared: February 1, 2000

U.S. FISH AND WILDLIFE SERVICE
MONITORING REPORT FOR
MARCH 18-28, 1999
SPILL AT BONNEVILLE DAM

U.S Fish and Wildlife Service
Columbia River Fisheries Program Office
9317 N.E. Highway 99, Suite I
Vancouver, WA 98665, USA

Monitoring Report for March 18-28, 1999, Spill at Bonneville Dam

Introduction

The U.S. Fish and Wildlife Service (USFWS) requested a total dissolved gas (TDG) waiver from the Oregon Department of Environmental Quality and an adjusted dissolved gas standard from the Washington Department of Ecology (WDOE) for spill at Bonneville Dam for the period March 18 through 28, 1999. These requests were made to allow for TDG saturation up to 115% as measured at the Camas-Washougal monitoring station and 120% in the Bonneville Dam tailrace. The Oregon Environmental Quality Commission approved this request at its January 28, 1999 meeting. The WDOE provided the adjusted TDG standard on March 8, 1999. One of the conditions of the approved waiver and adjusted TDG standard was that the USFWS conduct biological and physical monitoring downstream of Bonneville Dam during the spill period and to provide reports of this monitoring.

The USFWS Columbia River Fisheries Program Office (CRFPO) monitored water conditions and examined fish collected below Bonneville Dam for signs of Gas Bubble Trauma (GBT) during the March 1999 spill period. This report summarizes the results of this monitoring program.

Operations

On the morning of March 18, 1999, Spring Creek National Fish Hatchery (NFH) released 4.2 million juvenile tule fall chinook salmon. The salmon management agencies requested that spill up to the 120% gas cap begin at 2000 hours on March 18 and continue for 24 hours per day through 2000 hours on March 28. This request was transmitted to the operating agencies via System Operational Request #99-1 (Attached). Voluntary spillway releases to assist fish passage began at Bonneville Dam on March 18, 1999 at 2000 hours when spill was increased from about 39 thousand cubic feet per second (kcfs) to about 151 kcfs. The total river flow volume at that time was about 236 kcfs.

The operating agencies only agreed to spill for 7 days with additional days contingent on juvenile fish passage information. On March 25, 1999, the project operators and regulators denied the salmon managers' request to spill for fish passage at Bonneville Dam through March 28. However, spill up to 150 kcfs at night and 75 kcfs during the day was provided through March 28. This occurred because river flow exceeded electrical power demand at times.

Biological Monitoring

The biological monitoring program included collecting juvenile salmonids and resident fish during the period of spill and examining them for signs of gas bubble trauma. Sampling was conducted on three days. Personnel from the USFWS who collected and examined fish for GBT had been trained on examination techniques by staff from the Fish Passage Center and U.S. Geological Survey (USGS) Biological Resources Division. The same USFWS personnel had also conducted biological sampling and examined fish for GBT during the March, 1998, spill

period at Bonneville Dam.

Fish were collected by electroshocking from a boat and seining on March 19, 21, and 23. Electroshocking was conducted in the main river channel below Bonneville Dam and near the side channel of Pierce and Ives islands (Figure 1). Staff from the USFWS electroshocked along the shorelines and in areas where depths did not exceed 3 meters to maximize electroshocking and fish collecting efficiency. Sampling crews collected fish with a 50-foot-long beach seine in nearshore areas of Pierce and Ives islands. Most of the fish were captured by seining. Most fish were collected and examined on March 19 near Ives and Pierce islands. This was also the day that the fish passage index count (270,000 subyearling chinook) at Bonneville Dam was the highest. On March 19, Washington Department of Fish and Wildlife personnel also provided fish caught by beach seining.

On March19 and 21 the sampling station was set up on the shore of Pierce National Wildlife Refuge (NWR) just downstream of Hamilton Island (Figure 1). A tent was set up to move sampling equipment into it in case of rain. On March 23 the sampling station was set up at the top of Pierce Island (Figure 1).

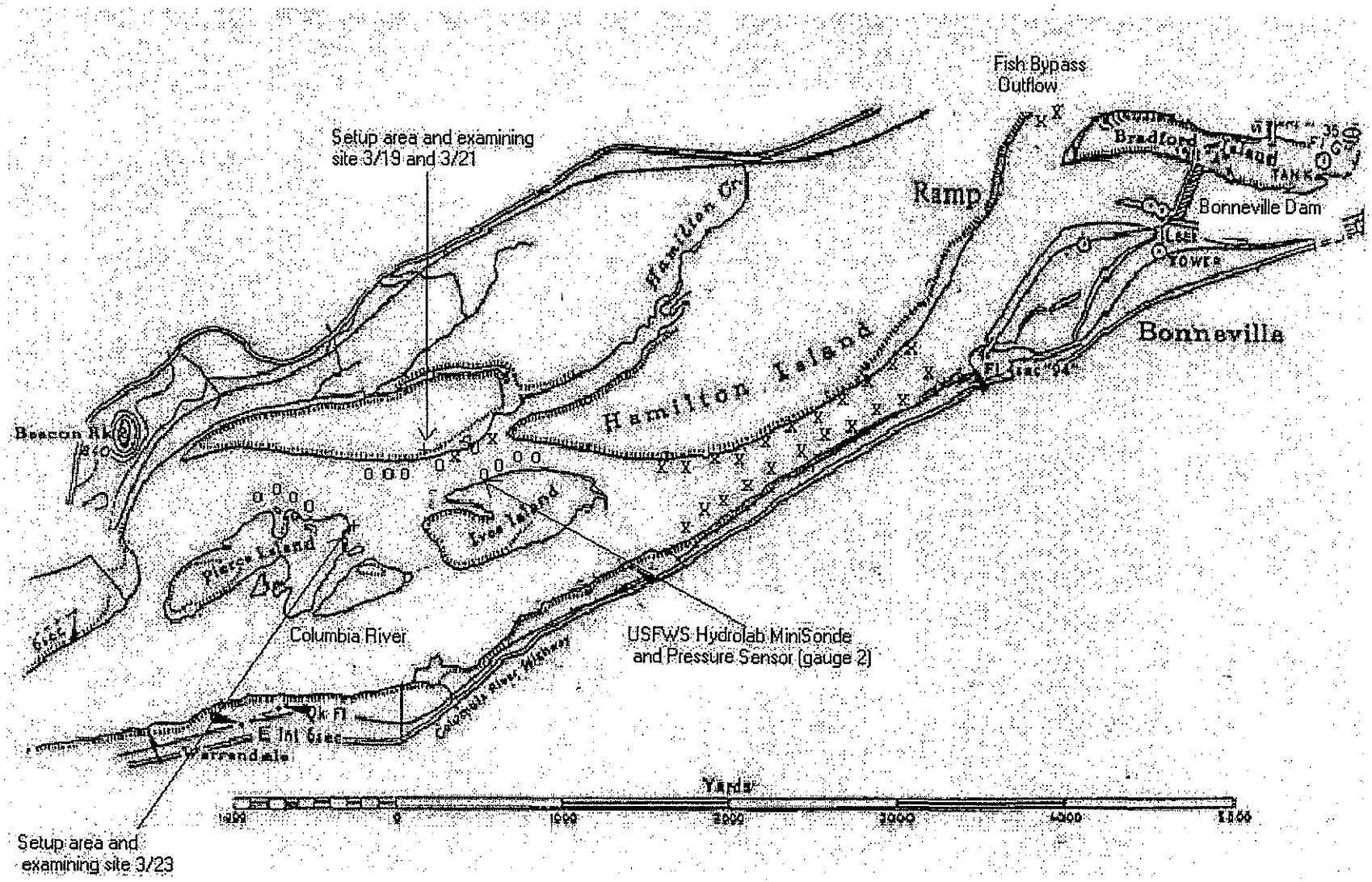
Captured fish were brought back to the sampling station and examined within 15 minutes of collection. Fish were examined according to regionally adopted protocols for GBT. The fish were anaesthetized and then examined under a microscope for signs of gas bubbles in the fins, eye and lateral line. The fish were allowed time to recover and then returned to the river. Other data that were collected included fish species, length, clipped fins, and other miscellaneous signs of injury. All data were recorded when the fish were examined.

A total of 145 fish were examined for signs of GBT. Of the fish examined, 122 were subyearling chinook salmon. Nine subyearling chinook were in the 0 to 49mm size range, 108 were in the 50mm to 120mm range, and 5 were in the 121mm to 160mm range. Other fish examined included 1 chum salmon fry (34mm), 1 cutthroat trout (232mm), 1 coho (38mm), 10 threespine sticklebacks, 4 largescale suckers, 5 northern pike minnows, and 1 prickley sculpin. No signs of GBT were observed on any fish released from Spring Creek NFH, resident fish, or salmonids rearing near Ives and Pierce islands. Table 1 summarizes the results of fish sampling for GBT. These results are similar to those from previous years when few or no fish had signs of GBT.

Monitoring of Physical Conditions

Physical conditions that the USFWS monitored included TDG, dissolved oxygen, and water depth over salmon redds (nests). Physical conditions were monitored continuously during the spill period.

The USFWS CRFPO deployed a Hyrolab Minisonde (Hydrolab Corporation, 12921 Burnet Rd. Austin, TX 78727) on March 9, 1999 offshore from Ives Island to monitor TDG levels in chum and fall chinook spawning and rearing areas (Figure 2). The Minisonde was placed at the same location as a pressure depth sensor previously installed and maintained by the USFWS CRFPO (Figure 2, gauge station 2) to measure water depth over the highest elevation chum salmon redd.



X = electroshocking sites + = examining station
0 = seining sites

Figure 1. March 1999 sampling sites.

Table 1. Summary of fish sampled for signs of GBT - March 1999 Spill at Bonneville Dam

Species	Size Range in mm	# fish samp. 03/19/99	# fish Samp. 03/21/99	# fish samp. 03/23/99	Total # of fish samp.	Total number of fish observed with bubbles in unpaired fins or eye				
						LL	DF	AF	CA	EY
Chinook	0-49	2	1	6	9	0	0	0	0	0
Chinook	50-120	87	12	9	108	0	0	0	0	0
Chinook	121-160	4	1	0	5	0	0	0	0	0
Chum	0-50	0	1	0	1	0	0	0	0	0
Coho	0-40	1	0	0	1	0	0	0	0	0
Cutthroat	200-250	1	0	0	1	0	0	0	0	0
Stickleback	0-70	4	3	3	10	0	0	0	0	0
Large Scale Sucker	300-450	2	2	0	4	0	0	0	0	0
Northern Pike Minnow	0-200	0	3	2	5	0	0	0	0	0
Prickley Sculpin	0-90	0	1	0	1	0	0	0	0	0
Totals		101	24	20	145	0	0	0	0	0

LL = lateral line
DF = dorsal fin
AF = anal fin
CA = caudal fin
EY = eye

Figure 2. Fall Chinook and chum salmon spawning redd locations observed below Bonneville Dam in 1998.

Data were also gathered for TDG from the USGS monitoring stations located at Warrendale, Skamania, and Camas/Washougal.

Levels of TDG in the Ives Island side channel where fall chinook and chum salmon had spawned in 1998 were similar to those recorded by the USGS monitoring stations. Figure 3 compares the various levels of TDG recorded by USGS monitoring stations at Skamania, Warrendale, and Camas/Washougal and the USFWS monitoring site at Ives Island. TDG levels in the Ives Island side channel recorded by the USFWS Hydrolab Minisonde varied from a low of 98.4% on March 18 at 2100 hours to a high of 119.4% on March 19 at 1900 hours.

On March 19 and 23, staff from the USFWS CRFPO also measured TDG with a hand held Common Sensing meter at various locations from Bradford to Pierce islands. These TDG readings were generally similar to those obtained at the USGS Skamania and USFWS Minisonde site at Ives Island. Figure 4 shows sites where USFWS CRFPO staff took those measurements.

Levels of TDG differed at the three USGS monitoring stations. The Warrendale monitoring station, which was located on the Oregon side of the Columbia River Bonneville Dam at river mile 140, never recorded 12 hour average TDG levels greater than 115%. The Skamania station, which was located at river mile 140 on the Washington side of the Columbia River, recorded 12 hour average TDG levels that ranged between 113% and 122% and exceeded 120% on 3 days. The Camas/Washougal site, located at river mile 122, had 12 hour average TDG levels between 112% and 118%.

The TDG levels at the USGS Camas/Washougal monitoring site varied from a low of 104.2% on March 18 at 0100 hours to a high of 119% on March 20 at 1600 hours. Levels of TDG were above 114% from 0300 hours March 20 to 1000 hours March 26 (Figure 4). From March 20 to March 25, the 12 hour average TDG level was greater than 115%.

The highest percent TDG reading of all the monitoring stations was at the Skamania (Bonneville tailrace) site. It recorded a high of 122.3% at 2200 hours on March 19, 1999. The time of this reading is also close to the highest spill level recorded at Bonneville Dam for the spill period. The spill level at Bonneville Dam for this corresponding time was 176.6 kcfs (Figure 5). The TDG level recorded at the Warrendale (also Bonneville tailrace) site during the same time period was 115%. The 12 hour average TDG exceeded 120% at the Skamania monitoring station on March 19, 20, and 22. At the Warrendale station, the 12 hour average TDG level never exceeded 115%.

Table 2 shows the 12 and 24 hour percent TDG daily averages for the USGS downstream monitoring sites. Total flow during the spill period ranged from 234.3 kcfs to 343.5 kcfs (Figure 6). Spill varied from a low of 73.2 kcfs to a high of 176.9 kcfs (Figure 5). Table 3 shows daily average flow through powerhouses 1 and 2, and spill (in kcfs) at Bonneville Dam.

Spill and TDG levels are controlled by the U.S. Army Corps of Engineers which operates Bonneville Dam. Levels of TDG can be controlled by adjusting spill volumes, but TDG production can vary depending on total river flow, forebay and tailwater elevations, gate settings,

water temperature, TDG level of water in the forebay, spill patterns and other factors. Frequent adjustments are necessary to control TDG levels. During the March, 1999, spill period, the Corps of Engineers made several adjustments in spill to try to maintain TDG at or below the waiver and adjusted standard levels.

Also of concern were impacts of elevated TDG levels on recently hatched fry from populations of chum and fall chinook salmon that spawned naturally near Pierce and Ives islands in the fall 1998. Calculations of egg incubation and hatching times indicated that sac fry could be present in river gravels during the requested spill period. Fish in the sac fry stage of development appear to be most vulnerable to GBT, with mortalities over 50% when TDG levels reach 120%. Mortality of sac fry begins when TDG reaches 105%.

Hydrostatic pressure on a fish alleviates the effect that supersaturation may have on GBT. Each foot of water depth compensates for about 3% saturation; 1 meter for about 10% saturation. Thus, one meter of depth would reduce the effect of a total gas pressure of 120% down to110%. The USFWS, therefore, constantly monitored water depth over the highest chum salmon redd during the spill period to ensure adequate depth compensation to protect sac fry from elevated levels of TDG. The USFWS was prepared to notify the Corps of Engineers to reduce spill if TDG levels were too high or if depth over the highest redd became too shallow.

Depth levels recorded at the USFWS Hydrolab Minisonde monitoring site varied from a low of 5.74 feet at 0600 hours (234.7 kcfs total flow) March 19 to a high of 10.59 feet at 2400 hours (341 kcfs total flow) March 28 (Figure 6). This corresponded to TDG compensation levels of about 17.2 % for the 5.74 foot and 31.8% for the 10.59 foot depths. The Fish Passage Center web site has a page that lists on-line real time data for the depth monitoring stations at Ives and Hamilton Island. The data are supplied by USFWS CRFPO (Joe Skalicky, Don Anglin). The web site address is http://www.fpc.org/rivrdata.html. The data are transmitted directly from the sensor to the Fish Passage Center.

Dissolved oxygen percent saturation varied during the March 18 to 28 period from a low of 85.9% (254 kcfs total flow) at 0900 hours to a high of 104.2% (249.6 kcfs total flow) at 1100 hours. Figure 7 compares dissolved oxygen , total river flow, and spill volume at Bonneville Dam.

Summary

In summary, the USFWS collected and examined fish for signs of gas bubble trauma, monitored water quality, and measured water depth over salmon redds during the March 18 to 28, 1999 spill period at Bonneville Dam. Biological sampling was conducted on March 19, 21, and 23. Biological monitoring showed that none of the fish that were collected and examined exhibited any signs of gas bubble trauma.

Water quality monitoring and records from the USGS Camas/Washougal data station showed that 12 hour average TDG levels exceeded 115% between March 20 and 25. Twelve hour average TDG levels at the Skamania monitoring station exceeded 120% on March 19, 20, and

22. At the Warrendale monitoring station twelve hour average TDG levels were never greater than 115%.

Water depth monitoring showed that the minimum depth over the highest elevation chum salmon redd was about 5.7 feet. This provided depth compensation which reduced total dissolved gas pressure by 17.2 % at redd surface level.

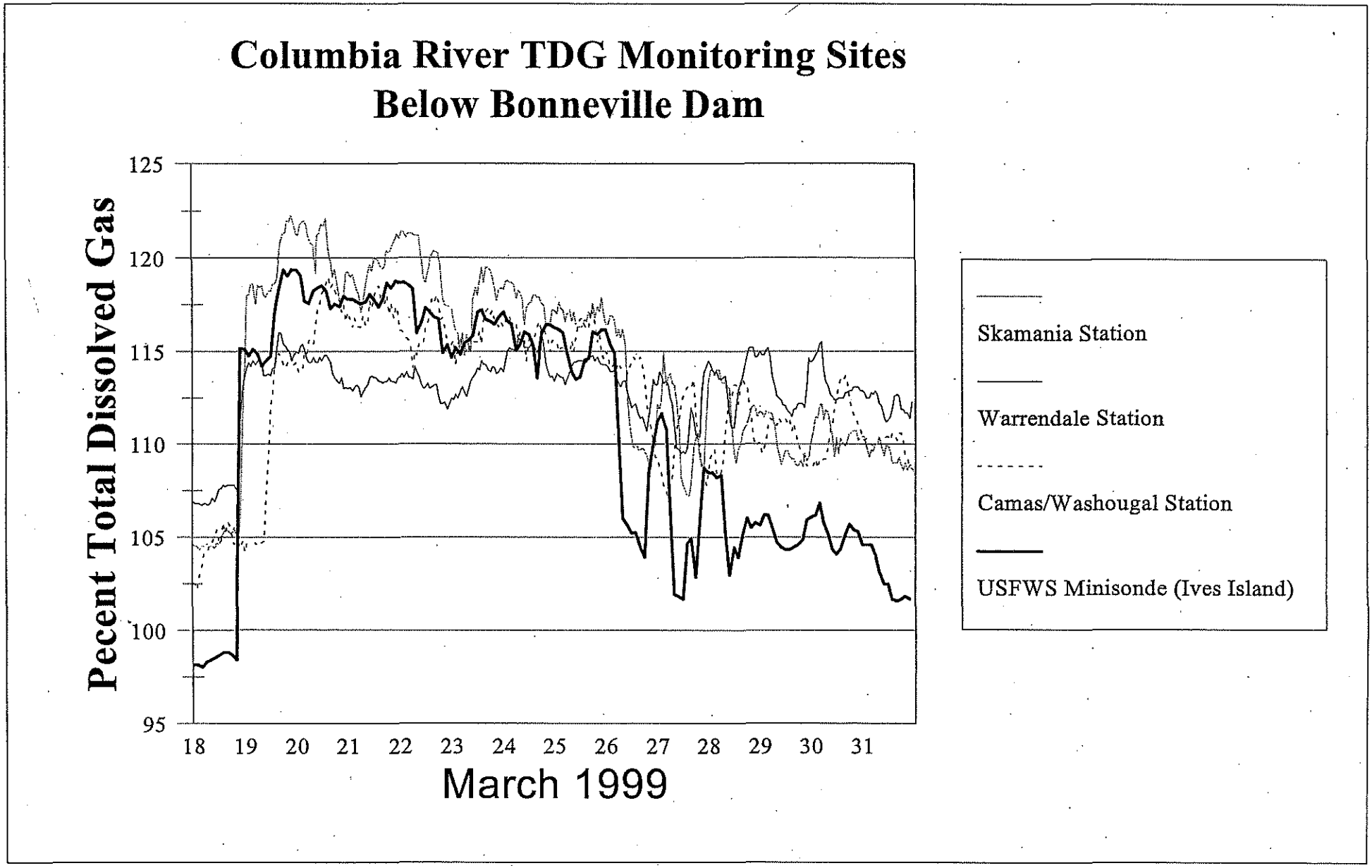


Figure 3. Comparison of Percent TDG levels recorded by USGS monitoring sites below Bonneville Dam and the USFWS Ives Island monitoring site.

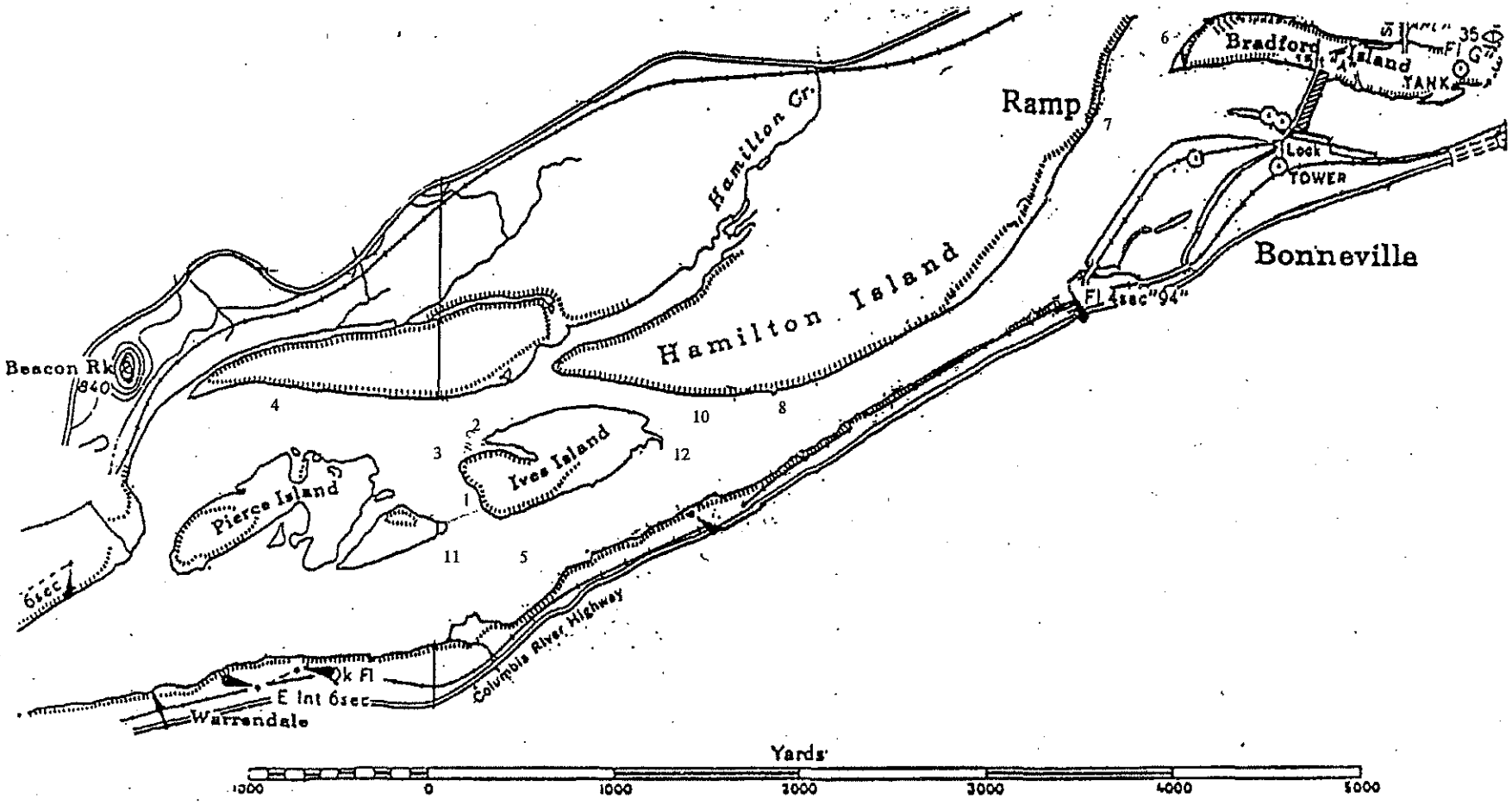
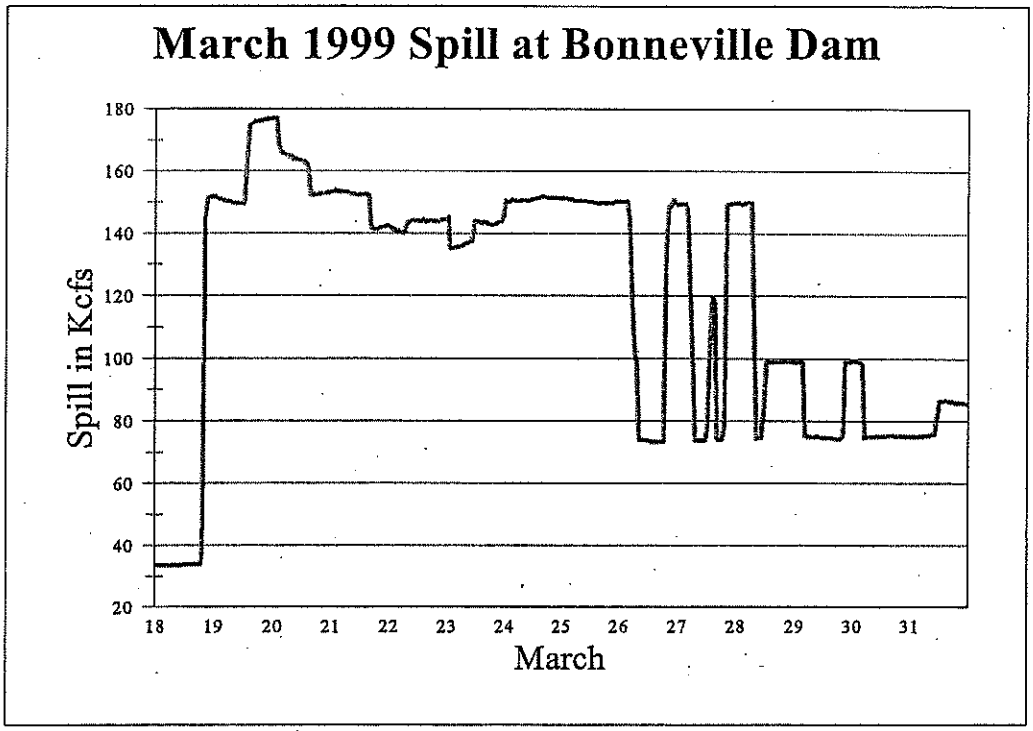


Figure 4. Common Sensing meter measurement locations.



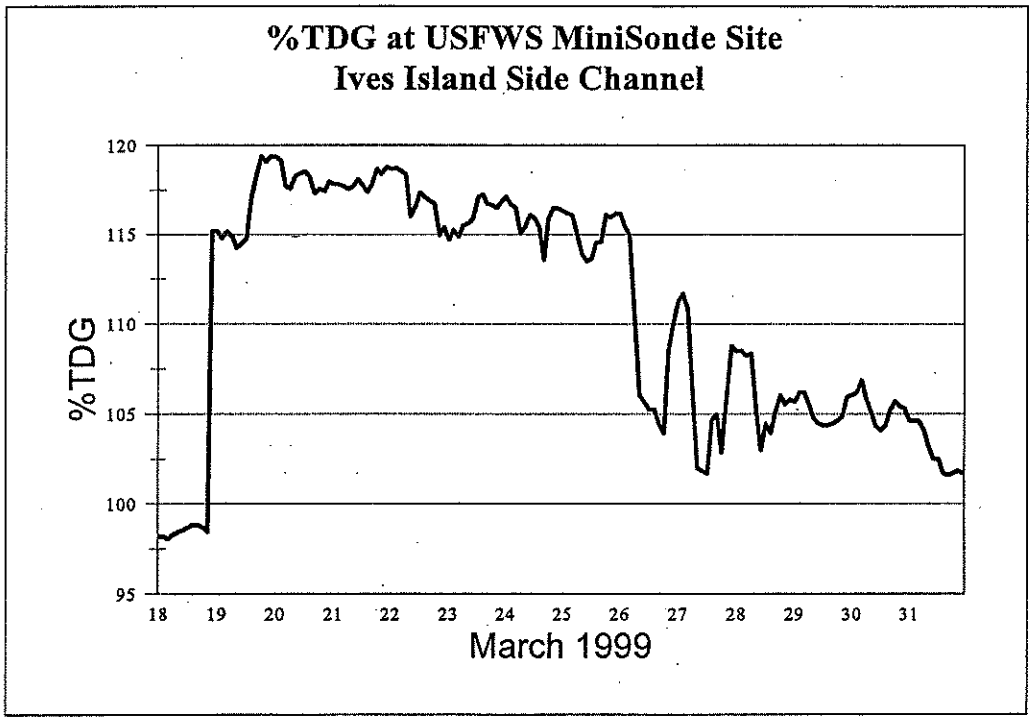


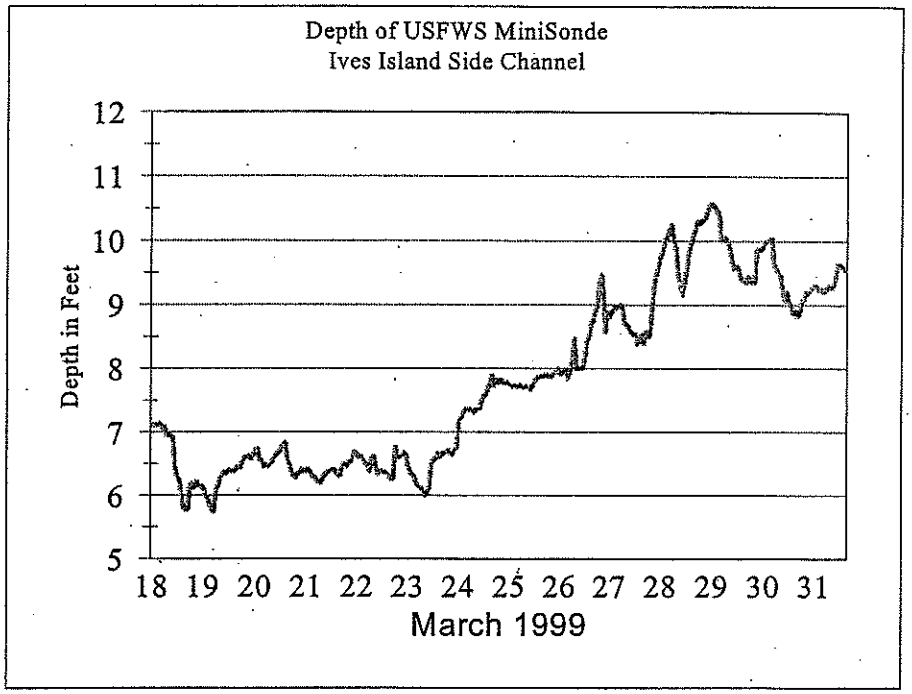
Figure 5. Comparison of Spill at Bonneville Dam and TDG levels recorded at Ives Island monitoring site.

Table 2. March 1999 Total dissolved gas percent saturation, 12 and 24 hour averages at Lower Columbia River sites.

	Bonneville				Warrendale				Skamania				Camas\Wash.			
	#	24h	12h		#	24h	12h		#	24h	12h		#	24h	12h	
Date	hr	Avg	Avg	High	hr	Avg	Avg	High	hr	Avg	Avg	High	hr	Avg	Avg	High
03/18/99	0	103	103	103	24	108	108	113	24	106	107	114	24	104	105	106
03/19/99	0	103	103	104	24	115	115	116	24	119	121	122	24	109	111	115
03/20/99	0	103	104	104	24	114	115	115	24	120	122	122	24	117	118	119
03/21/99	0	103	103	104	24	113	114	114	24	120	120	121	24	117	118	119
03/22/99	0	104	104	105	24	113	114	114	24	120	121	121	24	116	117	118
03/23/99	0	106	106	107	24	114	114	115	24	118	119	120	24	116	117	117
03/24/99	0	107	107	108	24	115	115	116	24	118	118	119	24	116	116	117
03/25/99	0	107	108	109	24	114	115	115	24	117	117	118	24	116	116	117
03/26/99	0	107	107	108	24	113	114	114	24	112	115	117	24	114	115	115
03/27/99	0	105	106	106	24	112	113	114	24	111	113	115	24	110	112	114
03/28/99	0	106	107	108	24	114	115	115	24	112	113	114	24	111	113	114

Table 3. Daily average flow through power house 1 & 2, and spill (in kcfs) at Bonneville Dam

Date	Spill	PH1	PH2				
03/18/99	53.2	75.5	108.3				
03/19/21	161.6	66.3	14.1				
03/20/99	161.0	71.7	5.3				
03/21/99	149.1	76.7	5.2				
03/22/99	143.0	81.8	10.7				
03/23/99	140.5	78.3	20.1				
03/24/99	151.0	76.3	38.1				
03/25/99	150.2	78.7	38.2				
03/26/99	108.5	83.1	91.6				
03/27/99	110.3	82.0	98.0				
03/28/99	110.3	86.6	124.0				



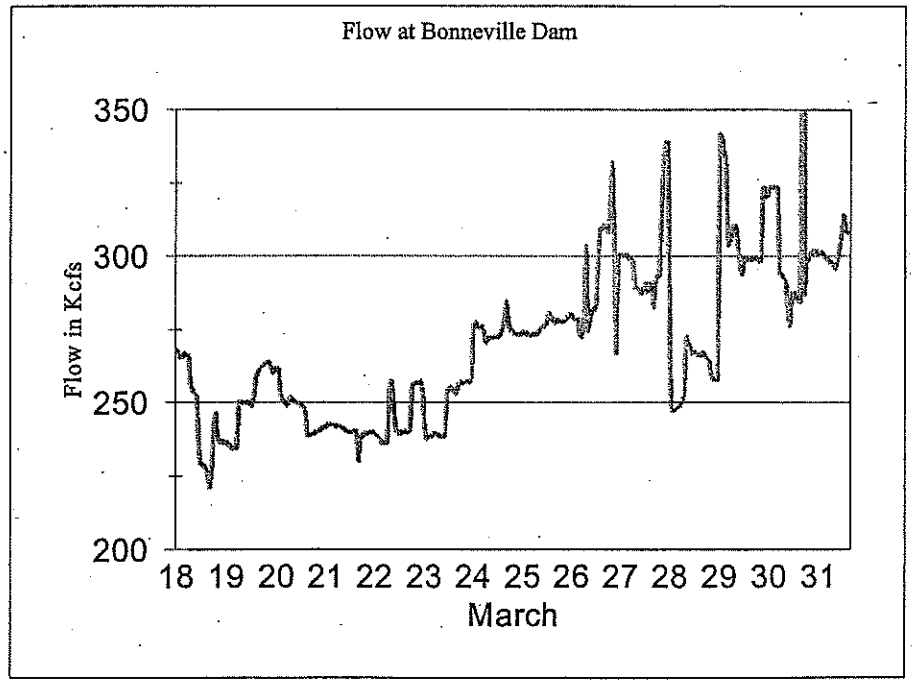
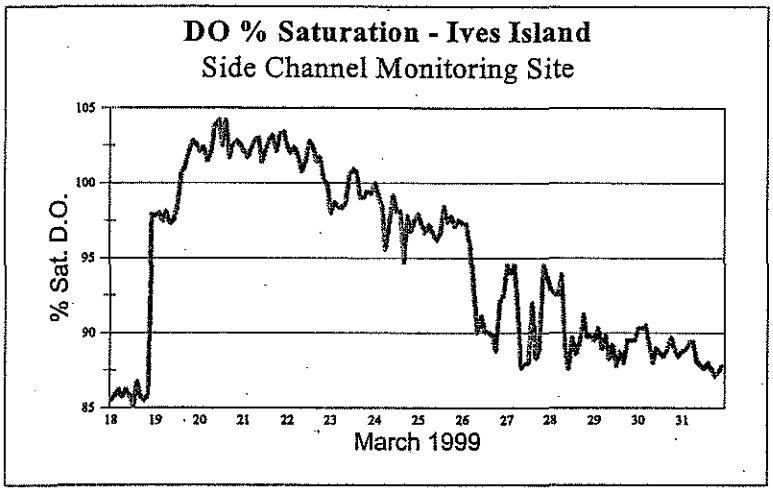
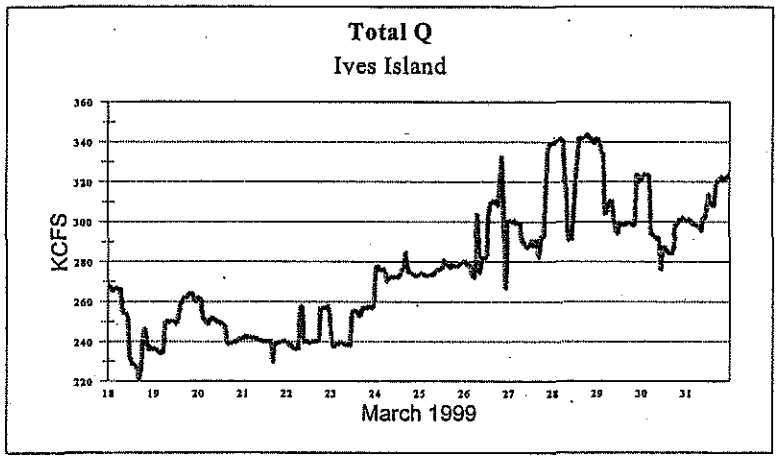


Figure 6. Comparison of depth over monitoring location and total flow.





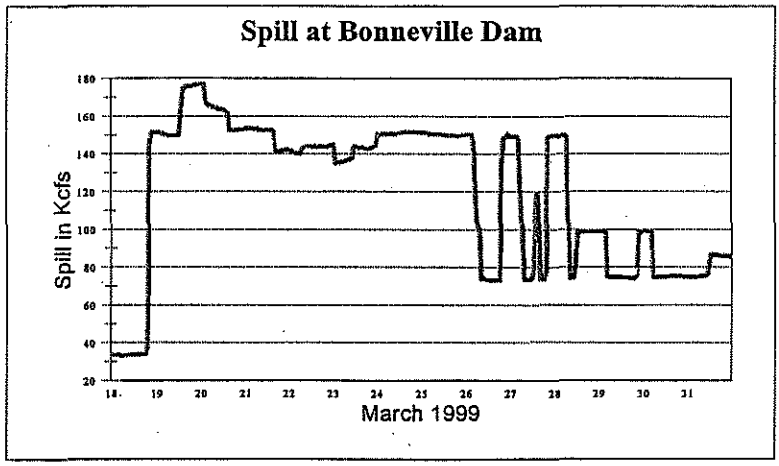


Figure 7. Comparison of DO percent saturation, total discharge, and spill.

State of Oregon

Department of Environmental Quality Memorandum

Date: February 7, 2000

To: Environmental Quality Commission

From: Langdon Marsh, Director

Subject: Agenda Item C, U.S. Fish & Wildlife Service's and U.S. Army Corps of Engineers' Request for a Variance to the Total Dissolved Gas Water Quality Standard, EQC Meeting February 10, 2000

Statement of Purpose

The U.S. Fish and Wildlife Service has petitioned the Commission for a variance to the State's total dissolved gas water quality standard to enable water to be spilled at Bonneville Dam to assist outmigrating fall chinook due to be released from the Spring Creek National Fish Hatchery. The petition requests a variance from the standard of 110 percent of saturation relative to atmospheric pressure, for a ten-day period between March 9, 2000 and March 19, 2000.

The U.S. Army Corps of Engineers has petitioned the Commission for a variance to the same standard to conduct tests at John Day Dam for a ten-day period commencing between February 11, 2000 nd March 1, 2000. The tests are being conducted to assess the hydraulic performance characteristics of flow deflectors installed at John Day Dam in 1997.

This report is organized to address the U.S. Fish and Wildlife Service's request, and then separately, the U.S. Army Corps of Engineers' request.

Rationale for the U.S. Fish and Wildlife Service's Variance Request

Although the Spring Creek Hatchery fish are not endangered species, they play an important role in helping protect Endangered Species Act listed fish. The eight million juveniles due to be released make up a large proportion of the fish to be caught under the United States/Canada treaty allocations. Additionally, these fish are important for the near-shore fisheries off the coasts of Oregon and Washington, and in the Columbia River, most notably the Buoy Ten fishery.

In the absence of these hatchery fish, a disproportionate number of endangered species can be expected to be taken. The Canadian ocean fisheries are managed under harvest quota, time and area regulations. Because both Spring Creek hatchery fish and endangered Snake River fish intermingle off the west coast of Vancouver Island, greater numbers of hatchery fish in the United States/Canada Treaty area will result in fewer endangered Snake River fish being caught.

Similarly, endangered Snake River fish are at greater risk if there is any reduction in Spring Creek Hatchery production. Historically, Spring Creek Hatchery fish contributed nine percent of the catch off the West Coast of Vancouver Island, and 27 percent of the catch off the Washington and northern Oregon coasts annually. Spring Creek Hatchery fish have contributed as much as 65,600 fish to tribal fisheries and 41,500 fish annually to non-tribal fisheries in the Columbia River in the past. In 1999, fall chinook produced at the hatchery contributed about 26,500 fish to commercial and sport fisheries in the Columbia River. The treaty Indian harvest was about 21,900 fish, and the in-river sport catch was about 4,400 fish. A further 200 fish were taken incidentally in prosecution of the non-Indian commercial sturgeon fishery.

In recent years both federal and state government have reduced hatchery production for the Columbia River due to Congressional reductions in Mitchell Act funding. These reductions have forced the closure of some hatcheries, with the result that the Spring Creek Hatchery is the sole producer of tule fall chinook remaining open above Bonneville Dam. These closures make the Spring Creek contribution even more important.

Spill for the Spring Creek Hatchery release was first requested in 1995 because of the low fish guidance efficiency (the number of fish guided away from turbine intakes) at the Bonneville Dam second powerhouse.

Justification for the Variance

A fish passage efficiency of 80 percent is targeted for the Spring Creek Hatchery release. This is the same as the fish passage efficiency targeted by the National Marine Fisheries Service for endangered salmonids. According to the National Marine Fisheries Service's calculations, for a river flow of 200 thousand cubic feet per second, spills of 45, 80 and 150 thousand cubic feet per second would result in fish passage efficiencies of 54, 63 and 72 percent respectively. According to the U.S. Army Corps of Engineers, spills of 45, 80 and 150 thousand cubic feet per second would result in total dissolved gas levels of 110, 115, and 120 percent saturation respectively. These calculations are presented in Table 1.

Table 1: Estimated Bonneville Spillway Flows, Total Dissolved Gas Levels, Fish Passage Efficiency, and Increase in Fish Survival.

Total River Flow (kcfs)	200	200	200	200	200	200
Spill (kcfs)	0	45	80	100	120	150
Tailrace Gas Level (percent)	100	110	115	116	117	120
Fish Passage Efficiency (percent)	41	54	63	67	70	72
Increase in fish survival Compared to no-spill	0	128,800	179,200	221,600	250,400	279,200

During previous spill events, both physical and biological monitoring have occurred. Physical monitoring has been required to ensure compliance with the standard variances. Biological monitoring has been required to demonstrate that the higher total dissolved gas levels have not adversely impacted fish. Biological monitoring occurring since 1995 has shown extremely low levels (one to two percent at most) of fish showing any signs of gas bubble disease. Incidences of gas bubble disease can be expected to be low due to the limited exposure time for these fish. They are exposed to elevated total dissolved gas levels for a short duration, and only one episode. Sub-lethal effects, such as difficulty with the fresh-water/salt-water transition or increased susceptibility to predation from northern pike-minnow have not been documented. But, again, due to the short duration and single episode, significant sub-lethal effects are not expected.

Authority of the Commission with Respect to the Issue

The authority of the Commission to address this issue is contained in Oregon Administrative Rules OAR 340-41-205(2)(n). A copy of the rule is attached at Appendix A.

At its meeting of February 16, 1995, the Commission modified the administrative rules to enable modifications of the total dissolved gas standard in the Columbia River for the purpose of assisting juvenile in-river salmon migration.

If the Commission is to grant the requested variance, it is required to make the following four findings:

(i) Failure to act would result in greater harm to salmonid stock survival through in-river migration than would occur by increased spill;

(ii) The modified total dissolved gas criteria associated with the increased spill provides a reasonable balance of the risk of impairment due to elevated total dissolved gas to both resident biological communities and other migrating fish and to migrating adult and juvenile salmonids when compared to other options for in-river migration of salmon;

(iii) Adequate data will exist to determine compliance with the standards; and

(iv) Biological monitoring is occurring to document that the migratory salmonid and resident biological communities are being protected.

The rule also enables the Commission to consider alternative modes of migration, at its discretion.

Alternatives and Evaluation

The U.S. Fish and Wildlife Service has considered alternatives to spill at Bonneville Dam. These include transporting smolts below Bonneville Dam, and releasing more fish.

Transporting Juvenile Fish

The alternative of transporting juvenile fish from the hatchery and releasing them downstream from Bonneville Dam has been considered. Potentially loading fish in barges and releasing them below Bonneville Dam could result in increased survival. Certainly, it would alleviate the effects of turbines, elevated total dissolved gas and predation. However, this has been evaluated, and a very high percentage of adult fish strayed to other hatcheries. Also, adult return rates to the Spring Creek Hatchery were significantly lower from the barged group. The goal for returns to the Spring Creek hatchery is 7,000 fish. This number is required to provide enough fish for spawning. Straying of fish to other streams or facilities may lead to the Spring Creek Hatchery falling short of this target.

The Spring Creek Hatchery has been in operation sufficiently long for its fish to have developed into a unique group. The U.S. Fish and Wildlife Service, along with state and tribal fisheries managers are trying to maintain the genetic integrity of this group. Supplementing the Spring Creek Hatchery with fish from other hatcheries (either of Spring Creek origin, or not) runs the risk of diluting the unique characteristics of these fish.

Releasing More Fish

Based on the notion that there are going to be mortalities at Bonneville Dam if this variance is not approved, the argument has been advanced that the U.S. Fish and Wildlife Service should simply release more fish. In this way, despite increased mortality, the required number of fish could be assured.

Due to the capacity of the hatchery, and hatchery operation, this is not a possibility. The Spring Creek Hatchery makes three releases per year, in March, April and May. Under this schedule, not all fish are released in March. Those that remain behind grow to take over the space vacated by the March release. Similarly, only a portion of the fish is released in April, and the remaining fish grow to occupy the vacated space. This latter group is released in May. This schedule fully utilizes the physical capacity of the hatchery, as well as its water supply and waste treatment facilities. This schedule has been followed to reduce the risk from low returns from any one release. Fish released in April and May are able to pass Bonneville Dam under the auspices of the National Marine Fisheries Service's total dissolved gas variance that the Commission will be considering at its March 2000 meeting.

Competition Between Spring Creek Hatchery Fish and Endangered Snake River Salmon

Interactions between wild fish and hatchery fish have been blamed for thinning the genetic diversity of wild fish, and competing for food and habitat. Spring Creek Hatchery fish are expected to pose little competitive risk to wild Snake River salmon. The main reason for this is the difference in migration timing. Because passage to the sea for Spring Creek Hatchery fish is short, the timing of the release assures that hatchery fish either completely miss or only slightly overlap with Snake River salmon. Spring Creek Hatchery fish are physiologically ready to migrate and move out of rearing areas in the Columbia River quickly. It is possible that hatchery and wild fish compete with one another for food in the ocean, although the size of the marine environment, coupled with the fact that there are billions of juveniles migrating in the ocean minimize the impact of this interaction.

Summary of Public Input Opportunity

The Department issued a notice on January 12, 2000 notifying the public of an opportunity to comment on the variance request. A public hearing was held on February 2, 2000, and written comments were due by 5:00 p.m. on February 4, 2000.

No one attended the public hearing, and only one written comment was received from the Columbia River Inter-Tribal Fish Commission. This written comment is summarized below.

The public comment opportunity and the lateness of providing this report to Commissioners results from the timing of the U.S. Fish and Wildlife Service's request. The request was received on January 7, 2000. The Department released its public notice on January 12, 2000, and in an attempt to maximize the public input opportunity, extended the comment period until February 4, 2000. Earlier receipt of the application from the U.S. Fish and Wildlife Service would have enabled a full 30 day public comment period, and Commissioners to have had this report sufficiently in advance of the meeting to consider it fully.

Public Comment Summary

The following is a summary of the written comment received from the Columbia River Inter-Tribal Fish Commission (CRITFC).

CRITFC supplied a cover letter containing its reasons for supporting the 2000 variance. It included also the supporting documentation it supplied to the Department in 1998. It has requested that this material be incorporated into this year's comments.

The significance of salmon to the Tribes is greater than to any other group in the Columbia Basin, due to their cultural significance and treaty rights guaranteed by the United States. Permitting increased total dissolved gas levels at Bonneville Dam is more protective of the beneficial use (salmonid fisheries) than forcing them through turbines and screened bypass systems. The Department and Environmental Quality Commission should focus on improving inriver survival. The Clean Water Act does not provide for protecting beneficial uses by removing them from the aquatic habitat to transport them around dams.

The Tribes depend on salmon, including Spring Creek Hatchery salmon for cultural, ceremonial and subsistence purposes. Tule fall chinook is especially valued because of its low oil content, allowing it to be more easily dried for protein over the winter months.

While some disparage the use of hatcheries, in fact it is very difficult to draw a clear line between the cultural value of hatchery versus wild fish. Indeed, Oregon's treaty obligations to the Tribes do not differentiate between these two types of fish. This principle was upheld in federal court in *U.S. v. Oregon*. Denial of this variance will result in the additional loss of 150,400 juvenile salmon relative to spill at the 110 percent total dissolved gas standard. Assuming a 1.1 percent estimated smolt-to-adult survival, this would result in a loss of 1,654 adults to treaty and non-treaty harvests, as well as potentially result in future decreases in production of this strain.

Recent planning pursuant to *U.S. v. Oregon* has resulted in an agreement to begin outplanting Spring Creek Hatchery juveniles into under-seeded tributaries in the Bonneville pool and Lower Columbia River to supplement wild production.

The Independent Scientific Advisory Board recently found that total dissolved gas levels of 120 percent were conservative and not harmful to fish in the river, and indeed, low incidence of gas bubble disease was detected in fish exposed to levels of 125 percent. In addition, mortality estimates of Spring Creek Hatchery fish at Bonneville Dam that passed via turbines, screened bypass systems and spill were 18, 20 and 4 percent respectively

As in the past, CRITFC will be conducting inriver biological monitoring below Bonneville Dam to check for gas bubble disease. On the issue of returning adults, there is no evidence that spill impedes adult returning migration at spill levels below those that result in 120 percent total dissolved gas saturation.

Conclusions

As in the past the issue before the Commission is one of balancing risk. The question is, are beneficial uses better protected by granting the requested variance to the total dissolved gas water quality standard than they would be by denying the request with attendant estimated mortalities

from turbine and bypass passage? In past years the Department has viewed total dissolved gas saturation at the levels requested this year as being conservative, and providing greater survival than migration in the absence of a variance. In order to proceed with granting the variance, the Commission must make the four findings required by the administrative rule:

(i) failure to act will result in more salmonid passage via hydroelectric dam turbines. Estimated mortalities from fish passing through turbines is between 11 and 15 percent. Fish passing over spillways as a result of spill experience 2 to 3 percent mortality;

(ii) the balance of risk of impairment to migrating salmonids, resident fish, and other aquatic life due to elevated dissolved gas levels needs to be balanced against migrating juvenile salmonid mortality from turbine passage. Resident fish and aquatic invertebrates in the Columbia River downstream of Bonneville Dam were monitored for signs of gas bubble disease since 1993. Less than one percent of fish examined in 1993 and 1995 showed signs of trauma, while in the remaining years, no incidences were detected in fish examined. No signs were observed in aquatic macroinvertebrates. Low incidences, as reported above, were detected in migrating juveniles and returning adults when total dissolved gas levels were within variance limits. Higher levels of total dissolved gas saturation resulting from involuntary spill have resulted in increased incidence of gas bubble disease detected. Given data from past monitoring, at the levels requested, there appears to be a reasonable balance between increased survival due to avoidance of turbine and bypass system mortalities;

(iii) the U.S. Fish and Wildlife Service has submitted a detailed physical monitoring plan. The U.S. Army Corps of Engineers will conduct physical monitoring at Warrendale, Skamania, Camas/Washougal and Wauna Mill. Hourly data will be posted electronically on the U.S. Army Corps of Engineers' Internet World Wide Web pages. Implementation of the physical monitoring plan will ensure that data will exist to determine compliance with the standards for the voluntary spill program;

(iv) the U.S. Fish and Wildlife Service has submitted a detailed biological monitoring plan. Juvenile salmonids and resident fish will be collected with a beach seine downstream from Bonneville Dam and examined for signs of gas bubble disease on non-paired fins, eyes and lateral lines. Based on evidence from previous years, few signs of gas bubble disease are expected. The sampling will, therefore be confined to two days during the ten-day spill period. No examinations of gill lamellae will occur this year due to the variability of results and increased risk to fish due to handling for this examination.

The Department concludes that the required findings are supported by the application.

Department Recommendation on the U.S. Fish and Wildlife Service's Request

The Department recommends that the Commission grant this petition by adopting the findings contained in the Draft Order attached as Appendix B, subject to implementation of physical and biological monitoring as proposed in the monitoring plan accompanying the U.S. Fish and Wildlife Service's request of January 7, 2000, and

(i) Approve a revised total dissolved gas standard for Bonneville Dam on the Columbia River for the period from 8:00 p.m. on March 9, 2000 to 8:00 p.m. on March 19, 2000;

(ii) Approve a total dissolved gas standard for Bonneville Dam of a daily (12 highest hours) average of 115 percent as measured at the Camas/Washougal monitoring station;

(iii) Approve a further modification of the total dissolved gas standard at Bonneville Dam to allow for a daily (12 highest hours) average of 120 percent as measured at tailrace monitors below the dam;

(iv) Approve a cap on total dissolved gas for Bonneville Dam during the spill program of 125 percent, based on the highest two hours during the 12 highest hourly measurements per calendar day; and

(v) Require that if *either* 15 percent of the fish examined show signs of gas bubble disease in their non-paired fins, *or* five percent of the fish examined show signs of gas bubble trauma in their non-paired fins where more than 25 percent of the surface area of the fin is occluded by gas bubbles, whichever is less, the Director will halt the spill program;

(vi) Require the U.S. Fish and Wildlife Service to incorporate the following conditions into its program:

a) written notice must be furnished to the Department within 24 hours of a violation of the conditions of this variance as it relates to voluntary spill. Such notice will include an explanation of the reasons for the violation, actions taken to resolve the situation, or if no action is taken, the reasons why not;

b) provision of a written report of the 2000 spill program for the Spring Creek National Fish Hatchery release. Such report is to be received by the Department no later than September 30, 2000;

c) application for a variance for 2001 is to be furnished to the Department in conjunction with the written report prescribed above.

Rationale for the U.S. Army Corps of Engineers' Variance Request

In 1997, flow deflectors (known colloquially as "flip lips") were installed at John Day Dam. At around the same time these structures were installed at Ice Harbor Dam on the Lower Snake River. Whereas the latter structures have worked very well at reducing total dissolved gas levels, questions have arisen over the efficacy of those installed at John Day Dam. It is not that they are not working, but that compared with Ice Harbor Dam, we have not seen a similar level of total dissolved gas reduction. This has raised questions regarding the optimal design of the flow deflectors. These center on flow deflector submergence and depth of flow in the stilling basin and adjoining tailwater channel.

The objective of the study is to determine the influence of tailwater elevation on total dissolved gas exchange over a range of discharges from the John Day Dam spillway, and to evaluate the potential benefits of adding end bay deflectors at bays one and 20. A range of deflector submergences will be evaluated by varying the tailwater elevation through manipulation of storage in The Dalles Dam pool, and manipulating spill quantity over the John Day spillway. Measurements of gas exchange throughout the stilling basin and tailwater channel will be measured by an array of water quality instruments. These will provide data on the latitudinal and longitudinal distribution of total dissolved gas pressures.

Justification for the Variance

This study has been designed to be conducted at a time when there are expected to be no migrating fish present in the river. It is also proposed at this time so that results from the spill test can be applied during the 2000 migration season.

This test is being initiated due to lower than expected quantities of spilled water being available in 1999 before total dissolved gas levels of 120 percent are reached compared to levels at Ice Harbor Dam. While a range of tests was conducted in February 1998, following deflector installation, tailwater elevation was not included. This study will expand on the instrument array and operating conditions evaluated by previous tests.

The first study objective will be achieved by implementing a uniform spill pattern over all 18-deflectored spill bays (1-19) for a range of tailwater elevations ranging from 155 to 166.3 feet above mean sea level as measured at The Dalles forebay. Clearly, variability in river flows will need to be factored into the study. It has been designed assuming total river flows at John Day

Dam being between 72 and 380 thousand cubic feet per second, and that test conditions can be held constant for a minimum duration of three hours.

The second objective will be achieved by varying the operation of the non-deflectored bays (one and 20) both with and without the operation of adjacent deflectored bays. A series of flows of four, six and eight thousand cubic feet per second per bay will be evaluated. Tailwater elevation will be held constant +/- one foot during test events.

Parameters measured during the test include depth, water temperature, total dissolved gas pressure and dissolved oxygen concentration. Data will be logged in 15-minute intervals. Tentatively, the near-field instrument array will consist of five longitudinal profiles and four lateral transects.

A draft summary report and data analysis will be completed 60 days following completion of field sampling. A final report will be compiled following receipt of comments on the draft report

Authority of the Commission with Respect to the Issue

The authority of the Commission to address this issue is contained in Oregon Administrative Rules OAR 340-41-445, 485 and 525(2)(n). A copy of the rule is attached at Appendix A.

At its meeting of February 16, 1995, the Commission modified the administrative rules to enable modifications of the total dissolved gas standard in the Columbia River for the purpose of assisting juvenile in-river salmon migration.

If the Commission is to grant the requested variance, it is required to make the following four findings:

(i) Failure to act would result in greater harm to salmonid stock survival through in-river migration than would occur by increased spill;

(ii) The modified total dissolved gas criteria associated with the increased spill provides a reasonable balance of the risk of impairment due to elevated total dissolved gas to both resident biological communities and other migrating fish and to migrating adult and juvenile salmonids when compared to other options for in-river migration of salmon;

(iii) Adequate data will exist to determine compliance with the standards; and

(iv) Biological monitoring is occurring to document that the migratory salmonid and resident biological communities are being protected.

The rule also enables the Commission to consider alternative modes of migration, at its discretion.

Alternatives and Evaluation

Installation of flow deflector at dams has been one of the structural alternatives pursued to reduce total dissolved gas saturation both to allow spill for fish passage and to attenuate total dissolved gas during periods of involuntary spill. Testing of deflectors is the only real-world alternative to verify modelled, pre-installation performance characteristics.

Summary of Public Input Opportunity

The Department issued a notice on January 12, 2000 notifying the public of an opportunity to comment on the variance request. A public hearing was held on February 2, 2000, and written comments were due by 5:00 p.m. on February 4, 2000.

No one attended the public hearing, and no written comments were received relating to this request.

The public comment opportunity and the lateness of providing this report to Commissioners is not the result of the timing of the U.S. Army Corps of Engineers' request, which was received on November 1, 1999. The intervening period has been spent resolving issues surrounding biological monitoring to be conducted in conjunction with the proposed test. By the time these were resolved, the next available Commission meeting was this one. We therefore joined this request to the one received from the U.S. Fish and Wildlife Service.

Conclusions

The Department supports this test because it will adds to already existing data, because it has been carefully timed to avoid impacts to fish, and because results from the test may improve fish passage during the migration season.

In order to grant this variance, the Commission is required to make the four findings contained in administrative rules.

(i) failure to act will result potentially in sub-optimal performance of the John Day Dam spillway. The result in the migration season will be migrating salmonids that otherwise may have been provided passage via spill having to proceed via turbines or bypass facilities with higher estimated mortality rates;

(ii) the balance of risk of impairment to migrating salmonids, resident fish, and other aquatic life due to elevated dissolved gas levels needs to be balanced against migrating juvenile salmonid mortality from turbine passage. The tests proposed here are designed to determine the quantity of water that can safely be spilled at John Day Dam to keep total dissolved gas at levels protective of fish. The test is designed to optimize fish passage while keeping total dissolved gas at levels that will protect resident populations;

(iii) the U.S. Army Corps of Engineers is proposing a comprehensive monitoring array. Indeed, the nature of the test requires detailed physical monitoring. Certainly, there will be plenty of physical monitoring to ensure that the variation conditions are being complied with;

(iv) the U.S. Army Corps of Engineers proposes to conduct biological monitoring using beach seining during the test. The Department expects to see few signs of gas bubble disease in any fish caught due to the relatively short duration of the test.

The Department concludes that the required findings are supported by the application.

Department Recommendation

The Department recommends that the Commission grant this petition by adopting the findings contained in the Draft Order attached as Appendix C, subject to implementation of physical and biological monitoring, and

(i) Approve a revised total dissolved gas standard for John Day Dam and The Dalles Dam on the Columbia River for not more than a ten-day period commencing between February 11, 2000 and March 1, 2000;

(ii) Approve a total dissolved gas standard for The Dalles Dam of a daily (12 highest hours) average of 115 percent as measured at The Dalles forebay monitoring station;

(iii) Approve a further modification of the total dissolved gas standard at John Day Dam to allow for a daily (12 highest hours) average of 120 percent as measured at tailrace monitors below the dam;

(iv) Approve a cap on total dissolved gas for John Day Dam during the spill program of 125 percent, based on the highest six hours during the 12 highest hourly measurements per calendar day; and

(v) Require that if *either* 15 percent of the fish examined show signs of gas bubble disease in their non-paired fins, *or* five percent of the fish examined show signs of gas bubble trauma in their non-paired fins where more than 25 percent of the surface area of the fin is occluded by gas bubbles, whichever is the less, the Director will halt the spill test;

(vi) Require the U.S. Army Corps of Engineers to furnish the Department with a written report of the test within 90 days after field sampling is completed.

Attachments

Appendix A: Oregon Administrative Rule, OAR 340-41-205, 445, 485 and 525 (2)(n)
Appendix B: Draft Order Approving the U.S. Fish and Wildlife Service's Request
Appendix C: Draft Order Approving the U.S. Army Corps of Engineers' Request

Reference Documents (available upon request)

U.S. Army Corps of Engineers (1999) *Application for a Variance to the State's Total Dissolved Gas Water Quality Standard at The Dalles and John Day Dams*, U.S. Army Corps of Engineers, Portland, OR, November 1, 1999.

U.S. Army Corps of Engineers (1999) *Draft Study Plan for Spillway Performance Test at John Day Dam*, U.S. Army Corps of Engineers, Portland, OR, November 1, 1999.

U.S. Fish and Wildlife Service (2000) *Application for a Variance to the State's Total Dissolved Gas Water Quality Standard at Bonneville Dam*, U.S. Fish and Wildlife Service, Vancouver, WA, January 7, 2000.

U.S. Fish and Wildlife Service (2000) *Gas Supersaturation Monitoring Program on the Columbia River Below Bonneville Dam for March 2000*, U.S. Fish and Wildlife Service, Vancouver, WA, January 7, 2000.

U.S. Fish and Wildlife Service (2000) *COE's Plan of Action for Dissolved Gas Monitoring in 2000 (Draft December 15, 1999)*, U.S. Fish and Wildlife Service, Vancouver, WA, January 7, 2000.

U.S. Fish and Wildlife Service (2000) *Monitoring Report for March 18-28, 1999 Spills at Bonneville Dam*, U.S. Fish and Wildlife Service, Vancouver, WA, January 2000.

Approved:

Section: 2/5/00

Division:

Report Prepared By: Russell Harding

Phone: (503) 229-5284

Date Prepared: February 5, 2000

APPENDIX A

Oregon Administrative Rule, OAR 340-41-205, 445, 485 and 525 (2)(n)

(A) The concentration of total dissolved gas relative to atmospheric pressure at the point of sample collection shall not exceed 110 percent of saturation, except when stream flow exceeds the ten-year, seven-day average flood. However, for hatchery receiving waters and waters of less than two feet in depth, the concentration of total dissolved gas relative to atmospheric pressure at the point of sample collection shall not exceed 105 percent of saturation;

(B) The Commission may modify the total dissolved gas criteria in the Columbia River for the purpose of allowing increased spill for salmonid migration. The Commission must find that:

(i) Failure to act would result in greater harm to salmonid stock survival through in-river migration than would occur by increased spill;

(ii) The modified total dissolved gas criteria associated with the increased spill provides a reasonable balance of the risk of impairment due to elevated total dissolved gas to both resident biological communities and other migrating fish and to migrating adult and juvenile salmonids when compared to other options for in-river migration of salmon;

(iii) Adequate data will exist to determine compliance with the standards; and

(iv) Biological monitoring is occurring to document that the migratory salmonid and resident biological communities are being protected.

(C) The Commission will give public notice and notify all known interested parties and will make provision for opportunity to be heard and comment on the evidence presented by others, except that the Director may modify the total dissolved gas criteria for emergencies for a period not exceeding 48 hours;

(D) The Commission may, at its discretion, consider alternative modes of migration.

APPENDIX B

Draft Order Approving U.S. Fish and Wildlife Service's Request

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

In the matter of the U.S. Fish and	(	
Wildlife Service's request to	(	ORDER
spill water to assist out-migrating	(	
Spring Creek Hatchery salmon smolts	(	

WHEREAS the Department of Environmental Quality received a request from the U.S. Fish and Wildlife Service dated January 7, 2000, to adjust the Total Dissolved Gas Standard as necessary to spill over Bonneville Dam on the Columbia River to assist out-migrating Spring Creek Hatchery tule fall Chinook smolts, for the period from 8:00 p.m. on March 9, 2000 to 8:00 p.m. on March 19, 2000; and

WHEREAS the public was notified of the request on January 12, 2000, and given the opportunity to provide testimony at 10:00 a.m. on February 2, 2000, and the opportunity to provide written comments until 5:00 p.m. on February 4, 2000.

WHEREAS the Environmental Quality Commission met on February 10, 2000 and considered the request, justification and public comment.

THEREFORE the Environmental Quality Commission orders as follows:

1. Acting under OAR 340-41-205(2)(n)(B), the Commission finds:

   (i) failure to act will result in more salmonid passage via hydroelectric dam turbines. Estimated mortalities from fish passing through turbines is between 11 and 15 percent. Fish passing over spillways as a result of spill experience 2 to 3 percent mortality;

   (ii) the balance of risk of impairment to migrating salmonids, resident fish, and other aquatic life due to elevated dissolved gas levels needs to be balanced against

migrating juvenile salmonid mortality from turbine passage. Resident fish and aquatic invertebrates in the Columbia River downstream of Bonneville Dam have been monitored for signs of gas bubble disease since 1993. Less than one percent of fish examined in 1993 and 1995 showed signs of trauma, while in the remaining years, no incidences were detected in fish examined. No signs were observed in aquatic macroinvertebrates. Low incidences, as reported above, were detected in migrating juveniles and returning adults when total dissolved gas levels were within variance limits. Higher levels of total dissolved gas saturation resulting from involuntary spill have resulted in increased incidence of gas bubble disease detected. Given data from past monitoring, at the levels requested, there appears to be a reasonable balance between increased survival due to avoidance of turbine and bypass system mortalities;

(iii) the U.S. Fish and Wildlife Service has submitted a detailed physical monitoring plan. The U.S. Army Corps of Engineers will conduct physical monitoring at Warrendale, Skamania, Camas/Washougal and Wauna Mill. Hourly data will be posted electronically on the U.S. Army Corps of Engineers' Internet World Wide Web pages. Implementation of the physical monitoring plan will ensure that data will exist to determine compliance with the standards for the voluntary spill program;

(iv) the U.S. Fish and Wildlife Service has submitted a detailed biological monitoring plan. Juvenile salmonids and resident fish will be collected with a beach seine downstream from Bonneville Dam and examined for signs of gas bubble disease on non-paired fins, eyes and lateral lines. Based on evidence from previous years, few signs of gas bubble disease are expected. The sampling will, therefore be confined to two days during the ten-day spill period. No examinations of gill lamellae will occur this year due to the variability of results and increased risk to fish to due handling for this examination.

2. The Environmental Quality Commission approves a modification to the Total Dissolved Gas standard for spill over Bonneville Dam subject to the following conditions:

(i) a revised total dissolved gas standard for Bonneville Dam on the Columbia River for the period from 8:00 p.m. on March 9, 2000 to 8:00 p.m. on March 19, 2000;

(ii) a total dissolved gas standard for Bonneville Dam of a daily (12 highest hours) average of 115 percent as measured at the Camas/Washougal monitoring station;

(iii) a further modification of the total dissolved gas standard at Bonneville Dam to allow for a daily (12 highest hours) average of 120 percent as measured at tailrace monitors below the dam;

(iv) a cap on total dissolved gas for Bonneville Dam during the spill program of 125 percent, based on the highest two hours during the 12 highest hourly measurements per calendar day; and

(v) if *either* 15 percent of the fish examined show signs of gas bubble disease in their non-paired fins, *or* five percent of the fish examined show signs of gas bubble trauma in their non-paired fins where more than 25 percent of the surface area of the fin is occluded by gas bubbles, whichever is less, the Director will halt the spill program;

(vi) the U.S. Fish and Wildlife Service to incorporate the following conditions into its program:

a) written notice must be furnished to the Department within 24 hours of a violation of the conditions of this variance as it relates to voluntary spill. Such notice will include an explanation of the reasons for the violation, actions taken to resolve the situation, or if no action is taken, the reasons why not;

b) provision of a written report of the 2000 spill program for the Spring Creek National Fish Hatchery release. Such report is to be received by the Department no later than September 30, 2000;

c) application for a variance for 2001 is to be furnished to the Department in conjunction with the written report prescribed above.

Dated: _____ ON BEHALF OF THE COMMISSION

_____
Director

APPENDIX C

Draft Order Approving U.S. Army Corps of Engineers' Request

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

In the matter of the U.S. Army Corps	(	
Of Engineers' request to spill water	(	ORDER
to test the hydraulic performance of	(	
flow deflectors at John Day Dam	(	

WHEREAS the Department of Environmental Quality received a request from the U.S. Army Corps of Engineers dated November 1, 1999, to adjust the Total Dissolved Gas Standard as necessary to spill over John Day Dam on the Columbia River to test the hydraulic performance of flow deflectors at John Day Dam, for a ten-day period commencing between February 11, 2000 and March 1, 2000; and

WHEREAS the public was notified of the request on January 12, 2000, and given the opportunity to provide testimony at 10:00 a.m. on February 2, 2000, and the opportunity to provide written comments until 5:00 p.m. on February 4, 2000.

WHEREAS the Environmental Quality Commission met on February 10, 2000 and considered the request, justification and public comment.

THEREFORE the Environmental Quality Commission orders as follows:

1. Acting under OAR 340-41-445, 485 and 525 (2)(n), the Commission finds:

(i) failure to act will result potentially in sub-optimal performance of the John Day Dam spillway. The result in the migration season will be migrating salmonids that otherwise may have been provided passage via spill having to proceed via turbines or bypass facilities with higher estimated mortality rates;

(ii) the balance of risk of impairment to migrating salmonids, resident fish, and other aquatic life due to elevated dissolved gas levels needs to be balanced against migrating juvenile salmonid mortality from turbine passage. The tests proposed here are designed to determine the quantity of water that can safely be spilled at John Day Dam to keep total dissolved gas at levels protective of fish. The test is designed to optimize fish passage while keeping total dissolved gas at levels that will protect resident populations;

(iii) the U.S. Army Corps of Engineers is proposing a comprehensive monitoring array. Indeed, the nature of the test requires detailed physical monitoring. Certainly, there will be plenty of physical monitoring to ensure that the variation conditions are being complied with;

(iv) the U.S. Army Corps of Engineers proposes to conduct biological monitoring using beach seining during the test. The Department expects to see few signs of gas bubble disease in any fish caught due to the relatively short duration of the test.

2. The Environmental Quality Commission approves a modification to the Total Dissolved Gas standard for spill over John Day Dam subject to the following conditions:

(i) a revised total dissolved gas standard for John Day Dam and The Dalles Dam on the Columbia River for not more than a ten-day period commencing between February 11, 2000 and March 1, 2000;

(ii) a total dissolved gas standard for The Dalles Dam of a daily (12 highest hours) average of 115 percent as measured at The Dalles forebay monitoring station;

(iii) a further modification of the total dissolved gas standard at John Day Dam to allow for a daily (12 highest hours) average of 120 percent as measured at tailrace monitors below the dam;

(iv) a cap on total dissolved gas for John Day Dam during the spill program of 125 percent, based on the highest six hours during the 12 highest hourly measurements per calendar day; and

(v) that if *either* 15 percent of the fish examined show signs of gas bubble disease in their non-paired fins, *or* five percent of the fish examined show signs of gas bubble trauma in their non-paired fins where more than 25 percent of the surface area of the fin is occluded by gas bubbles, whichever is the less, the Director will halt the spill test;

(vii) the U.S. Army Corps of Engineers to furnish the Department with a written report of the test within 90 days after field sampling is completed.

Dated: _____ ON BEHALF OF THE COMMISSION

_____
Director

MORROW COUNTY CSEPP STATUS REPORT

★ PERSONNEL PROTECTIVE EQUIPMENT (PPE)

- Protective over garments and respirators have been purchased for First Responders
- Work safety rules and respiratory compliance plans have been developed
- Ancillary support equipment (Wet Bulb meters, weather stations, etc.) has been purchased
- Initial fit testing of respirators complete
- Initial distribution of respirators and over garments complete
- Training ongoing

♦ PERSONNEL PROTECTIVE EQUIPMENT CONCERNS

- Impact of training, fit testing and compliance screening on First Responders
- Maintenance requirements
- Requirement for special needs respirators
- Requirement for larger size protective over garments
- Potential need for escape respirators to support extraction operations

★ DECONTAMINATION

- Decontamination trailers and tow vehicles on hand
- Buddy and "Man Pack" decontamination units on order
- Decontamination solutions on order
- Decontamination tents on order
- Most decontamination supplies on hand
- Draft decontamination procedures developed
- Runoff containment bladders on hand

♦ DECONTAMINATION CONCERNS

- Training impacts on First Responders
- Maintenance
- Ability to store and move equipment and supplies
- Lack of standards for decontamination
- *Staff to operate equipment during an event*

♦ TONE ALERT RADIO CONCERNS

- Refining and strengthening infrastructure
- Long term system maintenance
- Operating procedures and training for dispatch center personnel
- Sufficient radios for future growth
- ***DISTRIBUTION, DISTRIBUTION, DISTRIBUTION***

★ PLANNING

- Unified Incident Response Plan for entire community in final draft
- Supporting Annexes (COMMO, Monitoring, DECON, Medical) in draft
- Working with ODOT on traffic management plan

♦ PLANNING CONCERNS

- Do plans match reality
- Standards for finalizing Monitoring, DECON and Medical Plans

★ PROTECTIVE ACTIONS

- School over pressurization complete
- Busses to evacuate Boardman Schools on site
- Shelter- in-Place kits distributed
- Pilot project for alternative collective protection system

♦ PROTECTIVE ACTION CONCERNS

- Maintenance of over pressurized systems
- Reinforcing credibility of shelter-in-place capabilities
- Fielding of charcoal air filters to enhance shelter-in-place kits

★ MISCELLANEOUS

- Emergency Operations Center Operational
- Federal Emergency Management Information System (FEMIS) outreach
- Funding support to response agencies
- Reinvigorated public education program

Umatilla County
Chemical Stockpile Emergency Preparedness Program
Presentation to:
Environmental Quality Commission
February 11, 2000

Alert & Notification
- TARs
- Independent Evaluation

Communications
- Tactical Radios

Public Affairs
- Media Campaign

Coordinated Plans

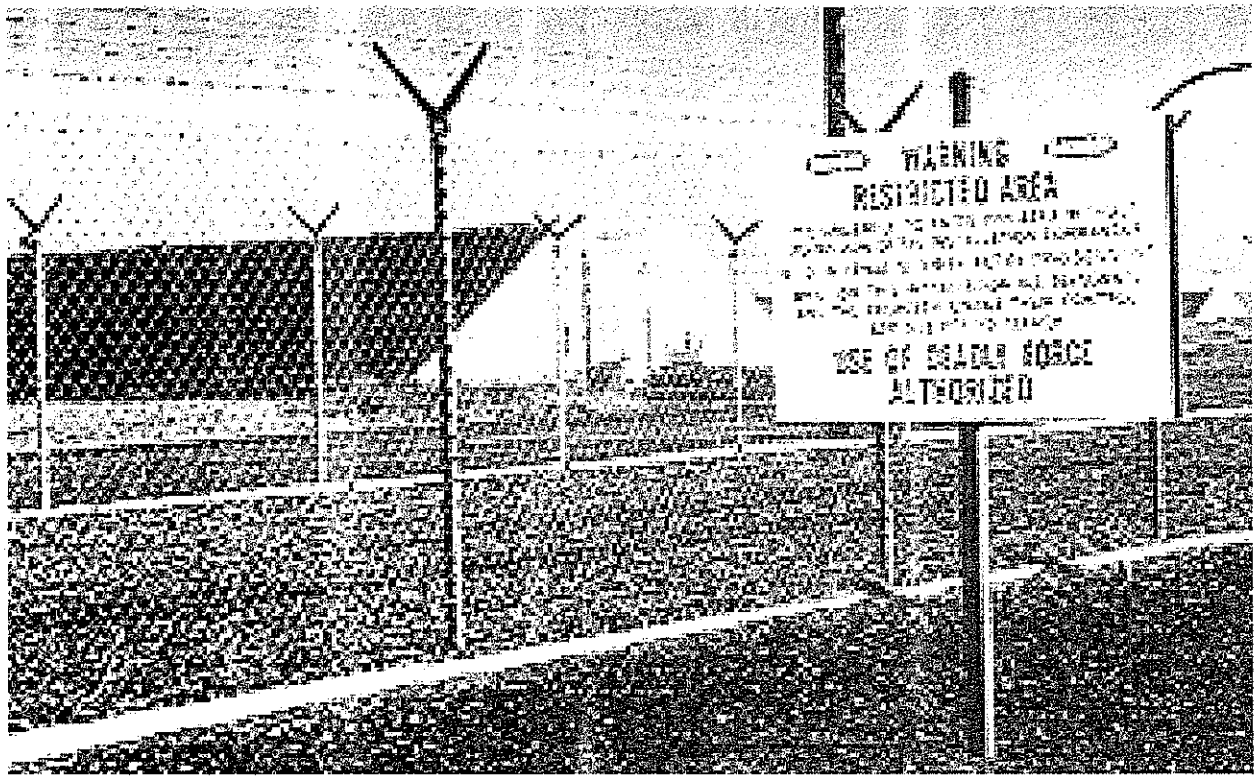
Emergency Operations Center

Personal Protective Equipment

Protective Actions

Budget Process

Chemical Accident/Incident Response Readiness Status



Lieutenant Colonel Thomas F. Woloszyn
Commander
Umatilla Chemical Depot

CAIRA Mission

- Save lives & evacuate casualties
- Reduce and eliminate contamination and downwind hazard
- Secure chemical surety materiel
- Protect property & prevent further damage to the environment
- Communicate protective action recommendation and critical information to community emergency management agencies
- Provide timely and accurate information to the public
- Maintain the confidence of the community
- Aggressively train response actions

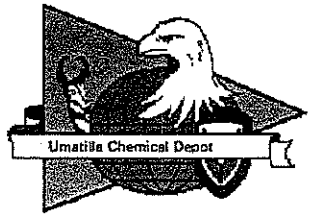
CAIRA Functions

- Security & combat augmentation force
- Survey & Monitoring
- Munitions recovery & containment
- Hot line/decontamination
- Medical & Fire/rescue response
- Command, Control, Communications & Information (C^3I)
  - Alert & Notification
  - EOC operations
  - Command & Control
  - Public Affairs
- Logistical functions
  - Depot resident shelter/evacuation
  - Transportation
  - Supplies

Collective Training

- Daily communications drills & tests
- Weekly EOC situational exercises
- Weekly siren training
- Monthly no-notice command post exercise
- Quarterly Chemical Accident/Incident Response & Assistance (CAIRA) training exercise
- Annual community CSEPP CAIRA
- Biannual Service Response Force exercise

Communications process



Depot
- PMCD/CoE
- Raytheon
- DEQ/OEM*
- Outreach Office

Depot Workforce

County/Local EOC
- Umatilla County
- Morrow County
- Hermiston Safety Ctr
- Benton (WA)

ARMY
- Army EOC
- SBCCOM EOC

UMCD Emergency Operations Center

State
- OEM (Salem)
- WA (Prosser)
- OSP (Bend)

Local Officials
- Governor
- Congressional Delegation
- Local elected *

Media -Public News Release

National
- CTUIR
- FEMA

→ All Call (10 min)

* Commander/County EOC

→ Recall Alert System

UMCD CAIRA Readiness

Functional Area	Status
AUTOMATION: EMIS/FEMIS	- Operational. Some problems with FEMIS program
COMMUNICATIONS	- All call operations. CTUIR integrated - Staff needs further manuals/training on Harris Radio. - Drafting Communications protocols
ALERT and NOTIFICATION • **Automated Call-Down** • **Outdoor System (Sirens)**	- Operational. OEM installing MW fax - Procedural (SOP) review complete. - Immediate action drills developed - MOA on event notification criteria - ANS independent review pending- depot system tested & operational. Training completed. - Community siren activation tested 1/00. - Siren MOA with communities required!
EOC (CSEPP) STAFFING	- 12 GS & 2 Contractors: Status - **Operational** – 24 hours a day
OPERATIONS CENTER	- Increased training opportunities & Immediate Action Drills - Monthly no-notice EOC CPXs instituted - Improved training cycle to encourage community involvement
CHEMICAL MONITORS	- 9 RTAPs total. Status: all **Operational**. Y2K compliant. - ICAMs fielded off-post. - 2 RTAPs for off-post assistance. - Need MOA on off-post RTAP use.
COLLECTIVE TRAINING	- Monthly no-notice CAIRA CPXs instituted (1/00) - Quarterly CAIRA 02/00. Status: **Operational**. - UMCDF evacuation drill (02/00)
PUBLIC AFFAIRS	- Outreach Office short 1 person.
EMERGENCY RESPONDERS	- UMCD Clinic exercised at 02/00 CAIRA - Fire-Rescue : **Operational** - Ft Lewis Medical Assistance & DART tested during CAIRA 11/99 - Augmentation force plans under revision.

Summary

- *Public safety is paramount*
- Training philosophy: *Train as we intend to "fight."*
- The UMCD Depot team is trained, tested and ready.
- Communications are a critical system.

