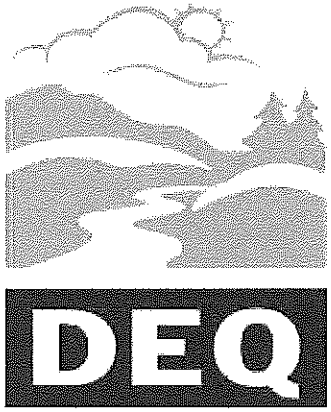
OREGON
ENVIRONMENTAL QUALITY
COMMISSION MEETING
MATERIALS 01/11/2001



State of Oregon
Department of Environmental Quality

AGENDA

ENVIRONMENTAL QUALITY COMMISSION MEETING

January 11-12, 2001
The Riverhouse Resort
3075 North Highway 97
Bend, 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, January 12, 2001** 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.

The Commission will tour the Old Mill Site and Beaver Coaches before the meeting

Thursday, January 11, 2001
Beginning at 3:00 p.m.

A. **Informational Item**: Chemical Demilitarization Program Update

B. **Action Item**: Review of Class 3 Permit Requests for the Umatilla Chemical Depot Facility (UMCDF)

C. **Informational Item**: Environmental Cleanup Financing Committee Report

The Environmental Quality Commission will hold an executive session at 8:00 a.m. The session will be to update the Commission on pending litigation involving the Agency. The executive session is to be held pursuant to ORS 192.660(1)(h). Only representatives of the media can attend but will not be allowed to report on any of the deliberations during the session.

Friday, January 12, 2001
Beginning at 8:30 a.m.

D. **Approval of Minutes**

E. **Action Item**: Contested Case No. WMC/T-ER-99-107 re: Dan's Ukiah Service

F. †**Rule Adoption**: Air Quality Nuisance Control Rules

G. **Informational Item**: Remote Sensing of Vehicle Exhaust

H. **Informational Item:** Overview of Revisions to Point Source Air Management Rules

I. †**Rule Adoption**: Repeal of OAR 340-41-0470(9) The Tualatin Sub-basin Rule for Total Phosphorous and Ammonia

J. **Informational Item**: Briefing on LaPine Project

K. †**Rule Adoption**: Amend Tax Credit Rules to Include Nonpoint Source Pollution Control Facilities as an Eligible Facility for Tax Credit Purposes

L. **Informational Item**: Budget Update

M. **Commissioners' Reports**

N. **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 has set aside March 8-9, 2001, for their next meeting. It will be held in Hermiston, 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 23, 2001

State of Oregon
Department of Environmental Quality Memorandum

To: Environmental Quality Commission **Date:** December 22, 2000

From: Stephanie Hallock, Director S. Hallock

Subject: Agenda Item B, EQC Meeting, January 12, 2001

Statement of Purpose

The Department of Environmental Quality (DEQ, Department) is requesting direction and guidance from the Environmental Quality Commission (EQC, Commission) with respect to the final decision authority for the following Class 3 permit modification requests submitted by the U. S. Army regarding the Umatilla Chemical Agent Disposal Facility:

- UMCDF-00-022-MISC(3) "Incorporation of 40 CFR 264 Air Emission Standards"
- UMCDF-00-004-WAST(3) "Permitted Storage in J-Block"
- UMCDF-00-016-WAST(3) "Secondary Waste Compliance Schedule"
- UMCDF-00-021-DUN(3) "Dunnage Incinerator and Associated Pollution Abatement System Improvements"

Summary descriptions for these permit modification requests and public comments received are provided in Attachment A.

The Commission's direction on this request will determine whether the Department will directly make the final decision to approve or deny any/all of these Class 3 permit modification requests, or whether that final decision authority will rest with the Commission, after the Department completes review of the submitted requests.

Background

In February 1997, the Commission granted final approval for and issued to the U. S. Army a Hazardous Waste Treatment and Storage Permit (HW Permit) for construction and operation of the Umatilla Chemical Agent Disposal Facility (Disposal Facility). The Disposal Facility is located within the boundaries of the Umatilla Chemical Depot (Depot) near Hermiston, Oregon and will be used for incineration and thermal destruction/treatment of all chemical agents (blister and nerve agents), chemical agent munitions and bulk items, and chemical agent-contaminated waste streams at the Depot. In January 1998, the Commission granted final approval of a Class 3 permit modification request [UMCDF-97-002-RDC(3E)], adding the Army's designated contractor, Raytheon Demilitarization Company, as a Co-Permittee and Co-Operator. There have been no additional Class 3 permit modification requests until the four which are the subject of this staff report.

Authority of the Commission with Respect to the Issue

The Commission granted final approval to issue the HW Permit in accordance with ORS 466 and OAR 340-120. Typically, permit modification requests are submitted and processed in accordance with the requirements of 40 CFR 270.42 and OAR 340-105-0041, and are approved primarily by the Department, except in special circumstances or subject to the intentions of the Commission. Class 3 permit modifications are considered substantial alterations to the permitted facility, or represent significant policy issues of a sensitive nature that are of concern to the Department, Commission and/or general public. With regard to approval signatures from both the Commission and Department on the HW Permit, the Department believes that it is appropriate and warranted for the Commission to exercise final decision authority on Class 3 permit modification requests representing significant changes or issues of interest.

Evaluation and Discussion of the Issue

The Class 3 permit modification request UMCDF-00-022-MISC(3) "Incorporation of 40 CFR 264 Air Emission Standards" is required by permit conditions II.P.2.ii. and II.P.2.iv. It addresses specific changes to facility design to comply with organic emission standards in 40 CFR 264, Subparts BB and CC. Although these standards have been in place for some time, the submission of this modification request was delayed pending guidance for implementation from the U.S. Environmental Protection Agency (USEPA). Most of these changes are technical in nature, including changes in valve types, inspection procedures and similar changes to ensure control of emissions of organic vapors. Most of these changes will be inside the Munitions Demilitarization Building, which also has a ventilation system to control emissions. The Department has been involved in discussions with both the permittee and the USEPA regarding these changes, and anticipates no significant problems in ensuring compliance. The primary issue with this permit modification request will be coordinating review and processing with a parallel effort by USEPA.

The submittal of UMCDF-00-004-WAST(3) "Permitted Storage in J-Block" reflects proposed changes to secondary waste storage. Secondary waste storage consists of chemical agent contaminated materials that are generated during the treatment and storage of the chemical agent munitions, and which must be further treated to remove the chemical agent contamination prior to off-site disposal. Originally, the Army proposed that secondary waste would be temporarily stored apart from the Disposal Facility before undergoing final treatment. The Army then decided it would be better to store secondary waste at the Disposal Facility, and the necessary storage igloos should be transferred to the Disposal Facility. As a result, these storage igloos were removed from the overall Storage Permit Application for the Depot, and this separate Class 3 permit modification request was submitted for the Disposal Facility. Because there are similar storage issues, such as monitoring and inspections, the Department is processing this Class 3 request in parallel to review of the overall Depot Storage Permit Application as much as possible. This will ensure consistency in final requirements for storage of chemical agent contaminated waste. This Class 3 permit modification request is an integral piece of the Army's strategy for management of Disposal Facility secondary process wastes. The Commission has shown significant interest in the Army's management of secondary wastes and the Department's role in overseeing and approving the final plan.

Both of the remaining Class 3 permit modification requests, UMCDF-00-016-WAST(3) "Secondary Waste Compliance Schedule" and UMCDF-00-021-DUN(3) "Dunnage Incinerator and Associated Pollution Abatement System Improvements", resulted from the August 18, 1999 EQC meeting in which the Army presented a proposed secondary waste management plan. The Army proposed to commit to compliance dates for a series of actions resulting in final treatment and disposal of all secondary wastes. The Army would be able to start operation of the Disposal Facility without first installing the Dunnage Incinerator (DUN) or other secondary waste treatment technology. At that meeting, the Commission expressed concern over the proposed approach, but directed the Department to meet with the Army to determine if an acceptable compromise could be reached. Subsequent correspondence from the Commission (see Attachment B) included guidance on issues which would need to be resolved before the Commission would look favorably on the Army's proposal. The Commission also indicated an expectation that the Army would proceed with a planned redesign of the DUN to remedy known deficiencies, and would submit a Class 3 permit modification request to update the HW Permit to reflect the new design. The Commission also indicated an expectation that they would have to approve any compliance schedule approach, and that there would be subsequent opportunities for public input in the process.

Summary of Public Input Opportunity

As part of the normal process for permit modification requests, each of the subject Class 3 permit modification requests have undergone an initial 60-day public comment period established by the permittee in accordance with requirements of 40 CFR 270.42(c). The Department received public comments regarding each of the four subject Class 3 permit modification requests, and will take those comments into account during ongoing reviews. After the Department has completed its review and drafted revised permit language, the public will have another 45-day opportunity to provide comment on each permit modification request. The Department will consider all comments received before preparing the final, revised permit language for EQC consideration and approval.

With regard to formal direction and guidance from the Commission to the Department as to final approval of the four subject Class 3 permit modification requests, there is no regulatory requirement for public input to such a decision by the Commission. The public can, of course, speak to the Commission during Public Forum at the EQC meeting.

Intended Future Actions

The Department will continue to review and process the subject Class 3 permit modification requests until sufficient information has been obtained to decide whether to deny or approve each of the Class 3 requests. At that time, dependent upon direction/guidance provided by the Commission, the Department will either directly approve/deny the request(s) or will prepare a decision recommendation for the Commission's consideration and action. In addition, as soon as possible, the Department will prepare and provide the Commission with an anticipated decision-making and public involvement schedule for each Class 3 permit modification request.

Department Recommendations/Conclusions

The Department recommends that the Commission delegate final decision authority to the Department for the Class 3 permit modification request to incorporate air emission standards [UMCDF-00-022-MISC(3)], due to the technical nature and lack of significant policy implications. The Department recommends that the Commission retain final decision authority for the remaining three Class 3 permit modification requests [UMCDF-004-WAST(3), UMCDF-00-016-WAST(3) and UMCDF-00-021-DUN(3)] due to the Commission's previously expressed interest in the resolution of secondary waste management issues, in which these three permit modification requests play a significant role.

Attachments

The following attachments are included with this staff report:

Attachment A: Class 3 Permit Modification Request Summaries

- UMCDF-00-022-MISC(3)
- UMCDF-00-004-WAST(3)
- UMCDF-00-016-WAST(3)
- UMCDF-00-021-DUN(3)

Attachment B: Correspondence related to the August 18, 1999 EQC Meeting and the Army's Presentation on the Dunnage Incinerator and Secondary Waste Management

- Letter, dated September 24, 1999; Carol Whipple, EQC Chair to Dr. Theodore Prociv and Mr. James Bacon of the Army. [DEQ Item No. 99-1640]
- Letter, dated December 17, 1999; James Bacon, U. S. Army to Melinda Eden, EQC Chair. [DEQ Item No. 99-2272]
- Letter, dated January 13, 2000; Melinda Eden, EQC Chair to Judge Terry Tallman, and Commissioners John Wenholz and Dan Brosnan of Morrow County. [DEQ Item No. 00-0194]

Approval

Author: Thomas G. Beam/ Thomas G Beam
Phone Number: (541) 567-8297, ext. 30

Program Administrator: Wayne C. Thomas/ Wayne C. Thomas

Date Prepared: December 21, 2000

UMCDF CLASS 3 PERMIT MODIFICATION REQUEST SUMMARY

Tracking Number:	**UMCDF-00-022-MISC(3)**
Title:	**"Incorporation of 40 CFR 264 Air Emission Standards"**
Submitted:	September 19, 2000
Basic Description/Purpose:	Revise the UMCDF HW Permit and RCRA Part B Permit Application to implement changes bringing the Facility into compliance with the organic air emission standards of 40 CFR 264.1050 through 264.1091 (Subparts BB and CC).
Initial Public Informational Meeting:	October 17, 2000
Initial Public Comment Period:	September 19, 2000 to November 20, 2000
Public Comments Received:	One set (CTUIR)
Summary of Public Comments:	The primary focus of the comments received was on whether or not a complete evaluation had been performed by the Permittee in determining all potential levels of air emission controls for organic vapors. There was also some question as to exactly what types of waste containers and which areas of the Facility are subject to these air emission standards.
Current Status:	Submittal undergoing initial Department review.
Initial Department Feedback:	The Department is not far enough along in its review to have any initial feedback on the proposed changes. However, the Department worked closely with the Permittee during the development of this submittal and does not expect any significant surprises. This Permit Modification Request is being processed by the Department in parallel with an identical Permit Application to EPA, Region X for a Subpart BB/CC "mini permit". This is necessary because the Department has not yet been authorized to administer this portion of the federal RCRA program. It is expected that both the EPA Subpart BB/CC Permit language and the revised UMCDF HW Permit language will be identical.
ETA for Final Decision:	Fall to Winter 2001
Recommended Decision Authority:	DEQ

UMCDF CLASS 3 PERMIT MODIFICATION REQUEST SUMMARY

Tracking Number:	**UMCDF-00-004-WAST(3)**
Title:	**"Permitted Storage in J-Block"**
Submitted:	February 29, 2000
Basic Description/Purpose:	Revise UMCDF HW Permit to include additional permitted storage capacity (igloos at the Umatilla Chemical Depot) for the anticipated quantities of UMCDF secondary waste generation, which will need to be stored until it can be appropriately treated prior to disposal.
Initial Public Informational Meeting:	April 4, 2000
Initial Public Comment Period:	February 29, 2000 to May 1, 2000
Public Comments Received:	Three sets (CTUIR, Morrow County, GASP et al.)
Summary of Public Comments:	Some of the more significant issues/concerns raised in the submitted comments related to the amount of requested additional storage capacity, the adequacy of igloos to store the proposed waste streams, the duration of expected storage, the storage of liquid waste, the additional risk associated with additional storage of agent-contaminated waste, and the lack of adequate detail to support the proposed changes.
Current Status:	The Department issued a Notice of Deficiency (NOD) on June 7, 2000. A Permittee Response was received on August 8, 2000. The Permittee Response is currently being reviewed. The Department expects to issue a 2nd NOD to address unresolved concerns.
Initial Department Feedback:	The original submittal was significantly lacking in pertinent details necessary for a complete review and evaluation. The Department's initial review of the Permittee's NOD response indicates a significant improvement in the level of detail provided to support the proposed changes. In general, the Department agrees that there will be a need for additional permitted storage capacity for agent-contaminated secondary waste streams awaiting final treatment. It is expected that all issues and concerns will be eventually resolved and revised draft Permit language will be prepared for public comment and eventually Commission consideration.
ETA for Final Decision:	Summer 2001
Recommended Decision Authority:	EQC

UMCDF CLASS 3 PERMIT MODIFICATION REQUEST SUMMARY

Tracking Number:	**UMCDF-00-016-WAST(3)**
Title:	**"Secondary Waste Compliance Schedule"**
Submitted:	June 27, 2000
Basic Description/Purpose:	Revise UMCDF HW Permit to provide a clear, defensible and enforceable path forward for identifying, developing and implementing appropriate treatment technologies for all secondary waste streams generated at UMCDF and UMCD, while allowing the Army to proceed with trial burns and surrogate operations.
Initial Public Informational Meeting:	July 18, 2000
Initial Public Comment Period:	June 27, 2000 to August 28, 2000
Public Comments Received:	Two sets (CTUIR, Morrow County)
Summary of Public Comments:	Some of the more significant issues/concerns raised in the submitted comments related to the lack of "teeth" in the proposed compliance schedule, the lack of a final decision on the DUN before start of hazardous waste operations, the lack of agent-free criteria prior to consideration of this proposal, the large quantities of wood to be processed, uncertainties in the proposed technologies (e.g. CMS), a lack of developed evaluation criteria for the new technologies, and the lack of a fallback plan if the technologies under consideration don't work.
Current Status:	The Department issued a Notice of Deficiency (NOD) on 10/10/00. A Permittee Response was received on December 11, 2000. The Permittee Response is currently being reviewed. Due to significant unresolved issues, the Department expects to issue a 2nd NOD prior to Spring 2001.
Initial Department Feedback:	Based on the original submittal and subsequent discussions with the Permittee, the Department is not encouraged about the chances for success of the compliance schedule approach to resolve secondary waste management issues. The submittal is significantly lacking in detail and firm commitments to keep the evaluation process moving forward and reaching a final decision. Major improvements in the proposal will need to be achieved through the NOD process in order for the Department to support the Permittee's proposal and proceed to draft revised Permit language for the Commission's consideration.
ETA for Final Decision:	Summer to Fall 2001
Recommended Decision Authority:	EQC

UMCDF CLASS 3 PERMIT MODIFICATION REQUEST SUMMARY

Tracking Number:	**UMCDF-00-021-DUN(3)**
Title:	**"Dunnage Incinerator and Associated PAS Improvements"**
Submitted:	September 19, 2000
Basic Description/Purpose:	Revise the UMCDF HW Permit and RCRA Part B Permit Application to reflect the recently updated and re-designed Dunnage Incinerator (DUN). The decision on whether to actually install the Dunnage Incinerator is proposed to be addressed as part of the approach outlined in the Secondary Waste Compliance Schedule Class 3 Permit Modification Request UMCDF-00-016-WAST(3) for resolution of secondary waste management issues.
Initial Public Informational Meeting:	October 24, 2000
Initial Public Comment Period:	September 19, 2000 to November 20, 2000
Public Comments Received:	Two sets (CTUIR, GASP et al.)
Summary of Public Comments:	The more significant comments received focused on the apparent omission from the updated DUN design of many of the specific improvements recommended by the Army's own 1999 DUN Improvement Options Feasibility Study. There was also some objection to any Department consideration of allowing the Army to start operations prior to installation of the DUN, since that is the only currently permitted technology for treatment of secondary waste. Other comments questioned the lack of and/or inadequacy of risk assessment efforts to support the proposed change, whether or not the Army has any intention of actually operating the redesigned DUN, and whether or not the Army has misrepresented the capabilities of its treatment units during the permitting process.
Current Status:	Submittal undergoing initial Department review.
Initial Department Feedback:	The Department is not far enough along in its review to have any significant feedback on the proposed changes. It has, however, noticed that at least some of the improvements recommended by the Army's DUN Improvement Options Feasibility Study, do not appear to be incorporated into the updated DUN design, as noted in the received public comments.
ETA for Final Decision:	Fall to Winter 2001.
Recommended Decision Authority:	EQC

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99-1610

State of Oregon
Department of Environmental Quality

FILE

RECEIVED
SEP 28 1999
OFFICE OF THE DIRECTOR

Oregon
ENVIRONMENTAL QUALITY COMMISSION

September 24, 1999

Dr. Theodore Prociv
Assistant Secretary of the Army
Office of the Assistant Secretary of the Army
Acquisition, Logistics, and Technology
2511 Jefferson Davis Highway, Room 11300
Arlington, VA 22202

Mr. James L. Bacon
Program Manager for Chemical Demilitarization (PMCD)
ATTN: SFAE-CD-Z, Building E4585
Corner of Hoadley and Parrish Roads, Edgewood Area
Aberdeen Proving Ground, Maryland 21010-5401

STATE OF OREGON
DEPARTMENT OF ENVIRONMENTAL QUALITY
RECEIVED
OCT 04 1999
HERMISTON OFFICE

Re: Follow-up to August 18, 1999
Environmental Quality Commission meeting

Dear Dr. Prociv and Mr. Bacon:

Thank you both for your personal attendance at the meeting of the Environmental Quality Commission on August 18, 1999. The Commission has considered the information you presented about the secondary waste treatment technologies that the Army is studying for utilization at the Umatilla Chemical Agent Disposal Facility (UMCDF). The information was disconcerting, to say the least.

The UMCDF hazardous waste permit that the Commission approved in 1997 permitted five treatment units for all waste stored at the Umatilla Chemical Depot, to include the wastes generated by any activities (past, present, or future) related to the storage, treatment, or disposal of the chemical weapons stockpile. The Dunnage incinerator was the treatment unit designated for secondary wastes. The Army has now come before the Commission, almost three years later and with 60% of the facility constructed, and informed us that the Dunnage incinerator is "too expensive" and has "throughput" problems.

We want to emphasize to you that the primary mission given to the Commission by the Governor of the State of Oregon is the protection of human health and the environment. When a Permittee from a hazardous waste facility in Oregon approaches the Commission concerning major modifications to their permit, the Commission's responsibility is to insure that any modifications do not impact human health and the environment and will result in adequate protection for the citizens of Oregon. Although the Commission appreciates the need to save the taxpayer's money, the cost to the Permittee to conduct operations in a protective manner and in compliance with their Permit is rarely a key criterion when evaluating a Permittee's request.

The Commission is very concerned about the potential for "legacy wastes" remaining at the Umatilla Chemical Depot after the chemical weapons themselves have been

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

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destroyed. The hazardous waste permit granted to the U.S. Army in 1997 was crafted to ensure the destruction of all chemical warfare materiel stored at the Depot at the time of permit issuance, and any and all byproducts from the storage activities or the demilitarization process.

As discussed at the August 18 meeting, the Commission has requested the Department of Environmental Quality staff work with the Army to insure that any Permit Modification Request concerning a compliance schedule contains sufficient information for the Commission to evaluate its merits on the basis of providing equal or better protection to the citizens of Oregon than that originally proposed by the Army and permitted by the Commission.

Any Permit Modification Request submitted to the Department of Environmental Quality that involves the implementation of a Compliance Schedule for developing secondary waste treatment technologies should include the identification and amount of all waste streams, proposed treatment methodology (or treatments being researched), and proposed disposal methods. The Army should clearly define in the Modification Request any benefits to the citizens of Oregon in terms of protection of public health and the environment, and the risks of the various treatment options, including the risks caused by potential delays in the destruction schedule.

The Commission does not want to delay the start of hazardous waste treatment operations at the Umatilla Chemical Depot, and yet we would hesitate to approve any Permit Modification Request that allows the generation of wastes for which there is no permitted treatment technology in place to process the waste. As I indicated at the August 18, 1999 work session, I don't think it's an unreasonable request from the state to insist that the entire process be operational before it starts. The Commission has always expected that all the permitted treatment units will be operational prior to the start of the processing of hazardous wastes.

The Commission learned from the Army that the existing permitted DUN must be modified to improve processing throughput and efficacy. We believe the Army should move forward immediately with implementing improvements to the design of the Dunnage incinerator and any permit modifications should be approved by the Department prior to the start of hazardous waste operations. This approach will provide a degree of assurance for the Commission that the Army is committed to implementing a technology at Umatilla that is capable of processing the agent contaminated secondary wastes.

Sincerely,

Carol Whipple

Carol Whipple, Chair
Environmental Quality Commission

cc: Governor John Kitzhaber
Environmental Quality Commission members
Langdon Marsh, Director, DEQ
Wayne Thomas, Umatilla Program Manager, DEQ
Raj Malhotra, Site Manager, Program Manager for Chemical Demilitarization
LTC Woloszyn, Commander, Umatilla Chemical Depot
Jay Bluestein, Site Project Manager, Raytheon

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92.05

FILE

DEPARTMENT OF THE ARMY
PROGRAM MANAGER FOR CHEMICAL DEMILITARIZATION
ABERDEEN PROVING GROUND, MARYLAND 21010-4005

99-2272

December 17, 1999

Program Manager for
Chemical Demilitarization

RECEIVED
DEC 21 1999
IN-993652
PMCD

Ms. Melinda Eden
Chair, Environmental Quality Commission
811 SW Sixth Avenue
Portland, Oregon 97204

Dear Ms. Eden:

Thank you for the letter of September 24, 1999, clarifying the Commission's views relative to the processing of secondary waste at the Umatilla Chemical Agent Disposal Facility (UMCDF). Only through continued effective and direct communication can we achieve our mutual goal of the safe and environmentally responsible destruction of the chemical agents and munitions stored at the Umatilla Chemical Depot.

The Chemical Stockpile Disposal Project is managed to ensure full compliance with Public Law 99-145, which requires the program to ensure maximum protection to the general public, the workers involved in the demilitarization effort, and the environment. Any changes to how we would propose to carry out destruction must meet the stringent mandate that this public law creates. We share the Commission's priority in ensuring that protection of human health and the environment remains paramount in carrying out the demilitarization effort.

We are beginning the effort to design the specific changes to the Dunnage Incinerator which are necessary to improve its performance. We will use the information gained by this engineering process to continue to evaluate the options for destruction of secondary wastes at the UMCDF.

I would be remiss, however, if I did not point out that it is also our responsibility to ensure that the approaches used to carry out the disposal effort are fiscally responsible and remain a sound investment by the American taxpayers. That is not to say or imply that any less costly approach can be considered; however, there may be opportunities for equally-protective, less-expensive approaches to be implemented. This is important from a financial perspective. Divorcing the financial realities of the demilitarization effort from the public safety issue is not representative of the realities facing this project. In a time of increasing competition for tax dollars, budget reductions or cuts in programs, to include the demilitarization program, are common. The best way to ensure that the

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destruction of the Umatilla stockpile and all associated wastes is not artificially delayed is to continue to identify and implement opportunities for reducing cost while still meeting the stringent maximum protection mandate of the program. I believe that the process outlined by the Army at our August 18, 1999, meeting is wholly consistent with this approach and represents a complete commitment on the part of the Army to deal with all wastes in a responsible manner--both from a public health and environmental protection perspective as well as from a fiduciary one.

I share the Commission's concerns about any delay to the start of agent operations at the UMCDF. The greatest risk to the public remains the continued storage of the chemical stockpile; and I am committed to continuing to work with the Commission on our path forward.

As presented in our August meeting, we are evaluating and demonstrating alternate secondary waste treatment processes as part of the Johnston Atoll Chemical Agent Disposal System closure operation. In preparing our permit modification, we are working closely with the Oregon Department of Environmental Quality (DEQ) to develop a Compliance Schedule for the implementation of these processes at UMCDF.

Since our meeting, we have met with the DEQ on a weekly basis concerning secondary waste as we move forward to submit a Compliance Schedule to the Commission. In addition, we have formed a secondary waste Integrated Product Team which includes membership from the DEQ. The goal of the team is to assist the Permittees in defining the requirements necessary to demonstrate to the citizens of Oregon, the Environmental Quality Commission, and the DEQ that the Permittees have developed viable secondary waste treatment technologies for all wastes currently stored at the Umatilla Chemical Depot and any waste expected to be generated by operations at the UMCDF. This group will be used to develop the proposed Compliance Schedule.