State of Oregon
Department of Environmental Quality

Memorandum

Date: January 10, 2000

To: Environmental Quality Commission

From: Langdon Marsh, Director

Subject: Agenda Item F, February 11, 2000 EQC Meeting

Issuance of Pollution Control Bonds

Statement of Purpose

The Department is requesting the commission to adopt a bond issuance resolution authorizing the Department and the State Treasurer to issue and sell not more than $20 million in original principal amount of State of Oregon General obligation Pollution control Bonds and to use the proceeds: 1) To provide the required state match for federal money in the Water Pollution Control Revolving Fund (State Revolving Fund or SRF); and 2) To fund the Department's Orphan Site Cleanup Program.

Background

The Commission has previously authorized the issuance of bonds and use of the proceeds for each of these purposes. The Department sold Orphan Site Bonds in 1992, 1994, 1995 and 1998 and SRF match bonds in 1993, 1994, 1995 and 1997.

It is the Department's current intent to sell $8 million in SRF match bonds and $8 million in Orphan Site cleanup bonds during March, 2000, tentatively March 15th. An additional $4 million SRF match sale is planned for March 2001. The Department of Energy is also planning a March 15th bond sale. By selling bonds for both departments on the same day both agencies will be able to realize certain economies of scale and minimize overall issuance costs.

Authority of the Commission with Respect to the Issue

The Commission has the authority to authorize the issuance of pollution control bonds and the uses to which the bond proceeds may be put under ORS 468.195 to 468.260 and ORS 468.426(2).

The 1999 legislature provided the Department with $41 million in bond limitation for the 1999 - 2001 biennium and sufficient appropriation to pay debt service on the planned bond issues.

Alternatives and Evaluation

There are really no viable alternatives. The issuance and sale of pollution control bonds is currently the only mechanism available to provide funding for these program activities. Commission action at its February 11, 2000 meeting is necessary to enable the Department to participate in the March 15, 2000 sale. This sale date not only fits the Treasurer's issuance calendar and provides funds to the programs in a timely manner but also enables the Department to share many of the fixed issuance costs with Energy.

Summary of Public Input Opportunity

Since 1971 there has been opportunity for public discussion of this matter at several previous Commission meetings at which the Commission authorized the issuance of bonds and the use of bond proceeds. The most recent of these meetings took place October 28, 1993, November 17, 1995 and August 22, 1997.

Additional public discussion occurred with the Joint Legislative Committee on Ways and Means during the review and approval of the Department's 1999-2001 budget (Enrolled House Bill 5019) and adoption of the overall bond limitation bill (Enrolled House Bill 5036)

Conclusions

- The use of bond proceeds is the only mechanism currently available to fund the state match for the SRF and the cleanup of Orphan Sites.
- Pollution control bonds cannot be issued without the approval of the Commission.
- The Commission has the authority to adopt a Resolution authorizing issuance and sale of the bonds and use of the bond proceeds

Intended Future Actions

The Department intends to issue and sell bonds and use the proceeds as outlined above.

Department Recommendation

It is recommended that the Commission accept this report, discuss the matter, adopt the attached form of Resolution and provide advice and guidance to the Department as appropriate.

Attachments

A. Form of Resolution
B. Summary of Bond Issuance to date.

Reference Documents (available upon request)

1. Statutory Authority
2. Applicable Rule(s)
3. Chronology of Previous Bond Issues - Amounts and Uses

Approved:

Section: _____

Division: _____

Report Prepared By: Barrett MacDougall

Phone: (503) 229-5355

Date Prepared: January 24, 2000

bm:hs

Attachment A.

RESOLUTION AUTHORIZING AND REQUESTING ISSUANCE OF BONDS

Section 1. Findings. The Environmental Quality Commission of the State of Oregon finds:

A. The Department of Environmental Quality (the "Department") is empowered to authorize and request the issuance of general obligation pollution control bonds:

1. To fund the Orphan Site Cleanup program;

2. To fund the State's match for the State Revolving Fund.

B. It is now desirable to authorize and request the issuance of general obligation pollution control bonds for these purposes.

C. Oregon Revised Statutes, Section 286.031, provides that all bonds of the State of Oregon shall be issued by the State Treasurer.

Section 2. Resolutions. The Environmental Quality Commission of the State of Oregon hereby resolves:

A. The State Treasurer of the State of Oregon is hereby authorized and requested to issue State of Oregon general obligation pollution control bonds ("Pollution Control Bonds") in amounts which the State Treasurer determines, after consultation with the Director of the Department or the Director's designee, will be sufficient to provide funding for the purposes described in Section 1.A of this resolution, and to pay costs associated with issuing the Pollution Control Bonds. The Pollution Control Bonds may be issued in one or more series at any time during the current biennium, and shall mature, bear interest, be subject to redemption, and otherwise be issued and sold upon the terms established by the State Treasurer after consultation with the Director of the Department or the Director's designee.

B. The Department shall comply with all provisions of the Internal Revenue Code of 1986, as amended (the "Code") which are required for interest on tax-exempt Pollution Control Bonds to be excludable from gross income under the Code, and shall pay any rebates or penalties which may be due to the United States under Section 148 of the Code in connection with the Pollution Control Bonds. The Director of the Department or the Director's designee may, on behalf of the Department, enter into covenants for the benefit of the owners of Pollution Control Bonds to maintain the tax-exempt status of the Pollution Control Bonds.

Section 3. Other Action. The Director of the Department or the Director's designee may, on behalf of the Department, execute any agreements or certificates, and take any other action the Director or the Director's designee determines is desirable to issue and sell the Pollution Control Bonds and to provide funding for the purposes described in this resolution.

Attachment B.

State of Oregon Pollution Control Bonds (the "Bonds")

The state of Oregon acting through the Environmental Quality Commission and Department of Environmental Quality has been using the proceeds from the sale of the Bonds for thirty years to pay for solid waste and wastewater treatment facilities. Issuance of the Bonds was authorized by the voters in May of 1969 and the first bonds – a $45 million series – was issued in 1971. Since then a total of some $336 million have been issued, $58.4 million are outstanding today.

Historically bond proceeds have been used for five main purposes: (1) loans and grants to local governments; (2) sewer safety net program; (3) loans to Portland and Gresham to help finance the mid-Multnomah County sewer project; (4) provide match to the State Revolving Fund (RLF) program; and (5) cleaning up Orphan Sites.

Proceeds from the first six bond issues - $188 million – were used for loans and grants to local governments, primarily to be used as local match for direct federal grants then available. The DEQ bond program is the only one in the state authorized to make grants with bond proceeds. DEQ made water quality grants to 73 local governments and solid waste grants to 39 agencies; water quality loans went to 68 local governments and solid waste loans to 11 agencies. Debt service on these bonds is paid by loan repayments for the loan portion of the bonds and by general fund appropriation and interest earned on the sinking fund for the grant portion.

The sewer safety net program, also known as the assessment deferral loan program, began in 1987. Under this program DEQ loaned bond proceeds to local governments to enable them to pay for sewering the residences of low-income home owners unable to currently afford construction costs. The local governments placed a lien on the property to be liquidated when the property was refinanced or changed hands. At this time the local government would repay the loan to DEQ. As the amount and timing of the loan repayments were very uncertain, the Legislature determined to keep repayments in the program and pay debt service with (originally) lottery and (now) general fund appropriation. Approximately $6 million in bond proceeds were used for this program.

About 1984 a health hazard from domestic septic tanks was found to exist in mid-Multnomah County, and the EQC issued an order to the cities of Portland and Gresham to build sanitary sewers in mid-county, even outside their corporate boundaries. The Commission agreed to issue pollution control to purchase special assessment bonds issued by the cities to finance this sewer construction. Between 1990 and 1994 DEQ sold some $95 million in bonds to finance this program. Debt service is paid out of repayments received from Portland and Gresham. These bonds are being repaid substantially ahead of schedule.

The state currently receives an annual grant from the USEPA to capitalize the Water Pollution Control Fund, commonly known as the State Revolving Fund or SRF. DEQ uses this fund to make below-market-rate loans to local governments for wastewater treatment projects. During fiscal year 2000, for example, these loans range from $20,000 planning loans to the cities of Moro and Gardiner to construction projects in excess of $3,000,000 in Klamath, Clatsop and Tillamook Counties. The terms of this grant require a state match of one dollar for every five federal dollars. The Legislature has determined to finance the state match with the proceeds from the sale of Oregon pollution control bonds, and to provide biennial appropriations to pay the debt service on these bonds. This program is currently the largest single user of bond proceeds.

DEQ also uses bond proceeds to pay for the cleanup of orphan sites, contaminated sites requiring remediation but for which the responsible parties are unknown, unable or unwilling to pay. Such sites as McCormick & Baxter, Prineville Texaco and Lone Elk Market (Spray) are or have been orphans, and it is possible that some orphan site bond funds may be used for Portland Harbor cleanup. These bonds are repaid from both hazardous substance possession fees and general fund appropriation.

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

Date: February 7, 2000

To: Environmental Quality Commission Members,
Rulemaking Work Group Members,
Public Commentators, and Interested Parties

From: Laurie McCulloch, UST Program

Subject: Correction to EQC Report for Heating Oil Tank Rule Revisions
Agenda Item G, February 11, 2000 EQC Meeting

Please note the following correction to the copy of the Environmental Quality Commission (EQC) staff report and rule package that you received.

Agenda Item G:
Attachment A.1, pages 1-11 is incorrect. Text for proposed deletion is not indicated in the copy you have. Please recycle this copy or mark it as not to be used.

Attached is the correct version of proposed rule revisions to Division 163. Although the words in the two versions are the same, **this** copy shows the changes that were made in red-line (new text), strike-out (~~deleted text~~) format.

My apologies for the error and any confusion this may have caused. If you have any questions, please contact me directly at 503-229-5769.

Laurie J McCulloch

attachment

Correct Version - red-line, strike-out 2/7/00 L. McCulloch

DIVISION 163

~~REGISTRATION AND~~ LICENSING REQUIREMENTS FOR ~~HEATING OIL TANK SOIL MATRIX CLEANUP~~ SERVICE PROVIDERS AND SUPERVISORS PROVIDING HEATING OIL TANK SERVICES

340-163-0005
Authority, Purpose, and Scope

(1) These rules are promulgated in accordance with and under the authority of ORS 466.706 and 466.750.

(2) The purpose of these rules is to provide for the regulation of ~~companies~~firms and individuals~~persons~~ who perform heating oil tank services for underground heating oil tanks.~~cleanup soil contamination resulting from spills and releases of heating oil from heating oil tanks utilizing the soil matrix standards in OAR 340-122-0305 to 340-122-0360.~~ These rules establish standards for:

(a) Licensing of firms performing heating oil tank ~~soil matrix cleanup~~ services ~~for heating oil tanks~~;

(b) Examination, qualification and licensing of individuals who supervise heating oil tank ~~soil matrix cleanup~~ services ~~for heating oil tanks~~; and

(c) Administration and enforcement of these rules by the Department.

(3) ~~Scope:~~

~~(a) OAR 340-163-0005 through 340-163-0150 applies~~These rules apply to ~~cleanup by~~ any individual or firm who performs or offers to perform heating oil tank services.~~person of soil contamination resulting from spills and releases of heating oil from heating oil tanks;~~

~~(b) OAR 340-163-0005 through 340-163-0150 do not apply to services performed by the tank owner, property owner or permittee.~~

(4) Service ~~P~~providers and ~~S~~supervisors licensed under this Division are not licensed to perform work under:

(a) OAR Chapter 340, Division 162 ~~Registration and Licensing Requirements for Underground Storage Tank Soil Matrix Cleanup Service Providers and Supervisors.~~; or

(b) OAR Chapter 340, Division 160.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706 & 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90

340-163-0010
Definitions

As used in ~~these rules~~this Division, the following definitions apply:

(1) "Commission" means the Environmental Quality Commission.

(2) "Confirmed Release" means petroleum contamination observed in soil or groundwater as a sheen, stain, or petroleum odor, or petroleum contamination detected in soil by the Northwest Total Petroleum Hydrocarbon Identification Analytical Method (NWTPH-HCID, DEQ, December, 1996), or analytical results of 50 mg/kg or greater for Diesel/Lube Oil Range Hydrocarbons by Method NWTPH-Dx (DEQ, December, 1996),

or detected in groundwater having concentrations detected by any appropriate analytical method specified in OAR 340-122-0218.

(3) "Corrective Action" has the same meaning as given in ORS 466.706.

(4) "Decommissioning" means to remove an underground heating oil tank from operation by an approved method specified in OAR 340-177-0025, such as abandonment in place (e.g. cleaning and filling with an inert material) or by removal from the ground.

~~(2) "Closure" means to remove an underground storage tank from operation, either temporarily or permanently, by abandonment in place or by removal from the ground.~~

(~~3~~5) "Department" means the Oregon Department of Environmental Quality.

~~(4) "Director" means the Director of the Oregon Department of Environmental Quality.~~

~~(5) "Facility" means the location at which heating oil tanks are in place or will be placed. A facility encompasses the entire property contiguous to the heating oil tanks that is associated with the use of the tanks.~~

(6) "Fee" means a fixed charge or service charge.

(7) "Firm" means any business, including but not limited to corporations, limited partnerships, and sole proprietorships, engaged in the performance of heating oil tank services.

(8) "Heating Oil" means petroleum that is No. 1, No. 2, No. 4 — heavy, No. 5 - light, No. 5 — heavy, and No. 6 - technical grades of fuel oil: other residual fuel oils (including Navy Special Fuel oil and Bunker C); and other fuels when used as substitutes for one of these fuel oils.

(9) "Heating Oil Tank" means any one or combination of ~~above ground or~~ underground tanks and above ground or underground pipes connected to the tank, which is used to contain heating oil used for space heating a building with human habitation or, water heating not used for commercial processing.

(10) "Heating Oil Tank Services" means the decommissioning of a heating oil tank or the performance of corrective action necessary as a result of a release of oil from an underground heating oil tank.

(1~~0~~1) "Licensed" means that a firm or an individual with supervisory responsibility for the performance of heating oil tank services has met the Department's ~~experience and~~ qualification requirements to offer or perform such services ~~related to heating oil tanks~~ and has been issued a license by the Department ~~to perform those services~~.

~~(11) "Permittee", as used in this section, has the meaning set forth in ORS 466.706(9).~~

~~(12) "Soil Matrix Cleanup" means soil cleanup action taken to comply with OAR 340-122-0305 through 340-122-0360.~~

(12) "Responsible Person" means "owner or operator" as defined in ORS 465.200(19) and any other person liable for or voluntarily undertaking remediation under ORS 465.200, and is used synonymously with the term "tank owner" in this Division.

(13) "Service Provider" is a firm licensed to offer and perform heating oil tank services on underground heating oil tanks in Oregon.

(1~~3~~4) "Supervisor" means a licensed individual ~~operating alone or employed by a contractor and~~ who is charged with the responsibility ~~to~~for directing and overseeing the performance of heating oil tank services at a ~~facility~~tank site.

~~(14) "Tank" means heating oil tank.~~

~~(15) "Tank Services" include but are not limited to soil cleanup of heating oil.~~

~~(16) "Tank Services Provider" is an individual or firm registered and, if required, licensed to offer or perform tank services on heating oil tanks in Oregon.~~

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706 & ORS 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90

340-163-0020
General Provisions

(1) Effective March 15, 2000~~After January 1, 1991~~, no firm ~~shall~~may perform or offer to perform heating oil tank ~~soil matrix cleanup~~ services without first having obtained a ~~H~~heating ~~O~~oil ~~T~~tank ~~Soil Matrix Cleanup S~~service ~~P~~provider license from the Department. Such services include, but are not limited to, site assessments on active or inactive heating oil tanks, decommissioning and cleanup.

~~(2) Proof of licensing must be available at all times a service provider is performing soil matrix cleanup services.~~

(~~3~~2) Any ~~Heating Oil Tank Soil Matrix Cleanup S~~service ~~P~~provider licensed ~~or certified~~ by the Department under the provisions of these rules ~~shall~~must comply with the appropriate provisions of:

(a) ~~Comply with the appropriate provisions of~~ OAR Chapter 340, Division 163~~340-163-0005 through 340-163-0150~~;

(b) ~~Comply with the appropriate provisions of~~ OAR 340-122-03205 through 340-122-0363~~5~~;

(c) OAR Chapter 340, Division 177; and

(d) Any other federal, state, or local regulations applicable to underground heating oil tanks.

(3) A service provider must:

(a) Certify that heating oil tank services have been conducted in compliance with all applicable regulations in accordance with OAR 340-163-0060;

(b) Hold and continuously maintain a valid certificate of registration with the Oregon Construction Contractors Board as required by their regulations;

(c) Hold and continuously maintain insurance in accordance with OAR 340-163-0050;

(d) Provide proof of current license upon request by Department staff or the tank owner at all times a service provider is performing heating oil tank services at a tank site; and

(~~e~~e) Maintain a current address on file with the Department.~~; and~~ Mail sent to the service provider that is returned to the Department by the U.S. Postal Service as undeliverable may be considered a failure to comply.

(4) A service provider or supervisor must report a confirmed release of petroleum from an underground heating oil tank to the Department within 72-hours of discovery. This report may be made by telephone or in writing (e.g. facsimile) on a form provided by the Department. The Department will assign a "site identification" or "log" number for each release, which will serve as confirmation of reporting.

(5) In the event a service provider no longer employs a supervisor, the service provider must stop work on any heating oil project until a supervisor is again employed by the service provider.

~~(d) Perform soil matrix cleanup services in a manner which conforms with all federal and state regulations applicable at the time the services are being performed.~~

~~(4) A firm licensed to perform heating oil tank soil matrix cleanup services must submit a checklist to the Department following the completion of a soil matrix cleanup. The checklist form will be made available by the Department.~~

(~~5~~6) ~~After January 1, 1991~~Effective March 15, 2000, a licensed ~~H~~heating ~~O~~oil ~~T~~tank ~~Soil Matrix Cleanup Services S~~supervisor ~~shall~~must be present at a tank site when the following tasks are ~~being~~ performed~~.~~:

(a) During all excavations made after a leak is suspected or has been confirmed;

(b) ~~When any tanks or lines are permanently closed by removal from the ground or filled in place as a result of a suspected or confirmed release~~After a tank has been cleaned: when examined for holes and leaks and is filled with an inert material, or when the tank is physically removed from the ground;

(c) When all soil ~~and/~~or water samples are collected and packed for shipping to the analytical testing laboratory;

(d) When any soil borings, back-hoe pits or other excavations are made for the purpose of investigating the extent of contamination; or

(e) ~~During removal from the open excavation or disposal of~~When any free product or groundwater is removed from an open excavation or disposed.~~; and~~

(7) Licensed supervisors must maintain a current address with the Department at all times during the license period. Mail sent to the individual that is returned to the Department by the U.S. Postal Service as undeliverable may be considered a failure to comply.

(8) Licensed supervisors must provide proof of current licensing upon request by Department staff or by the tank owner.

~~(6) After January 1, 1991 Service Providers shall not backfill or close a soil cleanup excavation site before a Department inspection unless authorized verbally or in writing by the Department. Verbal approvals will be confirmed in writing within 30 days by the Department.~~

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706 & 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90

~~**340-163-0025**~~

~~**Types of Licenses**~~

~~(1) The Department may issue the following types of licenses:~~

~~(a) Heating Oil Tank Soil Matrix Cleanup Services Provider;~~

~~(b) Heating Oil Tank Soil Matrix Cleanup Supervisor.~~

~~(2) A license will be issued to firms and individuals who meet the qualification requirements, submit an application and pay the required fee.~~

~~Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995~~

~~Stats. Implemented: ORS 466.750~~

~~Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90~~

340-163-0030

Licensing ~~of~~Requirements for Heating Oil Tank ~~Soil Matrix Cleanup~~ Services Providers

~~(1) After September 1, 1990, firms providing Heating Oil Tank Soil Matrix Cleanup services may apply for Heating Oil Tank Soil Matrix Cleanup Services Provider license from the Department.~~

(~~2~~1) ~~Licensing shall be accomplished by:~~The Department will issue a license for heating oil tank services to firms who complete

~~(a) Completing~~ and submit a license application ~~provided by~~to the Department~~;~~ that includes, but is not limited to, the following information: ~~or~~

~~(b) Submitting the following information to the Department:~~

(~~A~~a) The name of the firm or assumed business name as registered with the Oregon Corporation Division, and address and telephone number of the firm;

(b) The names and addresses of all principals of the firm;

~~(B) The nature of the services to be offered;~~

~~(c) A summary of the recent project history of the firm (the two year period immediately preceding the application) including the number of projects completed by the firm;~~

(~~D~~c) ~~Identifying t~~The names and supervisor license numbers and expiration dates of all employees or principals responsible for on-site project supervision; ~~and~~

(d) Proof of insurance as required by OAR 340-163-0050(3);

(e) Current Construction Contractors Board registration number;

(f) General information about any underground storage tank work (regulated or heating oil) performed in Oregon or any other state(s) within the previous year as applicable; and

(~~E~~g) ~~Remitting t~~The required license fee.

(~~3~~2) The Department will review the application for completeness. If the application is incomplete, the Department ~~shall~~will notify the applicant by telephone or in writing of the deficiencies.

~~(4) The Department shall deny, in writing, a license to a Heating Oil Tank Soil Matrix Cleanup Services Provider who has not satisfied the license application requirements.~~

(~~5~~3) Upon approval, t~~T~~he Department ~~shall~~will issue a license to the applicant ~~after the application is approved.~~ that is valid for twelve (12) months from the date of issue.

~~(6) The Department shall grant a license for a period of twenty four (24) months.~~

(~~7~~4) ~~Renewals:~~

~~(a)~~ License renewals must be applied for and will be issued in the same manner as ~~is~~ required for an initial license~~.~~; except:

(~~b~~a) The complete renewal application ~~shall~~must be submitted to the Department no later than 30 days prior to the license expiration date~~.~~;

(b) The application must include a list of all heating oil tank site assessments and certified decommissioning and cleanup projects worked on during the previous twelve (12) month period. The list must include, but is not limited to, the name of the property owner, address of the property, date(s) the services were performed, and the type of services performed (i.e. site assessment, decommissioning, cleanup).

(c) The renewal license period will be for twelve (12) months from the expiration date of the previous license issued. If the current license lapses for any reason, the service provider may not perform or offer to perform heating oil tank services during any time between the expiration date and issuance of the renewal license.

(5) If a firm changes its business name, but there are no changes in the corporate structure (i.e. all principals remain the same), a request for a business name change and re-issuance of the service provider license must be made in writing and be accompanied by the required fee for name changes. A copy of the certificate of insurance with the new corporate name must be included. The license period will remain the same as issued to the previous business name.

(6) If the Construction Contractors Board requires that a firm re-register as a new entity, the service provider license issued by the Department will become invalid and the firm must reapply as a new applicant.

~~(8) The Department may suspend or revoke a license if the tank services provider:~~

~~(a) Fraudulently obtains or attempts to obtain a license;~~

~~(b) Fails at any time to satisfy the requirements for a license or comply with the rules adopted by the Commission;~~

~~(c) Fails to meet any applicable state or federal standard relating to the service performed under the license;~~

~~(d) Fails to employ and designate a licensed supervisor for each project.~~

~~(9) A Heating Oil Tank Soil Matrix Cleanup Services Provider who has a license suspended or revoked may reapply for a license after demonstrating to the Department that the cause of the revocation has been resolved.~~

~~(10) In the event a Heating Oil Tank Soil Matrix Cleanup Services provider no longer employs a licensed supervisor the services provider must stop work on any heating oil soil matrix cleanup. Work shall not start until a licensed Heating Oil Tank Soil Matrix Cleanup Supervisor is again employed by the provider and written notice of the hiring of a licensed Heating Oil Tank Soil Matrix Supervisor is received by the Department.~~

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706 & 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90

340-163-0035

Licensing and Examination Requirements for Heating Oil Tank ~~Soil Matrix Cleanup~~ Supervisors ~~Examination and Licensing~~

(1) ~~To obtain a license from the Department to supervise heating oil tank soil matrix cleanup services from a heating oil tank, a~~An individual must take and pass a qualifying examination approved by the Department to be eligible to apply for a license to supervise heating oil tank services when employed by a licensed heating oil tank service provider. The Department may use examinations administered by a nationally recognized underground storage tank examination firm or organization.

(2) If no national examination system is available or if an Oregon-specific testing method is determined necessary by the Department, the Department may develop an examination process that may include field tests in addition to or in lieu of a written examination, that is specific to heating oil tank services, is administered by the Department, and that includes reimbursement of an amount sufficient to cover the costs of administering the examination.

(3) The Department will issue a license for heating oil tank site assessment, decommissioning and cleanup activities to individuals who complete and submit a license

application to the Department that includes, but is not limited to, the following information:

(a) Name and address of the individual;

(b) Name, address and license number of the service provider that the individual is employed by or is regularly associated with;

(c) Original or clearly legible copy of documentation that the applicant has successfully passed the appropriate supervisor examination; and

(d) The required fee.

~~(2) Applications for Heating Oil Tank Soil Matrix Supervisor Licenses — General Requirements:~~

(~~a~~4) Applications must be submitted to the Department within 30 days of passing the qualifying examination~~;~~.

(5) The Department will review the application for completeness. If the application is incomplete, the applicant will be notified of deficiencies by telephone or in writing.

(6) After the application is approved, the Department will issue a supervisor license to the applicant that is valid for twenty-four (24) months from the date of issue. The license is in the form of an identification card that includes the name of the individual, license number and expiration date.

~~(b) Application shall be submitted on forms provided by the Department and shall be accompanied by the appropriate fee;~~

~~(c) The application to be a Licensed Heating Oil Tank Soil Matrix Supervisor shall include:~~

~~(A) Documentation that the applicant has successfully passed the heating oil tank soil matrix Supervisor examination;~~

~~(B) Any additional information that the Department may require.~~

~~(3) A license is valid for a period of 24 months after the date of issue.~~

(4~~7~~) License renewals must be applied for and will be issued in the same manner as the application for the original license, including re-examination~~.~~, except:

(a) The renewal license period will be for twenty-four (24) months from the expiration date of the previous license issued. If the current license lapses for any reason, the individual may not perform or offer to perform heating oil tank supervisory services during any time between the expiration date and issuance of the renewal license.

(8) Until July 1, 2000, or a later date determined by the Department, applicants for a heating oil tank supervisor license may use the Oregon Soil Matrix Cleanup examination to meet the requirements of OAR 340-163-0035(1). After that date, the Department will designate a heating-oil-specific examination as the qualifying examination. The Department may make a determination that more than one examination or license category is necessary.

~~(5) Suspension or Revocation:~~

~~(a) The Department may suspend or revoke a Heating Oil Tank Soil Matrix Supervisor's license for failure to comply with any state or federal rule or regulation pertaining to the cleanup of soil contamination from a heating oil tank;~~

~~(b) If a Heating Oil Tank Soil Matrix Cleanup Supervisor's license is revoked, an individual may not apply for another supervisor license prior to 90 days after the revocation date.~~

~~(6) Upon issuance of a Heating Oil Tank Soil Matrix Cleanup Supervisor's license, the Department shall issue an identification card to all successful applicants which shows the license number and license expiration date.~~

~~(7) The Supervisor's license identification card shall be available for inspection at each site.~~

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706 & 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90

~~Examination Schedule~~

~~(1) At least once prior to November 1, 1990, and twice every year thereafter, the Department shall offer a qualifying examination for any person who wishes to became licensed to supervise soil matrix cleanups from heating oil tanks.~~

~~(2) Not less than 30 days prior to offering an examination the Department shall prepare and make available to interested persons, a study guide which may include sample examination questions.~~

~~(3) The Department shall develop and administer the qualifying examinations in a manner consistent with the objectives of this section.~~

~~Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995~~
~~Stats. Implemented: ORS 466.750~~
~~Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90~~

340-163-0050

Service Provider Insurance Requirements

(1) Any firm applying for a service provider license to perform heating oil tank services must first obtain insurance coverage for errors-and-omissions or professional liability that will be used to pay for any additional corrective action necessary as a result of improper or inadequate site assessment, decommissioning or cleanup work. General liability insurance or pollution liability insurance are not acceptable substitutes for the insurance requirements.

(2) Insurance must be obtained in the amount of $500,000 per claim or per occurrence, with a total aggregate of $1,000,000, from an insurance company authorized to do business in Oregon. Coverage must remain continuous during the license period and until one (1) year after a firm has ceased to perform heating oil tank services in Oregon.

(3) Proof of insurance in the form of a standard insurance policy certificate must be provided to the Department at time of license application and renewal. The certificate of insurance must include the following:

(a) The name of the insurance company, policy number, effective dates of coverage, coverage amounts, deductible amount, name of all insured entities, agent's name, address and telephone number; and

(b) A 30-day cancellation clause that provides notice to the Department if the insurance is cancelled. Notices must be sent to: Department of Environmental Quality, Underground Storage Tank Program, 811 S.W. Sixth Avenue, Portland, Oregon, 97204.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706
Hist.: New

340-163-0060
Certification of Work Performed

(1) A licensed service provider must certify to the Department that heating oil tank services have been performed in compliance with applicable regulations for each decommissioning or cleanup report submitted to the Department. Categories for certification are:

(a) Voluntary Decommissioning;

(b) Soil Matrix Cleanup;

(c) Heating Oil Tank Generic Remedy Cleanup; and

(d) Risk-Based Cleanup with a Corrective Action Plan.

(2) Each individual decommissioning or cleanup certification must contain the following elements:

(a) Statement of compliance that includes the following declaration by the business owner or senior corporate officer for the service provider: "Based on information and belief formed after reasonable inquiry, the heating oil tank services performed under this certification were conducted in compliance with all applicable federal, state and local laws.";

(b) Affirmation of insurance coverage as required by OAR 340-163-0050;

(c) Signature of service provider business owner or senior corporate officer;

(d) Technical report required by OAR 340-122-0205 to 340-122-0360 or OAR Chapter 340, Division 177 as appropriate, signed by the licensed supervisor responsible for the on-site supervision of the project;

(e) A list of technical standards and regulations covered by the certificate provided for the specific category, on a checklist provided by the Department; and

(f) The cost of each certified project, for the purpose of collecting general information by certification category. The service provider must provide information on a separate form provided by the Department, that includes the certification category, description of the complexity of the project, date the project was completed, name of the county the project is located in, and the project cost.

(3) Project certifications must be included with reports submitted by the tank owner, or service provider on owner's behalf, and accompanied by the required registration fee in accordance with OAR 340-177-0095.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706
Hist.: New

340-163-0070
Department Review of Certified Reports

(1) The Department may review and verify the accuracy of certified decommissioning and cleanup reports using a variety of standard compliance verification methods, including, but not limited to:

(a) Review of certified reports submitted for Department approval;

(b) Field inspection of heating oil tank services at tank sites; and

(c) Inspection of records, equipment, or materials held or temporarily stored at the service provider's place of business or storage facility.

(2) The Department will document the result of any report review conducted in writing, which includes a brief summary of the report review or inspection results. This information will be provided to both the tank owner and the certifying service provider.

(3) Any enforcement actions taken as a result of a report review will be conducted in accordance with the applicable requirements of OAR Chapter 340, Division 12.

(4) The Department may reject any decommissioning or cleanup report that has been certified as in compliance with all applicable regulations by a service provider if, but not limited to, any of the following conditions exist:

(a) There is a lack of information or data included with the certified report to support the finding of compliance;

(b) The Department determines that the compliance determination is not accurate based on the information submitted;

(c) Some or all of the supporting documentation does not accurately reflect conditions at the tank site;

(d) Information obtained during a site inspection by the Department may impact the validity of the certification results; or

(e) There is a violation of applicable regulations that has or potentially could impact the validity of the certification results.

(5) For any rejected certified report, the Department may require the service provider or their insurance policy to take specific corrective action(s) that may include additional work at the tank site, including, but not limited to, additional sampling and analysis, contaminated soil removal, or removal of the heating oil tank. Completion of any required additional work must be coordinated with the property owner.

(6) For purposes of determining report certification accuracy, any employee or authorized representative of the Department may enter the tank site or service provider facility at any reasonable time to interview persons, inspect equipment and site conditions, collect samples, take still or video pictures, conduct an investigation, or review and copy records.

(7) To assist the Department in scheduling inspections, service providers must provide information regarding specific projects in progress on any specific day or days upon request by the Department.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706
Hist.: New

340-163-0110
License Denial, Suspension, Revocation

(1) The Department may deny issuance of, suspend or revoke a license for fraud or deceit if the service provider or supervisor:

(a) Fraudulently obtains or attempts to obtain a license; or

(b) Knowingly signs required forms containing false information.

(2) The Department may also deny issuance of, suspend or revoke a license if the service provider or supervisor fails to comply with any applicable local, state or federal regulations pertaining to the performance of heating oil tank services or demonstrates negligence or incompetence, including but not limited to situations where the service provider or supervisor:

(a) Fails to employ and designate a licensed supervisor for each project;

(b) Fails to maintain required insurance;

(c) Fails to maintain appropriate registration with the Oregon Construction Contractors Board;

(d) Fails to resolve heating oil tank compliance related violations in accordance with an enforcement schedule or order issued by the Department;

(e) Fails to make corrections specified by the Department as the result of the Department's rejection of a decommissioning or cleanup report certified by the service provider;

(f) Fails to correct deficiencies noted by the Department for an incomplete license application;

(g) Fails to maintain a current address with the Department; or

(h) Fails at any time to satisfy the requirements for a license.

(3) A service provider or supervisor who has an application denied or license suspended or revoked may reapply for a license after demonstrating to the Department that the cause of the denial, suspension, or revocation has been resolved.

(4) Procedures for license denial, suspension, and revocation will be conducted in accordance with the appropriate provisions of ORS 183.310 to 183.550 and OAR Chapter 340, Division 12.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706 & 466.750
Hist.: new

340-163-0150
Fees

~~(1) Fees shall be assessed to provide revenues to operate the heating oil tank soil matrix cleanup services licensing program. Fees are assessed for the following:~~

~~(a) Heating Oil Tank Soil Matrix Cleanup Service Provider;~~

~~(b) Heating Oil Tank Soil Matrix Cleanup Supervisors Examination;~~

~~(c) Heating Oil Tank Soil Matrix Cleanup Supervisors License;~~

~~(d) Heating Oil Tank Soil Matrix Examination Study Guides.~~

(~~2~~1) Heating oil tank ~~soil matrix cleanup~~ service providers ~~shall~~must pay a non-refundable license ~~application~~ fee of $~~100~~750 for a ~~twenty four (24)~~twelve (12) month license.

~~(3) Individuals taking the Heating Oil Tank Soil Matrix Cleanup Supervisor licensing examination shall pay a non-refundable examination fee of $25.~~

(42) ~~Individuals seeking to obtain a~~ Heating ~~O~~oil ~~T~~tank ~~Soil Matrix Cleanup S~~supervisor~~'~~s ~~license shall~~must pay a non-refundable license ~~application~~ fee of $~~25~~150 for a ~~two year~~twenty-four (24) month license.

(3) Supervisors taking qualifying examinations administered by the Department must pay an examination fee equal to the cost of administering the examination.

(~~5~~4) Examination study guides ~~shall~~will be made available to the public for the cost of production. Copyrighted reference materials, which may have separate costs charged by the specific organization, are not included with study guides.

(~~6~~5) Replacement licenses, including name change requests, will be provided by the Department for a fee of $10.

Stat. Auth.: ORS 465.200 - ORS 465.320 & ORS 466.706 - ORS 466.995
Stats. Implemented: ORS 466.706 & 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90; DEQ 15-1991, f. & cert. ef. 8-14-91

Correct Version - red-line, strike-out 2/7/00 L. McCulloch

DIVISION 163

~~REGISTRATION AND~~ LICENSING REQUIREMENTS FOR ~~HEATING OIL TANK SOIL MATRIX CLEANUP~~ SERVICE PROVIDERS AND SUPERVISORS PROVIDING HEATING OIL TANK SERVICES

340-163-0005
Authority, Purpose, and Scope

(1) These rules are promulgated in accordance with and under the authority of ORS 466.706 and 466.750.

(2) The purpose of these rules is to provide for the regulation of ~~companies~~firms and individuals~~persons~~ who perform heating oil tank services for underground heating oil tanks.~~cleanup soil contamination resulting from spills and releases of heating oil from heating oil tanks utilizing the soil matrix standards in OAR 340-122-0305 to 340-122-0360.~~ These rules establish standards for:

(a) Licensing of firms performing heating oil tank ~~soil matrix cleanup~~ services ~~for heating oil tanks~~;

(b) Examination, qualification and licensing of individuals who supervise heating oil tank ~~soil matrix cleanup~~ services ~~for heating oil tanks~~; and

(c) Administration and enforcement of these rules by the Department.

(3) ~~Scope:~~

~~(a) OAR 340-163-0005 through 340-163-0150 applies~~These rules apply to ~~cleanup by~~ any individual or firm who performs or offers to perform heating oil tank services.~~person of soil contamination resulting from spills and releases of heating oil from heating oil tanks;~~

~~(b) OAR 340-163-0005 through 340-163-0150 do not apply to services performed by the tank owner, property owner or permittee.~~

(4) Service ~~P~~providers and ~~S~~supervisors licensed under this Division are not licensed to perform work under:

(a) OAR Chapter 340, Division 162 ~~Registration and Licensing Requirements for Underground Storage Tank Soil Matrix Cleanup Service Providers and Supervisors.~~; or

(b) OAR Chapter 340, Division 160.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706 & 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90

340-163-0010
Definitions

As used in ~~these rules~~this Division, the following definitions apply:

(1) "Commission" means the Environmental Quality Commission.

(2) "Confirmed Release" means petroleum contamination observed in soil or groundwater as a sheen, stain, or petroleum odor, or petroleum contamination detected in soil by the Northwest Total Petroleum Hydrocarbon Identification Analytical Method (NWTPH-HCID, DEQ, December, 1996), or analytical results of 50 mg/kg or greater for Diesel/Lube Oil Range Hydrocarbons by Method NWTPH-Dx (DEQ, December, 1996),

or detected in groundwater having concentrations detected by any appropriate analytical method specified in OAR 340-122-0218.

(3) "Corrective Action" has the same meaning as given in ORS 466.706.

(4) "Decommissioning" means to remove an underground heating oil tank from operation by an approved method specified in OAR 340-177-0025, such as abandonment in place (e.g. cleaning and filling with an inert material) or by removal from the ground.

~~(2) "Closure" means to remove an underground storage tank from operation, either temporarily or permanently, by abandonment in place or by removal from, the ground.~~

(~~3~~5) "Department" means the Oregon Department of Environmental Quality.

~~(4) "Director" means the Director of the Oregon Department of Environmental Quality.~~

~~(5) "Facility" means the location at which heating oil tanks are in place or will be placed. A facility encompasses the entire property contiguous to the heating oil tanks that is associated with the use of the tanks.~~

(6) "Fee" means a fixed charge or service charge.

(7) "Firm" means any business, including but not limited to corporations, limited partnerships, and sole proprietorships, engaged in the performance of heating oil tank services.

(8) "Heating Oil" means petroleum that is No. 1, No. 2, No. 4 – heavy, No. 5 – light, No. 5 – heavy, and No. 6 – technical grades of fuel oil: other residual fuel oils (including Navy Special Fuel oil and Bunker C); and other fuels when used as substitutes for one of these fuel oils.

(9) "Heating Oil Tank" means any one or combination of ~~above ground or~~ underground tanks and above ground or underground pipes connected to the tank, which is used to contain heating oil used for space heating a building with human habitation or, water heating not used for commercial processing.

(10) "Heating Oil Tank Services" means the decommissioning of a heating oil tank or the performance of corrective action necessary as a result of a release of oil from an underground heating oil tank.

(1~~0~~1) "Licensed" means that a firm or an individual with supervisory responsibility for the performance of heating oil tank services has met the Department's ~~experience and~~ qualification requirements to offer or perform such services ~~related to heating oil tanks~~ and has been issued a license by the Department ~~to perform those services~~.

~~(11) "Permittee", as used in this section, has the meaning set forth in ORS 466.706(9).~~

~~(12) "Soil Matrix Cleanup" means soil cleanup action taken to comply with OAR 340-122-0305 through 340-122-0360.~~

(12) "Responsible Person" means "owner or operator" as defined in ORS 465.200(19) and any other person liable for or voluntarily undertaking remediation under ORS 465.200, and is used synonymously with the term "tank owner" in this Division.

(13) "Service Provider" is a firm licensed to offer and perform heating oil tank services on underground heating oil tanks in Oregon.

(1~~3~~4) "Supervisor" means a licensed individual ~~operating alone or employed by a contractor and~~ who is charged with the responsibility ~~to~~for directing and overseeing the performance of heating oil tank services at a ~~facility~~tank site.

~~(14) "Tank" means heating oil tank.~~

~~(15) "Tank Services" include but are not limited to soil cleanup of heating oil.~~

~~(16) "Tank Services Provider" is an individual or firm registered and, if required, licensed to offer or perform tank services on heating oil tanks in Oregon.~~

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706 & ORS 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90

340-163-0020
General Provisions

(1) Effective March 15, 2000~~After January 1, 1991~~, no firm ~~shall~~may perform or offer to perform heating oil tank ~~soil matrix cleanup~~ services without first having obtained a ~~H~~heating ~~O~~oil ~~T~~tank ~~Soil Matrix Cleanup S~~service ~~P~~provider license from the Department. Such services include, but are not limited to, site assessments on active or inactive heating oil tanks, decommissioning and cleanup.

~~(2) Proof of licensing must be available at all times a service provider is performing soil matrix cleanup services.~~

(~~3~~2) Any ~~Heating Oil Tank Soil Matrix Cleanup S~~service ~~P~~provider licensed ~~or certified~~ by the Department under the provisions of these rules ~~shall~~must comply with the appropriate provisions of:

(a) ~~Comply with the appropriate provisions of~~ OAR Chapter 340, Division 163~~340-163-0005 through 340-163-0150~~;

(b) ~~Comply with the appropriate provisions of~~ OAR 340-122-03205 through 340-122-0363~~5~~;

(c) OAR Chapter 340, Division 177; and

(d) Any other federal, state, or local regulations applicable to underground heating oil tanks.

(3) A service provider must:

(a) Certify that heating oil tank services have been conducted in compliance with all applicable regulations in accordance with OAR 340-163-0060;

(b) Hold and continuously maintain a valid certificate of registration with the Oregon Construction Contractors Board as required by their regulations;

(c) Hold and continuously maintain insurance in accordance with OAR 340-163-0050;

(d) Provide proof of current license upon request by Department staff or the tank owner at all times a service provider is performing heating oil tank services at a tank site; and

(~~e~~e) Maintain a current address on file with the Department.~~; and~~ Mail sent to the service provider that is returned to the Department by the U.S. Postal Service as undeliverable may be considered a failure to comply.

(4) A service provider or supervisor must report a confirmed release of petroleum from an underground heating oil tank to the Department within 72-hours of discovery. This report may be made by telephone or in writing (e.g. facsimile) on a form provided by the Department. The Department will assign a "site identification" or "log" number for each release, which will serve as confirmation of reporting.

(5) In the event a service provider no longer employs a supervisor, the service provider must stop work on any heating oil project until a supervisor is again employed by the service provider.

~~(d) Perform soil matrix cleanup services in a manner which conforms with all federal and state regulations applicable at the time the services are being performed.~~

~~(4) A firm licensed to perform heating oil tank soil matrix cleanup services must submit a checklist to the Department following the completion of a soil matrix cleanup. The checklist form will be made available by the Department.~~

(~~5~~6) ~~After January 1, 1991~~Effective March 15, 2000, a licensed ~~H~~heating ~~O~~oil ~~T~~tank ~~Soil Matrix Cleanup Services S~~supervisor ~~shall~~must be present at a tank site when the following tasks are ~~being~~ performed~~.~~:

(a) During all excavations made after a leak is suspected or has been confirmed;

(b) ~~When any tanks or lines are permanently closed by removal from the ground or filled in place as a result of a suspected or confirmed release~~After a tank has been cleaned: when examined for holes and leaks and is filled with an inert material, or when the tank is physically removed from the ground;

(c) When all soil ~~and/~~or water samples are collected and packed for shipping to the analytical testing laboratory;

(d) When any soil borings, back-hoe pits or other excavations are made for the purpose of investigating the extent of contamination; or

(e) ~~During removal from the open excavation or disposal of~~When any free product or groundwater is removed from an open excavation or disposed.~~; and~~

(7) Licensed supervisors must maintain a current address with the Department at all times during the license period. Mail sent to the individual that is returned to the Department by the U.S. Postal Service as undeliverable may be considered a failure to comply.

(8) Licensed supervisors must provide proof of current licensing upon request by Department staff or by the tank owner.

~~(6) After January 1, 1991 Service Providers shall not backfill or close a soil cleanup excavation site before a Department inspection unless authorized verbally or in writing by the Department. Verbal approvals will be confirmed in writing within 30 days by the Department.~~

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706 & 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90

~~**340-163-0025**~~

~~**Types of Licenses**~~

~~(1) The Department may issue the following types of licenses:~~

~~(a) Heating Oil Tank Soil Matrix Cleanup Services Provider;~~

~~(b) Heating Oil Tank Soil Matrix Cleanup Supervisor.~~

~~(2) A license will be issued to firms and individuals who meet the qualification requirements, submit an application and pay the required fee.~~

~~Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995~~

~~Stats. Implemented: ORS 466.750~~

~~Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90~~

340-163-0030

Licensing ~~of~~Requirements for Heating Oil Tank ~~Soil Matrix Cleanup~~ Services Providers

~~(1) After September 1, 1990, firms providing Heating Oil Tank Soil Matrix Cleanup services may apply for Heating Oil Tank Soil Matrix Cleanup Services Provider license from the Department.~~

(~~2~~1) ~~Licensing shall be accomplished by:~~The Department will issue a license for heating oil tank services to firms who complete

~~(a) Completing~~ and submit a license application ~~provided by~~to the Department~~;~~ that includes, but is not limited to, the following information: ~~or~~

~~(b) Submitting the following information to the Department:~~

(~~A~~a) The name of the firm or assumed business name as registered with the Oregon Corporation Division, and address and telephone number of the firm;

(b) The names and addresses of all principals of the firm;

~~(B) The nature of the services to be offered;~~

~~(c) A summary of the recent project history of the firm (the two year period immediately preceding the application) including the number of projects completed by the firm;~~

(~~D~~c) ~~Identifying t~~The names and supervisor license numbers and expiration dates of all employees or principals responsible for on-site project supervision; ~~and~~

(d) Proof of insurance as required by OAR 340-163-0050(3);

(e) Current Construction Contractors Board registration number;

(f) General information about any underground storage tank work (regulated or heating oil) performed in Oregon or any other state(s) within the previous year as applicable; and

(~~E~~g) ~~Remitting t~~The required license fee.

(~~3~~2) The Department will review the application for completeness. If the application is incomplete, the Department ~~shall~~will notify the applicant by telephone or in writing of the deficiencies.

~~(4) The Department shall deny, in writing, a license to a Heating Oil Tank Soil Matrix Cleanup Services Provider who has not satisfied the license application requirements.~~

(~~5~~3) Upon approval, t~~T~~he Department ~~shall~~will issue a license to the applicant ~~after the application is approved.~~ that is valid for twelve (12) months from the date of issue.

~~(6) The Department shall grant a license for a period of twenty-four (24) months.~~

(~~7~~4) ~~Renewals:~~

~~(a)~~ License renewals must be applied for and will be issued in the same manner as ~~is~~ required for an initial license~~,~~; except:

(~~b~~a) The complete renewal application ~~shall~~must be submitted to the Department no later than 30 days prior to the license expiration date~~.~~;

(b) The application must include a list of all heating oil tank site assessments and certified decommissioning and cleanup projects worked on during the previous twelve (12) month period. The list must include, but is not limited to, the name of the property owner, address of the property, date(s) the services were performed, and the type of services performed (i.e. site assessment, decommissioning, cleanup).

(c) The renewal license period will be for twelve (12) months from the expiration date of the previous license issued. If the current license lapses for any reason, the service provider may not perform or offer to perform heating oil tank services during any time between the expiration date and issuance of the renewal license.

(5) If a firm changes its business name, but there are no changes in the corporate structure (i.e. all principals remain the same), a request for a business name change and re-issuance of the service provider license must be made in writing and be accompanied by the required fee for name changes. A copy of the certificate of insurance with the new corporate name must be included. The license period will remain the same as issued to the previous business name.

(6) If the Construction Contractors Board requires that a firm re-register as a new entity, the service provider license issued by the Department will become invalid and the firm must reapply as a new applicant.

~~(8) The Department may suspend or revoke a license if the tank services provider:~~

~~(a) Fraudulently obtains or attempts to obtain a license;~~

~~(b) Fails at any time to satisfy the requirements for a license or comply with the rules adopted by the Commission;~~

~~(c) Fails to meet any applicable state or federal standard relating to the service performed under the license;~~

~~(d) Fails to employ and designate a licensed supervisor for each project.~~

~~(9) A Heating Oil Tank Soil Matrix Cleanup Services Provider who has a license suspended or revoked may reapply for a license after demonstrating to the Department that the cause of the revocation has been resolved.~~

~~(10) In the event a Heating Oil Tank Soil Matrix Cleanup Services provider no longer employs a licensed supervisor the services provider must stop work on any heating oil soil matrix cleanup. Work shall not start until a licensed Heating Oil Tank Soil Matrix Cleanup Supervisor is again employed by the provider and written notice of the hiring of a licensed Heating Oil Tank Soil Matrix Supervisor is received by the Department.~~

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706 & 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90

340-163-0035

Licensing and Examination Requirements for Heating Oil Tank ~~Soil Matrix Cleanup~~ Supervisors ~~Examination and Licensing~~

(1) ~~To obtain a license from the Department to supervise heating oil tank soil matrix cleanup services from a heating oil tank, a~~An individual must take and pass a qualifying examination approved by the Department to be eligible to apply for a license to supervise heating oil tank services when employed by a licensed heating oil tank service provider. The Department may use examinations administered by a nationally recognized underground storage tank examination firm or organization.

(2) If no national examination system is available or if an Oregon-specific testing method is determined necessary by the Department, the Department may develop an examination process that may include field tests in addition to or in lieu of a written examination, that is specific to heating oil tank services, is administered by the Department, and that includes reimbursement of an amount sufficient to cover the costs of administering the examination.

(3) The Department will issue a license for heating oil tank site assessment, decommissioning and cleanup activities to individuals who complete and submit a license

application to the Department that includes, but is not limited to, the following information:

(a) Name and address of the individual;

(b) Name, address and license number of the service provider that the individual is employed by or is regularly associated with;

(c) Original or clearly legible copy of documentation that the applicant has successfully passed the appropriate supervisor examination; and

(d) The required fee.

~~(2) Applications for Heating Oil Tank Soil Matrix Supervisor Licenses — General Requirements:~~

(~~a~~4) Applications must be submitted to the Department within 30 days of passing the qualifying examination~~;~~.

(5) The Department will review the application for completeness. If the application is incomplete, the applicant will be notified of deficiencies by telephone or in writing.

(6) After the application is approved, the Department will issue a supervisor license to the applicant that is valid for twenty-four (24) months from the date of issue. The license is in the form of an identification card that includes the name of the individual, license number and expiration date.

~~(b) Application shall be submitted on forms provided by the Department and shall be accompanied by the appropriate fee;~~

~~(c) The application to be a Licensed Heating Oil Tank Soil Matrix Supervisor shall include:~~

~~(A) Documentation that the applicant has successfully passed the heating oil tank soil matrix Supervisor examination;~~

~~(B) Any additional information that the Department may require.~~

~~(3) A license is valid for a period of 24 months after the date of issue.~~

(4~~7~~) License renewals must be applied for and will be issued in the same manner as the application for the original license, including re-examination~~.~~, except:

(a) The renewal license period will be for twenty-four (24) months from the expiration date of the previous license issued. If the current license lapses for any reason, the individual may not perform or offer to perform heating oil tank supervisory services during any time between the expiration date and issuance of the renewal license.

(8) Until July 1, 2000, or a later date determined by the Department, applicants for a heating oil tank supervisor license may use the Oregon Soil Matrix Cleanup examination to meet the requirements of OAR 340-163-0035(1). After that date, the Department will designate a heating-oil-specific examination as the qualifying examination. The Department may make a determination that more than one examination or license category is necessary.

~~(5) Suspension or Revocation:~~

~~(a) The Department may suspend or revoke a Heating Oil Tank Soil Matrix Supervisor's license for failure to comply with any state or federal rule or regulation pertaining to the cleanup of soil contamination from a heating oil tank;~~

~~(b) If a Heating Oil Tank Soil Matrix Cleanup Supervisor's license is revoked, an individual may not apply for another supervisor license prior to 90 days after the revocation date.~~

~~(6) Upon issuance of a Heating Oil Tank Soil Matrix Cleanup Supervisor's license, the Department shall issue an identification card to all successful applicants which shows the license number and license expiration date.~~

~~(7) The Supervisor's license identification card shall be available for inspection at each site.~~

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706 & 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90

~~**Examination Schedule**~~

~~(1) At least once prior to November 1, 1990, and twice every year thereafter, the Department shall offer a qualifying examination for any person who wishes to became licensed to supervise soil matrix cleanups from heating oil tanks.~~

~~(2) Not less than 30 days prior to offering an examination the Department shall prepare and make available to interested persons, a study guide which may include sample examination questions.~~

~~(3) The Department shall develop and administer the qualifying examinations in a manner consistent with the objectives of this section.~~

~~Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995~~
~~Stats. Implemented: ORS 466.750~~
~~Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90~~

340-163-0050
Service Provider Insurance Requirements

(1) Any firm applying for a service provider license to perform heating oil tank services must first obtain insurance coverage for errors-and-omissions or professional liability that will be used to pay for any additional corrective action necessary as a result of improper or inadequate site assessment, decommissioning or cleanup work. General liability insurance or pollution liability insurance are not acceptable substitutes for the insurance requirements.

(2) Insurance must be obtained in the amount of $500,000 per claim or per occurrence, with a total aggregate of $1,000,000, from an insurance company authorized to do business in Oregon. Coverage must remain continuous during the license period and until one (1) year after a firm has ceased to perform heating oil tank services in Oregon.

(3) Proof of insurance in the form of a standard insurance policy certificate must be provided to the Department at time of license application and renewal. The certificate of insurance must include the following:

(a) The name of the insurance company, policy number, effective dates of coverage, coverage amounts, deductible amount, name of all insured entities, agent's name, address and telephone number; and

(b) A 30-day cancellation clause that provides notice to the Department if the insurance is cancelled. Notices must be sent to: Department of Environmental Quality, Underground Storage Tank Program, 811 S.W. Sixth Avenue, Portland, Oregon, 97204.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706
Hist.: New

340-163-0060
Certification of Work Performed

(1) A licensed service provider must certify to the Department that heating oil tank services have been performed in compliance with applicable regulations for each decommissioning or cleanup report submitted to the Department. Categories for certification are:

(a) Voluntary Decommissioning;

(b) Soil Matrix Cleanup;

(c) Heating Oil Tank Generic Remedy Cleanup; and

(d) Risk-Based Cleanup with a Corrective Action Plan.

(2) Each individual decommissioning or cleanup certification must contain the following elements:

(a) Statement of compliance that includes the following declaration by the business owner or senior corporate officer for the service provider: "Based on information and belief formed after reasonable inquiry, the heating oil tank services performed under this certification were conducted in compliance with all applicable federal, state and local laws.";

(b) Affirmation of insurance coverage as required by OAR 340-163-0050;

(c) Signature of service provider business owner or senior corporate officer;

(d) Technical report required by OAR 340-122-0205 to 340-122-0360 or OAR Chapter 340, Division 177 as appropriate, signed by the licensed supervisor responsible for the on-site supervision of the project;

(e) A list of technical standards and regulations covered by the certificate provided for the specific category, on a checklist provided by the Department; and

(f) The cost of each certified project, for the purpose of collecting general information by certification category. The service provider must provide information on a separate form provided by the Department, that includes the certification category, description of the complexity of the project, date the project was completed, name of the county the project is located in, and the project cost.

(3) Project certifications must be included with reports submitted by the tank owner, or service provider on owner's behalf, and accompanied by the required registration fee in accordance with OAR 340-177-0095.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706
Hist.: New

340-163-0070
Department Review of Certified Reports

(1) The Department may review and verify the accuracy of certified decommissioning and cleanup reports using a variety of standard compliance verification methods, including, but not limited to:

(a) Review of certified reports submitted for Department approval;

(b) Field inspection of heating oil tank services at tank sites; and

(c) Inspection of records, equipment, or materials held or temporarily stored at the service provider's place of business or storage facility.

(2) The Department will document the result of any report review conducted in writing, which includes a brief summary of the report review or inspection results. This information will be provided to both the tank owner and the certifying service provider.

(3) Any enforcement actions taken as a result of a report review will be conducted in accordance with the applicable requirements of OAR Chapter 340, Division 12.

(4) The Department may reject any decommissioning or cleanup report that has been certified as in compliance with all applicable regulations by a service provider if, but not limited to, any of the following conditions exist:

(a) There is a lack of information or data included with the certified report to support the finding of compliance;

(b) The Department determines that the compliance determination is not accurate based on the information submitted;

(c) Some or all of the supporting documentation does not accurately reflect conditions at the tank site;

(d) Information obtained during a site inspection by the Department may impact the validity of the certification results; or

(e) There is a violation of applicable regulations that has or potentially could impact the validity of the certification results.

(5) For any rejected certified report, the Department may require the service provider or their insurance policy to take specific corrective action(s) that may include additional work at the tank site, including, but not limited to, additional sampling and analysis, contaminated soil removal, or removal of the heating oil tank. Completion of any required additional work must be coordinated with the property owner.

(6) For purposes of determining report certification accuracy, any employee or authorized representative of the Department may enter the tank site or service provider facility at any reasonable time to interview persons, inspect equipment and site conditions, collect samples, take still or video pictures, conduct an investigation, or review and copy records.

(7) To assist the Department in scheduling inspections, service providers must provide information regarding specific projects in progress on any specific day or days upon request by the Department.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706
Hist.: New

340-163-0110
License Denial, Suspension, Revocation

(1) The Department may deny issuance of, suspend or revoke a license for fraud or deceit if the service provider or supervisor:

(a) Fraudulently obtains or attempts to obtain a license; or

(b) Knowingly signs required forms containing false information.

(2) The Department may also deny issuance of, suspend or revoke a license if the service provider or supervisor fails to comply with any applicable local, state or federal regulations pertaining to the performance of heating oil tank services or demonstrates negligence or incompetence, including but not limited to situations where the service provider or supervisor:

(a) Fails to employ and designate a licensed supervisor for each project;

(b) Fails to maintain required insurance;

(c) Fails to maintain appropriate registration with the Oregon Construction Contractors Board;

(d) Fails to resolve heating oil tank compliance related violations in accordance with an enforcement schedule or order issued by the Department;

(e) Fails to make corrections specified by the Department as the result of the Department's rejection of a decommissioning or cleanup report certified by the service provider;

(f) Fails to correct deficiencies noted by the Department for an incomplete license application;

(g) Fails to maintain a current address with the Department; or

(h) Fails at any time to satisfy the requirements for a license.

(3) A service provider or supervisor who has an application denied or license suspended or revoked may reapply for a license after demonstrating to the Department that the cause of the denial, suspension, or revocation has been resolved.

(4) Procedures for license denial, suspension, and revocation will be conducted in accordance with the appropriate provisions of ORS 183.310 to 183.550 and OAR Chapter 340, Division 12.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706 & 466.750
Hist.: new

340-163-0150
Fees

~~(1) Fees shall be assessed to provide revenues to operate the heating oil tank soil matrix cleanup services licensing program. Fees are assessed for the following:~~

~~(a) Heating Oil Tank Soil Matrix Cleanup Service Provider;~~

~~(b) Heating Oil Tank Soil Matrix Cleanup Supervisors Examination;~~

~~(c) Heating Oil Tank Soil Matrix Cleanup Supervisors License;~~

~~(d) Heating Oil Tank Soil Matrix Examination Study Guides.~~

(~~2~~1) Heating oil tank ~~soil matrix cleanup~~ service providers ~~shall~~must pay a non-refundable license ~~application~~ fee of $~~100~~750 for a ~~twenty four (24)~~twelve (12) month license.

~~(3) Individuals taking the Heating Oil Tank Soil Matrix Cleanup Supervisor licensing examination shall pay a non-refundable examination fee of $25.~~

(42) ~~Individuals seeking to obtain a~~ Heating ~~O~~oil ~~T~~tank ~~Soil Matrix Cleanup S~~supervisor~~'~~s ~~license shall~~must pay a non-refundable license ~~application~~ fee of $~~25~~150 for a ~~two year~~twenty-four (24) month license.

(3) Supervisors taking qualifying examinations administered by the Department must pay an examination fee equal to the cost of administering the examination.

(~~5~~4) Examination study guides ~~shall~~will be made available to the public for the cost of production. Copyrighted reference materials, which may have separate costs charged by the specific organization, are not included with study guides.

(~~6~~5) Replacement licenses, including name change requests, will be provided by the Department for a fee of $10.

Stat. Auth.: ORS 465.200 - ORS 465.320 & ORS 466.706 - ORS 466.995
Stats. Implemented: ORS 466.706 & 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90; DEQ 15-1991, f. & cert. ef. 8-14-91

Environmental Quality Commission

☒ Rule Adoption Item
☐ Action Item
☐ Information Item

Agenda Item G
February 11, 2000 EQC Meeting

Title:

Heating Oil Tank Technical and Service Provider Licensing Rule Revisions

Summary:

The Department is proposing rule changes to two rule divisions pertaining to heating oil tanks and the licensing of companies who perform heating oil tank services. These changes are necessary to implement laws passed by the 1999 Legislative Assembly in H.B. 3107 and S.B. 542. The most significant new additional requirements are:

- adds technical standards for decommissioning heating oil tanks, including soil sampling
- requires decommissioning projects as requested by owner and all cleanup projects to be certified as in compliance by licensed service provider
- adds $50 fee to have certified reports filed and approved by DEQ
- requires service providers to have errors-and-omissions insurance for work performed
- increases license fees for service providers and supervisors

The funding for this program is based on service provider and supervisor license fees, certified report filing fee, and general funds for 1999-2001. Four positions have been approved to conduct the work involved with the program.

License fees are set by the Legislature at $750 per year for a service provider (company) and $75 per year (i.e. $150 every two years) for supervisors. The $50 filing fee is also set by statute. These fees allow for project-specific oversight without cost recovery.

Department Recommendation:

It is recommended that the Commission adopt the proposed amendments and additions to the Heating Oil Tank rules (OAR Chapter 340, Division 177) and Heating Oil Tank Service Provider Licensing rules (OAR Chapter 340, Division 163) as presented in Attachments A.1 and A.2 of the Department's Staff Report.

Report Author	Division Administrator	Director
Laurie J. McCulloch	Mary Wahl	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: January 24, 2000

To: Environmental Quality Commission

From: Langdon Marsh

Subject: Agenda Item G, Heating Oil Tanks, February 11, 2000 EQC Meeting

Background

On November 15, 1999 the Director authorized the Underground Storage Tank (UST) Program of the Waste Management and Cleanup Division to proceed to a rulemaking hearing on proposed rules which would create a new service provider license specific for heating oil tank services and add technical requirements for decommissioning underground heating oil tanks.

Pursuant to the authorization, hearing notice was published in the Secretary of State's Bulletin on December 1, 1999. The Hearing Notice and informational materials were mailed to the mailing list of those persons who have asked to be notified of rulemaking actions, and to a mailing list of persons known by the Department to be potentially affected by or interested in the proposed rulemaking action on November 17, 1999.

Two Public Hearings were held: the first hearing was on December 16, 1999 at 2:00 P.M. in Eugene, with Karen White-Fallon serving as Presiding Officer; the second hearing was on December 21, 1999 at 7:00 P.M. in Portland, with Mitch Scheel serving as Presiding Officer. Written comment was received through 5:00 P.M. on January 3, 2000. The Presiding Officer's Report (Attachment C) summarizes the oral testimony presented at 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.

The following sections summarize the issue that this proposed rulemaking action is intended to address, the authority to address the issue, the process for development of the rulemaking proposal including alternatives considered, a summary of the rulemaking proposal presented for

public hearing, a summary of the significant public comments and the changes proposed in response to those comments, a summary of how the rule will work and how it is proposed to be implemented, and a recommendation for Commission action.

Issue this Proposed Rulemaking Action is Intended to Address

The 1999 Legislature passed two bills that required rule changes to implement. Senate Bill 542 abolishes the Oil Heat Commission and ended the funding program for grants to homeowners who voluntarily decommissioned a heating oil tank.

House Bill 3107 specifies requirements for licensing of companies and individuals who provide heating oil tank services. This includes requirements for certification of work performed, and insurance to cover errors and omissions. Decommissioning standards must be established (previously only "recommended practices" were available). The bill requires DEQ to set standards for tank owners who voluntarily choose to decommission a tank. DEQ registers receipt of the certified reports and prepares an acknowledgement for a $50 fee, closing DEQ records of the release and/or decommissioning. DEQ will audit (i.e. review reports and conduct inspections) some of the work of licensed service providers and supervisors and can reject certifications that do not meet standards.

Relationship to Federal and Adjacent State Rules

None. There are no federal requirements for heating oil tanks. Washington State sets cleanup standards for the cleanup of releases from heating oil tanks and requires cleanup of contamination when groundwater is impacted.

Authority to Address the Issue

The Department has the statutory authority to address this issue under ORS 466.706. These rules implement ORS 466.706 (House Bill 3107 and Senate Bill 542).

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

A work group comprised of representatives for service providers, homeowners, environmental law practitioners, realtors, banking, utilities, Oregon Petroleum Marketing Association, insurance, and local government (fire, building) was established. This group met four times in September and October 1999 to provide input on rule concepts and to review draft rules. The requirement to collect two soil samples when the tank is decommissioned and have those samples tested for Total Petroleum Hydrocarbons (TPH) was widely discussed and work group members and individuals in the audience tended to have strong feelings one way or another.

DEQ consulted with the Construction Contractors Board to ensure that these rules do not duplicate other insurance requirements and to provide consistency in licensing requirements where feasible. Information obtained during an "early implementation" trial during December, 1999 provided additional feedback that was useful in making some changes after the initial rules were developed. This trial allows licensed service providers to certify cleanup projects and have the reports filed with DEQ for the $50 filing fee.

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

This proposal would modify Oregon Administrative Rules (OAR) Chapter 340, Division 177 "Heating Oil Underground Storage Tanks" in the following ways:

- Deletes rule language for providing grants to homeowners for decommissioning a residential heating oil tank
- Adds technical standards for decommissioning heating oil tanks, including sampling
- Requires heating oil tank cleanup projects to be certified by a licensed service provider
- Retains voluntary decommissioning, but requires that a licensed service provider must certify the work, and the work must meet technical standards, if tank owner wants DEQ to file and approve report
- Imposes $50 fee to have certified reports filed and approved by DEQ

This proposal would modify OAR Chapter 340, Division 163 "Licensing Requirements for Service Providers and Supervisors of Heating Oil Tank Services" in the following ways:

- Adds license requirements for decommissioning and site assessment to existing cleanup license requirements
- Adds requirement for heating oil tank service providers to be registered with Construction Contractors Board (CCB) as required by CCB regulations
- Requires service providers to certify that heating oil tank services for each project have been performed in accordance with rules
- Allows DEQ to review work performed by service providers and reject certifications under certain circumstances
- Requires insurance to cover cost of additional work required for rejected certifications (e.g. errors-and-omissions insurance)
- Increases license fees for companies from $100 every two years to $750 per year
- Increases license fees for individuals from $25 to $150 every two years

Summary of Significant Public Comment and Changes Proposed in Response

The most significant issue during public comment period was the cost of and amount of insurance required by service providers. DEQ proposes changes to these requirements as a result. The next issue most commented on was the amount of the license fee increases. These fees were set by statute and not in this rule action. Any changes to the fees would require legislative action.

Although the discussion on whether to require soil testing when tanks are decommissioned was very active during work group meetings, no public comment was submitted on this issue. The Department believes this requirement is crucial to ensure that environmental protection has been achieved before a decommissioning project can be certified. This requirement remains in the proposed rules.

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

DEQ will implement the rules by providing written guidance to tank owners who need information on decommissioning a tank or cleaning up a release of heating oil. DEQ has notified currently licensed service providers and supervisors and contractors registered with the Construction Contractors Board of proposed rule changes and will provide training and written guidance materials as necessary.

Early implementation of certification of cleanup projects is being conducted on a voluntary basis.

Service providers currently licensed for soil matrix cleanups who obtain errors-and-omissions insurance were given training and allowed to submit certified reports during December 1999 and January 2000. This allowed additional input from service providers and gave the Department an opportunity to develop early guidance materials that will be invaluable if the rules are adopted.

The Department will focus compliance review efforts on service provider certified reports. Department staff will conduct field inspections of service provider work in progress. Technical assistance will be provided to service providers by phone or on site at specific cleanup projects.

The Legislature approved four positions (4.0 FTE) to conduct the work involved with the program. Funding for this program is based on service provider and supervisor license fees, certified report filing fee and general funds for 1999-2001. Extensive efforts made by the Department so far this biennium on rule development, written guidance, and transition activities (backlog of reports that have not been reviewed by DEQ) may limit its efforts during the remainder of the biennium due to budget constraints. The Department needs to carefully monitor work efforts and budget to make sure it can smoothly implement the program goals of streamlined operation and ease of homeowners use of guidance information.

Recommendation for Commission Action

It is recommended that the Commission adopt the rule amendments regarding heating oil tank service provider licensing and heating oil tank decommissioning standards as presented in Attachment A of the Department Staff Report.

Attachments

A. Rule Amendments Proposed for Adoption:
   1. OAR Chapter 340, Division 163, Service Provider Licensing
   2. OAR Chapter 340, Division 177, Heating Oil Tank Requirements

B. Supporting Procedural Documentation:
   1. Legal Notice of Hearing
   2. Fiscal and Economic Impact Statement
   3. Land Use Evaluation Statement
   4. Questions to be Answered to Reveal Potential Justification for Differing from Federal Requirements
   5. Cover Memorandum from Public Notice

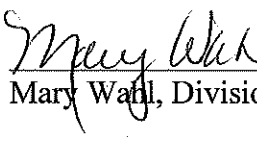
C. Presiding Officer's Report on Public Hearing
D. Department's Evaluation of Public Comment
E. Detailed Changes to Original Rulemaking Proposal made in Response to Public Comment
F. Advisory Committee Membership List
G. Rule Implementation Plan

Reference Documents (available upon request)

Written Comments Received (listed in Attachment C)

Approved:

Section: 
Michael H. Kortenhof, Program Manager

Division: 
Mary Wahl, Division Administrator

Report Prepared By: Laurie J. McCulloch

Phone: 503-229-5769

Date Prepared: January 10, 2000

LJM:ljm

DIVISION 163

REGISTRATION AND LICENSING REQUIREMENTS FOR HEATING OIL TANK SOIL MATRIX CLEANUP SERVICE PROVIDERS AND SUPERVISORS PROVIDING HEATING OIL TANK SERVICES

340-163-0005
Authority, Purpose, and Scope

(1) These rules are promulgated in accordance with and under the authority of ORS 466.706 and 466.750.

(2) The purpose of these rules is to provide for the regulation of companiesfirms and individualspersons who perform heating oil tank services for underground heating oil tanks.cleanup soil contamination resulting from spills and releases of heating oil from heating oil tanks utilizing the soil matrix standards in OAR 340-122-0305 to 340-122-0360. These rules establish standards for:

(a) Licensing of firms performing heating oil tank soil matrix cleanup services for heating oil tanks;

(b) Examination, qualification and licensing of individuals who supervise heating oil tank soil matrix cleanup services for heating oil tanks; and

(c) Administration and enforcement of these rules by the Department.

(3) Scope:

(a) OAR 340-163-0005 through 340-163-0150 appliesThese rules apply to cleanup by any individual or firm who performs or offers to perform heating oil tank services.person of soil contamination resulting from spills and releases of heating oil from heating oil tanks;

(b) OAR 340-163-0005 through 340-163-0150 do not apply to services performed by the tank owner, property owner or permittee.

(4) Service Pproviders and Ssupervisors licensed under this Division are not licensed to perform work under:

(a) OAR Chapter 340, Division 162 — Registration and Licensing Requirements for Underground Storage Tank Soil Matrix Cleanup Service Providers and Supervisors.; or

(b) OAR Chapter 340, Division 160.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706 & 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90

340-163-0010
Definitions

As used in these rulesthis Division, the following definitions apply:

(1) "Commission" means the Environmental Quality Commission.

(2) "Confirmed Release" means petroleum contamination observed in soil or groundwater as a sheen, stain, or petroleum odor, or petroleum contamination detected in soil by the Northwest Total Petroleum Hydrocarbon Identification Analytical Method (NWTPH-HCID, DEQ, December, 1996), or analytical results of 50 mg/kg or greater for Diesel/Lube Oil Range Hydrocarbons by Method NWTPH-Dx (DEQ, December, 1996),

or detected in groundwater having concentrations detected by any appropriate analytical method specified in OAR 340-122-0218.

(3) "Corrective Action" has the same meaning as given in ORS 466.706.

(4) "Decommissioning" means to remove an underground heating oil tank from operation by an approved method specified in OAR 340-177-0025, such as abandonment in place (e.g. cleaning and filling with an inert material) or by removal from the ground.

(2) "Closure" means to remove an underground storage tank from operation, either temporarily or permanently, by abandonment in place or by removal from, the ground.

(35) "Department" means the Oregon Department of Environmental Quality.

(4) "Director" means the Director of the Oregon Department of Environmental Quality.

(5) "Facility" means the location at which heating oil tanks are in place or will be placed. A facility encompasses the entire property contiguous to the heating oil tanks that is associated with the use of the tanks.

(6) "Fee" means a fixed charge or service charge.

(7) "Firm" means any business, including but not limited to corporations, limited partnerships, and sole proprietorships, engaged in the performance of heating oil tank services.

(8) "Heating Oil" means petroleum that is No. 1, No. 2, No. 4 – heavy, No. 5 - light, No. 5 – heavy, and No. 6 - technical grades of fuel oil: other residual fuel oils (including Navy Special Fuel oil and Bunker C); and other fuels when used as substitutes for one of these fuel oils.

(9) "Heating Oil Tank" means any one or combination of above ground or underground tanks and above ground or underground pipes connected to the tank, which is used to contain heating oil used for space heating a building with human habitation or, water heating not used for commercial processing.

(10) "Heating Oil Tank Services" means the decommissioning of a heating oil tank or the performance of corrective action necessary as a result of a release of oil from an underground heating oil tank.

(101) "Licensed" means that a firm or an individual with supervisory responsibility for the performance of heating oil tank services has met the Department's experience and qualification requirements to offer or perform such services related to heating oil tanks and has been issued a license by the Department to perform those services.

(11) "Permittee", as used in this section, has the meaning set forth in ORS 466.706(9).

(12) "Soil Matrix Cleanup" means soil cleanup action taken to comply with OAR 340-122-0305 through 340-122-0360.

(12) "Responsible Person" means "owner or operator" as defined in ORS 465.200(19) and any other person liable for or voluntarily undertaking remediation under ORS 465.200, and is used synonymously with the term "tank owner" in this Division.

(13) "Service Provider" is a firm licensed to offer and perform heating oil tank services on underground heating oil tanks in Oregon.

(134) "Supervisor" means a licensed individual operating alone or employed by a contractor and who is charged with the responsibility tofor directing and overseeing the performance of heating oil tank services at a facilitytank site.

(14) "Tank" means heating oil tank.

(15) "Tank Services" include but are not limited to soil cleanup of heating oil.

(16) "Tank Services Provider" is an individual or firm registered and, if required, licensed to offer or perform tank services on heating oil tanks in Oregon.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706 & ORS 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90

340-163-0020
General Provisions

(1) Effective March 15, 2000After January 1, 1991, no firm shallmay perform or offer to perform heating oil tank soil matrix cleanup services without first having obtained a Hheating Ooil Ttank Soil Matrix Cleanup Sservice Pprovider license from the Department. Such services include, but are not limited to, site assessments on active or inactive heating oil tanks, decommissioning and cleanup.

(2) Proof of licensing must be available at all times a service provider is performing soil matrix cleanup services.

(32) Any Heating Oil Tank Soil Matrix Cleanup Sservice Pprovider licensed or certified by the Department under the provisions of these rules shallmust comply with the appropriate provisions of:

(a) Comply with the appropriate provisions of OAR Chapter 340, Division 163340-163-0005 through 340-163-0150;

(b) Comply with the appropriate provisions of OAR 340-122-03205 through 340-122-03635;

(c) OAR Chapter 340, Division 177; and

(d) Any other federal, state, or local regulations applicable to underground heating oil tanks.

(3) A service provider must:

(a) Certify that heating oil tank services have been conducted in compliance with all applicable regulations in accordance with OAR 340-163-0060;

(b) Hold and continuously maintain a valid certificate of registration with the Oregon Construction Contractors Board as required by their regulations;

(c) Hold and continuously maintain insurance in accordance with OAR 340-163-0050;

(d) Provide proof of current license upon request by Department staff or the tank owner at all times a service provider is performing heating oil tank services at a tank site; and

(ce) Maintain a current address on file with the Department.; and Mail sent to the service provider that is returned to the Department by the U.S. Postal Service as undeliverable may be considered a failure to comply.

(4) A service provider or supervisor must report a confirmed release of petroleum from an underground heating oil tank to the Department within 72-hours of discovery. This report may be made by telephone or in writing (e.g. facsimile) on a form provided by the Department. The Department will assign a "site identification" or "log" number for each release, which will serve as confirmation of reporting.

(5) In the event a service provider no longer employs a supervisor, the service provider must stop work on any heating oil project until a supervisor is again employed by the service provider.

(d) Perform soil matrix cleanup services in a manner which conforms with all federal and state regulations applicable at the time the services are being performed.

(4) A firm licensed to perform heating oil tank soil matrix cleanup services must submit a checklist to the Department following the completion of a soil matrix cleanup. The checklist form will be made available by the Department.

(56) After January 1, 1991Effective March 15, 2000, a licensed Hheating Ooil Ttank Soil Matrix Cleanup Services Ssupervisor shallmust be present at a tank site when the following tasks are being performed.:

(a) During all excavations made after a leak is suspected or has been confirmed;

(b) When any tanks or lines are permanently closed by removal from the ground or filled in place as a result of a suspected or confirmed releaseAfter a tank has been cleaned: when examined for holes and leaks and is filled with an inert material, or when the tank is physically removed from the ground;

(c) When all soil and/or water samples are collected and packed for shipping to the analytical testing laboratory;

(d) When any soil borings, back-hoe pits or other excavations are made for the purpose of investigating the extent of contamination; or

(e) During removal from the open excavation or disposal ofWhen any free product or groundwater is removed from an open excavation or disposed.; and

(7) Licensed supervisors must maintain a current address with the Department at all times during the license period. Mail sent to the individual that is returned to the Department by the U.S. Postal Service as undeliverable may be considered a failure to comply.

(8) Licensed supervisors must provide proof of current licensing upon request by Department staff or by the tank owner.

(6) After January 1, 1991 Service Providers shall not backfill or close a soil cleanup excavation site before a Department inspection unless authorized verbally or in writing by the Department. Verbal approvals will be confirmed in writing within 30 days by the Department.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706 & 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90

340-163-0025

Types of Licenses

(1) The Department may issue the following types of licenses:

(a) Heating Oil Tank Soil Matrix Cleanup Services Provider;

(b) Heating Oil Tank Soil Matrix Cleanup Supervisor.

(2) A license will be issued to firms and individuals who meet the qualification requirements, submit an application and pay the required fee.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90

340-163-0030

Licensing ofRequirements for Heating Oil Tank Soil Matrix Cleanup Services Providers

(1) After September 1, 1990, firms providing Heating Oil Tank Soil Matrix Cleanup services may apply for Heating Oil Tank Soil Matrix Cleanup Services Provider license from the Department.

(21) Licensing shall be accomplished by:The Department will issue a license for heating oil tank services to firms who complete

(a) Completing and submit a license application provided byto the Department; that includes, but is not limited to, the following information: or

(b) Submitting the following information to the Department:

(Aa) The name of the firm or assumed business name as registered with the Oregon Corporation Division, and address and telephone number of the firm;

(b) The names and addresses of all principals of the firm;

(B) The nature of the services to be offered;

(c) A summary of the recent project history of the firm (the two year period immediately preceding the application) including the number of projects completed by the firm;

(Dc) Identifying tThe names and supervisor license numbers and expiration dates of all employees or principals responsible for on-site project supervision; and

(d) Proof of insurance as required by OAR 340-163-0050(3);

(e) Current Construction Contractors Board registration number;

(f) General information about any underground storage tank work (regulated or heating oil) performed in Oregon or any other state(s) within the previous year as applicable; and

(Eg) Remitting tThe required license fee.

(32) The Department will review the application for completeness. If the application is incomplete, the Department shallwill notify the applicant by telephone or in writing of the deficiencies.

(4) The Department shall deny, in writing, a license to a Heating Oil Tank Soil Matrix Cleanup Services Provider who has not satisfied the license application requirements.

(53) Upon approval, tThe Department shallwill issue a license to the applicant after the application is approved. that is valid for twelve (12) months from the date of issue.

(6) The Department shall grant a license for a period of twenty-four (24) months.

(74) Renewals:

(a) License renewals must be applied for and will be issued in the same manner as is required for an initial license.; except:

(ba) The complete renewal application shallmust be submitted to the Department no later than 30 days prior to the license expiration date.;

(b) The application must include a list of all heating oil tank site assessments and certified decommissioning and cleanup projects worked on during the previous twelve (12) month period. The list must include, but is not limited to, the name of the property owner, address of the property, date(s) the services were performed, and the type of services performed (i.e. site assessment, decommissioning, cleanup).

(c) The renewal license period will be for twelve (12) months from the expiration date of the previous license issued. If the current license lapses for any reason, the service provider may not perform or offer to perform heating oil tank services during any time between the expiration date and issuance of the renewal license.

(5) If a firm changes its business name, but there are no changes in the corporate structure (i.e. all principals remain the same), a request for a business name change and re-issuance of the service provider license must be made in writing and be accompanied by the required fee for name changes. A copy of the certificate of insurance with the new corporate name must be included. The license period will remain the same as issued to the previous business name.

(6) If the Construction Contractors Board requires that a firm re-register as a new entity, the service provider license issued by the Department will become invalid and the firm must reapply as a new applicant.

(8) The Department may suspend or revoke a license if the tank services provider:

(a) Fraudulently obtains or attempts to obtain a license;

(b) Fails at any time to satisfy the requirements for a license or comply with the rules adopted by the Commission;

(c) Fails to meet any applicable state or federal standard relating to the service performed under the license;

(d) Fails to employ and designate a licensed supervisor for each project.