Again, I thank you for the Commission's letter. I am committed to working with the Commission and Oregon DEQ in order to achieve our mutual goal of the safe and environmentally responsible destruction of the chemical agents and munitions stored at the Umatilla Chemical Depot. This commitment extends to secondary wastes as well, resulting in removing the legacy of chemical weapons from the State of Oregon forever.

Sincerely,

James L. Bacon

James L. Bacon
Program Manager for
Chemical Demilitarization

Attachment B - Page 4

FILE

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00-0194

Oregon

January 13, 2000

STATE OF OREGON
DEPARTMENT OF ENVIRONMENTAL QUALITY
RECEIVED

FEB 03 2000

HERMISTON OFFICE

ENVIRONMENTAL
QUALITY
COMMISSION

Judge Terry Tallman
Commissioner John Wenholz
Commissioner Dan Brosnan
Morrow County Court
P.O. Box 788
Heppner, OR 97836

Dear Judge Tallman, and Commissioners Wenholz and Brosnan:

We wish to express our thanks to Morrow County for attending the Environmental Quality Commission (EQC) special work session on Umatilla in Portland on August 18, 1999. We want you to know that your commitment and support of the safe and timely destruction of the chemical agents stored at Umatilla Chemical Depot (UMCD) are very important to the Environmental Quality Commission.

One of the purposes of the August EQC meeting was for the Commission to hear directly from the Army on the issue of the Dunnage Incinerator and the management of secondary wastes at the Umatilla Chemical Agent Disposal Facility (UMCDF). The Army proposed to the Commission that it be allowed to postpone the installation of the Dunnage Incinerator at UMCDF during evaluation of other technologies to treat agent-contaminated wastes originally destined for the Dunnage Incinerator.

A Permittee of a hazardous waste facility may approach the Commission concerning major modifications to its permit, and the Commission's responsibility is to ensure that any modifications do not affect human health and the environment. The primary basis of the Army's justification for the proposal seemed to be cost savings to the taxpayer. Although the Commission appreciates the Army's desire to save the taxpayer's money, the cost to the Army to conduct operations in a protective manner and in compliance with the Permit rarely is a key criterion when evaluating a Permittee's request.

The Army's proposal would require a longer period of storage of secondary wastes at the Umatilla Chemical Depot (UMCD) than originally anticipated. Because of the high risk associated with continued storage of chemical agent munitions versus the much lower risk of secondary waste storage, the Commission does not want to delay the start of hazardous waste treatment operations at UMCDF. However, we would hesitate to approve any UMCDF Permit Modification Request that allows the generation of wastes when there is no permitted treatment technology in place to process the waste. The Commission has consistently maintained that Umatilla will not be the testing facility for unproven treatment technologies, and we are adhering to that position.

The Hazardous Waste Permit issued by the Commission in 1997 already assumed the need for limited storage of secondary waste generated by the treatment operations of the Disposal Facility. The nature of operations at UMCDF, especially the prohibition of multi-agent processing, results in secondary wastes that must be processed after completion of agent-specific campaigns. It is therefore important to recognize that storage capacity for secondary wastes must be provided under any circumstances, either through a modification to the existing UMCDF permit, or through a Depot-specific Resource Conservation and Recovery Act (RCRA) storage permit.

The Army submitted a RCRA Part B Storage Permit Application on March 24, 1999, for the storage of hazardous wastes at the Umatilla Chemical Depot. The Application described how the Army intends to manage waste munitions and how it will store maintenance and dunnage wastes generated from the operation of the UMCDF. The Department of Environmental Quality

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Attachment B - Page 5

(DEQ) had completed initial review of the Application and issued a Notice of Deficiency (in two parts) to the Army on May 24 and July 27, 1999. On Monday, September 27, 1999 the Army withdrew the March Storage Permit Application because it has now decided to allocate responsibilities for storage in a different way.

The Army is now contemplating limiting the Depot storage responsibilities to the munitions and the wastes derived from their maintenance activities. The "dunnage" and other process wastes that will be generated at the Disposal Facility will be UMCDF's responsibility instead of transferring these wastes back to the Depot. If this permitting approach is followed, then storage of the UMCDF-generated wastes will be addressed through a Class 3 permit modification to the Disposal Facility permit that will require EQC review and approval. The Class 3 permit modification process will follow the RCRA rules regarding public participation, and the modification must be approved before the start of thermal operations at UMCDF.

The Permit for the Storage of Hazardous Wastes at UMCD will not be issued by the EQC, but by the Department. The Department has advised the Army that the UMCD storage permit must be issued prior to the start of thermal operations at the UMCDF, even though the UMCD storage permit will not now include UMCDF wastes. The EQC is in full support of the Department's position. Once a complete Application has been received, the Department will begin preparing a draft Storage Permit that will undergo the RCRA public review and comment process. The Department intends to hold a public information meeting in the local area prior to drafting any Storage Permit.

As you are aware, the Commission did not take any action at the August meeting except to direct the Department staff to meet with the Army to further explore the Army's proposal. If the Army decides to submit a UMCDF permit modification request to formalize the August proposal for a "compliance schedule," the Army will have to come before the Commission, and there will be an opportunity for formal public comment.

Once again, I appreciate your commitment to resolving this significant environmental issue as soon as possible to protect the citizens of Oregon.

Sincerely,

Melinda S. Eden
Chair

cc: Environmental Quality Commissioners
Langdon Marsh, Director, DEQ
Stephanie Hallock, Office of the Governor
Wayne C. Thomas, Manager, Umatilla Program

State of Oregon

Department of Environmental Quality Memorandum

Date: December 18, 2000

To: Environmental Quality Commission

From: Stephanie Hallock, Director for Myrlia Taylor

Subject: Agenda Item C, EQC Meeting January 11, 2001

Statement of Purpose

This report informs the Commission of recent improvements to the Environmental Cleanup Program.

Background

During the 1999-2001 biennium, DEQ undertook the following initiatives to improve the effectiveness of its environmental cleanup programs. Briefly, DEQ:

- Created a new headquarters division to focus more attention on environmental cleanup and spill prevention and response. The 2001-03 budget proposes to make this change permanent.
- Formalized the Independent Cleanup Pathway to assist people in cleaning up contaminated property without ongoing DEQ oversight. Under this program, DEQ reviews reports of completed cleanups provided by property owners. If the cleanup is consistent with state cleanup rules, DEQ issues a "No Further Action" determination. This successful program provides more flexibility and reduces oversight costs.
- Developed an Alternative Dispute Resolution process, which provides a forum for DEQ and participants in the Independent Cleanup Pathway to resolve contested "No Further Action" determinations.
- Prioritized actions to address program issues identified in an independently conducted survey of cleanup program participants. Recommendations include reviewing technical issues, improving communication between DEQ project managers and participants, and improvements in procedures, such as invoice content.
- Established a special Environmental Cleanup Financing Committee to advise DEQ on creative financial solutions to assist and promote

cleanup. The Committee's report recommends several ways that the burden of financing cleanups might be lessened.

DEQ worked with advisory committees on most of these improvements. Two standing environmental cleanup advisory groups, the Environmental Cleanup Advisory Committee and the Voluntary Cleanup Focus Group, assisted DEQ in developing a survey of cleanup program participants, and in identifying areas for improvement. These groups also helped DEQ craft a mechanism to resolve disagreements related to Independent Cleanups, as directed by the Legislature in a 1999 Budget Note.

Independent Cleanup Pathway

In April 1999, DEQ formalized the Independent Cleanup Pathway, which specifies the process for parties who want to clean up contaminated sites without ongoing 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 which 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 later, the Independent Cleanup Pathway adds more definition and certainty to the process.

The Independent Cleanup Pathway provides more flexibility in scheduling the investigation and cleanup, and lowers cost by reducing DEQ oversight. 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, the program also offers an option 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.

The Independent Cleanup Pathway is available for sites ranked 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.

The program has been successful in many respects. As of this writing, 62 sites have entered the Independent Cleanup Pathway. Participation has been about evenly split between those requesting technical consultation before submitting cleanup reports for approval and those simply submitting their final report for approval. A few projects have requested only technical assistance to quickly resolve environmental issues on large development projects. In most cases, DEQ has exceeded the goal of completing reviews within 60 days. This is an important factor for many parties cleaning up properties voluntarily. Average turnaround to date has been about 40 days. The program is also increasing the total number of cleanups completed to DEQ

standards because sites can be cleaned up more quickly. In addition, the technical consultation provision allows property owners to take advantage of DEQ expertise as needed, making it easier to pursue cleanup at their own pace, or phasing the environmental work with other redevelopment activities.

The program is still new and both DEQ and the regulated community are learning about its benefits and limitations. Ongoing program review has revealed at least two improvement areas and DEQ is working on strategies to address them. Of the 25 final reports submitted to date, 11 initially lacked sufficient information for DEQ to issue an NFA. Most of these are being successfully completed with supplemental information. DEQ is developing improved guidance about final report requirements to make the process more efficient for both the participants and DEQ. Similarly, DEQ is also clarifying other aspects of the Independent Cleanup Pathway information packet to reduce the administrative cost of explaining the program to new participants.

Alternative Dispute Resolution

Because cleanups in the Independent Cleanup Pathway occur without ongoing DEQ oversight, there is a potential for disagreement about whether investigation and cleanup was sufficient to protect human health and the environment. With this in mind, the 1999 Legislature directed DEQ to "investigate mechanisms for dispute resolution and mediation for the independent cleanup program to provide for an alternative path when the Department denies the application for a No Further Action determination."

DEQ involved its customers and other stakeholders, in particular the Environmental Cleanup Advisory Committee and the Voluntary Cleanup Program Focus Group, to develop an Alternative Dispute Resolution (ADR) process. While DEQ fully expects Voluntary Cleanup Program and Independent Cleanup Pathway projects to be collaborative processes, it is likely that there will be occasional differences between responsible parties and DEQ. The ADR process now in place will be useful in resolving those differences. Using ADR does not mean compromising environmental standards, but, rather, it allows exploration of options to satisfy multiple needs and interests.

Additional information on the Alternative Dispute Resolution process is available in DEQ's presentation to the Legislative Emergency Board in November, 2000.

Confidential Customer Survey

In early 2000, as a part of its continuing efforts to improve its site response and voluntary cleanup programs, DEQ hired a consultant to conduct a confidential survey of program participants and other interested parties. The intent was to measure customer satisfaction and identify potential areas for program improvement. DEQ collaborated with both the

Environmental Cleanup Advisory Committee and the Voluntary Focus Group to develop questions to be asked of survey participants. The survey included a large-scale telephone survey (305 responses) and 21 more detailed interviews to probe issues identified in the survey.

Using the consultant's final report, DEQ and the two advisory groups met five times in mid-2000 to identify areas for improvement and to develop potential actions to address them. In October, the Environmental Cleanup Advisory Committee produced a prioritized list of recommendations, which fell into three general categories:

- Technical issues, such as reviewing the use of institutional or engineering controls and posting key project documents on DEQ's web site
- Improving communications between DEQ project managers and program participants, including clarifying expectations when participants enter the program
- Procedural improvements, such as improving how DEQ provides oversight cost and time frame estimates, improving invoice content and format, evaluating ways to provide expedited service

Cleanup staff are developing an implementation plan for each of the recommendations. Some may take time to complete, but others may be completed fairly quickly. For example, all DEQ project management staff have received the first phase of training to improve communications. In addition, DEQ has developed a more detailed invoice, which provides more information about the nature of DEQ oversight and related activities. The new detail is expected to be included with invoices in the first part of 2001.

Environmental Cleanup Financing Committee

DEQ established the Environmental Cleanup Financing Committee in April 2000 to explore creative financial solutions to assist and promote cleanup. The impetus for creating the Committee was criticism from cleanup program participants indicating that, in spite of changes over the years to streamline cleanup and reduce costs, the financial burden of conducting cleanup remains too onerous for many responsible parties. Specifically, the Committee's mission was "to identify actions state government could take or encourage that would reduce or eliminate the financial and economic barriers to cleanup, so that private and governmental resources are used efficiently and fairly to achieve the level of environmental protection mandated by the state's environmental cleanup laws."

The Committee, which consisted of three citizen members with financial and legal expertise, met seven times to consider information from several sources, including an environmental consulting firm hired to provide research support, DEQ staff, experts on various topics, and interested

parties. The Committee explored financial and other obstacles preventing site cleanups, reviewed financial tools and opportunities currently available in Oregon and identified potential new solutions for reducing the cost barriers. Public comments relating to the draft recommendations were received in late November and a detailed report was delivered for the Director's consideration in December.

In general, the Committee found that Oregon already has a number of effective tools for financing cleanup of contaminated sites, but that many are underutilized or need to be expanded to meet the needs of those conducting cleanups. Several recommendations making better use of existing resources are contained in the Environmental Cleanup Financing Committee's Report and Recommendations, which is available from the Department and on the DEQ web site.

Authority of the Commission with Respect to the Issue

The Commission has authority to adopt rules changing the operations of the Environmental Cleanup Program. The Commission may also elect to provide the Program advice on other program changes not identified herein.

Alternatives and Evaluation

The Department discussed all possible customer service improvements with our Environmental Cleanup Advisory Committee and Voluntary Cleanup Focus Group. These groups provided information on which ideas should be more fully investigated for program improvements. Additionally the Voluntary Cleanup Focus Group prioritized recommendations for program improvements that are now being incorporated into an implementation plan.

The Environmental Cleanup Financing Committee examined several financing alternatives and rejected them as follows:

Broaden the use of the Solid Waste Orphan Site Account. The Committee noted that the Solid Waste Orphan Site Account funds remain idle. It considered ways in which the funds might be put to use to assist other cleanup efforts not permissible under current Orphan Site laws. These include:

- Use the Solid Waste Orphan Site Account to fund cleanups other than solid waste disposal sites.
- Use the Account to fund financial assistance for "non-orphans", including sites that may be unable to pay, but do not meet DEQ's definition of high environmental priorities.

Use of the Account could include the current excess fund balance, future collections, or both.

While the Committee found these alternatives compelling, it understands that the solid waste disposal industry strongly opposes the use of these funds for other purposes and the Committee does not recommend pursuing legislative changes at this time.

- Require those handling hazardous substances to carry insurance to cover future releases.

The Committee considered the benefits of requiring all those who deal with hazardous substances to carry insurance to enable them to clean up in the event of a release. The Committee received public comments indicating difficulties in implementing such a proposal. Ultimately the Committee determined that this concept would not be of much assistance with the extant large number of sites, which was the Committee's main focus.

Summary of Public Input Opportunity

Stakeholders in the Environmental Cleanup Program have had opportunities to comment throughout the yearlong process. As an example, the Environmental Cleanup Advisory Committee met 5 times, The Voluntary Cleanup Focus Group met 7 times, the Drycleaners Advisory committee met 10 times, and the Environmental Cleanup Financing Committee met 7 times. Each meeting was open to the public and advertised on our agency web page. Additionally, direct mail solicitations for public input were made through the yearlong process.

Conclusions

The yearlong process to identify concerns about DEQ's Environmental Cleanup Program has yielded impressive results. Stakeholders, once seriously concerned about the performance of this program, are vocal supporters. Environmental standards have not changed, only the method in which DEQ addresses its customers has.

Keys to the program's success include delivering the program improvements and monitoring our ability to provide excellent customer service.

Intended Future Actions

The Environmental Cleanup Program will implement customer improvements as identified in our implementation strategy. Additionally, the program will determine ways to monitor program effectiveness and response to customer satisfaction needs.

Department Recommendation

It is recommended that the Commission accept this report, discuss the matter, and provide advice and guidance to the Department as appropriate.

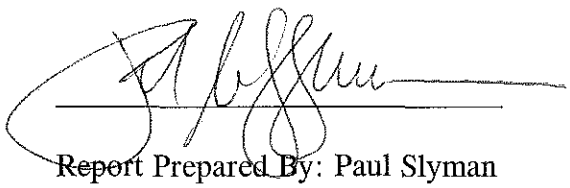
Attachments

None.

Reference Documents (available upon request)

Results of Customer Service Survey
Factsheet—DEQ's Independent Cleanup Pathway
Factsheet—DEQ's use of Alternative Dispute Resolution
Factsheet—DEQ's Cleanup Program Update
Factsheet—Update on the Drycleaner Program
Report of the Environmental Cleanup Financing Committee
Report to the Legislative Emergency Board on Alternative Dispute Resolution

Approved:

Division: 

Report Prepared By: Paul Slyman

Phone: (503) 229-5332

Date Prepared: December 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 Ninetieth Meeting

November 29, 30 and December 1, 2000
Summit and Regular Meeting

On November 29, 2000, the Environmental Quality Commission (EQC) held a summit with senior Department of Environmental Quality (DEQ) staff at the Heathman Hotel, 1001 SW Broadway, Portland, Oregon. On November 30 and December 1, 2000 the Commission met for its regular meeting at DEQ headquarters, 811 SW Sixth, Portland, Oregon. The following Environmental Quality Commission members were present on all three days:

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

Also present were Larry Knudsen, Assistant Attorney General, Oregon Department of Justice (DOJ) on November 30 and December 1, 2000; Stephanie Hallock, Director, Department of Environmental Quality (DEQ); 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 summit began at 10:00 a.m. November 29, 2000. Jennifer Yocum facilitated the meeting. A summary of the day's proceedings is attached. The summit ended at 3:55 p.m.

The regular meeting was called to order by Chair Eden at 10:05 a.m. on Thursday, November 30, 2000. The following topics were discussed.

A. Action Item: Contested Case No. WMC/T-ER-107 Dan's Ukiah Service

Larry Knudsen, Commission legal counsel, introduced the contested case. No Commissioner had a conflict of interest with this case. A Proposed Final Order prepared by Ken L. Betterton, Hearings Officer, in the matter of Daniel Vincent doing business as Dan's Ukiah Service was reviewed. The Hearings Officer had conducted a hearing on Mr. Vincent's appeal of the Notice of Violation, Department Order and Assessment of Civil Penalty which DEQ had issued to Mr. Vincent. The Proposed Order would ~~dismiss~~ *uphold* ~~the Department Order, finding that Mr. Vincent could not comply or had already satisfactorily complied with the Order. It would also uphold penalties DEQ~~ assesse~~d~~*ing a penalty* of $57,200 for storing gasoline and diesel fuel in underground storage tanks and periodically dispensing such fuels from the tanks without first obtaining an underground storage tank general operating permit registration and $6,600 for failing to permit a DEQ representative to have access to Mr. Vincent's records to underground storage tanks.
DEQ was represented by Les Carlough, Manager of the Statewide Enforcement Section. Daniel Vincent was represented by his father, Doug Vincent. The Commission heard ~~both parties~~ arguments from the Department and Mr. Vincent.

A motion was made by Commissioner Malarkey to uphold the Hearings Officer's report with no alterations. There was seconded by Chair Eden. A role call vote was taken: Commissioner Malarkey, yes; Vice Chair Van Vliet, no; Commissioner Reeve, no; Chair Eden, yes. The motion failed. During further deliberations, the Commission had additional questions for Mr. Vincent, who had left the meeting before its conclusion. A motion was made by Vice Chair Van Vliet to hold over making a final decision

until the January meeting. It was seconded by Commissioner Malarkey and carried with four "yes" votes. The Commission directed that, in the interim, Mr. Vincent be recontacted to determine if he would be willing to submit financial records in support of his claim of financial incapacity.

B. Action Item: Contested Case No. WMC/SW-NWR-98-249 Stark Trucking Inc.

Larry Knudsen, Commission legal counsel, introduced the contested case hearing decision in the Stark Trucking, Inc. case. No Commissioner had a conflict of interest in this case. DEQ issued the company a Notice of Civil Penalty assessing Stark Trucking a $8,850 penalty for operating a solid waste disposal site without a permit in Salem, and ordered removal of the waste. The company appealed, and the Hearings Officer upheld the order and ruled that the company owed a penalty of $8,600. Larry Cwik, Environmental Law Specialist with the Statewide Enforcement Section, represented DEQ. The EQC also asked some questions of Bob Barrows, manager of DEQ's Western Region Solid Waste Program. Duane Stark, president of Stark Trucking, represented the company.

After hearing both parties and after deliberation a motion was made by Vice Chair Van Vliet to uphold the Hearings Officer's finding that the company was in violation, and ruled that the company was liable for the $8,600 penalty decided by the Hearings Officer. The Commission modified the hearings officer's order to provide that the company was to come into compliance with the Department's solid waste permitting requirements within 20 days or operate under rules that do not require a permit. The motion was seconded by Commissioner Reeve and carried with four "yes" votes. The Commission asked that the Order be signed by Stephanie Hallock, DEQ Director, on their behalf.

C. Informational Item: Presentation by Bonneville Power Administration Regarding Power Marketing and Water Quality

This item was postponed until the March 2001 EQC meeting.

D. Action Item: US Fish and Wildlife Services Request for a Waiver to the Total Dissolved Gas of the Water Quality Standard

Mike Llewelyn, Water Quality Division Administrator, and Russell Harding, Columbia River Coordinator, Water Quality Division presented this item.

Fred Olney, Senior Fisheries Specialist and Steve Olhaussen, Principal Biologist from the U.S. Fish and Wildlife Service requested a variance to the total dissolved gas water quality standard for a ten-day period in March 2001. At that time, approximately 5.3 million fall Chinook salmonid smolts will be released from the Spring Creek National Fish Hatchery. The variance is required to enable water to be spilled to assist these outmigrating smolts past Bonneville Dam. These fish are important to the U.S.-Canada treaty ocean fisheries, as well as to Columbia River commercial/Tribal and recreational fisheries. Having these fish available for harvest results in fewer threatened and endangered Columbia and Snake River fish being taken. The U.S. Geological Survey will conduct physical monitoring of total dissolved gas levels for the period of this spill to ensure compliance with the variance. Additionally, biological monitoring of fish will be conducted on two days during the spill. Specimens will be collected by beach seining and will be examined by variable power dissecting microscopes.

The Commission noted the ten-day period approved for 2000 had been truncated by the action agencies due to operational considerations. The Commission expressed its concern that when they grant these requests for variances for a ten-day period they expect it be implemented fully. Staff indicated a multi-agency technical management Committee meets weekly to make these decisions. Ultimately, however, these decisions rest with the U.S. Army Corps of Engineers.

A motion was made by Commissioner Reeve to adopt the findings and to adopt the order attached to the staff report with the modification that the U.S. Fish and Wildlife Service notify the Director 24 hours prior to the beginning of the spill. Commissioner Malarkey seconded the motion and it carried with four "yes" votes. Stephanie Hallock, DEQ Director, will sign the order on the Commission's behalf.

N. Director's Report

A new position has been created in the Director's office to serve the dual role as special assistant to both the director and the Environmental Quality Commission (EQC). This position should be filled within two months. The person in this position will supervise the Director's office support staff. They will handle all

administrative matters for the EQC and the Director's office and will supervise rules coordination work. Kitty Purser will move into a new role of affirmative action outreach for DEQ within Human Resources.

The Enforcement Section will move to the Director's Office from Northwest Region to provide cross media coordination, integration with program compliance activities, and personal oversight by the Director. The Deputy Director is managing the transition, scheduled to be complete by early spring.

The Director has requested the Department of Administrative Services appoint Joni Hammond and Kerri Nelson to permanent positions as Division Administrators (DA) in DEQ's Eastern and Western regions. Both Joni and Kerri, who competed internally for the positions, have been serving in interim capacity for some time. Paul Slyman will remain as acting DA in the Environmental Cleanup Division through the legislative session when DEQ will know if the agency is provided with an additional DA position as requested in the budget. Sally Puent will remain as acting DA in Waste Prevention and Management through the legislative session.

DEQ is waiting for an analysis on Measure 7 by the Attorney General. The Department has been advised not to speculate publicly on potential impacts.

Portland Harbor was listed on the National Priorities List (NPL) on November 30 in the Federal Register. Taylor Lumber & Treating (Sheridan) will be proposed for listing on the NPL in the same issue of the Federal Register. The proposal marks the start of a formal 60-day public comment period.

The Oregon State Police served a search warrant on November 14 to Thomas William Higgens, 35, a former DEQ vehicle inspector suspected of falsifying vehicle emission tests. Over the past five months, DEQ and DMV have been working with the State Police in an ongoing investigation of potential forgery of certificates required for vehicle registration. In May 1999, DEQ fired Higgens for falsifying test certificates at a vehicle test station. The Vehicle Inspection Program was the source of another news story when Portland station KATU-TV did a report about DMV issuing multiple trip-permits to vehicle owners who do not pass the DEQ test. DMV is proposing legislation in 2001 that would limit the number of trip permits issued to a single vehicle. DEQ supports efforts made by DMV to make sure that trip permits serve their intended functions and are not abused.

The Governor's Budget is scheduled for release on December 1. DEQ is hopeful that cuts to general fund in the water quality program will be restored. Even with general fund restorations, fee increases will be needed in several programs, if the Governor includes DEQ fee-related packages in his budget. The Department will brief the EQC on the Governor's recommended budget at the January meeting.

M. Commissioners' Reports

Commissioner Malarkey reported on the meetings she had been attending in the Eugene area. Commissioner Reeve as the Commission's representative to the Oregon Water Enhancement Board (OWEB) is encouraging a joint meeting with the EQC and OWEB. Chair Eden is continuing to participate in the Governor's Executive Review Panel on the Commission's behalf.

E. Approval of Minutes

The following corrections were made to the minutes from the September 28-29, 2000 meeting. On page 6, Commissioners' Report, line 3 should read "...staff on their interactions with the community. She also indicated that *she attended the Eugene/Springfield Metropolitan Wastewater Treatment Plan meeting.* " A motion was made by Vice Chair Van Vliet to approve the September 29-30, 2000 minutes as corrected. Commissioner Reeve seconded the motion and it carried with four "yes" votes.

A motion was made by Vice Chair Van Vliet to approve the minutes of the November 6, 2000 meeting. The motion was seconded by Commissioner Malarkey and carried with four "yes" votes.