(9) A Heating Oil Tank Soil Matrix Cleanup Services Provider who has a license suspended or revoked may reapply for a license after demonstrating to the Department that the cause of the revocation has been resolved.

(10) In the event a Heating Oil Tank Soil Matrix Cleanup Services provider no longer employs a licensed supervisor the services provider must stop work on any heating oil soil matrix cleanup. Work shall not start until a licensed Heating Oil Tank Soil Matrix Cleanup Supervisor is again employed by the provider and written notice of the hiring of a licensed Heating Oil Tank Soil Matrix Supervisor is received by the Department.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706 & 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90

340-163-0035

Licensing and Examination Requirements for Heating Oil Tank Soil Matrix Cleanup Supervisors Examination and Licensing

(1) To obtain a license from the Department to supervise heating oil tank soil matrix cleanup services from a heating oil tank, aAn individual must take and pass a qualifying examination approved by the Department to be eligible to apply for a license to supervise heating oil tank services when employed by a licensed heating oil tank service provider. The Department may use examinations administered by a nationally recognized underground storage tank examination firm or organization.

(2) If no national examination system is available or if an Oregon-specific testing method is determined necessary by the Department, the Department may develop an examination process that may include field tests in addition to or in lieu of a written examination, that is specific to heating oil tank services, is administered by the Department, and that includes reimbursement of an amount sufficient to cover the costs of administering the examination.

(3) The Department will issue a license for heating oil tank site assessment, decommissioning and cleanup activities to individuals who complete and submit a license

application to the Department that includes, but is not limited to, the following information:

(a) Name and address of the individual;

(b) Name, address and license number of the service provider that the individual is employed by or is regularly associated with;

(c) Original or clearly legible copy of documentation that the applicant has successfully passed the appropriate supervisor examination; and

(d) The required fee.

(2) Applications for Heating Oil Tank Soil Matrix Supervisor Licenses — General Requirements:

(a4) Applications must be submitted to the Department within 30 days of passing the qualifying examination;.

(5) The Department will review the application for completeness. If the application is incomplete, the applicant will be notified of deficiencies by telephone or in writing.

(6) After the application is approved, the Department will issue a supervisor license to the applicant that is valid for twenty-four (24) months from the date of issue. The license is in the form of an identification card that includes the name of the individual, license number and expiration date.

(b) Application shall be submitted on forms provided by the Department and shall be accompanied by the appropriate fee;

(c) The application to be a Licensed Heating Oil Tank Soil Matrix Supervisor shall include:

(A) Documentation that the applicant has successfully passed the heating oil tank soil matrix Supervisor examination;

(B) Any additional information that the Department may require.

(3) A license is valid for a period of 24 months after the date of issue.

(47) License renewals must be applied for and will be issued in the same manner as the application for the original license, including re-examination., except:

(a) The renewal license period will be for twenty-four (24) months from the expiration date of the previous license issued. If the current license lapses for any reason, the individual may not perform or offer to perform heating oil tank supervisory services during any time between the expiration date and issuance of the renewal license.

(8) Until July 1, 2000, or a later date determined by the Department, applicants for a heating oil tank supervisor license may use the Oregon Soil Matrix Cleanup examination to meet the requirements of OAR 340-163-0035(1). After that date, the Department will designate a heating-oil-specific examination as the qualifying examination. The Department may make a determination that more than one examination or license category is necessary.

(5) Suspension or Revocation:

(a) The Department may suspend or revoke a Heating Oil Tank Soil Matrix Supervisor's license for failure to comply with any state or federal rule or regulation pertaining to the cleanup of soil contamination from a heating oil tank;

(b) If a Heating Oil Tank Soil Matrix Cleanup Supervisor's license is revoked, an individual may not apply for another supervisor license prior to 90 days after the revocation date.

(6) Upon issuance of a Heating Oil Tank Soil Matrix Cleanup Supervisor's license, the Department shall issue an identification card to all successful applicants which shows the license number and license expiration date.

(7) The Supervisor's license identification card shall be available for inspection at each site.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706 & 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90

Examination Schedule

(1) At least once prior to November 1, 1990, and twice every year thereafter, the Department shall offer a qualifying examination for any person who wishes to became licensed to supervise soil matrix cleanups from heating oil tanks.

(2) Not less than 30 days prior to offering an examination the Department shall prepare and make available to interested persons, a study guide which may include sample examination questions.

(3) The Department shall develop and administer the qualifying examinations in a manner consistent with the objectives of this section.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90

340-163-0050
Service Provider Insurance Requirements

(1) Any firm applying for a service provider license to perform heating oil tank services must first obtain insurance coverage for errors-and-omissions or professional liability that will be used to pay for any additional corrective action necessary as a result of improper or inadequate site assessment, decommissioning or cleanup work. General liability insurance or pollution liability insurance are not acceptable substitutes for the insurance requirements.

(2) Insurance must be obtained in the amount of $500,000 per claim or per occurrence, with a total aggregate of $1,000,000, from an insurance company authorized to do business in Oregon. Coverage must remain continuous during the license period and until one (1) year after a firm has ceased to perform heating oil tank services in Oregon.

(3) Proof of insurance in the form of a standard insurance policy certificate must be provided to the Department at time of license application and renewal. The certificate of insurance must include the following:

(a) The name of the insurance company, policy number, effective dates of coverage, coverage amounts, deductible amount, name of all insured entities, agent's name, address and telephone number; and

(b) A 30-day cancellation clause that provides notice to the Department if the insurance is cancelled. Notices must be sent to: Department of Environmental Quality, Underground Storage Tank Program, 811 S.W. Sixth Avenue, Portland, Oregon, 97204.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706
Hist.: New

340-163-0060

Certification of Work Performed

(1) A licensed service provider must certify to the Department that heating oil tank services have been performed in compliance with applicable regulations for each decommissioning or cleanup report submitted to the Department. Categories for certification are:

(a) Voluntary Decommissioning;

(b) Soil Matrix Cleanup;

(c) Heating Oil Tank Generic Remedy Cleanup; and

(d) Risk-Based Cleanup with a Corrective Action Plan.

(2) Each individual decommissioning or cleanup certification must contain the following elements:

(a) Statement of compliance that includes the following declaration by the business owner or senior corporate officer for the service provider: "Based on information and belief formed after reasonable inquiry, the heating oil tank services performed under this certification were conducted in compliance with all applicable federal, state and local laws.";

(b) Affirmation of insurance coverage as required by OAR 340-163-0050;

(c) Signature of service provider business owner or senior corporate officer;

(d) Technical report required by OAR 340-122-0205 to 340-122-0360 or OAR Chapter 340, Division 177 as appropriate, signed by the licensed supervisor responsible for the on-site supervision of the project;

(e) A list of technical standards and regulations covered by the certificate provided for the specific category, on a checklist provided by the Department; and

(f) The cost of each certified project, for the purpose of collecting general information by certification category. The service provider must provide information on a separate form provided by the Department, that includes the certification category, description of the complexity of the project, date the project was completed, name of the county the project is located in, and the project cost.

(3) Project certifications must be included with reports submitted by the tank owner, or service provider on owner's behalf, and accompanied by the required registration fee in accordance with OAR 340-177-0095.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995

Stats. Implemented: ORS 466.706

Hist.: New

340-163-0070

Department Review of Certified Reports

(1) The Department may review and verify the accuracy of certified decommissioning and cleanup reports using a variety of standard compliance verification methods, including, but not limited to:

(a) Review of certified reports submitted for Department approval;

(b) Field inspection of heating oil tank services at tank sites; and

(c) Inspection of records, equipment, or materials held or temporarily stored at the service provider's place of business or storage facility.

(2) The Department will document the result of any report review conducted in writing, which includes a brief summary of the report review or inspection results. This information will be provided to both the tank owner and the certifying service provider.

(3) Any enforcement actions taken as a result of a report review will be conducted in accordance with the applicable requirements of OAR Chapter 340, Division 12.

(4) The Department may reject any decommissioning or cleanup report that has been certified as in compliance with all applicable regulations by a service provider if, but not limited to, any of the following conditions exist:

(a) There is a lack of information or data included with the certified report to support the finding of compliance;

(b) The Department determines that the compliance determination is not accurate based on the information submitted;

(c) Some or all of the supporting documentation does not accurately reflect conditions at the tank site;

(d) Information obtained during a site inspection by the Department may impact the validity of the certification results; or

(e) There is a violation of applicable regulations that has or potentially could impact the validity of the certification results.

(5) For any rejected certified report, the Department may require the service provider or their insurance policy to take specific corrective action(s) that may include additional work at the tank site, including, but not limited to, additional sampling and analysis, contaminated soil removal, or removal of the heating oil tank. Completion of any required additional work must be coordinated with the property owner.

(6) For purposes of determining report certification accuracy, any employee or authorized representative of the Department may enter the tank site or service provider facility at any reasonable time to interview persons, inspect equipment and site conditions, collect samples, take still or video pictures, conduct an investigation, or review and copy records.

(7) To assist the Department in scheduling inspections, service providers must provide information regarding specific projects in progress on any specific day or days upon request by the Department.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706
Hist.: New

340-163-0110
License Denial, Suspension, Revocation

(1) The Department may deny issuance of, suspend or revoke a license for fraud or deceit if the service provider or supervisor:

(a) Fraudulently obtains or attempts to obtain a license; or

(b) Knowingly signs required forms containing false information.

(2) The Department may also deny issuance of, suspend or revoke a license if the service provider or supervisor fails to comply with any applicable local, state or federal regulations pertaining to the performance of heating oil tank services or demonstrates negligence or incompetence, including but not limited to situations where the service provider or supervisor:

(a) Fails to employ and designate a licensed supervisor for each project;

(b) Fails to maintain required insurance;

(c) Fails to maintain appropriate registration with the Oregon Construction Contractors Board;

(d) Fails to resolve heating oil tank compliance related violations in accordance with an enforcement schedule or order issued by the Department;

(e) Fails to make corrections specified by the Department as the result of the Department's rejection of a decommissioning or cleanup report certified by the service provider;

(f) Fails to correct deficiencies noted by the Department for an incomplete license application;

(g) Fails to maintain a current address with the Department; or

(h) Fails at any time to satisfy the requirements for a license.

(3) A service provider or supervisor who has an application denied or license suspended or revoked may reapply for a license after demonstrating to the Department that the cause of the denial, suspension, or revocation has been resolved.

(4) Procedures for license denial, suspension, and revocation will be conducted in accordance with the appropriate provisions of ORS 183.310 to 183.550 and OAR Chapter 340, Division 12.

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995
Stats. Implemented: ORS 466.706 & 466.750
Hist.: new

340-163-0150
Fees

(1) Fees shall be assessed to provide revenues to operate the heating oil tank soil matrix cleanup services licensing program. Fees are assessed for the following:

(a) Heating Oil Tank Soil Matrix Cleanup Service Provider;

(b) Heating Oil Tank Soil Matrix Cleanup Supervisors Examination;

(c) Heating Oil Tank Soil Matrix Cleanup Supervisors License;

(d) Heating Oil Tank Soil Matrix Examination Study Guides.

(21) Heating oil tank soil matrix cleanup service providers shallmust pay a non-refundable license application fee of $100750 for a twenty-four (24)twelve (12) month license.

(3) Individuals taking the Heating Oil Tank Soil Matrix Cleanup Supervisor licensing examination shall pay a non-refundable examination fee of $25.

(42) Individuals seeking to obtain a Heating Ooil Ttank Soil Matrix Cleanup Ssupervisor's license shallmust pay a non-refundable license application fee of $25150 for a two yeartwenty-four (24) month license.

(3) Supervisors taking qualifying examinations administered by the Department must pay an examination fee equal to the cost of administering the examination.

(54) Examination study guides shallwill be made available to the public for the cost of production. Copyrighted reference materials, which may have separate costs charged by the specific organization, are not included with study guides.

(65) Replacement licenses, including name change requests, will be provided by the Department for a fee of $10.

Stat. Auth.: ORS 465.200 - ORS 465.320 & ORS 466.706 - ORS 466.995
Stats. Implemented: ORS 466.706 & 466.750
Hist.: DEQ 28-1990, f. & cert. ef. 7-6-90; DEQ 15-1991, f. & cert. ef. 8-14-91

DIVISION 177

~~RESIDENTIAL~~ HEATING OIL UNDERGROUND STORAGE TANKS

340-177-0001

Purpose and Scope

~~340-177-0001~~ (1) This Division specifies requirements for the ~~remediation~~cleanup of releases of petroleum from underground ~~residential~~ heating oil tanks, technical standards ~~and~~ for the ~~disbursement of grants to property owners (homeowners) who~~ voluntar~~ily~~ decommissioning of~~an unused~~ underground ~~residential~~ heating oil tanks, and requirements for submittal of technical reports that have been certified by licensed service providers.

Stat. Auth.: ORS 465.200 - 465.320, 466.706 and ORS 466.850 - 466.870
Stats. Impl: ORS 465.400, 465.405, 466.706, 466.855 and 466.870
Hist.: DEQ 25-1998, f. & cert. ef. 11-2-98; DEQ 29-1998, f. & cert. ef. 12-22-98

340-177-0005

Definitions

As used in this Division, the following definitions apply:

(1) "Above-Ground Release" means any release to the land surface or to surface water from the above-ground portion of a residential heating oil tank system and releases associated with overfills and transfer operations during heating oil deliveries to or dispensing from a residential heating oil tank system.

(2) "Below-Ground Release" means any release to the land subsurface having concentrations detected by the Northwest Total Petroleum Hydrocarbon Identification Analytical Method (NWTPH-HCID, DEQ, December 1996), or analytical results of 50 mg/kg or greater for Diesel/Lube Oil Range Hydrocarbons by Method NWTPH-Dx (DEQ, December, 1996), or any release to groundwater having concentrations detected by any appropriate analytical method specified in OAR 340-122-0218. This includes but is not limited to releases from the below-ground portion of a residential heating oil tank and releases to the land subsurface or groundwater associated with overfills and transfer operations as the heating oil is delivered to or dispensed from a residential heating oil tank system.

(3) "Confirmed Release" means petroleum contamination observed in soil or groundwater as a sheen, stain, or petroleum odor, or petroleum contamination detected in soil by the Northwest Total Petroleum Hydrocarbon Identification Analytical Method (NWTPH-HCID, DEQ, December 1996), or analytical results of 50 mg/kg or greater for Diesel/Lube Oil Range Hydrocarbons by Method NWTPH-Dx (DEQ, December, 1996), or detected in groundwater having concentrations detected by any appropriate analytical method specified in OAR 340-122-0218.

(4) "Corrective Action" has the same meaning as given in ORS 466.706.

(45) "Decommissioning" ~~or "Removal"~~ means to remove an underground storage tank from operation by an approved method specified in OAR 340-177-0025, such as abandonment in place (e.g. cleaning and filling with an inert material) or by removal from the ground.

(~~5~~6) "Department" means the Oregon Department of Environmental Quality.

(~~6~~7) "Excavation Zone" means an area containing a ~~residential~~ heating oil tank system and backfill material bounded by the ground surface, walls, and floor of the pit and trenches into which the ~~residential~~ heating oil tank system is placed at the time of installation.

(~~7~~8) "Free Product" means petroleum in the non-aqueous phase (e.g., liquid not dissolved in water).

(9) "Groundwater" means any water, except capillary moisture, beneath the land surface or beneath the bed of any stream, lake, reservoir, or other body of surface water within the boundaries of the state, whatever may be the geological formation or structure in which such water stands, flows, percolates or otherwise moves.

(~~8~~10) "Heating Oil" means petroleum that is No. 1, No. 2, No. 4-Heavy, No. 5-Light, No. 5-Heavy, or No. 6-Technical grades of fuel oil; other residual fuel oils (including Navy Special Fuel Oil and Bunker C); or other fuels when used as substitutes for one of these fuel oils.

(~~9~~11) "Heating Oil Tank" means any one or combination of underground tanks and above-ground or underground pipes connected to the tank, which is used to contain heating oil used for space heating a building with human habitation, or water heating not used for commercial processing.

(12) "Heating Oil Tank Services" means the decommissioning of a heating oil tank or the performance of corrective action necessary as a result of a release of oil from an underground heating oil tank.

~~(10) "Household Income" means the combined total gross annual income of all persons shown in the county deed records as owners of the property where a residential heating oil tank has been or will be decommissioned. The annual period is for the most recent tax year that complete tax forms are available, in reference to both the date of tank decommissioning and date of grant application.~~

(1~~1~~3) "Petroleum" means gasoline, crude oil, fuel oil, diesel oil, lubricating oil, oil sludge, oil refuse, and crude oil fractions and refined petroleum fractions, including gasoline, kerosene, heating oils, diesel fuels, and any other petroleum-related product or waste or fraction thereof that is liquid at a temperature of 60 degrees Fahrenheit and a pressure of 14.7 pounds per square inch absolute. "Petroleum" does not include any substance identified as a hazardous waste under 40 CFR Part 261.

(1~~2~~4) "Remediation" or "Remedial Measures" means "Remedial Action" as defined in ORS 465.200(22) and "Removal" as defined by ORS 465.200(24)~~.~~, and is used synonymously with the term "cleanup" in this Division.

~~(13) "Residential Heating Oil Tank" is a heating oil tank located on property used primarily for single family dwelling purposes.~~

(14~~5~~) "Responsible Person" means "owner or operator" as defined in ORS 465.200(19) and any other person liable for or voluntarily undertaking remediation under ORS 465.200, and is used synonymously with the term "tank owner" in this Division.

(1~~5~~6) "Service Provider" is a ~~means an individual or~~ firm licensed ~~by the Department~~ to offer and perform ~~Matrix Cleanup~~heating oil tank services on underground heating oil tanks in Oregon ~~who is hired by a person responsible for a residential heating oil tank to provide such services~~.

(17) "Supervisor" means a licensed individual who is charged with the responsibility for directing and overseeing the performance of heating oil tank services at a tank site.

Stat. Auth.: ORS 465.200 - 465.420, ORS 466.706 and ORS 466.850 - 466.870
Stats. Implemented: ORS 465.200, 465.400, 466.706, 466.855 and 466.870
Hist.: DEQ 25-1998, f. & cert. ef. 11-2-98; DEQ 29-1998, f. & cert. ef. 12-22-98

340-177-0025
Decommissioning Standards and Reporting Requirements

(1) Any responsible person for property where a heating oil tank is located who voluntarily decommissions the tank, or a licensed service provider contracted to perform the work, must conduct the work in accordance with the standards set forth in this section and insure that appropriate safety precautions are maintained at all times.

(2) The decommissioning must be conducted using a national code of practice, such as, "Removal and Disposal of Used Underground Petroleum Storage Tanks", American Petroleum Institute (API) 1604, (March, 1996) or Uniform Fire Code Article 79. The specific procedures used must be stated in required reports. The following actions must be taken in all cases:

(a) The tank and associated piping must be cleaned as thoroughly as possible to the maximum extent practicable of all product, sludge and/or water rinsate. This material must be recycled or disposed of in accordance with all local, state, and federal requirements;

(b) The cleaned, empty tank must be: removed from the ground and disposed or recycled appropriately, or the tank must be completely filled in-place with a non-reactive (i.e. inert) solid material that is compacted in the tank and that is appropriate for individual site conditions; and

(c) A site assessment must be conducted to determine if a release has occurred using the following procedures:

(A) If the tank is removed during decommissioning: collect two soil samples, one from each end of the excavation. Each sample must be collected at least six inches in native soil below the bottom of the excavation, but no more than one foot below the bottom of the former heating oil tank.

(B) If the tank is decommissioned in-place: collect two soil samples, one from each end of the tank, no more than six inches from the end of the tank. Each sample must be collected at least one foot, but no more than two feet, below the bottom of the tank.

(C) If there are obvious areas of contamination based on visual observations or odors, samples must be collected from these areas of worst contamination, in addition to (A) or (B) of this subsection.

(d) Soil samples must be collected in accordance with OAR 340-122-0340 and 340-122-0345 and analyzed for Diesel/Lube Oil Range Hydrocarbons by Method NWTPH-Dx (DEQ, December, 1996) in accordance with OAR 340-122-0218.

(e) If groundwater is encountered during soil boring or in the tank excavation, a water sample must be collected. The sample must be collected in accordance with OAR 340-122-0340 and 340-122-0345 and analyzed for benzene, toluene, ethylbenzene, and total xylenes (BTEX) and polynuclear aromatic hydrocarbons (PAHs) in accordance with OAR 340-122-0340(4)(B) and (C).

(f) If contamination is detected that exceeds confirmed release levels as defined in OAR 340-177-0005(3), the decommissioning is now considered to be a cleanup project

instead of a decommissioning project. OAR 340-177-0055 outlines reporting and cleanup project requirements.

(3) A report documenting the actions taken must accompany any certified decommissioning report and request for Department approval in accordance with OAR 340-177-0095. The report must contain the following information:

(a) Name of property owner and address of property;

(b) Name of the licensed service provider responsible for the project, including license number and expiration date;

(c) Name, date and signature of the person preparing the report;

(d) Information about the decommissioned tank, including approximate tank size, amount of product/sludge removed from the tank, reference name of the national code of practice procedure followed during decommissioning, and the amount and type of fill material used if tank was decommissioned in-place;

(e) A site map, drawn approximately to scale, showing the location of all buildings on the property and on adjacent properties, and location of the heating oil tank;

(f) A sketch of the site that clearly shows all of the sample locations and depths and identifies each location with a unique sample identification code;

(g) Copies of chain-of-custody forms for all soil and water samples collected, which forms include, but are not limited to: the date, time and location of the sample collection; a unique sample identification number; the name of the person collecting the sample; any unusual or unexpected problems encountered during the sample collection which may have affected the sample integrity;

(h) Copies of all laboratory data reports;

(i) Copies of all receipts or permits related to the disposal of free product, contaminated rinsate water, or decommissioned tanks and piping;

(j) A summary table of the concentrations measured for all samples;

(k) In cases where groundwater was present in the tank excavation zone, a summary of the data collected; and

(l) Any other relevant information that adds clarity to the specifics of the individual decommissioning project, such as photographs taken during tank cleaning, removal, and sample collection activities.

Stat. Auth.: ORS 466.706
Stats. Implemented: ORS 466.706
Hist.: New

~~**340-177-0050**~~

~~**Decommissioning Grants, General Conditions**~~

~~(1) Any person owning property where a residential heating oil tank is located may be eligible for a heating oil tank decommissioning grant pursuant to OAR 340-177-0060 upon meeting the provisions of OAR 340-177-0070.~~

~~(2) The heating oil tank decommissioning work must have been performed after October 4, 1997.~~

~~(3) Any person awarded a grant for a residential heating oil tank that was decommissioned by filling in place must record a deed notice of the presence of the tank in the property deed in the county of record. Documentation of the recording must be submitted to the Department, in accordance with county requirements or on a form provided by the Department, before actual grant disbursement.~~

~~Stat. Auth.: ORS 466.850 - 466.870~~
~~Stats. Implemented: ORS 466.870~~
~~Hist.: DEQ 29-1998, f. & cert.ef. 12-22-98~~

~~340-177-0060~~
~~Decommissioning Grants, Grant Amounts~~

~~(1) Subject to subsections 2 and 3 of this section, the Department will award heating oil tank decommissioning grants in the following amounts:~~
~~(a) for annual household income less than $35,000 the grant amount is $750;~~
~~(b) for annual household income between $35,000 and $75,000 the grant amount is $500; and~~
~~(c) for annual household income more than $75,000 the grant amount is $250.~~
~~(2) Subject to subsection 3 of this section, the Department will award decommissioning grants on a first come, first served basis, within a reasonable time for application approval and check issuance, dependent upon receipt of a complete application pursuant to OAR 340-177-0070 and according to the following priority:~~
~~(a) Until March 1, 1999 to low income (less than $35,000 annually) qualifying property owners who were non-funded Oil Heat Commission claimants;~~
~~(b) From March 1, 1999 to June 30, 1999 to any low income (less than $35,000 annually) qualifying property owners;~~
~~(c) From July 1, 1999 to September 30, 1999 to any qualifying property owners who were non-funded Oil Heat Commission claimants; and~~
~~(d) After October 1, 1999 to any qualifying property owners.~~
~~(3) The Department is obligated to pay grants only to the extent that it has received moneys and spending authority for heating oil tank decommissioning grants. Neither the Department nor the State of Oregon may incur any obligation or liability to pay heating oil tank decommissioning grants beyond moneys specifically allocated and authorized by the Legislative Assembly or Emergency Board for this express purpose.~~
~~(4) The Department may waive the priority schedule in subsection 2 of this section if sufficient funds are available to award grants in proportion to the number of actual or projected applications.~~
~~(5) The Department may pre-approve applicants for basic eligibility requirements if sufficient funds are available to make this provision feasible.~~
~~(a) Pre-approved status expires 60 days after date of issuance by the Department.~~
~~(6) The Department will promptly notify grant applicants of any additional information needed to process their application. The Department will notify applicants in writing if the provisions of OAR 340-177-0070 are not met or if there are other conditions impacting application status (e.g. ineligible, on hold pending additional information, etc.).~~
~~Stat. Auth.: ORS 466.850 - 466.870~~
~~Stats. Implemented: ORS 466.855 and 466.870~~
~~Hist.: DEQ 29-1998, f. & cert.ef. 12-22-98~~

~~340-177-0070~~
~~Decommissioning Grants, Eligibility Requirements and Conditions~~

(1) To receive a heating oil tank decommissioning grant, eligible property owners may submit an application on a form provided by the Department. Each applicant must provide the following information, unless otherwise directed by the Department:

(a) The name, mailing address and phone number of the owner (s) of the household;

(b) Social security number and full name of the grant applicant to whom a check will be
issued;

(c) To receive priority consideration pursuant to OAR 340-177-0060(2)(a) or (c), the Oil Heat Commission claim number must be provided, and this number must correspond to any lists of non-funded claims provided by the Oil Heat Commission to the Department;

(d) Evidence of annual household income as defined by OAR 340-177-0005 (10) by providing either:

(A) A copy of the Federal Income Tax Return(s) (page 1 and 2 of Form 1040 or equivalent without attachments) that shows the total household income for all owners of the property where the residential heating oil tank was/is located, or

(B) For a property owner not required to file a Federal Income Tax Return, a signed statement of that owner's total annual household income;

(e) A copy of a decommissioning report that meets the provisions of OAR 340-177-0080 that includes documentation that decommissioning work was performed after October 4, 1997; and

(f) If the heating oil tank was decommissioned in place, a copy of the recorded deed notice in accordance with OAR 340-177-0050 (3).

Stat. Auth.: ORS 466.850 - 466.870

Stats. Implemented: ORS 466.870

Hist.: DEQ 29-1998, f. & cert.ef. 12-22-98

340-177-0080

Decommissioning Grant Reports, Conditions and Requirements

(1) Except as otherwise provided in subsections (2) and (3) of this section, to be eligible for a heating oil tank decommissioning grant, an applicant must submit a decommissioning report, either as a narrative report or on a form provided by the Department that includes the following:

(a) A statement that the work was performed by the tank owner or the name and license number of the Service Provider and Supervisor that performed the work;

(b) Copies of disposal receipts for any heating oil, sludge or other liquids or solids that were removed from inside the tank;

(c) If the tank was removed from the site, copies of disposal receipts for the heating oil tank, or if the tank was filled in place, a description of the material that was used to fill the tank;

(d) Results of a site assessment to determine the presence or absence of soil or groundwater contamination. The site assessment must include, at a minimum:

(A) Two soil samples, one collected from each end of the tank, unless otherwise approved by the Department. Each sample must be at least at the depth of the bottom of the tank, but no more than two feet below the bottom of the tank. If there are obvious areas of contamination based on visual observations or odors, samples must be collected

~~from these areas of contamination. The samples must be collected in accordance with OAR 340-122-0340 and 340-122-0345 and analyzed for Diesel/Lube Oil Range Hydrocarbons by Method NWTPH-Dx (DEQ, December, 1996) in accordance with OAR 340-122-0218, and~~

~~(B) If groundwater is encountered in the soil borings or the tank excavation, a water sample must be collected. The sample must be collected in accordance with OAR 340-122-0340 and 340-122-0345 and analyzed for BTEX and PAHs in accordance with OAR 340-122-0218; and~~

~~(c) If levels of contamination exceed confirmed release levels as defined in OAR 340-177-0005 (3), documentation that a release report was filed with the Department pursuant to OAR 340-177-0110 (1) (c).~~

~~(2) If a confirmed release has occurred, the remediation report required by OAR 340-177-0110 (5) may be substituted in lieu of OAR 340-177-0080 (1).~~

~~(3) The Department may waive one or more of the provisions of subsection (1) of this section for decommissioning work completed between October 4, 1997 and the effective date of these rules or as otherwise determined appropriate by the Department.~~
~~Stat. Auth.: ORS 466.850 - 466.870~~
~~Stats. Implemented: ORS 466.870~~
~~Hist.: DEQ 29-1998, f. & cert. ef. 12-22-98~~

340-177-~~0110~~0055
~~Remediation~~Cleanup and Reporting Requirements

(1) Within 72 hours after a confirmed release of petroleum from an underground ~~residential~~ heating oil tank is identified, the ~~responsible person~~ licensed service provider or supervisor must report the release to the Department by telephone or in writing, in accordance with OAR 340-163-0020(4). The Department will assign a "site identification" or "log" number for each release, which will serve as confirmation of reporting. If work on the tank is being performed by the tank owner, the tank owner is responsible for the required notification to the Department.

(2) The responsible person must take the following initial abatement actions for any release which has or may result in a sheen on surface water or groundwater, any below-ground release, any above-ground release in excess of 25 gallons, or any above-ground release of less than 25 gallons if the responsible person is unable to contain or clean up the release within 24 hours:

(a) Take immediate action to prevent any further release of heating oil into the environment; and

(b) Identify and mitigate any fire or safety hazards posed by vapors or free product.; ~~and~~

~~(c) Report the release to the Department by telephone. The Department will issue a "site identification or log number" for each release, which will serve as confirmation of reporting.~~

(~~2~~3) If groundwater is encountered at any time during release identification or ~~remediation~~cleanup, or if any fire or safety hazards are posed by vapors or free product that has migrated from the excavation zone, the Department must be notified immediately. The Department may require that additional investigation or ~~remediation~~cleanup be conducted before proceeding further with the requirements of

OAR 340-177-0110~~55~~(3) and (4). Any free product observed must be removed in accordance with the requirements of OAR 340-122-0235;

(~~3~~4) The following actions must be taken for each release:

(a) Remove as much of the product as possible from the ~~residential~~ heating oil tank to prevent further release to the environment;

(b) Conduct a visual inspection of any above-ground release(s) or exposed below-ground release(s) and take actions necessary to prevent any further migration of the heating oil into surrounding soils and groundwater;

(c) Remedy any hazards posed by contaminated soils that are excavated or exposed as a result of release confirmation, site investigation, abatement, or ~~remediation~~cleanup. If ~~remediation~~cleanup includes treatment or disposal of contaminated soils, the responsible person and service provider must comply with all applicable state and local requirements. ~~Excavated contaminated soil shall be managed in accordance with solid waste regulations.~~Stock-piled contaminated soil must be placed on an impermeable material (e.g. visqueen) and covered and bermed to prevent run-off. Storage of contaminated soil longer than 30 days requires a solid waste letter of authorization permit from the Department and may be prohibited by local jurisdictions~~.~~; and

(d) Measure for the presence of a release where contamination is most likely to be found at the residential heating oil tank site. In selecting sample types, sample locations, and measurement methods, the responsible person or service provider must consider the nature of the stored substance, the type of back-fill material that is present, depth to groundwater, and other factors as appropriate for identifying the presence and source of the release.

(4~~5~~) Within forty-five days after the date a release from a ~~residential~~ heating oil tank is reported to the Department, the responsible person or service provider must submit a written initial ~~remediation~~cleanup report to the Department, if groundwater is encountered at any time during ~~remediation~~cleanup or during tank investigation, if any fire or safety hazards posed by vapors or free product have not yet been eliminated, or if ~~remediation~~cleanup at the site is not expected to begin until after forty-five days from the date the release is reported.

(a) The written report may be a narrative report or on a form provided by the Department, that adequately describes any and all actions taken in accordance with section (3) of this rule;

(b) The amount in gallons of heating oil removed and the name of the disposal or reuse location must be included in the report; and

(c) If ~~remediation~~cleanup has not been initiated within the first forty-five days after the release is discovered, a proposed schedule for ~~remediation~~cleanup of the release must be included in the report.

(~~5~~6) Within sixty days of completing ~~remediation~~cleanup at a ~~residential~~ heating oil tank release site or within another longer period of time approved by the Department, the responsible person or service provider must submit to the Department, as a narrative report or on a form provided by the Department, a final ~~remediation~~cleanup report, which includes, as a minimum, the following information:

(a) A narrative section describing how the release was discovered, what initial measures were taken to control the spread of contamination, what was observed when the tank was removed from the pit (odor, sheen, stained soils, holes in tank or lines, etc.),

how the ~~remediation~~cleanup was done, how much contaminated soil was removed, what was done with the contaminated soil and the decommissioned tank and piping, who collected the samples, how the samples were collected, stored, and shipped to the laboratory, and any problems encountered during the ~~remediation~~cleanup or sample collection process;

(b) A description of all actions taken under OAR 340-177-0~~110~~055(3), as a narrative report or on a form provided by the Department;

(c) A site map, drawn approximately to scale, showing the location of all buildings on the property and on adjacent properties, and location of the ~~residential~~ heating oil tank;

~~(d) Photographs taken at the time of residential heating oil tank decommissioning and remediation;~~

(~~e~~d) A sketch of the site that clearly shows all of the sample locations and depths and identifies each location with a unique sample identification code;

(~~f~~e) Copies of chain-of-custody forms for all soil and water samples collected, which forms include, but are not limited to: the date, time and location of the sample collection; a unique sample identification number; the name of the person collecting the sample; ~~how the sample was collected;~~ and any unusual or unexpected problems encountered during the sample collection which may have affected the sample integrity;

(~~g~~f) Copies of all laboratory data reports;

(~~h~~g) Copies of all receipts or permits related to the disposal of free product, contaminated soil, contaminated water, or decommissioned tanks and piping;

(~~i~~h) A summary of the concentrations measured in the final round of samples from each sampling location;

(~~j~~i) In cases where groundwater was present in the tank excavation zone, a summary of the data collected ~~and the decision made by the Department in accordance with OAR 340-122-0355(3)~~;

(~~k~~j) The type of ~~remediation~~cleanup option selected and implemented under OAR 340-177-0~~120~~065(1); and

(~~l~~k) Any other relevant information that adds clarity to the specifics of the individual ~~remediation~~cleanup project~~.~~, such as photographs taken during tank cleaning, removal, and sample collection activities.

(6) All written reports and correspondence required to be submitted to the Department must include the following information:

(a) Name of property owner and address of property;

(b) Site identification or log number assigned to the property by the Department;

(c) Name of the service provider~~(s)~~ working on the project, ~~if any,~~ including license number and expiration date; and

(d) Name and signature of the person preparing the report.

~~(7) Upon review of the final residential heating oil tank remediation report the Department will:~~

~~(a) Provide the responsible person a written statement that, based upon information contained in the report, remediation at the site has been completed in accordance with these rules; or~~

~~(b) Request the responsible person to submit additional information or perform further investigation; or~~

~~(c) Request the responsible person to select and implement a different type of remediation option to adequately protect human health, safety, welfare and the environment.~~

Stat. Auth.: ORS 465.200 - ORS 465.400
Stats. Implemented: ORS 465.260
Hist.: DEQ 25-1998, f. & cert. ef. 11-2-98

340-177-0~~120~~065
~~Remediation~~Cleanup Options and Technical Requirements

(1) Depending on the extent of contamination and other relevant factors, the responsible person must determine which type of ~~remediation~~cleanup option is best suited for the release, using the following:

(a) Soil Matrix, OAR 340-122-0320 through 340-122-0360;

(b) Risk-Based, OAR 340-122-0244 and Corrective Action Plan, 340-122-0250; or

(c) Generic Remedy, as approved by the Department pursuant to OAR 340-122-0252 and as applicable to residential heating oil tank releases.

(2) For the specific ~~remediation~~cleanup option selected, additional written report requirements may be required and must be included as specified by the applicable regulations.

(3) Public participation will be provided by the Department as required for the specific ~~remediation~~cleanup option selected in section (1) of this rule.

(4) Sampling and analysis must be conducted in accordance with OAR 340-122-0218, unless otherwise specified by the ~~remediation~~cleanup option selected in section (1) of this rule.

(5) All samples must be collected in accordance with OAR 340-122-0340 and 340-122-0345.

(6) Evaluation of analytical results must be conducted in accordance with OAR 340-122-0355.

Stat. Auth.: ORS 465.200 - ORS 465.420
Stats. Implemented: ORS 465.260 & ORS 465.400
Hist.: DEQ 25-1998, f. & cert. ef. 11-2-98

340-177-0095
Certified Reports

(1) The tank owner, or service provider on owner's behalf, must submit certified project reports and receive approval from the Department for heating oil tank services performed at underground heating oil tank sites. This applies to the following projects:

(a) Decommissioning projects where the tank owner voluntarily requests Department approval; and

(b) All underground heating oil tank cleanup projects.

(2) Service providers licensed in accordance with Chapter 340, Division 163 are eligible to submit certified reports.

(3) Certified reports submitted to the Department must be accompanied by the required $50 filing fee, which is non-refundable.

(4) Certified reports must contain specific information as set forth below:

(a) For a voluntary decommissioning performed after March 15, 2000:

(A) The decommissioning report as required by OAR 340-177-0025 and decommissioning certification as required by OAR 340-163-0060.

(b) For a voluntary decommissioning performed prior to March 15, 2000:

(A) If the work was performed by a service provider licensed to perform soil matrix cleanup or UST decommissioning at the time the service was provided and two soil samples were collected in general conformity with the requirements of OAR 340-177-0025, a report that meets the general requirements of OAR 340-177-0025(3) is sufficient;

(B) If no soil samples were collected, or if the sampling work was performed by an unlicensed contractor, a licensed service provider must conduct a site assessment that meets the requirements of OAR 340-177-0025(2)(c) and must include a report that meets the requirements OAR 340-177-0025(3).

(c) For all heating oil tank cleanup projects, the cleanup certification provided in accordance with OAR 340-163-0060 must be accompanied by the specific report required by either or both OAR 340-177-0055(4) and (5) and OAR 340-177-0065(2) based on the cleanup option selected for the site.

(4) Department approval will be provided in the form of a letter to the tank owner, with a copy to the certifying service provider, that indicates the certified report has been registered and Department files on the project have been closed.

Stat. Auth.: ORS 466.706

Stats. Implemented: ORS 466.706

Hist.: New

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Heating Oil Tank Technical and Licensing Rule Revisions

ATTACHMENT B.1
Legal Notice of Hearing

Secretary of State
NOTICE OF PROPOSED RULEMAKING HEARING
A Statement of Need and Fiscal Impact accompanies this form.

DEQ – Waste Management & Cleanup 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	

December 16, 1999 Hearing Date	2:00 pm Time	777 Pearl St. Eugene, McNutt Rm Location	Karen White-Fallon Hearings Officer
December 21, 1999 Hearing Date	7:00 pm Time	2020 SW 4th, Portland, 4th floor Location	Mitch Scheel Hearings Officer

Are auxiliary aids for persons with disabilities available upon advance request?
✓ Yes ☐ No

RULEMAKING ACTION

ADOPT:
Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

OAR 340-177-0025, -0095

OAR 340-163-0050, -0060, -0070, -0110

AMEND:

OAR 340-177-0001, -0005

OAR 340-163-0005, -0010, -0020, -0030, -0035, -0150

REPEAL:

OAR 340-177-0050, -0060, -0070, -0080

OAR 340-163-0025, -0040

RENUMBER:

Secure approval of rule numbers with the Aministrative Rules Unit prior to filing.

From OAR 340-177-0120 to -0065

AMEND AND RENUMBER:

Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

From OAR 340-177-0110 to -0055

Stat. Auth.: ORS 465.200 – 465.455 & ORS 466.706, 466.750
Stats. Implemented: ORS ORS 466.706

RULE SUMMARY

OAR Chapter 340, Division 177 – Deletes provisions for grants to homeowners who voluntarily decommission a heating oil tank, adds technical standards for decommissioning heating oil tanks, and adds requirement to have heating oil tank decommissioning and cleanup projects certified by licensed service providers submitted to DEQ for approval with $50 filing fee (decommissioning voluntary).

OAR Chapter 340, Division 163 – Adds requirement for service providers to certify heating oil tank decommissioning and cleanup projects performed in accordance with regulations instead of DEQ, adds requirement for service providers to obtain errors-and-omissions insurance, statutorily increases license fees from $100 every two years to $750 every year for companies and from $25 to $150 every two years for individuals.

January 3, 2000	Susan M. Greco, Rules Coordinator 11/15/99
Last Day for Public Comment	Authorized Signer and Date

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Heating Oil Tank Technical and Licensing Rule Revisions

ATTACHMENT B.2
Fiscal and Economic Impact Statement

Introduction

The rule changes are a result of new statutory requirements that were established by the 1999 Legislative Assembly that affect heating oil tank owners and service providers. The changes are expected to provide greater environmental and consumer protection when heating oil tank services are performed. The new requirements that will have some type of fiscal impact are:

- addition of soil sampling for decommissioning
- requirement for errors-and-omission insurance for service providers
- increased license fees for service providers and supervisors
- change from cost recovery paid by tank owners for cleanup projects to a report filing fee
- statutorily specified license fees and report filing fees instead of rule-specified fees

In addition to assumptions outlined in the interest-group sections of this statement, these rules are based on the following assumptions:

- 3000 heating oil tanks decommissioned per year
  - number derived from assumption that the number of leaking tanks, which is known, is 50% of the number of tanks decommissioned
- 1500 leaking heating oil tanks per year
  - based on approximately 1250 releases reported as of 10/30/99
- average cost of decommissioning a tank is $750 without collection and analysis of two soil samples
  - decommissioning cost varies depending on size of tank, whether tank is removed or left in place, difficulty in accessing the site, groundwater level, travel time to job site, etc. Soil sample costs can also vary for many reasons and the $250 figure is presented as a reasonable average for collection and analysis for Total Petroleum Hydrocarbons (TPH)
- average cost of decommissioning a tank with soil samples is $1,000
- average cost of soil-only heating oil tank cleanup is $4000 (includes decommissioning)

General Public

Owners of underground heating oil tanks will receive the following direct benefits as a result of these rule changes:

- Currently, if a homeowner wants DEQ to review a cleanup project, he or she pays a $500 deposit to DEQ, then receives a refund of any amount remaining. The average DEQ cost recovery for a soil-only heating oil cleanup is $250. Under the proposed rules, the service provider would certify that the cleanup meets regulatory requirements. The DEQ filing fee is $50. This is an average direct savings of $200 per cleanup project.

- Currently, if additional work is determined necessary during DEQ's review, the tank owner has to pay for the additional work. Under the proposed rules, the service provider, not the tank owner, would be liable for the cost of any additional work if DEQ rejected a project that the service provider had certified. The service provider would be covered by the new insurance required.

Heating oil tank owners are likely to be directly impacted by additional decommissioning costs for sample collection and analysis. It is still not mandatory to decommission a tank. However, if the work is performed, it must meet technical standards and be performed by a licensed service provider. Submitting the certified decommissioning report to DEQ with the $50 filing fee is also voluntary. DEQ previously *recommended* sampling at the time of decommissioning, but will now *require* sampling. There will be an average increase of approximately $250 in the cost of decommissioning a tank, because more tank owners will perform a complete decommissioning that includes sampling. This cost includes sampling, analysis, and the requirement to secure the site and return several days later after obtaining sample results (e.g. before a tank is decommissioned in-place). Some tank owners will have higher sampling costs due to site-specific conditions which make the sampling more difficult.

Heating oil tank owners may also be indirectly impacted by increased costs as the expenses of some service providers rise to cover insurance and license fees. Refer to section on "small business" for additional information.

It is difficult to calculate the environmental protection achieved by the early detection of releases that would not be cleaned up if sampling was not conducted or if the work was performed by an unlicensed contractor who may not have appropriate technical training and insurance coverage for their customers. The benefit to property buyers of the greater assurance that the tank did not leak is also difficult to estimate, but could be assumed to be the cost of a cleanup (if a release is discovered at some future date) if the previous property owner cannot be located and required to pay.

When all factors are combined, tank owners are most likely to have a net decrease in costs as compared to projects completed prior to these proposed changes. Because of variations in cost from site to site, decrease cannot be quantified beyond the estimates provided here.

Small Business

There are about 250 service providers licensed by DEQ to provide a variety of services on underground tanks. The majority of these companies are small businesses with less than 50 employees, however, there are no provisions in statute or rule requiring service providers to supply information on the size of their workforce. Currently, companies are only required to be licensed to perform soil cleanups at heating oil tank sites. Under the proposed rules (and statute), they must be licensed to perform either decommissioning or cleanup under one new license. It is estimated that approximately 60 service providers will be licensed to provide heating oil tank services. These companies will be directly impacted by increased operating costs in the following ways:

- Increase in license fee from $100 for two year license to $750 per year = $700 per year
- Increase in supervisor license fee from $25 to $150 every two years = $62.50 per year per employee
  - assumes company pays the license fee for their employees
- $2,500 per year in insurance costs for each $250,000 in gross sales (the cleanup and decommissioning costs charged to tank owners) = 1% of cost ($10 for decommissioning and $40 for cleanup)

The amount of additional costs for each company will differ depending on whether it already carries errors-and-omissions insurance (many do), and the number of heating oil tank jobs it performs over a year's time. Obviously, the more jobs performed will reduce the increased costs that a company faces -- which may be passed on to the consumer (tank owner).

The average fiscal impact of insurance costs for the industry as a whole can be estimated on a per-job basis using the following example:

- 1500 cleanups at $4,000 per job = $6,000,000 in gross sales
- 1500 decommissionings at $1,000 per job = $1,500,000 in gross sales
- $7,500,000 total gross sales / $250,000 x $2,500 = $75,000 total industry cost
- $75,000 divided by 3,000 jobs per year = $25 average cost per job

The average fiscal impact of increased insurance costs on a single company is $2,500 ($75,000 / 60 service providers). To put this amount in further perspective, a company with $500,000 gross sales would pay $5,000 per year for errors-and-omissions insurance. This amount is added to the current $115,000 paid each year for all other types of insurance (pollution liability, general liability, employee insurance coverage, etc.). The $5,000 in increased insurance is approximately 4% of the total cost of insurance for the company.

The benefit to a company with $250,000 gross sales per year (e.g. 90 decommissionings and 40 cleanups) in retaining this insurance may be paid back if there is only one claim of $2,500 made per year (less than 1% of the total jobs performed).

Standardizing insurance, licensing, and sampling requirements will level the playing field for companies that, because of voluntary insurance and sampling procedures, previously had a competitive disadvantage from increased operating costs. Tank owners benefit by this standardization in that they now can review bids based on type and quality of work instead of bid prices that may not have covered the same services.

Large Business

Some – the exact number is indeterminate - of the approximately 250 licensed service providers may be large business owners. The absolute fiscal impact would be the same as for a small business, but it may reasonably assumed that the large business will have higher revenues and costs, so the proportional impact on a large business will be less than the same absolute impact would have on a small business.

Local Governments

The program would affect local government entities owning heating oil tanks the same as it would impact the general public who own tanks. The fiscal impact depends on the number and size of the tanks - more or bigger tanks would mean higher costs.

State Agencies

Department of Environmental Quality, 1999-2001 biennium, is expected to show the following increases:

- 4.0 FTE's (permanent positions)
- $540,000 Revenue ($300,000 in general funds and $240,000 from license and filing fees)
- $540,000 Expenses

Other Agencies

- Not applicable

Assumptions

Assumptions are set forth in the introduction and each specific section discussed.

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

Heating Oil Tank Technical and Licensing Rule Revisions

ATTACHMENT B.3

Land Use Evaluation Statement

1. Explain the purpose of the proposed rules.

The purpose of the proposed rule changes are to implement provisions of House Bill 3107 passed by the 1999 Legislature.

The proposed rule changes would modify Oregon Administrative Rules (OAR) Chapter 340, Division 177 "Heating Oil Underground Storage Tanks" in the following ways:

- Adds technical standards for decommissioning heating oil tanks
- Requires heating oil tank cleanup projects to be certified by licensed service provider
- Retains voluntary decommissioning, but requires that a licensed service provider must certify the work and the work must meet technical standards, if tank owner wants DEQ to file and approve report
- Imposes $50 fee to have certified reports filed and approved by DEQ

The proposed rule changes would modify OAR Chapter 340, Division 163 "Licensing Requirements for Service Providers and Supervisors of Heating Oil Tank Services" in the following ways:

- Adds a requirement for heating oil tank service providers to carry errors-and-omissions insurance and be registered with Construction Contractors Board
- Requires service providers to certify that heating oil tank services for each project have been performed in accordance with rules
- Allows DEQ to audit work performed by service providers and reject certifications if necessary
- Increases license fees to $750 per year for companies and to $150 every two years for supervisors

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:**

   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.**

      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.

DEQ has evaluated the regulation of heating oil tanks through its State Agency Coordination Program and concluded that it is not a land use program or activity that significantly affects 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.

Signed by:

Laurie J. McCulloch	Roberta Young	11/10/1999
Underground Storage Tank Program Waste Management & Cleanup Division	Intergovernmental Coordinator	Date

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Heating Oil Tank Technical and Licensing Rule Revisions

Federal Requirements

ATTACHMENT B.4

Questions to be Answered to Reveal Potential Justification for Differing from Federal Requirements.

1. Are there federal requirements that are applicable to this situation? If so, exactly what are they?

No. There are no federal requirements for heating oil tank standards or licensing of service providers.

2. Are the applicable federal requirements performance based, technology based, or both with the most stringent controlling?

Not applicable.

3. Do the applicable federal requirements specifically address the issues that are of concern in Oregon? Was data or information that would reasonably reflect Oregon's concern and situation considered in the federal process that established the federal requirements?

Not applicable.

4. Will the proposed requirement improve the ability of the regulated community to comply in a more cost effective way by clarifying confusing or potentially conflicting requirements (within or cross-media), increasing certainty, or preventing or reducing the need for costly retrofit to meet more stringent requirements later?

Not applicable.

5. Is there a timing issue which might justify changing the time frame for implementation of federal requirements?

Not applicable.

6. Will the proposed requirement assist in establishing and maintaining a reasonable margin for accommodation of uncertainty and future growth?

If federal requirements are established for underground heating oil tanks in the future, the proposed requirements are expected to be consistent, as they were developed to be similar to federal requirements for regulated tanks.

7. Does the proposed requirement establish or maintain reasonable equity in the requirements for various sources? (level the playing field)

Standardizing insurance, licensing, and sampling requirements will level the playing field for companies that, because of voluntary insurance and sampling procedures, previously had a competitive disadvantage from increased operating costs. Moreover, these requirements will ensure that contractors will have appropriate technical training and insurance coverage for their customers. Tank owners benefit by this standardization in that they now can review bids based on type and quality of work instead of bid prices that may not have covered the same services. Tank owners will be able to determine if work performed is adequate.

8. Would others face increased costs if a more stringent rule is not enacted?

In real estate transactions, it is important to have consistent requirements for soil testing. The proposed rules will set standards that were previously only "recommended practices". Buyers of property where a heating oil tank was decommissioned without sampling could have to pay for a cleanup in the future if contamination is discovered after they have purchased the property. Current owners who have work performed that needs to be re-done due to sub-standard work would pay for it themselves without the new requirements for service provider insurance.

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.

10. Is demonstrated technology available to comply with the proposed requirement?

Yes. Decommissioning practices have been industry standards for many years.

11. Will the proposed requirement contribute to the prevention of pollution or address a potential problem and represent a more cost effective environmental gain?

The requirement to sample when decommissioning a heating oil tank means that pollution can be detected earlier. This can potentially reduce the cost of a cleanup that could spread to groundwater or off-site if not detected.

State of Oregon
Department of Environmental Quality **Memorandum**

Date: November 15, 1999

To: Interested and Affected Public

Subject: Rulemaking Proposal and Rulemaking Statements -
Heating Oil Tank Technical and Licensing Rule Revisions

This memorandum contains information on a proposal by the Department of Environmental Quality (DEQ) to adopt new rules and amend existing rules regarding heating oil tanks and licensing requirements for persons who perform heating oil tank services. 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 modify Oregon Administrative Rules (OAR) Chapter 340, Division 177 "Heating Oil Underground Storage Tanks" in the following ways:

- Deletes rule language for providing grants to homeowners for decommissioning a residential heating oil tank
- Adds technical standards for decommissioning heating oil tanks
- Requires heating oil tank cleanup projects to be certified by licensed service provider
- Retains voluntary decommissioning, but requires that a licensed service provider must certify the work, and the work must meet technical standards, if tank owner wants DEQ to file and approve report
- Imposes $50 fee to have certified reports filed and approved by DEQ

This proposal would modify OAR Chapter 340, Division 163 "Licensing Requirements for Service Providers and Supervisors of Heating Oil Tank Services" in the following ways:

- Adds requirement for heating oil tank service providers to carry errors-and-omissions insurance and be registered with Construction Contractors Board
- Requires service providers to certify that heating oil tank services for each project have been performed in accordance with rules
- Allows DEQ to audit work performed by service providers and reject certifications under certain circumstances
- Requires insurance to cover cost of additional work required for rejected certifications
- Increases license fees for companies from $100 every two years to $750 per year
- Increases license fees for individuals from $25 to $150 every two years

The Department has the statutory authority to address this issue under ORS 466.706. These rules implement ORS 466.706.

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.

Public Comment Period

You are invited to review these materials and present written comment on the proposed rule changes. Written comments must be presented to the Department by 5:00 p.m., January 3, 2000. Please forward all comments to Department of Environmental Quality, Attn: Laurie McCulloch, UST Program, 811 S.W. Sixth Avenue, Portland, Oregon, 97204, or hand deliver to the Department of Environmental Quality, 811 S.W. Sixth Avenue, 8th Floor reception desk between 8:00 a.m. and 5:00 p.m.

In accordance with ORS 183.335(13), no comments can be accepted after the close of the comment period. 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. Interested parties are encouraged to present their comments as early as possible prior to the close of the comment period to ensure adequate review and evaluation of the comments presented.

Public hearings have been scheduled as follows:

City	Date	Start Time	Meeting Location
Eugene	December 16	2:00 pm	City of Eugene, 777 Pearl St., McNutt Rm
Portland	December 21	7:00 pm	DEQ-NWR, 2020 SW 4th, 4th Floor

A brief informational presentation will made at the beginning of each hearing to give background information about rule changes.

What Happens After the Public Comment Period Closes

Following the close of the public comment period, the Department will prepare a report which summarizes the comments received. The Environmental Quality Commission (EQC) will receive a copy of this report.

The Department will review and evaluate the rulemaking proposal in light of all information received during the comment period. Following the review, the rules may be presented to the EQC as originally proposed or with modifications made in response to the public comments received.

The EQC will consider the Department's recommendation for rule adoption during one of their regularly scheduled public meetings. The targeted meeting date for consideration of this rulemaking proposal is February 11, 2000. This date may be delayed if needed to provide additional time for evaluation and response to the public comments received.

You will be notified of the time and place for final EQC action if you submit written comment during the comment period or ask to be notified of the proposed final action on this rulemaking proposal.

Background on Development of the Rulemaking Proposal

Why is there a need for the rule?

The 1999 Legislature passed two bills that required rule changes to implement. Senate Bill 542 abolished the Oil Heat Commission end ended the funding program for grants to homeowners who voluntarily decommissioned a heating oil tank.

House Bill 3107 specifies requirements for licensing of companies and individuals who provide heating oil tank services. This includes requirements for certification of work performed, and insurance to cover errors and omissions. Decommissioning standards must be established (previously only "recommended practices" were available). The bill requires DEQ to set standards for tank owners who voluntarily choose to decommission a tank. DEQ will file certified reports for a $50 fee. DEQ will audit (i.e. review reports and conduct inspections) the work of licensed service providers and supervisors.

How was the rule developed?

A work group comprised of representatives for service providers, homeowners, environmental law practitioners, realtors, banking, utilities, Oregon Petroleum Marketing Association, insurance, and local government (fire, building) was established. This group met four times in September and October, 1999 to provide input on rule concepts and to review draft rules. DEQ consulted with the Construction Contractors Board to ensure that these rules do not duplicate other insurance requirements and to provide consistency in licensing requirements where feasible.

House Bill 3107, and to a lesser degree Senate Bill 542, were the primary documents used to formulate rule sections and language. Copies of the documents relied upon in the development of this rulemaking proposal can be reviewed at the Department of Environmental Quality's office at 811 S.W. 6th Avenue, Portland, Oregon, 8th floor reception desk. The documents are available for review between 8:00 am and 5:00 pm Monday through Friday.

Whom does this rule affect including the public, regulated community and other agencies, and how does it affect these groups?

Heating oil tank owners – Tank owners receive added consumer protection through the requirement for licensed service providers to carry insurance. Tank decommissioning standards provide consistency in work performed and environmental protection through a site assessment for contamination. Service providers certify that the project was completed in compliance with the rules instead of DEQ. Tank owners can have decommissioning projects certified and filed with DEQ, when previously only cleanup projects could be approved. The $50 filing fee is less than the average $250 cost recovery amount needed for DEQ to review and approve projects.

Companies and individuals – Companies have added requirement for insurance, although many licensed service providers already carry errors-and-omissions insurance as good business practice. These rules require the company to certify that a project has been completed in compliance with applicable rules. The license fee increase from $100 every two years to $750 per year is significant to a company that only performs a few heating oil projects a year, but is not expected to be a hardship or add to tank owner costs for those companies that perform numerous projects. Licensing requirements for individuals who supervise heating oil projects are not greatly changed, except license fees are increased from $25 to $150 every two years.

Other agencies – There is no expected impact on other agencies. However, state and local government agencies such as fire protection and public works may be logical sources to distribute guidance information for tank owners. These rules are not intended to supersede existing local requirements. Any agency that owns an underground heating oil tank would be subject to these rules as any other tank owner.

How will the rule be implemented?

DEQ will implement the rules by providing written guidance to tank owners who need information on decommissioning a tank or cleaning up a release of heating oil. DEQ will notify currently licensed service providers and supervisors, and contractors registered with the Construction Contractors Board of rule changes and will provide training and written guidance materials.

Early implementation of certification of cleanup projects is proposed on a voluntary basis. Service providers currently licensed for soil matrix cleanups who obtain errors-and-omissions insurance will be given training and allowed to submit certified reports during December 1999 and January 2000. This will allow additional input from tank owners who might not comment on the proposed rules during the public comment period, but who will be able to comment on their particular project results and the new process for cleanup approval.

Are there time constraints?

Yes. The effective date for service provider and supervisor licensing changes is March 15, 2000. This allows approximately one month after the proposed adoption of the rules to implement changes to new licenses and fees. The effective date for supervisor license examinations is July 1, 2000, to coincide with new examinations for heating oil tank services now under development.

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:

Laurie McCulloch
DEQ – UST Program
811 SW Sixth
Portland, OR 97204
503-229-5769
mcculloch.laurie.j@deq.or.us

Copies of the draft rules will be available December 1, 1999 by calling 503-229-5913 or 1-800-742-7878 to request that a hard copy be mailed to you, or directly on our web page at:

http://www.deq.state.or.us/wmc/tank/ust-lust.htm

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.

State of Oregon
Department of Environmental Quality Memorandum

Date: January 10, 2000

To: Environmental Quality Commission

From: Laurie McCulloch, UST Program

Subject: Presiding Officer's Report for Rulemaking Hearing
Heating Oil Tank Technical and Service Provider Licensing Rule Revisions
Attachment C

Two rule making hearings were held on the above titled proposal. At each hearing, people were asked to sign witness registration forms if they wished to present testimony. People were also advised that the hearing was being recorded and of the procedures to be followed.

Hearing #1 Date and Time:	December 16, 1999, beginning at 2:00 pm
Hearing #1 Location:	777 Pearl Street, McNutt Conference Room, Eugene

The first rulemaking hearing on the above titled proposal was convened at 2:00 pm by Karen White-Fallon, Presiding Officer. Nine (9) people were in attendance; no one signed up to give oral testimony. One person handed in written comments. Prior to receiving testimony, Andree Pollock explained the specific rulemaking proposal, the reason for the proposal, and responded to questions from the audience. The hearing was closed at 3:04 pm.

Hearing #2 Date and Time:	December 21, 1999, beginning at 7:00 pm
Hearing #2 Location:	2020 SW Fourth, Conference Room 4, Portland

The second rulemaking hearing was convened at 7:00 pm by Mitch Scheel, Presiding Officer. Four (4) people were in attendance; three people signed up to give oral testimony (one left prior to providing testimony and one decided not to testify after his questions were answered). Prior to receiving testimony, Mike Kortenhof explained the specific rulemaking proposal, the reason for the proposal, and responded to questions from the audience. After the testimony was complete, the hearing was closed at 10:00 pm.

Memo To: Environmental Quality Commission
January 10, 2000
Presiding Officer's Report on
December 16 & 21, 1999 Rulemaking Hearings

Summary of Oral Testimony

Commentator #1, Arthur Van Alstine (O.E.M. Industries): Mr. Van Alstine stated that his company had eleven years of experience with underground storage tanks and feels that experience should have credibility. The (service provider) license fee is too high – this additional cost and cost of insurance will be passed on to home owners. Requiring licensed supervisors to collect samples when the tank is decommissioned will be a help to home owners and future property owners. Licensed supervisors who are experienced are more valuable than those who can just pass a test, but have not done the work. Sometimes rules are not clear enough, and it is important that (the revised rules) are clear.

Written Testimony

The following people provided written comments during the public comment period:

Commentator #2, Ron Richey (Staton Companies): Mr. Richey had four main points. 1) The current licensing programs for service providers and supervisors should be used (or some type of endorsement) until a licensee is retested for their current license (license expiration date); 2) Use liability insurance instead of errors-and-omissions insurance; 3) All printed paperwork should include the same disclaimer language contained in current DEQ "no further action" required letters. This disclaimer should be included in heating oil tank work to protect the contractor in the same way it protects DEQ; and 4) Recognize the distinction between construction related work and professional consulting services.

Commentator #3, Mark Norbury (Aspen Environmental): Mr. Norbury believes that the requirement for $1,000,000 coverage in errors-and-omissions insurance is too high and out of line with the work performed. Coverage of $25,000 per site would be adequate since third part impact (groundwater contamination or off-site migration of contamination) is usually covered under the home owner's insurance.

Commentator #4, Christopher Wohlers (Wohlers Environmental Services, Inc.): Mr. Wohlers had comments on three main issues of concern. 1) To insure legislative intent is achieved, DEQ should obtain formal feedback from home owners and service providers on whether the new process is timely, is cost reasonable, and understandable; 2) Service provider and supervisor license fee increases are extremely high and should be reduced, plus insurance costs are excessive for smaller businesses; and 3) objects to the requirement for registration with the Oregon Construction Contractors Board if the service provider is not doing excavation work.

Two others provided written testimony outside of the public comment period (one before and one after). Although their comments cannot be addressed officially, the Department believes their issues are addressed in the Staff Report and Response to Comments documents; their comments are summarized here as additional information.

John LaRiviere (Abiqua Engineering, Inc.): Mr. LaRiviere had three main issues. 1) License fees are too high and should be on a sliding scale based on number of tanks decommissioned per year; 2) Requirement for errors-and-omissions insurance is redundant if company is registered with the Construction Contractors Board. If a service provider sub-contracts with another company to do the excavating, that company should be registered with the CCB and that would be sufficient (insurance). The amount of insurance required is excessive and should be reduced to $250,000 to $500,000; and 3) It is reasonable to have the service provider responsible for rejected certifications, but there must be clear standards for rejection and the certifications must be reviewed by DEQ in a timely manner.

Mark Yinger (Mark Yinger Associates): Mr. Yinger objects to the proposed rules because he believes they cannot be implemented uniformly and equitably throughout Oregon. It will cause hardship for home owners in rural areas because there will not be any licensed service providers outside of the Willamette Valley. He is concerned that rural home owners will be required to hire a company from Portland (for increased costs), as small companies like his do not perform enough heating oil tank work to warrant the additional costs for licensing and insurance.

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Heating Oil Tank Technical and Service Provider Licensing Rule Revisions

Attachment D
Department's Evaluation of Public Comments

Public comments are summarized below along with the Department's responses. Copies of the complete comments are available upon request. Please refer to the Presiding Officer's Report (Attachment C) for information about the public comment period and hearings.

General Comments

Comment: Commentator No. 4 recommends that the Department obtain feedback from home owners and service providers to determine if issues of legislative intent are in fact being met.

Response: The Department agrees that feedback is essential in gauging the effectiveness of program changes and has plans to do so as part of rule implementation. No changes to the rules are proposed.

OAR 340-177-0025(2)(c) and (d)

Comment: Commentator No. 1 believes that requiring licensed supervisors to collect soil samples (when a heating oil tank is decommissioned) will help home owners and future property owners.

Response: The Department agrees that minimum provisions for soil sampling at tank decommissioning are an essential environmental protection requirement. However, the rules do not preclude home owners from collecting the samples if they can insure that collection procedures are followed correctly to provide valid data. No rule changes are proposed.

OAR 340-163-0020(1) and (6)
and
OAR 340-163-0035(8)

Comments: Commentator #2 believes that the license changes should not go into effect until the current license expires for both service providers and supervisors.

Response: The licenses for heating oil tank services are a new license category, not a continuation of an existing license. Licensees have new responsibilities under the new program and the Department has new implementation and inspection tasks. The effective date of the license requirements has been set at March 15, 2000 in order to give companies and individuals approximately one month to apply for the new license type.

In addition, supervisors have until July 1, 2000 or a later date determined by the Department to take a new examination specific for heating oil tank work. In the interim, the Department will accept examinations for Soil Matrix Cleanup as qualifying for a Heating Oil Tank Supervisor license. The Department expects to use the discretion provided in the rules to allow supervisors a period of time (e.g. three to four months) after the exam is available to take the exam, get results back, and reapply for their license. No additional license fee will be charged for reissuance of the license after the new exam results are submitted. This is a one-time issue. No changes to the rules are proposed.

OAR 340-163-0020(3)(b)

Comment: Commentator #4 objects to the requirement for a service provider to be registered with the Oregon Construction Contractor's Board (CCB) if the company works as a consultant rather than performing actual tank excavation. Commentator #2 also believes there should be recognition of the distinction between construction related work and professional consulting services.

Response: The Department agrees that wording changes are necessary to clearly represent the intent of this requirement and has proposed revisions to this section. Revised rule language will clarify that the requirement for registration with CCB must be met if CCB requirements apply, instead of a specific requirement that all service providers must be registered.

OAR 340-163-0050

Comment: All four commentators believe that the amount of insurance required is too high and will cost too much for small businesses and Commentator #2 believes that liability insurance should be sufficient, instead of errors-and-omissions insurance. Commentator #3 believes that lower insurance amounts are sufficient as home owner general insurance would cover groundwater contamination or off-site migration of contamination issues.

Response: After further review and as a result of information obtained during the "early implementation" trial, the Department agrees that changes are appropriate and has proposed revisions to this section. The requirement for errors-and-omissions

insurance will be broadened to include "professional liability" insurance as the two types are generally synonymous and cover the same type of situations. However, general liability and pollution liability are specifically excluded as a qualifying types of insurance as they do not provide protection in the event a certificate is rejected by the Department due to errors made by the service provider. Insurance carried by a home owner is not pertinent to coverage required by a service provider.

Additionally, the amount of per occurrence insurance will be reduced from $1,000,000 to $500,000 to be consistent with Construction Contractor's Board liability insurance requirements per OAR 812-003-0000(16)(b) and 812-003-0015(3)(D). The aggregate amount has also been reduced from $2,000,000 to $1,000,000, as doubling of the "per occurrence" amount protects against a single catastrophic loss.

As a result of information obtained during the "early implementation" trial, a new requirement will also be added that the insurance "deductible" amount be stated on the copy of the insurance form provided to the Department. This is necessary to track as informational-only at this point with no set amount required, but will be valuable background data if problems with service provider certifications develop over time.

OAR 340-163-0060(2)(a)

Comment: Commentator No. 2 believes that certification language service providers are required to include with certified reports be the same as the language the Department previously used in "no further action" required letters.

Response: The Department agrees with this statement in general, but does not believe that the same language is necessary to specify what the service provider is actually certifying. The Department was *reviewing* work, while the service provider *performs* work. Both documents state that the environmental requirements have been met. In addition, individual service providers routinely state what their limitations are when they prepare a report for a home owner on the work that has been performed, and the proposed rules do not restrict that. No changes to the rules are proposed.

OAR 340-163-0150

Comment: Commentators No. 1 and No. 4 both believe that license fees for service providers and supervisors are much too high and should be reduced.

Response: The fee amounts are certainly much higher than service providers have been required to pay in the past. However, these license fees are set in statute (ORS 466.706 in accordance with House Bill 3107) and cannot be changed without legislative action. Work to approve license applications, inspect service provider performance and enforce compliance when there are violations must be funded by these license fees. Even with the increases, license fees and report registration fees are still not at a level to sustain a minimum program without additional funding from the Legislature for at least one more biennium. No changes to the rules are proposed.

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Heating Oil Tank Technical and Service Provider Rule Revisions

Attachment E
Detailed Changes to Original Rulemaking Proposal Made in Response to Public Comments

Listed below by rule number are recommended changes to the public comment rule drafts.

OAR 340-163-0020(3)(b)

Recommended: Hold and continuously maintain a valid certificate of registration with the Oregon Construction Contractors Board as required by its regulations.

Hearing Proposal: Hold and continuously maintain a valid certificate of registration with the Oregon Construction Contractors Board.

Reason: Additional wording adds clarity that registration must be maintained if it is required by the Construction Contractors Board.

OAR 340-163-0050(1)

Recommended: Any firm applying for a service provider license to perform heating oil tank services must first obtain insurance coverage for errors-and-omissions or professional liability that will be used to pay for any additional corrective action necessary as a result of improper or inadequate site assessment, decommissioning or cleanup work. General liability insurance or pollution liability insurance are not acceptable substitutes for the insurance requirements.

Hearing Proposal: Any firm applying for a service provider license to perform heating oil tank services must first obtain insurance coverage for errors-and-omissions (i.e. economic loss) that will be used to pay for any additional corrective action necessary as a result of improper or inadequate site assessment, decommissioning or cleanup work.

Reason: Wording changes add clarity and expand acceptable insurance coverage types. The changes specifically state that general or pollution liability insurance types are not acceptable, to avoid confusion.

OAR 340-163-0050(2)

Recommended: Insurance must be obtained in the amount of $500,000 per claim or per occurrence, with a total aggregate of $1,000,000, from an insurance company authorized to do business in Oregon. Coverage must remain continuous during the license period and until one (1) year after a firm has ceased to perform heating oil tank services in Oregon.

Hearing Proposal: Insurance must be obtained in the amount of $1,000,000 per claim or per occurrence, with a total aggregate of $2,000,000, from an insurance company authorized to do business in Oregon. Coverage must remain continuous during the license period and until one (1) year after a firm has ceased to perform heating oil tank services in Oregon.

Reason: Reduces amount of per-occurrence insurance required to be consistent with general liability insurance amount required by Construction Contractors Board for work on residential and commercial sites. The aggregate amount is also reduced to be consistent with standard industry practices of doubling per-occurrence amount to provide protection against a single catastrophic loss.

OAR 340-163-0050(3)(a)

Recommended: The name of the insurance company, policy number, effective dates of coverage, coverage amounts, deductible amount, name of all insured entities, agent's name, address and telephone number;

Hearing Proposal: The name of the insurance company, policy number, effective dates of coverage, coverage amounts, name of all insured entities, agent's name, address and telephone number;

Reason: The additional information on deductible amounts is informational-only at this point and no limitations are being made. Insurance forms reviewed by the Department to date show some deductibles as high as $25,000. This amount is higher than many claims could be. Having the information on hand will help determine possible solutions to a potential future problem, should the Department see a high number of rejected certifications. A rejected certification coupled with a high insurance deductible amount could result in a bankruptcy situation, which could be disastrous for a home owner or small business.

OAR 340-163-0110(2)

Recommended:

(2) The Department may also deny issuance of, suspend or revoke a license if the service provider or supervisor fails to comply with any applicable local, state or federal regulations pertaining to the performance of heating oil tank services or demonstrates negligence or incompetence, including but not limited to situations where the service provider or supervisor:
(a) Fails to employ and designate a licensed supervisor for each project;
(b) Fails to maintain required insurance;
(c) Fails to maintain appropriate registration with the Oregon Construction Contractors Board;
(d) Fails to resolve heating oil tank compliance related violations in accordance with an enforcement schedule or order issued by the Department;
(e) Fails to make corrections specified by the Department as the result of the Department's rejection of a decommissioning or cleanup report certified by the service provider;
(f) Fails to correct deficiencies noted by the Department for an incomplete license application;
(g) Fails to maintain a current address with the Department; or

Hearing Proposal:

(2) The Department may also deny issuance of, suspend or revoke a license if the service provider or supervisor fails to comply with any applicable local, state or federal regulations pertaining to the performance of heating oil tank services or demonstrates negligence or incompetence in performance of the services by:
(a) Failing to employ and designate a licensed supervisor for each project;
(b) Failing to maintain required insurance;
(c) Failing to maintain appropriate registration with the Oregon Construction Contractors Board;
(d) Failing to resolve heating oil tank compliance related violations in accordance with an enforcement schedule or order issued by the Department;
(e) Failing to make corrections specified by the Department as the result of the Department's rejection of a decommissioning or cleanup report certified by the service provider;
(f) Failing to correct deficiencies noted by the Department for an incomplete license application;
(g) Failing to maintain a current address with the Department; or

Reason:

These changes were made at the recommendation of Department Counsel to ensure that rule language in this section is clear and does not inadvertently restrict Department action on enforcement issues.

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Heating Oil Tank Technical and Service Provider Licensing Rule Revisions

Attachment F
List of Heating Oil Tank Work Group Members

The following is the list of Work Group members involved with the rule revision process. Mike Kortenhof of DEQ chaired the group. Audience participation was encouraged whenever feasible.

Last Name	**First Name**	**Organization Name**	**City**
Adams	Brian	Sunset Fuel/Safe-Way Tank	Portland
Arntson	Jeff	Albina Fuel Company	Portland
Baracco	Al	Northwest Natural Gas	Portland
Bush	Charles	Portland Tank Service, Inc.	Portland
Chenoweth	Brian	Rycewicz & Chenoweth	Portland
DeSpain	Robert	Staton Companies	Eugene
Elliott	Kent	Elliott, Powell, Baden & Baker	Portland
Friant	Doug	Portland Fire Bureau	Portland
Goodman	Ron	Goodman Brothers Inc.	Portland
Hudson	Kris	Home Owner	Portland
Pratuch	Jeff	Washington Mutual	Clackamas
Rock	David	Portland Bureau of Buildings	Portland
Schmidt	Jerry	Oregon Association of Realtors	Salem

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Heating Oil Tank Technical and Licensing Rule Revisions

Attachment G
Rule Implementation Plan

Summary of the Proposed Rule

The 1999 Legislative Assembly passed House Bill 3107 which specifies requirements for licensing of companies and individuals who provide heating oil tank services. Licensed service providers must certify that the work they perform meets all regulations and must have insurance to cover errors and omissions. Decommissioning standards must be established for tank owners who voluntarily choose to decommission a tank. DEQ will file certified reports for a $50 fee. DEQ will audit (i.e. review reports and conduct inspections) the work of licensed service providers and supervisors. License fees are set at $750 per year for service providers and $75 per year for supervisors. The Department has the statutory authority to address these issues under ORS 466.706.

Proposed Effective Date of the Rule

The rule revisions will be heard at the February 11, 2000 Environmental Quality Commission meeting. The proposed effective date of the service provider licensing requirements is March 15, 2000; this will allow approximately one month for companies to apply for and receive new licenses. The proposed effective date for licensing changes for supervisors is July 1, 2000; this will coincide with the anticipated availability date for new examinations currently under development.

Notification of Affected Persons

All existing licensed service providers and supervisors have been notified of the proposed rule changes, including contractors listed with the Oregon Construction Contractors Board. Notification was also sent to approximately 4,000 persons, primarily homeowners and realtors who have expressed interest in heating oil tank rules over the past several years. Detailed program information has been posted on the Underground Storage Tank (UST) program web page. A press release was made and sent to all forms of media (print, radio, television) throughout the state to help inform the public that rule changes are being proposed. Information was also be provided to DEQ's list of persons who are interested in all DEQ rule actions.

Proposed Implementing Actions

The Legislature approved 4.0 FTE for the program. Internal implementation will be through staff training meetings, with a statewide-consistent internal process to be established that includes a review process for reports certified by service providers. The DEQ Business Office has been informed and consulted regarding the procedural change from cost recovery (invoices mailed to tank owners with checks received on payment date) to filing fees (checks received from tank owners). External implementation will be done primarily through fact sheets, checklists, service provider training meeting(s), and written process instructions. Use of the UST web page is important for information dissemination.

Education and outreach efforts will be key to implementation of the proposed rules. The goal is to inform homeowners of issues and options. Coordination with the media and home-related businesses (realtors, furnace contractors, lenders) through fact sheets and guidance documents will be used to communicate new program information. A HOT (Heating Oil Tank) Helpline telephone message system will be established to provide answers to frequently asked questions.

Early implementation of service provider certified cleanups is being tried during December 1999 and January 2000. Service providers who are currently licensed for soil matrix cleanup work and who have the required insurance are eligible to participate in the trial period. Tank owners with cleanups pending have been notified of the opportunity to participate in this trial. The change from an average $250 cost recovery bill to a $50 filing fee is likely to be a good incentive to participate. This will also be an opportunity for DEQ to receive direct feedback from tank owners and service providers on the proposed rule changes. Decommissioning certifications will begin after rules have been adopted.

Proposed Training/Assistance Actions

Staff will be provided initial information through statewide program meetings. Smaller training sessions will be offered for staff expected to be working closely with the new program. Service providers will be provided a one-day training session on the new requirements for certifying work.

Environmental Quality Commission

☒ Rule Adoption Item
☐ Action Item
☐ Information Item

Agenda Item H
February 11, 2000 Meeting

Title:

Marine Loading Vapor Control

Summary:

The purpose of this rulemaking is to adopt new rules and rule amendments Air Quality OARs 340, Divisions 232 and 200. This rulemaking requires all bulk gasoline terminals operating in the Portland area will reduce emissions of gasoline vapors when loading marine vessels by at least 95 percent. This also requires pollution control for lightering (lightering is the term used to describe the ship to ship transfer of cargo) when either vessel is birthed at a terminal dock. Uncontrolled lightering that occurs at designated anchorage's in the river would be prohibited on Clean Air Action days. The proposal does not affect refueling of vessels.

The Portland area is officially classified as in attainment with the ozone standard, having completed a ten year maintenance plan detailing commitments to continuing healthful air quality. Securing emission reductions from marine loading of gasoline or equivalent sources was identified as a commitment within the plan. This rule will be submitted, if adopted to the US EPA as a revision to the Oregon Clean Air Act State Implementation Plan (OAR 340-200-0040), as required by the Clean Air Act.

Department Recommendation:

The department recommends that the Commission adopt the rules/rule amendments regarding Marine Loading Vapor Control as presented in Attachment A of the staff report.

Report Author | Division Administrator | Director

1/11/00

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: January 24, 2000

To: Environmental Quality Commission

From: Langdon Marsh

Subject: Agenda Item H, Marine Loading Vapor Control, EQC Meeting February 11, 2000

Background

On November 9, 1999, the Director authorized the Air Quality Division to proceed to a rulemaking hearing on proposed rules which would require vapor recovery controls when loading gasoline and, under certain conditions, other fuel products onto river barges in the Portland area.

Pursuant to the authorization, hearing notice was published in the Secretary of State's Bulletin on December 1, 1999. The Hearing Notice and informational materials were mailed to the mailing list of those persons who have asked to be notified of rulemaking actions, and to a mailing list of persons known by the department to be potentially affected by or interested in the proposed rulemaking action on November 10, 1999.

A Public Hearing was held December 16, 1999 with George Davis serving as Presiding Officer. Written comment was received through December 21, 1999. The Presiding Officer's Report (Attachment C) summarizes the oral testimony presented at 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.

The following sections summarize the issue that this proposed rulemaking action is intended to address, the authority to address the issue, the process for development of the rulemaking proposal including alternatives considered, a summary of the rulemaking proposal presented for public hearing, a summary of the significant public comments and the changes proposed in response to those comments, a summary of how the rule will work and how it is proposed to be implemented, and a recommendation for Commission action.

Issue this Proposed Rulemaking Action is Intended to Address

In 1997 EPA redesignated the Portland area as in attainment with the ozone health standards and approved the ten-year maintenance plan that outlines strategies to assure continuing healthful air quality. Achieving emission reductions from marine loading of gasoline or other equivalent reductions by 1999 was identified as a commitment within the plan. When gasoline is loaded onto river barges for transport the vapors are allowed to vent to the outdoor atmosphere. The vapors released from this activity, over 600 tons per year, contribute to ozone air pollution. The department had relied upon restricting barge loading activity on Clean Air Action Days but found that, despite the good cooperation of the terminals with this program, pollutants from this activity still contributed to exceedances of the ozone standard. The plan relied on reductions from a cross-Cascades pipeline that would have provided a cost effective alternative to barging gasoline to fuel terminals east of the mountains. In July, 1999, planning for the pipeline was halted following an explosion from a pipeline rupture in Bellingham, reinforcing the need to implement a more effective long term solution. Therefore, the department is proposing to make up the emission reductions through an alternative means as required by the maintenance plan.

Relationship to Federal and Adjacent State Rules

A federal guideline requires the same emission reduction performance standard as proposed in this rule. However, the federal rule applies only to terminals loading more than 10 million barrels per year. None of the Portland terminals meet the federal applicability limits.

Several jurisdictions in California, including the South Coast Air Quality Management District, the San Luis Obispo Air Pollution Control District and the Bay Area Air Quality Management District, have adopted marine vapor recovery rules similar to the rule proposed here, including emission reduction performance and applicability. Neither the Washington state Department of Ecology nor any local air pollution control district in that state have yet adopted requirements for marine vapor recovery. However the Southwest Washington Air Pollution Control Authority has committed to proposing requirements similar to Oregon's for the two bulk gas marine terminals located in Vancouver.

Authority to Address the Issue

The Department of Environmental Quality is directed by the policy outlined in ORS 468A.010 "to restore and maintain the quality of the air resources of the state in a condition as free from air pollution as is practicable, consistent with the overall public welfare of the state." The department, under direction from the Environmental Quality Commission is to prepare and develop comprehensive plans for the control of air pollution, recognizing the varying requirements for different areas of the state (ORS 468A.035). Section 183 (f) of the 1990 federal Clean Air Act Amendments authorizes states to adopt standards that regulate emissions from marine vessels.