K. Rule Adoption: Mediation Confidentiality Rules

Dawn Jansen, Personnel Officer, presented the rule adoption requests for Confidentiality and Inadmissibility of Mediation Communications, and Confidentiality and Inadmissibility of Workplace Interpersonal Dispute Mediation Communications. She described what types of mediations the two rules would cover. Presently mediations involving state agencies are not confidential unless the agency has adopted these rules allowing for confidentiality. The rules were written by the Department of Justice and major modifications to the rules were not authorized. The rules apply only to mediations, and simply give

the agency the option of making mediation communications confidential and do not require confidentiality. Although the agency has not had much experience using mediation, when the occasion has risen, the parties were not interested in participating since confidentiality could not be offered.

Commissioner Van Vliet asked if arbitration proceedings were different, and legal counsel responded that arbitration was a separate process.

A motion was made by Vice Chair Van Vliet to adopt both sets of rules as presented. It was seconded by Commissioner Malarkey and carried with four "yes" votes.

L. Rule Adoption: Repeal of the Water Quality Certification Rules for Grazing Activities

Mike Llewelyn, Water Quality Division Administrator, and Susan Greco, Rules Coordinator, presented a request to repeal rules that established a program of issuing 401 certifications for grazing on federal lands. In 1996 a federal district court entered a judgment directing the U.S. Forest Service to require permit applicants to receive 401 water quality certification before issuing or renewing grazing permits. The Department and Oregon Department of Agriculture adopted joint rules to provide for the process for issuing these certifications. In 1998 the 9th Circuit Court of Appeals reversed the district court decision. These rule changes delete all rules and portion of rules which related to these certifications.

A motion was made by Vice-Chair Van Vliet to adopt the rule changes as proposed by the Department. Commissioner Reeve seconded the motion and it carried with four "yes" votes.

The meeting recessed for the evening; it resumed at 8:35 a.m. on December 1, 2000.

F. Informational Item: Discussion on Total Maximum Daily Loads (TMDLs) and an Update on the Tualatin River Basin Rule

Dick Pedersen, Manager of the Watershed Management Section, provided an update of the TMDL program. The TMDL schedule was included in an agreement with the Environmental Protection Agency signed in February 2000. In July 2000, Federal District Judge Hogan signed a consent order settling a lawsuit between EPA and Environmental Organizations. That order further binds EPA to ensure TMDLs are established per the Oregon schedule.

Dick reported that EPA approved the Upper Grande Ronde TMDL in the Spring of 2000. The Tualatin TMDL public comment period recently closed and the Department is reviewing comments from approximately 60 individuals and organizations as it prepares the final TMDL for submittal around the first of the year. The public comment period for TMDLs for the Umatilla Basin and South Fork Coquille has closed. The Department anticipates submitting them to EPA for final approval shortly after the first of the year. TMDLs for the Upper Klamath, Spraque, Williamson, Hood, and Tillamook will soon be out for public review and comment. The Willamette Basin TMDLs are on track for completion by the end of 2003. The Department received funding from the last legislative session to hire 5.5 FTEs to complete TMDLs for 9 of the 12 Willamette Sub-basins and the mainstem Willamette River on this more aggressive schedule. Staff has been hired and is working to complete the task on time. The Department is seeking continued funding from the legislature to finish this task.

The Department will be working on a general TMDL rule that will be scheduled to go before the Commission in the later part of 2001. This is following direction from the Commission in 1990 that suggested all individual TMDLs do not need to be in rule. The reasons included standards in rule are the basis for TMDLs; waste load allocations are regulated through NPDES permits; the Department has agreements with the Oregon Department of Agriculture and the Oregon Department of Forestry on implementing TMDL load allocations on agricultural land and state and private forests; and just the numerous TMDLs to be completed over the next several years would overload the Commission. Some other issues that could be addressed in the general rule are consistency with the EPA Agreement and Court Order; public involvement; what a Department TMDL Order would look like; EQC review or other EQC roles; format of Record of Decision or Findings document; any specific rule making needs; and other policy issues that may come up.

Andy Schaedel, Northwest Region TMDL Manager, discussed the proposal to repeal the Tualatin TMDL rule. The draft Tualatin TMDL public comment period ended October 27, 2000. The proposed TMDL is a package that includes revision of Phosphorus and Ammonia TMDLs and new TMDLs for temperature,

bacteria and Total Volatile Solids. The Department has proceeded with rule making to repeal the existing Tualatin TMDL rule for ammonia and phosphorus, which would take aeffect with EPA approval of new/modified TMDLs. In 1988 the Tualatin TMDL was the first one established in Oregon, and was also established in the following by rule (OAR 340-41-0470(9)):

- the total phosphorus and ammonia Total Maximum Daily Loads (TMDLs), expressed in terms of monthly median concentrations at the mouths of tributaries and along the mainstem of the Tualatin River (which were submitted to the Environmental Protection Agency (EPA) and subsequently approved);
- requirements for program plans to be submitted to the Department; and
- a date for achieving the concentrations.

The rule repeal package is out for pubic comment from November 15 to December 19 with a hearing on December 18. The Department will come back to the January EQC meeting for the repeal of the Tualatin Rule. The reason for suggesting rule repeal is to put the Tualatin on similar basis as other TMDLs, implementing through a Department Order and using programs that have been subsequently developed for implementation including storm water permits, SB1010 plans, FPA and other authorities.

G. Consideration of Tax Credit Requests

Larry Knudsen, legal counsel to the Commission, told the Commission that the Portland General Electric Order for preliminary certification of the Independent Spent Fuel Storage Installation was not complete. There was little or no legal ramifications to the delay because PGE would not be able to take advantage of the tax credit until after final certification. The Order will be ready for the January EQC meeting.

Maggie Vandehey, Tax Credit Manager, presented this item. She also indicated that John Ledger distributed the Topic discussion document on deadline for filing applications on September 19th to the AOI membership. This is the same document that was part of the July 14, 2000 agenda. The Commissioners agreed upon December 19, 2000 for the annual tax credit year-end special telephone meeting.

There were 61 applications presented in the Staff Report and *its* Addendum. The Addendum corrected Leupold & Stevens' application number 5423. Staff asked to remove Western Bank application numbers 5471 and 5491 from the agenda. The required written notice of the EQC meeting did not reach the applicant and she would include the applications in the telephone meeting.

The deadline for submitting Pollution Prevention tax credit applications is December 31st of this year. It was a 4-year pilot program established by the 1995 Legislature. The program focus was to provide an incentive to eliminate chemicals that cause significant health effects; specifically as used by dry cleaners, electroplaters and halogenated solvent users.

APPROVALS

Ms. Vandehey discussed Willamette Industries application number 4979, and Smurfit Newsprint Corporation application number 5236. These applications had been on previous EQC agendas.

Mr. Thomas R. Wood, counsel for Smurfit Newsprint Corporation and Mr. Mike Hibbs, Manager of Technical and Compliance Services for Smurfit, presented the applicant's position regarding application 5236. Mr. Wood presented oral testimony consistent with the letter included with the Staff Report (Thomas R. Wood to Ms. Maggie Vandehey dated September 26, 2000).

Chair Eden asked if any Commissioners need to recuse themselves. Vice Chair Van Vliet indicated he had a conflict of interest on application number 4979; Commissioner Reeve had a conflict of interest on application number 5480 and Chair Eden had a conflict of interest on application number 5345.

A motion was made by Vice Chair Van Vliet for approval of the tax credits found in attachment A excluding application numbers 5471, 5491, 4979, 5480, and 5345. It was seconded by Commissioner Malarkey and carried with four "yes" votes. A motion was made by Commissioner Malarkey to approve application number 4979. It was seconded by Commissioner Reeve and carried with three "yes" votes. Vice chair Van Vliet abstained. A motion was made by Vice Chair Van Vliet to approve application number 5345. It was seconded by Commissioner Malarkey and carried with three "yes" votes. Chair Eden abstained. A motion was made by Vice Chair Van Vliet to approve application number 5480. It was

seconded by Commissioner Malarkey and carried with three "yes" votes. Commissioner Reeve abstained.

Application No.	Media	Applicant	Certified Cost	Percent Allocable	Value	Action
4979	Air	Willamette Industries, Inc.	$ 638,662	100%	$ 319,331	Approve
5236	Air	Smurfit Newsprint Corp.	$ 24,184	100%	$ 12,092	Approve
5271	Air	Eagle-Picher Minerals	$ 1,415,430	100%	$ 707,715	Approve
5314	Plastics	Agri-Plas, Inc.	$ 48,891	100%	$ 24,446	Approve
5332	Noise	Oregon Steel Mills, Inc.	$ 99,246	100%	$ 49,623	Approve
5333	Noise	Oregon Steel Mills, Inc.	$ 244,495	100%	$ 122,248	Approve
5345	Water	Van Beek Dairy	$ 98,823	100%	$ 49,412	Approve
5361	FB	Indian Brook, Inc.	$ 155,970	100%	$ 77,985	Approve
5402	Air	ESCO Corporation	$ 531,950	100%	$ 265,975	Approve
5406	Water	Doherty & Russell	$ 8,774	100%	$ 4,387	Approve
5408	Air	REXAM Graphics	$ 847,898	100%	$ 423,949	Approve
5409	FB	McKee Farms	$ 14,857	100%	$ 7,429	Approve
5413	Air	Lanz Cabinet Shop, Inc.	$ 154,264	100%	$ 77,132	Approve
5414	SW	Lanz Cabinet Shop, Inc.	$ 3,300	100%	$ 1,650	Approve
5415	SW	Lanz Cabinet Shop, Inc.	$ 55,000	85%	$ 23,375	Approve
5416	Air	LANZ Cabinet Shop, Inc.	$ 390,000	91%	$ 177,450	Approve
5417	Air	LANZ Cabinet Shops, Inc.	$ 13,000	100%	$ 6,500	Approve
5421	FB	James Van Leeuwen	$ 13,772	100%	$ 6,886	Approve
5422	USTs	Robert E. Miles	$ 107,437	99%	$ 53,181	Approve
5423	Water	Leupold and Stevens, Inc.	$ 42,360	100%	$ 21,180	Approve
5424	Water	Rejuvenation, Inc.	$ 79,909	100%	$ 39,955	Approve
5426	Water	Portland General Electric	$ 81,781	100%	$ 40,891	Approve
5431	Air	Fujimi America Inc.	$ 61,356	100%	$ 30,678	Approve
5432	Air	Times Litho, Inc.	$ 284,119	100%	$ 142,060	Approve
5433	Perc	Thomas Joseph, Inc.	$ 7,867	100%	$ 3,934	Approve
5436	USTs	Traughber Oil Company	$ 75,465	79%	$ 29,809	Approve
5438	USTs	Cornelius Fast Serv	$ 493,653	94%	$ 232,017	Approve
5442	Plastics	Denton Plastics, Inc.	$ 12,600	100%	$ 6,300	Approve
5443	USTs	Truax Harris Energy LLC	$ 324,491	93%	$ 150,888	Approve
5444	USTs	Truax Harris Energy LLC	$ 275,020	93%	$ 127,884	Approve
5445	USTs	Truax Harris Energy LLC	$ 324,162	93%	$ 150,735	Approve
5446	USTs	Truax Harris Energy LLC	$ 304,129	96%	$ 145,982	Approve
5449	SW	Newberg Garbage Services	$ 1,000	100%	$ 500	Approve
5451	USTs	Stein Oil Co., Inc.	$ 7,758	100%	$ 3,879	Approve
5452	USTs	Stein Oil Co., Inc.	$ 36,037	100%	$ 18,019	Approve
5454	USTs	The Jerry Brown Co., Inc.	$ 153,195	92%	$ 70,470	Approve
5455	CFC	Dailey's Tire & Auto	$ 1,800	100%	$ 900	Approve
5457	USTs	Stein Oil Co., Inc.	$ 6,605	100%	$ 3,302	Approve
5461	Air	Riverview Abbey Mausoleum	$ 16,263	100%	$ 8,132	Approve
5464	Plastics	Ernst Manufacturing Inc.	$ 45,000	100%	$ 22,500	Approve
5466	Air	Forrest Paint Co.	$ 35,840	100%	$ 17,920	Approve
5469	SW	Rexius Forest By-Products	$ 49,765	100%	$ 24,883	Approve
5470	Water	Art & Ann Hop	$ 38,481	100%	$ 19,241	Approve

5472	Plastics	BOWCO Industries, Inc.	$	6,025	100%	$	3,013	Approve
5473	Plastics	BOWCO Industries, Inc.	$	140,075	100%	$	70,037	Approve
5474	Water	Portland General Electric	$	49,984	100%	$	24,992	Approve
5475	FB	Neils Jensen Farms Inc.	$	278,369	83%	$	115,523	Approve
5476	Water	Full Sail Brewing Co.	$	211,243	100%	$	105,622	Approve
5477	SW	Bert's Auto Salvage	$	24,798	100%	$	12,399	Approve
5479	USTs	New Pacific Corporation	$	57,907	100%	$	28,954	Approve
5480	Water	The Halton Company	$	89,633	100%	$	44,817	Approve
5481	USTs	Seaside Stop & Go, Inc.	$	79,338	100%	$	39,669	Approve
5482	Plastics	NPI, Inc.	$	78,217	100%	$	39,109	Approve
5483	Perc	Kim's Cleaners	$	35,000	100%	$	17,500	Approve
5484	Perc	Thomas Joseph, Inc.	$	40,976	100%	$	20,488	Approve
5485	Plastics	Agri-Plas, Inc.	$	73,438	100%	$	36,719	Approve
5486	Plastics	Agri-Plas, Inc.	$	85,446	100%	$	42,723	Approve
5487	Plastics	Denton Plastics, Inc.	$	4,500	100%	$	2,250	Approve
5488	Plastics	Denton Plastics, Inc.	$	4,975	100%	$	2,488	Approve

DENIALS

Commissioner Reeve noted the Department recommended denial of the CyaChem Analyzer presented in application number 5286. He asked if this was because the control require human intervention. Ms. Vandehey said, "yes" and explained that the claimed facility does not reduce or eliminate industrial waste with the use of a treatment works as required by statue. It triggers an alarm for a person to take corrective action. The Commission suggested the Department may want to reconsider that manual intervention as a valid response to taking corrective action to an error condition. Ms. Vandehey suggested removing application 5286 and the Department would provided additional analysis for the Commission. The Commission agreed it was not necessary for this application.

Vice Chair Van Vliet indicated he would have to recuse himself from voting on application numbers 5299 and 5167. A motion was made by Commissioner Malarkey to deny application numbers 5299 and 5197. It was seconded by Commissioner Reeve and carried with three "yes" votes. Vice Chair Van Vliet abstained. A motion was made by Commissioner Malarkey to deny application numbers 5276 and 5286. It was seconded by Commissioner Reeve and carried with four "yes" votes.

5167	Air	Willamette Industries	$	38,267	100%	$	19,133	Deny
5276	Water	Teledyne Industries, Inc.	$	132,705	100%	$	66,353	Deny
5286	Water	Teledyne Industries, Inc.	$	22,500	100%	$	11,250	Deny
5299	Water	Willamette Industries, Inc.	$	30,817	100%	$	15,409	Deny

REJECTIONS

Ms. Vandehey discussed Mitsubishi Silicon America applications 5049, 5100, 5101, 5102, 5103, 5104, and 5105 presented for rejection. These applications had been on the EQC agenda a number of times.

A motion was made by Vice Chair Van Vliet to reject the following applications. It was seconded by Commissioner Reeve and carried with four "yes" votes.

5049	Air	Mitsubishi Silicon America	$	278,399	100%	$	139,200	Reject
5100	Water	Mitsubishi Silicon America	$	1,599,606	100%	$	799,803	Reject
5101	Air	Mitsubishi Silicon America	$	37,358	100%	$	18,679	Reject
5102	Air	Mitsubishi Silicon America	$	95,170	100%	$	47,585	Reject
5103	Air	Mitsubishi Silicon America	$	145,824	100%	$	72,912	Reject
5104	Air	Mitsubishi Silicon America	$	146,236	100%	$	73,118	Reject
5105	Air	Mitsubishi Silicon America	$	128,179	100%	$	64,090	Reject
5357	Water	Oregon Steel Mills, Inc.	$	174,175	100%	$	87,088	Reject

TRANSFERS
Ms. Vandehey presented certificates numbered 4063 and 4067 for transfer. A motion was made by Vice Chair Van Vliet to approve the following transfers. It was seconded by Commissioner Malarkey and carried with four "yes" votes.

	Certificate # 4063 to Waste Management of Oregon, Incorporated	Transfer
	Certificate # 4067 to Lebold Business Development	Transfer

H. Rule Adoption: Acid Rain and New Source Performance Standards

Andy Ginsburg, Air Quality Division Administrator, and Mark Fisher, Air Quality staff, presented a summary of the proposed rules for adopting by reference updates to federal Acid Rain and New Source Performance Standards (NSPS). New sources would be informed of the rules during the initial permitting action (e.g., issuance of an Air Contaminant Discharge Permit), which occurs prior to when a Title V or Acid Rain application is due.

Commissioner Malarkey asked whether these rules would also apply to sources in Washington. Staff responded that since these are federal rules they should apply to all sources in the U.S., but it is not known when Washington has or will adopt the revisions as part of their regulations.

A motion was made by Vice Chair Van Vliet to approve the rules as written. It was seconded by Commissioner Malarkey and carried with four "yes" votes.

I. Rule Adoption: Lane County Regional Air Pollution Authority (LRAPA) Title 34, Permit Fees and State Implementation Plan (SIP) Revision

Andy Ginsburg, Air Quality Administrator, and Loretta Pickerell, Air Quality staff presented this agenda item. LRAPA revised its Title 34 permit rules, primarily to raise permit fees, and the Commission now needed to adopt LRAPA's revisions as amendments to Oregon's SIP. LRAPA's fees are slightly lower than those DEQ charges comparable sources elsewhere in the state. DEQ and LRAPA calculate program costs differently and use a different mix of revenue sources to fund their permit programs. LRAPA's Title 34 revisions raised fees in part to bring them closer to DEQ's.

Commissioner Van Vliet further questioned whether LRAPA should continue to exist as the only local air quality authority in Oregon, or whether DEQ should assume its functions. Staff explained LRAPA periodically reviews this issue and has consistently chosen to retain local control of air quality matters, as is its prerogative under Oregon law. They also noted that local air quality authorities are common in other states, including California and Washington, and are encouraged under the Clean Air Act. When asked whether DEQ requires gas-fired boilers operating without oil-fired backup units and emitting below threshold levels of pollutants to obtain permits, staff indicated DEQ does not, and this is one of a few sources for which LRAPA, but not DEQ, requires permits.

A motion was made by Commissioner Reeve to adopt the amendments to the SIP. It was seconded by Vice Chair Van Vliet and carried with four "yes" votes.

J. Rule Adoption: Rules Regarding Open Burning

Andy Ginsburg, Air Quality Administrator, and Kevin Downing, Air Quality planning staff, presented this item. The rules are part of a larger program process improvement review for air quality and are intended to improve environmental protection, harmonize the rules with statutory authority and streamline administration of the program. The Clean Air Act is silent on the practice of open burning but these rules, being in the State Implementation Plan, are a part of the state's commitment to cleaner air in Oregon. In specific circumstances open burning rules have been more closely tied to nonattainment issues. LRAPA has their own set of rules regarding open burning that match the Department's rules for stringency.

When asked how slash burning is managed on private, state and federal lands, Staff indicated it is coordinated through a Smoke Management Plan that describes how burn decisions are to be made and coordinated on state, federal and private lands subject to the plan. This plan is implemented primarily by the Oregon Department of Forestry.

Cooperation with local fire districts occurs when suspected violations of the Department's burning rules are referred to Department staff for follow-up and potential enforcement action. The Department has limited staff to devote to open burning enforcement and relies heavily on this form of cooperation to make the program work. A significant number of penalties are written to enforce open burning rules. The proposed rules provide an opportunity to delegate all or portions of the open burning program to local jurisdictions when they have expressed an interest and are able to take on that responsibility.

Commissioner Reeve asked about the definition of an agricultural operation. Staff replied that the test was established in rule and required evidence of operations connected to the raising of produce or livestock and at least an intention of making a profit. The Department's definition was based on statutory language in ORS 215 and the Right to Farm laws.

A motion was made by Vice Chair Van Vliet to adopt the rules as presented as an amendment to the SIP. Commissioner Reeve seconded the motion and it carried with four "yes" votes.

There was no public comment. There being no further business, the meeting was adjourned at 11:35 a.m.

Approved_____
Approved with Corrections__X__

Minutes are not final until approved by the EQC

Environmental Quality Commission
Minutes of the Two Hundred and Ninetieth Meeting

November 29, 30 and December 1, 2000
Summit and Regular Meeting

On November 29, 2000, the Environmental Quality Commission (EQC) held a summit with senior Department of Environmental Quality (DEQ) staff at the Heathman Hotel, 1001 SW Broadway, Portland, Oregon. On November 30 and December 1, 2000 the Commission met for its regular meeting at DEQ headquarters, 811 SW Sixth, Portland, Oregon. The following Environmental Quality Commission members were present on all three days:

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

Also present were Larry Knudsen, Assistant Attorney General, Oregon Department of Justice (DOJ) on November 30 and December 1, 2000; Stephanie Hallock, Director, Department of Environmental Quality (DEQ); 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 summit began at 10:00 a.m. November 29, 2000. Jennifer Yocum facilitated the meeting. A summary of the day's proceedings is attached. The summit ended at 3:55 p.m.

The regular meeting was called to order by Chair Eden at 10:05 a.m. on Thursday, November 30, 2000. The following topics were discussed.

A. Action Item: Contested Case No. WMC/T-ER-107 Dan's Ukiah Service

Larry Knudsen, Commission legal counsel, introduced the contested case. No Commissioner had a conflict of interest with this case. A Proposed Final Order prepared by Ken L. Betterton, Hearings Officer, in the matter of Daniel Vincent doing business as Dan's Ukiah Service was reviewed. The Hearings Officer had conducted a hearing on Mr. Vincent's appeal of the Notice of Violation, Department Order and Assessment of Civil Penalty which DEQ had issued to Mr. Vincent. The Proposed Order would ~~dismiss~~ *uphold* ~~the Department Order, finding that Mr. Vincent could not comply or had already satisfactorily complied with the Order. It would also uphold penalties DEQ~~ assesse*ding a penalty* of $57,200 for storing gasoline and diesel fuel in underground storage tanks and periodically dispensing such fuels from the tanks without first obtaining an underground storage tank general operating permit registration and $6,600 for failing to permit a DEQ representative to have access to Mr. Vincent's records to underground storage tanks.
DEQ was represented by Les Carlough, Manager of the Statewide Enforcement Section. Daniel Vincent was represented by his father, Doug Vincent. The Commission heard ~~both parties~~ arguments from the Department and Mr. Vincent.

A motion was made by Commissioner Malarkey to uphold the Hearings Officer's report with no alterations. There was seconded by Chair Eden. A role call vote was taken: Commissioner Malarkey, yes; Vice Chair Van Vliet, no; Commissioner Reeve, no; Chair Eden, yes. The motion failed. During further deliberations, the Commission had additional questions for Mr. Vincent, who had left the meeting before its conclusion. A motion was made by Vice Chair Van Vliet to hold over making a final decision

until the January meeting. It was seconded by Commissioner Malarkey and carried with four "yes" votes. The Commission directed that, in the interim, Mr. Vincent be recontacted to determine if he would be willing to submit financial records in support of his claim of financial incapacity.

B. Action Item: Contested Case No. WMC/SW-NWR-98-249 Stark Trucking Inc.

Larry Knudsen, Commission legal counsel, introduced the contested case hearing decision in the Stark Trucking, Inc. case. No Commissioner had a conflict of interest in this case. DEQ issued the company a Notice of Civil Penalty assessing Stark Trucking a $8,850 penalty for operating a solid waste disposal site without a permit in Salem, and ordered removal of the waste. The company appealed, and the Hearings Officer upheld the order and ruled that the company owed a penalty of $8,600. Larry Cwik, Environmental Law Specialist with the Statewide Enforcement Section, represented DEQ. The EQC also asked some questions of Bob Barrows, manager of DEQ's Western Region Solid Waste Program. Duane Stark, president of Stark Trucking, represented the company.

After hearing both parties and after deliberation a motion was made by Vice Chair Van Vliet to uphold the Hearings Officer's finding that the company was in violation, and ruled that the company was liable for the $8,600 penalty decided by the Hearings Officer. The Commission modified the hearings officer's order to provide that the company was to come into compliance with the Department's solid waste permitting requirements within 20 days or operate under rules that do not require a permit. The motion was seconded by Commissioner Reeve and carried with four "yes" votes. The Commission asked that the Order be signed by Stephanie Hallock, DEQ Director, on their behalf.

C. Informational Item: Presentation by Bonneville Power Administration Regarding Power Marketing and Water Quality

This item was postponed until the March 2001 EQC meeting.

D. Action Item: US Fish and Wildlife Services Request for a Waiver to the Total Dissolved Gas of the Water Quality Standard

Mike Llewelyn, Water Quality Division Administrator, and Russell Harding, Columbia River Coordinator, Water Quality Division presented this item.

Fred Olney, Senior Fisheries Specialist and Steve Olhaussen, Principal Biologist from the U.S. Fish and Wildlife Service requested a variance to the total dissolved gas water quality standard for a ten-day period in March 2001. At that time, approximately 5.3 million fall Chinook salmonid smolts will be released from the Spring Creek National Fish Hatchery. The variance is required to enable water to be spilled to assist these outmigrating smolts past Bonneville Dam. These fish are important to the U.S.-Canada treaty ocean fisheries, as well as to Columbia River commercial/Tribal and recreational fisheries. Having these fish available for harvest results in fewer threatened and endangered Columbia and Snake River fish being taken. The U.S. Geological Survey will conduct physical monitoring of total dissolved gas levels for the period of this spill to ensure compliance with the variance. Additionally, biological monitoring of fish will be conducted on two days during the spill. Specimens will be collected by beach seining and will be examined by variable power dissecting microscopes.

The Commission noted the ten-day period approved for 2000 had been truncated by the action agencies due to operational considerations. The Commission expressed its concern that when they grant these requests for variances for a ten-day period they expect it be implemented fully. Staff indicated a multi-agency technical management Committee meets weekly to make these decisions. Ultimately, however, these decisions rest with the U.S. Army Corps of Engineers.

A motion was made by Commissioner Reeve to adopt the findings and to adopt the order attached to the staff report with the modification that the U.S. Fish and Wildlife Service notify the Director 24 hours prior to the beginning of the spill. Commissioner Malarkey seconded the motion and it carried with four "yes" votes. Stephanie Hallock, DEQ Director, will sign the order on the Commission's behalf.

N. Director's Report

A new position has been created in the Director's office to serve the dual role as special assistant to both the director and the Environmental Quality Commission (EQC). This position should be filled within two months. The person in this position will supervise the Director's office support staff. They will handle all

administrative matters for the EQC and the Director's office and will supervise rules coordination work. Kitty Purser will move into a new role of affirmative action outreach for DEQ within Human Resources.

The Enforcement Section will move to the Director's Office from Northwest Region to provide cross media coordination, integration with program compliance activities, and personal oversight by the Director. The Deputy Director is managing the transition, scheduled to be complete by early spring.

The Director has requested the Department of Administrative Services appoint Joni Hammond and Kerri Nelson to permanent positions as Division Administrators (DA) in DEQ's Eastern and Western regions. Both Joni and Kerri, who competed internally for the positions, have been serving in interim capacity for some time. Paul Slyman will remain as acting DA in the Environmental Cleanup Division through the legislative session when DEQ will know if the agency is provided with an additional DA position as requested in the budget. Sally Puent will remain as acting DA in Waste Prevention and Management through the legislative session.

DEQ is waiting for an analysis on Measure 7 by the Attorney General. The Department has been advised not to speculate publicly on potential impacts.

Portland Harbor was listed on the National Priorities List (NPL) on November 30 in the Federal Register. Taylor Lumber & Treating (Sheridan) will be proposed for listing on the NPL in the same issue of the Federal Register. The proposal marks the start of a formal 60-day public comment period.

The Oregon State Police served a search warrant on November 14 to Thomas William Higgens, 35, a former DEQ vehicle inspector suspected of falsifying vehicle emission tests. Over the past five months, DEQ and DMV have been working with the State Police in an ongoing investigation of potential forgery of certificates required for vehicle registration. In May 1999, DEQ fired Higgens for falsifying test certificates at a vehicle test station. The Vehicle Inspection Program was the source of another news story when Portland station KATU-TV did a report about DMV issuing multiple trip-permits to vehicle owners who do not pass the DEQ test. DMV is proposing legislation in 2001 that would limit the number of trip permits issued to a single vehicle. DEQ supports efforts made by DMV to make sure that trip permits serve their intended functions and are not abused.

The Governor's Budget is scheduled for release on December 1. DEQ is hopeful that cuts to general fund in the water quality program will be restored. Even with general fund restorations, fee increases will be needed in several programs, if the Governor includes DEQ fee-related packages in his budget. The Department will brief the EQC on the Governor's recommended budget at the January meeting.

M. Commissioners' Reports

Commissioner Malarkey reported on the meetings she had been attending in the Eugene area. Commissioner Reeve as the Commission's representative to the Oregon Water Enhancement Board (OWEB) is encouraging a joint meeting with the EQC and OWEB. Chair Eden is continuing to participate in the Governor's Executive Review Panel on the Commission's behalf.

E. Approval of Minutes

The following corrections were made to the minutes from the September 28-29, 2000 meeting. On page 6, Commissioners' Report, line 3 should read "...staff on their interactions with the community. She also indicated that *she attended the Eugene/Springfield Metropolitan Wastewater Treatment Plan meeting.* " A motion was made by Vice Chair Van Vliet to approve the September 29-30, 2000 minutes as corrected. Commissioner Reeve seconded the motion and it carried with four "yes" votes.

A motion was made by Vice Chair Van Vliet to approve the minutes of the November 6, 2000 meeting. The motion was seconded by Commissioner Malarkey and carried with four "yes" votes.

K. Rule Adoption: Mediation Confidentiality Rules

Dawn Jansen, Personnel Officer, presented the rule adoption requests for Confidentiality and Inadmissibility of Mediation Communications, and Confidentiality and Inadmissibility of Workplace Interpersonal Dispute Mediation Communications. She described what types of mediations the two rules would cover. Presently mediations involving state agencies are not confidential unless the agency has adopted these rules allowing for confidentiality. The rules were written by the Department of Justice and major modifications to the rules were not authorized. The rules apply only to mediations, and simply give

the agency the option of making mediation communications confidential and do not require confidentiality. Although the agency has not had much experience using mediation, when the occasion has risen, the parties were not interested in participating since confidentiality could not be offered.

Commissioner Van Vliet asked if arbitration proceedings were different, and legal counsel responded that arbitration was a separate process.

A motion was made by Vice Chair Van Vliet to adopt both sets of rules as presented. It was seconded by Commissioner Malarkey and carried with four "yes" votes.

L. Rule Adoption: Repeal of the Water Quality Certification Rules for Grazing Activities

Mike Llewelyn, Water Quality Division Administrator, and Susan Greco, Rules Coordinator, presented a request to repeal rules that established a program of issuing 401 certifications for grazing on federal lands. In 1996 a federal district court entered a judgment directing the U.S. Forest Service to require permit applicants to receive 401 water quality certification before issuing or renewing grazing permits. The Department and Oregon Department of Agriculture adopted joint rules to provide for the process for issuing these certifications. In 1998 the 9th Circuit Court of Appeals reversed the district court decision. These rule changes delete all rules and portion of rules which related to these certifications.

A motion was made by Vice-Chair Van Vliet to adopt the rule changes as proposed by the Department. Commissioner Reeve seconded the motion and it carried with four "yes" votes.

The meeting recessed for the evening; it resumed at 8:35 a.m. on December 1, 2000.

F. Informational Item: Discussion on Total Maximum Daily Loads (TMDLs) and an Update on the Tualatin River Basin Rule

Dick Pedersen, Manager of the Watershed Management Section, provided an update of the TMDL program. The TMDL schedule was included in an agreement with the Environmental Protection Agency signed in February 2000. In July 2000, Federal District Judge Hogan signed a consent order settling a lawsuit between EPA and Environmental Organizations. That order further binds EPA to ensure TMDLs are established per the Oregon schedule.

Dick reported that EPA approved the Upper Grande Ronde TMDL in the Spring of 2000. The Tualatin TMDL public comment period recently closed and the Department is reviewing comments from approximately 60 individuals and organizations as it prepares the final TMDL for submittal around the first of the year. The public comment period for TMDLs for the Umatilla Basin and South Fork Coquille has closed. The Department anticipates submitting them to EPA for final approval shortly after the first of the year. TMDLs for the Upper Klamath, Spraque, Williamson, Hood, and Tillamook will soon be out for public review and comment. The Willamette Basin TMDLs are on track for completion by the end of 2003. The Department received funding from the last legislative session to hire 5.5 FTEs to complete TMDLs for 9 of the 12 Willamette Sub-basins and the mainstem Willamette River on this more aggressive schedule. Staff has been hired and is working to complete the task on time. The Department is seeking continued funding from the legislature to finish this task.

The Department will be working on a general TMDL rule that will be scheduled to go before the Commission in the later part of 2001. This is following direction from the Commission in 1990 that suggested all individual TMDLs do not need to be in rule. The reasons included standards in rule are the basis for TMDLs; waste load allocations are regulated through NPDES permits; the Department has agreements with the Oregon Department of Agriculture and the Oregon Department of Forestry on implementing TMDL load allocations on agricultural land and state and private forests; and just the numerous TMDLs to be completed over the next several years would overload the Commission. Some other issues that could be addressed in the general rule are consistency with the EPA Agreement and Court Order; public involvement; what a Department TMDL Order would look like; EQC review or other EQC roles; format of Record of Decision or Findings document; any specific rule making needs; and other policy issues that may come up.

Andy Schaedel, Northwest Region TMDL Manager, discussed the proposal to repeal the Tualatin TMDL rule. The draft Tualatin TMDL public comment period ended October 27, 2000. The proposed TMDL is a package that includes revision of Phosphorus and Ammonia TMDLs and new TMDLs for temperature,

bacteria and Total Volatile Solids. The Department has proceeded with rule making to repeal the existing Tualatin TMDL rule for ammonia and phosphorus, which would take ~~a~~effect with EPA approval of new/modified TMDLs. In 1988 the Tualatin TMDL was the first one established in Oregon, and was also established in the following by rule (OAR 340-41-0470(9)):

- the total phosphorus and ammonia Total Maximum Daily Loads (TMDLs), expressed in terms of monthly median concentrations at the mouths of tributaries and along the mainstem of the Tualatin River (which were submitted to the Environmental Protection Agency (EPA) and subsequently approved);
- requirements for program plans to be submitted to the Department; and
- a date for achieving the concentrations.

The rule repeal package is out for pubic comment from November 15 to December 19 with a hearing on December 18. The Department will come back to the January EQC meeting for the repeal of the Tualatin Rule. The reason for suggesting rule repeal is to put the Tualatin on similar basis as other TMDLs, implementing through a Department Order and using programs that have been subsequently developed for implementation including storm water permits, SB1010 plans, FPA and other authorities.

G. Consideration of Tax Credit Requests

Larry Knudsen, legal counsel to the Commission, told the Commission that the Portland General Electric Order for preliminary certification of the Independent Spent Fuel Storage Installation was not complete. There was little or no legal ramifications to the delay because PGE would not be able to take advantage of the tax credit until after final certification. The Order will be ready for the January EQC meeting.

Maggie Vandehey, Tax Credit Manager, presented this item. She also indicated that John Ledger distributed the Topic discussion document on deadline for filing applications on September 19th to the AOI membership. This is the same document that was part of the July 14, 2000 agenda. The Commissioners agreed upon December 19, 2000 for the annual tax credit year-end special telephone meeting.

There were 61 applications presented in the Staff Report and *its* Addendum. The Addendum corrected Leupold & Stevens' application number 5423. Staff asked to remove Western Bank application numbers 5471 and 5491 from the agenda. The required written notice of the EQC meeting did not reach the applicant and she would include the applications in the telephone meeting.

The deadline for submitting Pollution Prevention tax credit applications is December 31st of this year. It was a 4-year pilot program established by the 1995 Legislature. The program focus was to provide an incentive to eliminate chemicals that cause significant health effects; specifically as used by dry cleaners, electroplaters and halogenated solvent users.

APPROVALS

Ms. Vandehey discussed Willamette Industries application number 4979, and Smurfit Newsprint Corporation application number 5236. These applications had been on previous EQC agendas.

Mr. Thomas R. Wood, counsel for Smurfit Newsprint Corporation and Mr. Mike Hibbs, Manager of Technical and Compliance Services for Smurfit, presented the applicant's position regarding application 5236. Mr. Wood presented oral testimony consistent with the letter included with the Staff Report (Thomas R. Wood to Ms. Maggie Vandehey dated September 26, 2000).

Chair Eden asked if any Commissioners need to recuse themselves. Vice Chair Van Vliet indicated he had a conflict of interest on application number 4979; Commissioner Reeve had a conflict of interest on application number 5480 and Chair Eden had a conflict of interest on application number 5345.

A motion was made by Vice Chair Van Vliet for approval of the tax credits found in attachment A excluding application numbers 5471, 5491, 4979, 5480, and 5345. It was seconded by Commissioner Malarkey and carried with four "yes" votes. A motion was made by Commissioner Malarkey to approve application number 4979. It was seconded by Commissioner Reeve and carried with three "yes" votes. Vice chair Van Vliet abstained. A motion was made by Vice Chair Van Vliet to approve application number 5345. It was seconded by Commissioner Malarkey and carried with three "yes" votes. Chair Eden abstained. A motion was made by Vice Chair Van Vliet to approve application number 5480. It was

seconded by Commissioner Malarkey and carried with three "yes" votes. Commissioner Reeve abstained.

Application No.	Media	Applicant	Certified Cost	Percent Allocable	Value	Action
4979	Air	Willamette Industries, Inc.	$ 638,662	100%	$ 319,331	Approve
5236	Air	Smurfit Newsprint Corp.	$ 24,184	100%	$ 12,092	Approve
5271	Air	Eagle-Picher Minerals	$ 1,415,430	100%	$ 707,715	Approve
5314	Plastics	Agri-Plas, Inc.	$ 48,891	100%	$ 24,446	Approve
5332	Noise	Oregon Steel Mills, Inc.	$ 99,246	100%	$ 49,623	Approve
5333	Noise	Oregon Steel Mills, Inc.	$ 244,495	100%	$ 122,248	Approve
5345	Water	Van Beek Dairy	$ 98,823	100%	$ 49,412	Approve
5361	FB	Indian Brook, Inc.	$ 155,970	100%	$ 77,985	Approve
5402	Air	ESCO Corporation	$ 531,950	100%	$ 265,975	Approve
5406	Water	Doherty & Russell	$ 8,774	100%	$ 4,387	Approve
5408	Air	REXAM Graphics	$ 847,898	100%	$ 423,949	Approve
5409	FB	McKee Farms	$ 14,857	100%	$ 7,429	Approve
5413	Air	Lanz Cabinet Shop, Inc.	$ 154,264	100%	$ 77,132	Approve
5414	SW	Lanz Cabinet Shop, Inc.	$ 3,300	100%	$ 1,650	Approve
5415	SW	Lanz Cabinet Shop, Inc.	$ 55,000	85%	$ 23,375	Approve
5416	Air	LANZ Cabinet Shop, Inc.	$ 390,000	91%	$ 177,450	Approve
5417	Air	LANZ Cabinet Shops, Inc.	$ 13,000	100%	$ 6,500	Approve
5421	FB	James Van Leeuwen	$ 13,772	100%	$ 6,886	Approve
5422	USTs	Robert E. Miles	$ 107,437	99%	$ 53,181	Approve
5423	Water	Leupold and Stevens, Inc.	$ 42,360	100%	$ 21,180	Approve
5424	Water	Rejuvenation, Inc.	$ 79,909	100%	$ 39,955	Approve
5426	Water	Portland General Electric	$ 81,781	100%	$ 40,891	Approve
5431	Air	Fujimi America Inc.	$ 61,356	100%	$ 30,678	Approve
5432	Air	Times Litho, Inc.	$ 284,119	100%	$ 142,060	Approve
5433	Perc	Thomas Joseph, Inc.	$ 7,867	100%	$ 3,934	Approve
5436	USTs	Traughber Oil Company	$ 75,465	79%	$ 29,809	Approve
5438	USTs	Cornelius Fast Serv	$ 493,653	94%	$ 232,017	Approve
5442	Plastics	Denton Plastics, Inc.	$ 12,600	100%	$ 6,300	Approve
5443	USTs	Truax Harris Energy LLC	$ 324,491	93%	$ 150,888	Approve
5444	USTs	Truax Harris Energy LLC	$ 275,020	93%	$ 127,884	Approve
5445	USTs	Truax Harris Energy LLC	$ 324,162	93%	$ 150,735	Approve
5446	USTs	Truax Harris Energy LLC	$ 304,129	96%	$ 145,982	Approve
5449	SW	Newberg Garbage Services	$ 1,000	100%	$ 500	Approve
5451	USTs	Stein Oil Co., Inc.	$ 7,758	100%	$ 3,879	Approve
5452	USTs	Stein Oil Co., Inc.	$ 36,037	100%	$ 18,019	Approve
5454	USTs	The Jerry Brown Co., Inc.	$ 153,195	92%	$ 70,470	Approve
5455	CFC	Dailey's Tire & Auto	$ 1,800	100%	$ 900	Approve
5457	USTs	Stein Oil Co., Inc.	$ 6,605	100%	$ 3,302	Approve
5461	Air	Riverview Abbey Mausoleum	$ 16,263	100%	$ 8,132	Approve
5464	Plastics	Ernst Manufacturing Inc.	$ 45,000	100%	$ 22,500	Approve
5466	Air	Forrest Paint Co.	$ 35,840	100%	$ 17,920	Approve
5469	SW	Rexius Forest By-Products	$ 49,765	100%	$ 24,883	Approve
5470	Water	Art & Ann Hop	$ 38,481	100%	$ 19,241	Approve

5472	Plastics	BOWCO Industries, Inc.	$ 6,025	100%	$ 3,013	Approve
5473	Plastics	BOWCO Industries, Inc.	$ 140,075	100%	$ 70,037	Approve
5474	Water	Portland General Electric	$ 49,984	100%	$ 24,992	Approve
5475	FB	Neils Jensen Farms Inc.	$ 278,369	83%	$ 115,523	Approve
5476	Water	Full Sail Brewing Co.	$ 211,243	100%	$ 105,622	Approve
5477	SW	Bert's Auto Salvage	$ 24,798	100%	$ 12,399	Approve
5479	USTs	New Pacific Corporation	$ 57,907	100%	$ 28,954	Approve
5480	Water	The Halton Company	$ 89,633	100%	$ 44,817	Approve
5481	USTs	Seaside Stop & Go, Inc.	$ 79,338	100%	$ 39,669	Approve
5482	Plastics	NPI, Inc.	$ 78,217	100%	$ 39,109	Approve
5483	Perc	Kim's Cleaners	$ 35,000	100%	$ 17,500	Approve
5484	Perc	Thomas Joseph, Inc.	$ 40,976	100%	$ 20,488	Approve
5485	Plastics	Agri-Plas, Inc.	$ 73,438	100%	$ 36,719	Approve
5486	Plastics	Agri-Plas, Inc.	$ 85,446	100%	$ 42,723	Approve
5487	Plastics	Denton Plastics, Inc.	$ 4,500	100%	$ 2,250	Approve
5488	Plastics	Denton Plastics, Inc.	$ 4,975	100%	$ 2,488	Approve

DENIALS

Commissioner Reeve noted the Department recommended denial of the CyaChem Analyzer presented in application number 5286. He asked if this was because the control require human intervention. Ms. Vandehey said, "yes" and explained that the claimed facility does not reduce or eliminate industrial waste with the use of a treatment works as required by statue. It triggers an alarm for a person to take corrective action. The Commission suggested the Department may want to reconsider that manual intervention as a valid response to taking corrective action to an error condition. Ms. Vandehey suggested removing application 5286 and the Department would provided additional analysis for the Commission. The Commission agreed it was not necessary for this application.

Vice Chair Van Vliet indicated he would have to recuse himself from voting on application numbers 5299 and 5167. A motion was made by Commissioner Malarkey to deny application numbers 5299 and 5197. It was seconded by Commissioner Reeve and carried with three "yes" votes. Vice Chair Van Vliet abstained. A motion was made by Commissioner Malarkey to deny application numbers 5276 and 5286. It was seconded by Commissioner Reeve and carried with four "yes" votes.

5167	Air	Willamette Industries	$ 38,267	100%	$ 19,133	Deny
5276	Water	Teledyne Industries, Inc.	$ 132,705	100%	$ 66,353	Deny
5286	Water	Teledyne Industries, Inc.	$ 22,500	100%	$ 11,250	Deny
5299	Water	Willamette Industries, Inc.	$ 30,817	100%	$ 15,409	Deny

REJECTIONS

Ms. Vandehey discussed Mitsubishi Silicon America applications 5049, 5100, 5101, 5102, 5103, 5104, and 5105 presented for rejection. These applications had been on the EQC agenda a number of times.

A motion was made by Vice Chair Van Vliet to reject the following applications. It was seconded by Commissioner Reeve and carried with four "yes" votes.

5049	Air	Mitsubishi Silicon America	$ 278,399	100%	$ 139,200	Reject
5100	Water	Mitsubishi Silicon America	$ 1,599,606	100%	$ 799,803	Reject
5101	Air	Mitsubishi Silicon America	$ 37,358	100%	$ 18,679	Reject
5102	Air	Mitsubishi Silicon America	$ 95,170	100%	$ 47,585	Reject
5103	Air	Mitsubishi Silicon America	$ 145,824	100%	$ 72,912	Reject
5104	Air	Mitsubishi Silicon America	$ 146,236	100%	$ 73,118	Reject
5105	Air	Mitsubishi Silicon America	$ 128,179	100%	$ 64,090	Reject
5357	Water	Oregon Steel Mills, Inc.	$ 174,175	100%	$ 87,088	Reject

TRANSFERS
Ms. Vandehey presented certificates numbered 4063 and 4067 for transfer. A motion was made by Vice Chair Van Vliet to approve the following transfers. It was seconded by Commissioner Malarkey and carried with four "yes" votes.

	Certificate # 4063 to Waste Management of Oregon, Incorporated	Transfer
	Certificate # 4067 to Lebold Business Development	Transfer

H. Rule Adoption: Acid Rain and New Source Performance Standards

Andy Ginsburg, Air Quality Division Administrator, and Mark Fisher, Air Quality staff, presented a summary of the proposed rules for adopting by reference updates to federal Acid Rain and New Source Performance Standards (NSPS). New sources would be informed of the rules during the initial permitting action (e.g., issuance of an Air Contaminant Discharge Permit), which occurs prior to when a Title V or Acid Rain application is due.

Commissioner Malarkey asked whether these rules would also apply to sources in Washington. Staff responded that since these are federal rules they should apply to all sources in the U.S., but it is not known when Washington has or will adopt the revisions as part of their regulations.

A motion was made by Vice Chair Van Vliet to approve the rules as written. It was seconded by Commissioner Malarkey and carried with four "yes" votes.

I. Rule Adoption: Lane County Regional Air Pollution Authority (LRAPA) Title 34, Permit Fees and State Implementation Plan (SIP) Revision

Andy Ginsburg, Air Quality Administrator, and Loretta Pickerell, Air Quality staff presented this agenda item. LRAPA revised its Title 34 permit rules, primarily to raise permit fees, and the Commission now needed to adopt LRAPA's revisions as amendments to Oregon's SIP. LRAPA's fees are slightly lower than those DEQ charges comparable sources elsewhere in the state. DEQ and LRAPA calculate program costs differently and use a different mix of revenue sources to fund their permit programs. LRAPA's Title 34 revisions raised fees in part to bring them closer to DEQ's.

Commissioner Van Vliet further questioned whether LRAPA should continue to exist as the only local air quality authority in Oregon, or whether DEQ should assume its functions. Staff explained LRAPA periodically reviews this issue and has consistently chosen to retain local control of air quality matters, as is its prerogative under Oregon law. They also noted that local air quality authorities are common in other states, including California and Washington, and are encouraged under the Clean Air Act. When asked whether DEQ requires gas-fired boilers operating without oil-fired backup units and emitting below threshold levels of pollutants to obtain permits, staff indicated DEQ does not, and this is one of a few sources for which LRAPA, but not DEQ, requires permits.

A motion was made by Commissioner Reeve to adopt the amendments to the SIP. It was seconded by Vice Chair Van Vliet and carried with four "yes" votes.

J. Rule Adoption: Rules Regarding Open Burning

Andy Ginsburg, Air Quality Administrator, and Kevin Downing, Air Quality planning staff, presented this item. The rules are part of a larger program process improvement review for air quality and are intended to improve environmental protection, harmonize the rules with statutory authority and streamline administration of the program. The Clean Air Act is silent on the practice of open burning but these rules, being in the State Implementation Plan, are a part of the state's commitment to cleaner air in Oregon. In specific circumstances open burning rules have been more closely tied to nonattainment issues. LRAPA has their own set of rules regarding open burning that match the Department's rules for stringency.

When asked how slash burning is managed on private, state and federal lands, Staff indicated it is coordinated through a Smoke Management Plan that describes how burn decisions are to be made and coordinated on state, federal and private lands subject to the plan. This plan is implemented primarily by the Oregon Department of Forestry.

Cooperation with local fire districts occurs when suspected violations of the Department's burning rules are referred to Department staff for follow-up and potential enforcement action. The Department has limited staff to devote to open burning enforcement and relies heavily on this form of cooperation to make the program work. A significant number of penalties are written to enforce open burning rules. The proposed rules provide an opportunity to delegate all or portions of the open burning program to local jurisdictions when they have expressed an interest and are able to take on that responsibility.

Commissioner Reeve asked about the definition of an agricultural operation. Staff replied that the test was established in rule and required evidence of operations connected to the raising of produce or livestock and at least an intention of making a profit. The Department's definition was based on statutory language in ORS 215 and the Right to Farm laws.

A motion was made by Vice Chair Van Vliet to adopt the rules as presented as an amendment to the SIP. Commissioner Reeve seconded the motion and it carried with four "yes" votes.

There was no public comment. There being no further business, the meeting was adjourned at 11:35 a.m.

Outcomes Report from
Environmental Quality Commission (EQC) /
Department of Environmental Quality (DEQ) Summit
29 November 2000

Purposes: The purpose of this Outcomes Report is to summarize main themes and assignments from the EQC / DEQ Summit meeting. The Summit outlined issue areas and priority actions for DEQ staff to research and present to the EQC over the next 6-8 months.

Present:
Melinda Eden (chair-EQC),
Didi Malarkey (EQC)
Mark Reeve (EQC)
Tony Van Vliet (EQC)
Lauri Aunan (DEQ Legislative Liaison)
Sarah Bott (DEQ Public Affairs)
Marianne Fitzgerald (DEQ Pollution Prevention)
Rick Gates (DEQ Lab)
Andy Ginsburg (DEQ Air Quality Division)
Stephanie Hallock (DEQ Director)
Joni Hammond (DEQ Eastern Region)
Mike Llewelyn (DEQ Water Quality Division)
Helen Lottridge (DEQ Management Services Division)
Neil Mullane (DEQ Northwest Region)
Kerri Nelson (DEQ Western Region)
Sally Puent (DEQ Waste Prevention and Management)
Kitty Purser (DEQ Executive Assistant to the Director)
Paul Slyman (DEQ Environmental Cleanup Division)
Lydia Taylor (DEQ Deputy Director)
Jennifer Yocum (Facilitator)

Issue Areas: Commissioners and DEQ staff discussed several items. The following issues areas generated the most significant discussion and are listed below. (Note: the listing order only reflects order of discussion, not a prioritized ranking.) Summaries on each topic and assignments follow this list.

1. Environmental information and data management
2. Cooperation among natural resource and other state and federal agencies
3. Role of DEQ as a regulatory agency and as a progressive innovator / Point Source and Non Point Source environmental strategies
4. Balance and fairness in enforcement, concerns about East/West, Urban/Rural splits
5. Connections between water quality and water quantity / Harmonizing needs for environmental protection, economic advancement and energy
6. Suggestions for improving EQC and DEQ interactions (process issues)

1. Environmental Information and Data Management

Concerns: Right now, a great deal of environmental information is collected and managed by several public entities throughout the state and region. Much of the data in these systems is unavailable due to technical and cultural barriers. There is also a great deal of concern about data quality and resiliency (the ability to use data collected for one purpose in another application.) While commissioners and DEQ staff agree that more data, and a more effective use of data, is necessary for developing policy and making science-based decisions, significant time and money are needed to realize this desire. Thus far the Legislature has not been very supportive of single-agency information system efforts, although multi-agency efforts may be more successful. Statewide leadership is needed.