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

The department reviewed marine vapor control requirements in other jurisdictions around the country and developed a straw proposal based on the need to reduce emissions as part of the Portland ozone maintenance plan and the relative cost effectiveness of these controls. The straw proposal called for controls year-round for the larger terminals and only during the ozone season at the smaller terminals (those loading less than 10,000,000 gallons of gasoline per year). The seasonal requirement was proposed assuming that it would lead to development of contractual arrangements with the larger controlled terminals to control vapors rather than the construction and then off-season idling of control equipment. Contractual arrangements similar to this have been used to meet pollution control requirements at truck loading facilities. The proposal also called for vapor control during all lightering events. Lightering is the term used to describe the ship-to-ship transfer of cargo.

This straw proposal was presented in a series of meetings to representatives of the bulk terminals, shipping companies and interested and affected persons in order to identify concerns. Industry concerns centered on the definition of applicable fuel products, the effective date of the rule and the practicality of complying with a seasonal requirement. The public was concerned with cumulative effects of exposure to the pollutants found in gasoline vapor and wanted to secure the maximum protection from exposure to the vapors associated with gasoline loading as soon as possible. Concerned citizens urged the department to more thoroughly investigate the feasibility of portable controls to make complete control of these emissions more economically viable. This information shaped the proposal presented for public hearing.

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

The proposal presented on public notice requires that all bulk gasoline terminals operating in the Portland area reduce the emissions of gasoline vapors when loading marine vessels by at least 95 percent. The proposal also required pollution control for lightering when either vessel is berthed at a terminal dock. Uncontrolled lightering that occurs at designated anchorages in the river would be prohibited on Clean Air Action days.

Successful control of the emissions from barge loading of gasoline anywhere in the country has required the resolution of concerns regarding safety, regulatory authority and cost effectiveness. The promulgation of rules by the U.S. Coast Guard in 1990 regarding vessel safety during loading events and the adoption of the 1990 amendments to the federal Clean Air Act marked the resolution of the first two concerns. As elsewhere, the cost of controls for small terminals in Portland is disproportionately greater than for facilities with larger throughputs. Marine vapor control systems are sized and priced according to the maximum anticipated loading rate. Since all terminals want to

proposal the department had originally proposed seasonal controls for the small terminals. However, after discovering that portable control devices made full time compliance economically feasible for the smaller terminals, the proposal placed on public notice was revised to require the same emission reductions from all terminals year round.

Summary of Significant Public Comment and Changes Proposed in Response

- **Comment: Require a more stringent pollution reduction standard, e.g., 99%.**
  Response: The department disagreed that a more stringent standard is necessary but is recommending adding a concentration limitation to improve compliance. The most stringent standard in the state and federal rules is 95% reduction. Achieving greater reductions becomes increasingly more difficult and more expensive. Certain jurisdictions require concentration limits but this limitation effectively applies only during the startup phase of barge loading when emissions are low. The department recognizes that these concentration limits allow for more reliable compliance determinations and is recommending adding a limit similar to California's to the rule. This will bring Oregon's rule in line with the emission standard adopted in all other West Coast jurisdictions where barge loading is regulated. The proposed rule will result in equipment being installed, as in other jurisdictions, with efficiencies higher than 95% to ensure that full compliance can be continuously maintained.
- **Comment: Require vapor control when loading any petroleum product.**
  Response: The department disagrees with this comment. The Portland petroleum market is "simple" compared to other jurisdictions with marine vapor control rules. In part this is because the Portland area, unlike the other jurisdictions where marine vapor control is required, does not have any refineries. The range of products transported here is limited. Gasoline is the most volatile product loaded onto barges in the area and also represents the greatest volume of petroleum products shipped. Based on 1997 shipping reports to the Corps of Engineers, gasoline accounted for about 99% of all VOC emissions from barge transported petroleum products in the Portland area. Recovery and destruction efficiencies for petroleum products other than gasoline are also much lower, making vapor control of these products much more energy intensive and inefficient.
- **Comment: Require vapor control statewide.**
  Response: The department disagrees with this comment. The rule is driven by a need to secure emission reductions to assure continued compliance with the ozone standard in Portland. There are no other barge loading terminals in areas that experience ozone problems. It is unlikely that terminals can move to other locations in the state that are on navigable waterways with convenient and inexpensive access to large supplies of gasoline to justify extending the geographic applicability of the rule.
- **Comment: Require vapor control for all ship-to-ship loading events.**
  Response: The department disagrees with this comment but is recommending a change to monitor the level of uncontrolled activity. The vapor control equipment at the terminal will control emissions from ship-to-ship transfers, or lightering, when these transfers occur at a terminal dock. Because of technical limitations ship-based vapor control is difficult to achieve and expensive to

- **Comment: Require vapor control for all ship-to-ship loading events.**
  Response: The department disagrees with this comment but is recommending a change to monitor the level of uncontrolled activity. The vapor control equipment at the terminal will control emissions from ship-to-ship transfers, or lightering, when these transfers occur at a terminal dock. Because of technical limitations ship-based vapor control is difficult to achieve and expensive to install, so it is not practicable to require controls for midstream lightering. The department is recommending a change in the recordkeeping requirements of the proposal to allow more accurate tracking of the impact from this uncontrolled activity. Marine vessel owners and operators will be required to maintain records of all lightering events, regardless of the location, and report this data to the department. The department will periodically evaluate the data to determine impact and will also assess the development of feasible controls. In the event of an assessment of a significant impact and/or the advent of feasible controls, the department will propose controls on midstream lightering in the future.
- **Comment: Establish an exemption based on throughput or emissions.**
  Response: The department disagrees with this comment. Compliance costs are greater for smaller terminals than larger terminals but the department does not believe they are unreasonable. EPA established a reasonable standard for marine vapor control in 1979 at costs of $2000 per ton of pollution reduced. Accounting for inflation, the value would be about $4600 today. Analysis of the impacts associated with the terminal in question indicate that control costs would be about $1900 per ton. These costs also compare favorably to the costs of other emission reduction strategies in the maintenance plan.
- **Comment: Compliance deadline is too short or too long.**
  Response: The department believes the compliance schedule is achievable and neither too long nor too short. The compliance schedule was established to achieve the earliest possible protection for the ozone season while allowing sufficient time to install a complex system that must perform reliably to meet strict safety and environmental requirements. This schedule can not be readily shortened as time is needed to engineer and build each of these control units as well as to secure authorization from the city of Portland for building and greenway construction and approval from the Division of State Lands, the Corps of Engineers and other agencies with responsibilities for oversight of activities that affect waterways and threatened species. The department will work to facilitate permit review by these agencies because of the importance of obtaining these emission reductions. The proposed schedule is, on the other hand, not too long. Many other jurisdictions have allowed up to three years for compliance. Only one other jurisdiction has proposed a tighter schedule, by three months, for compliance with marine vapor control requirements.
- **Comment: Delete one-time visit exemption.**
  Response: The department agrees with this comment and recommends changes to the rule. The proposal exempted vessels for any single visit to the Portland harbor within a year from compliance with the rule. After review the department determined that compliance monitoring would be difficult to implement. Allowing an exemption of this sort also proved to be outside accepted practice in the maritime industry as all vessels are required to meet U.S. Coast Guard safety requirements when visiting U.S. ports regardless of where they travel in their normal course of trade.

- **Comment: Require vessel owner/operators to be equally responsible with terminal operators for compliance with the rule.**
  Response: The department agrees with this comment and recommends changes to the rule. It is typical practice in many other jurisdictions to make all parties responsible for compliance and will serve as an incentive for all parties to meet the requirements of the rule.

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

By June 1, 2001 all bulk gas terminals in the Portland area will be required to use pollution control equipment when loading gasoline onto river barges. If the previous load in the barge was gasoline then vapor control will be required when loading any subsequent petroleum product. Ship-to-ship transfers, known as lightering, will be required to be conducted with vapor control if either vessel is berthed at a terminal dock. Mid-river lightering transfers will not require vapor control but will be prohibited on Clean Air Action days.

Department staff will incorporate the requirements of this proposed rule into the existing permits of the bulk gas terminals operating in the Portland area. Inspection and compliance assistance activities related to marine operations will be incorporated into the existing compliance assurance inspections associated with other permitted activity at the bulk gas terminals.

Recommendation for Commission Action

It is recommended that the Commission adopt the rules/rule amendments regarding Marine Loading Vapor Control as presented in Attachment A of the department Staff Report.

Attachments

A. Rule (Amendments) Proposed for Adoption
B. Supporting Procedural Documentation:
   1. Legal Notice of Hearing
   2. Fiscal and Economic Impact Statement
   3. Land Use Evaluation Statement
   4. Questions to be Answered to Reveal Potential Justification for Differing from Federal Requirements
   5. Cover Memorandum from Public Notice
C. Presiding Officer's Report on Public Hearing
D. Department's Evaluation of Public Comment
E. Detailed Changes to Original Rulemaking Proposal made in Response to Public Comment
F. Rule Implementation Plan

Reference Documents (available upon request)

Written Comments Received (listed in Attachment C)
(Other Documents supporting rule development process or proposal)

Controlling Hydrocarbon Emissions from Tank Vessel Loading, National Research Council, 1987

Draft Environmental Impact Statement, Cross Cascade Pipeline, U.S. Forest Service & Washington State Energy Facility Site Evaluation Council, September 1998

Hazardous Air Pollutant Emissions from Gasoline Loading Operations at Bulk Gasoline Terminals, American Petroleum Institute, October 1998

OAQPS Control Cost Manual, Fifth Edition, U.S. Environmental Protection Agency, February 1996

Approved:

Section:

Division:

Report Prepared By: Kevin Downing

Phone: 503 229-6549

Date Prepared: January 21, 2000

KD:kd
E:\WINWORD\Barge Loading\Rulemaking\EQC Adopt.doc
12/27/1999

DIVISION 232

EMISSION STANDARDS FOR VOC POINT SOURCES

340-232-0030
Definitions

The definitions in OAR 340-200-0020, 340-204-0010 and this rule apply to this division. If the same term is defined in this rule and OAR 340-200-0020 or 340-204-0010, the definition in this rule applies to this division.

(1) "Aerospace component" means the fabricated part, assembly of parts, or completed unit of any aircraft, helicopter, missile or space vehicle.

(2) "Air dried coating" means coatings which are dried by the use of air at ambient temperature.

(3) "Applicator" means a device used in a coating line to apply coating.

(4) "Bulk gasoline plant" means a gasoline storage and distribution facility which receives gasoline from bulk terminals by railroad car or trailer transport, stores it in tanks, and subsequently dispenses it via account trucks to local farms, businesses, and gasoline dispensing facilities.

(5) "Bulk gasoline terminal" means a gasoline storage facility which receives gasoline from refineries primarily by pipeline, ship, or barge, and delivers gasoline to bulk gasoline plants or to commercial or retail accounts primarily by tank truck.

(6) "Can coating" means any coating applied by spray, roller, or other means to the inside and/or outside surfaces of metal cans, drums, pails, or lids.

(7) "Carbon bed breakthrough" means the initial indication of depleted adsorption capacity characterized by a sudden measurable increase in VOC concentration exiting a carbon adsorption bed or column.

(8) "Certified storage device" means vapor recovery equipment for gasoline storage tanks as certified by the State of California Air Resources Board Executive Orders, copies of which are on file with the Department, or which has been certified by other air pollution control agencies and approved by the Department.

(9) "Class II hardboard paneling finish" means finishers which meet the specifications of Voluntary Product Standard PS-59-73 as approved by the American National Standards Institute.

(10) "Clear coat" means a coating which lacks color and opacity or is transparent and uses the undercoat as a reflectant base or undertone color.

(11) "Coating" means a material applied to a surface which forms a continuous film and is used for protective and/or decorative purposes.

(12) "Coating line" means one or more apparatus or operations which include a coating applicator, flash-off area, and oven or drying station wherein a surface coating is applied, dried, and/or cured.

(13) "Condensate" means hydrocarbon liquid separated from natural gas which condenses due to changes in the temperature and/or pressure and remains liquid at standard conditions.

(14) "Crude oil" means a naturally occurring mixture which consists of hydrocarbons and/or sulfur, nitrogen, and/or oxygen derivatives of hydrocarbons and which is a liquid at standard conditions.

(15) "Custody transfer" means the transfer of produced petroleum and/or condensate after processing and/or treating in the producing operations, from storage tanks or automatic transfer facilities to pipelines or any other forms of transportation.

(16) "Cutback asphalt" means a mixture of a base asphalt with a solvent such as gasoline, naphtha, or kerosene. Cutback asphalts are rapid, medium, or slow curing (known as RC, MC, SC), as defined in **ASTM D2399**.

(17) "Day" means a 24-hour period beginning at midnight.

(18) "Delivery vessel" means any tank truck or trailer used for the transport of gasoline from sources of supply to stationary storage tanks.

(19) "Dry cleaning facility" means any facility engaged in the cleaning of fabrics in an essentially nonaqueous solvent by means of one or more washes in solvent, extraction of excess solvent by spinning, and drying by tumbling in an airstream. The facility includes but is not limited to any washer, dryer, filter and purification systems, waste disposal systems, holding tanks, pumps, and attendant piping and valves.

(20) "Emissions unit" means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation.

(21) "External floating roof" means a cover over an open top storage tank consisting of a double deck or pontoon single deck which rests upon and is supported by the volatile organic liquid being contained, and is equipped with a closure seal or seals to close the space between the roof edge and tank shell.

(22) "Extreme performance coatings" means coatings designed for extreme environmental conditions such as exposure to any one of the following: continuous ambient weather conditions, temperature consistently above 95° C., detergents, abrasive and scouring agents, solvents, corrosive atmosphere, or similar environmental conditions.

(23) "Extreme performance interior topcoat" means a topcoat used in interior spaces of aircraft areas requiring a fluid, stain or nicotine barrier.

(24) "Fabric coating" means any coating applied on textile fabric. Fabric coating includes the application of coatings by impregnation.

(25) "Flexographic printing" means the application of words, designs and pictures to a substrate by means of a roll printing technique in which the pattern to be applied is raised above the printing roll and the image carrier is made of rubber or other elastomeric materials.

(26) "Freeboard ratio" means the freeboard height divided by the width (not length) of the degreaser's air/solvent area.

(27) "Forced air dried coating" means a coating which is dried by the use of warm air at temperatures up to 90° C. (194° F.).

(28) "Gas Freed" means a marine vessel's cargo tank has been certified by a Marine Chemist as "Safe for Workers" according to the requirements outlined in the National Fire Protection Association Rule 306.

(2~~8~~9) "Gasoline" means any petroleum distillate having a Reid vapor pressure of 27.6 kPa (4.0 psi) or greater which is used to fuel internal combustion engines.

(~~29~~30) "Gasoline dispensing facility" means any site where gasoline is dispensed to motor vehicle, boat, or airplane gasoline tanks from stationary storage tanks.

(3~~0~~1) "Gas service" means equipment which processes, transfers or contains a volatile organic compound or mixture of volatile organic compounds in the gaseous phase.

(3~~1~~2) "Hardboard" is a panel manufactured primarily from inter-felted ligno-cellulosic fibers which are consolidated under heat and pressure in a hot press.

(3~~2~~3) "Hardwood plywood" is plywood whose surface layer is a veneer of hardwood.

(3~~3~~4) "High performance architectural coating" means coatings applied to aluminum panels and moldings being coated away from the place of installation.

(34~~5~~) "Internal floating roof" means a cover or roof in a fixed roof tank which rests upon or is floating upon the petroleum liquid being contained, and is equipped with a closure seal or seals to close the space between the roof edge and tank shell.

(3~~5~~6) "Large appliance" means any residential and commercial washers, dryers, ranges, refrigerators, freezers, water heaters, dish washers, trash compactors, air conditioners, and other similar products.

(3~~6~~7) "Leaking component" means any petroleum refinery source which has a volatile organic compound concentration exceeding 10,000 parts per million (ppm) when tested in the manner described in method 31 and 33 on file with the Department. These sources include, but are not limited to, pumping seals, compressor seals, seal oil degassing vents, pipeline valves, flanges and other connections, pressure relief devices, process drains, and open-ended pipes. Excluded from these sources are valves which are not externally regulated.

(3~~7~~8) "Lightering" means the transfer of fuel product into a cargo tank from one marine tank vessel to another.

(3~~7~~9) "Liquid-mounted" means a primary seal mounted so the bottom of the seal covers the liquid surface between the tank shell and the floating roof.

(3~~8~~40) "Liquid service" means equipment which processes, transfers or contains a volatile organic compound or mixture of volatile organic compounds in the liquid phase.

(4~~0~~1) "Loading event" means the loading or lightering of gasoline into a marine tank vessel's cargo tank, or the loading of any product into a marine tank vessel's cargo tank where the prior cargo was gasoline. The event begins with the connection of a marine tank vessel to a storage or cargo tank by means of piping or hoses for the transfer of a fuel product from the storage or cargo tank(s) into the receiving marine tank vessel. The event ends with disconnection of the pipes and/or hoses upon completion of the loading process.

(3~~9~~42) "Low solvent coating" means a coating which contains a lower amount of volatile organic compound than conventional organic solvent borne coatings. Low solvent coatings include waterborne, higher solids, electrodeposition and powder coatings.

(4~~0~~3) "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 pollutant subject to regulation under the Clean Air Act.

(4~~1~~4) "Major source" means a stationary source which emits or has the potential to emit any pollutant regulated under the Clean Air Act at a significant emission rate.

(45) "Marine Tank Vessel" means any marine vessel constructed or converted to carry liquid bulk cargo that transports gasoline.

(46) "Marine Terminal" means any facility or structure used to load or unload any fuel product cargo into or from marine tank vessels.

(47) "Marine Vessel" means any tugboat, tanker, freighter, passenger ship, barge or other boat, ship or watercraft.

(4~~2~~8) "Maskant for chemical processing" means a coating applied directly to an aerospace component to protect surface areas when chemical milling, anodizing, aging, bonding, plating, etching and/or performing other chemical operations on the surface of the component.

(4~~3~~9) "Miscellaneous metal parts and products" means any metal part or metal product, even if attached to or combined with a nonmetal part or product, except cans, coils, metal furniture, large appliances, magnet wires, automobiles, ships, and airplane bodies.

(44~~5~~0) "Natural finish hardwood plywood panels" means panels whose original grain pattern is enhanced by essentially transparent finishes frequently supplemented by fillers and toners.

(4~~5~~51) "Operator" means any person who leases, operates, controls, or supervises a facility at which gasoline is dispensed.

(4~~6~~52) "Oven-dried" means a coating or ink which is dried, baked, cured, or polymerized at temperatures over 90° C. (194° F.).

(4~~7~~53) "Packaging rotogravure printing" means rotogravure printing upon paper, paper board, metal foil, plastic film, and other substrates, which are, in subsequent operations, formed into packaging products and labels for articles to be sold.

(4~~8~~54) "Paper coating" means any coating applied on paper, plastic film, or metallic foil to make certain products, including (but not limited to)adhesive tapes and labels, book covers, post cards, office copier paper, drafting paper, or pressure sensitive tapes. Paper coating includes the application of coatings by impregnation and/or saturation.

(4~~9~~55) "Person" means the federal government, any state, individual, public or private corporation, political subdivision, governmental agency, municipality, industry, co-partnership, association, firm, trust, estate, or any other legal entity whatsoever.

(5~~0~~6) "Petroleum refinery" means any facility engaged in producing gasoline, aromatics, kerosene, distillate fuel oils, residual fuel oils, lubricants, asphalt, or other products through distillation of petroleum, crude oil, or through redistillation, cracking, or reforming of unfinished petroleum derivatives.

"Petroleum refinery" does not mean a re-refinery of used motor oils or other waste chemicals. "Petroleum refinery" does not include asphalt blowing or separation of products shipped together.

(5~~1~~7) "Plant site basis" means all of the sources on the premises (contiguous land) covered in one Air Contaminant Discharge Permit unless another definition is specified in a Permit.

(5~~2~~8) "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 limitations on the capacity of a source to emit an air pollutant, excluding air pollution control equipment, shall be treated as part of its design if the limitation is enforceable by the Department.

(5~~3~~9) "Pretreatment wash primer" means a coating which contains a minimum of 0.5% acid by weight for surface etching and is applied directly to bare metal surfaces to provide corrosion resistance and adhesion.

(~~54~~60) "Printed interior panels" means panels whose grain or natural surface is obscured by fillers and basecoats upon which a simulated grain or decorative pattern is printed.

(~~55~~61) "Printing" means the formation of words, designs and pictures, usually by a series of application rolls each with only partial coverage.

(~~56~~62) "Prime coat" means the first of two or more films of coating applied in an operation.

(~~57~~63) "Publication rotogravure printing" means rotogravure printing upon paper which is subsequently formed into books, magazines, catalogues, brochures, directories, newspaper supplements, and other types of printed materials.

(~~58~~64) "Reasonably available control technology" or "RACT" means the lowest emission limitation that a particular source or source category is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility.

(~~59~~65) "Roll printing" means the application of words, designs and pictures to a substrate by means of hard rubber or steel rolls.

(6~~0~~6) "Sealant" means a coating applied for the purpose of filing voids and providing a barrier against penetration of water, fuel or other fluids or vapors.

(6~~1~~7) "Specialty printing" means all gravure and flexographic operations which print a design or image, excluding publication gravure and packaging printing. Specialty Printing includes printing on paper plates and cups, patterned gift wrap, wallpaper, and floor coverings.

(6~~2~~8) "Splash filling" means the filling of a delivery vessel or stationary storage tanks through a pipe or hose whose discharge opening is above the surface level of the liquid in the tank being filled.

(6~~3~~9) "Source" 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.

(~~64~~70) "Source category" means all sources of the same type or classification.

(~~65~~71) "Submerged fill" means any fill pipe or hose, the discharge opening of which is entirely submerged when the liquid is 6 inches above the bottom of the tank; or when applied to a tank which is loaded from the side, shall mean any fill pipe, the discharge of which is entirely submerged when the liquid level is 18 inches, or is twice the diameter of the fill pipe, whichever is greater, above the bottom of the tank.

(~~66~~72) "Thin particleboard" means a manufactured board 1/4 inch or less in thickness made of individual wood particles which have been coated with a binder and formed into flat sheets by pressure.

(~~67~~73) "Thirty-day rolling average" means any value arithmetically averaged over any consecutive thirty days.

(~~68~~74) "Tileboard" means paneling that has a colored waterproof surface coating.

(~~69~~75) "Topcoat" means a coating applied over a primer or intermediate coating for purposes such as appearance, identification or protection.

(7~~0~~6) "True vapor pressure" means the equilibrium pressure exerted by a petroleum liquid as determined in accordance with methods described in American Petroleum Institute Bulletin 2517, "Evaporation Loss from Floating Roof Tanks", February, 1980.

(7~~1~~7) "Vapor balance system" means a combination of pipes or hoses which create a closed system between the vapor spaces of an unloading tank and a receiving tank such that vapors displaced from the receiving tank are transferred to the tank being unloaded.

(7~~2~~8) "Vapor-mounted" means a primary seal mounted so there is an annular vapor space underneath the seal. The annular vapor space is bounded by the primary seal, the tank shell, the liquid surface, and the floating roof.

(79) "Vapor Tight" means, as used in OAR 340-232-0110, a condition that exists when the concentration of a volatile organic compound, measured one centimeter from any source, does not exceed 10,000 ppm (expressed as methane) above background.

[**NOTE:** This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-200-0020.]

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the office of the agency.]

Stat. Auth.: ORS 468.020 & ORS 468A.025

Stats. Implemented: ORS 468A.025

Hist.: DEQ 21-1978, f. & ef. 12-28-78; DEQ 17-1979, f. & ef. 6-22-79; DEQ 23-1980, f. & ef. 9-26-80; DEQ 3-1986, f. & ef. 2-12-86; DEQ 8-1991, f. & cert. ef. 5-16-91; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 13-1995, f. & cert. ef. 5-25-95; DEQ 6-1996, f. & cert. ef. 3-29-96; DEQ 9-1997, f. & cert. ef. 5-9-97; DEQ 20-1998, f. & cert. ef. 10-12-98; renumbered from OAR 340-022-0102.

340-232-0110

Loading Gasoline onto Marine Tank Vessels

(1) Applicability. This rule applies to loading events at any location within the Portland ozone air quality maintenance area when gasoline is placed into a marine tank vessel cargo tank; or where any liquid is placed into a marine tank vessel cargo tank that had previously held gasoline. The owner or operator of each marine terminal and marine tank vessel is responsible for and must comply with this rule.

(2) Exemptions. The following activities are exempt from the marine vapor control emission limits of this rule:

(a) Marine vessel bunkering;

(b) Lightering when neither vessel is berthed at a marine terminal dock,

(c) Loading when both of the following conditions are met:

(A) The vessel has been gas freed (regardless of the prior cargo), and

(B) When loading any products other than gasoline.

(3) Vapor Collection System. The owner or operator of a marine terminal subject to this rule must equip each loading berth with a vapor collection system that is designed to collect all displaced VOC vapors during the loading of marine tank vessels. The owner or operator of a marine tank vessel subject to this rule must equip each marine tank vessel with a vapor collection system that is designed to collect all displaced VOC vapors during the loading of marine tank vessels. The collection system must be designed such that all displaced VOC vapors collected during any loading event are vented only to the control device.

(4) Marine Vapor Control Emission Limits. Vapors that are displaced and collected during marine tank vessel loading events must be reduced from the uncontrolled condition by at least 95 percent by weight, as determined by EPA Method 25 or other methods approved in writing by the Department or limited to 5.7 grams per cubic meter (2 lbs. per 1000 bbls) of liquid loaded.

(5) Operating Practice and Maintenance.

(a) All hatches, pressure relief valves, connections, gauging ports and vents associated with the loading of fuel product into marine tank vessels must be maintained to be leak free and vapor tight.

(b) The owner or operator of any marine tank vessel must certify to the Department that the vessel is leak free, vapor tight, and in good working order based on an annual inspection using EPA Method 21 or other methods approved in writing by the Department.

(c) Gaseous leaks must be detected using EPA Method 21 or other methods approved in writing by the Department.

(d) Loading must cease anytime gas or liquid leaks are detected. Loading may continue only after leaks are repaired or if documentation is provided to the Department that the repair of leaking components is technically infeasible without dry-docking the vessel or cannot otherwise be undertaken safely. Subsequent loading events involving the leaking components are prohibited until the leak is repaired. Any liquid or gaseous leak detected by Department staff is a violation of this rule.

(6) Monitoring and Record-Keeping.

(a) Marine terminal operators must maintain operating records for at least five years of each loading event at their terminal. Marine tank vessel owners and operators are responsible for maintaining operating records for at least five years for all loading events involving each of their vessels. Records must be made available to DEQ upon request. These records must include but are not limited to:

(A) The location of each loading event.

(B) The date of arrival and departure of the vessel.

(C) The name, registry and legal owner of each marine tank vessel participating in the loading event.

(D) The type and amount of fuel product loaded into the marine tank vessel.

(E) The prior cargo carried by the marine tank vessel. If the marine tank vessel has been gas freed, then the prior cargo can be recorded as gas freed.

(F) The description of any gaseous or liquid leak, date and time of leak detection, leak repair action taken and screening level after completion of the leak repair.

(7) Lightering exempted from controls by subsection 2 (b) of this rule must be curtailed from 2:00 AM until 2:00 PM when the Department declares a Clean Air Action (CAA) day. If the Department declares a second CAA day before 2:00 PM of the first curtailment period, then such uncontrolled lightering must be curtailed for an additional 24 hours until 2:00 PM on the second day. If a third CAA day in a row is declared, then uncontrolled lightering is permissible for a 12 hour period starting at 2 PM on the second CAA day and ending at 2 AM on the third CAA day. Uncontrolled lightering must be curtailed from 2 AM until 2 PM on the third CAA day. If the Department continues to declare CAA days consecutively after the third day, the curtailment and loading pattern used for the third CAA day will apply.

(8) Safety/Emergency Operations. Nothing in this rule is intended to:

(a) Require any act or omission that would be in violation of any regulation or other requirement of the United States Coast Guard; or

(b) Prevent any act that is necessary to secure the safety of a vessel or the safety of passengers or crew.

[**NOTE:** This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the Environmental Quality Commission under OAR 340-200-0040.]

Stat. Auth.: ORS 468A.035

Stats. Implemented: ORS 468A.025

DIVISION 200
GENERAL AIR POLLUTION PROCEDURES AND DEFINITIONS

General

340-200-0040
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 agency.]

Stat. Auth.: ORS 468.020

Stat. Implemented: ORS 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; DEQ 10-1998, f. & cert. ef. 6-22-98; DEQ 15-1998, f. & cert. ef. 9-23-98; DEQ 16-1998, f. & cert. ef. 9-23-98; DEQ 17-1998, f. & cert. ef. 9-23-98; DEQ 20-1998, f. & cert. ef. 10-12-98; DEQ 21-1998, f. & cert. ef. 10-12-98; DEQ 1-1999, f. & cert. ef. 1-28-99; DEQ 2-1999, f. & cert. ef. 3-25-99; DEQ 6-1999, f. & cert. ef. 5-21-99; DEQ 10-1999, f. & cert. ef. 7-1-99; renumbered from OAR 340-020-0047.

Secretary of State

NOTICE OF PROPOSED RULEMAKING HEARING

A Statement of Need and Fiscal Impact accompanies this form.

DEQ – Air Quality 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

December 16, 1999	7:00 PM	State Office Building Room 140, 800 NE Oregon Portland, Oregon	DEQ Staff
Hearing Date	Time	Location	Hearings Officer

Are auxiliary aids for persons with disabilities available upon advance request?
☒ Yes ☐ No

RULEMAKING ACTION

ADOPT:
Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

340-232-0110

AMEND:

340-232-0030, 340-200-0040

Stat. Auth.: ORS 468A.035
Stats. Implemented: ORS 468A.025

RULE SUMMARY

Often when gasoline is loaded onto barges for transport the vapors are allowed to escape to the atmosphere, leading to adverse air pollution impacts. This rule proposal would require vapor recovery controls when loading gasoline and, under certain other conditions, other fuel products onto barges in the Portland area. The proposal does not affect refueling of vessels. The Portland area is officially classified as in attainment with the ozone standard, having completed a ten year maintenance plan detailing commitments to continuing healthful air quality. Securing emission reductions from marine loading of gasoline or equivalent sources was identified as a commitment within the plan. This rule will be submitted, if adopted, to the U.S. EPA as a revision to the Oregon Clean Air Act State Implementation Plan (340-200-0040), as required by the Clean Air Act.

Copies of the proposal are available for review at DEQ Headquarters, 11th floor, 811 SW 6th Avenue, Portland or by calling Kevin Downing at 503/229-6549.

December 21, 1999 5:00 PM Last Day for Public Comment	Susan M. Greco Authorized Signer and Date

Attachment B-2

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Marine Loading Vapor Control

Fiscal and Economic Impact Statement

Introduction

Terminals will likely use one of two technologies, carbon adsorption or combustion, to control the emission of gasoline vapors when loading barges. Carbon adsorption returns the vapor to a liquid state for reuse while an combustion process destroys the recovered vapors. The equipment is sized and priced to accommodate the maximum expected loading rate. Since all terminals want to load at similarly high rates, basic equipment costs will not vary much among the terminals. Any variation in additional expenses is determined by the configuration of each site and the effort needed to provide auxiliary power, supplemental fuel, an appropriate and safe location for the control equipment, piping to carry recovered vapors to the controls and any improvements to the loading dock needed to accommodate the additional equipment. Operating costs will vary by terminal and are directly related to the volume of product loaded and the vapor recovered.

General Public

The cost of these controls may add up to two cents per gallon to the cost of gasoline transported to eastern Oregon and Washington. Since barge transported gasoline accounts for about 43% of this area's gasoline inventory, the net impact would be less than one cent per gallon overall. This cost may not be reflected in the sale price at the retail outlet, as gasoline east of the Cascades is often priced more cheaply than gasoline sold in the Portland area, even though there are additional handling and storage costs.

Small Business

No small businesses will be directly impacted by the proposed regulation. Small businesses east of the Cascades that purchase gasoline may experience a retail price increase under the same circumstances experienced by the general public.

Given the size of some of the terminals in the Portland market and business considerations affecting their operations, it is likely that a market opportunity would be developed for a small business to provide vapor control services as a result of the adoption of this rule. We anticipate that it would be

more economic for the smaller terminals to effectively share the capital costs by contracting with a vendor to provide vapor recovery services. The benefits to this business would be based on how many terminals would contract for this service and how efficiently the operation was managed.

Large Business

In 1997 three of the largest Portland area bulk terminals prepared a cost effectiveness analysis to determine a local standard for RACT (Reasonably Available Control Technology). These analyses assumed completion of the cross-Cascade pipeline in the year 2000 and accelerated the depreciation schedule accordingly. If a typical depreciation schedule is used, the total annual cost, annual capital costs plus operating expenses, for a carbon adsorption process ranges from $304,890 to $713,801 while for a flare control device the annual costs range from $374,247 to $644,934.

To determine costs for the remaining seven terminals a price estimate was obtained for an 8000 barrel per hour marine vapor control system. Cost assumptions and methodology were applied from EPA's "Control Cost Manual". For the remaining four terminals total annual costs range from $332,198 to $333,380 for a carbon adsorption system. For a flare control, costs range from $247,676 to $253,919.

The greatest costs in the previous analysis are associated with the smaller terminals that would find a portable vapor control service more economic. A portable control device (flare) could be used at these terminals to eliminate the need to invest capital in a device that would not be as heavily used as at the larger terminals. The total annual costs range for this system range from $89,971 to $210,633. The fiscal impact associated with a portable system would drop further if the Vancouver terminals and/or any other larger Portland terminal also decided to use this service instead of installing a fixed site system.

Some of these sources will see their air pollution permit fee assessments change as a result of the reduction in emissions. Industrial sources paying Title V emission fees based on volume of pollutants emitted will see that assessment reduced. Some Title V sources could fall below the applicability threshold for Title V and become subject only to the state Air Contaminant Discharge Permit requirements and fees. As a group, the terminals could see a net reduction in permit fees of up to $19,714 per year.

Local Governments

There is no direct impact to local governments. The cost of gasoline purchases may be affected as outlined above for the general public and small businesses.

State Agencies

- DEQ
  - FTEs 0.16 NRS4
  - Revenues ($ 20,161)
  - Expenses $ 31,613

- Other Agencies
  No direct impact. The cost of gasoline purchases may be affected as outlined above.

DEQ costs are associated with the need to rewrite the permits to reflect the requirements of this rule and additional inspection time at the terminal to determine compliance. The permit revisions are a one time activity (0.157 FTE) costing about $31,020.

Assumptions

The portable control equipment is designed to accommodate loading rates of 6,000 barrels per hour. The permanent facility could handle loading rates up to 8,000 barrels per hour. Calculation of costs are based on the protocols and assumptions oultined in EPA's Office of Air Quality Planning and Standards "Control Cost Manual, 1996 edition". The costs and estimating methodology in this manual are directed toward a study estimate of ± 30 percent accuracy. All capital costs are adjusted for a capital recovery factor that reflects amortization and the time value of money. The depreciation schedule is assumed to be 10 years and the interest rate for borrowed money is assumed to be 10%.

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.

Attachment B-3

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Marine Loading Vapor Control

Land Use Evaluation Statement

1. Explain the purpose of the proposed rules.

This rule is intended to reduce the emission of volatile fuel vapors associated with the loading of gasoline into marine vessels in the Portland area.

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:

The requirement to utilize vapor control when loading gasoline will be implemented through the use of permits issued under the Title V Industrial Source Permit Program and the Air Contaminant Discharge Permit Program. Both of these programs are existing activities identified in the LCDC-Approved DEQ State Agency Coordination (SAC) agreement.

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.

Not applicable

In the space below, state if the proposed rules are considered programs affecting land use. State the criteria and reasons for the determination.

The permitting programs to be used to implement the requirement for vapor control are covered by a SAC agreement, as explained under 2a.

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

11/3/99
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?

Yes. The Environmental Protection Agency has established Reasonably Available Control Technology (RACT) standards for marine tank vessel loading operations. Large marine terminals that load either 200 million barrels of crude oil or 10 million barrels per year of gasoline must reduce emissions of volatile organic compounds by 95 percent.

2. Are the applicable federal requirements performance based, technology based, or both with the most stringent controlling?

These standards are performance based, e.g., emissions of volatile organic compounds must be reduced by 95 percent by weight, and reflect the capability of current technologies to achieve the reductions.

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. The federal RACT standard for marine vessel loading is targeted towards very large bulk gasoline terminals but did not consider how smaller facilities may nonetheless make a significant contribution to air quality degradation. None of the Oregon terminals meet the throughput threshold specified in the federal rule. However, collectively these terminals emit over 600 tons per year of ozone precursors that contribute to recently recorded exceedances of the ozone standard in the Portland area. Emissions from these facilities represent one percent of all VOC pollution in the airshed based on the 1992 emission inventory for the Portland ozone maintenance plan and are the largest source of uncontrolled industrial emissions in the area. A Governor's Task Force charged with developing the Portland ozone maintenance plan considered over 140 control strategies, selected the most efficient and cost effective strategies to implement and still acknowledged that emission reductions from marine loading of gasoline would be critical to making the entire plan work.

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?

As the Portland ozone maintenance plan was developed in the early 1990s, emissions from barge loading was identified then as a large source of air pollution that needed to be reduced. The most cost-effective approach relied upon the construction and operation of the cross-Cascades pipeline. However, the process for approval of the pipeline slipped from early projections. Rising controversy over whether the pipeline should be built led to speculation that operation would be delayed by years of litigation, even if it was approved for construction. In the meantime, some terminals decided to install control equipment while others have forestalled making any decisions on capital investment until the situation is clarified. This has resulted in a situation where some operators have installed the controls, and incurred the costs, while others have not. This rule will establish requirements for marine vapor control in the Portland area and eliminate uncertainty about what is expected from the terminals and barge companies.

Meeting the standards outlined in the proposed rule should preclude the necessity for further requirements and controls on this activity to meet ozone pollution standards.

5. Is there a timing issue that might justify changing the time frame for implementation of federal requirements?

Not applicable

6. Will the proposed requirement assist in establishing and maintaining a reasonable margin for accommodation of uncertainty and future growth?

The proposed requirement increases the certainty that the federal air quality standards will be met through 2006.

7. Does the proposed requirement establish or maintain reasonable equity in the requirements for various sources? (level the playing field)

Many other sources of ozone pollution in the Portland area, including businesses and individuals, have made commitments to reduce emissions of ozone precursors to ensure that Portland area air quality will continue to be healthful. For instance, large industry has been required to install emission controls without consideration of cost; since 1974, motor vehicle owners have been required to maintain their cars and have them inspected every two years; gas station owners have been required to install and maintain Stage II vapor recovery systems; and manufacturers of paint, other architectural coatings and consumer products have been required to reengineer their products to low fuming

formulations. This rulemaking ensures that the efforts made by others will be matched by the contribution that had been expected from this sector.

8. Would others face increased costs if a more stringent rule is not enacted?

If barge loading of gasoline continues to remain uncontrolled other steps will be necessary to ensure that the Portland area continues to meet federal air quality standards. There is no larger source of uncontrolled emissions in the Portland area. Over the past twenty years the most feasible and cost effective strategies have been identified and implemented to improve the air quality in the Portland area. Reductions in emissions from barge loading were identified as a critical strategy within the ozone maintenance plan. Failing to secure emission reductions from marine loading of gasoline would force a second look at other less effective or more costly strategies to maintain air quality. For example, reformulating gasoline to enhance air quality could be required but at a cost of about $0.14 per gallon and a 3% fuel economy penalty. The net cost effectiveness of this strategy is about $5,000 per ton of pollution reduced compared to between $857 to $3,859 per ton for marine vapor controls.

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?

Yes. For instance, one terminal in the Portland area already uses vapor recovery during barge loading.

11. Will the proposed requirement contribute to the prevention of pollution or address a potential problem and represent a more cost-effective environmental gain?

The proposed requirement meets commitments established in the Portland ozone maintenance plan, which is effectively a pollution prevention plan. Should the Portland area fail the ozone standards, additional air pollution control strategies would have to be implemented. These strategies could include stringent industrial controls (at upwards of $18,000 per ton of pollution reduced), reformulated gasoline requirements (at $5,000 per ton) and congestion pricing of highway travel (at $4,000 per ton). Marine vapor control at between $800 to $3,800 per ton of pollution reduced is a more cost-effective strategy.

State of Oregon
Department of Environmental Quality **Memorandum**

Date: November 12, 1999

To: Interested and Affected Public

Subject: Rulemaking Proposal and Rulemaking Statements - Marine Loading Vapor Control, OAR 340-232-0110; State Implementation Plan, OAR 340-200-0040

This memorandum contains information on a proposal by the Department of Environmental Quality (Department) to adopt new rules and rule amendments regarding loading of fuel products at bulk gasoline terminals. Pursuant to Oregon Revised Statute (ORS) 183.335, this memorandum also provides information about the Environmental Quality Commission's intended action to adopt a rule.

Gasoline is loaded onto barges in the Portland area for transport within the harbor, to coastal ports and to destinations elsewhere on the Columbia and Snake Rivers. Gasoline vapors are allowed to escape to the outdoor atmosphere during loading resulting in annual emissions of over 600 tons per year of ozone precursors. This proposal would require vapor recovery controls for loading gasoline and, under certain conditions, other fuel products onto barges. The Portland area is officially classified as in attainment with the ozone standard, having completed a ten year maintenance plan detailing commitments to continuing healthful air quality. Securing emission reductions from marine loading of gasoline or equivalent sources was identified as a commitment within the plan.

The Department has the statutory authority to address this issue under ORS 468A.035. The proposed rules implement ORS 468A.025. If adopted, these rules will be submitted to the U.S. Environmental Protection Agency as a revision to the State Implementation Plan, which is a requirement of the Clean Air Act.

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 rules.

Key Words & Acronyms:

Maintenance Plan:	A maintenance plan is part of the redesignation to clean air status and must demonstrate how the applicable air quality standard will continue to be met for at least ten years. The plan contains additional measures that may be necessary to ensure continued healthful air quality.
Ozone	A strong smelling, pale blue, reactive, toxic gas consisting of three oxygen atoms. It is a product of the photochemical process involving the sun's energy. Ozone exists in the upper atmospheric layers as well as at the earth's surface. Ozone at the earth's surface causes numerous adverse health effects and is a criteria air pollutant under the federal Clean Air Act. It is a major component of smog.
RACT	Reasonably Available Control Technology. An emissions standard for industrial facilities which represents the lowest limitation a particular source or source category is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility.
VOC	Volatile Organic Compounds. Hydrocarbon compounds which exist in the ambient air. VOCs contribute to the formation of smog and/or may themselves be toxic. VOCs often have an odor, and some examples include gasoline, alcohol and the solvents used in paints.

Hearing Process Details

The Department is conducting a public hearing at which comments will be accepted either orally or in writing. The hearing will be held as follows:

Date: December 16, 1999
Time: 7:00 p.m. (Question and answer session from 6:30 p.m. to 7:00 p.m.)
Place: State Office Building, Room 140, 800 NE Oregon, Portland

Deadline for submittal of Written Comments: 5:00 PM, December 21, 1999

Department staff will serve as 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: Kevin Downing, 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. 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 that summarizes the oral testimony presented and identifies written comments submitted. The Environmental Quality Commission (EQC) will receive a copy of the Presiding Officer's report. The public hearing will be tape recorded, but the tape will not be transcribed.

The Department will review and evaluate the rulemaking proposal in light of all information received during the comment period. Following the review, the rules may be presented to the EQC as originally proposed or with modifications made in response to public comments received.

The EQC will consider the Department's recommendation for rule adoption during one of their regularly scheduled public meetings. The targeted meeting date for consideration of this rulemaking proposal is February 11, 2000. 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

Marine Loading of Gasoline

Bulk gasoline terminals in the Portland harbor serve as distribution centers for petroleum products. Gasoline and other liquid petroleum products are received by pipeline, ocean barge and tankship and then shipped by truck and pipeline to points in western Oregon and by truck and river barge to eastern Washington and Oregon. The transfer of gasoline from one transport mode to another can result in the release of air pollutants that contribute to ozone pollution problems. While regulations requiring vapor controls when loading trucks at the terminals have been in place since 1978, barge loading has remained uncontrolled because of concerns regarding safety, jurisdiction, technical feasibility and financial cost.

Emissions of volatile organic compounds (VOCs) can also occur when barges are loaded with any other liquid cargo and the previous load was a volatile fuel product such as gasoline. So-called "switch loading" of differing fuel products, even those with fairly low volatility, results in the release of ozone precursors as the newly loaded product displaces the volatile vapors from the previous load of gasoline.

Why is there a need for the rule?

The Portland area has 7 bulk gasoline terminals with 9 marine docks. Over the past three years emissions from barge loading at these terminals has averaged 632 tons per year. In the most recent emission inventory (1992) barge loading accounted for more than 1 percent of total emissions from all human caused sources of volatile organic compounds. The potential for increases in barge loading is closely tied to the overall economy. Since the 1992 inventory was completed, growth in the barge loading activity has occurred and is expected to continue. The Portland ozone maintenance plan projected emissions from barge loading to increase at a 1.6 percent average annual growth rate from 1992 through 1998. Actual barge loading has increased at an average rate of 3.2 percent per year during this same time. The draft environmental impact statement for the cross-Cascade pipeline projected growth in barge shipments of gasoline up the Columbia River to increase at an average annual rate of 2.4 percent from 1996 to 2009 in the no-build scenario.

Barge loading was identified as a significant source of ozone precursor emissions in the Portland ozone maintenance plan. The Department assumed within the maintenance plan that construction of a cross-Cascades pipeline from Woodinville to Pasco, Washington would reduce VOC emissions from barge loading in the Portland area by 90% by 1999. The pipeline would offer lower transportation costs and transport a large share of the gasoline to the eastside gasoline terminals that the river barges currently service.

By the spring of 1999 the pipeline development process was proceeding but behind schedule. A rupture and explosion in June on the Olympic Pipeline in Bellingham led the Olympic Pipeline Company, also the proposed builder and operator of the cross-Cascades pipeline, to withdraw its application for the cross-Cascades pipeline. If the proposal is revived, the process will have to begin anew, leading to many years of investigation, research, evaluation and review before this pipeline could be approved for construction. This rulemaking is intended to achieve the emission reductions that cannot now be obtained from the operation of a pipeline across the Cascades.

Portland Ozone Maintenance Plan

Many approaches to reducing ozone pollution in the Portland area have been considered and

implemented over the past twenty years. The 1996 Portland ozone maintenance plan was developed from an initial list of over 140 potential strategies to reduce the emission of ozone precursors. The Governor's Task Force on Reducing Motor Vehicle Emissions evaluated these strategies for environmental benefit, economic impact and feasibility. The final recommendation made by the Task Force encompassed strategies affecting a variety of pollution sources including motor vehicles, lawn and garden equipment, marine engines, consumer products, architectural coatings, options for work commuting and autobody refinishing. The plan accounted for emission benefits from national strategies like improvements in motor vehicle pollution control systems. The plan also relied upon the ongoing benefits secured from previous emission reduction strategies like vapor recovery at gas stations and gasoline tank truck loading facilities, lower vapor pressure for gasoline sold in the area and the required installation of pollution controls at a variety of businesses. The following table provides a representative listing of some of these strategies and the cost effectiveness associated with each.

Activity Category	**Strategy**	**Cost Effectiveness ($ per ton of VOC reduced)**
On road vehicles	Enhanced Inspection and Maintenance	$4,964
Non road engines	Small engine emission standards	$280
Non road engines	EPA Phase I marine engine emission standards	$1,026
Area sources	Autobody refinishing	$0 benefits balance costs
Area sources	Architectural coatings	$12,800
Area sources	Consumer products	$4,900
Area Sources	Stage II Vapor Recovery	$1,000
On road vehicles	Employee commute options	$ (445) benefits outweigh costs
Industry	Process controls at semiconductor plant	$18,000

Recognizing the critical need for reductions from barge loading, the plan also committed to securing equivalent emission reductions if the pipeline was not in place by 1999. Most sources of volatile organic compounds within the Portland area are already required to control emissions. Industrial activities ranging from paper coating, printing, iron and steel manufacturing, solvent metal cleaning to waste disposal must use pollution controls like thermal oxidation, high solids coatings, water based coatings and combustion tuning, significantly reducing emissions of ozone precursors. Among all the uncontrolled industrial source categories contributing to ozone pollution, barge loading, at 903 tons per year under current permit levels, far exceeds the amount from the next largest uncontrolled category, bakeries, at 285 tons per year.

The need for the emission reductions from barge loading is further underscored by air quality monitoring reports in recent years. The data show the Portland area continuing to experience exceedances of the preexisting 1 hour ozone standard (3 in 1996, 3 in 1998) and the new 8 hour ozone standard (4 in 1998). The Department did find that barge loading activity may have contributed to the ozone exceedances in 1996 because of the heavy volume loaded in the days prior. This impact occurred despite the Department's efforts to predict ozone exceedance days and the terminals' willingness to avoid loading on days predicted to be conducive to exceedances.

Marine Vapor Control

A typical vapor control system includes the following elements: 1) vapor collection piping from all cargo tanks on the barge; 2) piping to transfer displaced vapors, usually ashore; and 3) vapor processing equipment, also usually ashore. Vapor processing technology is available in a number of forms but can be broadly broken down into two categories, recovery/reuse and recovery/combustion. Pollution control efficiencies can be quite high. Recovery/reuse technologies like carbon bed adsorption are effective at reducing VOC emissions about 95 percent by weight. Recovery/combustion technologies achieve 98 percent and greater control efficiencies. Recovery/reuse technologies do allow for the recovery of the product, which has an economic benefit for the terminal. However, operational and maintenance costs are high for this approach. The preferred technology appears to be combustion. There are emissions from the combustion process but they are negligible compared to the reductions otherwise obtained. For instance, if all terminals chose to comply with the Department's proposed rule using combustion technology, 619 tons of VOC from barge loading would have been eliminated, offset by 13 tons of VOC and 5 tons of nitrogen oxides from the combustion process.

Regulation of Marine Loading of Gasoline

EPA first proposed marine loading controls in the early 1970s but delayed its effort to resolve issues about safety, cost and effects on interstate commerce. The National Research Council conducted a comprehensive study of the issue in 1987 and concluded that controls were technically feasible, provided that the Coast Guard promulgated safety requirements. The Coast Guard issued its safety requirements in 1990. In that same year amendments to the Clean Air Act clarified EPA's authority to regulate emissions from marine vessels. The agency followed through by adopting categorical RACT (reasonably available control technology) guidelines in 1995. The rule required controls on facilities that load more than 420,000,000 gallons of gasoline per year. The rule also established performance requirements for the control of air toxics using maximum achievable control technology (MACT).

None of the terminals in the Portland area meet the threshold for compliance under the federal requirement. However, Oregon Administrative Rule 340-232-0040 requires a case-by-case review of RACT for major sources for which no categorical RACT exists. In 1997 the Department requested a RACT analysis by the three terminals covered under this rule. The results of those analyses regarding economic feasibility are described in the following section on "Cost Effectiveness".

Vapor recovery technology has been readily available since the late 1980s and has been required in several jurisdictions across the country including New Jersey, Pennsylvania, Texas, Louisiana, San Francisco Bay, San Luis Obispo and the Los Angeles/Long Beach basin.

Cost Effectiveness of Controls

A primary factor in determining whether to regulate the emissions from loading gasoline onto barges has been the cost-effectiveness of the controls, typically expressed as dollars per ton of pollution reduced. These costs have tended to be high for Portland area terminals because they are relatively small compared to other facilities around the country that have been required to install marine vapor controls. Marine vapor control systems are sized and priced according to the maximum anticipated loading rate. Since all terminals want to load at a high rate, they would all need to build large-scale controls. The larger terminals would have advantage of spreading the capital cost over a larger throughput.

Local information about cost effectiveness, reflecting conditions specific to local terminals, is available from the 1997 RACT analysis required of the larger Portland terminals, Chevron, Equilon and GATX. The RACT analysis was based on the expected completion date of the cross-Cascade pipeline assuming a 2.5 year depreciation schedule for the control equipment. Under this scenario the terminals reported cost effectiveness ranging from $5,750 to $7,900 per ton for carbon adsorption technology and from $4,700 to $9,290 per ton of pollution reduced using a flare technology. Since the pipeline is not going to be constructed in the near term, the capital recovery factor was adjusted, in the analysis shown below, to reflect the typical depreciation cycle for this equipment, 10 years. It is also important to note that the Environmental Protection Agency had suggested $2,000 per ton as the cost of RACT for marine loading in 1979. Adjusted for the effects of inflation, the cost to meet the RACT standard for marine loading would be about $4,500 per ton today.

Cost per Ton of VOC Reduced

Carbon Adsorption (Recovery/reuse)	RACT with 10 year depreciation[1]	Fixed Site Control, EPA cost assumptions[2]	Portable Control, EPA cost assumptions[3]
ARCO	NA	$ 5,317	NA
Chevron	$ 2,236	$ 1,072	NA
Equilon	$ 2,866	$ 3,147	NA
GATX	$ 3,536	$ 2,636	NA
Mobil	NA	$ 3,205	NA
Time Oil[4]	NA	$ 4,371	NA
Tosco	NA	$ 11,975	NA
Flare (Recovery/combustion)			
ARCO	NA	$ 3,859	NA
Chevron	$ 1,959	$ 857	NA
Equilon	$ 3,410	$ 2,325	NA
GATX	$ 4,005	$ 1,963	NA
Mobil	NA	$ 3,205	$ 1,797
Time Oil [4]	NA	$ 3,190	$ 1,795
Tosco	NA	$ 8,568	$ 2,266

The first column represents cost effectiveness based on assumptions provided by the terminals but projected over a typical life span of the equipment. The cost effectiveness from this analysis compares very favorably to the RACT analysis provided by the Oregon Title V terminals. To compare the relative impact of controls on terminals that were not required to complete a RACT analysis the Department obtained a standard quote for both types of controls and applied control cost methodology based on EPA guidance to all the terminals in the Portland area. This analysis is shown in the second column and further illustrates that there is a relatively steep decline in cost effectiveness as annual throughput decreases. The third column shows cost effectiveness relying upon a portable control device. This information is discussed in more detail in the discussion on "Seasonal Control".

---

1 Based on RACT analyses provided by select terminals in 1997 but with 10 year depreciation schedule.

2 Based on cost of fixed location equipment from supplier and cost methodology outlined in EPA "Control Cost Manual".

3 Based on cost of portable equipment from supplier and cost methodology outlined in EPA "Control Cost Manual". Assume 6000 barrel per hour loading and a Coast Guard required dock safety skid located at each terminal.

4 Cost effectiveness is calculated based on controls at the Linnton facility only. If regulated, barge loading of affected products (i.e., gasoline) would likely cease at the St. Johns facility.

How was the rule developed?

Rule Language Development

The Department consulted with air pollution control authorities in jurisdictions where barge loading is regulated to identify the necessary elements of a feasible rule. Based on this work, staff developed an initial proposal to address air quality concerns in the Portland area, keeping in mind the cost effectiveness of the controls. The proposal called for controls year-round for the larger terminals and at the smaller terminals only during the ozone season. Including the smaller terminals was necessary to obtain an air quality benefit equivalent to that of the pipeline. The seasonal requirement was proposed assuming that it would lead to development of contractual arrangements with the larger controlled terminals to control vapors rather than the construction and off-season idling of control equipment. The proposal also called for vapor control during all lightering events. Lightering is the term used to describe the ship-to-ship transfer of cargo.

This proposal was presented in a series of meetings to representatives of the bulk terminals, shipping companies and interested and affected persons in order to identify any concerns with the draft regulation. Industry concerns centered on the definition of applicable fuel products, the effective date of the rule and the practicality of complying with a seasonal requirement. The public was concerned with cumulative effects of exposure to the pollutants found in gasoline vapor and wanted to secure as soon as possible the maximum protection from exposure to the vapors associated with gasoline loading. Concerned citizens urged the Department to more thoroughly investigate the feasibility of portable controls to make complete control of these emissions more economically viable.

Fuel Product Applicability

The terminals preferred to narrow the definition of applicable fuel products to only include gasoline as it is the most volatile product loaded and represents the bulk of the petroleum products transported by barge. Although the original proposal is proactive and aligns with California applicability, shipping reports on the Columbia River indicate that gasoline is the single largest contributor, about 99%, to emissions among petroleum products loaded. There are no refineries in Oregon and the mix among petroleum products shipped in the state is not expected to change. Limiting applicability to when gasoline is loaded or when the previous load was gasoline would provide the needed environmental benefit and simplify compliance determinations for both the terminals and the Department.

Effective Date

Terminal operators expressed concern about the proposed June 2001 effective date. They noted that in addition to the time required for engineering and construction, additional time is needed to secure the necessary permits including greenway construction approval. They requested an additional six months to comply, i.e., November 2001. Citizens urged an earlier compliance date of August 2000.

There are a number of steps involved for the terminals to comply that involve permitting, engineering, construction and testing. Permits will be required from the Division of State Lands (DSL) and the Corps of Engineers if modifications are required for the marine dock and construction occurs in the river. Construction permits would also be required from the city of Portland, including approval to build in the Willamette River greenway. The city of Portland permitting process could take 3 to 5 months. The DSL/Corps process could also take up to 5 months. The city of Portland provides for an expedited review if an emergency exists. The DSL/Corps process does not have a formal expedited process but recommends collectively briefing all affected agencies to speed the review time. Permit review for each of these tracks can occur simultaneously. An engineering firm that had bid for one Portland terminal's vapor recovery system estimated 50 weeks for construction, from the design phase to operational testing. It appears, then, that at least 15.5 months would be required to bring a vapor recovery unit into operation starting from the design stage.

The Department considers these pollution reductions critical to maintaining good air quality and will work to support expedited permit reviews by other agencies in order to reduce the risk of exceedances during future ozone seasons. Many of the steps needed to install and operate control devices cannot be accelerated and are otherwise not sensitive to any compliance incentives the Department could offer. The June 2001 effective date provides a realistic time to comply while minimizing the possibility of poor air quality occurrences.

Seasonal Control

The major concern raised by the small terminals and one mid-sized terminal was the financial impact of requiring controls, seasonal or otherwise, that would be cost prohibitive. The terminals did not consider contractual arrangements a feasible approach to meet seasonal control requirements and the installation of expensive controls would compromise their ability to stay in business. Some of these terminals act as agents for other's products and it would be especially difficult to pass along those costs. One terminal pointed out that, as a third party operator, its Portland tank operation does not support its own company gas stations and so the company had less incentive to make substantial capital investments. If the market could not support passing along these costs, the company would be inclined to close the facility because it is not essential to their core business. This would result in a loss of storage capacity for fuel products in the

Portland area and the region. Another terminal pointed out that commitments made in contracts to store other company's products may extend into and beyond the summer months. Not being able to provide complete services hampers their ability to secure these contracts. The terminal argued that the seasonal control requirement is potentially costly enough to effectively be a prohibition on barge loading during the summer months. This would have the detrimental effect of diminishing their customer base and otherwise threatening their ability to stay in business.

Citizens supported an approach that would require vapor recovery on all terminals year round to maximize protection against air toxic exposure in nearby neighborhoods. Their concern about cumulative impact of toxic emissions from these sources, they felt, justified high levels of control.

The Department researched the issue further and found that costs could be reduced and cost-effectiveness improved for these terminals by sharing the capital costs through the use of a portable emission control system. Portable units have been used in other parts of the country as a primary and backup control device intended to meet similar regulatory requirements and are expected to meet the same performance standards as a permanently sited system. A portable device improves the cost-effectiveness to $1,795 per ton reduced. A marine vapor control service could be provided by a consortium of interested local terminals or by an independent business.

There are also two small terminals located in Vancouver. Both terminals have the potential within their permits to significantly increase gasoline loading above current levels. The adoption of a marine vapor control requirement by the state of Oregon may shift gasoline loading activity to these terminals. Since the Washington terminals share both the same airshed and economic market as the Portland terminals, the Southwest Washington Air Pollution Control Authority has agreed to adopt similar requirements as those adopted in Oregon. A portable device would be an attractive approach to compliance for these facilities as well, further improving the overall cost effectiveness.

Lightering

Some fuel products enter the Portland area gas distribution system by ocean going barge and tankship. Lightering of petroleum products may be utilized to avoid a transfer to the onshore terminals when the product is ultimately destined for upriver terminals. It may also occur to reduce the draft on incoming vessels to allow them to tie up to the docks at the terminals. Lightering can occur offshore, at designated anchorages in the river and alongside ships berthed at docks.

Lightering has not been a high volume activity in the Portland area, releasing about 8.5 tons of VOCs per year. During the summer of 1999 the volume of fuel product lightered has increased

as a result of the Bellingham pipeline explosion. During the ensuing investigation, the two terminals in Bellingham have not been able to transport product through the pipeline and the rest of the pipeline has been subject to a precautionary reduction in capacity. As a result, the Oregon terminals are receiving a larger percentage of their product by ocean tank ship. Petroleum shipments are arriving on any available ship to meet the immediate need. These ships, fully loaded, may ride deeper than the draft available at the terminal docks and so require some lightering to offload at the dock. It is expected that as the situation matures, ships with appropriate draft will be contracted for this trade and lightering will decline to historic levels.

Discussions with petroleum shippers in other jurisdictions where lightering regulations are in place indicated that there are no feasible controls when lightering occurs away from a terminal. Tidewater Barge, the only barge company providing petroleum shipping services in the Portland area, investigated the feasibility of lightering controls. To provide for vapor control during lightering, a barge would be removed from service and a carbon adsorption unit would be installed on board. The cost of installing and operating this device would be higher than for a similar land-based system due to a number of factors, including the revenue lost with removing the barge from more lucrative transport service, the need to supply auxiliary power, tugboat transfer to lightering locations and storage of the barge when not in use. For vessels that lighter at a terminal dock, the terminal's vapor control system can be used to control emissions. Since the costs are relatively high for the loading operations that occur away from a terminal and the air quality impact is not significant, the Department is proposing to prohibit lightering on Clean Air Action days where neither vessel is berthed at a terminal dock.

What is proposed by the rule?

All bulk gasoline terminals operating in the Portland area will be required to reduce by at least 95 percent the emissions of gasoline vapors when loading marine vessels, including lightering when either vessel is berthed at their dock. Lightering that occurs at other locations will be prohibited on Clean Air Action days[1].

Copies of documents relied upon in the development of this rulemaking proposal can be reviewed at the Department of Environmental Quality's office at 811 S.W. 6th Avenue, Portland, Oregon.

These include: *Controlling Hydrocarbon Emissions from Tank Vessel Loading*, National Research Council, 1987

[1] Clean Air Action days are announced by the Department when meteorological conditions are such that ozone formation is enhanced and the probability of an exceedance of the standard could be expected. The declaration of such days leads to a number of voluntary and required actions by businesses, local governments and individuals to minimize the release of ozone precursors.

Draft Environmental Impact Statement, Cross Cascade Pipeline, U.S. Forest Service & Washington State Energy Facility Site Evaluation Council, September 1998
Hazardous Air Pollutant Emissions from Gasoline Loading Operations at Bulk Gasoline Terminals, American Petroleum Institute, October 1998
OAQPS Control Cost Manual, Fifth Edition, U.S. Environmental Protection Agency, February 1996

Please contact Kevin Downing (phone and email address noted below) for times when the documents are available for review.

Who does this rule affect including the public, regulated community or other agencies, and how does it affect these groups?

The rule directly affects bulk gasoline terminals in the Portland area. Terminals will install vapor recovery control equipment in order to reduce emissions by at least 95 percent. Barge companies will have to ensure that their river barges are leak free, vapor tight and in good working order to transport fuel from these terminals. Fuel costs could increase by 1 to 2 cents per gallon for product transported east of the Cascades because of the increased costs associated with installing and operating the vapor recovery equipment. These costs may or may not be reflected at the retail sale.

The environmental benefits will be substantial. We project overall VOC emissions will be reduced by upwards of 98 percent, depending on the control technology employed. Based on the loading patterns reported by the terminals over the past three years and assuming the use of combustion controls, the net emissions would have been 25.6 tons per year VOC and 5 tons of NOx, reduced from 632 tons per year of VOC. A secondary benefit is the reduction of air toxics, which account for about 4.8 percent of gasoline vapor by weight. These include alkylated lead, benzene, ethylene dichloride, polycyclic organic matter and toluene. Emissions of air toxics are reduced with vapor control technology at an equal, if not greater, efficiency than VOCs. Benzene emissions, the largest volume and one of the most potent of these toxic compounds, would have been reduced 99 percent to 226 pounds from 5 tons per year otherwise.

How will the rule be implemented?

The proposed effective date of the rule is June 1, 2001. The permits for the affected bulk gas terminals will be revised to add permit conditions reflecting the adopted requirements. Compliance will be determined via the monitoring and recordkeeping requirements outlined in the proposed rule and evaluated following typical departmental inspection procedure and practice.

Are there time constraints?

The Portland ozone maintenance plan projected a significant reduction in ozone precursors by 1999 from barge loading through the operation of a cross-Cascade pipeline. Air quality monitoring data from recent years show the Portland area continues to experience exceedances and near exceedances of the preexisting 1 hour and the new 8 hour ozone standard. While the area has not violated the 8 hour ozone standard, the preponderance of these exceedance events highlights the need for achieving all emission reductions identified in the plan, including those from barge loading.

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:

Kevin Downing
DEQ – Air Quality
811 SW 6th Avenue
Portland, Oregon 97204

503 229-6549
downing.kevin@deq.state.or.us

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: December 22, 1999

To: Environmental Quality Commission

From: George Davis and Kevin Downing

Subject: Hearings Report for Marine Loading Vapor Control rule, OAR 340-232-0110

A hearing was held to accept testimony on proposed rules that will require the control of Volatile Organic Compounds (VOC) emissions that occur when gasoline vapors are displaced from marine tank vessels during loading.

On December 16, 1999, a public hearing was held at the State Office Building, Room 140, 800 N.E. Oregon Street, Portland. Twenty-five persons attended, five persons presented oral testimony. Two persons at that meeting presented written testimony.

The following report provides a summary of written and oral comments made, including written comments received outside of the public hearings. Nineteen persons submitted additional written testimony outside of the public hearings. Comments are grouped by similar subject areas. The persons who made the comment are identified by a code, which is keyed to the entries in the Testimony Reference table.

Testimony References

No.	Oral Testimony	Written Testimony	Name and Affiliation
O1	YES	YES	John Williams Rebound 12770 SW Foothills Dr. Portland
O2	YES	NO	Nancy Cushwa 1427 N.W. 23rd Portland
O3	YES	YES	Robert Davies 2518 N.W. Savier Portland
O4	YES	YES	Sharon Genasci NW District Association Health and Environment Committee 2217 N.W. Johnson Portland
O5	YES	YES	David Paul Paul & Sugerman, PC 520 SW 6th #920 Portland

Written Testimony Received

No.	Name and Affiliation
W1	Paul Mairose SW Air Pollution Control Authority 1308 NE 134th Street Vancouver, WA
W2	May Avery 4424 SE Roethe Rd. Unit 4 Portland, OR
W3	Robert D. Elliott SW Air Pollution Control Authority 1308 NE 134th Street Vancouver, WA
W4	Jerry Holmes Chevron Products Co. Willbridge Terminal Portland, OR
W5	J. Michael Paisley Time Oil Co. 2737 West Commodore Way Seattle, WA
W6	Bob and Mary Holmström 2934 NW 53rd Drive Portland, OR
W7	John Sherman Terminal Superintendent Tosco 5528 NW Doane Avenue Portland, OR
W8	Sarah Doll Oregon Environmental Council 520 SW 6th Avenue, Suite 940 Portland, OR
W9	Marilyn Mangion 2138 NW Lovejoy Portland, OR
W10	Stacey Vallas 2856 NW Thurman St. Portland, OR
W11	Carol Dansereau Executive Director Washington Toxics Coalition 4629 Sunnyside Ave N, #540 E Seattle, WA
W12	Karl Anuta Northwest Environmental Defense Center 10015 SW Terwilliger Blvd Portland, OR
W13	Gordon Lauderbach Terminal Superintendent ARCO 9930 NW St. Helens Rd. Portland, OR
W14	Robert Amundson 1616 SW Harbor Way Portland, OR

W15 Martha Gannett
2466 NW Thurman St.
Portland, OR

W16 Bart A. Brush
President
Northwest Environmental Defense Center
10015 SW Terwilliger Blvd
Portland, OR

W17 Brendan Kane
OSPIRG
1536 SE 11th Avenue
Portland, OR

Testimony Summary/Issues	Whose Comment

GENERAL COMMENTS ABOUT THE RULE

1. O1, O2, O3, O4, O5, W6, W8, W9, W10, W11, W12, W14, W15, W16, W17

Glad that DEQ was proposing a rule to control emissions from barge loading, but the rule does not go far enough.

2. W13

In principle, this terminal supports the rulemaking as a means to ensure long term attainment with federal air quality standards in the Portland ozone maintenance area with specific concerns about the proposal that need to be addressed.

3. O4

DEQ has delayed too long. Why hasn't DEQ protected public health all these years?

4. O5, W8, W10

It is extremely important from a public health perspective to begin requiring capture equipment for gasoline and other fuel emissions. Any disadvantages or inconveniences suffered by fuel companies are vastly outweighed by the benefits to Portland residents.

5. W5

Final rule needs to reflect the goals that were established for its justification, i.e., to capture four hundred tons of VOC emissions to compensate for the loss of the cross-Cascade Pipeline.

THE PROPOSED RULE REQUIRES A 95 PERCENT REDUCTION IN EMISSIONS; A HIGHER LEVEL SHOULD BE REQUIRED

6. O1, O2, O4, O5, W8, W9, W11, W12, W14, W16, W17

San Francisco requires 98.5 percent controls. Santa Barbara requires Exxon to reduce emissions by 99.8 percent. Portland deserves the same level of protection. Oregon should require 99 percent reduction in VOCs, as has been achieved elsewhere on the west coast. The goal should be zero percent pollution. State of the art technology should be required at all facilities.

THE PROPOSED RULE ONLY REQUIRES CONTROL OF GASOLINE EMISSIONS; EMISSIONS FROM OTHER FUELS SHOULD ALSO BE CONTROLLED

7. O1, O2, O3, O4, W15

Emissions of other fuel vapors, such as jet fuel and diesel fuel should also be required. Once installed, the equipment should be used for the maximum benefit of the airshed.

8. O3, W14

Benzene is a concern and is present in gasoline, jet fuel, diesel fuel and heating oil. DEQ should be concerned about the tons of benzene released from the tank farms. Benzene is toxic and was found to be 113 times one benchmark in a nationwide EPA study. DEQ should take every opportunity to reduce emissions of hazardous air pollutants.

THE PROPOSED RULE APPLIES ONLY IN THE PORTLAND AIR QUALITY MANAGEMENT AREA; IT SHOULD APPLY STATE-WIDE

9. O1, O2, O4, W9, W14, W15

There are oil terminals in other parts of the state that should also be controlled, such as the McCall dock and in Umatilla. Cascade Grain in Clatskanie is exempted from the rule, but it should not be as emissions could be transported into the Portland area. Oil companies should not have the opportunity to simply move outside the Portland metropolitan area to avoid compliance. The rule should apply statewide.

CONCERNS ABOUT SEASONAL APPLICABILITY

10. O4, O5, W6, W8, W9, W10, W11, W12, W15, W16, W17

The proposed rule should not allow a seasonal exemption; it should apply year-round.

Exposure to toxic air contaminants like benzene is a problem year round. Year round operation will add only marginally to overall costs as operational costs are much less than capital costs.

11. W5

Smaller terminals, facing much higher control costs, should be allowed to control ozone emissions only during ozone season when the threat is greatest.

EFFECTIVENESS OF PORTABLE DEVICE IS LIMITED BY LOGISTICS

12. W7

Sharing a control device appears reasonable but scheduling issues will make coordination very difficult.

EMISSIONS DURING LIGHTERING SHOULD ALSO BE CONTROLLED

13. O1, O2, O5

Lightering is only restricted on Clean Air Action Days. There should be a 100 percent prohibition of lightering. Lightering controls may be expensive, but that is "tough luck" for the oil companies. Emissions from lightering were not quantified in the staff report.

14. O4

Rule has been weakened by the oil companies; lightering is uncontrolled. Will DEQ monitor lightering?

15. O5, W6, W8, W11, W12, W15, W16, W17

Lightering must not become a method to avoid compliance. This rule should add language to monitor lightering activities and ensure that lightering does not become a substitute for compliance with these new rules.

16. O4, W6

Requirements should extend even to those vessels making first time visits to the area. How will DEQ enforce this requirement?

CONCERNS ABOUT NEEDING OR ALLOWING AN EMISSION OR THROUGHPUT EXEMPTION

17. W5

Small terminals face disproportionately higher costs for control. A terminal loading very few barges in a year will face substantially escalated costs of abatement. Exemptions exist in Oregon for other gasoline categories of VOC that are small emitters. A similar exemption based on throughput or emissions should be considered here.

18. O5, W8, W11, W12, W16, W17

A de minimis exception is bad policy and bad for the air. Deal with the emissions on an equitable basis. There can be no complaint of financial impact, given that every other major west coast port requires controls.

COMMENTS ON THE FISCAL IMPACT

19. W2, W15, W16

Supports adoption of the rule, even if it adds one or two cents per gallon to the price of gasoline. The market will absorb any minimum additional costs. People will continue to drive their cars with higher fuel costs and one or two cents will not make much difference.

20. O5, W8, W17

Based on experience in Washington and California, proposed rule would not increase the cost of gasoline.

CONCERNS ABOUT THE COMPLIANCE SCHEDULE

21. O3, O4, O5, W8, W9, W10, W12, W14, W15, W16, W17

Concerned that the rule will not be effective until 2001. Control equipment has been available for at least 12 years. The control equipment is available now, why wait until 2001 if it can be done sooner? The rule should become effective in August 2000. Southern California, northern California, Washington state and elsewhere implemented these regulations over ten years ago. The industries have been on notice for many months that proposed rules were under consideration. The essential infrastructure can be constructed and rendered operational with 40 to 50 weeks. The time schedule for implementation should be compressed.

22. O5, W8, W17

The permitting process with governmental authorities can be expedited by cooperation and taking advantage of concurrent processing of permits.

23. W4

The proposed compliance schedule is accurate and aggressive. Barge loading controls will require a unique system here. The controls are a complex unit that must reliably meet safety and regulatory requirements.

24. W6

Many previous regulations have incorporated a phased in schedule based on facility throughput. DEQ should implement a three-tiered schedule with high emitters coming into compliance according to the proposed schedule; low emitting west side terminals should be allowed additional two years; low emitting east side terminal allowed additional three years.

25. W7

The proposed schedule allows only 2 weeks of flexibility to deal with any disruptions in approval or construction, based on estimates for permit review and engineering and construction. DEQ should extend the compliance deadline four to six months or extend compliance deadline, by month, subject to completion of the permit review process by the city of Portland and DSL/Corps.

THE PROPOSED RULE ALLOWS A CHOICE OF CONTROL TECHNOLOGIES, VAPOR RECOVERY SHOULD BE THE PREFERRED CONTROL TECHNOLOGY

26. O4, O5, W8, W11, W12, W16, W17

Carbon adsorption allows the oil companies to recover product and recycle it; they should not burn it. Encourage carbon adsorption, not burning; oil companies will save money by recovering product. The cost of the recovered product should be reflected in the cost analysis.

CONTINUOUS EMISSION MONITORS SHOULD BE REQUIRED

27. O1, O2, O4

Commentor is skeptical of oil companies' veracity in reporting their own fuel throughput, control efficiency and the resulting emissions. Continuous emission monitors should be required to verify the control efficiencies. Emissions are going to be higher in the summer months and reliance on a single emission factor will not be sufficient to reflect the variability in emissions related to ambient temperature. The monitors will provide real time measurement of these emissions.

THE PROPOSED RULE ALLOWS TOO MUCH LEAKAGE FROM HATCHES

28. O1, O2

The proposed rule allows up to 10,000-ppm leakage from hatches and other seals. This standard would allow leaks of up to 10 percent. The Bay Area Air Quality Management District considers 100 ppm the appropriate emissions ceiling for process valves and pumps. DEQ should require less leakage.

PERMIT MODIFICATIONS MUST BE UNDERTAKEN PROMPTLY

29. O5, W8, W12, W16, W17

The permittees should be advised upon implementation of these proposed rules that permit modifications will be initiated by the Department, and permit modifications should be finalized on a timely basis. Lacking a binding requirement in federal law or the Oregon State Implementation Plan, the rulemaking should be amended to include a schedule for permit modifications.

CLARIFY THE APPLICABILITY OF SELECT PROVISIONS IN THE RULE

30. W1,W3

340-232-0110 (7) addresses uncontrolled lightering events but refers to "uncontrolled barge loading". For consistency, all references to uncontrolled barge loading in this section should be revised to refer to uncontrolled lightering events.

31. W13

340-232-0110 (1) places the sole responsibility for compliance with the rule upon the terminal owners or operators. This places an unrealistic burden on terminals forcing responsible operators to conduct operation and maintenance reviews of each vessel to ensure each vessel meets requirements. Recommends that both the vessel and terminal operator be responsible for compliance for the vessels and facilities within their control.

32. W13

"Liquid leak" is not defined. Suggest adopting dripping liquids definition from federal register 40 CFR60 Section 60.481.

33. W13

340-232-0110 (6) (a) requires only marine terminal operators to maintain records of loading events at terminals. Marine vessel operators should also be required to keep records of loading events at terminals.

34. W13

Commentor suggests adding exemption from control requirements when both the following conditions are met: 1) The vessel has been gas freed (regardless of prior cargo), and 2) When loading any products other than gasoline.

35. W13

Recordkeeping requirements in 340-232-0110 (6) (a) (E) should be amended to identify prior cargoes as gas freed when it has occurred. Gas freed should also be clearly defined as, for instance, when the concentration of VOC in the cargo bay has been measured with an OVA at a level less than 10,000 ppm expressed as methane.

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Marine Loading Vapor Control

Department's Evaluation of Public Comment

Testimony Summary/Issues **Whose Comment**

GENERAL COMMENTS ABOUT THE RULE

1. O1, O2, O3, O4, O5, W6, W8, W9, W10, W11, W12, W14, W15, W16, W17

Glad that DEQ was proposing a rule to control emissions from barge loading, but the rule does not go far enough.

The Department appreciates comments in support of the proposed rule and acknowledges changes proposed by the commentors.

2. W13

In principle, this terminal supports the rulemaking as a means to ensure long term attainment with federal air quality standards in the Portland ozone maintenance area with specific concerns about the proposal that need to be addressed.

The Department appreciates comments in support of the proposed rule. The concerns raised by this commentor and the Department's response are detailed in comments 32 through 35.

3. O4

DEQ has delayed too long. Why hasn't DEQ protected public health all these years?

The Department has taken steps to protect public health since the agency was first established. This rule constitutes the most recent step in a long line of regulatory measures affecting a variety of sources of volatile organic compounds. This history of protective measures extends back to the 1970s, all of which have been effective in reducing exposure to these air contaminants. These measures include requirements for the storage and handling of gasoline at the wholesale and retail levels, reductions in the volatility of gasoline, controlling the release of vapors from degreasing manufactured parts, surface coating of

wood and metal parts, asphalt and coal tar pitches used in roof coatings, printing inks and dry cleaning. In addition, the Department has operated one of the most successful vehicle inspection programs in the country since the mid-1970s. More recently the Department adopted a variety of rules targeting sources of volatile organic compounds including the use of automobiles (parking ratios and employee commute options programs) and motor vehicle refinishing. Following a program of pollution control in a progressive manner that has restored and maintained air quality, keeping the air as free from pollution as is practicable, residents in the Portland area have experienced improvements in air quality even as the population has increased by over 55 percent since 1970.

Emission reductions from barge loading was targeted in the Portland ozone maintenance plan. Analysis of future Portland air quality accounting for the influence of growth and the phase-in of all the adopted control strategies indicated that these pollution savings would not be needed until 1999 when it was expected that the cross-Cascade pipeline would be operational. The pipeline would effectively address petroleum distribution needs and significantly reduce emissions in the Portland area.

4. O5, W8, W10

It is extremely important from a public health perspective to begin requiring capture equipment for gasoline and other fuel emissions. Any disadvantages or inconveniences suffered by fuel companies are vastly outweighed by the benefits to Portland residents.

The Department agrees with the commentor that vapor control for loading gasoline is needed to protect public health. Vapor control for loading other fuels is not as necessary for the reasons outlined in the response to comment 7.

5. W5

Final rule needs to reflect the goals that were established for its justification, i.e., to capture four hundred tons of VOC emissions to compensate for the loss of the cross-Cascade Pipeline.

The Department has assumed within the maintenance plan a reduction equivalent to about 90 percent of the uncontrolled emissions. In the 1992 base year this would have amounted to about 440 tons. In the meantime, terminals have come into operation that were not operating in 1992 and barge loading activity has increased at twice the rate that had been projected within the maintenance plan. The need to secure emission reductions from barge loading is further underscored by recent air quality monitoring. The data show the Portland area continuing to experience exceedances of the 1 hour standard (3 in 1996, 3 in 1998) and the new 8 hour ozone standard (4 in 1998).

The emission reduction standard proposed in the rule, 95 percent, reflects not the maintenance plan commitment but the standard for control among most of the jurisdictions that require marine vapor control. The requirement to include all of the terminals, including those with lower throughput, is based on a determination of what can be

reasonably expected based upon the analysis outlined in the Rulemaking Proposal Memorandum and in the response to comment 11.

THE PROPOSED RULE REQUIRES A 95 PERCENT REDUCTION IN EMISSIONS; A HIGHER LEVEL SHOULD BE REQUIRED

6. O1, O2, O4, O5, W8, W9, W11, W12, W14, W16, W17

San Francisco requires 98.5 percent controls. Santa Barbara requires Exxon to reduce emissions by 99.8 percent. Portland deserves the same level of protection. Oregon should require 99 percent reduction in VOCs, as has been achieved elsewhere on the west coast. The goal should be zero percent pollution. State of the art technology should be required at all facilities.

The Department disagrees. No supporting documentation was provided by the commenters. DEQ's research shows that the Bay Area Air Quality Management District requires emissions from loading into marine vessels to be reduced by at least 95 percent (8-44-301). The Santa Barbara County Air Pollution Control District requires an identical reduction (Rule 327-C-1).

Zero percent pollution production is not technologically feasible. While the rule requires 95 percent reduction from the uncontrolled condition, the equipment designed to meet this standard is typically constructed to perform at high levels, approaching 99 percent, to ensure an adequate margin of compliance for the regulated source. State of the art equipment will be installed to comply with this rule.

THE PROPOSED RULE ONLY REQUIRES CONTROL OF GASOLINE EMISSIONS; EMISSIONS FROM OTHER FUELS SHOULD ALSO BE CONTROLLED

7. O1, O2, O3, O4, W15

Emissions of other fuel vapors, such as jet fuel and diesel fuel should also be required. Once installed, the equipment should be used for the maximum benefit of the airshed.