Assignments: **Helen Lottridge** will develop a proposal that will look at current plans around state agency information exchange and develop options for DEQ's role in improving data access and use for the environment. This proposal will include potential projects outlined for scope and resource needs. The proposal will be communicated to the EQC as a part of the Director's report at the January meeting. Additionally, **Andy Ginsburg** will present a draft of DEQ's Environmental Results Management System (ERMS) initiative for EQC input/brainstorming in May.

1. Cooperation among natural resource and other state and federal agencies

Concerns: Related to problems with information exchange referenced above, the many lines drawn between and among state and federal agencies charged with aspects of looking after the environment often get in the way of effective and efficient environmental management. Relationships between these entities are often tense and several examples of attacks on credibility (mostly related to science) were described. While the Community Solutions Team model has been successful, outside of a few integrated efforts on the Oregon Plan for Salmon and Steelhead, no coordinated effort exists to address conflicts in rules, permits or other policy issues.

Assignment: **Mike Llewelyn** will develop a proposal to look at how to improve cooperation and credibility with different natural resource agencies through targeted interactions with other boards, commissions and directors. These discussions will look at mission, philosophy and administration. The proposal will be communicated to the EQC as a part of the Director's report at the January meeting.

2. Role of DEQ as a regulatory agency and as a progressive innovator / Point Source and Non Point Source environmental strategies

Concerns: DEQ's policy and revenue structures are mostly drawn on its role as a permit-issuer and enforcer of environmental laws. However, due to the changing nature of the sources of pollution and a desire to see what environmental gains can be achieved through strategies other than prescribed regulation, DEQ has taken on several other roles including partner, educator, etc. The multiplication of roles diverts already thin resources and may cause confusion among staff and the public as to where our priorities lie. Still, our effectiveness and credibility depend on playing all of these roles to some extent.

Assignment: **Stephanie Hallock** will convene the DA group to examine the priorities listed under the strategic planning theme centered on engaging all Oregonians in protecting and enhancing the environment in their communities. The group will look at how they plan to update the agency's Strategic Plan, and how they might select one specific area for engaging Oregonians (along the lines of recycling) before the next EQC meeting.

3. Balance and fairness in enforcement, concerns about East/West, Urban/Rural splits

Concerns: Our current enforcement penalty matrix has generated concerns about fairness and effectiveness in its application. Different programs use different enforcement tools and philosophies. Some differences may occur across regions. Violators have different levels of access to attorneys and consultants. Fines may not always be the most effective approach in poorer areas.

Assignments: **Neil Mullane** will put together a proposal to evaluate fairness in our enforcement matrix sometime before the May EQC meeting. He will also send out a white paper report on PGE back up generators and share information on enforcement trends in Oregon. **Kerri Nelson** and **Joni Hammond** will look at developing differential policy implementation strategies that may be appropriate, also for the May meeting.

4. Connections between water quality and water quantity / Harmonizing needs for environmental protection, economic advancement and energy

Concerns: There is no coordinated effort to look at balances between water quality and water quantity. Some trade off choices are emerging. Trade offs are also a common theme in the discussion about environmental protection, economic advancement and energy needs. While generally we want to find win-win solutions, doing so requires a great deal of conversation early involvement.

Assignment: None

5. Suggestions for improving EQC and DEQ interactions

Concerns: We want to make sure that the EQC has enough information and enough time to make good decisions. Information can be presented more clearly and regular program "check-ins" were proposed.

Assignments: **Paul Slyman** will revise the report forms used for review by the EQC. LFO has a model, also look at Secretary of State's calendar for rule postings. New forms will be used for the May meeting. A template will be reviewed in March. **Sarah Bott** will help. **Stephanie Hallock** will send an email to staff letting them know that EQC members may be contacting them for more information. Stephanie will make sure that EQC members get materials at least two weeks in advance and will create a schedule for program check-ins. Stephanie will also meet with Harvey Bennett to review outcomes from this meeting.

Approved ✓
Approved with Corrections____

Minutes are not final until approved by the EQC

Environmental Quality Commission
Minutes of the Two Hundred and Ninety-First Meeting

December 19, 2000
Special Phone Meeting

On December 19, 2000 the Commission held a special phone meeting at DEQ headquarters, 811 SW Sixth, Portland, Oregon. The following Environmental Quality Commission members were present.

Melinda Eden, Chair
Harvey Bennett, Member
Mark Reeve, Member
Deirdre Malarkey, Member

Also present were Larry Knudsen, Assistant Attorney General, Oregon Department of Justice (DOJ); Lydia Taylor, Deputy Director, Department of Environmental Quality (DEQ); and other staff from DEQ.

A. Consideration of Tax Credit Requests

Maggie Vandehey, Tax Credit Manager for the Department presented this item. In addition to the 16 Pollution Control Facilities tax credits presented for approval, there were 3 Reclaimed Plastics Tax Credit and 1 Pollution Prevention tax credit.

Commissioner Malarkey asked if storage lagoons for animal waste systems were lined. Staff confirmed that they were.

Commissioners Reeve and Bennett noted that leasing arrangements such as the lease between Western Bank and West Linn Refuse and Recycling (applications 5471 and 5491) seemed to circumvent the portion allocable issue. Ms. Vandehey affirmed their interpretation. The tax credit is available to either the lessee or the lessor of a material recovery facility. The Commission has authority to adopt rules regarding the portion of the facility cost that is allocable to pollution control. The Commission advised staff they may want to revisit this at a future date.

In regard to the Review Report for application 5504, Commissioner Reeve asked if it was a requirement that the tax credit not be a determining factor in installing the claimed equipment. Mr. Knudsen said he thought it was either part of the statute or the rule. Commissioner Reeve said even though the program will sunsets on December 31, 2000 that it might be important. Should the next legislative session decide to revive a Pollution Prevention Tax Credit Program, the program design should not have contradictory language. Staff agreed to research the origin of Section 5c of the Review Report.

Commissioner Reeve recused himself of applications 5435 and 5447. A motion was made by Commissioner Malarkey to approve all applications presented in the staff report with the exception of application numbers 5435 and 5447. Commissioner Bennett seconded the motion and it carried with four "yes" votes. A motion was made by Commissioner Bennett to approve applications 5435 and 5447. Commissioner Malarkey seconded the motion and it carried with three "yes" votes. Commissioner Reeve abstained.

App. No.	Media	Applicant	Certified Cost	Percent Allocable	Value	Action
5387	Field Burning	GH Farms, Inc.	$ 72,241	100%	$ 36,121	Approved
5418	USTs	Newberg Garbage Service, Inc.	$ 16,245	100%	$ 8,123	Approved
5435	Water	The Halton Company	$ 45,420	100%	$ 22,710	Approved
5437	UST	WSCO Petroleum Corporation	$155,269	89%	$ 69,095	Approved
5439	Water	TDY Industries, Inc.	$ 29,491	100%	$ 14,746	Approved
5440	Water	Oregon Metallurgical Corp.	$ 78,138	100%	$ 39,069	Approved
5447	Water	The Halton Company	$ 19,404	100%	$ 9,702	Approved
5453	Plastics	Nursery Supplies, Inc.	$488,550	100%	$ 244,275	Approved
5458	UST	Stein Oil Co., Inc.	$ 7,692	100%	$ 3,846	Approved
5462	Water	RI-Mar Farms, Inc.	$ 23,819	100%	$ 11,910	Approved
5468	Plastics	Denton Plastics, Inc.	$ 7,500	100%	$ 3,750	Approved
5471	Solid Waste	Western Bank	$821,356	100%	$ 410,678	Approved
5489	Solid Waste	Columbia Sportswear Co.	$ 28,828	100%	$ 14,414	Approved
5491	Solid Waste	Western Bank	$666,347	100%	$ 333,174	Approved
5496	UST	Peter Kryl	$ 10,267	100%	$ 5,134	Approved
5497	UST	W.B. Anderson Trailer Sales	$129,433	94%	$ 60,834	Approved
5499	UST	Victor Point Fertilizer Co.	$ 15,627	100%	$ 7,814	Approved
5500	Plastics	Mt. Hood Beverage Co.	$ 14,995	100%	$ 7,498	Approved
5501	Solid Waste	Mt. View Sanitary Service	$ 92,690	100%	$ 46,345	Approved
5504	H. Solvent	Rejuvenation, Inc.	$ 75,000	100%	$ 37,500	Approved

Commissioner Malarkey brought up a letter the Commissioners had received from the Pacific Rivers Council regarding EQC's recent tour with the Board of Forestry. A copy was being sent to the Department and the Commission directed DEQ to take appropriate action.

There being no further business, the meeting was adjourned at 1:25 p.m.

Environmental Quality Commission

☒ Rule Adoption Item
☐ Action Item
☐ Information Item

Agenda Item F
January 11/12, 2000 Meeting

Title:

Air Quality Nuisance Control Rules

Summary:

The Director authorized the Air Quality Division to develop rules to codify DEQ's approach to resolving air quality nuisance issues. The proposed rules also update several other rules from former local air pollution control agencies in the Portland area and the mid-Willamette Valley. The proposed rules clarify DEQ's procedure for evaluating a nuisance air quality complaint and provide a process for abating the nuisance outside the traditional enforcement process.

Department Recommendation:

DEQ recommends the Commission adopt the rules/rule amendments regarding Air Quality Nuisance Controls as presented in Attachment A of the Department Staff Report. OAR 340-208-0010 through-0210 are elements of the State Implementation Plan (SIP) and should be adopted as an amendment to the SIP.

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: December 22, 2000

To: Environmental Quality Commission

From: Stephanie Hallock S. Hallock

Subject: Agenda Item F, Air Quality Nuisance Control Rules, EQC Meeting January 11, 12, 2001

Background

On April 4, 2000, the Director of the Department of Environmental Quality (DEQ, Director) authorized the Air Quality Division to proceed to a rulemaking hearing. These proposed rules would codify the Department's approach to resolving air quality nuisance issues and update several other rules from former local air pollution control agencies in the Portland area and the mid Willamette Valley.

Pursuant to the authorization, hearing notice was published in the Secretary of State's Bulletin on June 1, 2000. On May 24, 2000 the Hearing Notice and informational materials were mailed to the list of 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.

Public Hearings were held July 18th in Coos Bay, Corvallis and Madras; July 19th in Tillamook; and July 20th in Gresham and Pendleton. The comment period was to close on July 27, 2000. The public comment period was reopened on three occasions at the request of several individuals and groups who felt they did not have enough time to adequately review the proposal. The comment period finally closed on November 1, 2000. A public workshop was held on the proposed rules on October 26th at the State Office Building in Portland. The Presiding Officer's Report (Attachment C) summarizes the oral testimony presented at the hearings and lists all the written comments received. (A copy of the comments is available upon request.)

The Department is recommending modifications to the rulemaking proposal based upon the evaluation of comments received (Attachment D). These modifications are summarized below and detailed in Attachment E.

Issue this Proposed Rulemaking Action is Intended to Address

The Department receives about 1500 air quality nuisance complaints per year not related to permitted source or open burning activity. These complaints are generally about odors, fugitive dust emissions or particle fallout. Investigating and resolving these complaints takes a significant amount of time. While each case is significant to the complainant and the offending party, the matter is, in many cases, a relatively insignificant air quality issue that frequently requires significant Department resources to resolve. The current rules do not clearly describe how to make determinations of nuisance or how to proceed when working to resolve a nuisance claim. The proposed rules include criteria found in common law cases related to nuisance. The rules also propose an alternative to resolving nuisances, a Best Work Practices Agreement, that offers an additional option for nuisance resolution that lies between voluntary and traditional enforcement approaches.

The nuisance rule is intended to provide a more defined protocol to respond to complaints of nuisance activity at nonpermitted sources. However, the rule would also apply to nuisance activity at permitted sources. Permits typically include a general condition that requires that a source not contribute to a nuisance condition as a result of its operation. Staff have generally responded to nuisance complaints at permitted sources by invoking this permit condition, and requiring the source to take the necessary steps to abate the nuisance. For both permitted and non-permitted sources, the rule clarifies what constitutes a nuisance condition and provides the additional option for abatement using the Best Work Practices Agreement. For a nonpermitted source the Agreement will stand on its own as a description of what steps the source is expected to take to abate the nuisance. For permitted sources, the rules provide for the Best Work Practices Agreements to be incorporated into permits as specific conditions at permit renewal or other administrative opportunities.

The proposed rulemaking also contains a number of other rules that are remnant from disbanded regional air pollution control authorities. When these agencies, the Columbia-Willamette Air Pollution Control Authority and the Mid-Willamette Air Pollution Control Authority, dissolved, the Environmental Quality Commission (EQC, Commission) adopted selected elements of their rules into the rules governing operation of DEQ. Many of these rules have since been superseded by the evolution of pollution control policy and technology and are no longer relevant. These rules are proposed for deletion. Two of the rules, however, which relate to masking of emissions and large particle fallout, are more suitably applied on a widespread basis, and the Department is recommending to extend their applicability statewide. Remaining rules that apply in Columbia, Clackamas, Multnomah and Washington were modified for clarification and retained because they are still valuable to the Department.

Relationship to Federal and Adjacent State Rules

The federal Clean Air Act does not specifically regulate nuisances or require states to implement programs to abate nuisances. The fugitive emissions rule that is included in this packet is, however, an approved element of the state of Oregon State Implementation Plan (SIP). The State

Implementation Plan is a federally enforceable agreement, required under the Clean Air Act, that details how each state will meet the national ambient air quality standards.

Many states, like California, have rules prohibiting the creation of air quality nuisances. Idaho also recently proposed a process to evaluate and resolve nuisance odor complaints.

Authority to Address the Issue

As provided in ORS 468A.010, the Department is directed "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." ORS 468A.025 directs the Commission to establish air purity standards and outlines considerations when adopting these standards. In addition, ORS468A.100 (4) states that air quality regulations do not preclude any individual or state agency from commencing a suit on behalf of a nuisance claim. The authority to amend the State Implementation Plan resides in OAR 340-200-0040.

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

Responding to nuisances was identified as a priority during the Air Quality Program's process improvement evaluation. For this rulemaking, Department staff from planning, enforcement and field offices throughout the state met over the course of several months to identify the issues associated with identifying and resolving nuisance concerns. Staff also consulted with the Department of Justice to resolve legal issues identified during this review.

Following Commission action on this rulemaking proposal, the Department plans to engage local governments and other interested parties in a discussion about how to further improve the nuisance resolution process. This discussion will include options to better integrate and coordinate state and local government nuisance programs.

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

This primary purpose of this rulemaking is to expedite how the Department evaluates and resolves nuisance complaints. The proposed rules include an updated definition of nuisance, outline criteria for determining a nuisance and propose an alternative method for abating or preventing a nuisance. The proposed rules also identify several criteria to be used to fulfill the reasonable person-balancing test commonly accepted in case law as the appropriate grounds for determining a nuisance.

Other proposed rule changes included a modification to the fugitive emission rules to clarify that odors are also subject to this rule. The rules from the former local air pollution authorities applied in a limited area of the state. After staff review, two were proposed to apply statewide. One provision

prohibits the masking of emissions that would otherwise cause a detriment to health, safety or welfare of people and the second rule prohibits the deposition of particulate matter greater than 250 microns in size on another's property. Most of the remaining rules were proposed for deletion.

Summary of Significant Public Comment and Changes Proposed in Response

The Department received a number of comments on rules in the Division from both business and environmental interests. Business comments included concerns about the Department's authority to regulate nuisances, the adequacy of the criteria, the feasibility of the Best Work Practices Agreement, the lack of an apparent standard for enforcement of the 250 micron fallout rule, the specification of odors as fugitive emissions and whether sources otherwise in compliance with their permit are presumed in compliance with many of the rules in this Division. Comments from citizens included concerns that the nuisance rule was being diluted in its effectiveness, the criteria were too favorable to industry, businesses under Best Work Practices Agreements would have the protection of the Department while inadequately addressing nuisance emissions, odors should be highlighted as a fugitive emission and the 250 micron particle fallout rule was needed. Some of the more significant comments and the Department's response to them are highlighted below.

- **Comment: Criteria for determining a nuisance should be modified.**
  Response: The list of criteria as originally proposed tended to reflect public health considerations. Nuisance law requires a balancing test between the interests and rights of the parties concerned. Each person is privileged, within reasonable limits, to make use of his or her property, for his or her own benefit. The law anticipates that complainants should expect to endure some inconvenience rather than curtail the defendant's freedom of action. However, a nuisance source does not have unlimited rights to engage in activity that unreasonably and significantly interferes with rights held by others. The Department is recommending changes to the proposed criteria that better reflect this balancing test, i.e., extent and character of the harm, number of people impacted, suitability of each party's use to their location and the parties ability to prevent or avoid harm. These modifications help to strengthen the balancing element of the rule, making any determination more likely to prevail if challenged during an enforcement process.

- **Comment: Abandon the Best Work Practices Agreement or make it more prescriptive.**
  Response: Currently, Department staff can choose to approach the source of a complaint with a proposal to voluntarily abate the nuisance or make a formal determination that a nuisance exists and initiate enforcement action. The Best Work Practices Agreement is a midway alternative. The agreement will be voluntarily signed but outline specific practices to satisfactorily address the issues raised in a complaint. Failure to implement the practices becomes enforceable. This approach avoids an arduous and potentially contentious nuisance determination process and provides protection for the source from enforcement by the Department unless the agreement is violated. In response to public comment, staff recommend other changes to the Best Work Practices Agreement process to outline whether the agreement can be revisited in light of

ongoing nuisance issues, the term of the agreement and how elements are incorporated into permits for sources subject to permit requirements.

- **Comment: Odors as fugitives, rely upon interpretation that odors are included by definition.**
  Response: Fugitive emissions are generally defined as unconfined air contaminants which are, in turn, defined to include odors, among other elements. The existing rule has typically been narrowly interpreted and used to primarily address fugitive dust sources. The Department intended to clarify the applicability to odors. After consideration of public comment, including industry comments that the rule as originally written is applicable to fugitive odors, the Department agrees that substantive changes to the original rule are unnecessary.

- **Comment: Repeal the 250-micron particle fallout rule or modify to reflect enforcement practice.**
  Response: This rule has been enforced in the populous counties of the Willamette Valley since the late 1960s, and permitted sources have been able to comply with the rule without significant difficulty. It was originally established to denote the transport of large particles from a well-run operation. Larger particles fall out quickly, and evidence of a deposition of particles greater than 250 microns at the property line indicates a failure of equipment or processes to adequately manage their discharge. Materials that commonly trigger this standard include sawdust and paint overspray.

  The rule provides a readily usable tool to address complaints caused by particle fallout and avoid the entanglement of addressing fallout as a nuisance. The rule is employed on a complaint driven basis and is invoked by Department staff when the sources are readily identifiable and controls are readily available. The Department continues to recommend extending the rule to statewide applicability, but modified the proposal to incorporate enforcement judgment by staff as the standard for a violation.

Summary of How The Proposed Rule Will Work and How It Will Be Implemented

The Department plans to begin implementation of the rules following adoption by the Commission by filing the rules to be effective on February 1, 2001. Department staff are continuing to develop a guidance document for implementation of the nuisance rules. The guidance document will incorporate the new criteria and tools included in this rulemaking and will be used by staff to provide a framework for investigation, determination and resolution of nuisance complaints. The rule will be implemented through the existing complaint response and inspection programs operated by the Department. Another part of the implementation process will be coordination with local nuisance control efforts. Every city and county in the state received a copy of the rulemaking notice and accompanying materials. As a second phase of implementation, the Department will approach local jurisdictions in the state to assess interest in improving coordination and cooperation in addressing air quality nuisances.

Recommendation for Commission Action

It is recommended that the Commission adopt the rules/rule amendments regarding Air Quality Nuisance Controls as presented in Attachment A of the Department Staff Report. OAR 340-208-0010 through –0210 are elements of the State Implementation Plan and should be adopted as an amendment to the SIP.

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
G. Interim Draft Rulemaking Proposal

Reference Documents (available upon request)

Written Comments Received (listed in Attachment C)

Approved:

Section:

Division:

Report Prepared By: Kevin Downing
Phone: 503 229-6549
Date Prepared: December 20, 2000

DIVISION 208

VISIBLE EMISSIONS AND NUISANCE REQUIREMENTS

340-208-0010
Definitions

The definitions in OAR 340-200-0020 and this rule apply to this division. If the same term is defined in this rule and OAR 340-200-0020, the definition in this rule applies to this division.

(1) "Abate" means to eliminate the nuisance or suspected nuisance by reducing or managing the emissions using reasonably available practices. The degree of abatement will depend on an evaluation of all of the circumstances of each case and does not necessarily mean completely eliminating the emissions.

(~~1~~2) "Air Contaminant" means a dust, fume, gas, mist, odor, smoke, pollen, vapor, soot, carbon, acid or particulate matter, or any combination thereof.

(~~2~~3) "Emission" means a release into the outdoor atmosphere of air contaminants.

(~~3~~4) "Fuel Burning Equipment" means a device ~~which~~ that burns a solid, liquid, or gaseous fuel, the principal purpose of which is to produce heat or power by indirect heat transfer, except marine installations and internal combustion engines that are not stationary gas turbines.

(~~4~~5) "Fugitive Emissions" means emissions of any air contaminant that escape to the atmosphere from any point or area not identifiable as a stack, vent, duct, or equivalent opening.

(~~5~~6) "New source" means, for purposes of OAR 340-208-0110, any air contaminant source installed, constructed, or modified after June 1, 1970.

(~~6~~7) "Nuisance ~~condition~~" means ~~unusual or annoying amounts of fugitive emissions traceable directly to one or more specific sources. In determining whether a nuisance condition exists, consideration shall be given to all of the circumstances, including density of population, duration of the activity in question, and other applicable factors.~~ a substantial and unreasonable interference with another's use and enjoyment of real property, or the substantial and unreasonable invasion of a right common to members of the general public.

(~~7~~8) "Odor" means that property of an air contaminant that affects the sense of smell.

(~~8~~9) "Opacity" means the degree to which an emission reduces transmission of light and obscures the view of an object in the background as measured in accordance with OAR 340-212-0120 and 212-0140. Unless otherwise specified by rule, opacity shall be measured in accordance with EPA Method 9. For all standards, the minimum observation period shall be six minutes, though longer periods may be required by a specific rule or permit condition. Aggregate times (e.g. 3 minutes in any one hour) consist of the total duration of all readings during the observation period that exceed the opacity percentage in the standard, whether or not the readings are consecutive. Alternatives to EPA Method 9, such as a continuous opacity monitoring system (COMS), alternate Method 1 (LIDAR), or EPA Methods 22, or 203, may be used if approved in advance by the ~~Department~~department, in accordance with the Source Sampling Manual.

(~~9~~10) "Particulate matter" means all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by an applicable reference method in accordance with OAR 340-212-0120 and OAR 340-212-0140. Sources with exhaust gases at or near ambient conditions may be tested with DEQ Method 5 or DEQ Method 8, as approved by the ~~Department~~department. Direct heat transfer sources shall be tested with DEQ Method 7; indirect heat transfer combustion sources and all other non-fugitive emissions sources not listed above shall be tested with DEQ Method 5 or an equivalent method approved by the ~~Department~~department;

~~(10) "Refuse" means unwanted matter.~~

~~(11) "Refuse-burning equipment" means a device designed to reduce the volume of solid, liquid, or gaseous refuse by combustion.~~

(~~12~~11) "Special Control Area" means an area designated in OAR 340-204-0070.

(~~13~~12) "Standard conditions" means a temperature of 68° Fahrenheit and a pressure of 14.7 pounds per square inch absolute.

(~~14~~13) "Standard cubic foot" means the amount of gas that would occupy a volume of one cubic foot, if the gas were free of uncombined water at standard conditions. When applied to combustion flue gases from fuel ~~or refuse burning~~, "standard cubic foot" also implies adjustment of gas volume to that which would result at a concentration of 12% carbon dioxide or 50% excess air.

[**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.]
[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 & ORS 468A
Stats. Implemented: ORS 468.020 & ORS 468A.025
Hist.: [DEQ 16, f. 6-12-70, ef. 7-11-70; DEQ 1-1984, f. & ef. 1-16-84; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 3-1996, f. & cert. ef. 1-29-96]; [DEQ 37, f. 2-15-72, ef. 3-1-72; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 3-1996, f. & cert. ef. 1-29-96]; [DEQ 4-1978, f. & ef. 4-7-78; DEQ 9-1979, f. & ef. 5-3-79; DEQ 3-1980, f. & ef. 1-28-80; DEQ 14-1981, f. & ef. 5-6-81; DEQ 22-1989, f. & cert. ef. 9-26-89; DEQ 23-1991, f. & cert. ef. 11-13-91; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 10-1995, f. & cert. ef. 5-1-95; DEQ 4-1995, f. & cert. ef. 2-17-95; DEQ 10-1995, f. & cert. ef. 5-1-95; DEQ 3-1996, f. & cert. ef. 1-29-96]; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0005, 340-021-0050, 340-030-0010

Visible Emissions

340-208-0100
Applicability

OAR 340-208-0100 through 340-208-0110 apply in all areas of the state.

[**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 468 & ORS 468A
Stats. Implemented:ORS 468A.025
Hist.: DEQ 10-1995, f. & cert. ef. 5-1-95; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0012

340-208-0110
Visible Air Contaminant Limitations

(1) Existing sources outside special control areas. No person ~~shall~~ may ~~cause, suffer, allow, or permit the emission of~~emit or allow to be emitted any air contaminant into the atmosphere from any existing air contaminant source located outside a special control area for a period or periods aggregating more than three minutes in any one hour which is equal to or greater than 40% opacity.

(2) New sources in all areas and existing sources within special control areas: No person ~~shall~~ may ~~cause, suffer, allow, or permit the emission of~~emit or allow to be emitted any air contaminant into the atmosphere from any new air contaminant source, or from any existing source within a special control area, for a period or periods aggregating more than three minutes in any one hour which is equal to or greater than 20% opacity.

(3) Exceptions to sections (1) and (2) of this rule:

(a) Where the presence of uncombined water is the only reason for failure of any emission to meet the requirements of sections (1) and (2) of this rule, such sections shall not apply;

(b) Existing fuel burning equipment utilizing wood wastes and located within special control areas shall comply with the emission limitations of section (1) of this rule in lieu of section (2) of this rule.

[**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 468 & ORS 468A
Stats. Implemented: ORS 468.020 & ORS 468A.025
Hist.: DEQ 16, f. 6-12-70, ef. 7-11-70; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 3-1996, f. & cert. ef. 1-29-96; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0015

~~Nuisance~~ Fugitive Emission Requirements

340-208-0200
Applicability

OAR 340-208-0200 through 340-208-0210 ~~shall~~ apply:

(1) Within Special Control Areas, ~~as established~~ designated in OAR 340-204-0070~~,~~ and

(2) ~~When ordered by the Department, i~~In other areas when the ~~need for application of these rules~~department determines a nuisance exists and should be controlled, and the control measures are practicable.~~, and the practicability of control measures, have been clearly demonstrated.~~

[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 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 37, f. 2-15-72, ef. 3-1-72; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0055

340-208-0210
Requirements

(1) When fugitive emissions escape from a building or equipment in such a manner and amount as to create a nuisance ~~conditions~~ or to violate any regulation, the ~~Department~~ department may~~,~~ order the owner or operator to abate the nuisance or to bring the facility into compliance. ~~I~~In addition to other means of obtaining compliance~~,~~ the department may order that the building or equipment in which processing, handling and storage are done be tightly closed and ventilated in such a way that air contaminants are controlled or removed before ~~discharge~~ being emitted to the open air.

(2) No person ~~shall~~ may cause~~, suffer, allow,~~ or permit any materials to be handled, transported, or stored; or a building, its appurtenances, or a road to be used, constructed, altered, repaired or demolished; or any equipment to be operated, without taking reasonable precautions to prevent particulate matter from becoming airborne. Such reasonable precautions ~~shall~~ may include, but not be limited to the following:

(a) Use, where possible, of water or chemicals for control of dust in the demolition of existing buildings or structures, construction operations, the grading of roads or the clearing of land;

(b) Application of asphalt, oil, water, or other suitable chemicals on unpaved roads, materials stockpiles, and other surfaces which can create airborne dusts;

(c) Full or partial enclosure of materials stockpiles in cases where application of oil, water, or chemicals are not sufficient to prevent particulate matter from becoming airborne;

(d) Installation and use of hoods, fans, and fabric filters to enclose and vent the handling of dusty materials;

(e) Adequate containment during sandblasting or other similar operations;

(f) Covering, at all times when in motion, open bodied trucks transporting materials likely to become airborne;

(g) The prompt removal from paved streets of earth or other material ~~which~~ that does or may become airborne.

[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 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 37, f. 2-15-72, ef. 3-1-72; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0060

Nuisance Control Requirements

340-208-0300
Nuisance Prohibited

(1) No person may cause or allow air contaminants from any source subject to regulation by the department to cause a nuisance.

(2) Upon determining a nuisance may exist, the department will provide written notice to the person creating the suspected nuisance. The department will endeavor to resolve observed nuisances in keeping with the policy outlined in OAR 340-12-0026. If the department subsequently determines a nuisance exists under OAR 340-208-0310 and proceeds with a formal enforcement action, pursuant to Chapter 340 Division 12, the first day for determining penalties will be no earlier than the date of this notice.

340-208-0310
Determining Whether A Nuisance Exists

(1) In determining a nuisance, the department may consider factors including, but not limited to, the following:
  (a) Frequency of the emission;
  (b) Duration of the emission;
  (c) Strength or intensity of the emissions, odors or other offending properties;
  (d) Number of people impacted;
  (e) The suitability of each party's use to the character of the locality in which it is conducted;
  (f) Extent and character of the harm to complainants;
  (g) The source's ability to prevent or avoid harm.

(2) Compliance with a Best Work Practices Agreement that identifies and abates a suspected nuisance constitutes compliance with OAR 340-208-0300 for the identified nuisance. For sources subject to OAR 340-216-0020 or 340-218-0020, compliance with specific permit conditions that results in the abatement of a nuisance associated with an operation, process or other pollutant emitting activity constitutes compliance with OAR 340-208-0300 for the identified nuisance. For purposes of this section, "permit condition" does not include the general condition prohibiting the creation of nuisances.

340-208-0320
Best Work Practices Agreement

(1) A person may voluntarily enter into an agreement with the department to implement specific practices to abate the suspected nuisance. This agreement may be modified by mutual consent of both parties. This agreement will be an Order for the purposes of enforcement under OAR 340 Division 12.

(2) For any source subject to OAR 340-216-0020 or 340-218-0020, the conditions outlined in the Best Work Practices Agreement will be incorporated into the permit at the next permit renewal or modification.

(3) This agreement will remain in effect unless or until the department provides written notification to the person subject to the agreement that:
  (a) The agreement is superseded by conditions and requirements established later in a permit;
  (b) The department determines the activities that were the subject of the agreement no longer occur; or
  (c) The department determines that further reasonably available practices are necessary to abate the suspected nuisance.

(4) The agreement will include one or more specific practices to abate the suspected nuisance. The agreement may contain other requirements including, but not limited to:
  (a) Monitoring and tracking the emission of air contaminants;
  (b) Logging complaints and the source's response to the complaint;
  (c) Conducting a study to propose further refinements to best work practices.

(5) The department will consult, as appropriate, with complainants with standing in the matter throughout the development, preparation, implementation, modification and evaluation of a Best Work Practices Agreement. The department will not require that complainants identify themselves to the source as part of the investigation and development of the Best Work Practices Agreement.

340-208-0400
Masking of Emissions

No person may cause or permit the installation or use of any device or use of any means designed to mask the emission of an air contaminant that causes or is likely to cause detriment to health, safety, or welfare of any person or otherwise violate any other regulation or requirement.

340-208-0450
Particle Fallout Limitation

No person ~~shall~~ may cause or permit the emission of particulate matter ~~which is~~ larger than 250 microns in size ~~provided if such particulate matter does or will deposit~~at sufficient duration or quantity as to create an observable deposition upon the real property of another person when notified by the department that the deposition exists and must be controlled.

Clackamas, Columbia, Multnomah, and Washington Counties

340-208-0500
Application

OAR 340-208-0500 through 340-208-~~0640~~ 0630 apply in Clackamas, Columbia, Multnomah, and Washington Counties.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0001; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0400

340-208-0510
Exclusions

(1) The requirements contained in OAR 340-208-0500 through 340-208-~~0640~~ 0630 ~~shall~~ apply to all activities conducted in Clackamas, Columbia, Multnomah, and Washington Counties, other than those for which specific industrial standards have been adopted (Divisions 230, 234, 236, and 238), and except for the reduction of animal matter, OAR 236-0310(1) and (2).

(2) The requirements outlined in OAR 340-208-0500 through 340-208-0630 do not apply to activities related to a domestic residence of four or fewer family-living units.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0003; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0410

~~**340-208-0520**~~
~~**Incinerators and Refuse Burning Equipment**~~

~~(1) No person shall cause, permit, or maintain any emission from any refuse burning equipment which does not comply with the emission limitations of this rule.~~

~~(2) Refuse Burning Hours:~~

~~(a) No person shall cause, permit, or maintain the operation of refuse burning equipment at any time other than one-half hour before sunrise to one-half hour after sunset, except with prior approval of the Department;~~

~~(b) Approval of the Department for the operation of such equipment may be granted upon the submission of a written request stating:~~

~~(A) Name and address of the applicant;~~

~~(B) Location of the refuse burning equipment;~~

~~(C) Description of refuse burning equipment and its control apparatus;~~

~~(D) Type and quantity of refuse;~~

~~(E) Good cause for issuance of such approval;~~

~~(F) Hours during which the applicant seeks to operate the equipment;~~

~~(G) Time duration for which approval is sought.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0025; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0420

~~340-208-0530~~
~~Concealment and Masking of Emissions~~

~~(1) No person shall willfully cause or permit the installation or use of any device or use of any means such as dilution, which, without resulting in a reduction in the total amount of air contaminant emitted, conceals an emission of air contaminants which would otherwise violate OAR Chapter 340.~~

~~(2) No person shall cause or permit the installation or use of any device or use of any means designed to mask the emission of an air contaminant, which air contaminant causes or is likely to cause detriment to health, safety, or welfare of any person.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0030; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0430

~~340-208-0540~~
~~Effective Capture of Air Contaminant Emissions~~

~~Air contaminants which are, or may be, emitted to the atmosphere through doors, windows, or other openings in a structure or which are, or may be, emitted from any process not contained in a structure, shall be captured and transferred to air pollution control equipment using the most efficient and best practicable hooding, shrouding, or ducting equipment available. New sources shall comply at the time of installation.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. &cert. ef. 3-10-93; Renumbered from 340-028-0040; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0440

340-208-0550
Odor Control Measures

(1) Control apparatus and equipment, using the highest and best practicable treatment currently available, ~~shall~~ must be installed and operated to reduce to a minimum odor-bearing gases or odor-bearing particulate matter emitted into the atmosphere.

(2) Gas effluents from incineration operations and process after-burners ~~shall~~ installed under section (1) of this rule must be maintained at a temperature of 1,400° Fahrenheit for at least a 0.5 second residence time, or controlled in another manner determined by the ~~Department~~ department to be equally or more effective.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0045; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0450

340-208-0560
Storage and Handling of Petroleum Products

(1) In volumes of greater than 40,000 gallons, gasoline or any volatile petroleum distillate or organic liquid having a vapor pressure of 1.5 psia or greater under actual storage conditions ~~shall~~ must be stored in pressure tanks or reservoirs, or ~~shall be stored~~ in containers equipped with a floating roof or vapor recovery system or other vapor emission control device.

(2) Gasoline or petroleum distillate tank car or tank loading facilities handling 20,000 gallons per day or more ~~shall~~ must be equipped with submersible filling devices or other vapor emission control systems.

(3) Gasoline tanks with a capacity of 500 gallons or more~~,~~ that were installed after January 1, 1970~~,~~ ~~shall~~must be equipped with a submersible filling device or other vapor emission control systems.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0050; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0460

340-208-0570
Ships

While in those portions of the Willamette River and Columbia River ~~which~~ that pass through or adjacent to Clackamas, Columbia, and Multnomah Counties, each ship ~~shall minimize emissions from soot blowing and shall be~~ is subject to the emission standards and rules for visible emissions and particulate matter size and must minimize soot emissions. The owner, operator or other responsible party must ensure that these standards and requirements are met.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0055; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0470

~~340-208-0580~~
~~Upset Condition~~

~~Emission of air contaminants in excess of applicable standards as a result of equipment breakdown shall be subject to OAR 340-214-0300 through 340-214-0360.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. &cert. ef. 3-10-93; Renumbered from 340-028-0060; DEQ4-1995, f. & cert. ef. 2-17-95; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0480

340-208-0590
Emission Standards — General

Compliance with any specific emission standard in this Division does not preclude required compliance with any other applicable emission standard or requirement contained in OAR Chapter 340.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0065; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0490

340-208-0600
Visible Air Contaminant Standards

No person ~~owning, operating, or maintaining non-fuel-burning equipment sources of emissions shall discharge into the atmosphere from any single source of emission whatsoever any air contaminant for a period or periods aggregating more than 30 seconds in any one hour which is equal to or greater than 20 percent opacity~~may allow any non-fuel-burning-equipment to discharge any air contaminant that is 20 percent opacity or greater into the atmosphere for a period of or periods totaling more than 30 seconds in any one hour.

Stat. Auth.: ORS 468 & ORS 468A.
Stats. Implemented: ORS 468.020 & ORS 468A.025.
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0070; DEQ 3-1996, f. & cert. ef. 1-29-96; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0500

340-208-0610
Particulate Matter Weight Standards

~~(1)~~ Except for equipment burning natural gas and liquefied petroleum gas, the maximum allowable emission of particulate matter~~,~~ from any fuel burning equipment ~~shall~~:

(~~a~~1) ~~Be~~ Is a function of maximum heat input ~~and be~~as determined from **Figure 1**, except that from existing fuel burning equipment utilizing wood residue, it ~~shall be~~is 0.2 grain, and from new fuel burning equipment utilizing wood residue, it ~~shall be~~is 0.1 grain per standard cubic foot of exhaust gas, corrected to 12 percent carbon dioxide;

(~~b~~2) Must ~~N~~not exceed Smoke Spot #2 for distillate fuel and #4 for residual fuel, measured by ASTM D2156-65, "Standard Method for Test for Smoke Density of the Flue Gases from Distillate Fuels".

~~(2) The maximum allowable emission of particulate matter from any refuse burning equipment shall be a function of the maximum heat input from the refuse only and shall be determined from **Figure 2**.~~

[Publications: The publication(s) referred to or incorporated by reference in this rule is available from the office of the agency.]
[ED. NOTE: The Figures referenced in this rule are not printed in the OAR Compilation. Copies are available from the agency.]
Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468.020 & ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0075; DEQ 3-1996, f. & cert. ef. 1-29-96; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0510

~~340-208-0620~~
~~Particulate Matter Size Standard~~

~~No person shall cause or permit the emission of any particulate matter which is larger than 250 microns in size provided such particulate matter does or will deposit upon the real property of another person.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0080; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0520, Moved to 340-208-0450.

340-208-0630
Sulfur Dioxide Emission Standard

For any air contaminant source that may emit sulfur dioxide, no person ~~shall~~ may cause or permit emission of sulfur dioxide in excess of 1,000 ppm from any air contamination source as measured in accordance with the ~~Department's~~ department's Source Test Manual, except those persons burning natural gas, liquefied petroleum gas, or fuel conforming to provisions of rules relating to the sulfur content of fuels. This rule applies to sources installed, constructed, or modified after October 1, 1970.

[Publications: The publication(s) referred to or incorporated by reference in this rule is available from the office of the agency.]
Stat. Auth.: ORS 468 & ORS 468A.
Stats. Implemented: ORS 468.020 & ORS 468A.025.
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0085; DEQ 3-1996, f. & cert. ef. 1-29-96; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0530

~~340-208-0640~~
~~Odors~~

~~(1) No person shall cause or permit the emission of odorous matter in such manner as to contribute to a condition of air pollution, or exceed:~~

~~(a) A Scentometer No. 0 odor strength or equivalent dilution in residential and commercial areas;~~

~~(b) A Scentometer No. 2 odor strength or equivalent dilution in all other land use areas;~~

~~(c) Scentometer Readings: Scentometer No. and Concentration Range — No. of Thresholds, respectively:~~

~~(A) 0 — 1 to 2;~~

~~(B) 1 — 2 to 8;~~

~~(C) 2 — 8 to 32;~~

~~(D) 3 — 32 to 128.~~

~~(2) A violation of this rule shall have occurred when two measurements made within a period of one hour, separated by at least 15 minutes, off the property surrounding the air contaminant source exceeds the limitations of section (1) of this rule.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025

Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0090; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0540

Benton, Linn, Marion, Polk, and Yamhill Counties

340-208-0650
Application

OAR 340-208-0650 through 340-208-0670 shall apply in Benton, Linn, Marion, Polk and Yamhill Counties.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 109, f. 3-15-76, ef. 3-25-76; DEQ 11-1982, f. & ef. 6-18-82; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-029-0001; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0600

340-208-0660
Odors

(1) Unless otherwise regulated by specific odor regulation or standard, no person shall cause or permit the emission of odorous matter:

(a) In such a manner as to cause a public nuisance; or

(b) That occurs for sufficient duration or frequency so that two measurements made within a period of one hour, separated by at least 15 minutes, off the property surrounding the emission point, that is equal to or greater than a Scentometer No. 0 or equivalent dilutions in areas used for residential, recreational, educational, institutional, hotel, retail sales or other similar purposes.

(2) In all land use areas other than those specified in subsection (1)(b) of this rule, release of odorous matter shall be prohibited if equal to or greater than a Scentometer No. 2 odor strength, or equivalent dilutions.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 11-1982, f. & ef. 6-18-82; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-029-0011; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0610

340-208-0670
Particulate Matter Size Standard

No person shall cause or permit the emission of any particulate matter which is larger than 250 microns in size provided such particulate matter does or will deposit upon real property of another person.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 11-1982, f. & ef. 6-18-82; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-029-0030; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0620

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
Stats. 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. 1-25-99; DEQ 5-1999, f. & cert. ef. 3-25-99; DEQ 6-1999, f. & cert. ef. 5-21-99; DEQ 10-1999, f. & cert. ef. 7-1-99; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-020-0047; DEQ 15-1999, f. & cert. ef. 10-22-99; DEQ 2-2000, f. 2-17-00, cert. ef. 6-1-01; DEQ 6-2000, f. & cert. ef. 5-22-00; DEQ 8-2000, f. & cert. ef. 6-6-00; DEQ 13-2000, f. & cert. ef. 7-28-00; DEQ 16-2000, f. & cert. ef. 10-25-00; DEQ 17-2000, f. & cert. ef. 10-25-00.

Secretary of State

NOTICE OF PROPOSED RULEMAKING HEARING

A Statement of Need and Fiscal Impact accompanies this form.

DEQ – 200 & 208
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

Hearing Date	Time	Location	Hearings Officer
July 18, 2000	7:00 PM	Newmark Center Building (across from Walmart) Room 228 1988 Newmark Avenue Coos Bay	Martin Abts
July 18, 2000	7:00 PM	La Sells Stewart Center – OSU Agricultural Production Room 875 SW 26th Street Corvallis	Kevin Downing
July 18, 2000	7:00 PM	Madras Fire Station Main Hall 765 S. Adams Drive Madras	Larry Calkins
July 19, 2000	7:00 PM	Tillamook County Courthouse Commissioners' Meeting Room 201 Laurel Avenue Tillamook	Duane Altig
July 20, 2000	7:00 PM	Gresham City Hall Springwater Trail Room 1333 NW Eastman Parkway Gresham	Kevin Downing
July 20, 2000	7:00 PM	Pendleton City Hall Community Room 500 SW Dorion Pendleton	Tom Hack

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.

340-208-0300; 340-208-0310; 340-208-0320

AMEND:
340-200-0040; 340-208-0010; 340-208-0110; 340-208-0200; 340-208-0210; 340-208-0500; 340-208-0510; 340-208-0560; 340-208-0570; 340-208-0600; 340-208-0610

REPEAL:

340-208-0520; 340-208-0540; 340-208-0580; 340-208-0640; 340-208-0650; 340-208-0660; 340-208-0670

RENUMBER:
Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

AMEND AND RENUMBER:
Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

340-208-0530 to 340-208-0400; 340-208-0620 to 340-208-0450

Stat. Auth.: ORS 468A.010
Stats. Implemented: ORS 468A.025

RULE SUMMARY

This proposal would refine the definition of an air quality nuisance, outline criteria to determine a nuisance and propose an alternative to traditional enforcement tools to abate the nuisance. This Division also contains other rules originally adopted in 1973 by the Environmental Quality Commission from the former, and now defunct Columbia-Willamette and Mid-Willamette Air Pollution Control Authorities that are no longer applicable or have been superseded by subsequent rule adoptions by the Commission. Most of these rules are proposed for deletion. Two requirements are proposed to apply statewide, i.e., a prohibition on masking otherwise harmful emissions and a prohibition on large (greater than 250 microns) particle fallout. Other proposed changes include housekeeping changes intended to improve the readability and enforceability of the rules. If adopted, the rules in OAR 340-208-0010 through 340-208-0210 will be submitted to the U.S. Environmental Protection Agency (EPA) as a revision to the State Implementation Plan, which is a requirement of the Clean Air Act.

July 27, 2000
Last Day for Public Comment

Susan M. Greco 5/15/00
Authorized Signer and Date

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Air Quality Nuisance Control Rules

Fiscal and Economic Impact Statement

Introduction

The proposed rules clarify the Department's procedure for evaluating a nuisance air quality complaint and provide a process for abating the nuisance outside the traditional enforcement route. Parties suspected of or proven to be creating a nuisance will face increased cost associated with implementing controls to remove or reduce the nuisance air contaminants. Providing a precise estimate of the economic impact and benefit of nuisance abatement is difficult, given the wide range of sources that potentially create nuisances. The cost of abating the nuisance is influenced by the scale of the operation creating the nuisance but also the type of contaminant, whether particle fallout, odor or visible emissions. Historically, the cost of any nuisance control is considered on a case-by-case basis and is weighed against the costs relative to the benefit anticipated.

General Public

The public exposed to air quality nuisance would receive an indeterminate benefit related to greater enjoyment of their personal real property once the nuisance is abated. These benefits could include reduced cleaning costs, enhanced enjoyment of vistas, more opportunities to be outside and/or reduced damage to plantings or structures. Overall the public's quality of life is better without the exposure to nuisances.

Small Business

Nuisance air contaminants are typically classified as three types: particle fallout, odors and visible emissions. Control strategies vary by type and size of source. Effective nuisance control could be as simple as moving the operation indoors, covering solvents when not in use, repairing or maintaining existing filters and controls and/or rearranging the process flow that is creating nuisance emissions. Particle fallout control could involve installing a cyclone for dust control (estimated at between $10,000 and $20,000). Larger operations may require more than one cyclone. Dust control from vehicle traffic could be managed by paving (estimated at $37 to $45 per square yard) or chemical dust suppression (approximately $0.77 a square yard per application. Reapplication rates depend on the volume of traffic but could necessitate 1 to 3 reapplications per

year.). Covering truck loads to reduce wind blown dust could cost between $1,500 to $5,000 per vehicle. Other techniques to manage particle fallout include erecting walls to contain the source pile of materials. Costs of this control depend upon the size and number of material piles at each facility.

Nuisance odor could be managed by installing a carbon bed or afterburners, modifying the production process and/or changing the stack height. The cost of these controls is very sensitive to the size and type of facility. As an example, an afterburner for a mid-sized coffee roaster would cost about $32,000. Afterburners could also be used to reduce visible emissions. Changing the stack height to reduce the odor impact of styrene emissions could cost about $2,200.

Each source will require an evaluation of appropriate controls and it is not possible to predict the types of nuisance abatement practices that would be typically implemented.

Large Business

This rule will have less effect on larger businesses than smaller businesses as many of these operations are already subject to existing permit requirements regarding management of nuisance air contaminants. If a large business not otherwise subject to permit requirements is creating a nuisance, the costs and controls will be as outlined above but tending toward the upper end of any range of estimated costs.

Local Governments

No impact to local governments except to the extent that their activities may contribute to a nuisance. The fiscal impacts would be similar to those outlined above depending upon the type of air contaminant requiring abatement.

State Agencies

- DEQ
  - FTEs (0.86)
  - Revenues $ 0
  - Expenses ($173,533)
- Other Agencies Not applicable

Assumptions

The Department receives over 1500 complaints a year not associated with permitted sources. The time required to investigate and resolve a complaint ranges from 2 hours to 28 hours, with the average at 10 hours. The savings in fiscal impact for the Department outlined above comes

from the use of the more effective tools proposed in this rulemaking. Implementation of the Best Work Practices Order protocol is estimated to result in a 10 percent reduction in staff effort associated with nuisance complaint resolution.

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
Air Quality Nuisance Control Rules

Land Use Evaluation Statement

1. Explain the purpose of the proposed rules.

This proposal would refine the definition of an air quality nuisance, outline criteria to determine a nuisance and propose an alternative to traditional enforcement tools to abate the nuisance. This Division also contains other rules originally adopted in 1973 by the Environmental Quality Commission from the former and now defunct Columbia-Willamette and Mid-Willamette Air Pollution Control Authorities that are now longer applicable or have been superseded by subsequent rule adoptions by the Commission. Most of these rules are proposed for deletion. Two requirements are proposed to apply statewide, i.e., a prohibition on masking otherwise harmful emissions and a prohibition on large (greater than 250 microns) particle fallout. Other proposed changes include housekeeping intended to improve the readability and enforceability of the rules.

2. Do the proposed rules affect existing rules, programs or activities that are considered land use programs in the DEQ State Agency Coordination (SAC) Program? ☒ **Yes** ☐ **No**

a. If yes, identify existing program/rule/activity:

Nuisances may be caused by permitted sources. Resolution of these types of complaints for these sources are typically handled by procedures outlined in their permits. The air quality permitting programs are an existing land use program under OAR 340-18-030.

b. If yes, do the existing statewide goal compliance and local plan compatibility procedures adequately cover the proposed rules? ☐ **Yes** ☐ **No (if no, explain):**

Not applicable

c. If no, apply the following criteria to the proposed rules.

Staff should refer to Section III, subsection 2 of the SAC document in completing the evaluation form. Statewide Goal 6 - Air, Water and Land Resources is the primary goal that relates to DEQ authorities. However, other goals may apply such as Goal 5 - Open Spaces, Scenic and Historic Areas, and Natural Resources; Goal 11 - Public Facilities and Services; Goal 16 - Estuarine

Resources; and Goal 19 - Ocean Resources. DEQ programs and rules that relate to statewide land use goals are considered land use programs if they are:

1. Specifically referenced in the statewide planning goals; or

2. Reasonably expected to have significant effects on
   a. resources, objectives or areas identified in the statewide planning goals, or
   b. present or future land uses identified in acknowledged comprehensive plans.

In applying criterion 2 above, two guidelines should be applied to assess land use significance:
- The land use responsibilities of a program/rule/action that involved more than one agency, are considered the responsibilities of the agency with primary authority.
- A determination of land use significance must consider the Department's mandate to protect public health and safety and the environment.

In the space below, state if the proposed rules are considered programs affecting land use. State the criteria and reasons for the determination.

The proposed rules do not have a significant affect on land use. The Department may need to coordinate with local governments in regard to their role in approving the siting of uses that may contribute to creating a nuisance.

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

Intergovernmental Coordinator — Date 5/16/00

Attachment B-4

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Air Quality Nuisance Control Rules

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. Nuisance abatement is a fundamental issue in environmental regulation with a long history of consideration under common law. However, nuisances tend to be local and not often associated with the health concerns identified as priority concerns within the federal Clean Air Act. Resolution of nuisance issues has traditionally fallen within state and local government responsibilities.

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?