Gasoline is at least three times more volatile than any of the other petroleum products typically shipped in the Portland area such as diesel fuel, heating oil, ethanol and jet fuel. The Portland area is a rather "simple" petroleum market as compared to other jurisdictions where marine vapor control is required. The bulk of the product loaded onto river barges is gasoline, based on the latest reports made to the Army Corps of Engineers in 1997. Considering these two factors, gasoline loading accounts for about 99 percent of all the volatile organic compound emissions from loading barges. The rule proposes vapor control when gasoline is loaded or when gasoline was the previous load. This latter

condition ensures that the vapors from the previous gasoline load are captured and controlled even if another less volatile product is being loaded.

8. O3, W14

Benzene is a concern and is present in gasoline, jet fuel, diesel fuel and heating oil. DEQ should be concerned about the tons of benzene released from the tank farms. Benzene is toxic and was found to be 113 times one benchmark in a nationwide EPA study. DEQ should take every opportunity to reduce emissions of hazardous air pollutants.

The Department agrees that benzene, along with other toxic air contaminants are a concern. With marine vapor controls in place, as proposed in this rule, toxic emissions associated with gasoline vapor from barge loading will be reduced by 99 percent.

THE PROPOSED RULE APPLIES ONLY IN THE PORTLAND AIR QUALITY MANAGEMENT AREA; IT SHOULD APPLY STATE-WIDE

9. O1, O2, O4, W9, W14, W15

There are oil terminals in other parts of the state that should also be controlled, such as the McCall dock and in Umatilla. Cascade Grain in Clatskanie is exempted from the rule, but it should not be as emissions could be transported into the Portland area. Oil companies should not have the opportunity to simply move outside the Portland metropolitan area to avoid compliance. The rule should apply statewide.

The rule does apply to the McCall Oil facility in Portland if they load gasoline onto river barges.

The Tidewater facility in Umatilla is located within an area that meets the ozone standard and used solely for storing diesel oil and other products like liquid fertilizer. The Department has investigated operations at this site periodically and found them within compliance of state air quality rules.

The Department is aware of the proposed Cascade Grain facility in Clatskanie and is currently meeting with the owners and operators of the facility in pre-permit meetings. The need for appropriate air pollution controls for this facility will be determined in the next several months. One commentor had suggested that federal rules require sources within 24 hours of "wind travel" time of an ozone maintenance area to be considered to be in an ozone transport zone. The Department has found no evidence of such a rule. Oregon and federal rules call for additional air quality requirements for sources within 30 kilometers of an ozone nonattainment area. The Clatskanie facility is beyond this impact zone and, unless air quality modeling shows otherwise, would have no measurable effect on the Portland ozone area.

The Department is sensitive to the limitations of a geographically constrained rule that may contribute to a business' decision to locate outside the defined area to avoid the regulation. The probability that the existing terminals in Portland will shut down and move their operations is not high. The oil companies have made a substantial investment in their existing facilities, which benefit tremendously from their location on the Olympic Pipeline that supplies gasoline inexpensively to the terminals.

CONCERNS ABOUT SEASONAL APPLICABILITY

10. O4, O5, W6, W8, W9, W10, W11, W12, W15, W16, W17

The proposed rule should not allow a seasonal exemption; it should apply year-round. Exposure to toxic air contaminants like benzene is a problem year round. Year round operation will add only marginally to overall costs as operational costs are much less than capital costs.

The Department agrees. The proposed rule did not allow for seasonal applicability. See response to comment 11.

11. W5

Smaller terminals, facing much higher control costs, should be allowed to control ozone emissions only during ozone season when the threat is greatest.

While the conditions that result in unhealthy ozone levels typically occur in the summer months the cost savings that come from operating the control device on a seasonal basis are not as great as one could expect. Most of the costs associated with vapor recovery controls reflect capital expenditures and not operating expenses. Any savings based on seasonal operations would come only from reduced operating expenses. Most of the operating expenses would be incurred in the summer months when most of the annual loading of gasoline occurs. As a result, the smaller terminals could expect to reduce their annual costs by no more than 14 percent through a seasonal shutdown. In this scenario, expending the 14 percent of the costs associated with year round operation allows pollution to be controlled from 45 percent of the throughput, markedly improving the overall cost effectiveness of this approach.

Fundamentally environmental protection is expected all the time, regardless of the temporal or seasonal sensitivity of the environment to endure impacts. In some cases, for reasons of financial impact or technical feasibility, environmental rules do allow for periodic control. Cost analysis of marine vapor recovery for the smaller terminals indicates that year round controls would reduce emissions at a cost of between $1,800 to $3,000 per ton of pollution reduced. A measure of how reasonable this financial cost is can be obtained by comparing these values to those established by EPA for Reasonably Available Control Technology or RACT. Under the provisions of the Clean Air Act, EPA establishes RACT on an industry-

by-industry basis that reflects an expectation of performance for pollution control equipment that takes into account technological and financial feasibility. In 1979 EPA published RACT for marine terminals at $2,000 per ton. In current dollars, adjusted for inflation, that standard would be at about $4,500 per ton. Year round pollution controls at the smaller Portland terminals fall within this RACT standard and are therefore justified.

Other programs aimed at reducing ozone pollution typically apply year round. These include, for instance, gasoline vapor controls at gas stations, the vehicle inspection program, industrial rules affecting degreasing parts and surface coating, the requirement for employers of more than 50 employees at a work site to reduce drive alone commuting, and reduced volatility of paint products.

EFFECTIVENESS OF PORTABLE DEVICE IS LIMITED BY LOGISTICS

12. W7

Sharing a control device appears reasonable but scheduling issues will make coordination very difficult.

The Department agrees. Scheduling issues may be challenging but should not be insurmountable. The opportunities to load simultaneously at more than one site will be limited by the availability of barges (four) capable of meeting the vapor control requirements. The probability that loading events requiring portable controls will occur at the same time is also influenced by the demand. Among all the smaller terminals that could use a portable device, including Mobil, Tosco, Shore Terminals, Time Oil, Cenex and Tesoro, the total annual loading time amounts to only 188 hours or 2 percent of the year. Between the limited availability of vessels to load and a relatively small number of hours per year that loading would likely occur a system to coordinate a portable control device should develop.

EMISSIONS DURING LIGHTERING SHOULD ALSO BE CONTROLLED

13. O1, O2, O5

Lightering is only restricted on Clean Air Action Days. There should be a 100 percent prohibition of lightering. Lightering controls may be expensive, but that is "tough luck" for the oil companies. Emissions from lightering were not quantified in the staff report.

The Department disagrees. The proposed rule requires vapor control when lightering occurs at the terminal dock. Typically most of the gasoline lightered occurs at these locations rather than at midstream anchorages. Providing vapor control at midstream anchorages is, at this time, impracticable because it requires a barge to be removed from service so that a vapor recovery control system could be installed on board. The cost of installing and operating this device would be higher than for a similar land-based system

due to a number of factors, including revenue lost with removing the barge from more lucrative transport service, the need to supply auxiliary power, tugboat transfer to lightering locations, storage of the barge when not in use and compliance with applicable Coast Guard regulations.

The report accompanying the notice of rulemaking did note that emissions from lightering activities typically release about 8.5 tons of volatile organic compounds annually, based on data from 1998.

14. O4

Rule has been weakened by the oil companies; lightering is uncontrolled. Will DEQ monitor lightering?

The Department revised the elements of the rule related to lightering based on research to determine the technical and practical feasibility of requiring these controls. The change was not made at the request of any of the oil companies or any other party involved. Otherwise, see response to comment 16.

15. O5, W6, W8, W11, W12, W15, W16, W17

Lightering must not become a method to avoid compliance. This rule should add language to monitor lightering activities and ensure that lightering does not become a substitute for compliance with these new rules.

The Department recognizes that midstream lightering, while impracticable to control under current conditions, may increase in frequency to avoid costs associated with complying with the regulation. The Department recommends changes to the Recordkeeping/Reporting section of the rule to require vessel owner/operators to report the extent of lightering regardless of location in the area.

16. O4, W6

Requirements should extend even to those vessels making first time visits to the area. How will DEQ enforce this requirement?

The Department recognizes that with limited staff available to review records of marine vessel visits to Portland area terminals that enforcement of this provision may prove difficult. Therefore the Department recommends that this exemption be deleted from the proposed rule.

CONCERNS ABOUT NEEDING OR ALLOWING AN EMISSION OR THROUGHPUT EXEMPTION

17. W5

Small terminals face disproportionately higher costs for control. A terminal loading very few barges in a year will face substantially escalated costs of abatement. Exemptions exist in Oregon for other gasoline categories of VOC that are small emitters. A similar exemption based on throughput or emissions should be considered here.

Exemptions in other VOC control programs like Stage I and Stage II vapor recovery were established because the costs per facility approached 2-3% of the capital costs of constructing a new station. In both of these rulemakings the Department relied upon a test of reasonableness tied to the cost per ton of pollution reduced. As noted in comment 11 the requirement for marine vapor control for all terminals in the Portland area meets a test of reasonableness based upon a comparison to EPA's inflation adjusted cost of control for marine terminals.

18. O5, W8, W11, W12, W16, W17

A de minimis exception is bad policy and bad for the air. Deal with the emissions on an equitable basis. There can be no complaint of financial impact, given that every other major west coast port requires controls.

The Department agrees. The proposed rule did not contain a de minimis exemption. However, not all west coast ports require marine vapor control, e.g., Seattle, Tacoma and San Diego. For those ports that do require vapor control the terminals tend to be much larger than in Portland. As noted elsewhere, the financial impact to smaller operations can be greater than for larger terminals. Nonetheless, in the Department's analysis of costs associated with marine vapor controls we have determined that it is reasonable to require vapor control at even the smallest terminals in Portland.

COMMENTS ON THE FISCAL IMPACT

19. W2, W15, W16

Supports adoption of the rule, even if it adds one or two cents per gallon to the price of gasoline. The market will absorb any minimum additional costs. People will continue to drive their cars with higher fuel costs and one or two cents will not make much difference.

The Department appreciates the comment in support of the rule. The fiscal estimate was for costs of control expressed as a price per gallon. This does not necessarily mean that this cost would be directly reflected at retail. For instance, the typical cost per gallon east of the Cascades is often lower than retail prices in the Willamette Valley even though transportation costs are higher east of the Cascades. The fiscal statement also assumed that

all costs would be assigned to product transported by barge. If, instead, costs were distributed among all the product handled by the Portland terminals the impact at retail would be less than a quarter of that estimated.

20. O5, W8, W17

Based on experience in Washington and California, proposed rule would not increase the cost of gasoline.

Marine vapor control is not required in Washington state. No evidence was provided nor is the Department aware of any studies regarding the assignment of costs associated with marine vapor control rules and the impact on retail prices. Oregon drivers, for instance, may already be paying some of these costs as some of the gasoline sold in the state arrives by tankships loaded in the San Francisco Bay area where marine vapor control requirements have been fully operational since 1992.

CONCERNS ABOUT THE COMPLIANCE SCHEDULE

21. O3, O4, O5, W8, W9, W10, W12, W14, W15, W16, W17

Concerned that the rule will not be effective until 2001. Control equipment has been available for at least 12 years. The control equipment is available now, why wait until 2001 if it can be done sooner? The rule should become effective in August 2000. Southern California, northern California, Washington state and elsewhere implemented these regulations over ten years ago. The industries have been on notice for many months that proposed rules were under consideration. The essential infrastructure can be constructed and rendered operational with 40 to 50 weeks. The time schedule for implementation should be compressed.

The compliance timeline was established to provide the earliest protection possible to the most vulnerable season. The estimate accounts for the time needed to engineer, build, install and test control equipment that is safe and reliable. These devices are not off-the-shelf items and must be built to reflect the conditions specific to each location. Despite the comment that these devices have been around for a long time, the controls have only been in widespread use since the early to mid 1990s.

In addition, each of these companies must secure approvals from other permitting authorities like the city of Portland for building and greenway construction permits. If modifications to the terminal dock are required then review by the Division of State Lands and the Army Corps of Engineers is needed to control the impact to the state's waters and any threatened species in the area. Construction and engineering will be delayed during permit review. The timeline proposed accommodates estimates from each of these agencies

and manufacturers of the control equipment and provides little additional time. It would be a very difficult to meet a tighter schedule.

The commentors refer to the experience from other states in establishing compliance timelines. Washington state currently does not require marine vapor control at any location in the state. In California terminals were allowed anywhere from 2 years to 3.5 years to comply with the regulation. Compared to the schedules proposed by any other jurisdiction around the country, Oregon's timeline is the second shortest, so clearly it is not a lax schedule.

22. O5, W8, W17

The permitting process with governmental authorities can be expedited by cooperation and taking advantage of concurrent processing of permits.

The Department is prepared to provide whatever resources it can to facilitate and expedite permit review by other agencies. The proposed schedule assumes concurrent processing of permits.

23. W4

The proposed compliance schedule is accurate and aggressive. Barge loading controls will require a unique system here. The controls are a complex unit that must reliably meet safety and regulatory requirements.

The Department agrees with this comment and feels that the schedule balances the need to achieve these pollution reductions as soon as possible and the needs to build safe and reliable equipment.

24. W6

Many previous regulations have incorporated a phased in schedule based on facility throughput. This allows the lower throughout facilities to prepare financially to upgrade their facilities. DEQ should implement a three-tiered schedule with high emitters coming into compliance according to the proposed schedule; low emitting west side terminals should be allowed additional two years; low emitting east side terminal allowed additional three years.

Phased in compliance schedules in the past have reflected the need to construct a multitude of control devices in order to comply with the rule. The pool of sources affected by this rule is much smaller, seven. The Department began discussions with terminals and interested members of the public in June 1999 regarding the Department's intention to control emissions from barge loading. Early stages of financial planning could have been commenced at that time. The Department is not aware of any evidence to indicate that more time is needed for financial planning.

25. W7

The proposed schedule allows only 2 weeks of flexibility to deal with any disruptions in approval or construction, based on estimates for permit review and engineering and construction. DEQ should extend the compliance deadline four to six months or extend compliance deadline, by month, subject to completion of the permit review process by the city of Portland and DSL/Corps.

As noted elsewhere, the Department recognizes that this is an aggressive schedule but is based upon estimates from vendors and permitting agencies and therefore DEQ considers it realistic as well.

THE PROPOSED RULE ALLOWS A CHOICE OF CONTROL TECHNOLOGIES, VAPOR RECOVERY SHOULD BE THE PREFERRED CONTROL TECHNOLOGY

26. O4, O5, W8, W11, W12, W16, W17

Carbon adsorption allows the oil companies to recover product and recycle it; they should not burn it. Encourage carbon adsorption, not burning; oil companies will save money by recovering product. The cost of the recovered product should be reflected in the cost analysis.

Ultimately the decision to install a particular device is up to the regulated entity. While a recovery/reuse system is attractive as a way to reuse product that would otherwise have been lost as vapor, there are known technical and environmental limitations to this process. The expected recovery rate from marine loading is less than 1 gallon per thousand gallons loaded. The recovery efficiency and the quality of the product recovered also declines rapidly if products other than gasoline are recovered. The carbon in the unit ultimately must be disposed and must be treated as hazardous waste.

The value of the recovered product was incorporated into the financial analysis that was reported in the public notice. Even with the value of the recovered product included, in most cases carbon adsorption proves to be a more costly recovery technology than combustion.

CONTINUOUS EMISSION MONITORS SHOULD BE REQUIRED

27. O1, O2, O4

Commentor is skeptical of oil companies' veracity in reporting their own fuel throughput, control efficiency and the resulting emissions. Continuous emission monitors should be required to verify the control efficiencies. Emissions are going to be higher in the summer months and reliance on a single emission factor will not be sufficient to reflect the

variability in emissions related to ambient temperature. The monitors will provide real time measurement of these emissions.

No provision is needed in this rule to require continuous emission monitoring as the requirement is covered under other rules. Compliance assurance monitoring requirements are outlined in OAR 340-212-0200 for Title V sources and for other stationary sources in OAR 340-212-0120.

Each of the terminals' control devices will be required to have a source test to determine if its control efficiency meets the required 95%. The Department will review the accuracy of each source test. Source tests are preformed under normal operating conditions (for example the rate of fuel being loaded, the operating temperature of the thermal oxidizer, etc.) and operating parameters are established in the permit to ensure the source consistently stays within those parameters which will meet the control efficiency of the rule (for example setting the thermal oxidizer temperature at 1500 +/- 25degs and requiring continuous monitoring of the thermal oxidizer temperature.) Carbon adsorption units will rely on a different technology, e.g., organic vapor analyzers, to determine compliance assurance.

All sources subject to this rule will be required to install continuous process monitors appropriate to the control device selected to ensure that the equipment is operating properly and the expected environmental protection is secured.

THE PROPOSED RULE ALLOWS TOO MUCH LEAKAGE FROM HATCHES

28. O1, O2

The proposed rule allows up to 10,000-ppm leakage from hatches and other seals. This standard would allow leaks of up to 10 percent. The Bay Area Air Quality Management District considers 100 ppm the appropriate emissions ceiling for process valves and pumps. DEQ should require less leakage.

The proposed rule amendment 340-232-0030 (78) defines vapor tight as a "condition that exists when the concentration of a volatile organic compound...does not exceed 10,000 ppm (expressed as methane)." This is not a 10 percent leakage allowance. The reference concentration is consistent with the Bay Area Air Quality Management District rules for marine terminals (Rule 8-44-209) which defines "Gas Tight [as]: A condition that exists when the concentration of precursor organic compounds, measured 1 centimeter from any source, does not exceed 10,000 ppm (expressed as methane) above background." This reference compound concentration is also consistent with the definition of leak specified in 40 CFR 63.541 for Marine Tank Vessel Loading Operations (10,000 ppmv, as methane).

PERMIT MODIFICATIONS MUST BE UNDERTAKEN PROMPTLY

29. O5, W8, W12, W16, W17

The permittees should be advised upon implementation of these proposed rules that permit modifications will be initiated by the Department, and permit modifications should be finalized on a timely basis. Lacking a binding requirement in federal law or the Oregon State Implementation Plan, the rulemaking should be amended to include a schedule for permit modifications.

The provisions of the rule become applicable even without modifying the permit. The Department intends to initiate modifications to the terminal's permits in a timely manner. Even if this were not the case, failure to comply with the rule by one or more of the terminals would subject that terminal to an enforcement action by the Department for violation of the rule.

CLARIFY THE APPLICABILITY OF SELECT PROVISIONS IN THE RULE

30. W1,W3

340-232-0110 (7) addresses uncontrolled lightering events but refers to "uncontrolled barge loading". For consistency, all references to uncontrolled barge loading in this section should be revised to refer to uncontrolled lightering events.

The Department agrees with this comment and the clarification will be incorporated into the final rule.

31. W13

340-232-0110 (1) places the sole responsibility for compliance with the rule upon the terminal owners or operators. This places an unrealistic burden on terminals forcing responsible operators to conduct operation and maintenance reviews of each vessel to ensure each vessel meets requirements. Recommends that both the vessel and terminal operator be responsible for compliance for the vessels and facilities within their control.

The Department agrees with this comment and the change will be incorporated into the final rule.

32. W13

340-232-0110 (6) (a) requires only marine terminal operators to maintain records of loading events at terminals. Marine vessel operators should also be required to keep records of loading events at terminals.

The Department agrees with this comment and the change will be incorporated into the final rule. As noted in the response to comment 16 the Department will recommend that vessel owner/operators maintain records of all loading events, not just those at terminal docks.

33. W13

"Liquid leak" is not defined. Suggest adopting dripping liquids definition from federal register 40 CFR 60.481.

The Department reviewed several definitions for the term "leak" or "liquid leak," including the definition of "dripping liquids." The term "dripping liquids," as it is defined in 40CFR60.481, Standards of Performance For Equipment Leaks of VOC in the Synthetic Organic Chemicals Manufacturing Industry, means "any visible leakage from the seal including spraying, misting, clouding, and ice formation." The proposed rule requires the regulated vessel to be leak free and vapor tight. The definition of dripping liquids, as used to describe a leak, may be in conflict with "vapor tight" that is measured in parts per million using an approved test method; generally Method 21. The term "leak", read in the context of its plain meaning, includes releases that can be detected by visual or olfactory observations, but is compatible with the definition of vapor tight.

34. W13

Commentor suggests adding exemption from control requirements when both the following conditions are met: 1) The vessel has been gas freed (regardless of prior cargo), and 2) When loading any products other than gasoline. Recordkeeping requirements in 340-232-0110 (6) (a) (E) should be amended to identify prior cargoes as gas freed when it has occurred. Gas freed should also be clearly defined as, for instance, when the concentration of VOC in the cargo bay has been measured with an OVA at a level less than 10,000 ppm expressed as methane.

The Department agrees. A vessel that has been gas freed does not retain the vapors of the prior load. Under these conditions the loading of products other than gasoline will not contribute to a significant release of volatile organic compounds. The Department agrees with this point and to modify the recordkeeping requirements to identify a gas freed cargo hold among the prior conditions of the vessel. The Department recommends that the change be incorporated into the final rule.

"Gas freed" is a term commonly used within the maritime industry that is reflective of long standing requirements from the U.S. Coast Guard, federal Occupational Safety and Health Administration and embodied in National Fire Protection Association Rule 306. The commentor's proposed definition of gas freed does not necessarily reflect current understanding of what is meant by gas freed. The Department proposes instead to recommend that gas freed in this rule will reflect the condition as certified by a marine chemist outlined under the procedures identified in Rule 306 of the National Fire Protection Association.

Attachment E

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Marine Loading Vapor Control

Detailed Changes to the Original Rulemaking Proposal Made in Response to Public Comment

340-232-0030
Definitions

(28) "Gas Freed" means a marine vessel's cargo tank has been certified by a Marine Chemist as "Safe for Workers" according to the requirements outlined in the National Fire Protection Association Rule 306.

(44) "Marine Tank Vessel" means any marine vessel constructed or converted to carry liquid bulk cargo that transports gasoline ~~from or within the Portland ozone air quality maintenance area more than once a year~~.

340-232-0110
Loading Gasoline onto Marine Tank Vessels

(1) Applicability. ~~The purpose of this rule is to regulate the emissions of volatile organic compounds (VOC) while loading fuel products into marine tank vessels in the Portland ozone air quality maintenance area. Terminal owners or operators are responsible for compliance with these rules for all vessels loaded at their docks~~ This rule applies to operations to loading events at any location within the Portland ozone air quality maintenance area when gasoline is placed into a marine tank vessel cargo tank; or when any liquid is placed into a marine tank vessel cargo tank that had previously held gasoline. The owner or operator of each marine terminal and marine tank vessel is responsible for and must comply with this rule.

(2) The following activities are exempt from the marine ~~terminal~~ vapor control emission limits of this rule:

(a) Marine vessel bunkering;
(b) Lightering when neither vessel is berthed at a marine terminal dock,
(c) Loading when both of the following conditions are met:
(A) The vessel has been gas freed (regardless of the prior cargo), and
(B) When loading any products other than gasoline.

(4) Marine Vapor Control Emission Limits. Vapors that are displaced and collected during marine tank vessel loading events must be reduced from the uncontrolled condition by at least 95 percent by weight, as determined by EPA Method 25 or other methods approved in writing by the Department or limited to 5.7 grams per cubic meter (2 lbs. per 1000 bbls) of liquid loaded.

(6) Monitoring and Record-Keeping.

(a) Marine terminal operators must maintain operating records for at least five years of each loading event at their terminal. Marine tank vessel owners and operators are responsible for maintaining operating records for at least five years for ~~lightering operations occurring away from a terminal~~all loading events involving each of their vessels. Records must be made available to DEQ upon request. These records must include but are not limited to:

(A) The location of each loading event.

(B) The date of arrival and departure of the vessel.

(C) The name, registry and legal owner of each marine tank vessel participating in the loading event.

(D) The type and amount of fuel product loaded into the marine tank vessel.

(E) The prior cargo carried by the marine tank vessel. If the marine tank vessel has been gas freed, then the prior cargo can be recorded as gas freed.

(F) The description of any gaseous or liquid leak, date and time of leak detection, leak repair action taken and screening level after completion of the leak repair.

(7) ~~Uncontrolled l~~Lightering ~~events~~exempted by subsection 2(b) of this rule must be curtailed from 2:00 AM until 2:00 PM when the Department declares a Clean Air Action (CAA) day. If the Department declares a second CAA day before 2:00 PM of the first curtailment period, then such uncontrolled ~~barge loading~~lightering must be curtailed for an additional 24 hours until 2:00 PM on the second day. If a third CAA day in a row is declared, then uncontrolled ~~barge loading~~lightering is permissible for a 12 hour period starting at 2 PM on the second CAA day and ending at 2 AM on the third CAA day. Uncontrolled ~~barge loading~~lightering must be curtailed from 2 AM until 2 PM on the third CAA day. ~~The curtailment and loading pattern will repeat if CAA days continue beyond a third day~~ If the Department continues to declare CAA days consecutively after the third day, the curtailment and loading pattern used for the third CAA day will apply.

Attachment F

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Marine Vapor Recovery

Rule Implementation Plan

Summary of the Proposed Rule

The proposal presented on public notice proposed that all bulk gasoline terminals operating in the Portland area would reduce the emissions of gasoline vapors when loading marine vessels by at least 95 percent, including lightering, the ship-to-ship transfer of cargo, when either vessel is berthed at their dock. Lightering that occurred at other locations would be prohibited on Clean Air Action days.

Proposed Effective Date of the Rule

June 1, 2001

Proposal for Notification of Affected Persons

Responsible parties identified in the permits for bulk gas facilities in the Portland area will be notified of the adoption of marine vapor requirements. They will also be advised of the process for modification of their permits that will be initiated by the Department to ensure that the permits conform to the requirements. Regardless of when the permits are actually modified, sources will still be expected to meet the requirements of the rule upon the effective date.

Proposed Implementing Actions

All of the affected sources are in DEQ's Northwest Region. Two permit inspectors are responsible for the terminals, an NRS4 and an EE3. Over the next year, the inspectors will work with the sources to ensure that the sources are on schedule to comply with the requirements. Five of the sources have Title V permits. The rest have air contaminant discharge permits. Sources must comply with the rule requirements regardless of when the permits are modified or renewed. However, NWR intends to modify or renew all of the terminal permits by the June 1, 2001, compliance date. The inspectors will coordinate permit issuance with the City of Portland and the Department of State Lands.

Sources will be inspected periodically to determine the status of their compliance.

Proposed Training/Assistance Actions

For Department staff the rule does not represent any qualitative change from the permitting and compliance assurance activities that now occur in regard to these facilities. No additional training needs are anticipated.

The Department will provide support and assistance to facilitate review of permits required from other agencies so that the effort by the affected sources can move expeditiously to meet the June 2001 compliance deadline.

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

Date: February 9, 2000

To: Environmental Quality Commission

From: Susan M. Greco, Deputy Director's Office

Subject: Correction to EQC Report for Agenda Item I - Temporary Rule Adoption for Contested Case Hearings Conducted by the Central Hearings Panel

Attached you will find rule language which should be substituted for the language included in Attachment A to the Report dated January 25, 2000.

340-011-0005
Definitions

The words and phrases used in this Division have the same meaning given them in ORS 183.310 unless otherwise defined below.

(1) "Person" means any individual, partnership, corporation, association, governmental subdivision, public or private organization, and an agency. ~~"Adoption" means the carrying of a motion by the Commission with regard to the subject matter or issues of an intended agency action.~~

~~(2) "Agency Notice" means publication in OAR and mailing to those on the list as required by ORS 183.335(6).~~

~~(3)~~(2) "Commission" means the Environmental Quality Commission.

(3~~4~~) "Department" means the Department of Environmental Quality.

(4~~5~~) "Director" means the Director of the Department or the Director's authorized delegate.

(5~~6~~) "Filing" means receipt in the office of the Director. Such filing is adequate where filing is required of any document with regard to any matter before the Commission, Department or Director, except a claim of personal liability.

(6~~7~~) "Model Rules" or "Uniform Rules" means the Attorney General's Uniform and Model Rules of Procedure, OAR 137-001-0005 through 137-0034-05080 and 137-004-0001 through 137-004-0080, excluding OAR 137-001-0008 through 137-001-0009 as amended and in effect on January 1, 2000~~September 15, 1997~~.

~~(8) "Presiding Officer" or "Hearing Officer" means the Commission, its Chairman, the Director, or any individual designated by the Commission or the Director to preside in any contested case, public, or other hearing. Any employee of the Department who actually presides in any such hearing is presumptively designated by the Commission or Director, such presumptive designation to be overcome only by a written statement to the contrary bearing the signature of the Commission, Chairman or the Director.~~

State of Oregon
Department of Environmental Quality **Memorandum**

Date: January 25, 2000

To: Environmental Quality Commission

From: Langdon Marsh

Subject: Agenda Item I, Temporary Rule Adoption for Contested Case Hearings Conducted by the Central Hearings Panel, EQC Meeting: February 11, 2000

Background

The 1999 Legislature enacted House Bill 2525 which created a Central Hearing Officer Panel, housed within the Employment Department to conduct contested case hearings on behalf of all state agencies. Agencies covered by HB 2525 must comply with the recently adopted Attorney General's Hearing Panel Rules. This means that agencies no longer have the option of selecting those AG Model Rules they wish to adopt for use in their contested case hearings. Moreover agencies cannot adopt procedural rules for contested cases unless the rules are required by state or federal law, the rules are specifically authorized by the Hearing Panel Rules or the agency has been exempted from the Hearing Panel Rules. An agency's substantive rules continue to apply to all contested cases.

HB 2525 made several changes in the procedures applicable to contested case hearings. Most notable are changes are that ex parte communications made to the hearing officer now include communications regarding either factual or legal matters and if an agency wishes to substantially modify a hearing officer's proposed orders, it must explain those modifications. Furthermore, if an agency wishes to change a hearing officer's finding of historical fact, the agency can only do so if there is a preponderance of evidence supporting the change.

Issues this Proposed Rulemaking Action is Intended to Address

The Hearing Panel Rules as filed on December 23, 1999 became effective on January 1, 2000, the date that the Central Hearing Panel came into being. At this time, several of the Department's rules are considered to be 'procedural rules' and thus are negated by the Hearing Panel Rules. This temporary rulemaking will repeal those rules that are no longer needed by the Department.

Additionally under several Hearing Panel Rules, the Department has the authority to adopt its own rules, either limiting the availability of certain procedures, providing for public attendance at

---

contested case hearings, or outlining the procedures for filing exceptions before the Commission. This rulemaking also adopts those rules.

Additionally, this temporary rulemaking also makes some minor housekeeping changes and adopts the most recent changes made to the Model Rules for use in rulemaking.

Summary of Public Input Opportunity

Public input prior to adoption of temporary rules is not required under the Administrative Procedures Act. The Department has mailed copies of this staff report to those persons who have indicated an interested in general rulemakings. A public comment period will be provided when the Department adopts rule changes.

If the Model Rules (which apply to rulemaking) are adopted without change, under ORS 183.341(1), the Department may adopt the Rules by reference without public comment period or other public input.

Authority to Address the Issue

ORS 183.341(2) requires all agencies subject to the APA to adopt rules of procedure for use in rulemaking. Adoption of the Model Rules satisfies this requirement. Under various provisions of the Hearing Panel Rules, the Attorney General has given agencies the authority to adopt rules regarding certain portions of the contested case hearing.

Recommendation for Commission Action

It is recommended that the Commission adopt the rule amendments presented in Attachment A of the Department Staff Report along with the Statement of Need and Justification presented in Attachment C.

Attachments

A. Rule (Amendments) Proposed for Adoption
B. Attorney General's Uniform and Model Rules, effective December 23, 1999
C. Statement Of Need And Justification

Report Prepared By: Susan M. Greco
Phone: (503) 229-5213
Date Prepared: January 25, 2000

DIVISION 11

RULES OF GENERAL APPLICABILITY AND ORGANIZATION

Rules of Practice and Procedure

[ED. NOTE: Administrative Orders DEQ 69(Temp) and DEQ 72 repealed previous OAR 340-011-0005 through 340-011-0170(SA 10).]

340-011-0005
Definitions

The words and phrases used in this Division have the same meaning given them in ORS 183.310. Additional terms are defined as follows unless context requires otherwise

(1) ~~"Adoption" means the carrying of a motion by the Commission with regard to the subject matter or issues of an intended agency action.~~

~~(2) "Agency Notice" means publication in OAR and mailing to those on the list as required by ORS 183.335(6).~~

~~(3)~~ (2) "Commission" means the Environmental Quality Commission.

(34) "Department" means the Department of Environmental Quality.

(45) "Director" means the Director of the Department or the Director's authorized delegates.

(56) "Filing" means receipt in the office of the Director. Such filing is adequate where filing is required of any document with regard to any matter before the Commission, Department or Director, except a claim of personal liability.

(67) "Model Rules" or "Uniform Rules" means the Attorney General's Uniform and Model Rules of Procedure, OAR 137-001-0005 through 137-0034-05080 and 137-004-0001 through 137-004-0080, excluding OAR 137-001-0008 through 137-001-0009 as amended and in effect on January 1, 2000 ~~September 15, 1997~~.

~~(8) "Presiding Officer" or "Hearing Officer" means the Commission, its Chairman, the Director, or any individual designated by the Commission or the Director to preside in any contested case, public, or other hearing. Any employee of the Department who actually presides in any such hearing is presumptively designated by the Commission or Director, such presumptive designation to be overcome only by a written statement to the contrary bearing the signature of the Commission Chairman or the Director.~~

(7) "Hearing Panel Rules" means the Attorney General's Rules, OAR 137-003-0501 through 137-003-0700 in effect on January 1, 2000.

(8) "Participant" means the person served with notice under OAR 340-011-0097, a person granted either party or limited party status in the contested case under OAR 137-003-0535, an agency participating in the contested case under OAR 137-003-0540 and the Department.

Stat. Auth.: ORS 183.341 & ORS 468.020
Stats. Implemented: ORS 183.341
Hist.: DEQ 69(Temp), f. & ef. 3-22-74; DEQ 72, f. 6-5-74, ef. 6-25-74; DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 122, f. & ef. 9-13-76; DEQ 25-1979, f. & ef. 7-5-79; DEQ 7-

1988, f. & cert. ef. 5-6-88; DEQ 10-1997, f. & cert. ef. 6-10-97; DEQ 3-1998, f. & cert. ef. 3-9-98

Rulemaking

340-011-0010
Notice of Rulemaking

(1) Notice of intention to adopt, amend, or repeal any rule(s) shall be in compliance with applicable state and federal laws and rules, including ORS Chapter 183 and sections (2) and (3) of this rule.

(2) In addition to the news media on the list established pursuant to ORS 183.335(6), a copy of the notice shall be furnished to such news media as the Director may deem appropriate.

(3) In addition to meeting the requirements of ORS 183.335(1), the notice shall contain the following:

(a) Where practicable and appropriate, a copy of the rule proposed to be adopted;

(b) Where the proposed rule is not set forth verbatim in the notice, a statement of the time, place, and manner in which a copy of the proposed rule may be obtained and a description of the subject and issues involved in sufficient detail to inform a person that his interest may be affected;

(c) Whether the Presiding Officer will be ~~a hearing officer or a member of~~ the Commission, an employee of the Department or an agent of the Commission;

(d) The manner in which persons not planning to attend the hearing may offer for the record written testimony on the proposed rule.

Stat. Auth.: ORS 183 & ORS 468

Stats. Implemented: ORS 183.025 & ORS 183.335

Hist.: DEQ 69(Temp), f. & ef. 3-22-74; DEQ 72, f. 6-5-74, ef. 6-25-74; DEQ 122, f. & ef. 9-13-76

Contested Cases

340-011-0097
Service of Written Notice

(1) ~~Whenever a statute or rule requires that the Commission or Department serve a written notice or final order upon a party other than for purposes of ORS 183.335 or for the purposes of notice to members of the public in general, the notice or final order shall be personally delivered or sent by registered or certified mail.~~

~~(2)~~ The Commission or Department perfects service of a ~~written~~ notice of opportunity to request a contested case hearing when the notice is posted, addressed to, or personally delivered to:

(a) The person ~~party~~; or

(b) Any person designated by law as competent to receive service of a summons or notice for the person ~~party~~; or

(c) Following appearance of cCounsel for the partyperson, the party's person's counsel.

(3) A party person holding a license or permit issued by the Department or Commission or an applicant for a license or permittherefore, shall will be conclusively presumed able to be served at the address given in his the license or permit application, as it may be amended from time to time, until the expiration date of the license or permit.

(4) Service of written notice may be proven by a certificate executed by the person effecting service.

(5) In all cases not specifically covered by this section, a rule, or a statute, a writing to a person, if mailed to said person at his last known address, is rebuttably presumed to have reached said person in a timely fashion, notwithstanding lack of certified or registered mailing. Regardless of other provisions in this rule, documents sent through the U.S. Postal Service by regular mail are presumed to have been received if mailed to a person's last known address.

Stat. Auth.: ORS 183.335 & ORS 468.020

Stats. Implemented: ORS 183.341, ORS 183.413 & ORS 183.415

Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 122, f. & ef. 9-13-76

340-011-0098

Contested Case Proceedings Generally

Except as specifically provided in OAR 340-011-0132Chapter 340, Division 11, contested cases shall will be governed by the Attorney General's Model Rules of Procedure, OAR 137-003-0001 through 137-003-0093Hearing Panel Rules. In general, a contested case proceeding is initiated when a decision of the Director or Department is appealed to the Commission. Therefore, as used in the Model Rules, the terms "agency", "governing body", and "decision maker" generally should be interpreted to mean "Commission". The term "agency" may also be interpreted to be Department where context requires.

Stat. Auth.: ORS 183.335 & ORS 468.020

Stats. Implemented: ORS183.341, ORS 183.413 & ORS 183.415

Hist.: DEQ 7-1988, f. & cert. ef. 5-6-88

~~**340-011-0102**~~

~~**Non-Attorney Representation**~~

~~Pursuant to the provisions of Section 3 of Chapter 833, Oregon Laws 1987, and the Attorney General's Model Rule OAR 137-003-0008, a person may be represented by an attorney or by an authorized representative in a contested case proceeding before the Commission or Department.~~

~~Stat. Auth.: ORS 183.335 & ORS 468.020~~

~~Stats. Implemented: ORS 183.457~~

~~Hist.: DEQ 7-1988, f. & cert. ef. 5-6-88~~

340-011-0103

Agency Representation by Enforcement Section

(1) The Enforcement Section staff is authorized to appear on behalf of the Department in contested case hearings involving civil penalties and/or Department o~~O~~rders under OAR 137-003-0545.

~~(2) The Enforcement Section staff shall not present legal argument on behalf of the Department in contested case hearings.~~

~~(3) "Legal argument" as used in this rule includes argument on:~~

~~(a)The jurisdiction of the Department to hear the contested case;~~

~~(b) The constitutionality of a statute or rule or the application of a constitutional requirement to the Department; and~~

~~(c) The application of court precedent to the facts of the particular contested case proceeding.~~

~~(4) "Legal argument" as used in this rule does not include presentation of evidence, examination or cross-examination of witnesses, factual argument or argument on:~~

~~(a) The application of the facts to the statutes or rules directly applicable to the issues in the contested case;~~

~~(b)Comparisons of prior actions of the Department in handling similar situations;~~

~~(c)The literal meaning of the statute or rules directly applicable to the issues in the contested case; or~~

~~(d) The admissibility of evidence or the correctness of procedures being followed.~~

(2~~5~~) When the Enforcement Section staff is representing the Department in a contested case hearing, the hearings officer will ~~shall~~ advise the Department representative of the manner in which objections may be made and matters preserved for appeal. Such advice is of a procedural nature and does not change applicable law on waiver or the duty to make timely objections. Where such objections involve legal argument, the hearings officer ~~shall~~ will provide a reasonable opportunity for the Department representative to consult legal counsel and ~~shall~~ permit legal counsel to file written legal argument within a reasonable time after conclusion of the hearing but ~~before final disposition~~before issuance of an order by the hearing officer.

Stat. Auth.: ORS 183.335 & ORS 468.020

Stats. Implemented: ORS 183.450 & ORS 183.341

Hist.: DEQ 16-1991, f. & cert. ef. 9-30-91

340-011-0107

Answer Required: Consequences of Failure to Answer

(1) Unless waived in the notice of opportunity for a hearing, and except as otherwise provided by statute or rule, a person ~~party~~ who has been served ~~written~~ with notice under OAR 340-011-0097~~of opportunity for a hearing~~ shall have 21 days from the date of mailing or personal delivery of the notice in which to file with the Director a written answer and a request ~~application~~ for hearing.

(2) In the answer, the party ~~shall~~ will admit or deny all factual matters and ~~shall affirmatively~~ allege any and all affirmative claims or defenses ~~the party may have~~ and the reasoning in support thereof. Except for good cause shown:

(a) Factual matters not controverted will ~~shall~~ be presumed admitted;

(b) Failure to raise a claim or defense will ~~shall~~ be presumed to be waiver of such claim or defense;

(c) New matters alleged in the answer will ~~shall~~ be presumed to be denied unless admitted in subsequent pleading or stipulation by the Department or Commission; and

(d) Subject to ORS 183.415(10) evidence will ~~shall~~ not be taken on any issue not raised in the notice and the answer unless such issue is specifically raised by a subsequent petitioner for party status and is determined to be within the scope of the proceeding by the hearing ~~presiding~~ officer.

(3) A late hearing request may be accepted by the Department if the Department determines that the cause for the late request was beyond the reasonable control of the person.

(4) In the absence of a timely answer, the Director on behalf of the Commission or Department may issue a default order and judgment, based upon a prima facie case made on the record~~, for the relief sought in the notice~~.

Stat. Auth.: ORS 183.335 & ORS 468.020

Stats. Implemented: ORS 183.430 & ORS 183.435

Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 122, f. & ef. 9-13-76; DEQ 7-1988, f. & cert. ef. 5-6-88

~~**340-011-0116**~~

~~**Subpoenas**~~

~~Subpoenas.~~

~~(1) Upon a showing of good cause and general relevance any party to a contested case shall be issued subpoenas to compel the attendance of witnesses and the production of books, records and documents.~~

~~(2) Subpoenas may be issued by:~~

~~(a) A hearing officer; or~~

~~(b) A member of the Commission; or~~

~~(c) An attorney of record of the party requesting the subpoena.~~

~~(3) Each subpoena authorized by this section shall be served personally upon the witness by the party or any person over 18 years of age.~~

~~(4) Witnesses who are subpoenaed, other than parties or officers or employees of the Department or Commission, shall receive the same fees and mileage as in civil actions in the circuit court.~~

~~(5) The party requesting the subpoena shall be responsible for serving the subpoena and tendering the fees and mileage to the witness.~~

~~(6) A person present in a hearing room before a hearing officer during the conduct of a contested case hearing may be required, by order of the hearing officer, to testify in the same manner as if he were in attendance before the hearing officer upon a subpoena.~~

~~(7) Upon a showing of good cause a hearing officer or the Chairman of the Commission may modify or withdraw a subpoena.~~

~~(8) Nothing in this section shall preclude informal arrangements for the production of witnesses or documents, or both.~~

~~Stat. Auth.: ORS 183.335 & ORS 468.020~~

~~Stats. Implemented: ORS 183.341 & ORS 183.440~~

~~Hist.: DEQ 122, f. & ef. 9-13-76; DEQ 25-1979, f. & ef. 7-5-79; DEQ 7-1988, f. & cert. ef. 5-6-88~~

340-011-0122

Public Attendance at Contested Case Hearing

Contested case hearings before a hearing officer may be closed to the public upon the request of a participant in the contested case hearing.

340-011-0124

Immediate Review by Agency; Motion for Ruling on Legal Issues

Immediate review by the agency and motions for ruling on legal issues will not be allowed (see OAR 137-003-0580 or OAR 137-003-0640).

340-011-0131

Permissible Scope of Hearing

(a) The scope of a contested case hearing will be limited to those matters that are relevant and material to either proving or disproving the matters asserted in the Department's notice under OAR 340-011-0097. Equitable remedies will not be considered by a hearing officer.

(b) Under no circumstances will the hearing officer reduce or mitigate a civil penalty below the minimum established in the schedule of civil penalties contained in OAR Chapter 340, Division 12.

340-011-0132

Alternative Procedure for Entry of a Final Order in Contested Cases Resulting from Appeal of Civil Penalty Assessments

~~In accordance with the procedures and limitations which follows, the Commission's designated Hearing Officer is authorized to enter a final order in contested cases resulting from imposition of civil penalty assessments:~~

~~(1) Hearing Officer's Final Order: In a contested case if a majority of the members of the Commission have not heard the case or considered the record, the Hearing Officer shall prepare a written Hearing Officer's Final Order including findings of fact and conclusions of law. The original of the Hearing Officer's Final Order shall be filed with the Commission and copies shall be served upon the parties in accordance with OAR 340-011-0097 (regarding service of written notice).~~

(1~~2~~) Commencement of Review by the Commission ~~Appeal to the Commission~~:

(a) Copies of the hearing officer's Order will be served on each of the participants in accordance with OAR 340-011-0097. The ~~H~~hearing ~~O~~officer's ~~Final~~ Order will ~~shall~~ be the final order of the Commission unless within 30 days from the date ~~of mailing, or if not mailed then from the date~~ of ~~personal~~ service, ~~any of the parties~~a participant or~~,~~ a member of the Commission~~, or the Department~~ files with the Commission and serves upon each ~~party and the Department~~ participant a ~~Notice of Appeal~~Petition for Commission Review. A proof of service should ~~thereof shall~~ also be filed, but failure to file a proof of service ~~shall~~ will not be a ground for dismissal of the Petition. ~~Notice of Appeal:~~

(b) The timely filing and service of a Petition ~~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;

(c) The timely filing and service of a sufficient Notice of AppealPetition to the Commission shall will automatically stay the effect of the hHearing oOfficer's Final Order.

(d) In any case where more than one participant timely serves and files a Petition, the first to file will be considered to be the Petitioner and the latter the Respondent.

(23) Contents of the Petition for Commission Review Notice of Appeal. A Notice of Appeal Petition willshall be in writing and need only state the partyparticipant's or a Commissioner's intent that the Commission review the hHearing oOfficer's Final Order.

(34) Procedures on Appeal:Procedures on Review:

(a) AppellantPetitioner's Exceptions and Brief — Within 30 days from the date of service or filing of his Notice of Appealthe Petition, whichever is later, the Appellant Petitioner shall file with the Commission and serve upon each other party participant written exceptions, brief and proof of service. Such The exceptions will shall specify those findings and conclusions objected to and reasoning, and shall also include proposed alternative findings of fact, conclusions of law, and order with specific references to those portions to the parts of the record upon which the Petitioner party relies. Matters not raised before the hHearing oOfficer will shall not be considered except when necessary to prevent manifest injustice. In any case where opposing parties timely serve and file Notices of Appeal, the first to file shall be considered to be the appellant and the opposing party the cross appellant;

(b) Appellee's Respondent's Brief — Each party so served with exceptions and brief shall then participant will have 30 days from the date of service or filing of the Petitioner's Exceptions and Brief, whichever is later, in which to file with the Commission and serve upon each participant other party an answering brief and proof of service. If multiple Petitions have been filed, the Respondent will also file his exceptions as required in (2)(a) at this time.;

(c) Reply Brief — Except as provided in subsection (d) of this section, eEach party participantserved with an answering brief shall will have 20 days from the date of service or filing of a Respondent's Brief, whichever is later, in which to file with the Commission and serve upon each other participantparty a reply brief and proof of service.;

(d) Cross Appeals — Should any party entitled to file an answering brief so elect, he may also cross appeal to the Commission the Hearing Officer's Final Order by filing with the Commission and serving upon each other party in addition to an answering brief a Notice of Cross Appeal, exceptions (described in subsection (a) of this section), a brief on cross appeal and proof of service, all within the same time allowed for an answering brief. The appellant cross appellee shall then have 30 days in which to serve and file his reply brief, cross answering brief and proof of service. There shall be no cross reply brief without leave of the Chairman or the Hearing Officer;

(de) Briefing on Commission Invoked Review — Where one or more members of the Commission commence an appeal to the Commission pursuant to subsection (2)(a) of this rule, wish to review a hearing officer's Order and where no party participant to the case has timely served and filed a Notice of AppealPetition, the Chairman will shall promptly

notify the ~~parties~~ participants of the issue that the Commission desires the ~~parties~~ participants to brief ~~and the schedule for filing and serving briefs~~. The Chairman will also establish the schedule for the filing of briefs. The participants will ~~parties shall~~ limit their briefs to those issues. ~~Where one or more members of the Commission have commenced an appeal to the Commission and a party has also timely commenced such a proceeding~~Where the Commission wishes to review a hearing officer's Order and a participant also requested review, briefing ~~shall~~ will follow the schedule set forth in subsections (a), (b), and (c)~~, (d), and (f)~~ of this section.~~;~~

(c~~f~~) Extensions — The Chairman or the Director ~~a Hearing Officer, upon request,~~ may extend any of the time limits contained in this section. Each extension request will~~shall~~ be ~~made~~ in writing and be served upon each ~~party~~participant. Any request for an extension may be granted or denied in whole or in part;

(f~~g~~) Failure to Prosecute — The Commission may dismiss any ~~appeal or cross appeal~~ Petition if the ~~appellant or cross-appellant~~ Petitioner fails to timely file and serve any exceptions or brief required by these rules.~~;~~

(g~~h~~) Oral Argument — Following the expiration of the time allowed the participants ~~parties~~ to present exceptions and briefs, the Chairman may at his discretion schedule the appeal for oral argument before the Commission.~~;~~

(4~~i~~) Additional Evidence: A request to present additional evidence will be submitted by motion and be accompanied by a statement specifying the reason for the failure to present the evidence to the hearing officer. If the Commission grants the motion or decides on its own motion that additional evidence is necessary, the matter will be remanded to a hearing officer for further proceedings.

(5) Scope of Review — ~~In an appeal to the Commission of a Hearing Officer's Final Order, the~~The Commission may~~,~~ substitute its judgment for that of the ~~H~~hearing ~~O~~officer in making any particular finding of fact, conclusion of law, or order except as limited by OAR 137-003-0665. ~~As to any finding of fact made by the Hearing Officer the Commission may make an identical finding without any further consideration of the record;~~

~~(j) Additional Evidence — In an appeal to the Commission of a Hearing Officer's Final Order the Commission may take additional evidence. Requests to present additional evidence shall be submitted by motion and shall be supported by a statement specifying the reason for the failure to present it at the hearing before the Hearing Officer. If the Commission grants the motion, or so decides of its own motion, it may hear the additional evidence itself or remand to a Hearing Officer upon such conditions as it deems just.~~

~~(5) In exercising the authority to enter a final order pursuant to this rule, the Hearing Officer:~~

~~(a) Shall not reduce the amount of civil penalty imposed by the Director unless:~~

~~(A) The department fails to establish some or any of the facts regarding the violation; or~~

~~(B) New information is introduced at the hearing regarding mitigating and aggravating circumstances not initially considered by the Director. Under no circumstances shall the Hearing Officer reduce or mitigate a civil penalty based on new~~

~~information submitted at the hearing below the minimum established in the schedule of civil penalties contained in Commission rules.~~

~~(b) May elect to prepare proposed findings of fact and a proposed order and refer the matter to the Commission for entry of a final order pursuant to the general procedure for contested cases prescribed under OAR 340-011-0098.~~

Stat. Auth.: ORS 183 & ORS 468

Stats. Implemented: ORS 183.464

Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 115, f. & ef. 7-6-76; DEQ 25-1979, f. & ef. 7-5-79; DEQ 7-1988, f. & cert. ef. 5-6-88

340-011-0136

Powers of the Director

(1) Except as provided by OAR 340-012-0075, the Director, on behalf of the Commission, may execute any written order which has been consented to in writing by the parties adversely affected thereby.

(2) The Director, on behalf of the Commission, may prepare and execute written orders implementing any action taken by the Commission on any matter.

(3) The Director, on behalf of the Commission, may prepare and execute orders upon default where:

(a) ~~The adversely affected parties have been properly notified of the time and manner in which to request a hearing and have failed to file a proper, timely request for a hearing~~A person receiving notice under OAR 340-011-0097 has failed to timely request a hearing; or

(b) ~~Having requested a hearing, the adversely affected party has failed to appear at the hearing or at any duly scheduled prehearing conference~~The person requesting the contested case hearing failed to appear at the hearing.

(4) Default orders ~~based upon failure to appear shall~~ will be issued only upon the making of a prima facie case on the record.

Stat. Auth.: ORS 183.335 & ORS 468.020

Stats. Implemented: ORS 183.464

Hist.: DEQ 122, f. & ef. 9-13-76

~~**340-011-0142**~~

~~**Rules/Applicability**~~

~~(1) The Environmental Quality Commission hereby adopts the Attorney General's Model Rules numbered OAR 137-003-0001 through 137-003-0093 and OAR 137-004-0010 (Model Rules) for application to any contested case conducted by or for the Commission on denial pursuant to OAR 340-048-0035 of 401 certification of the proposed Salt Caves Hydroelectric Project.~~

~~(2) The Model Rules shall only apply to the contested case (or cases) described in section (1) of this rule. The Commission's rules for conduct of contested cases, OAR 340-011-0097 through 340-011-0140, shall continue to apply in all other cases. These rules shall become effective upon filing of the adopted rule with the Secretary of State.~~

~~Stat. Auth.: ORS 183.335 & ORS 468.020~~
~~Stats. Implemented: ORS 183.341~~
~~Hist.: DEQ 19-1987, f. & ef. 10-15-87~~

Secretary of State
Certificate and Order for Filing

PERMANENT ADMINISTRATIVE RULES

I certify that the attached copies are true, full and correct copies of the PERMANENT Rules adopted on December 23, 1999, by the Attorney General, Oregon Department of Justice to become effective January 1, 2000. Rulemaking Notice was published in the October 1999 Oregon Bulletin.

OAR Chapter 137

Carol Riches, Rules Coordinator telephone: (503) 378-6313
1162 Court Street NE
Salem, OR 97310

RULEMAKING ACTION

ADOPT: 137-003-0000, 137-003-0501, 137-003-0505, 137-003-0510, 137-003-00515, 137-003-0520, 137-003-0525, 137-003-0530, 137-003-0535, 137-003-0540, 137-003-0545, 137-003-0550, 137-003-0555, 137-003-0560, 137-003-0565, 137-003-0570, 137-003-0575, 137-003-0580, 137-003-0585, 137-003-0590, 137-003-0595, 137-003-0600, 137-003-0605, 137-003-0610, 137-003-0615, 137-003-0625, 137-003-0630, 137-003-0635, 137-003-0640, 137-003-0645, 137-003-0650, 137-003-0655, 137-003-0660, 137-003-0665, 137-003-0670, 137-003-0675, 137-003-0690, 137-003-0695, 137-003-0700 and 137-005-0022

AMEND: 137-001-0005, 137-001-0007, 137-001-0008, 137-001-0009, 137-001-0085, 137-003-0001, 137-003-0002, 137-003-0005, 137-003-0008, 137-003-0010, 137-003-0015, 137-003-0025, 137-003-0035, 137-003-0045, 137-003-0050, 137-003-0075, 137-003-0080, 137-003-0092, 137-004-0080, 137-005-0020, 137-005-0030, 137-005-0040 and 137-005-0050

Stat. Auth.: ORS 183.341, 183.502

Stat. Implemented: ORS 36.110, 36.220 to 36.238, 180.060, 180.220, 183.025, 183.335, 183.341, 183.390, 183.413, 183.415, 183.418, 183.421, 183.425, 183.430, 183.440, 183.445, 183.450, 183.457, 183.460, 183.462, 183.464, 183.470, 183.482, 183.502, 183.540, 183.550; Or Laws 1999, chs 113, 448, 599, 849

RULE SUMMARY

The rulemaking 1) eliminates notice and minute requirements for rulemaking advisory committee meetings; 2) eliminates the requirement for a presuspension notice before an emergency license suspension order is issued; 3) simplifies, clarifies and provides agencies with greater flexibility in the assessment for, and use of, collaborative processes in rulemaking, contested cases and other administrative proceedings; 4) adopts procedural rules for contested case hearings conducted by a hearing officer assigned from the Hearing Officer Panel pursuant to Oregon Laws 1999, chapter 849 (HB 2525); 5) adopts a new rule for the assessment for use of collaborative dispute resolution in complex public policy disputes; and 6) makes other minor changes to conform to statutory requirements or to clarify the intent of the rules.

Authorized Signer

12/23/99
Date

ALV/GEN38424.DOC

ARC 930-1997

Attachment B

OAR Chapter 137, Division 1

Definitions

OAR 137-001-0005 For the purposes of OAR 137-001-0005 to 137-005-0070, unless otherwise defined therein, the words and phrases used in these rules have the same meaning as given to them in ORS 183.310 and:

(1) "Consensus" means a decision developed by a collaborative DR process that each participant can accept;

(2) "Convenor" means a person who aids in identifying appropriate issues and members for a collaborative rulemaking committee to develop a proposed rule, or who aids in identifying issues and participants for a collaborative dispute resolution process;

(3) "Collaborative dispute resolution process" or "collaborative DR process" means any process by which a collaborative dispute resolution provider assists the participants in working together to develop a mutually acceptable resolution to a controversy. A collaborative DR process does not include:

(a) Contested case hearings; or

(b) Meetings, outside of a collaborative rulemaking process, in which a facilitator is used solely to lead an orderly meeting, manage an agenda or assist the group in accomplishing tasks and the facilitator is not attempting to resolve a controversy by developing consensus among the participants.

(4) "Collaborative dispute resolution provider" or "collaborative DR provider" means an individual who assists the participants in a dispute resolution process to work together to develop a mutually acceptable resolution to a controversy. The collaborative DR provider may function as a mediator, facilitator, convenor, neutral fact-finder or other neutral. Arbitrators, investigators, customer service representatives and ombudspersons are not considered collaborative dispute resolution providers.

(5) "Disputants" means agencies, persons or entities, or their representatives, who have a direct interest in a controversy and does not include a collaborative DR provider or person involved only as a witness.

(6) "Mediation" means a process in which a collaborative DR provider assists two or more disputants in reaching a mutually acceptable resolution of the controversy. Mediation may also include facilitation or other processes in which a facilitator or other collaborative DR provider encourages and fosters discussions and negotiations aimed at reaching consensus among process participants.

(7) "Neutral fact-finder" means a third party who assists with the resolution of a controversy by conducting an investigation of critical facts and rendering non-binding, advisory findings.

(8) "Participants" means agencies, persons or entities involved in a dispute resolution proceeding, other than a collaborative DR provider or witness.

(9) "Agreement to collaborate" means the agreement specified in OAR 137-005-0030.

Stat. Auth.: ORS 183.341 & ORS 183.502
Stats. Implemented: ORS 183.310 & ORS 183.502

Rulemaking

Public Input Prior to Rulemaking

137-01-0007 (1) The agency may seek public input before giving notice of intent to adopt, amend or repeal a rule. Depending upon the type of rulemaking anticipated, the agency may appoint an advisory committee, solicit the views of persons on the agency's mailing list maintained pursuant to ORS 183.335(7), or use any other means to obtain public views to assist the agency.

(2) If the agency appoints an advisory committee, the agency shall make a good faith effort to ensure that the committee's members represent the interests of persons likely to be affected by the rule. The meetings of the advisory committee shall be open to the public.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.025(2), 183.341(1)

Assessment for Use of Collaborative Process in Rulemaking

137-001-0008 (1) In lieu of, or in addition to, a rulemaking advisory committee appointed under ORS 183.025(2), the agency may, in its discretion, establish a collaborative rulemaking committee to develop and seek agreement on a proposed rulemaking action. Before using a collaborative rulemaking process, the agency may conduct an assessment to determine if collaborative rulemaking is appropriate and, if so, under what conditions. The agency may consider any relevant factors, including whether:

(a) There is a need for a rulemaking action;

(b) The persons, interest groups or entities that will be significantly affected by any rulemaking action resulting from the collaborative rulemaking process

(A) are not so numerous that it would be impractical to convene a collaborative rulemaking committee;

(B) can be readily identified;

(C) are willing to participate in the collaborative rulemaking;

(D) are willing to negotiate in good faith; and

(E) have the time, resources and ability to participate effectively in a collaborative rulemaking process;

(c) The persons identified as representative of the interests of a group of persons or of an organization have sufficient authority to negotiate on behalf of the group or organization they represent;

(d) There is a reasonable likelihood that a committee will reach a consensus on the proposed rulemaking action within an appropriate period of time to avoid unreasonable delay in the agency's final rulemaking;

(e) The interest of the agency is in joint problem-solving, agreement or consensus which could best be met through collaborative rulemaking, and not solely in obtaining public comment, consultation or feedback, which may be addressed through an advisory committee;

(f) The agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and

(g) The agency, to the extent consistent with its legal obligations, will use the consensus of the committee with respect to the proposed rulemaking action as the basis for a notice of intended adoption, amendment or repeal of a rule pursuant to ORS 183.335.

(2) The agency may use the services of a convenor to assist the agency in conducting the assessment and in further identifying persons, interest groups or entities who will be significantly affected by a proposed rulemaking action and the issues of concern to them, and in ascertaining whether a collaborative rulemaking committee is feasible and appropriate for the particular rulemaking action. Upon request of the agency, the convenor may ascertain the names of persons who are willing and qualified to represent interests that will be significantly affected by the proposed rule.

(3) Upon request of the agency, the convenor shall report findings in writing and may make recommendations to the agency. Any written report and recommendations of the convenor shall be made available to the public upon request.

Stat. Auth.: ORS 183.341 &183.502
Stats. Implemented: ORS 183.502

Use of Collaborative Dispute Resolution in Rulemaking

137-001-0009 (1) If, after consideration of the factors set out in OAR 137-001-0008, the agency establishes a collaborative rulemaking committee, the agency shall inform the committee regarding:

(a) The membership of the rulemaking committee;

(b) Whether or not the agency will be a member of the committee; and

(c) A proposed agenda and schedule for completing the work of the committee, including a target date for publication by the agency of any intended rulemaking action pursuant to ORS 183.335.

(2) The agency may inform persons on the agency's mailing list maintained pursuant to ORS 183.335(7), those legislators designated in ORS 183.335(14) and any other persons of the subject and scope of rulemaking action that may result from the work of the collaborative rulemaking committee.

(3) The agency may limit membership on a collaborative rulemaking committee to ensure proper functioning of the committee or to achieve balanced membership. If the agency will be a member of the committee, the person or persons representing the agency may participate in the deliberations and activities of the committee with the same status as other members of the committee.

(4) A collaborative rulemaking committee established under this rule shall consider the matter proposed by the agency and attempt to reach a consensus concerning a proposed rulemaking action with respect to such matter.

(5) The agency shall explain to the committee the agency's expectations for using any consensus reached by the committee in any rulemaking action and explain the decision making process within the agency that would be necessary to bind the agency to any consensus reached by the committee.

(6) The agency may select a facilitator, subject to removal by the committee by consensus. In selecting a facilitator, the agency may consider the convenor or any qualified individual, including an agency employee. If the committee elects to remove the facilitator selected by the agency, the agency may select another facilitator or allow the committee to select a facilitator by

consensus. An individual designated to represent the agency in substantive issues may not serve as a facilitator or otherwise chair the committee.

(7) A facilitator approved or selected by a collaborative rulemaking committee shall chair the meetings of the committee in an impartial manner, impartially assist the members of the committee in conducting discussions and negotiations, and manage the keeping of minutes and records.

(8) For purposes of a collaborative rulemaking, both convenors and facilitators are considered dispute resolution providers, except that the agency's personal services contract for convenors need not contain the elements listed in OAR 137-005-0040(6)(b).

(9) A collaborative rulemaking committee established under this rule may adopt procedures for the operation of the committee. If the committee reaches a consensus on a proposed rulemaking action, the committee shall transmit to the agency a report containing the proposed rulemaking action. If the committee does not reach a consensus on a proposed rulemaking action, the committee may transmit to the agency a report specifying any areas in which the committee did reach a consensus.

(10) If the agency chooses to proceed with a rulemaking action after receiving the report of the committee, the agency shall comply with the rulemaking procedures in ORS 183.325 to ORS 183.355.

(11) The agency may request the committee to reconvene after a notice of proposed rulemaking action required by ORS 183.335(1) in order to consider any public comments received by the agency related to the rule. If the agency wishes to receive input from the committee after the deadline for comment on the proposed rulemaking action, the agency shall extend the comment deadline in order to receive such recommendations from the committee. The agency shall provide notice of the extended deadline to persons on the agency's mailing list maintained pursuant to ORS 183.335(7), to those legislators designated in ORS 183.335(14) and to persons identified in its notice rule adopted under ORS 183.341(4).

(12) The collaborative rulemaking committee shall terminate upon the agency's adoption, amendment or repeal of the final rule under consideration, unless the committee specifies an earlier termination date. The agency may terminate the collaborative rulemaking committee at any time.

(13) The members of a collaborative rulemaking committee are responsible for their own expenses of participation in the committee. If authorized by law, the agency may pay a member's reasonable travel and per diem expenses and other expenses as the agency deems appropriate.

Stat. Auth.: ORS 183.341 & 183.502
Stats. Implemented: ORS 183.502

Periodic Rule Review

137-001-0085 (1) Pursuant to ORS 183.545, the agency shall review and analyze all of its rules at least once every three years, including rules reviewed during prior reviews and rules adopted after the last review.

(2) As part of the review the agency shall invite public comment upon the rules and shall give notice of the review in accordance with ORS 183.335(1).

(3) The notice shall identify the rules under review by rule or division number and subject matter. It shall state that the agency invites written comments concerning the continued need for the rule; the complexity of the rule; the extent to which the rule duplicates, overlaps, or conflicts

with other state rules, federal regulations, and local government regulations; the degree to which technology, economic conditions, or other factors have changed in the subject area affected by the rule; and the legal basis for the rule.

(4) The notice shall state the date by which written comments must be received by the agency and the address to which the comments should be sent.

(5) If the agency provides a public hearing to receive oral comments on the rules, the notice shall include the time and place of the hearing.

Stat. Authority: ORS 183.341
Stat. Implemented: ORS 183.341(1), 183.545, 183.550

OAR Chapter 137, Division 3
Contested Case Proceedings

Applicability of Rules in OAR Chapter 137, Division 3 [NEW RULE]

137-003-0000 (1) An agency that does not use a hearing officer assigned from the Hearing Officer Panel to conduct contested case hearings for the agency may choose to adopt any or all of the Model Rules for Contested Cases in OAR 137-003-0000 to 137-003-0092 or in OAR 137-003-0501 to 137-003-0700. The agency may adopt these rules by reference without complying with the rulemaking procedures under OR 183.335. Notice of such adoption shall be filed with the Secretary of State in the manner provided by ORS 183.355.

(2) When a hearing officer assigned from the Hearing Officer Panel conducts a contested case hearing for the agency, the proceedings shall be conducted pursuant to OAR 137-003-0501 to 137-003-0700, unless: (a) the case is not subject to the procedural requirements for contested cases, or (b) the Attorney General, by order, has exempted the agency or a category of the agency's cases from the application of such rules in whole or in part. These rules need not be adopted by the agency to be effective.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341; Or Laws 1999, ch 849

Non-Hearing Officer Panel Rules

Contested Case Notice

137-003-0001 (1) The agency's contested case notice issued pursuant to ORS 183.415 shall include:

(a) a caption with the name of the agency and the name of the person or agency to whom the notice is issued;

(b) a short and plain statement of the matters asserted or charged and a reference to the particular sections of the statute and rules involved;

(c) a statement of the party's right to be represented by counsel;

(d) a statement of the party's right to a hearing;

(e) a statement of the agency's authority and jurisdiction to hold a hearing on the matters asserted or charged; and

(f) either (i) a statement of the specific time within which a person may request a hearing, the agency address to which a hearing request should be sent, and a statement that if a request for

hearing is not received by the agency within the time stated in the notice the person will have waived the right to a hearing, or (ii) a statement of the time and place of the hearing.

(2) A contested case notice may include either or both of the following:

(a) a statement that the record of the proceeding to date, including information in the agency file or files on the subject of the contested case automatically become part of the contested case record upon default for the purpose of proving a prima facie case;

(b) a statement that a collaborative dispute resolution process is available as an alternative to a contested case hearing, if requested within the time period stated in the notice, and that choosing such a process will not affect the right to a contested case hearing if a hearing request is received by the agency within the time period stated in the notice and the matter is not resolved through the collaborative process.

Stat. Auth.: ORS 183.341, 183.502
Stats. Implemented: ORS 183.341(1), 183.413, 183.415(7), 183.502

Rights of Parties in Contested Cases

137-003-0002 (1) In addition to the information required to be given under ORS 183.413(2) and 183.415(7), before commencement of a contested case hearing, the agency shall inform a party, if the party is an agency, corporation, or an unincorporated association, that such party must be represented by an attorney licensed in Oregon, unless statutes applicable to the contested case proceeding specifically provide otherwise.

(2) Except as otherwise required by ORS 183.415(7), the information referred to in section (1) of this rule may be given in writing or orally before the commencement of the hearing.

(3) Unless otherwise precluded by law, the agency and the parties may agree to use alternative methods of dispute resolution in contested case matters. Such alternative methods of resolution may include arbitration or any collaborative method designed to encourage the agency and the parties to work together to develop a mutually agreeable solution, such as negotiation, mediation, use of a facilitator or a neutral fact-finder or settlement conferences, but may not include arbitration that is binding on the agency.

(4) Final disposition of contested cases may be by a final order following hearing or, unless precluded by law, by stipulation, agreed settlement, consent order or final order by default. A stipulation, agreed settlement or consent order disposing of a contested case must be in writing and signed by the party or parties. By signing such an agreement, the party or parties waive the right to a contested case hearing and to judicial review. The agency shall incorporate the disposition into a final order.

Stat. Auth.: ORS 183.341 & ORS 183.502
Stats. Implemented: ORS 9.320, ORS 183.341(1), ORS 183.413, ORS 183.415 & ORS 183.502

Participation as Party or Limited Party

137-003-0005 (1) Persons who have an interest in the outcome of the agency's contested case proceeding or who represent a public interest in such result may request to participate as parties or limited parties.

(2) A person requesting to participate as a party or limited party shall file a petition with the agency at least 21 calendar days before the date set for the hearing and shall include a sufficient number of copies of the petition for service on all parties. Petitions untimely filed shall not be

considered unless the agency determines that good cause has been shown for failure to file timely.

(3) The petition shall include the following:

(a) Names and addresses of the petitioner and of any organization the petitioner represents;

(b) Name and address of the petitioner's attorney, if any;

(c) A statement of whether the request is for participation as a party or a limited party, and, if as a limited party, the precise area or areas in which participation is sought;

(d) If the petitioner seeks to protect a personal interest in the outcome of the agency's proceeding, a detailed statement of the petitioner's interest, economic or otherwise, and how such interest may be affected by the results of the proceeding;

(e) If the petitioner seeks to represent a public interest in the results of the proceeding, a detailed statement of such public interest, the manner in which such public interest will be affected by the results of the proceeding, and the petitioner's qualifications to represent such public interest;

(f) A statement of the reasons why existing parties to the proceeding cannot adequately represent the interest identified in subsection (3)(d) or (e) of this rule.

(4) The agency shall serve a copy of the petition on each party personally or by mail. Each party shall have seven calendar days from the date of personal service or agency mailing to file a response to the petition.

(5) If the agency determines under OAR 137-003-0003 that good cause has been shown for failure to file a timely petition, the agency at its discretion may:

(a) Shorten the time within which responses to the petition shall be filed; or

(b) Postpone the hearing until disposition is made of the petition.

(6) If a person is granted participation as a party or a limited party, the agency may postpone or continue the hearing to a later date if necessary to avoid an undue burden to one or more of the parties in the case.

(7) In ruling on petitions to participate as a party or a limited party, the agency shall consider:

(a) Whether the petitioner has demonstrated a personal or public interest that could reasonably be affected by the outcome of the proceeding;

(b) Whether any such affected interest is within the scope of the agency's jurisdiction and within the scope of the notice of contested case hearing;

(c) When a public interest is alleged, the qualifications of the petitioner to represent that interest;

(d) The extent to which the petitioner's interest will be represented by existing parties.

(8) A petition to participate as a party may be treated as a petition to participate as a limited party.

(9) If the agency grants a petition, the agency shall specify areas of participation and procedural limitations as it deems appropriate.

(10) An agency ruling on a petition to participate as a party or as a limited party shall be by written order and served promptly on the petitioner and all parties. If the petition is allowed, the agency shall also serve petitioner with the notice of rights required by ORS 183.413(2).

Stat. Auth.: ORS 183.341 & ORS 183.390
Stats. Implemented: ORS 183.341(1), ORS 183.415(4) & ORS 183.450(3)

Authorized Representative in Designated Agencies

137-003-0008 (1) For purposes of this rule, the following words and phrases have the following meaning:

(a) "Agency" means State Landscape Contractors Board, Office of Energy and the Energy Facility Siting Council, Environmental Quality Commission and the Department of Environmental Quality; Insurance Division of the Department of Consumer and Business Services for proceedings in which an insured appears pursuant to ORS 737.505; the Department of Consumer and Business Services and any other agency for the purpose of proceedings to enforce the state building code, as defined by ORS 455.010; the State Fire Marshal in the Department of State Police; Division of State Lands for proceedings regarding the issuance or denial of fill or removal permits under ORS 196.800 to 196.990; Public Utility Commission; Water Resources Commission and the Water Resources Department; Land Conservation and Development Commission and the Department of Land Conservation and Development; State Department of Agriculture for purposes of hearings under ORS 215.705; and the Bureau of Labor and Industries.

(b) "Authorized Representative" means a member of a partnership, an authorized officer or regular employee of a corporation, association or organized group, or an authorized officer or employee of a governmental authority other than a state agency;

(c) "Legal Argument" includes arguments on:

(A) The jurisdiction of the agency to hear the contested case;

(B) The constitutionality of a statute or rule or the application of a constitutional requirement to an agency;

(C) The application of court precedent to the facts of the particular contested case proceeding.

(d) "Legal Argument" does not include presentation of motions, evidence, examination and cross-examination of witnesses or presentation of factual arguments or arguments on:

(A) The application of the statutes or rules to the facts in the contested case;

(B) Comparison of prior actions of the agency in handling similar situations;

(C) The literal meaning of the statutes or rules directly applicable to the issues in the contested case;

(D) The admissibility of evidence; and

(E) The correctness of procedures being followed in the contested case hearing.

(2) A party or limited party participating in a contested case hearing before an agency listed in subsection (1)(a) of this rule may be represented by an authorized representative as provided in this rule if the agency has by rule specified that authorized representatives may appear in the type of contested case hearing involved.

(3) Before appearing in the case, an authorized representative must provide the presiding officer with written authorization for the named representative to appear on behalf of a party or limited party.

(4) The presiding officer may limit an authorized representative's presentation of evidence, examination and cross-examination of witnesses, or presentation of factual arguments to insure the orderly and timely development of the hearing records, and shall not allow an authorized representative to present legal argument as defined in subsection (1)(c) of this rule.

(5) When an authorized representative is representing a party or limited party in a hearing, the presiding officer shall advise such representative of the manner in which objections may be made and matters preserved for appeal. Such advice is of a procedural nature and does not change applicable law on waiver or the duty to make timely objection. Where such objections may involve legal argument as defined in this rule, the presiding officer shall provide reasonable opportunity for the authorized representative to consult legal counsel and permit such legal counsel to file written legal argument within a reasonable time after conclusion of the hearing.

Stat. Auth.: ORS 183.457
Stats. Implemented: ORS 183.341(1), 183.457; Or Laws 1999, ch 448, ch 599

Emergency License Suspension, Refusal to Renew

137-003-0010 (1) If the agency finds there is a serious danger to the public health or safety, it may, by order, immediately suspend or refuse to renew a license. For purposes of this rule, such an order is referred to as an emergency suspension order. An emergency suspension order must be in writing. It may be issued without prior notice to the licensee and without a hearing prior to the emergency suspension order.

(2)(a) When the agency issues an emergency suspension order, the agency shall serve the order on the licensee either personally or by registered or certified mail;

(b) The order shall include the following statements:

(A) The effective date of the emergency suspension order;

(B) Findings of the specific acts or omissions of the licensee that violate applicable laws and rules and are the grounds for revocation, suspension or refusal to renew the license in the underlying proceeding affecting the license;

(C) The reasons the specified acts or omissions seriously endanger the public's health or safety;

(D) A reference to the sections of the statutes and rules involved;

(E) That the licensee has the right to demand a hearing to be held as soon as practicable to contest the emergency suspension order; and

(F) That if the demand for hearing is not received by the agency within 90 calendar days of the date of notice of the emergency suspension order the licensee shall have waived its right to a hearing regarding the emergency suspension order.

(3)(a) If timely requested by the licensee, the agency shall hold a hearing on the emergency suspension order as soon as practicable.

(b) The agency may combine the hearing on the emergency suspension order with any underlying agency proceeding affecting the license.

(c) At the hearing regarding the emergency suspension order, the agency shall consider the facts and circumstances including, but not limited to:

(A) Whether the acts or omissions of the licensee pose a serious danger to the public's health or safety; and

(B) Whether circumstances at the time of the hearing justify confirmation, alteration or revocation of the order.

Stat. Auth.: ORS 183.341 & ORS 183.390
Stats. Implemented: ORS 183.341(1) & ORS 183.430

Use of Collaborative Dispute Resolution in Contested Cases Hearing

137-003-0015 (1) When an agency issues a contested case notice, the agency and a party may agree to participate in a collaborative dispute resolution (DR) process to resolve any issues relevant to the notice. Neither the party's request, nor any agreement by the agency, to participate in such a process tolls the period for filing a timely request for a contested case hearing.

(2) If the agency agrees to participate in a collaborative DR process, the agency may establish a deadline for the conclusion of the process.

(3) The agency and the party may sign an agreement containing any of the provisions listed in OAR 137-005-0030 or such other terms as may be useful to further the collaborative DR process.

(4) If the agency has agreed to participate in a collaborative DR process and the party makes a timely request for a contested case hearing:

(a) the hearing shall be suspended until the collaborative DR process is completed, the agency or the party opts out of the collaborative DR process, or the deadline, if any, for the conclusion of the collaborative process is reached.

(b) The agency shall proceed to schedule the contested case hearing if the collaborative DR process terminates without settlement of the contested case, unless the party withdraws the hearing request.

(5) Any informal disposition of the contested case shall be consistent with ORS 183.415(5) and OAR 137-003-0002(4).

Stat. Auth.: ORS 183.341, 183.502
Stats. Implemented: ORS 183.502

Discovery in Contested Cases Hearing

137-003-0025 (1) Discovery by the agency or any party may be permitted in appropriate contested cases at the discretion of the agency. Any party may petition the agency pursuant to the requirements in this rule for an order allowing discovery. Before requesting a discovery order, a party must seek the discovery through an informal exchange of information.

(2) Discovery may include but is not limited to one or more of the following methods:

(a) depositions of a material witness;

(b) disclosure of names and addresses of witnesses expected to testify at the hearing;

(c) production of documents, which may but need not be limited to documents that the party producing the documents plans to offer as evidence;

(d) production of objects for inspection;

(e) permission to enter upon land to inspect land or other property;

(f) requests for admissions;

(g) written interrogatories;

(h) prehearing conferences, as provided in OAR 137-003-0035.

(3)(a) A party seeking to take the testimony of a material witness by deposition shall file a written request with the agency, with a copy to all other parties. The request must include the name and address of the witness, a showing of the materiality of the witness's testimony, an explanation of why a deposition rather than informal or other means of discovery is necessary, and a request that the witness's testimony be taken before an individual named in the request for the purpose of recording testimony.

(b) For all other forms of discovery, a request for a discovery order must be in writing and must include a description of the attempts to obtain the requested discovery informally. The request must be mailed or delivered to the agency, with a copy to other parties.

(4) Any discovery request must be reasonably likely to produce information that is generally relevant to the case. If the relevance of the requested discovery is not apparent, the agency may require the party requesting discovery to explain how the request is likely to produce relevant information. If the request appears to be unnecessary, the agency may require an explanation of why the requested information is necessary or is likely to facilitate resolution of the case.

(5) The agency may, but is not required to, authorize the requested discovery. In making its decision, the agency shall consider any objections by the party from whom the discovery is sought. The agency shall issue an order granting or denying a discovery request in whole or in part.

(6) If the agency does authorize discovery, the agency shall control the methods, timing and extent of discovery. The agency may limit discovery to a list of witnesses and the principal documents upon which the agency and parties will rely;

(7) Only the agency may issue subpoenas in support of discovery. The agency may apply to the circuit court to compel obedience to a subpoena.

(8) The agency may delegate to a presiding officer its authority to order and control discovery. The delegation must be in writing, and it may be limited to specified forms of discovery.

(9) The presiding officer may refuse to admit evidence that was not disclosed in response to a discovery order, unless the party that failed to provide discovery offers a satisfactory reason for having failed to do so, or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10). If the presiding officer admits evidence that was not disclosed as ordered, the presiding officer may grant a continuance to allow an opportunity for the agency or other party to respond.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341(1), 183.415, 183.425

Prehearing Conferences

137-003-0035 (1) Prior to hearing, the agency may, in its discretion, conduct one or more prehearing conferences to facilitate the conduct and resolution of the case. The agency may convene the conference on its own initiative or at a party's request.

(2) The purposes of a prehearing conference may include, but are not limited to the following:

(a) to facilitate discovery and to resolve disagreements about discovery;

(b) to identify, simplify and clarify issues;

(c) to eliminate irrelevant issues;

(d) to obtain stipulations of fact;

(e) to provide to the presiding officer, agency and parties, in advance of the hearing, copies of all documents intended to be offered as evidence at the hearing and the names of all witnesses expected to testify;

(f) to authenticate documents;

(g) to decide the order of proof and other procedural matters pertaining to the conduct of the hearing;

(h) to discuss the use of a collaborative dispute resolution process in lieu of or preliminary to holding the contested case hearing; and

(i) to discuss settlement or other resolution or partial resolution of the case.

(3) The prehearing conference may be conducted in person or by telephone.

(4) The agency must make a record of any stipulations, rulings and agreements. The agency may make an audio or stenographic record of the pertinent portions of the conference or may place the substance of stipulations, rulings and agreements in the record by written summary. Stipulations to facts and to the authenticity of documents and agreements to narrow issues shall be binding upon the agency and the parties to the stipulation unless good cause is shown for rescinding a stipulation or agreement.

(5) After the hearing begins, the presiding officer may at any time recess the hearing to discuss any of the matters listed in section (2) of this rule.

(6) The agency may delegate to the presiding officer the discretion to conduct prehearing conferences.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341(1), 183.415(9), 183.462

Telephone Hearings

137-003-0045 (1) Unless precluded by law, the agency may, in its discretion, hold a hearing or portion of a hearing by telephone. Nothing in this rule precludes an agency from allowing some parties or witnesses to attend by telephone while others attend in person.

(2) The agency may direct that a hearing be held by telephone upon request or on its own motion.

(3) The agency shall make an audio or stenographic record of any telephone hearing.

(4) If a hearing is to be held by telephone, each party and the agency shall provide, before commencement of the hearing, to all other parties and to the agency and hearing officer copies of the exhibits it intends to offer into evidence at the hearing. If a witness is to testify by telephone, the party or agency that intends to call the witness shall provide, before commencement of the hearing, to the witness, to the other parties and to the agency and hearing officer a copy of each document about which the witness will be questioned.

(5) Nothing in this rule precludes any party or the agency from seeking to introduce documentary evidence in addition to evidence described in section (4) during the telephone hearing

and the presiding officer shall receive such evidence, subject to the applicable rules of evidence, if inclusion of the evidence in the record is necessary to conduct a full and fair hearing. If any evidence introduced during the hearing has not previously been provided to the agency and to the other parties, the hearing may be continued upon the request of any party or the agency for sufficient time to allow the party or the agency to obtain and review the evidence.

(6) The agency may delegate to the presiding officer the discretion to rule on issues raised under this rule.

(7) As used in this rule, "telephone" means any two-way electronic communication device, including video conferencing.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341(1)

Evidentiary Rules

137-003-0050 (1) Evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible.

(2) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, and privileges afforded by Oregon law shall be recognized by the presiding officer.

(3) All offered evidence, not objected to, will be received by the presiding officer subject to the officer's power to exclude irrelevant, immaterial, or unduly repetitious matter.

(4) Evidence objected to may be received by the presiding officer. Rulings on its admissibility, if not made at the hearing, shall be made on the record at or before the time a final order is issued.

(5) The presiding officer shall accept an offer of proof made for excluded evidence. The offer of proof shall contain sufficient detail to allow the reviewing agency or court to determine whether the evidence was properly excluded. The presiding officer shall have discretion to decide whether the offer of proof is to be oral or written and at what stage in the proceeding it will be made. The presiding officer may place reasonable limits on the offer of proof, including the time to be devoted to an oral offer or the number of pages in a written offer.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341(1), 183.415, 183.450

Final Orders by Default

137-003-0075 (1) The agency may issue a final order by default:

(a) When the agency has given a party an opportunity to request a hearing and the party fails to make a request within a specified time,

(b) When the party withdraws a request for a hearing,

(c) When the agency has scheduled a hearing and the party fails to appear at the specified time and place, or

(d) When the agency has scheduled a hearing in a matter in which only one party is before the agency and that party subsequently notifies the agency that the party will not appear at the specified time and place, unless the agency has agreed to reschedule the hearing.

(2) The agency may issue a final order that is adverse to a party by default only after making a prima facie case on the record. The record shall be made at a scheduled hearing on the matter or, if the hearing is canceled or not held, at an agency meeting or at the time the final order by default is

issued, unless the agency designates the agency file as the record at the time the contested case notice is issued in accordance with OAR 137-003-0001(1).

(3) The record may consist of oral (transcribed, recorded or reported) or written evidence or a combination of oral and written evidence. In all cases, the record must contain evidence that persuades the decision maker of the existence of facts necessary to support the order.

(4)(a) When a party requests a hearing after the time specified by the agency, but 60 calendar days or less after the agency has entered a final order by default, the agency may grant the request only if the cause for failure to timely request the hearing was beyond the reasonable control of the party, unless other applicable law provides a different standard. The agency may require the request to be supported by an affidavit and may conduct such further inquiry, including holding a hearing, as it deems appropriate.

(b) If a final order by default has already been entered, the party requesting the hearing shall deliver or mail within a reasonable time a copy of the hearing request to all persons and agencies required by statute, rule, or order to receive notice of the proceeding.

(c) If the hearing request is allowed by the agency, it shall enter an order granting the request and schedule a hearing in due course. If the request is denied, the agency shall enter an order setting forth its reasons for the denial.

(5) The agency shall notify a defaulting party of the entry of a final order by default by delivering or mailing a copy of the order. If the contested case notice contained an order that was to become effective unless the party requested a hearing, and designated the agency file as the record, that order becomes a final order by default if no hearing is requested, and no further order need be served upon the party.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341(1), 183.415(6), 183.470

Reconsideration and Rehearing—Contested Cases

137-003-0080 (1) A party may file a petition for reconsideration or rehearing of a final order in a contested case with the agency within 60 calendar days after the order is served. A copy of the petition shall also be delivered or mailed to all parties or other persons and agencies required by statute, rule, or order to receive notice of the proceeding.

(2) The petition shall set forth the specific grounds for reconsideration or rehearing. The petition may be supported by a written argument.

(3) A rehearing may be limited by the agency to specific matters.

(4) The petition may include a request for stay of a final order if the petition complies with the requirements of OAR 137-003-0090(2).

(5) The agency may consider a petition for reconsideration or rehearing as a request for either or both. The petition may be granted or denied by summary order and, if no action is taken, shall be deemed denied as provided in ORS 183.482.

(6) Within 60 calendar days after the order is served, the agency may, on its own initiative, reconsider the final order or rehear the case. If a petition for judicial review has been filed, the agency must follow the procedures set forth in ORS 183.482(6) before taking further action on the order. The procedural and substantive effect of reconsideration or rehearing under this section shall be identical to the effect of granting a party's petition for reconsideration or rehearing.

(7) Reconsideration or rehearing shall not be granted after the filing of a petition for judicial review, except in the manner provided by ORS 183.482(6).

(8) A final order remains in effect during reconsideration or rehearing until stayed or changed.

(9) Following reconsideration or rehearing, the agency shall enter a new order, which may be an order affirming the existing order.

Stat. Authority: ORS 183.341
Stat. Implemented: ORS 183.341(1), 183.482(1), (3)

Stay Proceeding and Order

137-003-0092 (1) The agency may conduct such further proceedings pertaining to the stay request as it deems desirable, including taking further evidence on the matter. Agency staff may present additional evidence in response to the stay request. The agency shall commence such proceedings promptly after receiving the stay request.

(2) The agency shall issue an order granting or denying the stay request within 30 calendar days after receiving it. The agency's order shall:

(a) Grant the stay request upon findings of irreparable injury to the petitioner and a colorable claim of error in the agency order and may impose reasonable conditions, including but not limited to, a bond, irrevocable letter of credit or other undertaking and that the petitioner file all documents necessary to bring the matter to issue before the Court of Appeals within a specified reasonable period of time; or

(b) Deny the stay request upon a finding that the petitioner failed to show irreparable injury or a colorable claim of error in the agency order; or

(c) Deny the stay request upon a finding that a specified substantial public harm would result from granting the stay, notwithstanding the petitioner's showing of irreparable injury and a colorable claim of error in the agency order; or

(d) Grant or deny the stay request as otherwise required by law.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341(1), 183.482(3)

Hearing Officer Panel Rules

Hearing Officer Panel Rules [NEW RULE]

137-003-0501 (1) OAR 137-003-0501 to 137-003-0700 apply to the conduct of all contested case hearings conducted for an agency by a hearing officer assigned from the Hearing Officer Panel unless:

(a) the case is not subject to the procedural requirements for contested cases, or

(b) the Attorney General, by order, has exempted the agency or a category of the agency's cases from the application of these rules in whole or in part.

(2) Any procedural rules adopted by the agency related to the conduct of hearings shall not apply to contested case hearings conducted for the agency by a hearing officer assigned from the Hearing Officer Panel unless required by state or federal law or specifically authorized by these rules or by order of the Attorney General. An agency may have rules specifying the time for requesting a contested case hearing, the content of a hearing request, any requirement for and content of a response to the contested case notice, the permissible scope of the hearing and

timelines for issuance of a proposed or final order. The agency's substantive rules, including those allocating the burden of proof, shall to apply to all of its hearings.

(3) If permitted by law, the agency may delegate to a hearing officer any of the agency's functions under these rules, including the authority to issue a final order. This delegation must be in writing and may be for a category of cases or on a case-by-case basis.

Stat. Auth.: ORS 183.341
Stats. Implemented: Or Laws 1999, ch 849

Contested Case Notice **[NEW RULE]**

137-003-0505 (1) When the agency is required to issue a contested case notice pursuant to ORS 183.415, the notice shall include:

(a) a caption with the name of the agency and the name of the person or agency to whom the notice is issued;

(b) a short and plain statement of the matters asserted or charged and a reference to the particular sections of the statute and rules involved;

(c) a statement of the party's right to be represented by counsel;

(d) a statement of the party's right to a hearing;

(e) a statement of the authority and jurisdiction under which a hearing is to be held on the matters asserted or charged;

(f) either (i) a statement of the specific time within which a person may request a hearing, the agency address to which a hearing request should be sent, and a statement that if a request for hearing is not received by the agency within the time stated in the notice the person will have waived the right to a contested case hearing, or (ii) a statement of the time and place of the hearing; and

(g) any other information required by law.

(2) A contested case notice may include either or both of the following:

(a) a statement that the record of the proceeding to date, including information in the agency file or files on the subject of the contested case automatically become part of the contested case record upon default for the purpose of proving a prima facie case;

(b) a statement that a collaborative dispute resolution process is available as an alternative to a contested case hearing, if requested within the time period stated in the notice, and that choosing such a process will not affect the right to a contested case hearing if a hearing request is received by the agency within the time period stated in the notice and the matter is not resolved through the collaborative process.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.413, 183.415; Or Laws 1999, ch 849

Rights of Parties in Contested Cases **[NEW RULE]**

137-003-0510 (1) In addition to the information required to be given under ORS 183.413(2), before commencement of a contested case hearing, the agency shall inform a party, if the party is an agency, corporation, partnership, limited liability company, trust, government body or an unincorporated association, that such party must be represented by an attorney licensed in

Oregon, unless statutes applicable to the contested case proceeding specifically provide otherwise.

(2) The agency may request the hearing officer to provide any or all of the information required to be given under ORS 183.413(2) or section (1) of this rule to each party in writing or orally before the commencement of the hearing.

(3) Unless otherwise precluded by law, the party(ies) and the agency, if participating in the contested case hearing, may agree to use alternative methods of dispute resolution in contested case matters. Such alternative methods of resolution may include arbitration or any collaborative method designed to encourage the agency and the parties to work together to develop a mutually agreeable solution, such as negotiation, mediation, use of a facilitator or a neutral fact-finder or settlement conferences, but may not include arbitration that is binding on the agency.

(4) Final disposition of contested cases may be by a final order following hearing or, unless precluded by law, by stipulation, agreed settlement, consent order or final order by default. A stipulation, agreed settlement or consent order disposing of a contested case must be in writing and signed by the party or parties. By signing such an agreement, the party or parties waive the right to a contested case hearing and to judicial review. The agency or hearing officer shall incorporate the disposition into a final order.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.413, 183.415; Or Laws 1999, ch 849

Agency Referral to Hearing Officer Panel [NEW RULE]

137-003-0515 (1) When referring a contested case to the Hearing Officer Panel, the agency shall provide written notice of the referral to the Hearing Officer Panel that includes the name of the agency and the name and address of each party and its counsel. The notice may also include the agency case number, the name and address of the agency staff person or the assigned Assistant Attorney General, if any, upon whom pleadings and other papers should be served, and any other information requested by the Hearing Officer Panel.

(2) The agency referral notice may be accompanied by a copy of the agency's contested case notice in the case and a copy of any request for hearing.

(3) The agency may provide a copy of the referral notice to each party or their counsel, if any.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341; Or Laws 1999, ch 849

Filing and Service of Pleadings and Other Documents in Contested Case [NEW RULE]

137-003-0520 (1) Unless otherwise provided by these rules, any documents, correspondence, motions, pleadings, rulings and orders filed in the contested case shall be filed as follows:

(a) With the agency before the case is referred by the agency to the Hearing Officer Panel,

(b) With the Hearing Officer Panel or assigned hearing officer after the agency has referred the case to the Panel and before the assigned hearing officer issues a proposed order,

(c) With the agency after the assigned hearing officer issues a proposed order, or with the hearing officer if the hearing officer has authority to issue the final order.

(2) After agency referral of a contested case to the Hearing Officer Panel, the person or agency that files any pleading, motion, correspondence or other document with the Hearing

Officer Panel or hearing officer assigned to the case shall serve copies on the agency and the parties, or their counsel if the agency or parties are represented.

(3) Service shall be by hand delivery, by facsimile, by mail or as otherwise permitted by the agency by rule or in writing.

(4) It is responsibility of each party to notify all other parties, the agency and the hearing officer of any change in the party's address or withdrawal or change of the party's representatives, including legal counsel.

(5) The agency may by rule or in writing waive the right to receive copies of documents filed under section (2) of this rule and other communications from the parties and the hearing officer if:

(a) the hearing officer is authorized or required to issue the final order, or

(b) the agency does not participate in certain multi-party or other contested case hearings.

(6) Motions, pleadings and other documents shall be considered filed on the date received by the agency or by the Hearing Officer Panel or assigned hearing officer.

(a) The agency shall refer to the Hearing Officer Panel or assigned hearing officer any motion or other matter filed with the agency that is not within its jurisdiction.

(b) The Chief Hearing Officer or assigned hearing officer shall refer to the agency any motion or other matter filed with the Hearing Officer Panel or assigned hearing officer that is not within the jurisdiction of the Hearing Officer Panel.

(7) Documents sent through the U.S. Postal Service by regular mail are presumed to have been received, subject to evidence to the contrary.

(8) In computing any period of time prescribed or allowed by these rules, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the time period shall be included, unless it is a Saturday or a legal holiday, including Sunday, in which event the time period runs until the end of the next day which is not a Saturday or a legal holiday. Legal holidays are those identified in ORS 187.010 and 187.020.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341; Or Laws 1999, ch 849

Scheduling Hearings [NEW RULE]

137-003-0525 Subject to the approval of the agency, the Hearing Officer Panel or assigned hearing officer shall set the date and time of the hearing, shall determine the location of the hearing and shall determine whether cases shall be consolidated or bifurcated.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341Or Laws 1999, ch 849

Late Filing [NEW RULE]

137-003-0530 (1) Unless otherwise provided by agency rule, a late hearing request may be accepted only if the agency determines that the cause for failure to timely file a request for hearing was beyond the reasonable control of the party. See OAR 137-003-0670(3).

(2) Unless otherwise provided by law, when a party or agency fails to file any document for the contested case proceeding, except a hearing request, within the time specified by agency

rules or these rules of procedure, the late filing may be accepted if the agency or hearing officer determines that there was good cause for failure to file the document within the required time.

(3) The decision as to whether a late filing will be accepted shall be made:

(a) by the agency if OAR 137-003-0520 requires the document to be filed with the agency, or

(b) by the hearing officer if OAR 137-003-0520 requires the document to be filed with the Hearing Officer Panel or the assigned hearing officer.

(4) The agency or hearing officer may require a statement explaining the reasons for the late filing.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341; Or Laws 1999, ch 849

Participation as Party or Limited Party [NEW RULE]

137-003-0535 (1) The agency may by rule or in writing identify persons or entities who shall be parties or limited parties.

(2) Persons who have an interest in the outcome of the agency's contested case proceeding or who represent a public interest in such result may request to participate as parties or limited parties. Unless otherwise provided by law, a person requesting to participate as a party or limited party shall file a petition with the agency and shall include a sufficient number of copies of the petition for service on all parties.

(3) The petition shall be filed at least 21 calendar days before the date set for the hearing, unless the agency by rule has set a different deadline. Petitions untimely filed shall not be considered unless the agency determines that good cause has been shown for failure to file within the required time.

(4) The petition shall include the following:

(a) Names and addresses of the petitioner and of any organization the petitioner represents;

(b) Name and address of the petitioner's attorney, if any;

(c) A statement of whether the request is for participation as a party or a limited party, and, if as a limited party, the precise area or areas in which participation is sought;

(d) If the petitioner seeks to protect a personal interest in the outcome of the agency's proceeding, a detailed statement of the petitioner's interest, economic or otherwise, and how such interest may be affected by the results of the proceeding;

(e) If the petitioner seeks to represent a public interest in the results of the proceeding, a detailed statement of such public interest, the manner in which such public interest will be affected by the results of the proceeding, and the petitioner's qualifications to represent such public interest;

(f) A statement of the reasons why existing parties to the proceeding cannot adequately represent the interest identified in subsection (4)(d) or (e) of this rule.

(5) The agency shall serve a copy of the petition on each party personally or by mail. Each party shall have seven calendar days from the date of personal service or agency mailing to file a response to the petition.

(6) If the agency determines under OAR 137-003-0530 that good cause has been shown for failure to file a timely petition, the agency at its discretion may:

(a) Shorten the time within which responses to the petition shall be filed; or

(b) Postpone the hearing until disposition is made of the petition.

(7) If a person is granted participation as a party or a limited party, the hearing may be postponed or continued to a later date if necessary to avoid an undue burden to one or more of the parties in the case.

(8) In ruling on petitions to participate as a party or a limited party, the agency shall consider:

(a) Whether the petitioner has demonstrated a personal or public interest that could reasonably be affected by the outcome of the proceeding;

(b) Whether any such affected interest is within the scope of the agency's jurisdiction and within the scope of the notice of contested case hearing;

(c) When a public interest is alleged, the qualifications of the petitioner to represent that interest;

(d) The extent to which the petitioner's interest will be represented by existing parties.

(9) The agency may treat a petition to participate as a party as if it were a petition to participate as a limited party.

(10) If the agency grants a petition, the agency shall specify areas of participation and procedural limitations as it deems appropriate.

(11) An agency ruling on a petition to participate as a party or as a limited party shall be by written order and served promptly on the petitioner, all parties and the Hearing Officer Panel or assigned hearing officer. If the petition is allowed, the agency shall also provide petitioner with the notice of rights required by ORS 183.413(2) or request the hearing officer to do so.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.415(4), 183.450(3); Or Laws 1999, ch 849

Agency Participation as Interested Agency or Party [NEW RULE]

137-003-0540 (1) At any time after an agency refers a contested case to the Hearing Officer Panel, the agency may also notify the parties that it intends to name any other agency that has an interest in the outcome of that proceeding as a party or as an interested agency, either on its own initiative or upon request by that other agency.

(2) Each party shall have seven calendar days from the date of service of the notice to file objections. The agency may establish a shorter or longer period of time for filing objections.

(3) The agency decision to name an agency as a party or as an interested agency shall be by written order and served promptly on the parties, the named agency and the Hearing Officer Panel or assigned hearing officer.

(4) An agency named as a party or as an interested agency has the same procedural rights and shall be given the same notices as any party in the proceeding. An interested agency, unlike a party, has no right to judicial review.

(5) An agency may not be named as a party under this rule without written authorization of the Attorney General.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 180.060, 180.220, 183.341, 183.415(4); Or Laws 1999, ch 849

Representation of Agency by Attorney General or Agency Representative [NEW RULE]

137-003-0545 (1) An agency may be represented at a contested case hearing by the Attorney General.

(2) An agency may be represented at a contested case hearing by an officer or employee of the agency if the Attorney General has consented to that representation in a particular hearing or class of hearings and the agency, by rule, has authorized an agency representative to appear on its behalf in the particular type of contested case hearing involved.

(3) The hearing officer shall not allow an agency representative appearing under section (2) of this rule to present legal argument as defined in this rule.

(a) "Legal Argument" includes arguments on:

(A) The jurisdiction of the agency to hear the contested case;

(B) The constitutionality of a statute or rule or the application of a constitutional requirement to an agency;

(C) The application of court precedent to the facts of the particular contested case proceeding.

(b) "Legal Argument" does not include presentation of motions, evidence, examination and cross-examination of witnesses or presentation of factual arguments or arguments on:

(A) The application of the statutes or rules to the facts in the contested case;

(B) Comparison of prior actions of the agency in handling similar situations;

(C) The literal meaning of the statutes or rules directly applicable to the issues in the contested case;

(D) The admissibility of evidence; and

(E) The correctness of procedures being followed in the contested case hearing.

(4) If the hearing officer determines that statements or objections made by an agency representative appearing under section (2) involve legal argument as defined in this rule, the hearing officer shall provide reasonable opportunity for the agency representative to consult the Attorney General and permit the Attorney General to present argument at the hearing or to file written legal argument within a reasonable time after conclusion of the hearing.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.413, 183.415; Or Laws 1999, ch 448, ch 599, ch 849

Representation of Parties [NEW RULE]

137-003-0550 (1) Natural persons who are parties in a contested case may represent themselves or may be represented by an attorney or, if authorized by state or federal law, other representative.

(2) Corporations, partnerships, limited liability companies, unincorporated associations, trusts and government bodies must be represented by an attorney except as provided in OAR 137-003-0555 or as otherwise authorized by law.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 9.320, 183.341, Or Laws 1999, ch 849

Authorized Representative of Parties Before Designated Agencies [NEW RULE]

137-003-0555 (1) For purposes of this rule, the following words and phrases have the following meaning:

(a) "Agency" means State Landscape Contractors Board, Office of Energy and the Energy Facility Siting Council, Environmental Quality Commission and the Department of Environmental Quality; Insurance Division of the Department of Consumer and Business Services for proceedings in which an insured appears pursuant to ORS 737.505; the Department of Consumer and Business Services and any other agency for the purpose of proceedings to enforce the state building code, as defined by ORS 455.010; the State Fire Marshal in the Department of State Police; Division of State Lands for proceedings regarding the issuance or denial of fill or removal permits under ORS 196.800 to 196.990; Public Utility Commission; Water Resources Commission and the Water Resources Department; Land Conservation and Development Commission and the Department of Land Conservation and Development; State Department of Agriculture for purposes of hearings under ORS 215.705; and the Bureau of Labor and Industries.

(b) "Authorized Representative" means a member of a partnership, an authorized officer or regular employee of a corporation, association or organized group, an authorized officer or employee of a governmental authority other than a state agency or other authorized representatives recognized by state or federal law;

(c) "Legal Argument" includes arguments on:

(A) The jurisdiction of the agency to hear the contested case;

(B) The constitutionality of a statute or rule or the application of a constitutional requirement to an agency;

(C) The application of court precedent to the facts of the particular contested case proceeding.

(d) "Legal Argument" does not include presentation of motions, evidence, examination and cross-examination of witnesses or presentation of factual arguments or arguments on:

(A) The application of the statutes or rules to the facts in the contested case;

(B) Comparison of prior actions of the agency in handling similar situations;

(C) The literal meaning of the statutes or rules directly applicable to the issues in the contested case;

(D) The admissibility of evidence; and

(E) The correctness of procedures being followed in the contested case hearing.

(2) A party or limited party participating in a contested case hearing before an agency listed in subsection (1)(a) of this rule may be represented by an authorized representative as provided in this rule if the agency has by rule specified that authorized representatives may appear in the type of contested case hearing involved.

(3) Before appearing in the case, an authorized representative must provide the hearing officer with written authorization for the named representative to appear on behalf of a party or limited party.

(4) The hearing officer may limit an authorized representative's presentation of evidence, examination and cross-examination of witnesses, or presentation of factual arguments to insure

the orderly and timely development of the hearing records, and shall not allow an authorized representative to present legal argument as defined in subsection (1)(c) of this rule.

(5) When an authorized representative is representing a party or limited party in a hearing, the hearing officer shall advise such representative of the manner in which objections may be made and matters preserved for appeal. Such advice is of a procedural nature and does not change applicable law on waiver or the duty to make timely objection. Where such objections may involve legal argument as defined in this rule, the hearing officer shall provide reasonable opportunity for the authorized representative to consult legal counsel and permit such legal counsel to file written legal argument within a reasonable time after conclusion of the hearing.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.457; Or Laws 1999, ch 448, ch 599, ch 849

Emergency License Suspension, Refusal to Renew [NEW RULE]

137-003-0560 (1) If the agency finds there is a serious danger to the public health or safety, it may, by order, immediately suspend or refuse to renew a license. For purposes of this rule, such an order is referred to as an emergency suspension order. An emergency suspension order must be in writing. It may be issued without prior notice to the licensee and without a hearing prior to the emergency suspension order.

(2)(a) When the agency issues an emergency suspension order, the agency shall serve the order on the licensee either personally or by registered or certified mail;

(b) The order shall include the following statements:

(A) The effective date of the emergency suspension order;

(B) Findings of the specific acts or omissions of the licensee that violate applicable laws and rules and are the grounds for revocation, suspension or refusal to renew the license in the underlying proceeding affecting the license;

(C) The reasons the specified acts or omissions seriously endanger the public's health or safety;

(D) A reference to the sections of the statutes and rules involved;

(E) That the licensee has the right to demand a hearing to be held as soon as practicable to contest the emergency suspension order; and

(F) That if the demand for hearing is not received by the agency within 90 calendar days of the date of notice of the emergency suspension order the licensee shall have waived its right to a hearing regarding the emergency suspension order.

(3)(a) If timely requested by the licensee, the agency shall refer the matter to the Hearing Officer Panel to hold a hearing on the emergency suspension order as soon as practicable;

(b) The agency may decide whether the hearing on the emergency suspension order shall be combined with any underlying agency proceeding affecting the license.

(c) At the hearing regarding the emergency suspension order, the hearing officer shall consider the facts and circumstances including, but not limited to:

(A) Whether the acts or omissions of the licensee pose a serious danger to the public's health or safety; and

(B) Whether circumstances at the time of the hearing justify confirmation, alteration or revocation of the order.

(4) Following the hearing, the hearing officer shall issue a proposed order consistent with OAR 137-003-0645 unless the hearing officer has authority to issue a final order without first issuing a proposed order. Any proposed order shall contain a recommendation whether the emergency suspension order should be confirmed, altered or revoked. The final order shall be consistent with OAR 137-003-0665 and shall be based upon the criteria in section (3)(c) of this rule.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341,183.430; Or Laws 1999, ch 849

Use of Collaborative Dispute Resolution in Contested Case Hearing [NEW RULE]

137-003-0565 (1) When an agency issues a contested case notice, the party(ies) and the agency, if participating in the contested case hearing, may agree to participate in a collaborative dispute resolution (DR) process to resolve any issues relevant to the notice . Neither a party's request, nor any agreement by the agency, to participate in such a process tolls the period for filing a timely request for a contested case hearing.

(2) The agency, if participating in the contested case hearing, or the hearing officer, if the agency is not participating in the contested case hearing, may establish a deadline for the conclusion of the collaborative DR process,

(3) The participants in the collaborative DR process may sign an agreement containing any of the provisions listed in OAR 137-005-0030 or such other terms as may be useful to further the collaborative DR process.

(4) If the party(ies), and the agency if participating in the contested case hearing, have agreed to participate in a collaborative DR process and a party makes a timely request for a contested case hearing, the hearing shall be suspended until the collaborative DR process is completed, the agency or the party opts out of the collaborative DR process, or the deadline, if any, for the conclusion of the collaborative process is reached.

(5) Collaborative dispute resolution may occur at any time before issuance of a final order. Any informal disposition of the contested case shall be consistent with ORS 183.415(5) and OAR 137-003-0510(4).

Stat. Auth.: ORS 183.341, 183.502
Stats. Implemented: ORS 183.341, 183.415(5), 183.502

Discovery in Contested Case Hearing [NEW RULE]

137-003-0570 (1) Discovery by the agency or any party may be permitted in appropriate contested cases at the discretion of the agency. Any party may petition the agency pursuant to the requirements in this rule for an order requiring discovery. Before requesting a discovery order, a party or the agency must seek the discovery through an informal exchange of information.

(2) The agency shall issue an order to require or deny discovery at the request of a party, or the agency may issue an order to require discovery on the agency's own motion.

(3) Discovery may include but is not limited to one or more of the following methods:

(a) depositions of a material witness;

(b) disclosure of names and addresses of witnesses expected to testify at the hearing;

(c) production of documents, which may but need not be limited to documents that the party producing the documents plans to offer as evidence;

(d) production of objects for inspection;

(e) permission to enter upon land to inspect land or other property;

(f) requests for admissions;

(g) written interrogatories;

(h) prehearing conferences, as provided in OAR 137-003-0575.

(4)(a) A party seeking to take the testimony of a material witness by deposition shall file a written request with the agency unless the agency has waived notice and delegated the decision to the hearing officer, with a copy to all other parties and to the hearing officer. The request must include the name and address of the witness, a showing of the materiality of the witness's testimony, an explanation of why a deposition rather than informal or other means of discovery is necessary, and a request that the witness's testimony be taken before an individual named in the request for the purpose of recording testimony.

(b) For all other forms of discovery, a request for a discovery order must include a description of the attempts to obtain the requested discovery informally. The request must be mailed or delivered to the agency unless the agency has waived notice and delegated the decision to the hearing officer, with a copy to other parties and to the hearing officer.

(c) Unless expressly provided by law or expressly granted by the agency, a hearing officer may not authorize a party to take depositions that are to be paid by the agency.

(5) Any discovery request must be reasonably likely to produce information that is generally relevant to the case. If the relevance of the requested discovery is not apparent, the agency may require the party requesting discovery to explain how the request is likely to produce relevant information. If the request appears to be unnecessary, the agency may require an explanation of why the requested information is necessary or is likely to facilitate resolution of the case.

(6) The agency may, but is not required to, authorize the requested discovery. In making its decision, the agency shall consider any objections by the party from whom the discovery is sought.

(7) If the agency does authorize discovery, the agency shall control the methods, timing and extent of discovery. The agency may limit discovery to a list of witnesses and the principal documents upon which the agency and parties will rely. The agency may adopt rules governing discovery in the agency's contested cases as long as those rules are not in conflict with the requirements of this rule.

(8) Only the agency may issue subpoenas in support of discovery. The agency or the party requesting the discovery may apply to the circuit court to compel obedience to a subpoena. (Subpoenas for attendance of witnesses or production of documents at the hearing are controlled by OAR 137-003-0585.)

(9) Unless otherwise prohibited by law, the agency may delegate to a hearing officer its authority to order and control discovery. The delegation must be by rule or in writing, and it may be limited to specified forms of discovery. When the agency has delegated the authority to control discovery to a hearing officer, the agency may seek discovery through the procedures available to a party under this rule.

(10) The hearing officer may refuse to admit evidence that was not disclosed in response to a discovery order, unless the party or agency that failed to provide discovery offers a satisfactory reason for having failed to do so, or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10). If the hearing officer admits evidence

that was not disclosed as ordered, the hearing officer may grant a continuance to allow an opportunity for the agency or other party to respond.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.425; Or Laws 1999, ch 849

Prehearing Conferences [NEW RULE]

137-003-0575 (1) Prior to hearing, the hearing officer may conduct one or more prehearing conferences to facilitate the conduct and resolution of the case. The hearing officer may convene the conference on the initiative of the hearing officer or at the agency's or a party's request.

(2) Prior to the conference, the hearing officer shall notify the party(ies) and the agency, if participating, of the purposes of the conference and the matters to be considered. The agency may add additional matters to be considered at the conference by providing notice in writing to the hearing officer and the parties.

(3) The party(ies) and the agency, if participating in the contested case hearing, shall appear at a prehearing conference through legal counsel or through persons authorized to represent the party or the agency in the contested case hearing.

(4) The purposes of a prehearing conference may include, but are not limited to the following:

(a) to facilitate discovery and to resolve disagreements about discovery;

(b) to identify, simplify and clarify issues;

(c) to eliminate irrelevant or immaterial issues;

(d) to obtain stipulations of fact and to admit documents into evidence;

(e) to provide to the hearing officer, agency and parties, in advance of the hearing, copies of all documents intended to be offered as evidence at the hearing and the names of all witnesses expected to testify;

(f) to authenticate documents;

(g) to decide the order of proof and other procedural matters pertaining to the conduct of the hearing;

(h) to assist in identifying whether the case might be appropriate for settlement or for a collaborative dispute resolution process and, if the agency agrees that the case is appropriate, to refer the case to the agency for settlement discussions or for exploration or initiation of a collaborative dispute resolution process;

(i) to schedule the date, time and location of the hearing or for any other matters connected with the hearing, including dates for pre-filed testimony and exhibits; and

(j) to consider any other matters that may expedite the orderly conduct of the proceeding.

(5) The prehearing conference may be conducted in person or by telephone.

(6) The failure of a party or the agency to appear at a prehearing conference convened by the hearing officer shall not preclude the hearing officer from making rulings on any matters identified by the hearing officer in the notice issued under section (2) of this rule, and discussion of any of these matters at the conference in the absence of the agency or a party notified of the conference does not constitute an ex parte communication with the hearing officer.

(7) The hearing officer conducting the prehearing conference must make a record of any stipulations, rulings and agreements. The hearing officer shall either make an audio or stenographic record of the pertinent portions of the conference or shall place the substance of stipulations, rulings and agreements in the record by written summary. Stipulations to facts and to the authenticity of documents and agreements to narrow issues shall be binding upon the agency and the parties to the stipulation unless good cause is shown for rescinding a stipulation or agreement.

(8) After the hearing begins, the hearing officer may at any time recess the hearing to discuss any of the matters listed in section (4) of this rule.

(9) Nothing in this rule precludes the agency and parties from engaging in informal discussions of any of the matters listed in section (4) of this rule without the participation of the hearing officer. Any agreement reached in an informal discussion shall be submitted to the hearing officer in writing or presented orally on the record at the hearing.

Stat. Auth.: ORS 183.341, 183.502
Stats. Implemented: ORS 183.341, 183.430, 183.502; Or Laws 1999, ch 849

Motion for Ruling on Legal Issue **[NEW RULE]**

137-003-0580 (1) Not less than 21 calendar days before the date set for hearing, the agency or a party may file a motion requesting a ruling in favor of the agency or party on any or all legal issues (including claims and defenses) in the contested case. The motion shall be accompanied by affidavits or other supporting documents and shall be served on the agency and parties in the manner required by OAR 137-003-0520.

(2) The agency or a party may file a response to the motion within seven calendar days after service of the motion. The response may be accompanied by affidavits or other supporting documents and shall be served on the agency and parties in the manner required by OAR 137-003-0520.

(3) The agency by rule or in writing may elect not to make available this process of immediate review by the agency. The hearing officer shall not consider a motion for ruling on a legal issue if the agency requests that the case proceed to a hearing on that issue.

(4) The hearing officer shall grant the motion if:

(a) the pleadings, affidavits, supporting documents and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought, and

(b) the agency or party filing the motion is entitled to a favorable ruling as a matter or law.

(5) The hearing officer may establish longer or shorter periods than those under section (1) and (2) of this rule for the filing of motions and responses.

(6) If the hearing officer's ruling on the motion resolves all issues in the contested case, the hearing officer shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling or a final order in accordance with OAR 137-003-0665 if the hearing officer has authority to issue a final order without first issuing a proposed order.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341; Or Laws 1999, ch 849

Subpoenas [NEW RULE]

137-003-0585 (1) Subpoenas for the attendance of witnesses or the production of documents at the hearing may be issued as follows:

(a) By an agency on its own motion or by an Assistant Attorney General on behalf of the agency;

(b) By the agency or hearing officer upon the request of a party to a contested case upon a showing of general relevance and reasonable scope of the evidence sought; and

(c) By an attorney representing a party on behalf of that party.

(2) A motion to quash a subpoena must be presented in writing to the hearing officer, with service on the agency and any other party in the manner required by OAR 137-003-0520.

(a) The agency and any party may respond to the motion to quash within seven calendar days of receiving the motion. Any response must be in writing and served on the agency and any other party in the manner required by OAR 137-003-0520.

(b) The hearing officer shall rule on the motion to quash within 14 calendar days of receiving the motion.

(3) If a person fails to comply with a properly issued subpoena, the agency, hearing officer or party may apply to any circuit court judge to compel obedience with the requirements of the subpoena.

(4) The hearing officer may establish longer or shorter periods than those under section (2) of this rule for the filing of motions and responses.

(5) The agency shall be responsible for paying any mileage or fees required by ORS 44.415 for witnesses subpoenaed to a hearing under subsection (1)(a) of this rule. The party shall be responsible for paying any mileage or fees required by ORS 44.415 for witnesses subpoenaed to a hearing under subsections (1)(b) or (c) of this rule.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 44.415, 183.341, 183.440, 183.445; Or Laws 1999, ch 849

Qualified Interpreters [NEW RULE]

137-003-0590 (1) For purposes of this rule:

(a) An "assistive communication device" means any equipment designed to facilitate communication by an individual with a disability;

(b) An "individual with a disability" means a person who cannot readily understand the proceedings because of deafness or a physical hearing impairment, or cannot communicate in the proceedings because of a physical speaking impairment;

(c) A "non-English speaking" person means a person who, by reason of place of birth or culture, speaks a language other than English and does not speak English with adequate ability to communicate effectively in the proceedings;

(d) A "qualified interpreter" means:

(A) for an individual with a disability, a person readily able to communicate with the individual with a disability, interpret the proceedings and accurately repeat and interpret the statements of the individual with a disability;

(B) for a non-English speaking person, a person readily able to communicate with the non-English-speaking person, translate the proceedings for the non-English speaking person and accurately repeat and translate the statement of the non-English speaking person.

(2) If an individual with a disability is a party or witness in a contested case hearing:

(a) The agency shall appoint a qualified interpreter and make available appropriate assistive communication devices whenever it is necessary to interpret the proceedings to, or to interpret the testimony of, the individual with a disability.

(b) No fee shall be charged to a party or witness for the appointment of an interpreter or use of an assistive communication device. No fee shall be charged to any person for the appointment of an interpreter or the use of an assistive communication device if appointment or use is made to determine whether the person is disabled for purposes of this rule.

(3) If a non-English speaking person is a party in a contested case hearing:

(a) The agency shall, except as provided in subsection (3)(b), appoint and pay the fees and expenses of a qualified interpreter whenever it is necessary to interpret the proceedings to the non-English speaking party or to interpret the testimony of the non-English speaking party, provided that:

(A) The non-English speaking person makes a verified statement and provides other information in writing under oath showing the inability of the non-English speaking person to obtain a qualified interpreter and provides any other information required by the agency concerning the inability of the non-English speaking person to obtain such an interpreter; and

(B) It appears to the agency that the non-English speaking person is without means and is unable to obtain a qualified interpreter.

(b) If the non-English speaking person knowingly and voluntarily files with the agency a written statement that the non-English speaking person does not desire a qualified interpreter to be appointed, the agency shall not appoint such an interpreter for the non-English speaking person.

(4) The agency may, by rule, provide that the agency will appoint and pay the fees and expenses of an interpreter for a non-English speaking party or witness in situations other than those specified in section (3) of this rule.

(5) The person requesting the interpreter, or assistive communication device for the individual with a disability, must notify the agency as soon as possible, but no later than 14 calendar days before the proceeding, including the hearing or pre-hearing conference, for which the interpreter or device is requested.

(a) For good cause, the agency may waive the 14-day advance notice.

(b) The notice to the agency must include:

(A) the name of the person needing a qualified interpreter or assistive communication device;

(B) the person's status as a party or a witness in the proceeding; and

(C) if the request is in behalf of (i) an individual with a disability, the nature and extent of the individual's physical hearing or speaking impairment, and the type of aural interpreter, or assistive communication device needed or preferred; or (ii) a non-English speaking person, the language spoken by the non-English speaking person.

(6) Any person serving as an interpreter in a contested case proceeding shall state or submit the person's qualifications on the record unless waived or otherwise stipulated to by the agency and the party or their counsel. An interpreter in a contested case proceeding shall swear or affirm under

oath to make a true and impartial interpretation of the proceedings in an understandable manner using the interpreter's best skills and judgment.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.418, 183.421; Or Laws 1999, ch 849

Public Attendance; Exclusion of Witnesses; Removal of Disruptive Individuals [NEW RULE]

137-003-0595 (1) Unless otherwise required by law, contested case hearings are open to the public unless the agency by rule or in writing determines that the hearing will be closed to non-participants in the hearing.

(2) The hearing officer may exclude witnesses from the hearing, except for a party, a party's authorized representative, expert witnesses, the agency representative and one agency officer or employee.

(3) A hearing officer may expel any person from the contested case hearing if that person engages in conduct that disrupts the hearing.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341; Or Laws 1999, ch 849

Conducting the Contested Case Hearing [NEW RULE]

137-003-0600 (1) The contested case hearing shall be conducted by and under the control of the hearing officer assigned from the Hearing Officer Panel.

(2) If the hearing officer has an actual or potential conflict of interest as defined in ORS 244.020(1) or (7), that officer shall comply with the requirements of ORS chapter 244 (*e.g.*, ORS 244.120 and 244.130).

(3) At the commencement of the hearing, the hearing officer shall explain the issues involved in the hearing and the matters that the parties must either prove or disprove.

(4) The hearing shall be conducted, subject to the discretion of the hearing officer, so as to include the following:

(a) The statement and evidence of the proponent in support of its action;

(b) The statement and evidence of opponents, interested agencies, and other parties; except that limited parties may address only subjects within the area to which they have been limited;

(c) Any rebuttal evidence; and

(d) Any closing arguments.

(5) The hearing officer, the agency through an agency representative or assistant attorney general, interested agencies through an assistant attorney general, and parties or their attorney or authorized representative shall have the right to question witnesses. However, limited parties may question only those witnesses whose testimony may relate to the area or areas of participation granted by the agency.

(6) The hearing may be continued with recesses as determined by the hearing officer.

(7) The hearing officer may set reasonable time limits for oral presentation and may exclude or limit cumulative, repetitious, irrelevant or immaterial matter.

(8) Exhibits shall be marked and maintained by the hearing officer as part of the record of the proceedings.

(9) If the hearing officer receives any written or oral ex parte communication during the contested case proceeding, the hearing officer shall notify all parties and otherwise comply with the requirements of OAR 137-003-0625.

(10) The hearing officer may request that any closing arguments be submitted in writing or orally.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.415(9); Or Laws 1999, ch 849

Telephone Hearings [NEW RULE]

137-003-0605 (1) Unless precluded by law, the hearing officer may hold a hearing or portion of a hearing by telephone.

(2) If a hearing is to be held by telephone, each party and the agency, if participating in the contested case hearing, shall provide, before commencement of the hearing, to all other parties, to the agency and to the hearing officer copies of the exhibits it intends to offer into evidence at the hearing.

(3) If a witness is to testify by telephone, the party or agency that intends to call the witness shall provide, before commencement of the hearing, to the witness, to the other parties, to the agency, if participating in the contested case hearing, and to the hearing officer a copy of each document about which the witness will be questioned.

(4) Nothing in this rule precludes any party or the agency from seeking to introduce documentary evidence in addition to evidence described in section (2) during the telephone hearing. The hearing officer shall receive such evidence, subject to the applicable rules of evidence, if inclusion of the evidence in the record is necessary to conduct a full and fair hearing. If any evidence introduced during the hearing has not previously been provided to the agency and to the other parties, the hearing may be continued upon the request of any party or the agency for sufficient time to allow the party or the agency to obtain and review the evidence.

(5) The hearing officer shall make an audio or stenographic record of any telephone hearing.

(6) As used in this rule, "telephone" means any two-way or multi-party electronic communication device, including video conferencing.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341; Or Laws 1999, ch 849

Evidentiary Rules [NEW RULE]

137-003-0610 (1) Evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible.

(2) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, and privileges afforded by Oregon law shall be recognized by the hearing officer.

(3) All offered evidence, not objected to, will be received by the hearing officer subject to the officer's power to exclude irrelevant, immaterial, or unduly repetitious matter.

(4) Evidence objected to may be received by the hearing officer. If the hearing officer does not rule on its admissibility at the hearing, the hearing officer shall do so either on the record before a

proposed order is issued or in the proposed order. If the hearing officer has authority to issue a final order without first issuing a proposed order, the hearing officer may rule on the admissibility of the evidence in the final order.

(5) The hearing officer shall accept an offer of proof made for excluded evidence. The offer of proof shall contain sufficient detail to allow the reviewing agency or court to determine whether the evidence was properly excluded. The hearing officer shall have discretion to decide whether the offer of proof is to be oral or written and at what stage in the proceeding it will be made. The hearing officer may place reasonable limits on the offer of proof, including the time to be devoted to an oral offer or the number of pages in a written offer.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.450; Or Laws 1999, ch 849

Judicial Notice and Official Notice of Facts [NEW RULE]

137-003-0615 (1) The hearing officer may take notice of judicially cognizable facts on the record before issuance of the proposed order or in the proposed order or, if the hearing officer has authority to issue a final order without first issuing a proposed order, before the final order is issued. The agency or party(ies) may present rebuttal evidence.

(2) The hearing officer may take official notice of general, technical or scientific facts within the specialized knowledge of the hearing officer.

(a) If the hearing officer takes official notice of general, technical or scientific facts, the hearing officer shall provide such notice to the parties and the agency, if the agency is participating in the contested case hearing, before the issuance of the proposed order or, if the hearing officer has authority to issue a final order without first issuing a proposed order, before the final order is issued.

(b) The agency or a party may present rebuttal evidence in response to hearing officer's official notice of general, technical or scientific facts.

(c) If rebuttal evidence is presented, the hearing officer shall rule before the issuance of the proposed order or in the proposed order or, if the hearing officer has authority to issue a final order, in the final order on whether the noticed facts will be considered as evidence in the proceeding.

(3) Before the issuance of the proposed order or a final order issued by a hearing officer, the agency may take notice of judicially cognizable facts and may take official notice of general, technical or scientific facts within the specialized knowledge of the agency as follows:

(a) The agency shall provide notice of judicially cognizable facts or official notice of general, technical or scientific facts in writing to the hearing officer and parties to the hearing.

(b) A party may present rebuttal evidence in response to agency notice of judicially cognizable facts or official notice of general, technical or scientific facts.

(c) If a party presents rebuttal evidence, the hearing officer shall rule on whether the noticed facts will be considered as evidence in the proceeding.

(4) After the issuance of a proposed order, the agency may take notice of judicially cognizable facts and may take official notice of general, technical or scientific facts within the specialized knowledge of the agency as follows:

(a) The agency shall provide notice of judicially cognizable facts or official notice of general, technical or scientific facts in writing to the parties to the hearing and, if authorized to issue a final order, to the hearing officer.

(b) A party may object in writing to agency notice of judicially cognizable facts or official notice of general, technical or scientific facts with service on any other parties and, if authorized to issue a final order, on the hearing officer in the manner required by OAR 137-003-0520. A party may request that the agency or, if authorized to issue a final order, the hearing officer provide an opportunity for the party to present written or non-written rebuttal evidence.

(c) The agency may request the hearing officer to conduct further hearing proceedings under OAR 137-003-0655 as necessary to permit a party to present rebuttal evidence.

(d) If a party presents rebuttal evidence, the agency or, if authorized to issue a final order, the hearing officer shall rule in the final order on whether the noticed facts were considered as evidence.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.450(4); Or Laws 1999, ch 849

Ex Parte Communications with Hearing Officer [NEW RULE]

137-003-0625 (1) For purposes of this rule, an ex parte communication is:

(a) an oral or written communication,

(b) by a party, a party's representative or legal adviser, any other person who has a direct or indirect interest in the outcome of the proceeding, any other person with personal knowledge of the facts relevant to the proceeding, or any officer, employee or agent of the agency,

(c) that relates to a legal or factual issue in the contested case proceeding,

(d) made directly or indirectly to the hearing officer,

(e) while the contested case proceeding is pending,

(f) that is made without notice and opportunity for the agency and all parties to participate in the communication.

(2) If a hearing officer receives an ex parte communication during the pendency of the contested case proceeding, the hearing officer shall place in the record:

(a) The name of each individual from whom the hearing officer received an ex parte communication;

(b) A copy of any ex parte written communication received by the hearing officer;

(c) A memorandum reflecting the substance of any ex parte oral communication made to the hearing officer;

(d) A copy of any written response made by the hearing officer to any ex parte oral or written communication; and

(e) A memorandum reflecting the substance of any oral response made by the hearing officer to any ex parte oral or written communication.

(3) The hearing officer shall advise the agency and all parties in the proceeding that an ex parte communication has been made a part of the record. The hearing officer shall allow the agency and parties an opportunity to respond to the ex parte communication. Any responses shall be made part of the record.

(4) The provisions of this rule do not apply to:

(a) Communications made to a hearing officer by other hearing officers;

(b) Communications made to a hearing officer by any person employed by the panel to assist the hearing officer; or

(c) Communications made to the hearing officer by an assistant attorney general if the communications are made in response to a request from the hearing officer and the assistant attorney general is not advising the agency about the matters at issue in the contested case proceeding.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341; Or Laws 1999, ch 849

Motions [NEW RULE]

137-003-0630 (1) Unless otherwise provided by statute or rule, all motions shall be filed in writing at least seven calendar days before the date of the hearing and a copy provided to the parties and to the agency in the manner required by OAR 137-003-0520 except:

(a) motions seeking to intervene or to be granted party status,

(b) motions made in a pre-hearing conference,

(c) motions for a ruling on legal issues, and

(d) motions to continue a scheduled conference or hearing.

(2) The agency or a party may file a response to a motion. Responses to motions made seven calendar days before the date of the hearing shall be in writing with service to the parties and to the agency in the manner required by OAR 137-003-0520 and shall be filed on the earlier of:

(a) five calendar days after receipt of the motion, or

(b) the date and time of the hearing.

(3) Responses to late-filed motions may be presented orally or in writing at the contested case hearing.

(4) The hearing officer may establish longer or shorter periods than those under sections (1) and (2) of this rule for the filing of motions and responses. The hearing officer may also consider motions presented orally at the contested case hearing

(5) The mere filing or pendency of a motion, even if uncontested, does not alter or extend any time limit or deadline established by statute, rule or order.

(6) The hearing officer shall rule on all motions on the record before issuance of a proposed order or in the proposed order or, if the hearing officer has authority to issue a final order without first issuing a proposed order, in the final order.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341; Or Laws 1999, ch 849

Transmittal of Questions to the Agency [NEW RULE]

137-003-0635 (1) Questions regarding the following issues may be transmitted to the agency:

(a) the agency's interpretation of its rules and applicable statutes, or

(b) which rules or statutes are applicable to a proceeding.

(2) At the request of the agency, the hearing officer shall transmit a question to the agency.

(3) At the request of a party or on the hearing officer's own motion, the hearing officer may transmit a question to the agency unless the agency by rule or in writing elects not to make available this process for transmittal of questions to the agency.

(4) The hearing officer shall submit any transmitted question in writing to the agency. The submission shall include a summary of the matter in which the question arises and shall be served on the agency representative and parties in the manner required OAR 137-003-0520.

(5) The agency may request additional submissions by a party or the hearing officer in order to respond to the transmitted question.

(6) Unless prohibited by statute or administrative rules governing the timing of hearings, the hearing officer may stay the proceeding and shall not issue the proposed order or the final order, if the hearing officer has authority to issue the final order, until the agency responds to the transmitted question.

(7) The agency shall respond in writing to the transmitted question and the response shall be made a part of the record of the contested case hearing. The agency's response may be to decline to answer the transmitted question.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341; Or Laws 1999, ch 849

Immediate Review by Agency [NEW RULE]

137-003-0640 (1) Before issuance of a proposed order or before issuance of a final order if the hearing officer has authority to issue a final order, the agency or a party may seek immediate review by the agency of the hearing officer's decision on any of the following:

(a) a ruling on a motion to quash a subpoena under OAR 137-003-0585;

(b) a ruling refusing to consider as evidence judicially or officially noticed facts presented by the agency under OAR 137-003-0615 that is not rebutted by a party;

(c) a ruling on the admission or exclusion of evidence based on a claim of the existence or non-existence of a privilege.

(2) The agency by rule or in writing may elect not to make available this process of immediate review by the agency.

(3) The agency or a party may file a response to the request for immediate review. The response shall be in writing and shall be filed with the agency within five calendar days after receipt of the request for review with service on the hearing officer, the agency representative, if any, and any other party.

(4) The mere filing or pendency of a request for immediate agency review, even if uncontested, does not alter or extend any time limit or deadline established by statute, rule, or order.

(5) The agency shall rule on all requests for immediate agency review in writing and the request and ruling shall be made part of the record of the proceeding.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341; Or Laws 1999, ch 849

Proposed Orders in Contested Cases [NEW RULE]

137-003-0645 (1) Unless the hearing officer is authorized or required to issue a final order without first issuing a proposed order, the hearing officer shall prepare a proposed order.

(2) The proposed order shall be based exclusively on:

(a) the pleadings, including the contested case notice, and motions;

(b) the applicable law;

(c) evidence and arguments;

(d) stipulations;

(e) ex parte written communications received by the hearing officer, memoranda prepared by the hearing officer reflecting the substance of any ex parte oral communications made to the hearing officer, written responses made by the hearing officer and any memoranda prepared by the hearing officer reflecting the substance of any oral responses made by the hearing officer;

(f) judicially cognizable facts and matters officially noticed;

(g) proposed findings of fact and written argument submitted by a party or the agency;

(h) intermediate orders or rulings by the hearing officer or agency; and

(i) any other material made part of the record of the hearing.

(3) The proposed order shall fully dispose of all issues presented to the hearing officer that are required to resolve the case. The proposed order shall be in writing and shall include:

(a) the case caption,

(b) the name of the hearing officer(s), the appearances of the parties and identity of witnesses,

(c) a statement of the issues,

(d) references to specific statutes or rules at issue,

(e) rulings on issues presented to the hearing officer, such as admissibility of offered evidence, when the rulings are not set forth in the record,

(f) findings as to each issue of fact and as to each ultimate fact required to support the proposed order, along with a statement of the underlying facts supporting each finding,

(g) conclusions of law based on the findings of fact and applicable law,

(h) an explanation of the reasoning that leads from the findings of fact to the legal conclusion(s),

(i) the action the hearing officer recommends the agency take as a result of the facts found and the legal conclusions arising therefrom, and

(j) the name of the hearing officer who prepared the proposed order and date the order was issued.

(4) The agency by rule may provide that the proposed order will become a final order if no exceptions are filed within the time specified in the agency rule unless the agency notifies the parties and the hearing officer that the agency will issue the final order. If the agency adopts such a rule, the proposed order shall include a statement to this effect.

(5) If the recommended action in the proposed order is adverse to any party, the proposed order shall also include a statement that the party may file exceptions and present argument to the agency or, if authorized to issue the final order, to the hearing officer. The proposed order shall include information provided by the agency as to:

(a) Where and when written exceptions must be filed to be considered by the agency; and

(b) When and in what form argument may be made to the official(s) who will render the final order.

(6) The hearing officer shall serve the proposed order on the agency and each party.

(7) The proposed order shall include a certificate of service, documenting the date the proposed order was served on the agency and each party.

(8) The hearing officer shall transmit the hearing record to the agency when the proposed order is served or, if the hearing officer has authority to issue a final order, when the final order is served.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.460, 183.464; Or Laws 1999, ch 849

Exceptions to Proposed Order [NEW RULE]

137-003-0650 (1) If the recommended action in the proposed order is adverse to any party or the agency, the party or agency may file exceptions and present argument to the agency or, if authorized to issue a final order, to the hearing officer.

(2) The agency shall by rule or in writing describe:

(a) Where and when written exceptions must be filed to be considered by the agency; and

(b) When and in what form argument may be made to the official(s) who will render the final order.

(3) The agency may request the hearing officer to review any written exceptions received by the agency and request the hearing officer either to provide a written response to the exceptions to be made a part of the record or to revise the proposed order as the hearing officer considers appropriate to address any exceptions. The hearing officer shall not consider new or additional evidence unless, pursuant to OAR 137-003-0655(2), the agency requests the hearing officer to conduct further hearing.

(4) Agency staff may comment to the agency or the hearing officer on the proposed order, and the agency or the hearing officer may consider such comments, subject to OAR 137-003-0625 and 137-003-0660.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.460, 183.464; Or Laws 1999, ch 849

Further Hearing and Issuance of Final Order [NEW RULE]

137-003-0655 (1) After issuance of the proposed order, if any, the hearing officer shall not hold any further hearing or revise or amend the proposed order except at the request of the agency.

(2) If the agency determines that further hearing is appropriate, the agency shall decide upon the scope of the further hearing. The agency shall request the hearing officer to conduct further hearing on such issues as the agency specifies and to prepare a revised proposed order as appropriate.

(3) If the hearing officer's proposed order recommended a decision favorable to a party and the agency intends to reject that recommendation and issue an order adverse to that party, the agency shall issue an amended proposed order unless (a) the official(s) who are to render the final order have considered the record, or (b) the changes to the proposed order are within the scope of any exceptions or agency comment to which there was an opportunity to respond. Any amended proposed order shall comply with OAR 137-003-0665(3) and (4) and shall include a statement that the party may file exceptions and present argument to the agency. The agency shall serve any amended proposed order on each party to the contested case proceeding.

(4) After considering any timely exceptions and argument, the agency or, if authorized, the hearing officer shall issue a final order in accordance with OAR 137-003-0665. The agency may adopt the proposed order prepared by the hearing officer as the final order, or modify the proposed order and issue the modified order as the final order. Neither the agency nor the hearing officer shall consider new or additional evidence unless, pursuant to section (2) of this rule, the agency requests the hearing officer to conduct further hearing.

(5) If an agency decision maker has an actual or potential conflict of interest as defined in ORS 244.020(1) or (7), that decision maker shall comply with the requirements of ORS chapter 244 (*e.g.*, ORS 244.120 and 244.130).

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341; Or Laws 1999, ch 849

Ex Parte Communications to Agency during Review of Contested Case [NEW RULE]

137-003-0660 (1) For purposes of this rule, an ex parte communication is an oral or written communication to an agency decision maker during its review of the contested case not made in the presence of all parties to the hearing, concerning a fact in issue in the proceeding, but does not include communication from agency staff or counsel about legal issues or about facts in the record.

(2) If an agency decision maker receives an ex parte communication during its review of a contested case, the decision maker shall:

(a) Give all parties notice of the substance of the communication, if oral, or a copy of the communication, if written; and

(b) Provide any party who did not present the ex parte communication an opportunity to rebut the substance of the ex parte communication.

(3) The agency shall include in the record of the contested case proceeding:

(a) The ex parte communication, if in writing;

(b) A statement of the substance of the ex parte communication, if oral;

(c) The agency's notice to the parties of the ex parte communication; and

(d) Rebuttal evidence, if any.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.462; Or Laws 1999, ch 849

Final Orders in Contested Cases [NEW RULE]

137-003-0665 (1) Final orders in contested cases shall be in writing.

(2) Except as provided in section (5) of this rule, all final orders in contested cases shall include the following:

(a) each of the elements identified in OAR 137-003-0645(3)(a)-(h),

(b) an Order stating the action taken by the agency as a result of the facts found and the legal conclusions arising therefrom; and

(c) a citation of the statutes under which the order may be appealed.

(3) If the agency modifies the proposed order issued by the hearing officer in any substantial manner, the agency must identify the modifications and provide an explanation to the parties as to why the agency made the modification. For purposes of this provision, an agency modifies a proposed order in a "substantial manner" when the effect of the modifications is to change the outcome or the basis for the order.

(4) The agency may modify a finding of historical fact made by the hearing officer only if the agency determines that the finding made by the hearing officer is not supported by a preponderance of the evidence in the record. For purposes of this provision, a hearing officer makes a finding of historical fact if the hearing officer determines that an event did or did not occur in the past or that a circumstance or status did or did not exist either before the hearing or at the time of the hearing.

(5) When informal disposition of a contested case is made by stipulation, agreed settlement or consent order as provided in OAR 137-003-0510(4), the final order need not comply with section (2) of this rule. However, the order must state the agency action and

(a) incorporate by reference a stipulation or agreed settlement signed by the party or parties agreeing to that action, or

(b) be signed by the party or parties.

(6) The final order shall be served on each party.

(7) The date of service of the final order on the parties shall be specified in writing and be part of or be attached to the order on file with the agency, unless service of the final order is not required by statute.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.415(5), 183.470; Or Laws 1999, ch 849

Default [NEW RULE]

137-003-0670 (1) The agency or, if authorized, the hearing officer may issue a final order by default:

(a) When the agency has given a party an opportunity to request a hearing and the party fails to make a request within a specified time,

(b) When the party withdraws a request for a hearing,

(c) When the agency or hearing officer has notified the party of the time and place of the hearing and the party fails to appear at the specified time and place, or

(d) When the agency or hearing officer has notified the party of the time and place of the hearing in a matter in which only one party is before the agency and that party subsequently notifies the agency or hearing officer that the party will not appear at the specified time and place, unless the agency or hearing officer has agreed to reschedule the hearing.

(2) An order adverse to a party may be issued upon default only upon a prima facie case made on the record. The record may consist of oral (transcribed, recorded or reported) or written

evidence or a combination of oral and written evidence. In all cases, the record must contain evidence that persuades the agency of the existence of facts necessary to support the order.

(a) If the agency designated the agency file as the record at the time the contested case notice was issued in accordance with OAR 137-003-0505 and no testimony or further evidence is necessary to establish a prima facie case, the agency file shall constitute the record. No hearing shall be conducted. The agency or, if authorized, the hearing officer shall issue a final order by default in accordance with OAR 137-003-0665.

(b) If the agency determines that testimony or evidence is necessary to establish a prima facie case, the hearing officer shall conduct a hearing and, unless authorized to issue a final order without first issuing a proposed order, the hearing officer shall issue a proposed order in accordance with OAR 137-003-0645. The agency or, if authorized, the hearing officer shall issue a final order by default in accordance with OAR 137-003-0665.

(3)(a) When a party requests a hearing after the time specified by the agency, but 60 calendar days or less after the agency or hearing officer has entered a final order by default, the agency may accept the late request only if the cause for failure to timely request the hearing was beyond the reasonable control of the party, unless other applicable statutes or rule provides a different standard.

(b) If a final order by default has already been entered, the party requesting the hearing shall deliver or mail within a reasonable time a copy of the hearing request to all persons and agencies required by statute, rule or order to receive notice of the proceeding.

(c) In determining whether to accept a late hearing request, the agency may require the request to be supported by an affidavit and may conduct such further inquiry as it deems appropriate. If the late hearing request is allowed by the agency, it shall enter an order granting the request and refer the matter to the Hearing Officer Panel to hold a hearing on the underlying matter. If the late hearing request is denied, the agency shall enter an order setting forth its reasons for the denial.

(d) The agency by rule or in writing may provide a right to a hearing on whether the late filing of a hearing request should be accepted. If a hearing is held, it shall be conducted pursuant to these rules by a hearing officer from the Hearing Officer Panel.

(4) The agency or hearing officer shall notify a defaulting party of the entry of a final order by default by delivering or mailing a copy of the order. If the contested case notice contained an order that was to become effective unless the party requested a hearing, and designated the agency file as the record, that order becomes a final order by default if no hearing is requested, and no further order need be served upon the party.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.415(6), 183.470; Or Laws 1999, ch 849

Reconsideration and Rehearing – Contested Cases [NEW RULE]

137-003-0675 (1) Unless otherwise provided by statute, a party may file a petition for reconsideration or rehearing of a final order in a contested case with the agency within 60 calendar days after the order is served. A copy of the petition shall also be delivered or mailed to all parties or other persons and agencies required by statute, rule or order to receive notice of the proceeding.

(2) The agency may, by rule or in writing, require the petition to be filed with the hearing officer.

(3) The petition shall set forth the specific grounds for reconsideration or rehearing. The petition may be supported by a written argument.

(4) The petition may include a request for stay of a final order if the petition complies with the requirements of OAR 137-003-0690(3).

(5) Within 60 calendar days after the order is served, the agency may, on its own initiative, reconsider the final order or rehear the case. If a petition for judicial review has been filed, the agency must follow the procedures set forth in ORS 183.482(6) before taking further action on the order. The procedural and substantive effect of reconsideration or rehearing under this section shall be identical to the effect of granting a party's petition for reconsideration or rehearing.

(6) The agency may consider a petition for reconsideration or rehearing as a request for either or both. The petition may be granted or denied by summary order and, if no action is taken, shall be deemed denied as provided in ORS 183.482.

(a) If the agency determines that reconsideration alone is appropriate, the agency shall enter a new final order in accordance with OAR 137-003-0665, which may be an order affirming the existing order.

(b) If the agency determines that rehearing is appropriate, the agency shall decide upon the scope of the rehearing. The agency shall request the hearing officer to conduct further hearing on such issues as the agency specifies and to prepare a proposed order as appropriate. The agency shall issue a new final order in accordance with OAR 137-003-0665. The agency may adopt the proposed order prepared by the hearing officer as the final order, or modify the proposed order and issue the modified order as the final order.

(7) Reconsideration or rehearing shall not be granted after the filing of a petition for judicial review, except in the manner provided by ORS 183.482(6).

(8) Unless otherwise provided by law, a final order remains in effect during reconsideration or rehearing until stayed or changed.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.482; Or Laws 1999, ch 849

Stay Request [NEW RULE]

137-003-0690 (1) Unless otherwise provided by law, any person who petitions for reconsideration, rehearing or judicial review may request the agency to stay the enforcement of the agency order that is the subject of the petition.

(2) The agency may, by rule or in writing, require the stay request to be filed with the hearing officer.

(3) The stay request shall contain:

(a) The name, address and telephone number of the person filing the request and of that person's attorney, if any;

(b) The full title of the agency decision as it appears on the order and the date of the agency decision;

(c) A summary of the agency decision; and

(d) The name, address and telephone number of each other party to the agency proceeding. When the party was represented by an attorney in the proceeding, then the name, address and

telephone number of the attorney shall be provided and the address and telephone number of the party may be omitted.

(e) A statement advising all persons whose names, addresses and telephone numbers are required to appear in the stay request as provided in subsection (3)(d) of this rule, that they may participate in the stay proceeding before the agency if they file a response in accordance with OAR 137-003-0695 within ten calendar days from delivery or mailing of the stay request to the agency;

(f) A statement of facts and reasons sufficient to show that the stay request should be granted because:

(A) The petitioner will suffer irreparable injury if the order is not stayed;

(B) There is a colorable claim of error in the order; and

(C) Granting the stay will not result in substantial public harm.

(g) A statement identifying any person, including the public, who may suffer injury if the stay is granted. If the purposes of the stay can be achieved with limitations or conditions that minimize or eliminate possible injury to other persons, petitioner shall propose such limitations or conditions. If the possibility of injury to other persons cannot be eliminated or minimized by appropriate limitation or conditions, petitioner shall propose an amount of bond, irrevocable letter of credit or other undertaking to be imposed on the petitioner should the stay be granted, explaining why that amount is reasonable in light of the identified potential injuries;

(h) A description of additional procedures, if any, the petitioner believes should be followed by the agency in determining the appropriateness of the stay request;

(i) In a request for a stay of an order in a contested case, an appendix of affidavits containing evidence (other than evidence contained in the record of the contested case out of which the stay request arose) relied upon in support of the statements required under subsections (3)(f) and (g) of this rule. The record of the contested case out of which the stay request arose is a part of the record of the stay proceedings; and

(j) In a request for stay of an order in other than a contested case, an appendix containing evidence relied upon in support of the statement required under subsections (3)(f) and (g) of this rule.

(4) The request must be delivered or mailed to the agency and on the same date a copy delivered or mailed to all parties identified in the request as required by subsection (3)(d) of this rule.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.482(3); Or Laws 1999, ch 849

Intervention in Stay Proceeding [NEW RULE]

137-003-0695 (1) Any party identified under OAR 137-003-0690(3)(d) desiring to participate as a party in the stay proceeding may file a response to the request for stay.

(2) The agency may, by rule or in writing, require the response to be filed with the hearing officer.

(3) The response shall contain:

(a) The full title of the agency decision as it appears on the order;

(b) The name, address, and telephone number of the person filing the response, except that if the person is represented by an attorney, then the name, address, and telephone number of the attorney shall be included and the person's address and telephone number may be deleted;

(c) A statement accepting or denying each of the statements of facts and reasons provided pursuant to OAR 137-003-0690(3)(f) in the petitioner's stay request; and

(d) A statement accepting, rejecting, or proposing alternatives to the petitioner's statement on the bond, irrevocable letter of credit or undertaking amount or other reasonable conditions that should be imposed on petitioner should the stay request be granted.

(4) The response may contain affidavits containing additional evidence upon which the party relies in support of the statement required under subsections (3)(c) and (d) of this rule.

(5) The response must be delivered or mailed to the agency and to all parties identified in the stay request within 10 calendar days of the date of delivery or mailing to the agency of the stay request.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.482(3); Or Laws 1999, ch 849

Stay Proceeding and Order [NEW RULE]

137-003-0700 (1) The agency may conduct such further proceedings pertaining to the stay request as it deems desirable, including taking further evidence on the matter. Agency staff may present additional evidence in response to the stay request. The agency shall commence such proceedings promptly after receiving the stay request.

(2) The agency shall issue an order granting or denying the stay request within 30 calendar days after receiving it. The agency's order shall:

(a) Grant the stay request upon findings of irreparable injury to the petitioner and a colorable claim of error in the agency order and may impose reasonable conditions, including but not limited to, a bond, irrevocable letter of credit or other undertaking and that the petitioner file all documents necessary to bring the matter to issue before the Court of Appeals within a specified reasonable period of time; or

(b) Deny the stay request upon a finding that the petitioner failed to show irreparable injury or a colorable claim of error in the agency order; or

(c) Deny the stay request upon a finding that a specified substantial public harm would result from granting the stay, notwithstanding the petitioner's showing of irreparable injury and a colorable claim of error in the agency order; or

(d) Grant or deny the stay request as otherwise required by law.

Stat. Auth.: ORS 183.341
Stats. Implemented: ORS 183.341, 183.482(3); Or Laws 1999, ch 849

OAR Chapter 137, Division 4
Miscellaneous, Orders in Other than Contested Cases

Reconsideration—Orders in Other Than Contested Case

137-004-0080 (1) A person entitled to judicial review under ORS 183.484 of a final order in other than a contested case may file a petition for reconsideration of a final order in other than a contested case with the agency within 60 calendar days after the date of the order. A copy of the

petition shall also be delivered or mailed to all other persons and agencies required by statute or rule to be notified.

(2) The petition shall set forth the specific grounds for reconsideration. The petition may be supported by a written argument.

(3) The petition may include a request for a stay of a final order if the petition complies with the requirements of OAR 137-003-0090(2).

(4) The petition may be granted or denied by summary order, and, if no action is taken, shall be deemed denied as provided by ORS 183.484(2).

(5) Within 60 calendar days after the date of the order, the agency may, on its own initiative, reconsider the final order. If a petition for judicial review has been filed, the agency must follow the procedures set forth in ORS 183.484(4) before taking further action on the order. The procedural and substantive effect of granting reconsideration under this subsection shall be identical to the effect of granting a party's petition for reconsideration.

(6) Reconsideration shall not be granted after the filing of a petition for judicial review, unless permitted by the court.

(7) A final order remains in effect during reconsideration until stayed or changed.

(8) Following reconsideration, the agency shall enter a new order, which may be an order affirming the existing order.

Stat. Authority: ORS 183.341
Stat. Implemented: ORS 183.484(2), Or Laws 1999, ch 113

OAR Chapter 137, Division 5
Collaborative Dispute Resolution Model Rules

Assessment for Use of Collaborative DR Process

137-005-0020 (1) **Before** instituting a collaborative dispute resolution process, the agency may conduct an assessment to determine if a collaborative process is appropriate for the controversy and, if so, under what conditions.

(2) A collaborative DR process may be appropriate if:

(a) The relationship between the parties will continue beyond the resolution of the controversy and a collaborative DR process is likely to have a favorable effect on the relationship;

(b) There are outcomes or solutions that are only available through a collaborative process;

(c) There is a reasonable likelihood that a collaborative process will result in an agreement;

(d) The implementation and durability of any resolution to the controversy will likely require ongoing, voluntary cooperation of the participants;

(e) A candid or confidential discussion among the disputants may help resolve the controversy, and OAR 137-005-0050 may provide for such candor or confidentiality;

(f) Direct negotiations between the parties have been unsuccessful or could be improved with the assistance of a collaborative DR provider;

(g) No single agency or jurisdiction has complete control over the issue and a collaborative process is likely to be effective in reconciling conflicts over jurisdiction and control; or

(h) The agency has limited time or other resources, and a collaborative process would use less agency resources, take less time or be more efficient than another type of process.

(3) A collaborative DR process may not be appropriate if:

(a) The outcome of the controversy is important for its precedential value, and a collaborative DR process is unlikely to be accepted as an authoritative precedent;

(b) There are significant unresolved legal issues in this controversy, and a collaborative DR process is unlikely to be effective if those legal issues are not resolved first;

(c) The controversy involves significant questions of agency policy, and it is unlikely that a collaborative DR process will help develop or clarify agency policy;

(d) Maintaining established policies and consistency among decisions is important, and a collaborative DR process likely would result in inconsistent outcomes for comparable matters;

(e) The controversy significantly affects persons or organizations who are not participants in the process or whose interests are not adequately represented by participants;

(f) A public record of the proceeding is important, and a collaborative DR process cannot provide such a record;

(g) The agency must maintain authority to alter the disposition of the matter because of changed circumstances, and a collaborative DR process would interfere with the agency's ability to do so;

(h) The agency has limited time or other resources, and a collaborative process would use more agency resources, take longer or be less efficient than another type of process; or

(i) None of the factors in section (2) apply.

(4) The assessment may also be used to:

(a) Determine or clarify the nature of the controversy or the issues to be resolved;

(b) Match a dispute resolution process to the objectives and interests of the disputants;

(c) Determine who will participate in the process;

(d) Estimate the time and resources needed to implement a collaborative DR process;

(e) Assess the potential outcomes of a collaborative DR process and the desirability of those outcomes;

(f) Determine the likely means for enforcing any agreement or settlement that may result;

(g) Determine the compensation, if any, of the dispute resolution provider;

(h) Determine the ground rules for the collaborative DR process; and

(i) Determine the degree to which the parties and the agency wish, and are legally able, to keep the proceedings confidential.

(5) The agency may contract with a collaborative DR provider pursuant to OAR 137-005-0040 to assist the agency in conducting the assessment and may request that the provider prepare a written report summarizing the results of the assessment.

Stat. Auth.: ORS 183.341 & 183.502
Stats. Implemented: ORS 183.502

Assessment for Use of Collaborative DR Process in Complex Public Policy Controversies [NEW RULE]

137-005-0022 (1) For the purposes of this rule, "complex public policy controversy" means a multi-party controversy that includes at least one governmental participant and that affects the broader public, rather than only a single group or individual.

(2) Before using a collaborative process to resolve a complex public policy controversy, the agency may conduct an assessment to determine if a collaborative DR process is appropriate and, if so, under what conditions. In addition to the factors in OAR 137-005-0020, the agency may use the assessment to consider if:

(a)The agency is interested in joint problem-solving or in reaching a consensus among participants, and not solely in obtaining public comment, consultation or feedback, which may be addressed through other processes;

(b) The persons, interest groups or entities significantly affected by the controversy or by any agreement resulting from the collaborative DR process

(A) can be readily identified;

(B) are willing to participate in a collaborative process; and

(C) have the time, resources and ability to participate effectively in a collaborative process and in the implementation of any agreement that may result from the collaborative process;

(c) The persons identified as representing the interests of a group of persons or of an organization have sufficient authority to negotiate a durable agreement on behalf of the group or organization they represent; or

(d) There are ongoing or proposed legislative, political or legal activities that would significantly undermine the value of the collaborative process or the durability of any collaborative agreement.

(3) The agency may contract with a collaborative DR provider pursuant to OAR 137-005-0040 to assist the agency in conducting all or part of the assessment under section (1) and may request that the provider prepare a written report summarizing the results of the assessment.

Stat. Auth.: ORS 183.341 &183.502
Stats. Implemented: ORS 183.502

Agreement to Collaborate

137-005-0030 In preparation for, or in the course of, a collaborative DR process the agency, the other participants and the provider may enter into a written agreement to collaborate. This agreement may include:

(1) A brief description of the dispute or the issues to be resolved;

(2) A list of the participants;

(3) A description of the proposed collaborative DR process;

(4) An estimated starting date and ending date for the process;

(5) A statement whether the collaborative DR provider will receive compensation and, if so, who will be responsible for its payment;

(6) A description of the process, including, but not limited to: the role of witnesses, and whether and how counsel may participate in the process;

(7) Consistent with applicable statute and rules, a statement regarding the degree to which the proceedings or communications made during the course of the collaborative DR process are confidential; and

(8) A description of the likely means for enforcing any agreement or settlement that may result.

Stat. Auth.: ORS 183.341 & 183.502
Stats. Implemented: ORS 183.502

Selection and Procurement of Dispute Resolution Providers

137-005-0040 (1) A collaborative DR provider may be a third party or a permanent or temporary employee of the state. The agency may select the collaborative DR provider or may opt to select the provider by consensus of the participants.

(2) A collaborative DR provider who has a financial interest in the subject matter of the dispute, who is an employee of an agency in the dispute, who has a financial relationship with any participant in the collaborative DR process or who otherwise may not be impartial is considered to have a potential bias. If, before or during the dispute resolution process, a provider has or acquires a potential bias, the provider shall so inform all the participants. Any participant may disqualify a provider who has a potential bias if the participant believes in good faith that the potential bias will undermine the ability of the provider to be impartial throughout the process.

(3) If the collaborative DR provider is a public official as defined by ORS 244.020(15), the provider shall comply with the requirements of ORS chapter 244.

(4) If the agency procures the services of a collaborative DR provider, the agency must comply with all procurement and contracting rules provided by law. A roster of collaborative DR providers and a simplified mediator and facilitator procurement process developed by the Department of Justice may be used by the agency when selecting a collaborative DR provider by consensus.

(5) If the collaborative DR provider is a mediator or facilitator who is not an employee of the agency, the participants shall share the costs of the provider, unless the participants agree otherwise or the provider is retained solely by the agency or by a non-participant.

(6) Whenever the agency compensates a provider who is not an employee of the agency, the agency must execute a personal services contract with the provider. If the agency and the other participants choose to share the cost of the collaborative DR provider's services, the non-agency participants may enter into their own contract with the provider or may be a party to the contract between the agency and the provider, at the discretion of the agency. The agency's contract with a provider must state:

(a) The name and address of the provider and the contracting agency;

(b) The nature of the dispute, the issues being submitted to the collaborative DR process and the identity of the participants, as well as is known at the time the contract is signed;

(c) The services the provider will perform (scope of work);

(d) The compensation to be paid to the provider and the maximum contract amount;

(e) The beginning and ending dates of the contract and that the contract may be terminated by the agency or the provider upon mutual written consent, or at the sole discretion of the agency

upon 30 calendar days notice to the provider or immediately if the agency determines that the DR process is unable to proceed for any reason.

(7) A student, intern or other person in training or assisting the provider may function as a co-provider in a dispute resolution proceeding. The co-provider shall sign and be bound by the agreement to collaborate specified in OAR 137-005-0030, if any, and, if compensated by the agency, a personal services contract as specified in section (6) of this rule.

Stat. Auth.: ORS 183.341 & 183.502
Stats. Implemented: ORS 183.502

Confidentiality of Collaborative Dispute Resolution Communications

137-005-0050 (1) For the purposes of this rule,

(a) "Mediation" means a process in which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between a mediator and any party or agent of a party, until such time as a resolution is agreed to by the parties or the mediation process is terminated.

(b) "Mediation communication" means:

(A) All communications that are made, in the course of or in connection with a mediation, to a mediator, a mediation program or a party to, or any other person present at, the mediation proceedings; and

(B) All memoranda, work products, documents and other materials, including any draft mediation agreement, that are prepared for or submitted in the course of or in connection with a mediation or by a mediator, a mediation program or a party to, or any other person present at, mediation proceedings.

(c) "Mediator" means a third party who performs mediation. Mediator includes agents and employees of the mediator or mediation program.

(d) "Party" means a person or agency participating in a mediation who has a direct interest in the controversy that is the subject of the mediation. A person or agency is not a party to a mediation solely because the person or agency is conducting the mediation, is making the mediation available or is serving as an information resource at the mediation.

(2) If the agency is a party to a mediation or is mediating a dispute as to which the agency has regulatory authority:

(a) Subject to approval by the Governor, the agency may adopt confidentiality rules developed by the Attorney General pursuant to ORS 36.224, in which case mediation communications shall be confidential to the extent provided in those rules.

(b) If the agency has not adopted confidentiality rules pursuant to ORS 36.220 to 36.238, mediation communications shall not be confidential unless otherwise provided by law, and the agency shall inform the parties in the mediation of that fact in an agreement to collaborate pursuant to OAR 137-005-0030 or other document.

(3) If the agency is mediating a dispute as to which the agency is not a party and does not have regulatory authority, mediation communications are confidential, except as provided in ORS 36.220 to 36.238. The agency and the other parties to the mediation may agree in writing that all or part of the mediation communications are not confidential. Such an agreement may be made a part of an agreement to collaborate authorized by OAR 137-005-0030.

(4) If the agency and the other participants in a collaborative DR process other than a mediation wish to make confidential the communications made during the course of the collaborative DR process:

(a) The agency, the other participants and the collaborative DR provider, if any, shall sign an agreement to collaborate pursuant to OAR 137-005-0030 or any other document that expresses their intent with respect to:

(A) Disclosures by the agency and the other participants of communications made during the course of the collaborative DR process;

(B) Disclosures by the collaborative DR provider of communications made during the course of the collaborative DR process;

(C) Any restrictions on the agency's use of communications made during the course of the collaborative DR process in any subsequent administrative proceeding of the agency; and

(D) Any restrictions on the ability of the agency or the other participants to introduce communications made during the course of the collaborative DR process in any subsequent judicial or administrative proceeding relating to the issues in controversy with respect to which the communication was made.

(b) Notwithstanding any agreement under subsection (4)(a) of this rule, communications made during the course of a collaborative DR process:

(A) May be disclosed if the communication relates to child abuse and is made to a person who is required to report abuse under ORS 419B.010;

(B) May be disclosed if the communication relates to elder abuse and is made to a person who is required to report abuse under ORS 124.050 to 124.095;

(C) May be disclosed if the communication reveals past crimes or the intent to commit a crime;

(D) May be disclosed by a party to a collaborative DR process to another person if the party's communication with that person is privileged under ORS chapter 40 or other provision of law;

(E) May be used by the agency in any subsequent proceeding to enforce, modify or set aside an agreement arising out of the collaborative DR process;

(F) May be disclosed in an action for damages or other relief between a party to a collaborative DR process and a DR provider to the extent necessary to prosecute or defend the matter; and

(G) Shall be subject to the Public Records Law, ORS 192.410 to 192.505, and the Public Meetings Law, ORS 192.610 to 192.690.

(c) If a demand for disclosure of a communication that is subject to an agreement under this section is made upon the agency, any other participant or the collaborative DR provider, the person receiving the demand for disclosure shall make reasonable efforts to notify the agency, the other participants and the collaborative DR provider.

Stat. Authority: ORS 183.341 & 183.502
Stat. Implemented: ORS 36.110, 36.220 to 36.238

Secretary of State

STATEMENT OF NEED AND JUSTIFICATION

A Certificate and Order for Filing Temporary Administrative Rules accompanies this form.