Yes. Nuisance issues are often difficult to resolve but can become contentious nevertheless. The voluntary Best Work Practices Order provides an opportunity for a source suspected of contributing to a nuisance to undertake one or more reasonable

steps to control the problem and, as a result, achieving some certainty regarding expectations for compliance. The agreement will be drafted to implement the most effective, reasonably available controls, reducing or eliminating the need to revisit the issue again. This approach will avoid ongoing involvement in continuous negotiations or enforcement actions, allowing the most immediate relief for complaints and letting the source go back to its primary activity and Department staff to work on higher priority air quality issues.

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?

Yes, the voluntary agreement, known as the Best Work Practices Order, will provide assurance to the source of what is expected to comply with the state of Oregon nuisance rules and will also provide more timely relief from exposure for those experiencing the nuisance.

7. Does the proposed requirement establish or maintain reasonable equity in the requirements for various sources? (level the playing field)

Yes. The Department will be preparing guidance for implementation to assist field staff across the state in evaluating the criteria for determining a nuisance in the same way. This will ensure that similar activities located in differing parts of the state will experience the same level of consideration and enforcement in regard to potential nuisance violations. This guidance will also outline a menu of potential abatement options so that sources could expect to be presented with the same choices for control as any other nuisance source in the state.

8. Would others face increased costs if a more stringent rule is not enacted?

Sources suspected of contributing to a nuisance may face challenges to abate the nuisance from many different fronts including local government enforcement and third party lawsuits. Voluntarily signing and complying with the Best Work Practices Order would ensure no further enforcement by the Department. The agreement may also serve as a demonstration of reasonable controls as a defense to other complaints.

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. The circumstances from one situation to the next will vary widely. Not all nuisance situations may be resolved with a reasonably available control device. However, depending on the nuisance, there are typically a wide variety of options available representing reasonable abatement practices.

11. Will the proposed requirement contribute to the prevention of pollution or address a potential problem and represent a more cost-effective environmental gain?

Yes. The nuisance abatement process outlined in the rule will reduce the amount of air contaminants emitted once controls are in place. The Department has also a number of case histories that show where sources of air pollution have been approached after complaints have been received, the resulting solution has often resulted in reduced operating costs for the business. Similar results can be expected in enforcing this rule, as offers of technical assistance are often the first tool used in interactions with problem sources.

State of Oregon
Department of Environmental Quality **Memorandum**

Date: May 16, 2000

To: Interested and Affected Public

Subject: Rulemaking Proposal and Rulemaking Statements - Air Quality Nuisance Control Rules, OAR 340 Division 208; 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/rule amendments regarding air quality nuisances. 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 refine the definition of an air quality nuisance, outline criteria to determine a nuisance and propose an alternative to traditional enforcement tools to abate the nuisance. This Division also contains other rules originally adopted in 1973 by the Environmental Quality Commission from the former, and now defunct Columbia-Willamette and Mid-Willamette Air Pollution Control Authorities that are no longer applicable or have been superseded by subsequent rule adoptions by the Commission. Most of these rules are proposed for deletion. Two requirements are proposed to apply statewide, i.e., a prohibition on masking otherwise harmful emissions and a prohibition on large (greater than 250 microns) particle fallout. Other proposed changes include housekeeping changes intended to improve the readability and enforceability of the rules.

The Department has the statutory authority to address this issue under ORS 468A.010. These rules implement ORS 468A.025. If adopted, the rules in OAR 340-208-0010 through -0210 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 rule (amendments).
Attachment D-2	State Implementation Plan rule

Hearing Process Details

The Department is conducting public hearings at which comments will be accepted either orally or in writing. The hearings will be held as follows:

Date	Time	Place
July 18	7:00 PM	Coos Bay Newmark Center Building (across from Walmart) 1988 Newmark Avenue Room 228
July 18	7:00 PM	Corvallis Agricultural Production Room LaSells Stewart Center - OSU 875 SW 26th Street
July 18	7:00 PM	Madras Main Hall Madras Fire Station 765 S. Adams Drive
July 19	7:00 PM	Tillamook Commissioner's Meeting Room Tillamook County Courthouse 201 Laurel Avenue
July 20	7:00 PM	Gresham Springwater Trail Room Gresham City Hall 1333 NW Eastman Parkway
July 20	7:00 PM	Pendleton Pendleton City Hall Community Room 500 SW Dorion

A question and answer period from 6:30 PM to 7:00 PM will precede each hearing.

Deadline for submittal of Written Comments: 5:00 p.m., July 27, 2000

Department staff will be the Presiding Officer at the hearing.

Written comments can be presented at the hearing or to the Department any time prior to the date above. Comments should be sent to: Department of Environmental Quality, Attn: Kevin Downing, 811 S.W. 6th Avenue, Portland, Oregon 97204; fax 503 229-5675; email downing.kevin@deq.state.or.us .

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 September 29, 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

Why is there a need for the rule?

The need to effectively address air quality nuisances was identified as a priority action within the Air Quality program's evaluation of process improvement opportunities. Air quality nuisance

complaints may involve health issues but are typically driven by aesthetic concerns such as odor, opacity and particle fallout. Nevertheless, nuisance issues can be very compelling for both the complainant and the offending party, and represent a substantial commitment of staff time to resolve. In part, this is due to the nature of nuisances themselves but also to the lack of a well-developed process in the Department's rules. Under current rules, staff respond to complaints with an investigation that involve several site visits to isolate and document the offending nature of the air contaminants. Following that, effective resolution of nuisance concerns often depends upon a resource intensive enforcement action.

The nuisance rules proposed here include a clearer definition of nuisance, criteria for determining a nuisance and a process to address nuisances as an alternative to the typical enforcement process. This process would begin with a voluntarily signed negotiated agreement with a source suspected of creating a nuisance. Under the agreement the source would commit to implementing specific steps which have been identified as being reasonable approaches to abating the nuisance at hand. Sources adhering to the agreement and implementing the outlined steps would be deemed to be in compliance with the rule and shielded from further enforcement action by the Department. This approach is expected to be more successful than the traditional approach because it encourages the application of controls to address the problem rather than seeking resolution through a potentially lengthy and contentious enforcement process.

As previously noted, many of the other rules in the Division are remnant from now defunct regional air pollution control authorities that predated the establishment of the Department of Environmental Quality. Several of the rules are now outdated and are unenforceable or have been superseded by subsequent rule adoptions by the Commission that apply statewide. These rules are proposed for deletion.

This rulemaking also proposes to extend statewide two rules that had previously applied either within the mid-Willamette valley and/or the Portland area. The first rule prohibits the masking of emissions that would otherwise cause a detriment to health, safety or welfare of people. The second rule would prohibit the emission of particulate matter greater than 250 microns in size that would be deposited on another person's property. Each of these rules addresses environmental problems that occur in the rest of the state as has historically occurred in the Portland and mid-Willamette Valley. Extending the applicability of the rule enhances the Department's ability to resolve the relevant air quality problems statewide.

How was the rule developed?

A workgroup consisting of DEQ air quality and enforcement staff as well as Department of Justice staff worked over several months to research and develop this rulemaking proposal. This work grew out of a broader Air Quality Program streamlining effort.

Copies of the documents relied upon in the development of this rulemaking proposal can be reviewed at the Department of Environmental Quality's office at 811 S.W. 6th Avenue, Portland, Oregon. Please contact Kevin Downing 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?

This rule directly affects persons under whose control air contaminants are released that are creating a nuisance. Persons deemed to be creating a nuisance would be directed to abate the nuisance or face civil penalty enforcement. As an alternative, persons suspected of creating a nuisance would be provided the option to sign a voluntary agreement with the Department to implement specific steps to control or mitigate the source of offending air pollution.

These rules also propose to extend statewide two provisions that had applied previously only in the Portland area and other portions of the Willamette Valley.

How will the rule be implemented?

The effective date of the rule will be November 1, 2000. Guidance on nuisance determination and the effective use of the alternative nuisance abatement process proposed in this rulemaking will be prepared and distributed to air quality staff responsible for enforcing these rules. Enforcement staff of the Department will be involved in the development of this guidance and the protocols needed to ensure that Best Work Practices Orders are written so that enforcement action can be taken if necessary.

Are there time constraints?

There are no outside time constraints regarding adoption of this rule. The Air Quality Division has identified nuisance control rule amendments as a priority in its process improvement program identified within the Air Quality Strategic Plan. Successful implementation of this program will help streamline program operations and allow resources, both inside and outside the agency, to address more environmentally protective issues.

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 Division
811 SW 6th Avenue
Portland, Oregon 97204

503 229-6549
Fax: 503 229-5675
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: November 20, 2000

To: Environmental Quality Commission

From: Kevin Downing, DEQ Air Quality Planning
Martin Abts, DEQ Coos Bay
Duane Altig, DEQ Portland
Larry Calkins, DEQ Bend

Subject: Presiding Officer's Report for Rulemaking Hearing
Air Quality Nuisance Control Rules

Hearing Date	Time	Place
July 18, 2000	7:00 PM	Coos Bay Newmark Center Building (across from Walmart) 1988 Newmark Avenue Room 228
July 18	7:00 PM	Corvallis Agricultural Production Room LaSells Stewart Center - OSU 875 SW 26th Street
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July 20	7:00 PM	Pendleton Pendleton City Hall Community Room 500 SW Dorion

In addition, information meetings on the nuisance rules along with the open burning rules were held in Lyons on June 26th, Falls City on June 28th and Corvallis on July 6th. Persons attending these meetings were briefed on the rules by staff and any questions they had about the proposal were answered at that time. They were also encouraged to either attend the scheduled public hearings or submit written comments to ensure that comments could be included in the public

record. At the hearings people were asked to sign registration forms if they wished to provide comments. People were also advised that the hearing was being recorded. Prior to receiving comments, staff briefly explained the specific rulemaking proposal and the procedures to be followed during the hearing.

The Coos Bay hearing was attended by 8 people; in Corvallis, 15 people; in Madras, 2 people; in Tillamook and Gresham, none; in Pendleton, 3 people. No one provided testimony on the nuisance rules at the public hearings. Thirty-three persons submitted additional written testimony outside of the public hearings.

The public comment period was reopened on three occasions at the request of several individuals and groups who felt they did not have enough time to adequately review the proposal. The comment period was initially extended to August 10. Comments from this initial round were incorporated into a revised rule draft (see Attachment G) and circulated to commenters during a second comment period from September 1 until September 13. The comment period was reopened again from October 1 to November 1. In addition, a public workshop was held on the proposed rules on October 26th at the State Office Building, 800 NE Oregon in Portland. Comments on Attachment G are referred to as comments on the revised draft, as opposed to the initial draft. Several persons submitted written comments on the rules during more than one of the comment periods and are noted in the Testimony Reference Table.

The following report provides a summary of written and oral comments received, including written comments received outside of the public hearings. The department's response to the comments is provided in a separate document. Comments are grouped by similar subject areas. 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.

Written Testimony References

No.	Name and Affiliation
W1	Kurt Anderson Monaco Coach P.O. Box 465 Wakarusa, Indiana

W2A, W2B	Thomas Wood Stoel Rives 900 SW Fifth Ave Suite 2600 Portland
W3A, W3B, W3C, W3D	John Ledger Associated Oregon Industries 1149 Court St NE Salem
W4A, W4B, W4C, W4D	Kathryn VanNatta Northwest Pulp and Paper Association 7874 Jani Court NE Keizer
W5	Debra Suzuki Environmental Protection Agency 1200 Sixth Avenue Seattle
W6A, W6B, W6C, W6D, W6E	Sharon Genasci NW District Association Health and Environment Committee 2217 NW Johnson Portland
W7	Caroline Skinner Elizabeth Meyer James Knight Crystal Rummell Judith Hill Renae Nifus 2420 NW Quimby St Portland
W8A, W8B	David F. Bartz, Jr. Schwabe, Williamson & Wyatt 1211 SW Fifth Ave Portland

W9A, W9B	Calvin Pittman Kingsford 3315 Marcola Road Springfield
W10A, W10B	Caroline Skinner 2420 NW Quimby St. Portland
W11	Stacey Vallas 2856 NW Thurman St Portland
W12A, W12B	Robert Davies 2518 NW Savier Portland
W13A, W13B	Bob Holmström 2924 NW 53rd Dr Portland
W14	Elizabeth Patte 3204 NW Wilson Portland
W15	Martha Gannett 2466 NW Thurman St Portland
W16	Judith Hill 2420 NW Quimby Portland
W17	G. Frank Hammond Cable, Huston, Benedict, Haagensen & Lloyd LLP 1001 SW 5th Ave, Suite 2000 Portland
W18A, W18B	Marvin Lewallen Weyerhaeuser Co. Tualatin

W19	Lori Luchak Miles Fiberglass and Composites 8855 SE Otty Rd. Portland
W20	Mike Elder SP Newsprint Co. P.O. Box 70 Newberg
W21	Jerry Bramwell U. S. Forest Industries Medford
W22	Dr. Robert G. Amundson 1616 Harbor Way #403 Portland
W23	David Paul Paul & Sugerman 520 SW Sixth Avenue, Suite 920 Portland
W24	Mathew Cusma Schnitzer Steel Products Co. 12005 N. Burgard Road Portland
W25	Robin Hochtritt, RN, MSW 707 NW Everett Street Portland
W26	Paul Engelking P. O. Box 236 Lowell
W27	Kim Strahm 91233 Rustic Ct. Coburg

W28	Dale F. Wonn Trus Joist MacMillan P.O. Box 22508 Eugene
W29	Kristan S. Mitchell Oregon Refuse and Recycling Association P. O. Box 2186 Salem

Testimony Summary/Issues **Whose Comment**

GENERAL COMMENTS ABOUT THE RULES

1. W6A, W7, W11, W12A, W13, W14, W15, W16

We write to voice our strong concerns about air quality in our homes in NW Portland, being periodically invaded with noxious burnt odors that may be indicative of any of a number of hazardous air pollutants including metals. The odors get so bad at times as to interfere with our use of the public sidewalks and roadways in the neighborhood. The frequency and uncertainty of the odor events make it impossible for residents to rely on outdoor ventilation to cool their homes in the summertime. People also report headaches and sore throats. We cannot stress enough the need for tough, enforceable air quality nuisance control rules.

2. W6C, W10B

We are concerned about our health and the health of our children. We do not know the consequences of breathing the 34 HAPs the foundry, for example, is permitted to emit. We do know that the HAPs we have monitored are extremely dangerous. It is unreasonable to expect neighbors to bear this burden of pollution year after year to save the company the expense of modernizing a very old plant.

3. W6C, W10B

Many types of fugitive emissions from these nearby facilities are not dissimilar to open burning, e.g., the pouring of molten metal poured into low level radioactive sand molds treated with a resin material. There is no attempt to control these emissions.

4. W3D, W4D

AOI understands the intent of the proposed action is to clarify and simplify the existing nuisance rules and not to create new regulatory requirements or authorities. It is also apparent that some parties wish to use the nuisance rules to combat hazardous air pollutants

when this issue will be addressed more comprehensively in the program proposed by the HAP Consensus Group. The agency should more clearly state the intent and scope of these rules so as to avoid ambiguity in their application.

5. W4B

The proposed rule that prohibits a nuisance establishes a process that we believe is fundamentally unfair and, importantly, unworkable.

6. W10B

I am only a citizen, not a scientist or politician or government employee so I need simple and effective tools to be able to give feedback to the appropriate agency when I am affected by bad air quality as I have been so much this summer. I understand industry's wish for less regulation, however, there has to be a counter-balance to represent the needs of the ordinary citizen who must live with industrial outputs that can affect both quality of life, esthetically, and can potentially cause ill-health as well.

7. W2A, W4A

It is not clear that the legislature has granted DEQ authority to address private nuisances involving a limited number of parties. The authority to regulate nuisances arises from the definition of air contaminants (ORS468A.005) that are described as substances that "interfere unreasonably with enjoyment of life and property throughout such area of the state as shall be affected thereby." "Area of the state" is defined in the statute as a specific geographical area designated by the EQC. The definition does not authorize DEQ to address nuisances that apply on a limited basis or in areas that have not been specifically designated by the EQC.

8. W17, W29

We are concerned that the Department's modifications to nuisance law may create constitutional questions. Determination of whether an activity results in "substantial and unreasonable" interference with a private or public right is generally a question of fact, often subject to decision by a jury in a civil action for nuisance. The proposed rules create civil penalties for a nuisance, in section 340-208-0300, while putting the fact-finding function into administrative hands. Similarly, the rules might violate the separation of powers doctrine because they might be read to impair common law nuisance remedies and defenses. Furthermore, under the Constitution the decision to impair a common law remedy must be left to the legislature, and then its powers are limited.

9. W27

Have you considered or previously tried a rule that if you have a source causing a consistent nuisance to neighboring areas and the agency receives a specific number of calls/complaints

within a determined amount of time and it is verified by the agency then the source is cited as a nuisance?

10. W2A

The cost assumptions used by the Department to determine the fiscal impact are inaccurate.

DEFINING NUISANCE

11. W21

The definition of nuisance is too broad. Without specific definitions of "odor" and "nuisance" every type of business activity would be open for arbitrary enforcement by the Department. The list of criteria for determining a nuisance does not define specific criterion to follow in making these determinations, making the final result based on no more than biased opinion. Test criterion has to be established regarding all odor emissions.

12. W3A, W4A, W9A, W18B, W29

The definition of a nuisance must be modified to correctly state the law. Specifically, both public and private nuisances must be unreasonable and substantial to be classified as a nuisance.

13. W6C, W10B, W12B

Since the proposed definition is not the actual definition of nuisance, we propose from the American Heritage Dictionary, "A use of property or course of conduct that interferes with the legal rights of others by causing damage, annoyance or inconvenience."

14. W6D, W22

We suggest a definition of nuisance closer to the May 16 draft: "Nuisance means unusual or annoying amounts of emissions traceable directly to one or more specific sources, resulting in interference with another's use and enjoyment of real property or the invasion of a right common to members of the general public."

15. W26

The distinction between public and private nuisances is not relevant in the case of airborne contaminants, as any airborne discharge that leaves the airspace above a property becomes an intrusion into the public domain and potentially an expectation of the reasonable use of air.

16. W1

Definition of a nuisance also needs to quantify the difference between a public and private

nuisance, including factors like the number of complaints, the duration of the incident, the intensity and verification of complaints by regulatory agency.

17. W20

The proposed revision to the definition of nuisance should include the reference to the source of the nuisance.

DETERMINING A NUISANCE

18. W2A, W3A, W3B, W4A, W4B, W9A, W29

Additional considerations should be used in determining whether a nuisance exists such as, geographic extent of impact, existence of cost effective controls, compliance with a permit, compliance with statutes or regulations, extent and character of the harm and the parties' ability to prevent or avoid harm.

19. W2A, W3A, W3B, W4A, W4B, W9A, W29

Where a source has already complied with a specific standard directed at controlling emissions from a particular process, that process should not then be subject to additional controls under the nuisance program. We must assume that when DEQ adopts specific standards, these standards are intended to prevent "substantial and unreasonable interference" with public and private rights. The general nuisance rule should simply be a safety net to fill in any gaps not addressed by specific standards.

20. W6A, W6C, W6E, W10B, W12B

Compliance with a permit should in no way exempt industry from the nuisance rule. Examples are evident where a facility in compliance with its permit can still be creating a nuisance. Delete the provision in proposed OAR 340-208-0310 (2).

21. W23

The Department has many programs mandated by federal law that are incorporated in to permits. However, none of these standards is directly connected to a standard of "substantial and unreasonable interference with public and private rights." Therefore, the existence of a permit is not a legal defense to nuisance.

22. W1, W2A, W3A, W4A, W4B, W9A, W19, W29

Definition of a nuisance needs to include site specific factors like zoning. Sources should

be exempted if operating within substantive permit requirements and appropriately located in areas zoned for the use.

23. W6C, W6D, W6E, W10B, W12B, W14

The criteria for a nuisance should not include "the suitability of each party's use and character of the locality." This places the burden entirely on the public affected rather than on the parties impacting the public and isn't acceptable.

24. W23

Oregon law establishes very clearly that "zoning is not an approval of manner of conducting business which causes private nuisance." Lunda v. Matthews 46 Or. App.701, 706-707 (1980).

25. W6A, W6B

Evaluation of the true costs of a nuisance must also include not only the cost of controls but also the costs to the health and well being of people living near the polluter. For instance, a recent health survey indicated that residents of NW and SE Portland had significantly higher asthma rates than anywhere else in the state and higher than the national average.

26. W6E, W12B

Do not include "geographic extent of impact" and "existence of cost effective controls" as criterion to determine a nuisance. These exclusions have been suggested by industry. This issue represents a serious public health matter and should not be treated as an inconvenience to industry.

27. W6C, W6D, W10B, W12B

Retain the originally proposed criterion of "proximity to residential and commercial areas" and delete the criterion of "extent and character of the harm to complainants." The revised proposal appears to favor industry and makes it more difficult for DEQ to enforce any nuisance rule. Isn't the difficulty of legal enforcement supposed to be the reason for changing the rule that is presently on the books – and not enforced?

28. W6D, W6E, W22, W25

Add "toxicity of emissions" to the original list of criteria determining a nuisance.

29. W6A

It is wrong to not consider harm on a smaller scale and to require a test that shows an extended area of harm before action can be taken. Our airshed is in the state it is because of a thousand small cuts of neglect and ignoring or not responding to complaints. No neighbor should be exposed to air toxics that will cause harm.

30. W12B

How does one prove that his breathing is seriously compromised by nuisance dust or odor – indeed, is that a necessity for constituting a nuisance, an annoyance or inconvenience? How better could DEQ determine what constitutes a nuisance? Do not consider extent and character of the harm but consideration of the parties' ability to prevent or avoid harm seems reasonable. Rewrite the criterion regarding number of people impacted to specify a compilation of complaints that specify frequency, duration, intensity and impacts on complainants, testing or monitoring, DEQ inspections or the use of odor contractors who might identify chemicals that cause objectionable smell.

31. W25

The originally proposed list of criteria is preferable. The existence of any one factor should be sufficient to find a nuisance. The language should be amended to indicate that the list is disjunctive.

32. W26

More emphasis should be placed on prevention. Some nuisances are potentially a problem and government can order them abated prior to actual harm being endured. The section in 340-208-0310 is heavy on actual harm and light on potential harm, in contrast to most current policy regarding nuisance abatement.

33. W23

The organization of OAR 340-208-0310 is flawed in that it merges the distinct concepts of defining a nuisance and curing a nuisance. For instance, the suitability of each party's use criterion is not relevant, see Lunda v. Matthews. Even if a polluter is zoned and permitted, it may constitute a nuisance. Therefore, the suitability of an offending party's use to the locality should be considered only in terms of penalties assessed and mandated efforts to cure the nuisance and not to the determination of a nuisance itself. This language should be deleted and relocated, if at all, to another section on penalties.

34. W24

The revised proposal adequately addresses several of our concerns, particularly related to the criteria for determining when a nuisance exists and the details of the Best Work Practices Agreement.

35. W25

The Bridgeview Community is a residential facility that serves as home for chronic mentally ill people. Earlier this year, another residential building nearby began operating an emergency diesel generator. The generator ran on a weekly basis, for about 20 minutes, for routine maintenance purposes. Depending upon the prevailing wind the Bridgeview's

interior would fill with exhaust fumes and, on occasion, set off the smoke alarms or cause an informal evacuation. We support DEQ's effort to fashion a regulatory scheme that recognizes that urban nuisances can come from an otherwise unregulated, nonpermitted source and have unusual or annoying impacts upon the rights of residential neighbors. We are not confident that the revised proposal would allow the Department to address this situation quickly and with few staff hours involved.

PRESUMPTIVE COMPLIANCE

36. W2A, W3A, W3D, W4A, W4B, W4D, W9A, W18B, W28, W29

The current regulations, OAR 340-208-0510, contain an express statement that sources complying with industry specific standards are not subject to the county odor regulations in OAR 340-208-0550. By moving the nuisance rules from –0550 to –0300 without correspondingly moving the presumptive compliance regulation exposes industries having already installed reasonable levels of controls to defend those standards against nuisance complaints. These standards take into account the specific impact of particular industries and are necessarily a reflection of balancing impact and what is reasonable. While compliance with general standards may not be a defense against a nuisance claim, compliance with industry specific standards should presumptively be a defense to nuisance.

NUISANCE PENALTIES 340-208-0300(2)

37. W2A, W3A, W4A, W4B, W9A, W29

Penalties should not be assessed from the date of the notice of a potential nuisance. The determination of what constitutes a nuisance is necessarily a difficult one. A source should not be penalized for arriving at a different subjective conclusion. In addition, a source can rarely abate a nuisance from the date of first notice. Issuing a penalty because the source believed that it was not a nuisance is not an appropriate means of responding to an issue. The proposal contradicts the department's guidance and procedure for enforcement of violations. The lack of notice conflicts with ORS 468.126 and does not even allow for mailing and receipt by the alleged offender.

38. W2A, W4A, W4B

Penalties may not be appropriate in the case of a nuisance. The department should instead issue an order requiring an assessment of appropriate responses and require implementation within a reasonable time frame.

39. W3B, W8A, W26

The concept of "suspected" nuisance agrees more directly with the department's intent for work practices orders and preliminary investigations into whether or not a nuisance exists. Suggest deleting the word "potential" and replacing with "suspected".

BEST WORK PRACTICES AGREEMENT

40. W2A, W3A, W4A, W4B, W9A, W29

The best resolution of any suspected nuisance is through cooperative efforts. The requirement that a source enter into a permanent enforcement order in order to have a defense against penalties is antagonistic. The Best Work Practices Order proposal may have initial appeal but has three serious problems: 1) Reliance on additional formal enforcement orders when such mechanisms are already available; 2) tying the orders to formal enforcement; and 3) creating orders that run forever. The proposed Best Work Practices Order is unnecessary and is unreasonably harsh.

41. W2A, W3A, W4A, W4B, W29

Although a "safe harbor" is appealing tying it to an enforcement order doesn't make sense and ultimately discourage cooperation with the department. An order will be construed as an admission of noncompliance that can be used by third parties in furthering their own civil actions against the source. In addition, we are unaware of other precedent where the department requires a source that has not been determined to be in violation of any rule to enter into an order so as to avoid enforcement. Less formal alternative approaches like determination letters documenting reasonable measures to combat a particular nuisance or source specific permit modifications addressing particular nuisance issues would be more effective.