Department of Environmental Quality, Director's Office
Agency and Division

In the Matter of	)	Statutory Authority,
Contested Case	)	Statutes Implemented,
Procedural Rules	)	Statement of Need,
Chapter 340, Division 11	)	Principal Documents Relied Upon,

Statutory Authority: ORS 183.341 and 468.020

Other Authority:

Statutes Implemented: ORS 183.341, 183.413, 183.415 and HB 2525 Or. Laws 1999

Need for the Temporary Rule(s): The Attorney General has adopted rules that became effective on January 1, 2000. All agencies covered by HB 2525 must comply with these rules. Some of the Department's rules conflict with these rules and under others, the Department has the authority to adopt procedural rules that are specific to the Department's needs.

Documents Relied Upon: HB 2525 Or. Law 1999; OAR Chapter 137, Division 003

Justification of Temporary Rule(s): Without adoption of these rules, the Department is without rules to cover its contested case hearings in certain situations. Adopting permanent rules will cause a lapse of several months at least when the Department will be without certain procedures.

Authorized Signer and Date

State of Oregon

Department of Environmental Quality Memorandum

Date: January 21, 2000

To: Environmental Quality Commission

From: Langdon Marsh, Director

Subject: Agenda Item J, Water Quality Standards Review, EQC Meeting Feb. 11, 2000

Statement of Purpose

The purpose of this report is to brief the EQC on the Water Quality Division's 1999-2002 Triennial Standards Review. This review cycle began with the first Policy Advisory Committee meeting in December 1999. The Department will present the proposed workplan for reviewing selected water quality standards over the next 3 years (see Attachment A). This report provides information on which standards are proposed for review and outlines the review process, including policy and technical advisory committees (PAC, TAC), federal agency interactions (EPA, NMFS and USFWS) and public involvement.

Background

Under the federal Clean Water Act, States are required to review their water quality standards every three years. States are to identify needed additions or revisions to designated uses, water quality criteria, antidegradation policy and implementation procedures, and other relevant general policies. DEQ's last triennial review was completed in January, 1996 when the EQC adopted revisions to the temperature, pH, dissolved oxygen and bacteria standards, and established a groundwater maximum measurable level (MML) for nitrates. DEQ submitted the standards to EPA for approval in July 1996.

EPA approved DEQ's revised standards in July 1999 with one exception. The 68°F temperature criterion for the lower Willamette River was disapproved. EPA's review included consultation with National Marine Fisheries Service and the US Fish & Wildlife Service under the Endangered Species Act. The standards were evaluated to determine whether they would be likely to adversely affect federally listed species and whether they would jeopardize the continued existence of those species. Both NMFS and USFWS issued "no jeopardy" opinions but found that elements of the standards are likely to adversely affect listed species. The "no jeopardy" decisions were contingent on the implementation by the State of a set of Conservation Measures. The approval letter from EPA and the State Conservation Measures are attached (Attachment B).

The State Conservation Measures that resulted from the ESA consultation process make up much of the work DEQ must do during the current review cycle, which includes the following:

1. Participate in an EPA project to develop temperature criteria for the Northwest and consider revising Oregon's temperature standard to adopt those regional criteria.
2. Develop guidance on how the narrative criteria for "threatened and endangered species" and for "cold water refugia" in the temperature standard will be applied.
3. Develop a plan for implementing the antidegradation policy by Dec. 31, 2000.
4. Identify the geographic areas and time periods to which the spawning criteria for temperature and dissolved oxygen apply and propose appropriate beneficial use designations, provided adequate information is available.
5. Identify the geographic areas to which the cool water dissolved oxygen standard will apply.
6. Identify the geographic areas and time periods to which the bull trout temperature criterion will apply and propose appropriate beneficial use designations.
7. Develop numeric temperature criteria for warm and cool water species, which could include site specific criteria.

Authority of the Commission with Respect to the Issue

The Commission has the statutory authority to adopt and revise water quality standards for the State of Oregon (ORS 468B.040). The Department will propose a package of water quality standards revisions for EQC rule adoption in 2002. The Department will present one or two items to the EQC prior to that time. For example, we will likely propose a temperature criterion for Lahontan Cutthroat Trout this year and present an informational item on the draft antidegradation implementation plan when it is near completion.

Alternatives and Evaluation

The Department recommends completion of the work listed below during the 1999-2002 triennial standards review. The Department prioritized standards work to be done during this review cycle and then estimated how much could be completed during the next three years based on available resources. Completing these priorities will utilize all the staff resource dedicated to standards, including a limited duration position provided by EPA grant funding. The Department proposes to complete the following tasks:

1. Complete the tasks committed to during the ESA consultation on approval of our last standards revisions (listed above).

2. Adopt standards for 8 priority pollutants with federal criteria. This was advised by a federal GAO audit of DEQ's water quality program.
3. Consider designating Outstanding Resource Waters. This was requested in Governor Kitzhaber's Executive Order 99-01.
4. Review the Department's plan for data collection and the development of numeric biocriteria and adopt numeric biocriteria for one ecoregion. The biomonitoring staff will take the lead for this work. EPA provides DEQ funding to collect the data needed to establish numeric biocriteria.
5. Revise some priority pollutants to be consistent with changes in federal criteria (i.e. aluminum, ammonia, and tributyltin), as time allows.
6. Review pH criteria for the coast range basins and for the Crooked River sub-basin, as time allows.

The Department recommends no work on the following items during this review cycle:

1. Sediment and turbidity standards. The Department was planning to review the sediment standard this cycle. However, this would be a resource intensive effort and the resources are not available given the work we must do as a result of the EPA approval/ESA consultation.
2. Bacteria standard. The Department reviewed and revised the bacteria standard during the last review cycle and because we have made no commitment to review it again this cycle, it is a lower priority.
3. Wetlands standards. This would be a resource intensive issue; the EPA criteria are incomplete and old. DEQ would have to develop much of the background information and possible criteria alternatives ourselves and there are many questions about monitoring and natural variability to address.
4. Dissolved v. total recoverable metals issue. In addition to the issue of resource limits, the Department does not propose consideration of the metals criteria because there is unresolved conflict between the federal agencies about this issue. NMFS and USFWS have concerns about using the dissolved rather than total recoverable basis for metals criteria and have issued a draft jeopardy opinion on the California Toxics rule. Similar problems have arisen in Idaho.

The Department will work with a Policy Advisory Committee (PAC) and standard specific Technical Advisory Committees and (TACs) throughout this 3-year review process. The PAC is made up of stakeholders and is chaired by Pat Amadeo. The role of the PAC is to evaluate standards alternatives and proposals from the point of view of implementation feasibility, social and economic impacts and legal requirements and provide advice and recommendations to the Department (PAC membership is shown in Attachment C). The PAC is not expected to reach consensus on all issues. When there is not a consensus-based recommendation, the different viewpoints will be documented in the form of majority and minority opinions and will be provided to the Department and the EQC for consideration. Also participating in the PAC meetings are five agency advisors from EPA, USFWS, NMFS, ODFW and the Oregon Health Division. These

agencies were selected because they must approve the State's standards, they have expertise on beneficial uses or both.

The technical committees or workgroups will be composed of people with scientific expertise in fields pertinent to the various parameters, including freshwater ecology, fish biology, fish toxicology, hydrology, human toxicology, water chemistry and engineering. The purpose of the technical committees is to assist the Department in reviewing and synthesizing the most pertinent and recent scientific literature and to determine levels needed to protect the most sensitive beneficial uses. If possible, the technical review will result in scientifically supportable alternatives, which may then be evaluated by the PAC. In the case of beneficial use designations, the technical workgroup will be comprised of fish biologists and aquatic ecologists with expertise or data on when and where the species and life history stages of concern occur. The Department plans to have technical committees for biocriteria, toxic compounds and aquatic life/conventional pollutants (temperature, nutrients and pH), and technical workgroups for bull trout and salmonid spawning.

Summary of Public Input Opportunity

Because this is an information report, there has been no formal public comment. The first Policy Advisory Committee meeting was held December 14, 1999. The primary issue of concern was EPA's regional temperature criteria project and how members of the PAC will be able to influence the federal process.

In speaking to various groups about the standards review, other issues raised so far include:

- A suggestion that we consider dissolved rather than total metals criteria.
- Concern that we're not addressing sediment and turbidity or wetland criteria this review cycle.
- Concern about what changes will be made to the temperature standard, both from those who view the current standard as not sufficiently protective and those who view it as overly stringent and unachievable.

In addition to working with advisory committees, DEQ will provide an opportunity for general public comment during the review process. The Department plans to hold public workshops on draft issue papers and standards alternatives during the second year of the process. When proposed rule language is developed, there will be an opportunity for public comment through public hearings and submission of written comment.

Conclusions

There are many standards issues that could be worked on; this report lays out those the Department believes are the top priorities and "doable" given available resources over the next 3 years. Additional topics may be picked up as those listed above are completed or if additional resources are obtained.

Intended Future Actions

1. The Department will work with the EPA process to develop regional temperature criteria and consider adoption of those by fall, 2002.
2. The Department will work with Policy and Technical Advisory committees to develop issue papers, evaluate standards alternatives and receive committee recommendations. At this point, the Department can brief the EQC with another informational report if so desired.
3. The Department will propose water quality standards rules revisions on the above listed topics to the EQC by fall, 2002.
4. See Attachment A, the draft workplan for the 1999-2002 standards review cycle, for more detail on future intended actions.

Department Recommendation

It is recommended that the Commission accept this report, discuss the matter, and provide advice and guidance to the Department as appropriate.

Attachments

A. 1999-2002 Water Quality Standards Review Draft Workplan.
B. Letter from EPA to DEQ on approval of water quality standards, July 1999.
C. Policy Advisory Committee membership list.

Reference Documents (available upon request)

1. EPA's Regional Temperature Criteria Development Project (a description).
2. Biological Opinion on EPA's approval of Oregon's water quality standards and accompanying conservation measures, NMFS, July 1999.
3. Biological Opinion on the Oregon water quality standards, USFWS, July 1999.

Approved:

Section: Janice M Renfroe

Division:

Report Prepared By: Debra Sturdevant

Phone: 229-6691

Date Prepared: January 21, 2000

DJS:djs
F:\TEMPLATE\FORMS\EQCINFO.DOT
10/13/95

Attachment A

12/13/99

Oregon Department of Environmental Quality
1999-2002 Water Quality Standards Review

Draft Workplan

Objectives of the 1999-2002 Water Quality Standards Review

1. Fulfill the Department's legal and policy obligations under the Clean Water Act, the Endangered Species Act and the Oregon Plan.

2. Conduct a public participation process that allows the Department to hear and consider the viewpoints of stakeholders. This will include opportunities for comment from the general public and input from a Policy Advisory Committee, which represents various interests and will engage in an in-depth dialogue with the Department on standards alternatives and proposals.

3. Conduct a technical review process that ensures that the best scientific knowledge available is considered and applied in setting water quality standards.

4. Review and revise the temperature standard to achieve EPA approval under the federal Clean Water Act and minimize adverse impacts to threatened and endangered species, as required by the federal Endangered Species Act.

5. Complete the State Conservation Measures DEQ agreed to during the approval and consultation process on standards adopted during the last standards review cycle.

6. Add to the specificity and clarity of beneficial use designations for aquatic life.

7. Respond to a federal audit of DEQ's water quality program, by adopting standards for 8 federal priority pollutants and developing an antidegradation implementation plan.

8. Respond to Governor Kitzhaber's request (executive order 99-01) that the Department consider designating Outstanding Resource Waters.

9. Obtain review of DEQ's plan for collecting data and developing biocriteria, and adopt numeric criteria for one region if adequate data is available.

Estimated Timeline

DATE	TASK	STAFF
May-Dec 1999	Decide what standards to include in the triennial review. Gather input internally and externally. Meet with EPA. Assign lead staff for each parameter.	Sturdevant
Aug-Nov 1999	Decide Policy Advisory Committee process and membership. Recruit members.	Sturdevant
Sept-Dec 99	Develop workplan and timeline for each parameter.	As assigned
Oct 1999	EPA Temp Criteria committees begin meeting.	Sturdevant
Dec 1999	First Policy Advisory Committee (PAC) meeting	Sturdevant
Dec 1999-Jan 2000	Decide Technical Advisory Committee process and membership. Recruit members.	Sturdevant
Jan 1999	Develop public participation plan.	Sturdevant
Jan-Dec 2000	Technical Committee conducts technical reviews and draft issue papers written.	As assigned
Feb. 10-11, 2000	EQC Information Item on Water Quality Standards Review, 1999-2002	Sturdevant
Sept 2000-June 2001	Present technical reviews and issue papers to PAC. Information exchange between TAC and PAC.	As assigned
Dec 2000	Antidegradation implementation plan to be completed.	Newell
March-June 2001	PAC develops standards alternatives and recommendations. Policy issue papers drafted.	As assigned
June-Sept 2001	Staff develops daft rule language.	As assigned
Sept 2001	EPA temperature criteria development completed.	Sturdevant
Oct. 2001	Public workshops on draft issue papers, standards alternatives and PAC recommendations.	Sturdevant

Fall 2001 (if needed)	EQC Informational item on draft issue papers, standards alternatives, PAC recommendations and comment from public workshops.	Sturdevant
Oct-Dec 2001	PAC finalizes recommendations for standards. Policy issue papers complete.	As assigned
Nov 2001-Jan 2002	Staff proposed rule language for public hearing.	As assigned
Feb. 2002	Formal public comment, hearings on proposed standards.	Sturdevant
April 2002	EQC work session on proposed standards.	Sturdevant
July 2002	EQC adopts standards	Sturdevant

Standards Work Proposed for the 1999-2002 Triennial Review

I) DEQ staff proposes that during the 1999-2002 Triennial Review, DEQ complete the following standards work. The are listed roughly in priority order.

1. **Temperature**

   Lead staff: Debra Sturdevant. Assistance: Ltd. Duration, Bruce Hammon

   During the standards approval and ESA consultation process, DEQ committed to participate in developing EPA Region 10 temperature criteria and to consider adoption of the resulting EPA criteria (Conservation Measure # 8). DEQ also committed to develop guidance on how to implement the narrative criteria for T&E species and cold-water refugia in the current standard by June 1, 2000 (Conservation Measure # 1).

   Temperature issues that may be considered include:
   - Salmonid rearing, smoltification and adult holding criteria
   - Cool or warm water species temperature criteria
   - Temperature criterion for Lahontan cutthroat trout
   - Temperature criterion for Redband trout
   - A cold temperature criterion (for protection from very cold water releases)
   - Organization of the standard in the rule language
   - Temperature criterion for the lower Willamette River
   - Lake and reservoir criteria, application of standard

- Guidance on how we will implement the narrative criteria for T&E species and cold-water refugia in the current standard.
- Separation of the bull trout criterion into 2 criteria, one for spawning and rearing and a second for the 2+ age class.

2. **Beneficial Use Designation**

   Lead staff: Debra Sturdevant; assistance: Ltd. Duration position

   During the standards approval and ESA consultation process, DEQ committed to specify sub-categories of salmonid fish use to clarify the time periods and geographic areas to which various temperature and dissolved oxygen criteria apply (Conservation Measures # 4 and 9). The uses to be specified, to the extent that the necessary data is available, include salmonid spawning, bull trout, Lahontan trout and Redband trout. In addition, DEQ committed to clarify where the cool versus cold water DO criteria apply in relation to ESA listed species (Conservation Measure # 5).

3. **Antidegradation Implementation Plan**

   Lead staff: vacant

   During the standards approval and ESA consultation process (Conservation Measure # 3) and in response to the 1999 federal audit of Oregon's water quality program, DEQ committed to develop an antidegradation implementation plan by December 31, 2000. Staff may also recommendation changes to the antidegradation policy rule language.

4. **Outstanding Resource Water designations**

   Lead staff: vacant

   The Governor has committed the State to consider ORW designations and requested that DEQ do so in Executive Order 99-01. DEQ has committed to consider ORW designations in the Oregon Plan for Salmon and Watershed and to petitioners. The staff intent is to begin working on ORWs after the antidegradation implementation plan is completed (i.e. Jan 2001).

5. **Toxic Contaminants - 8 Priority Pollutants**

   Lead staff: vacant. Assistance: Gene Foster

   DEQ committed to adopt criteria for 8 EPA priority pollutants in response to the 1999 federal audit of Oregon's water quality program. Federal criteria have been established but Oregon has not yet adopted them. The 8 priority pollutants are

bromoform, cholorodibromomethane, DDD, DDE, endosulfan sulfate, endrin aldehyde, methyl bromide and pyrene.

6. **Biocriteria**

   Lead staff: Rick Hafele

   Present plan for biocriteria development to PAC and TAC. Work with a technical subcommittee to resolve issues about the methodology for data collection and biocriteria development and application. If possible, develop numeric criteria for the Coast ecoregion, where sufficient data has been collected.

7. **Nutrients**

   Lead staff: vacant

   Participate in EPA Region 10 nutrient criteria development. DEQ then has one year following the adoption of EPA criteria to adopt nutrient standards for the State. We anticipate that this will not be completed prior to fall of 2002.

8. **Toxic Contaminants - Other**

   Lead staff: vacant. Assistance: Gene Foster

   In addition to the 8 EPA priority pollutants mentioned above, there have been revisions to the EPA criteria for other compounds which DEQ has not yet adopted. Examples include ammonia, aluminum and tributyltin (TBT). We propose to consider adoption of the revised federal criteria for these three compounds and possibly others. This task will be completed as time allows.

9. **pH**

   Lead staff: vacant

   Review pH criteria for the Crooked River sub-basin (consider changing the upper limit from 8.5 to 9.0) and the coast (consider changing the lower limit from 6.5 to 6.0). Reword special exception for dams to be consistent with original intent. This task will be completed as time allows.

II) The following items are not recommended for review during the 99-02 triennial review for one or more of the following reasons: the environmental need is not as great, there are not yet EPA criteria, and/or the staff resource commitment would be large and is not available at this time. Any of the following could be included if additional dedicated resources are provided.

1. Sediment and Turbidity

DEQ committed to review the sediment standard in the Oregon Plan and to NMFS. However, NMFS has now made it a higher priority to revisit the temperature standard. Reviewing and revising the sediment standard will be involved and time consuming. Staff recommends DEQ begin to gather information and data and develop monitoring methodologies as time allows, but not commit to adopting or revising sediment or turbidity standards during this triennial review cycle. There are no EPA criteria for sedimentation other than the narrative on which our turbidity standard is based. EPA is developing guidance for clean sediment TMDL development.

2. Bacteria Criteria for Shellfish Waters
   Consider adding to the bacteria standard for estuarine shellfish producing waters, a storm magnitude boundary condition. For example, if the fecal bacteria level exceeds the criterion during a storm of the defined magnitude (e.g. 5-year), it would not be a standard violation. This is a statement about the level of use protection desired. With this provision the policy would be that it's reasonable to expect shellfish harvesters to have to close their beds for harvesting once every 5 years, statistically (during a 5-year storm event).

3. Dissolved v. total recoverable metals
4. Sediment toxicity
5. Silver
6. Dioxins and furans
7. Wetlands: include wetlands in definition of waters of the State, standards
8. Lake & reservoir standards for DO and pH
9. Nuisance phytoplankton
10. Natural conditions
11. Habitat "indicators"

<u>Input on Triennial Review Process</u>

1. Internal Review:
   - DEQ staff review group – DEQ staff from various water quality programs to review standards and provide comment on how the alternatives and proposals would work as they are implemented via permits, 401 certifications, TMDLs, etc.
   - Regular reports and comment from DEQ's water quality managers.
   - EQC informational items, Feb, 2000 and fall, 2001(if needed)
   - EQC work session and meeting to adopt spring and summer/fall, 2002

2. External:
   - Met with EPA, July 1999
   - Public Notice on the beginning of the Triennial Review and first PAC meeting, November 1999
   - Policy Advisory Committee, Dec 1999 to summer/fall 2002

- Develop public participation plan, Dec 1999-Jan 2000.
- Technical Advisory Committee, Jan 2000 to fall 2001.
- Public workshops on draft issue papers and PAC recommendations, fall 2000.
- Public hearings on draft rules, Feb or spring 2002.

Policy Advisory Committee

A Policy Advisory Committee (PAC) will be convened to assist the Department with the 1999-2002 water quality standards review. The role of the PAC is to provide recommendations or input to the Department on standards revision alternatives and rulemaking. The PAC will review options and recommendations presented by the Technical Advisory Committee(s) or staff and evaluate them in terms of desired level of protection or risk to the beneficial use, social and economic impacts, and legal requirements. The PAC will review and comment on draft documents and issue papers, and PAC viewpoints will be documented. If technical questions arise during PAC discussion that staff cannot answer, they will be recorded and forwarded to the technical committee.

The goal will be to make consensus-based recommendations when possible. If the PAC is unable to make a committee recommendation based on consensus, however, majority and minority views will be documented and included in information considered by the Department and presented to the EQC.

Because of their role in approving the State's standards after they are adopted, it is extremely important that the EPA, National Marine Fisheries Service and US Fish & Wildlife Service participate on this advisory committee as ex-officio members throughout the triennial review.

Technical Advisory Committees

A Technical Advisory Committee (TAC) will be established to assist the Department with literature review, the synthesis of relevant scientific information, the development of scientifically supported standards alternatives and the drafting of issue papers. The technical review will include identifying the most sensitive beneficial uses, determining the constituent levels needed to protect the use, considering natural variability and potential, and considering cumulative or synergistic effects. The technical committee will help the Department identify standards alternatives and the risk associated with each alternative for review by the PAC. If policy questions arise during technical committee discussions that staff cannot answer, they will be forwarded to the policy committee.

The TAC will assist the Department with the review of temperature, beneficial uses, biocriteria, nutrients, pH and toxics. Work groups or subcommittees will likely be established for the beneficial use work, biocriteria and toxics. The EPA temperature criteria project will utilize an agency technical committee and a scientific review panel as well.

DEQ will seek individuals with demonstrated expertise in the following areas to participate on the TAC: fish biology, fish physiology, fish toxicology, stream ecology, limnology, water chemistry, hydrology, geomorphology, engineering (water supply & treatment, wastewater treatment), and human health & toxicology.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

Reply To
Attn Of: OW-134

JUL 22 1999

Michael T. Llewelyn, Administrator
Water Quality Division
Department of Environmental Quality
811 S. W., Sixth Avenue
Portland, OR 97204

Dear Mr. Llewelyn:

Pursuant to Section (§) 303(c) of the Clean Water Act (CWA) and implementing regulations found at 40 CFR Part 131, the Environmental Protection Agency (EPA) has reviewed the amendments to the Oregon Water Quality Standards (WQS) adopted on January 11, 1996, and submitted to the EPA on July 11, 1996. The amendments include changes to the definitions, policies and guidelines, implementation program, and standards for particular basins governing bacteria, pH, ground water nitrate, temperature, and Dissolved Oxygen (DO). This letter constitutes our formal notification of the results of this review.

Based on our authorities under the CWA, cited above, EPA approves the following portions of the Oregon WQS: Dissolved Oxygen; Temperature; except for the criteria for the lower Willamette; pH; and Bacteria. A summary of the basis for our approval is enclosed. In conducting our analysis we relied on the letter submitted by the Oregon Department of Environmental Quality (ODEQ) to EPA on June 22, 1998, (Michael T. Llewelyn to Philip G. Millam) to clarify the standards, and the letter of ODEQ's transmitting their conservation measures (M. Llewelyn to R. Smith, June 11, 1999). The letters clarify how certain elements of the WQS will be interpreted and applied, as well as the State's commitment to certain additional actions related to WQS.

We regret to inform you that, pursuant to § 303(c) of the CWA and implementing regulations found at 40 CFR Part 131.21, the EPA must disapprove the lower Willamette River rearing temperature criteria of 68 °F. The basis for this disapproval is provided in the enclosure. Consistent with 303(c), the EPA has provided direction on how the State may address this disapproval. Specifically the EPA has identified two alternatives which are described in the enclosure.

Prior to our approval decision, we completed Section 7 consultation with the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (FWS) as required under Section 7 of the Endangered Species Act. We have received a Biological Opinion (BO) from NMFS, dated July 7, 1999, and a Biological Opinion from the FWS dated July 1, 1999. The actions we consulted on included approval of Oregon's standards for pH, DO, and temperature criteria for salmonid spawning, rearing, and Bull Trout. Additionally, we modified our action to include two conservation measures.

First, the establishment of federal/state/tribal policy, and technical workgroups who will be responsible for developing and recommending to EPA, a more ecologically relevant temperature criteria protective of all salmonid life stages. EPA expects that the final product will be used by the ODEQ to revise the current temperature standard in the next triennial review.

Secondly, we are providing funding under § 104(b)(3) of the CWA to the State to partially support carrying out the 10 conservation measures identified in M. Llewelyn's letter to R. Smith dated June 11, 1999, Attachment A.

The NMFS and FWS found that EPA's action would not be likely to jeopardize the continued existence of listed species. The NMFS and FWS determinations were predicated upon the conservation measures being carried out in accordance with the dates outlined in June 11, 1999, letter and in our Temperature Review proposal. The BO also established a requirement for re-initiation of consultation. Failure of the State to meet its commitments regarding the conservation measures would result in EPA being required to re-initiate consultation with NMFS and FWS. The outcome of re-initiation could result in EPA's withdrawal of its approval of the State's temperature standard. Therefore, it is essential that the State meet its commitment to complete these implementation measures by the dates identified for each measure.

Regarding Oregon's WQS for ground water nitrate, EPA fully supports the strong, pro-active approach taken to protecting the State's ground water resources and public health. EPA is not taking an approval action on this standard because ground water is outside the jurisdiction of § 303(c) of the CWA.

The review and revision of WQS is an iterative process, with each triennial review incorporating the latest science and any changes in federal or state policy. We realize that the State is initiating the next triennial review of its WQS. We will be providing to the State, in a separate letter, a summary of areas that EPA believes are important to include in the review.

We also recognize that currently the State is intensively engaged in development of Total Maximum Daily Loads (TMDLs) for impaired waters listed on the 303(d) list. I would like to share with you my thoughts about the importance of the WQS program as the foundation of the TMDL and NPDES programs. Hence, the standards program requires adequate staff investment to assure that the standards are interpreted and applied accurately and consistently, as well as refined and revised as necessary especially in light of the stepped-up TMDL activity.

We commend Oregon for the thoroughness of the technical review that supported the recommendations to the Environmental Quality Commission for the WQS revisions. The technical issue papers developed by the work groups have had circulation far beyond this Region and have been held up as high-quality products and served as a model process Nation-wide. We also appreciate Oregon's willingness to participate in the Section 7 ESA consultation process with EPA and the Services.

Please feel free to contact me at (206)553-1261 if you have questions concerning this letter , or Dru Keenan, Oregon Water Quality Standards Coordinator at (206) 553-1219.

Sincerely,

Randall F. Smith
Director
Office of Water

Enclosures

cc: Rick Applegate, NMFS
Russ Peterson, USES
Dick Pedersen, ODEQ
Debra Sturdevant, ODEQ
Jeff Lockwood, NMFS
Elizabeth Materna, FWS

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

June 11, 1999

Mr. Randy Smith
EPA Region 10
1200 6th Ave.
Seattle, WA 98101

RE: State Conservation Measures for
Standards Consultation and Approval

Dear Mr. Smith:

EPA is in the process of consulting with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) on their proposal to approve the revised water quality standards submitted by the State of Oregon in July, 1996. EPA conducted a Biological Assessment, which concluded that some portions of the standards are likely to adversely affect ESA listed species. The State has been included in discussions about how to address these concerns.

In the interest of achieving our shared goal of protecting aquatic communities, and in particular our native salmonids, the Oregon Department of Environmental Quality offers our commitment to complete the ten State Conservation Measures listed in the attached document. Additional information on the standards consultation and approval processes, which provides background and context for the Measures, is included in the Biological Opinions being written by the Services and in the EPA approval action letter to the State.

Sincerely,

Michael T. Llewelyn
Water Quality Division Administrator

Cc: Rick Applegate, NMFS
Russell Peterson, USFWS

June 9, 1999

STATE CONSERVATION MEASURES

MEASURE 1

By June 1, 2000, DEQ will develop guidance on how the narrative criteria for "threatened and endangered species" and for "cold water refugia" in the temperature standard will be applied within DEQ's water quality program. DEQ will involve EPA and the Services in the development of the guidance. "Involve" means including the Services, and EPA in scoping, review of draft guidance, and discussion on the comments and final guidance. Should additional rulemaking be required to identify cold water refugia or areas where the narrative criteria will apply, that rulemaking will occur in the 1999-2002 Triennial Review. If it appears that these narrative criteria will not be included in the EPA temperature criteria or other measures below, and the Services agree, this measure becomes moot and will not be completed.

MEASURE 2

Within 3 months of the date the Services provide DEQ with GIS layers of listed and proposed species locations, DEQ will identify to the Services NPDES permits that meet all of the following characteristics:

1) discharge to streams with listed or proposed aquatic species, as specified by the Services, and
2) discharge to streams that are not water quality limited for temperature or DO (this will include streams with data that meet the standard and streams with insufficient data for listing), as data are available, and
3) have expired or will expire during the next 3 years and need to be renewed.

The Services will review the list of permits and identify to DEQ those permits that are of most concern for listed aquatic species. DEQ will notify the Services when applications for the permits identified by the Services are received. The Services will informally review the applications and accompanying information and provide comments to DEQ in a timely manner so as not to delay renewal schedules. DEQ also has a formal public notice and comment procedure for all NPDES permits. DEQ will review and consider all comments received during the public comment period and notify all who comment as to the final decision and provide a response to comments.

MEASURE 3

DEQ will develop a plan for the implementation of the anti-degradation policy by December 31, 2000. The state will involve EPA and the Services in the development of the implementation plan. "Involve" means including the services and EPA in scoping and review of the draft plan and providing an informal response to comments. DEQ intends to have the implementation plan completed prior to this date, however, DEQ is uncertain how the time line will be affected by EPA, NMFS and USFWS involvement. DEQ

anticipates applying the anti-degradation policy to NPDES permits as they are renewed following completion of the implementation plan.

MEASURE 4

During the 1999-2002 Triennial Review, DEQ will identify the geographic area and time period to which the spawning criteria for temperature and dissolved oxygen apply and will propose appropriate beneficial use designations, provided adequate information is available. DEQ will work with the Services, Oregon Department of Fish and Wildlife (ODFW), and others with relevant fish life history information to identify the geographic area and time period that spawning occurs. Within one year of the final BO, DEQ will identify the geographic area and time periods that the criteria will apply in three pilot basins identified by NMFS in the BO, provided adequate information is available. DEQ can apply the criteria in these basins in advance of rulemaking, because the spawning use designation is currently at the broad basin scale.

MEASURE 5

During the 1999-2002 Triennial Review, DEQ will identify the geographic area to which the cool water DO standard will apply. DEQ will work with the Services, ODFW, and others with relevant life history information to identify where application of the cold water DO criterion is necessary to fully protect threatened and endangered species.

MEASURE 6.

DEQ will use the 8mg/l IGDO "action level" in the intergravel dissolved oxygen standard as a listing criterion for impaired waterbodies in areas where there are relevant ESA listed species, beginning with the year 2000 303(d) list.

MEASURE 7

If EPA or the Services provide funding, DEQ will expand water temperature monitoring into the spring (to include May and June) and fall (to include September and October). Upon receiving funding, DEQ will begin to collect data to identify water bodies with threatened and endangered species that do not meet the water temperature standard for salmonid spawning and incubation. DEQ will work with the Services to identify target basins for spring and fall monitoring. The consultation identified the following basins as having threatened and endangered salmonid species that spawn or incubate during May-June, and September - early October.

May and June: Grande Ronde River, John Day River, Deschutes River, Miles Creek Basin, Hood River, upper Willamette River, Clackamas River, Sandy River (steelhead), and Umpqua River (sea-run cutthroat).
September and early October: Grande Ronde River (spring/summer & fall chinook), Upper Willamette River (chinook and steelhead), and Tillamook and Salmon Rivers (coho).

MEASURE 8

DEQ will participate in interagency technical and policy workgroups to review temperature issues and develop proposed EPA Region 10 stream temperature criteria. The goal is to develop temperature criteria that meet the biological requirements of listed aquatic species for survival and recovery. EPA will lead this process, which is intended to include Oregon, Idaho, Washington, Tribes, the USFWS, and the NMFS. The workgroups will take approximately 2 years to develop temperature criteria that will be recommended for adoption by the States and Tribes. .

Following the completion of the EPA criteria and recommendations, the State of Oregon will consider adoption of those as a State water quality standard during the 1999-2002 triennial standards review. DEQ will conduct a concurrent public participation process. However, the State's formal rulemaking process is expected to take an additional 8 to 12 months following completion of the EPA criteria and recommendations.

MEASURE 9

During the 1999-2002 Triennial Review, DEQ will identify when and where the bull trout temperature criterion will apply, and propose appropriate beneficial use designations. DEQ will work with the Services, ODFW, and others with relevant life history information to determine geographic area and time of year (including migration corridors) when application of the bull trout temperature criterion is necessary to maintain the viability of native Oregon bull trout.

MEASURE 10

During the 1999-2002 Triennial Review, DEQ will develop numeric temperature criteria for warm and cool water species, which could include site specific criteria. These criteria would apply only where salmonids or other cold water species are not a designated beneficial use. The state will involve EPA and the Services in the development of these criteria.

MEASURE 11

DEQ will meet twice yearly through June 30, 2002 with EPA and the Services to review progress in completing measures 1 through 10.

EPA Approval Decision for Oregon's Revised DO Standard:

Given that the IGDO values are consistent with EPA criteria found in the Gold Book, and ODEQ's interpretation of their DO criteria for salmonid spawning, **EPA therefore approves DO criteria for salmonid spawning as consistent with Section 303(c)(2)(A) and 40 CFR 131.11(a)(1).**

Given that the coldwater criteria values are consistent with EPA criteria, and ODEQ's commitment to not use the 6.0 mg/l or 6.5 mg/l criteria if threatened and endangered species or the presence of early life stages are found, **EPA therefore approves the coldwater DO criteria as consistent with Section 303(c)(2)(A) and 40 CFR 131.11(a)(1).**

Given that the cool-water criteria values are consistent with EPA criteria, and ODEQ's commitment to identify where the application of the cold-water DO criterion is necessary to fully protect threatened and endangered species, **EPA approves the cool-water DO criterion as consistent with Section 303(c)(2)(A) and 40 CFR 131.11(a)(1) .**

Given that the warm-water criteria values are consistent with EPA criteria, **EPA approves the Oregon's warm-water DO criterion as consistent with Section 303(c)(2)(A) and 40 CFR 131.11(a)(1) .**

Given that the estuarine criterion value is consistent with EPA criteria, and ODEQ's clarification in the policy letter of June 22, 1998, to apply the spawning DO criterion to times and areas where salmonid spawning occurs, **EPA approves the estuarine DO criterion as consistent with Section 303(c)(2)(A) and 40 CFR 131.11(a)(1) .**

EPA approves the DO criterion for Marine Waters as protective of marine life and consistent with Section 303(c)(2)(A) and 40 CFR 131.11(a)(1).

Based on the fact that the State treats provision (OAR 340-41-26(3)(C)(iii) (when DO naturally exceeds the criterion) as a site specific criteria and would submit it to EPA for review and approval **EPA approves the policy for addressing naturally occurring DO that is outside the criteria values.**

Definitions

Providing definitions of terms used in the DO criteria is important in fully understanding the intent of the criteria and how it is to be applied. EPA reviewed these definitions in the context of the criteria they are used in and determined that they are appropriate and support the protectiveness of the criteria. **EPA approves the definitions as consistent with 40 CFR 131.11(a)(1).**

EPA Approval Decision for Oregon's Revised Temperature Standard:

Salmonid Fish Rearing Numeric Criterion

In the prior Oregon WQS, temperature criteria, by basin, included temperatures of 68°F for many basins, particularly on the east side of the State. However, the following basins had more stringent criteria: 64°F for the Mid Coast, South Coast, and Willamette basins (although the Willamette River from the mouth to river mile 50 had a criterion of 70°F); and 58°F for the Umpqua, Rogue, and portions of North Coast, Hood, Sandy and Klamath basins. The new criteria for temperature are based more explicitly on the biological requirements for protection of a specific use, such as salmonid rearing.

The 64°F temperature is within the range of EPA's criteria for salmonid (coho, sockeye) for positive growth. More recent research findings have shown that as a rearing temperature criterion 64°F is in the upper range of what is considered protective of salmonid rearing, smoltification, and migration life history stages and may cause sub-lethal effects. However, the criterion is still considered appropriate when evaluated in the context of all of the temperature criteria applied together. In addition, the unit of measurement intends for 64°F to be the temperature that is reach on the warmest stretches during the warmest weeks of the year. When viewed in the context of the other temperature criteria, and given the unit of measurement, the rearing criteria is protective of salmonids. **Therefore, EPA is approving the temperature criterion for salmonid rearing as consistent with Section 303(c)(2)(A) and 40 CFR 131.11(a)(1).**

Salmonid Spawning, Egg Incubation, and Fry Emergence Numeric Criteria

Oregon's revised temperature criterion for salmonid spawning is set at 55°F. Oregon has clarified the time period and geographic area where the criterion is to apply. Furthermore, they have committed to work with the Services to correct any problems with specific times and locations that the Services identified in the ESA consultation. The Services have accepted this commitment as Reasonable and Prudent Measure to mitigate effects they identified with the criterion. This temperature is within the range of acceptable temperatures given by EPA Gold Book. Furthermore, the literature reviewed as part of the ESA consultation indicated that the temperature is appropriate and protective of salmonid spawning. **Therefore EPA approves the temperature criterion of 55° for salmonid spawning, egg incubation and fry emergence as meeting the requirements of Section 303(c)(2)(A) and 40 CFR 131.ll(a)(1).**

Bull Trout Numeric Criteria

Oregon temperature criteria to "support or to be necessary to maintain the viability of native Oregon bull trout" water temperatures are not to exceed 50°F ~~(10.0°C)~~. This temperature is consistent with EPA's recently promulgated water quality standards for portions of Idaho to protect bull trout. Oregon has clarified how the Department will make the determinations on locations where the criterion applies. The literature reviewed as part of the ESA consultation indicated that while the criteria was protective of adult stages, it would not be

supportive of spawning stages. However, if summer stream temperatures are controlled to meet this temperature, it is likely that fall temperatures, when spawning is occurring, will also be within the range of 39°F. The State has committed to work with the Services to better define the geographic extent of bull trout areas, including migration corridors. The Services have accepted this commitment as Reasonable and Prudent Measure to mitigate effects they identified with the criterion. **Therefore, EPA is approving the temperature criterion of 50°F adopted by Oregon for the protection of bull trout as consistent with the requirements under Section 303(c)(2)(A) and 40 CFR 131.11(a)(1) and (b)(1).**

Ecologically Significant Cold-Water Refugia and Waters with Threatened or Endangered Species.

These two provisions establish narrative criteria that require case-by-case determinations. "Ecologically Significant Cold-Water Refugia" is defined in the regulations to assist in making such determinations. These two provisions serve to further protect habitat and listed species beyond the numeric criteria already established because they can be invoked in individual circumstances to assert additional numeric criteria. **EPA approves these narrative provisions as enhancing the protectiveness of the temperature standards, consistent with Section 303(c)(2)(A) and 40 CFR 131.11(a)(1).**

Criterion for Waters with Low Dissolved Oxygen

Under OAR 340-41-[Basin](2)(e)(A)(viii) for waters where the dissolved oxygen (DO) levels are within 0.5 mg/l or 10 percent saturation of the water column or intergravel DO criterion there is no increase in temperature allowed. Application of this provision will have to be determined on a case-by-case basis in conjunction with DO measurements. This provision addresses the fact that as temperature rises, DO in solution decreases, thereby exacerbating the stress from two parameters, DO and temperature. **EPA approves this narrative criterion as adding additional protection consistent with Section 303(c)(2)(A) and 40 CFR 131.11(a)(1).**

Criterion for Natural Lakes

This narrative criterion prevents warming due to human activities, whatever the natural condition of the lake. **EPA approves the lake criterion as consistent with the requirements of Section 303(c)(2)(A) and 40 CFR 131.11(b)(2), as an appropriate narrative control given the range of individual lakes to be covered.** Some of the lakes in Oregon contain unique populations of fish that are listed under ESA as either threatened or endangered and are limited to a few lakes. EPA encourages the State to develop site-specific criteria for those lakes that are likely to experience development activity that may change lake hydrology and temperature.

Provision allowing an exceptions to the Temperature Criteria ((2)(b)(C)):

This provision allows exceptions to the temperature criteria for a discharge, but does not change the criterion for the water body. The State in its Letter had identified this as a variance policy. As such, these actions should include a scientifically defensible demonstration that the uses are fully supported, consistent with 40CFR 131.11 (a)(1), and the process for making the

determination should include public review and submittal to the EPA for review and approval (40CFR131.20(b) and (c)). The State has also indicated that where the water quality standards will not be met in the waterbody, primarily because of this discharge, the State will develop a TMDL and site-specific criteria may be developed. **EPA approves the provisions in Section C as consistent with 40 CFR 131.13 with the understanding that public review and submittal to EPA will occur. Any variance should be limited to 5 years or less, unless a review indicates that the conditions requiring the initial variance are still applicable.**

Policies Allowing 1°F Exceedence of the Temperature Criterion: (F,G,H)

These provisions allow an exceedence to the criterion and are designed to allow some flexibility in authorizing new or expanded activities even while the waterbody is exceeding its current numeric criterion. The key aspect of the provision appears to be the requirement to demonstrate or describe that the activity "will not have a measurable impact on beneficial uses, uses would not be adversely impacted, or will not significantly affect the beneficial uses." The State in the Letter said that they treat these provisions as variance policy, and would be submitting variances to EPA for review and approval. Development of such a policy is permissible under 40 CFR 131.13, however implementation of these provisions also requires public review in addition to submittal to EPA in accordance with 40CFR131.20 and 40CFR131.21. Documentation to support to support a variance must meet the requirements of the federal regulations found at 40 CFR131.10(g). **EPA therefore, approves the variance policy as consistent with the requirements of Section 303(c)(2)(A) and 40 CFR 131.13 with the understanding that public review and submittal to EPA will occur. Any variance should be limited to 5 years or less, unless a review indicates that the conditions requiring the initial variance are still applicable.**

Policies Allowing the Temperature Achieved to Become the Criterion D(ii):

This provision allows a temperature achieved after all feasible steps have been taken and "designated uses are not being adversely impacted" to become the criterion. This provides for a site-specific criterion that must meet the requirements of 40CFR131.20 regarding public participation and 40 CFR 131.11 regarding criteria development, namely that there is: (1) a scientifically defensible basis that the uses are fully supported, (2) public participation in the decision, and (3) a submittal to EPA for review and approval. Oregon clarifies in the Letter that it will handle these actions as site-specific criteria. **EPA therefore, approves this provision as consistent with Section 303(c)(2)(A) and 40 CFR 131.11(b)(1)(ii). In submitting a site-specific criterion to EPA the State will have to meet the requirements outlined above for a site-specific criterion.**

Definitions :

Four definitions were added pertaining to the temperature criteria and implementation policies: (54) Numeric Temperature Criteria, (55) Measurable Temperature Increase, (56) Anthropogenic, and (57) Ecologically Significant Cold-Water Refuge. (54) Numeric Temperature Criteria explains that these are measured as the seven-day moving average of the

daily maximum temperature, and that where insufficient data exists to establish a seven-day average, the numeric criteria shall be applied as an instantaneous maximum. In addition, the measurements are to be made using a sampling protocol "appropriate to indicate impact to the beneficial uses." **EPA approves this definition as an appropriate application of temperature criteria when there is insufficient information to develop both a daily maximum and a weekly average temperature as recommended by the EPA criteria guidance document for temperature, and therefore as consistent with the requirements of 40 CFR 131.6(c),(f).**

(55) Measurable Temperature Increase is defined as an increase in stream temperature of more than 0.25°F. This temperature change was selected based on the measurement error of temperature measurements. The numeric temperature criteria are implemented such that "no measurable surface water temperature increase resulting from anthropogenic activities is allowed", therefore increases of 0.25°F are permissible. This provision is also used in the standards under OAR 340-41-120 (11)(g) as a de minimus amount that would not trigger antidegradation analysis. **EPA approves this definition as appropriate and consistent with 40 CFR 131.6(c)(f).**

(56) Anthropogenic, when used to describe sources or warming, is defined as "that which results from human activity." **EPA approves this definition as appropriate and consistent with 40 CFR 131.6(c)(f).**

(57) Ecologically Significant Cold-Water Refuge exists when all or a portion of a water body supports cold-water species that have a narrow temperature tolerance that aren't widely supported within the subbasin and this refuge either maintains the cold-water temperatures throughout the year relative to other segments or supplies cold water to a receiving stream or downstream reach that supports cold-water biota. **EPA approves this definition as appropriate and consistent with 40CFR 131.6(c)(f).**

EPA Approval Decision for Oregon's Revised pH Standard:

Cascade Lakes pH Numeric Criterion:

EPA concurs that this represents a natural condition, which can become the criterion, **and therefore EPA approves this criterion as consistent with Section 303(c)(2)(A) and 40 CFR 131.10 for development of a criterion.**

Numeric pH levels for Waters in Eastern Oregon:

EPA approves these numeric criteria for waters in Eastern Oregon as consistent with Section 303(c)(2)(A) and 40 CFR 131. Where waters are currently meeting a pH of less than 9.0 pH units, EPA expects the State's antidegradation policy will protect those waters from increasing to 9.0 without a public process and meeting the requirements of the high quality waters policy.

Criteria for pH in Waters Impounded by Dams:

In requiring either compliance with the underlying criterion via a TMDL, or revision to the applicable criteria, either through development of a site-specific criterion or UAA to change uses **EPA approves this provision (as interpreted in the June 22, 1998, letter) as consistent with 40 CFR 131. 11(b)(ii).** Should a site-specific criterion or a UAA be developed, they must be submitted to EPA for review and approval.

EPA Approval Decision for Oregon's Revised Bacteria Standard:

Numeric Bacterial Criteria for Fresh waters and Estuarine Waters other than Shellfish Growing Waters: **EPA approves these criteria as consistent with EPA recommendations and meeting the requirements of 40 CFR 131.6 (c).**

EPA Dispproval Decision for Oregon's Revised Temperature Standard:

Willamette River Numeric Criterion

Under OAR 340-41-[Basin](2)(b)(A)(iii) for the Willamette River or its associated sloughs and channels from the mouth to river mile 50 the temperature can not be increased by anthropogenic activity when the temperature exceeds 68°F. This criterion is more stringent than the 70°F criterion that applied to the Willamette River mainstem in the previous WQS and represents an improvement in temperature aimed at protecting salmonid migration. Currently, this portion of the Willamette River is designated for salmonid rearing. Upper Willamette Spring Chinook and Steelhead are found in the Lower Willamette. The State has not provided any technical justification for a salmonid rearing temperature that is warmer than 64°F. This criterion exceeds EPA's recommended criteria for rearing (64°F) and the criterion Oregon established for all the other Oregon watersheds with the same use designations. Evidence reviewed during the SEA Section 7 consultation on Oregon's criteria for rearing, spawning, and bull trout, revealed that for migrating adults and smolts, 68°F causes physiological and behavioral effects that can lead to mortality of those life stages and their progeny. **Therefore, based on our authority under Section 303(c)(3) and 40 CFR 131.5, EPA disapproves this revision as not being consistent with the requirements under 131.11(a)(1) and (b)(1).** The State has two alternatives to resolve the disapproval. The State can adopt a criteria at least as stringent as the 64°F (or lower) criterion for the lower Willamette, which would bring it in alignment with the criterion the State has determined to support the same designated use (salmonids) found in other State waters. The second alternative is to develop a scientifically defensible, site-specific criterion, documenting how the 68°F criterion would protect the salmonid rearing use designated for the lower Willamette. The SSC would need to be submitted to EPA for review and approval.

Attachment C

'99-02 Triennial Water Quality Standards Review

Policy Advisory Committee

NAME	ORGANIZATION
Pat Amedeo	Committee Chair
Sharon Beck	Oregon Cattlemen's Association
Nina Bell	Northwest Environmental Advocates
Bill Gaffi	Unified Sewerage Agency
Rick George	Confederated Tribes of the Umatilla Reservation
John Ledger	Associated Oregon Industries
Karen Lewotsky	Oregon Environmental Council
Jim McCauley	Oregon Forest Industries Council
Peter Ruffier	League of Oregon Cities
Glen Spain	Pacific Coast Fed. Of Fishermen's Assns.
Pete Test	Oregon Farm Bureau
Kathryn VanNatta	NW Pulp & Paper Association
Shauna Widden	Oregon Trout

Agency Advisors

Dru Keenan	US Environmental Protection Agency, Region X
Rick Kepler	Oregon Dept. of Fish & Wildlife
David Leland	Oregon Health Division
Jeff Lockwood	National Marine Fisheries Service
Elizabeth Materna	US Fish & Wildlife Service

Department of Environmental Quality (DEQ) Personnel

Dianne Eaton	Administrative Specialist
Mike Llewelyn	Water Quality, Division Administrator
Langdon Marsh	Agency Director
Jan Renfroe	Program Policy & Project Assistance, Manager
Debra Sturdevant	PPPA, Standards Coordinator

HARDY MYERS
Attorney General

DAVID SCHUMAN
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

January 28, 2000

Melinda S. Eden, Chair
Environmental Quality Commission
PO Box 79
Milton-Freewater, OR 97862

Re: Final Contested Case Order – Cascade General, Inc.

Dear Melinda:

Enclosed is a proposed Final Order reflecting the Commission's deliberations in the Cascade General, Inc. contested case hearing appeal. The Commission made a preliminary decision in this matter during its meeting on November 19, 1999, and I was asked to prepare a proposed order for consideration at the February Commission meeting.

As directed by the Commission, the proposed Final Order incorporates the Hearing Officer's findings and those portions of the Hearing Officer's conclusions and reasons that are consistent with the Commission's motion. I did take the liberty of correcting a few typographical, grammatical, and citation errors. Of course, I also added new language addressing the Commission's decision on the procedural motions and exceptions. The new language appears principally on page four, in the "Ultimate Findings", on pages six and seven in the "Conclusions and Reasons" section, and in the "Civil Penalty" calculation.

In addition, we noticed a minor discrepancy between the findings of fact and the Hearing Officer's conclusions relating to the dilution of the Tectyl products with waste oil during transportation from the Port. The Finding 6 states that dilution with five times the amount of waste oil would be required to increase the flash point above 140 degrees. The Hearing Officer's conclusions recite that dilution with four times the amount of waste oil would be required. I believe that the statement in the findings is correct and I changed the text in the Conclusions accordingly. I don't believe the exact number is material to the decision, however. I have provided the Enforcement Division and the Respondent with a copy of the proposed order, and I will advise you if I hear anything to the contrary.

1515 SW Fifth Ave, Suite 410, Portland, OR 97201 Telephone: (503) 229-5725 Fax: (503) 229-5120 TTY: (503) 378-5938

If you or any of the Commissioners have questions about the proposed order, please let me know. Otherwise I will be prepared to answer questions about the draft and make any needed alterations at the Commission meeting.

Sincerely,

Larry Knudsen
Assistant Attorney General
Natural Resources Section

LJK:cer/GEN41025
cc: Harvey Bennett, EQC Commissioner
Deirdre Malarkey, EQC Commissioner
Mark Reeve, EQC Commissioner
Tony Van Vliet, EQC Commissioner
Susan Greco, DEQ
Kitty Purser, DEQ
Les Carlough, DEQ
Lori Irish Bauman, Attorney for Respondent

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF Cascade General, Inc., an Oregon Corporation, Respondent.	**FINAL ORDER REGARDING ASSESSMENT OF CIVIL PENALTY** **NO. HW-NWR-97-176** **MULTNOMAH COUNTY**

BACKGROUND

A Notice of Violation, Compliance Order and Assessment of Civil Penalty were issued November 18, 1997, under Oregon Revised Statutes (ORS) Chapter 183 and 468.126 through 468.140, and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12. On December 15, 1997, Respondent Cascade General, Inc. (hereinafter, Cascade) appealed the Notice.

A hearing was held in Portland, Oregon, on January 28, 1999, before hearings officer Lawrence S. Smith. Respondent Cascade was represented by its attorneys, John Schulz and Lori Irish Bauman, with three witnesses. Larry Schurr, environmental law specialist, represented DEQ, with two witnesses.

A hearing record remained open until March 16, 1999, for the parties to submit final written arguments, responses, and a reply. Both parties were granted extension of the time limits for submitting their arguments. DEQ's Post-Hearing Memorandum was received by fax on February 24, 1999. Cascade's Post-Hearing Memorandum was received on March 16, 1999. DEQ replied on March 30, 1999, that it had no further argument, and record was closed. On May 28, 1999, the Hearing Officer issued a Hearing Order.

Both DEQ and the Respondent filed exceptions to the Hearing Order. In addition, Cascade General moved to reopen the record to introduce an affidavit from Alan Sprott and certain Job Cost Summary Reports. DEQ objected to the motion to reopen the record. DEQ requested leave to introduce evidence submitted to support its economic benefit calculation if the Commission decided to reopen the record. This evidence had been submitted by DEQ to the Hearing Officer after the record closed on March 30, 1999 and for that reason it was excluded.

The Commission heard oral arguments in this matter during its regular meeting on November 19, 1999. It granted the motions of Cascade General and DEQ to submit new evidence. And, with certain exceptions discussed below, the Commission made the preliminary determination to affirm the decision of the Hearing Officer.

ISSUES

Did Respondent Cascade General fail to make a hazardous waste determination as required by OAR 340-102-0011(2), 340-100-0010(2)(z), and 40 CFR § 261.2(b)(1)?

Did Respondent Cascade General fail to properly manifest hazardous waste transported for disposal, as required by 40 CFR § 262.209(a)?

Were Department of Environmental Quality's used oil rules applicable under 40 CFR § 279.10?

Did DEQ properly calculate penalties for these violations under OAR 340-012-0045, 340-012-0068(1)(b), and 340-012-0068(1)(e)?

FINDINGS OF FACT

1. Respondent Cascade General, Inc. (Cascade) is an Oregon corporation performing ship repair and conversion and operating under a contract with the Port of Portland on Swan Island in Portland, Oregon. Cascade is licensed as a large quantity hazardous waste generator.

2. On December 15, 1995, Cascade contracted with the United States Navy to prepare the United States Naval Vessel Andrew J. Higgins for storage, or mothballing. Part of the contract required Cascade to drain all engine oil and replace it with corrosive preventive compounds, specifically Tectyl products 502C and 511M, made by the Valvoline Corporation. The Tectyl products were flushed through the engine compartments to coat the engines and prevent rusting. At least in part of the contract (work specification item 7.3.3.3 at page 202-3), Cascade was instructed to set aside the Tectyl for reuse. A secondary purpose of the Tectyl products was to provide lubrication if the engines were turned on again.

3. The Tectyl products at issue are mainly processed from crude oil products. Tectyl 511M, Class I, is 10 to 15% oxygenated hydrocarbon by weight, 1 to 10% sodium petroleum sulfonate, 45 to 50% aliphatic hydrocarbons (Stoddard type), 25 to 30% petroleum lube oil, and 1 to 5% ethylene or propylene glycol (Exhibit 5). Tectyl 502C is 25 to 30% oxygenated hydrocarbon by weight, 10 to 15% sodium petroleum distillate, 30 to 35% aliphatic hydrocarbons, and 10 to 15% petroleum distillate (Exhibit 5). The oxygenated hydrocarbons are a lubricating soap, with hydrophilic capacity that gives it anti-corrosive qualities. They are commonly used in lubricating and motor oils. Sodium sulfonate is a detergent that is also common in lubricating and motor oils. The burning profile of these substances is very similar to regular motor oil, except the aliphatic hydrocarbons burn at a lower temperature (somewhere between 95 to 110 degrees Fahrenheit) and the Tectyls have more spikes in the profile because they contain more paraffin (Exhibit 10). The Tectyls are not considered to be paints by the manufacturer because their purpose is not to cover a surface, but to protect it from rust (Exhibit 125). Unlike paint, the Tectyls do not contain binders that allow them to attach to surfaces and were more like a film to rest on surfaces. They can be easily removed by any oil.

4. On April 2, 1996, Cascade ordered 2,530 gallons of Tectyl 502C and 2,035 gallons of Tectyl 511M, with delivery set for April 6, 1996. Cascade flushed the Tectyl through the engines of the Andrew J. Higgins, as required by its contract. After the job, Cascade had 24 55-gallon drums of used Tectyl 511M, 17 drums of used Tectyl 502C, and seven drums of unused Tectyl 511M (Exhibit 5). In this context, "used Tectyl" refers to product that had been collected after it was flushed through the engines and it does not address the issue whether the product was spent, capable of reuse, or constitutes used oil.

5. Cascade contacted Oil Re-Refining Co., Inc., an Oregon company affiliated with Fuel Processors, Inc. Fuel Processors is an Oregon company that accepts used oil for recycling or reprocessing for burning. Cascade provided Oil Re-Refining with Material Safety Data Sheets from Valvoline on both Tectyl products (Exhibits 104 and 105). These sheets showed flashpoints of 106 degrees Fahrenheit for both Tectyls. Cascade also requested independent lab tests and provided them to Oil Re-Refining. The results from metal and flashpoint testing showed a flashpoint of 85 degrees Fahrenheit for both Tectyls and no violation of metal concentrations (Exhibits 107 and 108). The Tectyls were not tested for any other hazard factor. Despite the flashpoints lower than 140 degrees Fahrenheit, which means they exhibited a hazardous waste characteristic, Cascade still considered the used Tectyl as used oil because the chemical composition of the Tectyls was close to that of motor oils and its secondary use in engines was as a lubricant.

6. On May 2, 1996, Cascade asked Oil Re-Refining if it could take the Tectyls and Oil Re-Refining agreed (Exhibit 103). Oil Re-Refining picked up 2,775 gallons of used and unused Tectyls from Cascade and charged Cascade 35 cents per gallon (Exhibit 101). The unused Tectyl was Tectyle 511M that Cascade had no use for after the contract for the Higgins was completed. Oil Re-Refining added the Tectyls from Cascade to 600 gallons of used oil and transported it to Fuel Processors, Inc. for treatment so it could be burned. To increase the Tectyls' flashpoint above 140 degrees Fahrenheit, the Tectyls would have to be diluted with five times the amount of used motor oil.

7. Cascade in its contract with the Port of Portland was required to offer recycling of used marine oil. Cascade recycled mainly oil-contaminated water. Cascade did not recycle the Tectyls because the cost of processing the Tectyls would be higher than what Oil Re-Refining charged to dispose of the material.

8. DEQ has investigated Oil Re-Refining and its affiliated company, Fuel Processors. DEQ performed a review of Fuel Processors' records in about June 1997 and learned that Cascade had allowed Oil Re-Refining to take the Tectyls without preparing a Hazardous Waste Manifest, which DEQ believed was required because the flashpoints of the Tectyl products were less than 140 degrees Fahrenheit. Cascade admits that it did not prepare a Hazardous Waste Manifest. It asserts that the Tectyls were used oil and exempt from the definition of hazardous waste and thus the manifest requirement. DEQ also found that Cascade failed to make a complete and accurate hazardous waste determination for the Tectyl. DEQ does not allege any other basis for concluding that the Tectyls are hazardous waste other than the low flashpoints and the Department's conclusion that the Tectyls do not qualify as used oil.

9. DEQ interprets the definition of used oil in the EQC's rules to exclude corrosion inhibitors such as the Tectyls used by Cascade. The Department is concerned because while the Tectyls themselves exhibit only a low flashpoint, other corrosion inhibitors contain more toxic substances.

10. Cascade was not required by law to get an interpretation from DEQ beforehand regarding whether the used Tectyls were used oil.

11. A Notice of Assessment of Civil Penalty, issued January 9, 1996, imposed a penalty of $1,400 against Cascade for a Class II violation of violating daily plant site emission limits (Exhibit 111). Cascade paid the penalty rather than appeal.

12. Two Notices of Assessment of Civil Penalty were issued June 18, 1997, against Cascade (Exhibit 112). One imposed penalties totaling $4,200 for one Class I violation and three Class II violations for failing to clearly mark a container containing hazardous wastes with the date that accumulation in the container began, for failing to mark containers with the words "Hazardous Waste", for failing to maintain adequate records, and for failing to prepare a proper contingency plan. The other Notice imposed penalties totaling $3,600 for one Class I violation for discharging waste without an NPDES permit. Cascade did not appeal these penalties.

ULTIMATE FINDINGS

At least some of the discarded Tectyls, specifically the unused Tectyl products, did not meet the definition of used oil, which would exempt them from the definition of hazardous waste.

Cascade was required to prepare a complete Hazardous Waste Manifest on the Tectyls because the flashpoints of the Tectyls made them hazardous wastes and at least some of the Tectyl was not exempt as used oil.

A majority of the Commission was unable to reach a conclusion as to whether Cascade performed an adequate Hazardous Waste Determination on the discarded Tectyl products. Therefore, the Hearing Officer's determination that Cascade did perform an adequate Determination stands.

APPLICABLE LAW

ORS 466.075 states in part:

> (1) The commission may, by rule, require generators of hazardous waste to:
>
> * * * * *
>
> (b) Keep records that accurately identify the quantities of such hazardous waste, the constituents thereof, the disposition of such waste and waste minimization activities;

* * * * *

(e) Submit reports to the department setting out quantities of hazardous waste generated during a given time period, the disposition of all such waste and waste minimization activities;

OAR 340-102-0011(2) states in part:

> A person who generates a residue as defined in OAR 340-100-0010 must determine if that residue is a hazardous waste * * * .

OAR 340-100-0010(z) states:

> "Residue" means solid waste as defined in 40 CFR § 261.2.

40 CFR § 261.2(f), as adopted by reference in OAR 340-102-0010(2) and OAR 340-100-0002(1), states in part:

> Respondents in actions to enforce regulations implementing Subtitle C or RCRA who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation * * * to demonstrate that the material is not a waste, or is exempt from regulation.

OAR 340-102-0041(2) states in part:

> Effective January 1, 1992, and annually thereafter, a report shall be submitted to the Department, on a form provided by the Department, or by other means agreed to by the Department, by persons defined as small quantity hazardous waste generators, large quantity hazardous waste generators, and/or hazardous waste recyclers. * * * The annual report shall contain: (a) Information required for purposes of notification of hazardous waste activity and/or annual verification of hazardous waste generator status; * * * .

OAR 340-108-0002(11) states in part:

> "Oil" includes gasoline, crude oil, fuel oil, diesel oil, lubricating oil, sludge, oil refuse and any other petroleum related product.

ORS 459A.555(5) states in part:

> "Used Oil" means a petroleum-based oil which through use, storage or handling has become unsuitable for its original purpose due to the presence of impurities or loss of original properties.

OAR 340-111-0020(2)(c) states in part:

> "Used Oil" means any oil that has been refined from crude oil, or any synthetic oil that has been used as a lubricant, coolant (non-contact heat transfer fluids), hydraulic fluid or for similar uses and as a result of such use is contaminated by physical or chemical impurities. Used oil includes, but is not limited to, used motor oil, gear oil, greases, machine cutting and coolant oils, hydraulic fluids, brake fluids, electrical insulation oils, heat transfer oils and refrigeration oils. Used oil does not include used oil mixed with hazardous waste except as allowed in 40 CFR § 279.10(b), oil (crude or synthetic) based products used as solvents, antifreeze, wastewaters from which oil has been recovered, and oil contaminated media or debris; * * * .

40 CFR § 279.1 states in part:

> Used oil means any crude oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical impurities.

CONCLUSIONS AND REASONS

Hazardous Waste Manifest

Cascade has conceded that it did not prepare and file a Hazardous Waste Manifest on the Tectyls before using some of them and then offering all of them for transport. The first issue is whether Cascade was required to file a Hazardous Waste Manifest and to handle the Tectyls as hazardous waste. There was no disagreement that the Tectyls had a low flashpoint characteristic of hazardous wastes and must be considered such unless Cascade establishes an exception to the definition. The proponent of a fact has the burden of presenting evidence to support that fact. ORS 183.450(2). Also, the party claiming that a material is not a hazardous waste has the burden of proving it is not and therefore not subject to hazardous waste rules and requirements. *See* 40 CFR § 261.2(f). Cascade had the burden of establishing the exception.

DEQ's Post-Hearing Memorandum correctly disposed of Cascade's two affirmative defenses raised in its answer filed in response to the Notice of Violation, Compliance Order and Assessment of Civil Penalty, issued November 18, 1997. The used Tectyls were clearly not a virgin commercial petroleum fuel, and Cascade abandoned that defense in proceedings before the Hearing Officer. Similarly, the mixing of the Tectyls with the used oil in the tanks of Oil-Refining did not raise the flashpoint to an acceptable level, so the resulting mixture was still a hazardous waste. The Tectyls would have to be mixed with five times the amount of used oil to raise the flashpoint high enough so it no longer had the characteristic of a hazardous waste. Oil Re-Refining did not do that. Moreover, DEQ properly asserts that the mixing did not occur until it was transferred to Oil Re-Refining and remained a hazardous waste in the care of Cascade until then. Neither alleged defense rebuts the legal obligation of Cascade to prepare the required Hazardous Waste Manifest.

Respondent Cascade's third defense was that the Tectyls were exempted from the hazardous waste regulations as an "used oil". Some of the gallons offered to Oil Re-Refining were unused Tectyl. DEQ's calculation established that the unused Tectyl was included in the wastes recycled with Oil Re-Refining, based on the quantities listed in the invoices. Cascade's documents refer to unused Tectyls in the amount transferred. It recycled the Tectyls because it no longer had any need for them after the contract was completed. The *possibility* that more was used later does not detract from a conclusion based on the *probability* that the transferred substances included unused Tectyls. Cascade provided no evidence that work was done on the U.S. Higgins after May 2. As DEQ correctly asserted, 510 gallons of unused Tectyl were also shipped because Cascade had no use for it after completing its work on the U.S. Higgins. The unused Tectyls do not meet the definition of being "used" in both the state and federal law, and therefore, were clearly not "used oil" and not exempt from the definition of hazardous waste.

The Hearing Officer concluded that Cascade failed to establish that the Tectyls that were flushed through the engines of the U.S. Higgins were "used oil". A majority of the Commission, however, believes that it is unnecessary to reach a conclusion with respect to whether the "used" Tectyls were used oil because Cascade clearly disposed of some unused Tectyls and the used and unused products were not mixed until they were turned over to Oil Re-Refining.

At least some of the Tectyls did not meet the definition of "used oil" under the above sections of law. Cascade did not establish an exemption to the hazardous waste rules. It should have prepared Hazardous Waste Manifests for them and handled them accordingly.

Hazardous Waste Determination

The Department maintains that Cascade failed to perform an adequate hazardous waste determination. The Hearing Officer found:

> Cascade did perform a hazardous waste determination. It just discounted the results of such a determination. When assessing this penalty on Cascade, DEQ seems to say that unless Cascade reached the correct conclusion after this determination, it did not make a determination. Cascade did perform such a determination and learned from two sources about the low flashpoints of the Tectyls. At that point, Cascade had determined that the Tectyls were hazardous waste because of their low flashpoints. The second test revealed no metal content that would make it a hazardous waste. During the hearing, DEQ did not allege any other characteristic that would make it a hazardous waste. In its post-hearing memorandum, DEQ first mentions other potential hazardous constituents that Cascade should have tested for. Cascade made a sufficient hazardous waste determination because the determination revealed the Tectyls had a characteristic of hazardous waste.

A majority of the Commission failed to either affirm or reverse the Hearing Officers decision on this point. Accordingly, the decision of the Hearing Officer on this issue stands.

///

///

CIVIL PENALTY

The Hearing Order assessed a total penalty of $7,800. The Notice of Violation, Compliance Order and Assessment of Civil Penalty issued November 18, 1997, contained an explanation of the calculation of the penalty for offering hazardous waste for transport without a Hazardous Waste Manifest (Exhibit 2 to Exhibit A). The Hearing Officer adopted this calculation except that he reduced the P (prior action) factor to three because he concluded that there was evidence of only two prior Class One violations against Cascade in Exhibits 111 and 112 (*See* OAR 340-012-0045(c)(A).

The Hearing Officer also excepted from the calculation the EB factor, because he concluded that it was not supported by evidence in the record. DEQ originally offered some evidence supporting the EB calculation in its post-hearing memorandum. DEQ did not ask to keep the record open for this evidence, however, and the evidentiary record was closed before it was offered. Therefore, the Hearing Officer did not consider evidence for the EB factor.

Cascade and the Department have stipulated that the Hearing Officer incorrectly reduced the P (prior action) factor. As noted above, the Commission also reopened the record and allowed in the evidence of economic benefit as well as other evidence offered by Cascade. Therefore, the Commission reinstates the $10,000 penalty assessment for offering hazardous waste for transport without a manifest. The penalty calculation included in Exhibit 2 to the Notice of Violation, Compliance Order and Assessment of Civil Penalty is incorporated by reference.

No penalty is assessed for failure to make a hazardous waste determination.

COMPLIANCE ORDER

The Notice of Violation, Compliance Order and Assessment of Civil Penalty, issued November 18, 1997, contained a compliance order, but then in the penalty calculation on Exhibit 2 to Exhibit A, the Notice stated that the violation could not be corrected, so no compliance is order.

DATED this _____ day of _____, 2000.

ENVIRONMENTAL QUALITY COMMISSION

_____
By Langdon Marsh, Director
Department of Environment Quality

LJK:cer/GEN40839

Environmental Quality Commission

☒ Rule Adoption Item
☐ Action Item
☐ Information Item

Agenda Item L
Febraury 11, 2000 Meeting

Title:

Temporary Rule Adoption to Extend the Vehicle Inspection Program Hardship Waiver

Summary:

The department adopted a pilot program that waived the enhanced testing and inspection requirements for low-income vehicle owners. The program is set to expire on January 31, 2000. The department wishes to continue the waiver program and intends to submit the proposed permanent rule for the continuation of this program to the EQC for adoption later this year. This temporary rulemaking will allow the program to continue during the interim.

Department Recommendation:

The department recommends that the commission approve the temporary rulemaking, which will extend the motor vehicle inspection hardship waiver for low-income owners for 180 days.

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: 1/24/00

To: Environmental Quality Commission

From: Langdon Marsh

Subject: Agenda Item L, EQC Meeting of February 11, 2000

Background

The Department of Environmental Quality developed a two-year pilot program that waives enhanced inspection requirements for low-income vehicle owners. The program was developed in response to concerns raised by the Governor and legislators.

The waiver program allows a one-time hardship waiver from the enhanced testing requirements for low-income vehicle owners. The basic inspection and testing requirements still apply to the vehicles in this program. This hardship waiver provision is set to expire on January 31, 2000. The department wishes to continue the waiver program and intends to submit the proposed permanent rule to the EQC for adoption later this year. This temporary rulemaking will allow the program to continue during the interim.

No public hearing was performed or is required for this temporary rulemaking. As a part of the temporary rulemaking process, the department is required to take appropriate measures to inform the persons affected. This requirement will be accomplished through the continuation of the current waiver program. The initial hearing for the hardship waiver rule was held on December 17, 1997. No one attended the hearing. One written comment was received in support of the program.

As part of this temporary rulemaking, the department is required to demonstrate a need for the rule and show that failure to act promptly will result in serious prejudice (Attachment B). The department believes that an expiration of the waiver would disadvantage low-income vehicle owners required to register their vehicles within the next six months. The temporary rulemaking is required to assist in bridging the time span between the expiration of the current rule and the adoption of the permanent rule.

The following sections summarize the issue that this proposed rulemaking action is intended to address, the authority to address the issue, a summary of how the rule will work and how it is proposed to be implemented, and a recommendation for Commission action.

Issue this Proposed Rulemaking Action is Intended to Address

The low income waiver program was initiated in 1998 to address concerns regarding the potential impact of the vehicle inspection program enhanced testing requirements on Oregon low income vehicle owners. The enhanced test has a larger failure rate than the basic test, resulting in associated higher vehicle repair costs to the owner.

The waiver provision was adopted as pilot program that was to be operated for two years to provide the DEQ an opportunity to gather data and assess the viability of a permanent program. At the inception of the pilot program the DEQ anticipated that approximately 100 vehicles annually would be affected by the waiver, but up to 500 vehicles could be approved annually for the waiver without significant reductions in air quality benefits. Since March 5, 1998, the effective date of the pilot program, the DEQ has granted 240 hardship waivers. The number of waivers granted is within the anticipated range. The program has had the effect of granting economic relief to low-income vehicle owners, while having negligent impacts on air quality.

The DEQ has determined that the program is viable and permanent rules should be developed. This temporary rulemaking is intended to continue the low-income hardship waiver until permanent rules are adopted. The DEQ intends to submit proposed permanent rules to the EQC later this year.

Relationship to Federal and Adjacent State Rules

The Vehicle Emissions Testing program is one of the key strategies for ensuring that the Portland Area Air Quality Maintenance Area maintains compliance with state and federal air quality standards. Enhanced emissions testing is part of the emissions reduction strategy that has been incorporated into the Oregon State Implementation Plan (SIP). The department informed the EPA of the pilot program; however, it was not processed as a revision to the (SIP) due to its temporary duration and negligible effect on air quality. The final waiver rule will be an amendment to the Oregon State Implementation Plan.

The Vancouver, Washington, part of the Portland Air Quality Maintenance area, has initiated a similar program.

Authority to Address the Issue

The EQC has authority to address these issues under:

- ORS 468A.365 - which directs the department to develop rules which describe the motor vehicle pollution control system testing and certification requirements, and authorizes more rigorous testing requirements in the Portland Metro area.
- ORS 468A.363 – which allows the EQC to adopt measures related to improvements in the motor vehicle inspection program.

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

No advisory committee was formed for the temporary rulemaking. This rulemaking proposes to extend the existing program for 180 days, the maximum duration of a temporary rule, and remove the one-time limitation. No other changes are proposed for the temporary rulemaking.

In 1997, as part of the process for the initial rulemaking, the VIP staff conducted meetings with members of social service agencies. The committee consisted of Oregon Legal Services, Catholic Community Services, and Albina Headstart. The committee reviewed alternatives; the most promising alternative developed was to establish a program that would fund repairs. There were no funding resources available and this alternative was rejected.

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

No public hearing was conducted as part of this temporary rulemaking. The change to the original rule proposed by this temporary rule making is limited to a time extension for the waiver and removal of the one-time limitation.

During the original rulemaking the following issues were addressed:

Reasource Need – The conclusion was that one FTE was required for implementing the program.

Loss of Emission Reduction – The waiver does not exempt vehicles from basic emission testing requirements. The conclusion was that the loss of emission reduction was balanced by the need for assistance to low income vehicle owners.

The information collected since the March 1998 indicates that the number of vehicles that were granted waiver during the pilot program did not exceed the amount accounted for in the air emissions calculations used to estimate impacts to air quality.

Duration of Waiver – The two year time period was used to coincide with the DMV two-year registration cycle. At the end of two years the program was to be evaluated and assessed for the need for a permanent hardship program.

The department is planning to proceed with permanent rulemaking for the waiver and currently seeks a 180-day extension of the program.

Defining Low Income – The staff discussed this issue with state and local agencies and programs used in other states. The Department determined an eligibility level of 125% of the Federal Poverty level was appropriate.

The temporary rulemaking does not change the definition of low income.

Summary of Significant Public Comment and Changes Proposed in Response

No public hearing was conducted as part of the temporary rulemaking. During the original rulemaking no comments were received at the hearing. One written comment was received in support of the rulemaking.

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

The DEQ inspectors currently administer the hardship program. The inspectors inform vehicle owners of the waiver. The applicants for the waiver fill out a form and certify that they are qualified to receive the waiver.

Recommendation for Commission Action

It is recommended that the Commission adopt the temporary rule amendment to extend the motor vehicle inspection program hardship waiver as presented in Attachment A of the Department Staff Report.

Attachments

A. Rule (Amendments) Proposed for Adoption
B. Supporting Procedural Documentation:
   1. Statement of Need and Justification

Reference Documents (available upon request)

Approved:

Section:

Division:

Report Prepared By: Laurey L. Cook

Phone: (503) 786-0751

Date Prepared: 1/19/00

LLC
F:\TEMPLATE\FORMS\EQCRULE.DOT

Secretary of State

STATEMENT OF NEED AND JUSTIFICATION

A Certificate and Order for Filing Temporary Administrative Rules accompanies this form.

Department of Environmental Quality Air Quality Division
Agency and Division

In the Matter of	)	Statutory Authority,
Temporary rule to extend Motor Vehicle	)	Statutes Implemented,
Inspection Hardship Waiver		
Rule Number 340-256-0300	)	Statement of Need,
	)	Principal Documents Relied Upon,

Statutory Authority: ORS 365A.365, ORS 368A.363, and ORS 468.020

Other Authority:

Statutes Implemented: ORS 368A.365

Need for the Temporary Rule(s): A temporary rule is required to continue the enhanced motor vehicle inspection hardship waiver that provides economic relief to low-income vehicle owners. In 1998 a pilot program for the low-income waiver was adopted. The pilot program was to be operated for two years to provide the DEQ an opportunity to gather data and assess the viability of a permanent program. The DEQ intends to adopt permanent rules to continue the waiver program.

In the current rules, the waiver provision is set to expire on January 31, 2000. Without a temporary rule to extend the waiver, a segment of low-income people, who would otherwise benefit from this program, would not be eligible for the waiver during this interim period. This temporary rule would extend the waiver for an additional 180 days.

Documents Relied Upon: Rule 340-256-0300, Agenda Item H, Environmental Quality Commission Meeting, and dated January 21, 1998.

Justification of Temporary Rule(s): There is insufficient time to allow for permanent rulemaking procedures prior to the expiration date of the low-income waiver provision. The permanent rule will be a revision to the SIP and both state and federal notice requirements will apply. To continue the program prior to adoption of the permanent rule, a temporary rulemaking is necessary.

(to be signed at time of submittal to SOS)

_____

Authorized Signer and Date

State of Oregon
Department of Environmental Quality Memorandum

Date: February 8, 2000

To: Environmental Quality Commission

From: Langdon Marsh

Subject: Agenda Item M, Adoption of Proposed Temporary Rule Amending the Expiration Date of New or Innovative Technology or Material Approvals Granted by the Director Prior to July 1, 1999, EQC Meeting February 11, 2000

Background

On December 20, 1999, the Department requested the Commission adopt proposed rule amendments that established the criteria for review and evaluation of new or innovative technologies and materials, intended for application in the on-site sewage treatment and disposal program. Language within the proposed rules established that the approvals granted by the Director prior to July 1, 1999, for new or innovative technologies or materials, would expire on March 1, 2000, unless certain criteria described in the rule was met. The Commission adopted the amendments and they became effective upon date of filing with the Secretary of State, on December 29, 1999.

Since then, the Department has been in discussions with the two companies having approvals that are slated to expire on March 1, 2000. One company has indicated a willingness to submit a plan to meet the March 1 deadline. The other company has stated that it is unable to comply and will have to go out of business. Reasons cited are that the company can not be competitive if its products are held to the prescriptive standards applicable to materials that cannot provide performance documentation, and the cost to engage in a performance study is unreasonable.

The following sections summarize the issue that this proposed rulemaking action is intended to address, the authority to address the issue, the process for development of the rulemaking proposal including alternatives considered, a summary of how the rule will work and how it is proposed to be implemented, and a recommendation for Commission action.

Issue this Proposed Rulemaking Action is Intended to Address

The company that is not able to comply with the criteria to retain the approval granted by the Director will be afforded an additional 6 months under this temporary rulemaking action. During this time, the company faced with closure may stay in business, and explore the options available for compliance with rules.

Relationship to Federal and Adjacent State Rules

Not applicable

Authority to Address the Issue

ORS 454.625; ORS 468.620

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

Given the short time to resolve this issue, the Department is seeking resolution through the temporary rulemaking process. The issue has not been taken through a committee.

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

This proposal is being presented as a temporary rule. As such, there is no public hearing to solicit public comment.

Summary of Significant Public Comment and Changes Proposed in Response

Not Applicable.

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

The proposed rule will delay by 180 days the implementation date currently set in the rule. The businesses that are affected by the rule will have that much additional time to comply with the rules in order to retain their approvals.

Recommendation for Commission Action

It is recommended that the Commission adopt the Temporary rule amendments regarding the expiration date for Director-granted approvals, as presented in Attachment A of the Department Staff Report.

Attachments

A. Temporary Rule Amendments Proposed for Adoption
B. Statement of Need and Juistification

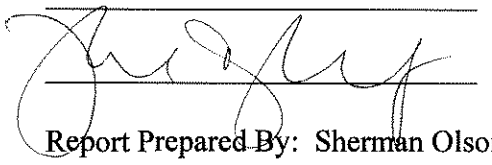
Reference Documents (available upon request)

OAR 340-071-0130
January 21, 2000 letter from the 70th Legislative Assembly, Joint Interim Committee on Water, Agriculture and Natural Resources

Approved:

Section:

Division:



Report Prepared By: Sherman Olson

Phone: 229-6443

Date Prepared: February 8, 2000

Secretary of State

STATEMENT OF NEED AND JUSTIFICATION

A Certificate and Order for Filing Temporary Administrative Rules accompanies this fom.

DEQ-Water Quality Division
Agency and Division

In the Matter of the amendment	)	Statutory Authority,
Of OAR 340-071-0130 as it affects	)	Statutes Implemented,
Director-Granted Approvals for New	)	Statement of Need,
Or Innovative Technologies and Materials	)	Principal Documents Relied Upon,

Statutory Authority: ORS 183.335; 454.615; 454.625; ORS 468.020

Other Authority: SB 335, 1999 Legislative Session

Statutes Implemented: ORS 454.615; ORS 454.625

Need for the Temporary Rule(s): On December 20, 1999, the Environmental Quality Commission adopted amendments to OAR 340-071-0130 that will cause all approvals for new or innovative technologies or materials that had been granted by the Director prior to July 1, 1999, to expire on March 1, 2000. The amendments also established the criteria to meet in order to prevent or delay expiration of the approval.

Two manufacturing companies directly areaffected by this rule because the Director granted an approval to each company for one or more specific products designed to be used within disposal trenches in lieu of the standard drain media and pipe. Both companies offered testimony during the public comment period of the previous rulemaking that was generally negative to the proposed rule language, that more time should have been taken in development of the proposed rules.

Even though one company did not fully support the innovative technology and materials rule language presented to the Commission in December, 1999, that company does plan to submit the necessary documentation needed to keep their approval from expiring, prior to March 1, 2000. This company, however, is agreeable to extending the deadline date in order that their submittal may be better prepared.

The second company has expressed a concern that it cannot meet either of the criteria needed to maintain their approval past March 1, 2000, and will, therefore, be forced out of business if the expiration date is not extended.

The citizens of the State of Oregon have an interest in this issue because the these products have been used within the state as an alternative to drain media and pipe since the Director approved

each company's product(s) in late 1995. The ability to continue usage of these products on properties that are difficult to access or excessively steep is of special benefit to affected property owners because it may not be reasonably possible to transport and place stone drain media into the on-site system's disposal trenches.

In order to prevent serious prejudice to the interests of these two parties and the public, the Department must amend the rule prior to March 1, 2000. It is not possible to amend the rule by that date under the permanent rulemaking process.

Documents Relied Upon:

1) January 21, 2000 letter from the 70th Legislative Assembly, Joint Interim Committee on Water, Agriculture and Natural Resources;

2) OAR 340-071-0130

Documents are available for public review during regular business hours, 8 a.m. to 5 p.m., Monday through Friday, at the Department's Land Application and Licensing section of the Water Quality Division, 811 S. W. Sixth Avenue, Portland, Oregon.

Justification of Temporary Rule(s):

The Department finds that the current rules will result in serious prejudice to the public interest and to the two businesses directly affected by the original March 1, 2000 deadline date. The Department's failure to promptly amend this rule may result in one company going out of business.

This temporary rulemaking action will avoid or mitigate these consequences because amendment of the Department's rule using the temporary rulemaking process will result in up to a six month extension before the affected companies will be obligated to meet one of the exception methods to keep their approvals from expiring. This will also provide time for the Department to re-examine the innovative technology and material approval criteria, and pursue permanent rulemaking as necessary.

_____

Authorized Signer and Date

Proposed Amendments to OAR Chapter 340, Division 71

NOTE: The **underlined** portion of text represents proposed additions to the rule. The ~~*[bracketed]*~~ portion of text represents proposed deletions to the rule.

340-071-0130 GENERAL STANDARDS, PROHIBITIONS AND REQUIREMENTS

(1) Public Waters or Public Health Hazards. If, in the judgment of the Agent, proposed operation of a system would cause pollution of public waters or create a public health hazard, system installation or use shall not be authorized. If, in the judgment of the Agent, the minimum standards contained in these rules do not afford adequate protection of public waters or public health, the requirements shall be more stringent. This may include, but is not limited to, increasing setbacks, increasing drainfield sizing and/or utilizing an Alternative System. If the Agent imposes requirements more stringent than the minimum, the Agent shall provide the applicant with a written statement of the specific reasons why the requirements are necessary.

(2) Approved Disposal Required.

(a) All sewage shall be treated and disposed of in a manner approved by the Department. After review by the Technical Review Committee and by the Department, the Director may approve the use of new or innovative technologies, materials, or designs that differ from those specified within this division and OAR Chapter 340, Division 73, if such technologies, materials, or designs provide equivalent or better protection of the public health and safety and waters of the State and meet the purposes of this division and OAR Chapter 340, Division 073, including the purposes stated in OAR 340-071-0110. The Director may amend or repeal an approval granted pursuant to this section. The Department may determine that the appropriate method of approving Alternative Systems is by rule amendment.

(b) On ~~*[March 1]*~~ **August 30**, 2000, each approval for new or innovative technology or material that was granted by the Director prior to July 1, 1999, shall expire unless the new or innovative technology or material is:

(A) found to be in conformance with the prescriptive standard option described in OAR 340-071-0116; or

(B) in the process of an evaluation in conformance with the criteria described in OAR 340-71-0117. At the conclusion of the evaluation, which shall not exceed three years, the Director may approve the new or innovative technology or material if it meets the criteria. While engaged in the performance evaluation, materials with a current approval from the Director for use as a drain media substitute may be allowed through a construction-installation permit and sized according to appropriate manufacturer's recommendation with Department concurrence, provided the following conditions are met:

(i) The manufacturer provides a written warranty acceptable to the Department that provides for repair or replacement if the material is found to be defective or contributes wholly or in part to a failure of the absorption facility;

(ii) The manufacturer, installer or property owner provides a bond or other security acceptable to the Department, assuring the repair or replacement of the absorption facility that the Department finds to be defective or to be contributing to the failure of the facility. The amount of the bond or security shall be based on the projected number of systems installed during the evaluation period at $2500 per system. The bond or security must be maintained for 5 years, or until the drain media substitute as installed has been approved as provided in subsection (2)(a) of this rule, or until the system is decommissioned, whichever is sooner;

(iii) The property with a system proposed to be installed at the appropriate manufacturer's recommended sizing, must have sufficient area available to accommodate an initial and replacement system at a size that would otherwise be required by these rules.

(3) Discharge of Sewage Prohibited. Discharge of untreated or partially treated sewage or septic tank effluent directly or indirectly onto the ground surface or into public waters constitutes a public health hazard and is prohibited.

(4) Discharges Prohibited. No cooling water, air conditioning water, water softener brine, groundwater, oil, hazardous materials, roof drainage, or other aqueous or non-aqueous substances which are, in the judgment of the Department, detrimental to the performance of the system or to groundwater, shall be discharged into any system.

(5) Increased Flows Prohibited. Except where specifically allowed within this division, no person shall connect a dwelling or commercial facility to a system if the total projected sewage flow would be greater than that allowed under the original system construction permit.

(6) System Capacity. Each system shall have adequate capacity to properly treat and dispose of the maximum projected daily sewage flow. The quantity of sewage shall be determined from **Table 2** or other information the Agent determines to be valid that may show different flows.

(7) Material Standards. All materials used in on-site systems shall comply with standards set forth in these rules.

(8) Encumbrances. A permit to install a new system can be issued only if each site has received an approved site evaluation (OAR 340-071-0150) and is free of encumbrances (i.e., easements, deed restrictions, etc.) which could prevent the installation or operation of the system from being in conformance with the rules of this division.

(9) Future Connection to Sewerage System. In areas where a district has been formed to provide sewerage facilities, placement of house plumbing to facilitate connection to the sewerage system shall be encouraged.

(10) Plumbing Fixtures Shall be Connected. All plumbing fixtures in dwellings and commercial facilities from which sewage is or may be discharged, shall be connected to, and shall discharge into an approved area-wide sewerage system, or an approved on-site system which is not failing.

(11) Property Line Crossed:

(a) A recorded utility easement and covenant against conflicting uses, on a form approved by the Department, is required whenever a system crosses a property line separating properties under different ownership. The easement must accommodate that part of the system, including setbacks, which lies beyond the property line, and must allow entry to install, maintain and repair the system;

(b) Whenever an on-site system is located on one lot or parcel and the facility it serves is on another lot or parcel under the same ownership, the owner shall execute and record in the county land title records, on a form approved by the Department, an easement and a covenant in favor of the State of Oregon:

(A) Allowing its officers, agents, employees and representatives to enter and inspect, including by excavation, that portion of the system, including setbacks, on the other lot or parcel; and

(B) Agreeing not to put that portion of the other lot or parcel to a conflicting use; and

(C) Agreeing that upon severance of the lots or parcels, to grant or reserve and record a utility easement, in a form approved by the Department, in favor of the owner of the lot or parcel served by the system.

(12) Disposal and Replacement Area. Except as provided in specific rules, the disposal area, including installed system and replacement area shall not be subject to activity that would, in the opinion of the Agent, adversely affect the soil or the functioning of the system. This may include, but is not limited to, vehicular traffic, covering the area with asphalt or concrete, filling, cutting, or other soil modification.

(13) Operation and Maintenance. All systems shall be operated and maintained so as not to create a public health hazard or cause water pollution. Those facilities specified in sections (15) or (16) of this rule as requiring a WPCF permit shall have operation and maintenance requirements established in the permit.

(14) Construction. The Department or Agent may limit the time period a system can be constructed due to soil conditions, weather, groundwater, or other conditions which could affect the reliability of the system.

(15) Operating Permit Requirements. The following systems shall be constructed and operated under a renewable WPCF permit, issued pursuant to OAR 340-071-0162:

(a) Any system or combination of systems located on the same property or serving the same facility with a total sewage flow design capacity greater than 2,500 gallons per day. Flows from single family residences or equivalent flows on separate systems need not be included;

(b) A system of any size, if the sewage produced is greater than residential strength wastewater;

(c) Holding tanks;

EXCEPTIONS: This requirement does not apply to septic tanks used as temporary holding tanks pursuant to OAR 340-071-0160(11), or to holding tanks described in OAR 340-071-0340(5).

(d) A system which includes a conventional sand filter as part of the treatment process that serves a commercial facility;

(e) A system which includes an aerobic treatment facility as part of the treatment process if:

(A) The system serves a commercial facility; or

(B) The system does not meet the requirements of OAR 340-71-0220 and 340-071-0345.

(f) Recirculating Gravel Filters (RGFs);

(g) Other systems that are not described in this division, that do not discharge to surface public waters.

(16) WPCF Permits for Existing Facilities:

(a) Owners of existing systems meeting the system descriptions in subsections (15)(a), (b), and (d) through (g) of this rule are not required to apply for a WPCF permit until such time as a system repair, or alteration is necessary;

(b) All owners of existing holding tanks installed under a construction-installation permit issued pursuant to these rules, except holding tanks described in OAR 340-071-0340(5) and septic tanks used as temporary holding tanks pursuant to OAR 340-071-0160(11), shall make application for a WPCF permit by September 30, 1998. The application filing fee and the annual compliance determination fee listed in OAR 340-071-0140(5) shall be submitted with the application. Applications submitted on or after October 1, 1998 shall include all applicable fees established in OAR 340-071-0140.

(17) Perpetual Surety Bond Requirements. Pursuant to Oregon Revised Statutes (ORS) 454.425 and OAR Chapter 340, Division 015, a perpetual surety bond, or approved alternate security, in the amount of $1.00 per gallon per day installed sewage disposal capacity, shall be filed with the Department by any person proposing to construct or

operate facilities for the collection, treatment, or disposal of sewage with a design capacity of 5,000 gallons per day or more.

(a) Exemptions From the Surety Bond Requirements:

(A) Systems serving only food handling establishments, travel trailer accommodations, tourist and travelers facilities, or other development operated by a public entity or under license issued by the State Health Division. (Systems which serve both licensed facilities and unlicensed facilities require a surety bond if the portion requiring a Health Division license has a design capacity of 5,000 gallons per day or more);

(B) Systems owned and operated by a state or federal agency, city, county service district, sanitary authority, sanitary district, or other public body;

(C) Systems serving the sewerage needs of industrial or commercial operations where there are no permanent residences.

(b) Alternate Security: The approved forms of alternate security are specified in OAR 340-015-0020.

(18) Fees for WPCF Permits. The fees required to be filed with WPCF permit applications and to be paid annually for WPCF permit compliance determination are outlined in OAR 340-71-140(5).

(19) Variances for WPCF Permits. The variance procedures established in this division do not apply to systems permitted by WPCF Permit.

(20) Engineering Plan Review. Pursuant to ORS 468B.055, unless specifically exempted by rule, all plans and specifications for the construction, installation or modification of disposal systems, shall be submitted to the Department for its approval or denial pursuant to rules of the Commission. The design criteria and rules governing the plan review are as follows:

(a) For on-site systems which do not require a WPCF permit, the rules and design criteria for construction are found in this division. Construction standards for certain manufactured items are found in OAR Chapter 340, Division 073;

(b) For on-site systems which require a WPCF permit, the criteria in this division shall be used. However, the Department may allow variations of the criteria and/or technologies, when the applicant or Department has adequate documentation of successful operation of that technology or design. The burden of proof for demonstrating new processes, treatment systems, and technologies that the Department is unfamiliar with, lies with the system designer. The Department shall review all plans and specifications for WPCF permits pursuant to procedures and requirements outlined in OAR Chapter 340, Division 052.

(21) Manufacturer's Specifications. All materials and equipment, including but not limited to tanks, pipe, fittings, solvents, pumps, controls, valves, etc. shall be installed, constructed, operated, and maintained in accordance with manufacturer's minimum specifications.

(22) Sewer and Water Lines. Effluent sewer and water line piping which is constructed of materials which are approved for use within a building, as defined by the current Oregon State Plumbing Specialty Code, may be run in the same trench. Where the effluent sewer pipe is of material not approved for use in a building, it shall not be run or laid in the same trench as water pipe unless both of the following conditions are met:

(a) The bottom of the water pipe at all points shall be set at least 12 inches above the top of the sewer pipe;

(b) The water pipe shall be placed on a solid shelf excavated at one side of the common trench with a minimum clear horizontal distance of at least 12 inches from the sewer pipe.

(23) Septage Disposal. No person shall dispose of sewage, septage (septic tank pumpings), or sewage contaminated materials in any location not authorized by the Department under applicable laws and rules for such disposal.

(24) Groundwater Levels. All groundwater levels shall be predicted using "Conditions Associated With Saturation" as defined in OAR 340-071-0100. In areas where conditions associated with saturation do not occur or are inconclusive, such as in soil with rapid or very rapid permeability, predictions of the high level of the water table shall be based on past recorded observations of the Agent. If such observations have not been made, or are inconclusive, the application shall be denied until observations can be made. Groundwater level determinations shall be made during the period of the year in which high groundwater normally occurs in that area. A properly installed nest of piezometers or other methods acceptable to the Department shall be used for making water table observations.

Stat. Auth.: ORS 454.625 & 468.020
Stats. Implemented: ORS 454.615, 454.655, 454.695, 468B.050, 468B.055 & 468B.080
Hist.: DEQ 10-1981, f. & ef. 3-20-81; DEQ 5-1982, f. & ef. 3-9-82; DEQ 8-1983, f. & ef. 5-25-83; DEQ 9-1984, f. & ef. 5-29-84; DEQ 27-1994, f. & cert. ef. 11-15-94; DEQ 12-1997, f. & cert. ef. 6-19-97; DEQ 8-1998, f. & cert. ef. 6-5-98; DEQ 15-1999, f. & cert. ef. 12-29-99

Oregon Department of Environmental Quality Memorandum

To: Environmental Quality Commission Date: Feb. 7, 2000
From: Langdon Marsh
RE: Director's Report

Oregon Department of Agriculture (ODA) Water Quality Planning Program

In January, Senator Veral Tarno from Coos and Curry Counties held a "town hall" hearing at the capitol about ODA's Areawide Water Quality Management Planning, also known as SB 1010 plans. ODA's proposed Umpqua Basin plan and rule has met strong opposition from the agricultural community in that area.

Over 200 people attended the Salem meeting, many of whom strongly objected to the SB 1010 planning process. Concerns ranged from private property taking to lack of public notification. ODA asked DEQ to testify at the hearing regarding the relationship of SB 1010 plans to the TMDL program. Most legislators' questions dealt with the temperature standard. Some speakers, like the Soil and Water Conservation Districts director, gave a more positive view of the program. ODA Director Phil Ward is following up by speaking with several Healthy Streams Partnership members with positive results.

TMDL Litigation

The Environmental Protection Agency (EPA) and DEQ continue to participate in settlement discussions with Northwest Environmental Activists (NWEA) and National Environmental Defense Council (NEDC) regarding a 1997 lawsuit on Oregon's Total Maximum Daily Load (TMDL) program. Settlement discussions have stalled due to complications arising from the re-emergence of a named plaintiff to a separate 1986 Consent Decree related to the TMDL Program.

Portland Harbor Update

The Governor's office and DEQ are continuing conversations with the EPA, federal, state and tribal natural resource trustees, and the Portland Harbor Group to reach an agreement for the state to manage the Portland Harbor cleanup. This would avoid a federal Superfund listing of Portland Harbor. The Portland Harbor Sediment Investigation Work Plan is nearing completion. DEQ also started upland site discovery work and the potentially responsible party's list has expanded from the original 17 to nearly 35. A meeting with the federal agencies, the Governor's office, and DEQ took place on February 3.

Willamette Restoration Initiative

The Governor formed the Willamette Restoration Initiative (WRI) to build political consensus for program support and policies to improve and protect the Willamette Basin. DEQ Director Lang Marsh is on the board of directors, and DEQ Western Region Administrator Steve Greenwood was the chair of the WRI Clean Water Workgroup. The workgroup recommendations to the WRI Board at a recent two-day meeting include improving riparian zone management, focusing on non-point sources of pollution, and developing mechanisms for effluent and pollutant trading.

The WRI Board will refine recommendations from four strategic workgroups into a draft restoration strategy and workplan. The board will submit a revised Willamette Restoration Strategy to the Governor's office for legislative consideration in May. There will be several public workshops and hearings about the proposed strategy before finalization in the fall.

City of Portland Combined Sewer Overflows (CSOs) Status

Construction of CSO control facilities for the Columbia Slough is scheduled for completion in December. Control facilities for the Willamette River are in the planning stage. The City has developed a Clean River Plan to address CSOs, storm water, endangered species, water quality, and habitat issues in the lower Willamette and tributary streams in a comprehensive and coordinated way. DEQ has been meeting with city representatives to try to understand the Clean Water Plan and its assumption of a nine-year delay in CSO control.

New Carissa Wreck Removal Update

Wreck removal operations were suspended due to extreme weather last October. It is doubtful that refloating the shipwreck is a viable removal method due to further degradation of the shipwrecked structure. The final disposition of the stern will be determined in the spring when the remainder of the stern section will be re-examined by DEQ and the responsible party to determine removal options.

New Carissa Unified Command Disbanded

The New Carissa Unified Command, made up of representatives of the Coast Guard, DEQ and responsible party, signed its last Decision Memo on February 1. DEQ, representing state interests, accepted the federal closure of the emergency response, but will continue working with the responsible party. State statutes require the responsible party to continue monitoring and removing oil as necessary. State interests also include attractive nuisance and liability concerns and the long-term fate of the stern. The one-year anniversary of the ship's grounding was February 4.

DEQ Director Lang Marsh Outreach

Director Lang Marsh has embarked on a strategic outreach effort to travel around Oregon talking to citizen's groups, neighborhood associations, schools, media, and various influential community members. During these events, the Director talks about the Oregon environment and the work that DEQ is doing as well as takes questions, input, and suggestions from the audience. His speeches highlight three themes: cleaning up rivers and streams, reducing people's exposure to toxics, and getting more community involvement in solving environmental problems.

On January 26 and 27, the Director had a successful tour of the Salem and Eugene areas. He spoke at the state On-Site conference in Salem and at a University of Oregon environmental course taught by DEQ's Joe Edney. He met with State Senator Susan Castillo and legislative candidates Phil Barnhart and Bob Ackerman. He also met with Brian Jensen, the new director of the Lane Regional Air Pollution Authority, and Albany Democrat Herald Editor Hasso Herring. His tour included constructive and informative visits to Weyerhaeuser, a Springfield paper mill, and the Lane Regional Air Pollution Authority. The Director has also addressed groups in Portland including the Columbia Corridor Association. The Director will do a Central Oregon speaking tour February 14, 15 and 16.

Upcoming Governor's Executive Order on Sustainability

Governor Kitzhaber recently announced his intent to issue an executive order in March to make state government a leader in the fight to sustain our environment and quality of life in the face of a growing population. The order will direct state agencies to make more efficient use of energy and materials.

11th Annual Environmental Cleanup Report

Now available from the DEQ Cleanup Division, the report includes site profiles, typical current cleanup and spill actions, and highlights current major initiatives including efforts to examine cleanup program operations to identify potential areas for improvement.

11th Annual Environmental Cleanup Report

January, 2000

submitted to:

Governor John Kitzhaber

•

Oregon Legislative Assembly

•

Environmental Quality Commission

by:

Langdon Marsh, Director
Department of Environmental Quality

Paul Slyman, Administrator
Environmental Cleanup Division

11th Annual Environmental Cleanup Report

Introduction

The Department of Environmental Quality (DEQ) is statutorily required (ORS 465.235) to report annually to the Legislature, the Governor and the Environmental Quality Commission. The purpose is to:

- report cleanup accomplishments of the previous fiscal year
- forecast activities for the current fiscal year
- report on the status of cleanups in Oregon
- update the program plan every 4 years (last updated in the 1999 report)

This report's primary focus is DEQ's hazardous substance cleanup program; information is also provided about cleanups of leaking underground storage tanks, which are conducted under separate statutory authority.

Highlights

This report covers significant events of the past year and continuing activities, including:

- Cleanups and spill events, including high priority cleanups, such as work on Portland Harbor's sediment contamination
- 1999 changes to the state's cleanup laws; new rules and guidance for regulated petroleum tank cleanups; implementation of legislative changes governing heating oil tank cleanups
- Introduction of a formal Independent Cleanup Pathway
- Initiatives to improve the cleanup process
- Improving spill response and prevention through partnerships
- Activities related to returning the state's brownfields to productive use, including continued use of prospective purchaser agreements
- Outreach to local communities and groups potentially affected by contamination

Accomplishments – Fiscal Year 1999

In the fiscal year ending June, 1999 (FY 1999), DEQ gave "No Further Action" (NFA) designations[1] to 41 hazardous substance cleanup sites, indicating that these sites are sufficiently clean to protect human health and the environment. We also concluded, after the initial assessment phase, that 11 other sites suspected of being contaminated do not require cleanup. Since 1989, DEQ has made more than 550 NFA determinations.

[1] In this report, the term NFA generally includes "'conditional" NFAs, where the determination depends on long-term operation and maintenance actions, or the on-going application of engineering or institutional controls. There are currently 20 sites with conditional NFAs.

For additional information or to download this report, visit our web site at: **www.deq.state.or.us/wmc/cleanup/clean.htm**.

During FY 1999, 156 sites were added to DEQ's database of properties known or suspected to be contaminated with hazardous substances. The list now includes nearly 2250 sites, including the 550 completed sites.

Once identified, sites in the cleanup database are evaluated for their potential impact on human health and environment, and if they meet certain criteria, they are added to one of two statutorily required lists[2]. One is the Confirmed Release List of sites – where DEQ has verified that hazardous substances have been released to the environment. In FY 1999, 93 sites were added to this list; as of October, 1999 there were a total of 441 sites on the Confirmed Release List. The other list is the Inventory of Hazardous Substance Sites – the confirmed release sites that need additional investigation or remediation. Forty sites were added to the Inventory in FY 1999, the total on the Inventory now stands at 225 sites.

Cleanups vary in complexity and in the type of DEQ involvement. The box on this page describes the various "routes to cleanup" and defines terms used in this report. A statistical summary of FY 1999 cleanup actions and projected FY 2000 activities is included on page 15.

Site Response: Sites cleaned up under enforcement orders and orphan sites are among the most complicated cleanups so it often takes a number of years to complete investigation and cleanup. During FY 1999, 6 sites were completed (given NFAs), including one orphan site.

Orphan Sites: Because orphan funding is

Routes to Cleanup in Oregon

At most contaminated sites, there is an owner or operator who is legally responsible to pay for the cleanup. DEQ has authority to require responsible parties to clean up through enforcement orders – these are called **site response** actions. More often, however, responsible parties address the contamination voluntarily. DEQ's **voluntary cleanup** program provides an avenue for the property owner or operator to investigate and clean up, with DEQ overseeing the process. Recently, DEQ formalized another option, called the **independent cleanup** pathway, in which the investigation and cleanup is done with a much reduced level of DEQ involvement. (See page 10 for more information.)

When the responsible party has not been identified or is unable or unwilling to pay for cleanup, DEQ can use "**orphan site**" funds to take necessary cleanup action. In addition to orphan funding, in 1995 the Oregon Legislature authorized a special account, funded by the dry cleaning industry, for cleaning up contamination at **dry cleaning sites**. DEQ also works with the federal Environmental Protection Agency (EPA) at the 9 Oregon sites currently on the **National Priorities List**, commonly known as Superfund sites.

Cleanups involving only releases of petroleum products from **underground storage tanks (USTs)** are managed within DEQ separately from other hazardous substance sites. Cleanups of large petroleum fuel tanks, primarily located at gas stations, are **regulated tank cleanups** under state and federal law. Cleanups of leaks from **heating oil tanks**, often at residential locations, have different requirements.

[2] Copies of the two lists are available from the Waste Management and Cleanup program at (503) 229-5913 or DEQ's toll-free number, (800) 452-4011. They can also be viewed through DEQ's web site at www.deq.state.or.us/wmc/cleanup/sas0.htm. The page provides more information about the listing process and contains links to the lists, which are updated quarterly.

limited, only sites posing significant risk to people or the environment become orphans. Two sites were added to the list of orphan sites in the past year. One of these sites, the Killingsworth Fast Disposal landfill in Portland, is the first solid waste site to be declared an orphan. Solid waste orphans differ from "industrial" orphans in that they are located at municipal or other landfills and are financed by a fee on disposal of solid waste.

Since 1991, when DEQ first started doing cleanup work at state-funded orphan sites, 35 orphans have been declared. Orphan fund financed cleanup activities are on-going at 18 of these sites. Three sites have received NFAs, including the Chambers Oil Site in North Bend, which was completed recently. At the other 14, either the high priority work has been completed, or further cleanup is being conducted by the responsible party or another funding source, such as the federal Superfund.

Over the past 8 years, DEQ has spent about $23 million on orphan site cleanups. We have reimbursed the fund for about $3.3 million through cost recovery, insurance settlements and prospective purchaser agreements. Much more orphan work remains: We currently have about 18 sites on our "potential orphan" list, including significant areawide work in Portland Harbor.

Dry Cleaner Sites: To date, we've completed work and issued NFA letters for four dry cleaner sites. Cleanup is currently under way at eight dry cleaner sites and eight more are in the assessment phase. Three of these sites have afforded DEQ the opportunity to team with private industry to demonstrate a way to enhance bioremediation, which should be less expensive than the "pump and treat" method. The availability of the dry cleaner fund has enabled DEQ to work with dry cleaners to reduce the risk of future releases of dry cleaner solvent and to investigate and clean up more sites than would otherwise have been possible.

Current Cleanup Projects

- Using orphan site funds, DEQ has taken interim steps to protect against gasoline-like vapors that have troubled businesses in **downtown Prineville**. DEQ's extraction system began operation on the east side of town in October, and a responsible party installed a system to address the plume on the west side. The situation will continue to be monitored as final cleanup levels are determined.
- With DEQ oversight through the voluntary program, **a Madras business** completed an expedited investigation concerning possible dumping of pesticide-contaminated truck wash water. The company needed the expedited process in order to replace its truck wash water lagoon with a new zero discharge treatment plant in the planned time frame. In only five months, the firm was able to complete sampling, prepare a risk assessment, develop construction plans and obtain DEQ's approval of the risk assessment and construction plans.
- In the summer of 1999, DEQ's contractor treated over 27,000 gallons of contaminated groundwater and excavated more than 11,000 tons of contaminated soil from a **used oil recycling facility north of Bandon**. These actions have reduced the threat from site runoff to the Coquille River, which is a drinking water source and is used to flood cranberry bogs.

Voluntary Cleanups: Since this cleanup program was initiated in 1991, DEQ has issued NFA letters for more than 212 voluntary cleanup sites, far more than would have been possible under the enforcement (site response) program alone. About five new sites now enter the program each month, about 70% more than planned for current staffing levels.

More Current Cleanups

- DEQ's long-term cleanup at the **McCormick & Baxter** site in North Portland reached a major milestone as nearly 33,000 tons (about 350 rail gondola cars) of contaminated soil and debris were excavated and hauled to a hazardous waste landfill in the spring of 1999. The excavated areas were backfilled with clean soil and reseeded. The next steps are design and implementation of the final components of the cleanup, including innovative creosote recovery techniques to clean up the groundwater, covering the entire site with clean soil and remedies to prevent release of contaminants into the Willamette River.
- The cleanup technology being used by the Cascade Corporation and Boeing of Portland to address areawide groundwater contamination in **East Multnomah County** is performing better than expected. Within a year of operation, concentrations of the solvent TCE declined by up to 50% in some areas of the aquifer.
- Based on investigation at a dental equipment manufacturing company in **Newburg**, DEQ has determined that no further action is needed. This site applies the risk assessment principles included in the 1995 changes to Oregon's cleanup laws. Solvent contamination remains in the soil and shallow groundwater at this site, but based on the property's use and because the groundwater isn't used, the likelihood that anyone would be exposed to it is very low.
- DEQ is continuing to oversee environmental investigations underway by Ross Island Sand and Gravel and the Port of Portland to assess potential human health and ecological impacts from many years of **sediment disposal at Ross Island**. Both a panel of technical experts and the public provided input to the Port's work plan to assess releases of hazardous substances from their confined sediment disposal cells in Ross Island Lagoon. The Port has completed much of the field sampling work. Ross Island Sand and Gravel is continuing their assessment of a breach of one of the Port's cells discovered in 1998, and has begun planning a comprehensive assessment of both fill and processing areas at the island. Some preliminary investigation work has been initiated in conjunction with the Port's investigation. DEQ is also working with state and federal agencies to help develop a coordinated, long-term management plan for Ross Island that will be consistent with the existing reclamation plan. This effort will be particularly important as the company phases out mining activities at the site within 5 years.

Brownfields:

Over the last several years, brownfields – abandoned or underutilized commercial or industrial properties where redevelopment or reuse is hampered at least in part by contamination – have become an increasingly visible issue nationwide and in Oregon. Cleaning up and reusing these properties not only protects people and the environment, but also increases employment, creates vibrant communities and lessens the need to build in undeveloped "greenfield" areas. Unlike

other states, Oregon DEQ has not developed a separate brownfields program, but rather has made returning these properties to productive use a key goal of existing cleanup programs.

One of the primary tools available to encourage brownfield redevelopment is the prospective purchaser agreement (PPA). A PPA is an agreement between DEQ and a buyer of contaminated property which limits the buyer's cleanup liability in exchange for a "substantial public benefit", such as assisting with cleanup or providing new jobs. For example, in a recently completed agreement, the new owner of the former orphan site, Rogue Valley Circuits in Medford, has agreed to complete all necessary cleanup work remaining and may reimburse some of DEQ's orphan costs if the property is sold at a profit within 5 years. DEQ completed 12 new agreements in FY 1999; agreements have been signed covering 39 properties since 1995.

Recent Brownfield Redevelopments

- Three new buildings – home to a bank, insurance agency and restaurant – have gone up in **downtown Ontario** on the site of a former furniture store that was vacant for 11 years due to low-level groundwater contamination. Under a prospective purchaser agreement, the new owner is not only making new jobs possible, but is also reimbursing DEQ for past oversight costs, and performing additional required cleanup work, including installation of monitoring wells, additional sampling and assessing the risk to human health.
- In 1999, a prospective purchaser completed investigation and cleanup at the site of a former electric power company maintenance site in **downtown Corvallis** that had been vacant since 1976. The power company undertook investigation and cleanup in the past, but the work wasn't finished. Under the prospective purchaser agreement, the buyer of the property has completed cleanup activities and will be redeveloping the property, providing additional jobs. Typically, such redevelopment also increases a jurisdiction's tax revenues. DEQ has determined that no further action is necessary on this parcel as long as the site remains in commercial use and the groundwater isn't used.
- A new specialty grocery store opened in **Northeast Portland** in 1999, in a project that is expected to serve as a catalyst for economic revitalization and community stabilization. The most significant contaminant at the site was solvent from the dry cleaning facility on the site. The grocery's owner is performing cleanup work under a prospective purchaser agreement. If contamination remains after the agreement's requirements are fulfilled, DEQ plans to use the dry cleaner fund to complete the cleanup. To date, the new owner has removed a source of contamination and installed a system to extract vapors from the soil. In addition, the purchaser also worked with DEQ's UST cleanup program to address contamination from a gas station formerly located on one portion of the site.
- DEQ is a participant in much of the redevelopment in the area around **Portland's former railyards**. The area, contaminated by more than 100 years of industrial and railroad use, is undergoing intensive new construction. Three of the five developments planned by the Portland Development Commission on former Union Station property are complete and occupied by housing developments, both low income and market rate, and an Oregon State University research facility. Cleanup decisions on the largest development area, the 16-block former Burlington Northern railyard, will be made in March. DEQ continues to work in cooperation with responsible parties and developers to address contamination in a way that facilitates the construction plans.

Spill Response:

DEQ typically receives each year about 1500 reports of spills possibly involving hazardous substances from the Oregon Emergency Management System. Because DEQ does not have sufficient resources to respond to many spill events, DEQ staff determine, based on reported information, the appropriate response. Response ranges from minimal, at events where the risk is low or it appears the responsible party is responding appropriately, to full coverage at major or significant spills.

Calendar year 1999 brought a fairly typical number of spill reports, but they included a large proportion of significant events. While DEQ plans for about 10 to 15 such events a year, there were 24 in 1999. In addition to the well-publicized grounding of the New Carissa, a major spill event, there was an unusually large number of vessel groundings and other significant spills.

Spill Events

- Shortly after the New Carissa grounding, a tanker truck spilled its load of gasoline into a stream on the **Warm Springs Reservation**. The spill impacted a tribal fish hatchery, resulting in a major salmonid fish kill. Because the spill was on tribal land, EPA was the primary responder, but DEQ assisted by meeting the tribe's request for technical assistance.
- During a 10 month period in 1999, four serious marine vessel accidents occurred in the **Columbia River**, all with high potential for great environmental damage: Three large vessels ran aground under power: one loaded oil tanker, an 800 foot container ship and a 600 foot cargo ship. The fourth lost power and ran into a dock at Kalama, Washington. Because the events occurred on the Columbia, Oregon spill staff prepared to respond, but we were fortunate – this time – that the groundings happened on the Washington side.
- 1700 gallons of heating oil were mistakenly delivered into a sewer line in **Astoria**, traveling through the sewage system to its settling ponds. DEQ's role as the state's lead spill responder is often to coordinate the actions of various parties, ensuring that all environmental issues are properly addressed. In this case, the Oregon Department of Fish and Wildlife bore the primary burden of addressing the waterfowl contaminated by the oil in and around the ponds.
- In August, a 4500 gallon gasoline spill threatened **Knowles Creek**, near Mapleton, a prime spawning and rearing habitat for salmonids. An immediate concern was the risk of explosion. DEQ staff, with assistance from local government officials, oversaw the responsible party's emergency response, which included soil removal. The on-going cleanup, under DEQ supervision, consists of additional soil treatment and stabilization and the installation of extraction wells to prevent small seeps from reaching the creek.
- A Joint Federal investigation with EPA emergency response personnel culminated in the emergency removal of 400 gallons of oil from a **Klamath Lake** barge situated in a wildlife area inhabited by endangered species.
- DEQ assisted an **Klamath County** property owner who found that a newly purchased barn contained unidentified chemicals. After the hazardous material crews stabilized the materials, DEQ assisted by arranging for their removal from the site.

Underground Storage Tanks: In FY 1999, DEQ approved a total of 944 underground storage tank cleanups. Of these, 412 were regulated underground storage tanks (USTs) – large

petroleum fuel tanks at retail service centers and other commercial establishments. The other 532 tank cleanups approved were heating oil tanks, primarily residential ones. Leaks from these tanks are a growing problem, as large numbers of aging tanks fail. Although heating oil tanks are smaller than regulated USTs and thus pose somewhat less danger to the environment, they are of concern because of the proximity to residences and work locations and because actual or suspected leaky tanks decrease the value of real estate.

Major Projects and Initiatives

Portland Harbor

Portland Harbor, in the Willamette River, continues to be a major focus of DEQ's cleanup activities. Findings from a 1997 joint DEQ-EPA study of harbor sediments led the EPA to consider declaring the harbor a Superfund site. Preferring to address cleanup using the state's authority and management, DEQ has pursued a course of action to bring together interested parties to solve the problem.

In June DEQ completed the Portland Harbor Sediment Management Plan, which is a harbor-wide framework for evaluating and managing the contaminated sediments and which outlines the state's plan to satisfy EPA's requirements for deferring Superfund listing. The Plan was developed with input from EPA and other federal and state agencies, and both input and funding from the Portland Harbor Group, a coalition of 10 private and public entities owning property or conducting business in the harbor area.

Although DEQ made significant progress towards meeting deferral criteria, EPA has postponed its decision until March, 2000. DEQ continues to work on two unresolved areas: coordination with natural resource trustees and tribal involvement. Meanwhile, DEQ has begun implementing the Plan, including:

- Continuing investigation at specific sites
- Identifying potentially responsible parties to sign on to a consent decree, which will require parties to participate in the harbor-wide investigation
- Developing a Sediment Investigation Workplan, with advice and input from a broad spectrum of technical and policy workgroups, to guide further sediment investigation. Implementation is scheduled for late summer 2000.
- Public outreach and community involvement tailored to meet the needs of the affected community, with opportunities for environmental and community group participation in workplan development and continued communication with affected neighborhoods.

Coos Bay

In December, 1998, the EPA agreed that DEQ should continue its state-led cleanup effort at three Coos Bay locations, rather than place the sites on the National Priorities (Superfund) List. EPA determined that the three sites have polluted the area with a variety of contaminants that threaten the bay's highly productive aquatic resources.

DEQ is cleaning up one of the sites, Mid-Coast Marine, a former marine construction and repair operation, using state orphan site funding. In 1999, DEQ's contractor removed soils

contaminated with arsenic and chromium from the site. In the first half of 2000, DEQ plans to remove sediments containing various metals and tributyltin, which pose a continuing threat to both the fishing and shellfish industries and to marine life in the bay.

Responsible parties at the other two shipyards are working under consent orders requiring them to both address existing contamination and implement practices to prevent future recontamination of the shipyards and the surrounding area. One, Southern Oregon Marine, has completed an interim sediment removal, an investigation and a risk assessment and has started work on a feasibility study of possible cleanup methods. The Port of Coos Bay completed the investigation and risk assessment phase at its Charleston Shipyard in September. The Port has also implemented a number of Best Management Practices to prevent continued release to the environment.

Columbia Slough

DEQ continues to work with the City of Portland to address the contaminated sediments in the 30-mile long Columbia Slough. The Slough is one of Portland's largest open spaces and is home to several threatened and endangered species. Contaminants in the Slough are persistent and tend to bioaccumulate in higher level organisms. Investigation has been completed at several of the sixteen areas identified as high priority. Investigation and cleanup is complicated for several reasons, including the large number of cleanup sites and continuing discharges from storm sewers and other outfalls. Cleanup staff, working with DEQ's water quality program, plan to develop a comprehensive approach that allows for some interim actions at cleanup sites coupled with methods to address the combined sewer and stormwater outfalls.

Partnering with others

DEQ tries to maximize its effectiveness by partnering with other interested parties to achieve cleanup work. A recent example is a cooperative investigation with the Portland Water Bureau to sample soil and groundwater in the city's backup wellfield, where volatile organic compound (VOC) contamination has been detected at low levels in the shallow groundwater, but the source is unknown. DEQ assisted the city by using its new hydraulic "direct-push" equipment, funded by an EPA grant, to obtain the samples. The city agreed to pay DEQ's costs for technical staff to operate the equipment. DEQ and city representatives continue to meet regularly to plan ways to combine resources and pursue the common objective of protecting this critical groundwater source.

Focusing our work on the most vulnerable areas

As a part of the cleanup program's strategic planning process, we have been developing a new approach to help us prioritize our work. Traditionally, we have looked at individual sites as they were referred to the cleanup program and ranked their priority for further action. The new Vulnerable Areas approach looks at sites statewide based on a number of factors, such as places with a high concentration of domestic or community wells, or areas surrounding streams identified as "water quality limited[3]" because of the presence of toxic substances. Focusing our effort to find and evaluate sites in these areas helps ensure that we're maximizing protection of human health and the environment.

---

[3] A federal and state Water Quality program designation.

The Vulnerable Areas approach can affect our work in many ways. For example, one of the Vulnerable Area categories is salmon streams located in historic mining districts. This criterion has led DEQ to partner with several other state and federal agencies (such the Oregon Department of Geology and Mineral Industries and the federal Bureau of Land Management) in a project to prioritize former mine sites for cleanup and environmental restoration.

Program Changes and Improvements

Changes to Oregon's Cleanup Statutes and Rules

- The 1999 Legislature expanded the use of orphan funds to include investigation and cleanup of contamination in "submerged lands" – the sediments in Oregon's rivers and other waterbodies. This will enable DEQ to continue work in Portland Harbor, where responsible parties are not yet clearly identified. Projected expenditures in Coos Bay do not appear to be necessary at this time.
- Another change will expedite DEQ's approval of excavation and removal remedies at areas of hazardous substance contamination defined as "hot spots" under cleanup law. Previously, the law specified a preference for treatment in these areas – in other words, the use of technologies that permanently eliminate or reduce the level of contamination. For hot spots in soil, the revised law expands the preference for treatment to include "digging and hauling" to an authorized hazardous waste landfill.
- A third bill revised Oregon law related to insurance coverage for cleanup of environmental contamination. The bill provides that 1) Oregon law applies to claims when cleanup of contaminated sites occur in Oregon, unless the policy provides that the laws of other states apply; 2) cleanup agreements with DEQ and EPA are equivalent to lawsuits when those terms are used in insurance policies; and 3) fees and costs under voluntary cleanup agreements and consent orders with DEQ or EPA are not considered voluntary payments when insurance claims are made.
- The Legislature enacted administrative changes intended to improve collection of the fees used to pay for dry cleaner cleanups. Industry-sponsored proposals to increase program revenue, which has lagged expectations, were not successful.
- The Environmental Quality Commission adopted a temporary rule classifying methane from abandoned landfills as a hazardous substance when there is a danger of explosion. This change enabled orphan site funds to be used at the Killingsworth Landfill, where methane is a hazard. DEQ has initiated discussions with interested parties to determine whether a permanent rule is needed to address methane risks.
- Two bills affected heating oil tank cleanups: One eliminated the 1997 law that would have provided grants to homeowners with heating oil tank problems and requires DEQ to form an advisory committee to investigate ways to lower cleanup costs. This bill also requires the oil to be pumped out when tanks are taken out of service, as a way of avoiding future leaks. Another bill provided funding for DEQ to develop a new heating oil tank program, using DEQ-licensed contractors to certify that leaks are properly cleaned up. Draft rules implementing these changes were released for public comment in November.

The cleanup program's budget for the 1999-2001 biennium is shown on page 16.

Independent Cleanup Pathway

In April 1999, DEQ formalized the Independent Cleanup Pathway, which lays out the process for parties who want to clean up contaminated sites without on-going DEQ oversight. This alternative to the existing voluntary process was a result of feedback from site owners and other stakeholders in the Voluntary Cleanup Focus Group, with whom DEQ has been working for the past several years. Although it has always been possible for a responsible party to clean up a site and ask DEQ to approve the cleanup after the fact, the Independent Cleanup Pathway (ICP) adds more definition and certainty to the process.

The Independent Cleanup Pathway provides a more expeditious route to cleanup approval. If the responsible party gives DEQ sufficient notice (90 days) before submitting a final report, DEQ's goal is to complete its review within 60 days. Although the Independent Cleanup Pathway eliminates the usual step-by-step DEQ oversight, there is still a provision for the party to pay for the amount of technical consultation it desires. By consulting with DEQ, the party may avoid cleaning up either more or less than would be required, or preparing an incomplete final report.

This option is available only for sites ranked as low or medium priority for further investigation or cleanup. Because these sites represent less risk to human health and the environment, they generally lend themselves to appropriate cleanup without DEQ oversight. In addition, more complex sites usually require more review, and DEQ would not be able to meet the expected turn-around time.

Since the inception of the ICP in the spring of 1999, 19 sites have signed up for the new option. Some property owners have notified DEQ they are cleaning up completely independently and will be submitting final reports, while others are choosing to take advantage of the technical consultation provision. One example is a former foundry and machine shop site in Northwest Portland, where DEQ is providing technical consultation tailored to the new owners needs as they perform an independent investigation of the property.

Cleanup Improvement Initiatives

DEQ has embarked on a series of new initiatives to improve communication with and to better serve those participating in site cleanups. The goal is to increase the cleanup program's ability to work effectively with responsible parties to protect Oregon's environment.

We are continuing to work with three existing groups of varying memberships designed to address issues from different perspectives:

- The **Environmental Cleanup Advisory Committee,** originally established to help draft administrative rules resulting from the 1995 cleanup law revision, has broad membership including local government, environmental and industry representatives. It continues to advise DEQ on overall program direction.
- DEQ will increase its interaction with the **Voluntary Cleanup Program (VCP) Focus Group**, which has met annually since 1995. The mission of the group is to evaluate the program's policies and operations and recommend improvements. There is no set membership of the Focus Group; participants are those involved in the state's voluntary cleanup program, including representatives of industry and local government, environmental consultants, attorneys and lenders.

- The **Early Warning Team** is comprised of DEQ's cleanup managers and individuals representing parties responsible for conducting cleanups. This team's mission is to provide a forum for sharing information and discussing site cleanup implementation issues.

Initiatives and their status are:

- In November, DEQ hired an independent consultant to conduct a confidential survey of a wide audience, primarily of past, present and potential future cleanup participants, to identify program elements that are working and those that need improvement. The Environmental Cleanup Advisory Committee and the VCP Focus Group have helped the consultant develop the survey. We expect that the confidential nature of the survey will provide useful information.
- In early January, 2000, DEQ announced the formation of a 3-member citizen group to examine the way Oregon finances cleanup of hazardous substance sites. The group will review current financing mechanisms, seek advice from experts, and look at other programs around the country. In addition, in order to facilitate this fresh look at cleanup in Oregon, DEQ has formed a new headquarters division to will focus solely on cleanup.
- DEQ is also designing a dispute resolution process for independent cleanups. The Environmental Cleanup Advisory Committee and VCP Focus Group are participating in this effort as well. DEQ intends to begin implementation of the alternative dispute resolution process in Spring, 2000.
- DEQ will also be addressing two areas where we've already heard concerns. Staff will be trained so that they better understand how work to with clients to simultaneously meet business and environmental needs. And DEQ will be improving its invoices so that they better explain oversight charges.

Separate from these efforts, DEQ has reconvened its Dry Cleaner Advisory Committee to explore programmatic issues and to seek a solution to the program's revenue shortfall.

Spill Response and Prevention

DEQ is also leading or participating in a number of efforts aimed at preventing spills and improving preparedness.

- DEQ has participated as an ex officio member of the New Carissa Review Committee, appointed by Governor Kitzhaber to study issues related to the grounding of the New Carissa. The group was charged with examining local, state, and volunteer involvement and identifying ways to improve oil spill planning, prevention and response by state and federal agencies. The Committee's report to the Governor, which is expected to be completed by January 2000, will likely make some recommendations and refer other topics for further work by expert committees. The final report will be available on its DEQ-supported web page (www.deq.state.or.us/wmc/nc/ncrc).
- DEQ is an active member of several Pacific Northwest groups that meet to exchange information, develop response plans, and coordinate resources. They include:
  - The Northwest Area Committee, formed as a result of the federal Oil Pollution Act of 1990 and which includes state and federal environmental and response organizations, is responsible for maintaining the Northwest Geographic Response Plans. These documents form the state's oil and hazardous material contingency plans for its navigable waterways – coastal areas and most of the Columbia River.

- Among the activities of the States/British Columbia Oil Spill Task Force are researching the potential for a west coast traffic plan that would move non-tanker vessels farther away from the shoreline and updating its Field Operations Guides, which describe procedures, roles and responsibilities for spill events.

Underground Storage Tank Cleanup

There were several changes to tank cleanup rules and guidance in the past year:

- The regulated tank cleanup rules were revised in 1998 to provide for the development of "generic remedies" or streamlined approaches to cleanup. In December of 1998, tank staff finalized a generic remedy for "low-impact" sites which allows a business to remain in operation while managing the potential risk from contamination. In September of 1999, the guidance document "Risk-Based Decision Making for the Remediation of Petroleum-Contaminated Sites" was issued in final form. Included in this document is a new generic remedy for simple risk-based cleanups. The generic remedy options and the use of risk-based decision-making provides more flexibility in the tank cleanup process.
- There has been considerable activity related to heating oil tank cleanups since the 1999 Legislature adjourned. A generic remedy for cleaning up heating oil releases was released for public comment in September of 1999 and is in the process of being finalized. DEQ has drafted administrative rules for implementing the requirements of HB3107, to license companies providing heating oil tank services. Until those rules are finalized, DEQ is offering the opportunity for tank owners to participate, on a voluntary basis, in a trial program using contractors to certify cleanups.

Other Activities

Brownfield Activities

In addition to normal cleanup work that supports cleanup and reuse of brownfield sites, DEQ supports a number of brownfield-specific activities, such as:

- EPA brownfields grants pay for DEQ to conduct site assessments at government-owned properties and private property where the redevelopment plans promise significant public benefits. Grant funds were recently used to conduct further investigation at the former Rose City Plating site in Portland. DEQ had previously used orphan funds to remove toxic metal plating wastes from the abandoned site. The brownfield investigation showed that only moderate contamination remains, providing sufficient information for the prospective purchaser to continue with final cleanup work and redevelopment.
- In September, Oregon State University hosted an EPA-funded conference in Bend, which focused on brownfields issues affecting the state's rural areas. DEQ assisted with conference development and several staff members attended both to provide information and to learn more about rural community needs.
- DEQ supports the federal brownfields tax incentive, by serving as the state agency certifying property eligibility. Unfortunately, only two taxpayers have requested certification since the provision became effective in 1997.
- DEQ participates in and provides support to several brownfield or brownfield-related efforts such as the Portland Showcase project, a federally supported redevelopment effort.
- DEQ is working closely with the Oregon Department of Community and Economic Development to provide assistance so that individuals can return brownfields to productivity.

Outreach

A key component of DEQ's cleanup program is education and involvement designed to help people understand the potential risks from contamination, what is being done to address the risks, and what the public can do to help protect the environment. This outreach takes many forms:

- For most cleanup sites, project managers develop a public involvement plan, to ensure that keeping the community informed and addressing their concerns are an integral part of the cleanup process. For many sites, providing fact sheets and an opportunity to comment on the cleanup plan is sufficient. For others, where community concern about the site's risk is high, DEQ may conduct a series of public meetings to thoroughly explain the science and address concerns about past exposures, and to discuss the effectiveness and risks of the proposed remedy. For example, DEQ staff meet monthly with the Oregon State Penitentiary Community Group to address issues related to solvent contamination in its Salem neighborhood.
- The cleanup staff in DEQ's Eastern Region have embarked on a special outreach campaign to better inform communities of cleanup program activities and services. Tailored information packets are being distributed to each county and to communities with a population of 4,000 or more. The packets are followed by presentations to local interested parties, such as the Community Solutions Teams, to exchange information.
- In November, the threat of groundwater contamination in Prineville was reduced through a DEQ-sponsored "tank pump-out" day. The event was a pilot project funded by an EPA pollution prevention grant. About 1,800 gallons of diesel fuel and heating oil was pumped from twelve tanks no longer being used by their owners.
- The cleanup program continues to enhance its internet presence to provide more information to Oregonians about cleanups and how the state's cleanup laws are carried out. (Address: www.deq.state.or.us/wmc/cleanup/clean.htm.) The internet helps us to provide, more quickly and cost effectively, the information we have traditionally supplied, and it enables us to reach a wider audience. We'll be working in the coming months to get feedback from users to continue to increase the web site's usefulness.
- The legislation that created the dry cleaner cleanup program also set new standards for dry cleaning operations designed to prevent future releases of dry cleaning solvent into the environment. In the summer of 1999, DEQ staff visited nearly 440 dry cleaner establishments to provide technical assistance in meeting those standards. DEQ was pleased to find that 95% of the businesses visited were in compliance with the law's requirements.

Cleanup Phases Completed

Sites with a release of hazardous substance or those suspected of being contaminated move through several stages of investigation and cleanup. The chart on the page 15 reports the number sites that have completed each of the stages in the past fiscal year; the number beginning each phase is also shown.

Sites added to DEQ's Environmental Cleanup Site Information (ECSI) database are first **screened**, or evaluated, based on readily available information, to determine the site's priority for further investigation. If warranted, many sites then undergo additional analysis called a **preliminary assessment**. Sometimes this investigation is all that is necessary to determine that the site does not pose significant risk. Sites with significant contamination go through the entire

process, starting with a **remedial investigation**, involving sampling and site characterization, and **feasibility study** to evaluate cleanup options. Once a proposed cleanup alternative is approved by DEQ's director, the cleanup method is fully planned in a **remedial design**. The phase where cleanup is carried out, which in some cases takes many years, is called **remedial action**. At a number of sites, interim cleanup actions may be taken prior to full investigation and design, in order to protect people and/or the environment from immediate threats. This is known as a **removal action**. A site receives a **no further action** (NFA) designation when DEQ determines that it poses no significant threat to human health or the environment.

For More Information

To obtain additional copies of this report, or for additional information about DEQ's cleanup programs, contact:

Address: Waste Management and Cleanup Division
811 SW Sixth Avenue
Portland, OR 97204
Telephone: (503) 229-6413

Or visit our web site at www.deq.state.or.us/wmc/cleanup/clean.htm

Cleanup Phases Completed and Initiated
Actual and Projected, July, 1998 – June, 2000

Actions	Completed		Initiated	
	7/98-6/99	Projected 7/99-6/00	7/98-6/99	Projected 7/99-6/00
Suspected Releases Added to Database	156	163	NA	NA
Added to Confirmed Release List	93	60	NA	NA
Added to Inventory	40	33	NA	NA
Site Screenings	105	165	104	165
Preliminary Assessments	79	100	61	100
Voluntary Cleanup				
Removal Actions	14	18	16	21
Remedial Investigations	31	29	23	26
Feasibility Studies	6	6	7	7
Remedial Designs	2	1	2	2
Remedial Actions	8	7	6	7
No Further Action Determinations*	35	45	NA	NA
Site Response				
Removal Actions	20	11	16	12
Remedial Investigations	7	11	11	13
Feasibility Studies	1	5	4	4
Remedial Design	3	4	1	4
Remedial Actions	0	3	4	6
No Further Action Determinations	6	4	NA	NA
Underground Tanks				
Regulated Tank Releases Reported	518	400	NA	NA
Regulated Tank Cleanups	412	375	480	400
Heating Oil Releases Reported	1330	1700	NA	NA
Heating Oil Tank Cleanups	532	600	727	1600

* Includes "conditional NFAs," where contamination is left in place, but controls are in place to prevent exposure.

Notes:

- Since the beginning of program operations, 23 sites have been removed from the Confirmed Release List and 17 from the Inventory.
- Site Response actions include cleanups that are not "enforcement" sites under a consent order; these include those financed by the dry cleaner fund and orphan site cleanups.
- Regulated UST cleanups initiated are those reported by the responsible party and do not include ones initiated by DEQ action. As a result, actions completed exceed those initiated.

Legislatively Adopted Budget
1999-2001
(Dollars in millions)

Activity	Funding Sources	Budget*
Hazardous Substance Cleanups		
Enforcement and voluntary sites, program management	HSRAF[4], including cost recoveries, General Fund, EPA grants	$ 15.11
Orphan cleanups	Orphan Site Account	9.16
McCormick & Baxter Superfund site	Federal Superfund	8.33
Dry cleaner cleanups[5]	Dry Cleaner Account	1.90
	103.50 FTE	$ 34.50
Underground Storage Tank Cleanups		
Regulated tank cleanups	Federal grant, cost recoveries, HSRAF (grant match)	$ 3.15
Heating oil tank cleanup and decommissioning	General fund, contractor licensing fees	.47
	25.25 FTE	$ 3.62
Spill Management		
Spill Response	General Fund	$ .40
Highway Spills	Petroleum Load Fee	.05
Drug Lab Cleanups	Asset forfeitures, cost recoveries, law enforcement reimbursements	.31
Oil spill prevention, preparedness	Marine vessel & facility fees	.46
	5.50 FTE	$ 1.22
Cleanup Total	**134.25 FTE**	**$ 39.34**

* Does not include agency indirect charges.

[4] Hazardous Substance Remedial Action Fund
[5] Includes hazardous waste minimization portion of program

Approved_____
Approved with Corrections_____

Minutes are not final until approved by the EQC

Environmental Quality Commission
Minutes of the Two Hundred and Eighty-Second Meeting

February 10-11, 2000
Regular Meeting

On February 10-11, 2000, the regular meeting of the Environmental Quality Commission (EQC) was held at the Department of Environmental Quality (DEQ) headquarters, 811 SW Sixth Avenue, Portland, Oregon. The following Environmental Quality Commission members were present:

Melinda Eden, Chair
Harvey Bennett, Member
Deirdre Malarkey, Member
Mark Reeve, Member
Tony Van Vliet, Member

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

Note: The 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.

Chair Eden called the meeting to order at 1:30 p.m. on Thursday, February 10.

A. Approval of Minutes

The following corrections were made to the November18-19, 1999 minutes. On page 2, 1st paragraph, the 7th line should read "... When asked if hazardous waste is temporar*ily* stored on-site prior to being;" on page 2, paragraph 6, the word "file" should be "*pile;*" on page 3, 1st paragraph, 2nd line, the word "contaminates" should be "*contaminants;*" and a date and topic were added to the end of the last sentence on page 7, paragraph 6. A motion was made by Commissioner Van Vliet to accept these minutes as corrected. Commissioner Malarkey seconded the motion and it was carried with five "yes" votes.

The following correction was made to the December 20, 1999 minutes. On page 4, 2nd paragraph, last line, the word "loose" should be "*lose.*" A motion was made by Commissioner Van Vliet to accept the minutes as corrected. Commissioner Bennett seconded the motion and it carried with five "yes" votes.

B. Approval of Tax Credits

Maggie Vandehey, Tax Credit Coordinator, presented the agenda item and its Addendum. The following applications were removed from consideration by the Commission action at this time.

App. No.	Applicant	Certified Cost	Percentage Allocable	Type	Value
4979	Willamette Industries, Inc.	$615,050	100%	Air	$307,525
4570	Willamette Industries, Inc.	$2,812,715	100%	SW	$1,406,358
5049	Mitsubishi Silicon America	$278,399	100%	Air	$139,200
5100	Mitsubishi Silicon America	$1,599,606	100%	Water	$799,803
5101	Mitsubishi Silicon America	$37,358	100%	Air	$18,679
5102	Mitsubishi Silicon America	$95,170	100%	Air	$47,585
5103	Mitsubishi Silicon America	$145,824	100%	Air	$72,912
5104	Mitsubishi Silicon America	$146,236	100%	Air	$73,118
5105	Mitsubishi Silicon America	$128,179	100%	Air	$64,090

The following applications were presented for approval.

Commission Action	App. No.	Applicant	Certified Cost	Percentage Allocable	Type	Value
Approve	5179	Capitol Recycling & Disposal, Inc.	$16,882	100%	SW	$8,441
Approve	5264	Capitol Recycling & Disposal, Inc.	$171,113	100%	SW	$85,556
Approve	5267	United Disposal Service, Inc.	$28,281	100%	SW	$14,141
Approve	5269	United Disposal Service, Inc.	$46,603	100%	SW	$23,301
Approve	5279	Forrest Paint Company	$34,357	100%	Air	$17,179
Approve	5281	United Disposal Service, Inc.	$14,307	100%	SW	$7,154
Approve	5287	Capitol Recycling & Disposal, Inc.	$18,106	100%	SW	$9,053
Approve	5288	Capitol Recycling & Disposal, Inc.	$52,131	100%	SW	$26,06(
Approve	5290	Capitol Recycling & Disposal, Inc.	$42,890	100%	SW	$21,445
Approve	5296	Grabhorn, Inc.	$300,565	100%	SW	$150,283
Approve	5308	United Disposal Service, Inc.	$8,243	100%	SW	$4,122
Approve	5322	Capitol Recycling & Disposal, Inc.	$4,420	100%	SW	$2,210
Approve	5328	United Disposal Service, Inc.	$9,538	100%	SW	$4,769
Approve	5338	Capitol Recycling & Disposal, Inc.	$26,919	100%	SW	$13,460
Approve	5343	Capitol Recycling & Disposal, Inc.	$32,744	100%	SW	$16,372
Approve	5344	United Disposal Service, Inc.	$24,680	100%	SW	$12,340
Approve	5347	Weldon's Enterprises, Inc.	$64,052	100%	Perc	$32,026
Approve	5349	Environmental Waste Systems,	$7,273	100%	SW	$3,636
Approve	5351	United Disposal Service, Inc.	$8,243	100%	SW	$4,122
Approve	5352	Keller Drop Box, Inc.	$6,789	100%	SW	$3,395
Approve	5354	Steve A. Kenner	$5,745	100%	Perc	$2,873

Commissioner Malarkey asked if the recycling tax credits are for new facilities or equipment only, for enlargement of a community that is being served, or for replacement of aging facilities. Staff responded that containers are for new service areas. Other equipment could be replacement equipment (identified under the eligibility section) and if eligible according to law, the percentage allocable section would show the calculations described in the rule. Commissioner Bennett moved to approve applications as presented in Attachment A of Agenda Item B with the exception of the applications pulled from the agenda. Commissioner Malarkey seconded the motion and it carried with five "yes" votes.

Komatsu Silicon America requested an extension of time to file a pollution control tax credit application. The applicant said there were "circumstances beyond the control of the applicant." Ms. Vandehey stated

the Hillsboro facility was not operating at this time. They would like the extension in hopes that they would have this facility up and operating within the next year. The applicant does not know if they will operate the facility in Hillsboro but they would like to have an opportunity to apply should they open the facility. Counsel clarified that the Commission has not had a request such as Komatsu's, and this one falls somewhere in the middle of what had previously been granted. The Commission does not have any kind of a precedence to rely on.

Commissioner Reeve said the phrase "circumstances beyond the control of the applicant" has to guide the Commission's decision in terms of any extension we give or don't give. He stated these circumstances seem to be within their control, and the Commission needed to be faithful to the language of the rule but mindful that faithfulness causes a somewhat difficult position for applicants in these circumstances. Commissioner Reeve made a motion to deny the application. Commissioner Malarkey seconded the motion and the motion passed with four "yes" votes. Commissioner Bennett voted "no."

Commissioner Bennett discussed economic development aspects of this program. Chair Eden stated there are movements to look at repairing some of the tax credit guidelines and regulations that create these ambiguities. She noted the next legislative session is coming and that there may be something we can think about. Commissioner Van Vliet asked if there was any effort in the Department right now to look at the wording of some of our statutes, noting the term "substantial completion" and how we apply it. He asked if we should be more precise in our language. During the 1999 session the Department attempted to correct some of the long-standing ambiguities including the items mentioned. HB 2181 did not move forward intact and those changes did not go forward. The Department will not present legislation regarding tax credits in the 2001 session because the program is scheduled to sunset December 31, 2001. In the definition of "substantial completion" counsel advised that it is a legislative change where there is little latitude. Counsel clarified that the Commission does have the ability to define terms that are ambiguous in the legislation and to "fill in the blanks" where the legislation has left them out. One of the problems with the tax credit statutes is that they are more specific and more directive than most of the environmental statutes the Commission deals with, and they have less room for regulatory policy making. The tax credit statutes have been amended about every two years since 1973; and, as a consequence, they are not always internally consistent. Director Marsh stated the Department has not made any decisions on bills that will be brought forward during the next session.

C. Action Item: US Fish and Wildlife Services Request for a Waiver to the Total Dissolved Gas of the Water Quality Standard

Russell Harding, Columbia River Coordinator, presented two applications for variances to the State's total dissolved gas water quality standard, one from the U.S. Fish and Wildlife Service to spill water at Bonneville Dam and one from the U.S. Army Corps of Engineers to spill water at John Day Dam.

Fred Olney and Marv Yoshinaka presented the U.S. Fish and Wildlife Service's petition to the Commission. The Service was seeking a variance for a ten-day period commencing on March 9, 2000, to spill water at Bonneville Dam to assist outmigrating Spring Creek National Fish Hatchery tule fall chinook smolts. About eight million smolts are due to be released in March, and the purpose of the spill request is to assist these smolts past Bonneville Dam. Biological sampling will be conducted as well as monitoring of redds below the dam to ensure there are no adverse impacts to resident fish, migrating smolts, and eggs and fry in the redds. The fish provide 9 percent of the west coast Vancouver Island fishery and 27 percent of the Oregon/Washington coastal fishery. If it were not for these fish, a disproportionately greater number of threatened and endangered Snake River salmon would be taken.

Raphael Bill from the Confederated Tribes of the Umatilla Indian Reservation, and Olney Patt Junior, Tribal Chief of the Warm Springs Council explained the importance of the Spring Creek National Fish Hatchery fish for ceremonial, religious and subsistence use. Because of their relatively low oil content, these fish are especially important as a source of protein for the winter months. Approving this request will ensure the survival of an additional 150,400 juveniles that will result in 1,650 returning adults.

In its discussion, the Commission found that its failure to act would result in more juveniles proceeding via screened bypass facilities and turbines resulting in greater numbers of mortalities. The balance of risk between elevated dissolved gas levels as a result of spill was more than off-set by improved survival of juveniles, and that resident fish and returning adults would be protected from gas bubble disease. The Commission voiced its frustration at the timing of this petition, and requested that future petitions be received by September 30 for the following year. The Commission understood that while this is very feasible, it would not be possible to determine the exact dates of the hatchery release that early.

A motion was made by Commissioner Van Vliet to approve the variance request by adopting the draft order appended at Appendix B of the staff report. Commissioner Bennett seconded the motion and it carried with five "yes" votes.

Rock Peters and Joe Carroll presented the request from the U.S. Army Corps of Engineers to spill water at John Day dam to test the hydraulic performance of flow deflectors at a number of spill quantities and deflector submergences. Flow deflectors have been installed at all lower Snake and Lower Columbia River Dams prior to 1997 with the exception of The Dalles, Ice Harbor and John Day dams. Deflectors have subsequently been installed at Ice Harbor and John Day. When deflectors were first installed they were designed to abate gas generated as a result of uncontrolled spill. Now they are being used to abate gas for fish passage. The deflectors at Ice harbor have performed very well at submergences between 3 and 11 feet. The John Day deflectors, with their submergences between 11 and 17 feet have not done as well. Other than the submergence, the bathymetry of the stilling basin at the two dams is different, Ice Harbor being substantially more shallow than that at the John Day dam. The first part of the proposed test is to try and separate the influence of submergence and bathymetry on deflector performance. The second part will be to assess the performance of the deflectors at varying submergences. Finally, the test is designed to evaluate the efficacy of installing deflectors on bays 1 and 20 (the two end bays), which are currently un-deflectored. The benefits from this test would accrue for future fish migrating in the river. There will be physical and biological monitoring in place to ensure compliance with any variance levels.

The Department recommended a variance to allow 120 percent saturation of total dissolved gas relative to atmospheric pressure in the tailwater of John Day Dam and 115 percent in the forebay of The Dalles Dam. In addition, the Department recommended that for no more than six hours in 24 should saturation exceed 125 percent.

The Commission required the test beginning no later than February 20, 2000, so it would not overlap with the variance granted for the Spring Creek National Fish Hatchery release. Commissioner Van Vliet moved that the request for a variance to the total dissolved gas standard by the U.S. Army Corps of Engineers be approved and that the draft order appended to the staff report at Appendix C be adopted subject to amendment of the commencement date. The motion was seconded by Commissioner Malarkey and it carried with five "yes" votes.

Rock Peters of the U.S. Army Corps of Engineers presented a summary of the Corps' gas abatement program. The program began in 1994 and is a cooperative venture between the Corps' Walla Walla and Portland Districts as well as other interested parties in the region. The program initially consisted of two phases:

1. short term actions that can be completed quickly to abate dissolved gas levels; and
2. longer term strategies.

The installation of flow deflectors at Ice Harbor and John Day Dams was accomplished under the first phase. The second phase involves a five-year study. The study is an alternatives investigation in which alternatives are evaluated relative to their expected outcomes and cost. A final draft report on this is expected in September 2000 with a final by April 2001.

In 1999 the National Marine Fisheries Service proposed a change, and "Fast-Track," was born. The objective here is to move beyond the study to look at spill optimization. The projects in most urgent need for evaluation for optimization are Bonneville, McNary and Lower Monument Dams. Bonneville is

scheduled to be concluded by the end of 2000. The other two will follow in December 2000/January 2001. In evaluating alternative spill patterns, the Corps is balancing fish passage efficiency, gas production and tailwater egress.

The Commission requested the Corps return at a future meeting for a more full briefing. Chair Eden also expressed an interest in viewing a flow deflector at Bonneville Dam later this year.

F. Action Item: Pollution Control Bonds

Barrett MacDougall, Budget Analyst, presented this item. The Department explained that in March 2000, $8 million in bonds would be sold to provide State Match for the State Revolving Fund (SRF), and $8 million in bonds would be sold to provide financing for the cleanup of Orphan sites. Additionally, it is planned to sell up to $4 million in SRF Match bonds in the Spring of 2001, if necessary. A motion was made by Commissioner Bennett to approve and adopt the Resolution and findings. Commissioner Van Vliet seconded the motion and it carried with five "yes" votes.

The meeting was recessed at 4:40 p.m. On Friday, February 11, the morning began with an executive session at 8:00 a.m. The Commission discussed current and likely litigation including EZ Drain Company v. State of Oregon, Department of Environmental Quality, Case No. 9809-06683; and Northwest Environmental Advocates and Northwest Environmental Defense Center v. Carol Browner, Administrator, EPA, and Associated Oregon Industries, Northwest Pulp and Paper Association, Oregon Forest Industries Council and State of Oregon, Department of Environmental Quality. The executive session was held pursuant to ORS 192.660(1)(h). The regular meeting was resumed at 9:07 a.m.

D. Informational Update: Request for Revocation of the Umatilla Chemical Agent Facility Permits

Wayne C. Thomas, Umatilla Demilitarization Program Administrator, and Sue Oliver, Senior Hazardous Waste Specialist, gave the Commission an update on the status of the Request for Revocation of the permits for the Umatilla Chemical Agent Disposal Facility. The Department is reviewing approximately 135 documents related to the Revocation Request, based on criteria provided in a guidance memorandum from the Department of Justice concerning the legal bases for modification, revocation and/or termination of a hazardous waste permit.

E. Informational Item: Current Status of the Chemical Stockpile Emergency Preparedness Program (CSEPP)

The Commission received an update on the current status of the Chemical Stockpile Emergency Preparedness Program (CSEPP) in the communities surrounding the Umatilla Chemical Depot. Lt. Col. Thomas Wolosyzn, Umatilla Chemical Depot Commander, briefed the Commission on the readiness status of the Depot's "Chemical Accident/Incident Response" program. Casey Beard, Morrow County Emergency Management Director, and Meg Capps, Umatilla County CSEPP Manager, discussed the readiness status of the off-post emergency response community. Chris Brown, Oregon Emergency Management CSEPP Manager, discussed the accidental siren activation that occurred on December 30, 1999.

G. Rule Adoption: Heating Oil Tank Technical and Licensing Rule Revisions

Mary Wahl, Waste Prevention and Management Division Administrator, gave a brief overview of the situation in Oregon regarding heating oil tank cleanups. Mike Kortenhof, Tanks Manager, described pertinent points in the rule packages. Division 177 is modified to include technical standards for voluntarily decommissioning a tank and adding provisions for reports to be certified by licensed service providers. Division 163 contains the requirements for service provider licensing. Service providers now certify that a tank decommissioning or cleanup meets all technical standards and regulations, then that report is filed with DEQ for a $50 filing fee. DEQ will then inspect the work of service providers instead of reviewing individual reports from tank owners. Service providers must also have errors-and-omissions insurance. As a result of public comment, the insurance amounts were reduced from $1,000,000 per occurrence and $2,000,000 aggregate to $500,000 per occurrence and $1,000,000 aggregate. To fund

the program, license fees are increased sharply by statute from $100 every two years to $750 per year for service providers and from $25 every two years to $150 every two years for supervisors. The program worked with service providers during an "early implementation" period to work out procedural issues with the new certification requirements.

Commission members had a few general questions about the program and rules. Laurie McCulloch was asked to respond to a question by Chair Eden about the definition of "confirmed release." Chair Eden requested two changes to the rules: 1) Division 163 - 340-163-0070, change the word "impact" to "affect" where used, and 2) Division 177 - 340-177-0095(4)(a)(A), combine (A) under (a) as there is no (B). A motion to approve the rules with the changes specified was made by Commissioner Reeve. It was seconded by Commissioner Malarkey and carried with five "yes" votes.

H. Rule Adoption: Marine Loading Vapor Control Rules

Annette Liebe, Acting Air Quality Division Administrator, and Kevin Downing, Air Quality staff, made a presentation on the process used in developing the rule proposal which included a summary of the comments received during the public comment period and the Department's recommendation on the changes suggested. The rule proposal presented called for reducing gasoline vapors year round by at least 95 percent when loading fuel products at any terminal in the Portland area. The rule establishes a performance standard for emission reduction but allows a business decision about which method to use. There are two classes of control that would likely be employed to meet the air quality protection standard, and both systems would rely on collected vapors from the enclosed barge. The unloading process was regulated by controls in place since the late 1970s such that vapors are not released uncontrolled during this phase of the transport and delivery process. After unloading, the barges travel with their tanks enclosed and the remaining vapors stay within the vessel. The ship-to-ship transfers that occurred while either vessel was berthed at a terminal dock would be processed through the terminal's control equipment. Control of the air emissions from these transfers at mid stream is not as feasible. The rule does prohibit this loading activity on Clean Air Action Days and requires record keeping and reporting of the mid-stream transfer activity so its frequency can be tracked and the impact evaluated. The rule does not apply to refueling operations and it focused on gasoline shipments. The bunker fuel used by ocean going vessels is a very heavy grade of petroleum product and is not as volatile as gasoline.

Commissioner Bennett raised a question about whether there were problems in other areas of the state from marine loading from oil terminals, such as Coos Bay and Astoria. Staff responded that this rule was intended to address known air quality issues in the Portland area as highlighted in the Ozone Maintenance Plan. While there are bulk gas terminals in other parts of the state, air quality protection needs did not warrant requiring controls at these locations at this time.

Larry Knudsen, Assistant Attorney General, pointed out a motion for adoption should also reflect that this rule is adopted as a revision to the Oregon State Implementation Plan (SIP). A motion was made by Commissioner Van Vliet to approve the rule for adoption with the revision to the SIP. The motion was seconded by Commissioner Reeve and it carried with five "yes" votes.

Public Comment: No citizens testified before the Commission.

I. Temporary Rule Adoption: Rules for Contested Case Hearings Conducted by the Hearing Office Panel (HB 2525)

Susan Greco, Rules Coordinator with the Director's Office, explained to the Commission that the temporary rules were proposed to align the Department's rules governing contested case hearings with HB 2525 and the Attorney General's Hearing Panel Rules. The Hearing Panel Rules as filed on December 23, 1999, became effective on January 1, 2000, the date the Central Hearing Panel came into being. At this time, several of the Department's rules are considered to be 'procedural rules' and thus are negated by the Hearing Panel Rules. The temporary rulemaking would repeal those rules that are no longer needed by the Department. Under several Hearing Panel Rules, the Department has the authority to adopt its own rules, either limiting the availability of certain procedures, providing for public attendance

at contested case hearings, or outlining the procedures for filing exceptions before the Commission. The rulemaking would also adopt those rules. Additionally, the rulemaking would make some housekeeping changes and adopt the most recent changes to the Model Rules for use in rulemaking.

It was recommended the Commission adopt the rule amendments contained in Attachment A of the staff report as amended by the revisions contained in the memorandum dated February 9, 2000, along with the Statement of Need and Justification. The rules would be in effect for no longer than six months. A motion was made by Commissioner Van Vliet to approve the temporary rule adoption with the stated amendments. Commissioner Malarkey seconded the motion and it passed with five "yes" votes.

J. Informational Item: 1999-2002 Water Quality Standards Review

Mike Llewelyn, Water Quality Division Administrator; Jan Renfroe, Program Policy and Project Assistance Manager, and Debra Sturdevant, Water Quality staff, presented an informational report on the 1999-2002 water quality standards review. The presentation included background information on water quality standards and triennial review. Staff outlined the work planned for this review cycle, and the topics the Department will not be able to address given available resources and the commitments DEQ made during the Endangered Species Act (ESA) consultation in our last standards revision. Topics to be addressed during this standards review cycle include temperature, beneficial use designations, antidegradation, certain toxic pollutants, and some nutrients and pH work. The Department will participate in an Environmental Protection Agency (EPA) Region 10 project to develop federal temperature criteria for the northwest and will consider revising Oregon's temperature standards to adopt those criteria.

A Policy Advisory Committee (PAC) of stakeholders and agency advisors has been assembled to advise the Department through the review process. Technical committees will be formed to help the Department compile and synthesize relevant scientific information and develop scientifically sound standards alternatives for consideration. Staff will return to the EQC several times over the next three years with informational items, work sessions and action items for standards revision and adoption. In addition to working with public advisory committees, the Department will solicit input from the public through workshops and hearings.

K. Action Item: Approval of Hearing Order Regarding Assessment of Civil Penalty in the Matter of Cascade General, Inc., Case No. HW-NWR-97-176

Larry Knudsen, Assistant Attorney General, Department of Justice, presented the final order for Commission approval. A correction was made in the Conclusions and Reasons portion of the Order to reflect that the Commission had allowed additional evidence but this evidence did not change the conclusion. Commissioner Reeve made a motion to approve the final order and findings of fact with the correction mentioned. The motion was seconded by Commissioner Van Vliet and approved with "yes" votes from Commissioners Van Vliet and Reeve and Chair Eden. Commissioners Malarkey and Bennett abstained.

L. Temporary Rule Adoption: Rulemaking to Extend the Vehicle Inspection Program Hardship Waiver

Annette Liebe, Acting Air Quality Division Administrator, and Lauri Cook, SIP Coordinator, made a presentation regarding the need to extend the low-income waiver for the enhanced vehicle inspection program. The presentation included a brief summary of the initial low-income waiver rule and its status. The rule proposal presented for consideration by the Commission called for extending the current low-income waiver rule for 180 days to bridge the time gap between the expiration of the initial waiver rule under a pilot program and the adoption of a permanent rule.

Commissioner Reeve noted the sentence on page two of the report indicated there were "negligent" impacts to air quality. Staff responded that the report should read "negligible" impacts. Commissioner Reeve also inquired about the removal of the words "one-time" from the rule. Staff's response was originally the pilot program was developed to evaluate the waiver program based on a two-year period, which is one registration cycle, and therefore it was limited to a single occurrence. A low number of

waivers were granted, and there was an economic need for these applicants. This issue would be further evaluated in the permanent rulemaking. A motion was made by Commissioner Van Vliet to approve the temporary rule for adoption with the correction. It was seconded by Commissioner Reeve and it carried with five "yes" votes.

M. Temporary Rule Adoption: Amendment of the Expiration Date of New or Innovative Technology or Material Approvals Granted by the Director

Mike Llewelyn, Water Quality Administrator, Ed Woods, Land Applications and Licensing Manager, and Sherman Olson, On-site staff, presented a brief summary of the staff report to the Commission. By extending the expiration date for approvals granted by the Director, the Department would have the opportunity to have the Technical Review Committee review the new innovative technology and materials rules, and make recommendations, as appropriate, for change. The Department would consider the committee's recommendations and could initiate a rulemaking effort to be completed prior to the expiration of the temporary rule.

Representatives for Infiltrator Systems, Inc., Michael Campbell and Todd Winkler, spoke to the Commission regarding this matter. The position of Infiltrator Systems, Inc. initially was not to opposed the temporary rule extending the expiration date. However, because this corporation has put forth the effort to develop a proposal to demonstrate performance of their product, the corporation has changed its position and now does not support the staff recommendation.

After discussion, a motion was made by Commissioner Van Vliet to adopt the proposed temporary rule. The motion was seconded by Commissioner Malarkey and it carried with four "yes" votes. Commissioner Reeve voted no.

N. Commissioners' Reports

Chair Eden updated the Commission on her meetings regarding the Umatilla Chemical Depot.

O. Director's Report

In January, Senator Veral Tarno from Coos and Curry Counties held a "town hall" hearing at the Capitol about Oregon Department of Agriculture's (ODA) Areawide Water Quality Management Planning, also known as SB 1010 plans. ODA's proposed Umpqua Basin Plan and rule has met strong opposition from the agricultural community in that area. Over 200 people attended the Salem meeting. Concerns ranged from private property taking to lack of public notification. DEQ testified regarding the relationship of SB 1010 plans to the Total Maximum Daily Load (TMDL) program. ODA Director Phil Ward is following up by speaking with several Healthy Streams Partnership members with positive results. EPA and DEQ continue to participate in settlement discussions with Northwest Environmental Advocates (NWEA) and the National Environmental Defense Council (NEDC) regarding a 1997 lawsuit on Oregon's TMDL program. Settlement discussions have stalled due to complications arising from the re-emergence of a named plaintiff to a separate 1986 Consent Decree related to the TMDL Program.

The Governor's office and DEQ are continuing conversations with EPA, federal, state and tribal natural resource trustees, and the Portland Harbor Group to reach an agreement for the state to manage the Portland Harbor cleanup. This would avoid a federal Superfund listing of Portland Harbor. The Portland Harbor Sediment Investigation Work Plan is nearing completion. DEQ also started upland site discovery work and the potentially responsible party's list has expanded from the original 17 to nearly 35.

The Governor formed the Willamette Restoration Initiative (WRI) to build political consensus for program support and policies to improve and protect the Willamette Basin. DEQ Director Lang Marsh is on the board of directors, and DEQ Western Region Administrator Steve Greenwood was the chair of the WRI Clean Water Workgroup. The workgroup recommendations to the WRI Board at a recent two-day meeting included improving riparian zone management, focusing on non-point sources of pollution, and developing mechanisms for effluent and pollutant trading. The WRI Board will refine recommendations from four strategic workgroups into a draft restoration strategy and workplan. The board will submit a

revised Willamette Restoration Strategy to the Governor's office for legislative consideration in May. There will be several public workshops and hearings about the proposed strategy before finalization in the fall.

Construction of Combined Sewer Overflow (CSO) control facilities for the Columbia Slough is scheduled for completion in December. Control facilities for the Willamette River are in the planning stage. The City has developed a Clean River Plan to address CSOs, storm water, endangered species, water quality, and habitat issues in the lower Willamette and tributary streams in a comprehensive and coordinated way. DEQ has been meeting with city representatives to try to understand the Clean Water Plan and its assumption of a nine-year delay in CSO control.

The New Carissa wreck removal operations were suspended due to extreme weather last October. It is doubtful that refloating the shipwreck is a viable removal method due to further degradation of the shipwrecked structure. The final disposition of the stern will be determined in the spring when the remainder of the stern section will be re-examined by DEQ and the responsible party to determine removal options. The New Carissa Unified Command, made up of representatives of the Coast Guard, DEQ and responsible party, signed its last Decision Memo on February 1. DEQ, representing state interests, accepted the federal closure of the emergency response, but will continue working with the responsible party. State statutes require the responsible party to continue monitoring and removing oil as necessary. State interests also include attractive nuisance and liability concerns and the long-term fate of the stern. The one-year anniversary of the ship's grounding was February 4.

Director Lang Marsh has embarked on a strategic outreach effort to travel around Oregon talking to citizen's groups, neighborhood associations, schools, media, and various influential community members. During these events, the Director talks about the Oregon environment and the work that DEQ is doing as well as takes questions, input, and suggestions from the audience. His speeches highlight three themes: cleaning up rivers and streams; reducing people's exposure to toxics; and getting more community involvement in solving environmental problems. On January 26 and 27, the Director had a successful tour of the Salem and Eugene areas. The Director will do a Central Oregon speaking tour February 14, 15 and 16.

Governor Kitzhaber recently announced his intent to issue an executive order in March to make state government a leader in the fight to sustain our environment and quality of life in the face of a growing population. The order will direct state agencies to make more efficient use of energy and materials.

There being no further business, the meeting was adjourned at 2:47 p.m.