42. W1, W2A, W4A, W4B

A Best Work Practices Order needs to provide more binding assurances to the source than is provided in 340-208-0320 (1). It is important that sources are provided a level of relief from ongoing complaints and enforcement threats. Sources will not sign Best Work Practices Orders that allow the Department at any future time to require more measures.

43. W1

Reasonably available controls considered for Best Work Practices must consider site specific factors, cost and the extent of the nuisance problem.

44. W3A, W9A, W29

The typical notice of noncompliance procedure has been effectively used to gain compliance. The NON process allows steps to be taken to address an alleged nuisance. Recalcitrant offenders can be penalized promptly but good faith responders are encouraged.

45. W6A, W6B, W23

It is totally unacceptable for the department to ask a company to reduce an odor by taking one or two inadequate steps, possibly contributing to a worsening of the airshed or leaving only a slightly reduced odor. The department should reserve the ability to revisit the adequacy of controls if they prove inadequate. A best work practices agreement should not shield a source from further enforcement actions unless or until the citizens making the complaint are satisfied that sufficient progress has been made toward abating the nuisance. To do otherwise would simply give an offending party a greater shield from liability than they would otherwise have in the absence of these rules.

46. W14

Any language that takes away the department's ability to continue to revisit a complaint is undesirable and should be removed.

47. W6C, W10B

Retain the provision in the originally proposed draft in 340-208-0320 (1) that specifies the agreement will remain in effect unless or until the department determines that further reasonably available practices are necessary to reduce the nuisance. Retain the provisions in the revised proposal in –0320 (2), -0320 (3)(b) and –0320 (3)(c). Delete the provision in the revised proposal in –0320 (3)(a).

48. W6D, W22

Delete –0310(2) in the revised proposal and replace –0320 (b) with "The department determines the activities that were the subject of the agreement no longer occur and that agreed-upon emission levels are consistently met as demonstrated through monitoring." With this addition –0320(3)(c) becomes redundant and should be deleted.

49. W12B, W13

340-208-0310 (2) does not say clearly enough that a permitted release can still be considered a nuisance. This provision, -0310 (2), stands in contradiction to –0320 (3)(c) and will allow minimal reductions in odor to occur.

50. W17, W29

Subsection (2) provides that compliance with permit conditions or a Best Work Practices Agreement will constitute compliance with 340-208-0300, which prohibits nuisances. Similar protections should apply equally to 340-208-210, especially subsection (4). OAR

340-208-0310 (2) should be modified to reflect this.

51. W12B

The original proposed 340-208-0320 (1) should be retained but substituting "abatement" for "manage and reduce". Subsection (3)(a) makes no sense but the word "later" should be inserted between the words "established" and "in a permit".

52. W8B

Regarding 340-208-0320(3)(b) in the revised proposal: this focuses on when the activities no longer occur, but what about the instance where the complainer goes away? The language should be modified to say that the Department determines that the circumstances that originally warranted the agreement have changed.

53. W6E

It is a particularly offensive suggestion that if the complainant moves away, the Best Work Practices Agreement should end as well. People should not be forced out of their homes and then polluters allowed to continue freely.

54. W6C, W10B

When a nuisance exists the rule should require an independent audit to prove that a chemical is absolutely necessary and that a better, safer alternative is not possible. The audit should be at the company's expense.

55. W6D, W22, W25

A provision should be added stating that all correspondence, documentation and data relating to this agreement are public information and will be readily available to the public.

56. W23, W25

The proposal for the Best Work Practices Agreement does not include any element of public participation. This is a fatal flaw and is significant because the offending party may achieve a benefit of finality and certainty by entering into a best work practices agreement. The victim and the public are not provided any assurance that the cure contemplated in the agreement will be effective.

57. W13B

The best work practices proposal satisfies no one. It will neither satisfy the complainer if the nuisance still exists nor the industry if you allow complainers to revisit the complaint if the best work practices do not work. Instead develop a process that results in a Nuisance Abatement Plan, which would have the following elements:

1. Logging of nuisance complaints at a central location using a standard procedure.

2. If complaints exceed some reasonable level, the creation of a specific nuisance project.
3. Evaluate the complaints and determine if it meets the criteria of Division 208 to be a nuisance and to require action. Note: the public will be extremely disappointed if industry can hide a nuisance behind zoning or permitted release regulations!
4. If it is determined by DEQ that a nuisance exists then start the NAP creation process:
   a. DEQ sets up a face to face meeting between the public and the polluter to discuss the issue.
   b. People identified by both the polluter and the public to participate in creating a NAP
   c. The group above meets, attempts to identify the problem, determines what might be measured to achieve success, and establishes goals.
   d. DEQ insures that the NAP is technically sound and meets the needs of both parties.
   e. Execute the NAP under DEQ supervision.
   f. Hopefully achieve success - but it is unlikely that all NAP will succeed, it will be a learning process for all.

58. W27

Have you consulted with attorneys on whether they feel that the Best Work Practices Agreement will be easier to fight in court than the existing nuisance laws?

59. W8B

In 340-208-0300(2), the final two words "this notice" are not clear to which notice it is referring.

60. W26

I am encouraged by the concept of the Best Work Practices Agreement (Section 340-208-0320) that would have force of an order. This solves a very substantial problem with the current approach embedded in civil law. Even if parties can agree on their own now, even so far as a contract, remedy of a future violation of such agreement or contract could be sought only by one party suing the other for damages. Under current legal theory, a private aggrieved party cannot ask a court for enforcement of performance of the contract by the other party, even to things that were agreed to in the contract; a private party can only sue for damages incurred by non-performance. The effect of this is to return the whole matter back to where everything started in the absence of any private agreement or contract: suing for damages. The nuisance continues and nothing is ultimately resolved.

FUGITIVE EMISSION REQUIREMENTS 340-208-0210

61. W17, W29

OAR 340-208-0010 (1) includes "odor" as an air contaminant; however, subsection (7) defines odor to be an "air contaminant that affects the sense of smell." This creates a circular definition that can be resolved by striking odor from the definition of air contaminants in 340-208-0010(1).

62. W2A, W4A, W4B, W18B, W28

There appears to be a technical error in the proposed addition of the words "or odors" to this rule. The definition of fugitive emissions already includes odor. Therefore it is redundant to add the words "or odors" and would lead reviewing courts to extend the phrase to include something more than the use of the term "odor" in the definition of air contaminant.

63. W6E, W23

Do not take out the words "or odors" in outlining applicable fugitive emissions.

64. W6E

Regarding the suggested differentiation between odors and fugitive emissions, how can you separate them? They are not separate.

65. W5

Odor control rules are inappropriate for inclusion into the State Implementation Plan (SIP) because these are non-criteria pollutants. EPA cannot separate out particular words in approving a rule subsection for inclusion within the SIP. EPA suggests that a separate subsection be created. Is the intention to only control odors from buildings or equipment or are there other sources of odor intended to be controlled under this rule?

66. W2B, W3C, W3D, W4B, W4D, W8B, W9B, W18B

The inclusion of section (3) and (4) to the rule add nothing to improve protection of the environment. In fact they represent two parts of the same rule addressing the same thing as in sections (1) and (2). The provisions in the proposed nuisance rule will adequately address odor control without this additional confusing rule.

67. W17, W29

The first sentence of subsection (3) is unclear because it is not evident what the Department would be seeking when bringing a "facility into compliance". Suggest the following modification:

> When fugitive emissions as odors escape from a building or equipment in such a manner and amount as to create a nuisance or to violate any regulation, the department may order the owner or operator to mitigate or eliminate the nuisance or to bring the facility into compliance.

68. W8B

Adopting an approach for odors that is just like fugitive emissions is not workable and ignores the whole concept of odors. The language in (4) would make it risky to drive a diesel engine car. Also, odors by their definition are already airborne, so how does the source "prevent odors from becoming airborne?"

69. W17, W29

Proposed section (4) is overbroad. Odors are by definition airborne and as drafted this provision would require virtually every outdoor activity to have "reasonable precautions" to prevent any odors, noxious or pleasant from becoming airborne. The Department should describe the odors it is restricting and establish clear grounds for compliance.

70. W3B, W8A

The proposed wording in section 1 is over broad and creates a practical impossibility. The department can accomplish its goal more straightforwardly by drawing a direct connection between the control and removal of air contaminants and the emission of those contaminants to the open air.

71. W13A

The use of the word "practicable" without a definition opens the barn door to any polluter. The term must be defined in the rule.

72. W4C, W18A

Unless "reasonable precautions", as used in section (4), are defined specifically within the rules, the rules will be inconsistently applied. The examples provided do not give enough specific guidance to effectively implement the regulatory intent of this section.

73. W13A

The fugitive emission requirements are relatively useless as a business would only have to put a cover, blower or duct on a pollution source to avoid the requirements.

74. W6C, W10B, W12B

Add to the definition of fugitive emissions the phrase "or the emission of any unfiltered

contaminant that escapes accidentally to the air."

MASKING OF EMISSIONS 340-208-0400

75. W5

EPA suggests adding a prohibition against the masking of emissions to also avoid compliance with regulations and requirements.

76. W6A

The provision to prevent masking of emissions is encouraging.

PARTICULATE MATTER SIZE STANDARD 340-208-0450

77. W20

There is no practical, objective or definitive method currently available to demonstrate compliance. We understand that studies using particle fallout buckets for measuring offsite deposition of particulate >250 microns are almost always inconclusive. Particulate matter captured in buckets of water cannot be accurately measured for size nor can they be analyzed to accurately identify sources.

78. W2A, W2B, W3C, W4A, W4B, W9B, W20, W24

The proposed rule extends a prohibition on emitting larger particles (>250 microns) from landing on another's property from nine counties to statewide applicability. Current rules allow the imposition of TACT whenever there is documentation of a nuisance and provides a means to address this issue. The proposed rule can result in a source being penalized regardless of whether the particulate emitted is causing a substantial or unreasonable impact and regardless of the measures taken by the source. The rule should be deleted or include a "reasonableness" component.

79. W9B

The prohibition on 250-micron particulate deposition appears inconsistent with limiting nuisance to substantial and unreasonable interference with the use and enjoyment of land. While the proposed standard may articulate the common law standard for trespass, the Department may wish to eliminate any potential that it could be drawn into issues of trespass law.

80. W2A, W3A, W3B, W3C, W3D, W4A, W4B, W8A, W9A, W9B, W28, W29

The 250-micron rule creates a class of pollutant with no applicable standard or assumes that any non-zero number is unreasonable and does not consider whether a nuisance has been created. Any impact from large particulate can be best addressed through the nuisance rule. The existing rule actually limits the Department's ability to deal with a condition, which may create a nuisance with various particulate sizes. This rule should be deleted.

81. W4C, W9B, W18A, W18B

The language as proposed could easily cause unintended consequences as routinely encountered wind events could transport naturally exposed dry or sandy soil conditions or even pine needles or leaves leading to deposition on neighboring property. If the rule is adopted as written, the majority of oceanfront property owners in Oregon could bring nuisance complaints against their neighbors for blowing sand.

82. W9B

Particulate matter greater than 250 microns appears to have no connection to the improvement of recognized air quality standards, which are usually associated with smaller particulate. The department should reevaluate the appropriateness of the 250-micron limitation.

83. W6E, W22

The definition of particulate should cover particulates from 250 down to 2.5. Particles smaller than 250 microns can accumulate in sufficient quantity to cause a nuisance. Furthermore, if the particles contain toxic substances they can also pose a health risk.

84. W1

The 250-micron rule provides little protection from particle fallout, as larger particles are unlikely to be transported by the wind. Most particle fallout subject to wind borne travel will be smaller than 250 microns and could be better addressed through the nuisance rule.

85. W3D, W4D

Changing the rule to require an observable deposition does not address our concerns, because if the deposition were not observable, then there could never be a violation anyway.

86. W23

The agency's discretion will be exercised reasonably to determine when an "observable deposition" has occurred. There will be no greater risk of uncertainty in this provision than there will be in the section on best work practices under 340-208-0320.

87. W3D, W4D

If the Department insists on keeping this antiquated rule, it should be rewritten in one of two ways. One would be to add language to make the rule consistent with the nuisance requirements, since it is a restatement of the nuisance prohibition. The second proposal would be to add language to make this rule consistent with the approach used in OAR 340-208-0210(1) where the Department may order the owner/operator to take reasonable measures to minimize or eliminate the source of the emissions.

88. W6A

The rule on prohibiting emissions of large particulates is encouraging and commenter strongly objects to eliminating the 250-micron standard.

ODOR CONTROL MEASURES 340-208-0550

89. W1, W3B, W4A, W9A

It is burdensome and unreasonable to set incinerator and afterburner operating parameters for odor control systems that are more appropriate for VOC control systems. Odor control systems, based on sound engineering design, that can be employed to control odors using less than the "highest and best practical treatment currently available" should be allowed. The goal should be nuisance abatement and not emission reductions. The rule should be deleted.

90. W2A, W4A

The "highest and best" portion of the rule is unnecessary given the TACT rule in Division 226. The incinerator/afterburner portion of the rule is antiquated and reflects equipment no longer in use.

COMMENTS ON THE PROCESS

91. W2A

The department should withdraw the rulemaking so as to allow the opportunity to work with affected sources to gain consensus about a practical means of approaching nuisance issues in Oregon.

92. W3B

Considering the scope of anticipated rule changes, the rule should be re-proposed rather than being issued as final.

93. W3C, W9B

The continuing opening and productive dialogue is greatly appreciated.

94. W6C, W10B

The process has been flawed in that we did not have sufficient notice of the rule change to prepare testimony. Although we have twice submitted written comments, industry representatives have been able to insert language that is obviously not in the public interest. We would like to have a public hearing on the rule.

COMMENTS ON OTHER RULES

95. W14

In addition to 340-208-0570, emissions from ships, the Department should also regulate emissions from locomotives, which are also a problem in NW Portland.

Attachment D

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Air Quality Nuisance Control Rules

Department's Evaluation of Public Comment

Testimony Summary/Issues **Whose Comment**

GENERAL COMMENTS ABOUT THE RULES

1. W6A, W7, W11, W12A, W13, W14, W15, W16

We write to voice our strong concerns about air quality in our homes in NW Portland, being periodically invaded with noxious burnt odors that may be indicative of any of a number of hazardous air pollutants including metals. The odors get so bad at times as to interfere with our use of the public sidewalks and roadways in the neighborhood. The frequency and uncertainty of the odor events make it impossible for residents to rely on outdoor ventilation to cool their homes in the summertime. People also report headaches and sore throats. We cannot stress enough the need for tough, enforceable air quality nuisance control rules.

The Department has developed and implemented several programs designed to improve air quality. As a result, emissions from a variety of sectors, including industrial, have been reduced and air quality has improved. Nonetheless, we recognize that continuing challenges remain, among them addressing the impact of toxic air contaminants. The Department has implemented elements of the federal air toxics program in the state and recognizes that further work is needed. With the assistance of citizens and businesses, the Department is developing a toxics reduction program tailored to the Oregon's circumstances. The Department encourages the commenters to participate in the development of this program.

The proposed nuisance rules clarify the Department's ability to address certain air quality issues. Nuisance as an air quality improvement tool is, however, inherently limited and is not effective for addressing general air quality concerns raised by nonspecific complaints. Where several sources create pollution, no one of which alone causes harm, it is difficult to assign responsibility for any harm caused by the cumulative effects of the pollution. Moreover, nuisance actions are a case-by-case, one-shot action, aimed to resolve a

particular problem.

2. W6C, W10B

We are concerned about our health and the health of our children. We do not know the consequences of breathing the 34 HAPs the foundry, for example, is permitted to emit. We do know that the HAPs we have monitored are extremely dangerous. It is unreasonable to expect neighbors to bear this burden of pollution year after year to save the company the expense of modernizing a very old plant.

The Department is also concerned about the health of people in the community. The Department's air toxics program, not the nuisance rule, will be the most effective in addressing these concerns. Over the past year the Department has been monitoring for hazardous air pollutants at five sites in Portland and will now use those results to describe the potential for health effects from these pollutants in those neighborhoods. None of the hazardous air pollutants measured at levels that would cause health concerns in NW Portland can be attributed solely to ESCO. Many of the hazardous air pollutants emitted by ESCO were measured at similar concentrations at all of the Portland monitoring sites, all below a level of concern for health safety. Information like this is essential to targeting pollution reduction efforts where they will make the greatest improvements in air quality. We are continuing our efforts to build a state air toxics program based on people within communities working together to resolve health concerns. These community-based programs will only make good decisions about pollution reduction strategies if they rely on good scientific information, like that provided by monitoring the air that people breathe.

3. W6C, W10B

Many types of fugitive emissions from these nearby facilities are not dissimilar to open burning, e.g., the pouring of molten metal poured into low level radioactive sand molds treated with a resin material. There is no attempt to control these emissions.

The Department disagrees. These two processes are dissimilar. Open burning is the combustion of waste products for the purpose of disposal. The foundry process involves pyrolization for the purpose of casting of materials. The process is subject to the controls outlined in the permit for the facility.

4. W3D, W4D

AOI understands the intent of the proposed action is to clarify and simplify the existing nuisance rules and not to create new regulatory requirements or authorities. It is also apparent that some parties wish to use the nuisance rules to combat hazardous air pollutants when this issue will be addressed more comprehensively in the program proposed by the HAP Consensus Group. The agency should more clearly state the intent and scope of these

rules so as to avoid ambiguity in their application.

The Department agrees that hazardous air pollutants will be comprehensively addressed under the air toxics program but disagrees with the need to establish an intended scope for the nuisance rules outside of the rule language itself. Establishing the criteria for determining a nuisance is the mechanism for guiding the scope of the rule's application. It is impossible to know beforehand the full range or limitation of future applicability because each nuisance case is fact-specific. As the court noted in Gronn v. Rogers Construction, Inc., *"what is a reasonable use and whether a particular use is a nuisance cannot be determined by any fixed general rules, but depend upon the facts of each particular case, such as location, character of the neighborhood, nature of the use, extent and frequency of the injury, the effect upon the enjoyment of life, health, and property, and the like."*

The commentor notes correctly that there will be more effective and proactive methods to control toxic air contaminants through the developing Air Toxic Pollutants Program. But the functional limitations inherent in nuisance law do not necessarily preclude its use in abating the harm associated with toxic air contaminants. For example, consider several of the cases successfully brought by farmers and orchardists against aluminum smelters requiring control of fluoride emissions from their facilities. In these cases, the plaintiffs prevailed because they were able to demonstrate an unreasonable and significant harm from the deposit of this toxic air contaminant on fruit trees and forage grasses.

5. W4B

The proposed rule that prohibits a nuisance establishes a process that we believe is fundamentally unfair and, importantly, unworkable.

Nuisance law admittedly has its limitations. This is why Congress and most states adopted statutes to address problems created by pollution. Still, existing statutory law is not, and probably cannot be, entirely successful in addressing all nuisance conditions caused by pollution. Prohibitions against nuisance are in existing rules. The proposed rule contains criteria that are well within the common law for determining nuisance conditions. The proposed Best Work Practices Agreement provides an additional option not otherwise available in the usual nuisance abatement action. The Department has considered many concerns raised by commenters about the feasibility of the process associated with developing an Agreement and has incorporated many of those comments into the proposed rule to make it more fair and workable.

6. W10B

I am only a citizen, not a scientist or politician or government employee so I need simple and effective tools to be able to give feedback to the appropriate agency when I am affected by bad air quality as I have been so much this summer. I understand industry's wish for

less regulation, however, there has to be a counter-balance to represent the needs of the ordinary citizen who must live with industrial outputs that can affect both quality of life, esthetically, and can potentially cause ill-health as well.

The Department appreciates that citizens are not experts on all matters that come before the Department for rulemaking. Comments of a general nature that express a desire, a direction or a goal are also helpful in crafting an effective rule.

The legislature has directed the Department to implement the state's policy 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 believes this rulemaking is a balanced approach to a challenging problem. It reflects the expertise and judgment of environmental staff, tempered by the comments and concerns raised by citizens and business interests.

7. W2A, W4A

It is not clear that the legislature has granted DEQ authority to address private nuisances involving a limited number of parties. The authority to regulate nuisances arises from the definition of air contaminants (ORS468A.005) that are described as substances that "interfere unreasonably with enjoyment of life and property throughout such area of the state as shall be affected thereby." "Area of the state" is defined in the statute as a specific geographical area designated by the EQC. The definition does not authorize DEQ to address nuisances that apply on a limited basis or in areas that have not been specifically designated by the EQC.

The Department disagrees. The argument requires a very narrow reading of the definition of "area of the state" that ignores historic precedent (see response to Comment 8) and would preclude the operation of long standing air pollution prevention programs like Prevention of Significant Deterioration. Furthermore, ORS 468A.025 directs the Commission to establish standards for air purity and emission standards for the entire state or an area of the state differentiating "between different areas of the state, different air contaminants and different air contamination sources or classes thereof." The Commission, through the Department, may then establish conditions for operation based on claims of nuisance in selected and limited areas of the state.

8. W17, W29

We are concerned that the Department's modifications to nuisance law may create constitutional questions. Determination of whether an activity results in "substantial and unreasonable" interference with a private or public right is generally a question of fact, often subject to decision by a jury in a civil action for nuisance. The proposed rules create civil penalties for a nuisance, in section 340-208-0300, while putting the fact-

finding function into administrative hands. Similarly, the rules might violate the separation of powers doctrine because they might be read to impair common law nuisance remedies and defenses. Furthermore, under the Constitution the decision to impair a common law remedy must be left to the legislature, and then its powers are limited.

Oregon historically addressed air quality problems, like many other pollution problems, through nuisance enforcement. Oregon's first statewide statute aimed at controlling air pollution was enacted in 1951. The statute authorized the state to institute legal proceedings to abate public nuisances created by air pollution, enforceable by penalties. This approach to controlling air pollution through nuisance actions continued for another ten years until the legislature enacted a new law authorizing the Sanitary Authority of Oregon to develop a general comprehensive plan for the control, abatement and prevention of air pollution throughout the state. The Department's authority to address nuisances follows from the statutes governing air quality protection, and is not reliant on the common law.

Although the legislature simultaneously repealed the 1951 provision declaring that air pollution is a public nuisance, that did not deny an opportunity for a nuisance claim. ORS 468.100 (4) expressly states that "the provisions of this section shall not prevent the maintenance of actions for legal or equitable remedies relating to private or public nuisances brought by any other person, or by the state on relation of any person without prior order of the commission." Individuals may continue to bring either private or public nuisance suits if the EQC adopts the proposed rule.

9. W27

Have you considered or previously tried a rule that if you have a source causing a consistent nuisance to neighboring areas and the agency receives a specific number of calls/complaints within a determined amount of time and it is verified by the agency then the source is cited as a nuisance?

Other agencies have developed rules that apply thresholds similar to that proposed by this commentor. We believe the proposed approach offers the greatest flexibility to effectively address nuisances, which can be wide ranging in their nature and impact. The proposal to have a nuisance status triggered solely by a selected volume of complaints, leaves a source open to a campaign of harassment by individuals or groups and provides insufficient protection for individuals from an infrequent, significant, and unreasonable interference with their enjoyment of life and property.

10. W2A

The cost assumptions used by the Department to determine the fiscal impact are inaccurate.

The Department compiled the cost estimates in consultation with representative businesses that were similar to or had been subject to nuisance abatement actions. The Fiscal Impact Statement noted that a precise estimate is difficult because each case will vary based on the type and size of the facility and the nature of the nuisance.

DEFINING NUISANCE

11. W21

The definition of nuisance is too broad. Without specific definitions of "odor" and "nuisance" every type of business activity would be open for arbitrary enforcement by the Department. The list of criteria for determining a nuisance does not define specific criterion to follow in making these determinations, making the final result based on no more than biased opinion. Test criterion has to be established regarding all odor emissions.

The Department disagrees. The proposed definition of nuisance reflects Oregon case law. Although courts have ruled on nuisance cases for over 400 years, the legal concept of a nuisance remains imprecise because the test reflects a balancing of considerations peculiar to each case. According to nuisance law, each person is privileged, within reasonable limits, to make use of his own property for his own benefit, even at the expense of harm to his neighbors. The reasonableness of a person's conduct depends upon the circumstances and varies from case to case. The ultimate question is whether the challenged use is reasonable under the circumstances. The Department believes that the proposed criteria will sufficiently guide a reasonable person's judgment of the facts relating to nuisance cases presented to the Department.

12. W3A, W4A, W9A, W18B, W29

The definition of a nuisance must be modified to correctly state the law. Specifically, both public and private nuisances must be unreasonable and substantial to be classified as a nuisance.

The Department agrees and will make the change. We are choosing to be consistent, but could be more stringent than common law.

13. W6C, W10B, W12B

Since the proposed definition is not the actual definition of nuisance, we propose from the American Heritage Dictionary, "A use of property or course of conduct that interferes with the legal rights of others by causing damage, annoyance or inconvenience."

The Department disagrees. The change in the definition of nuisance was originally proposed to correct legal deficiencies. The proposed definition incorporates the legal definition of nuisance developed in case law.

14. W6D, W22

We suggest a definition of nuisance closer to the May 16 draft: "Nuisance means unusual or annoying amounts of emissions traceable directly to one or more specific sources, resulting in interference with another's use and enjoyment of real property or the invasion of a right common to members of the general public."

The Department disagrees. See the discussion above regarding definition of a nuisance for legal purposes.

15. W26

The distinction between public and private nuisances is not relevant in the case of airborne contaminants, as any airborne discharge that leaves the airspace above a property becomes an intrusion into the public domain and potentially an expectation of the reasonable use of air.

While both forms of nuisance inconvenience someone, they are different legal concepts. A public nuisance is a substantial and unreasonable interference with a right common the general public, while a private nuisance is a substantial and unreasonable interference with the use and enjoyment of one's land. Air pollution may cause either a public nuisance, a private nuisance, or both. The nuisance rule could apply to both types of nuisance.

16. W1

Definition of a nuisance also needs to quantify the difference between a public and private nuisance, including factors like the number of complaints, the duration of the incident, the intensity and verification of complaints by regulatory agency.

The proposed definition of nuisance is taken from the common law. The difference between the two classes of nuisance is not necessarily related to the number of people affected but, rather, the nature of the nuisance itself. The Department agrees that the proposed definition in OAR 340-208-0010 (6) is insufficient on its own to provide direction to staff or guidance to citizens or businesses as to what constitutes a nuisance. This is why we propose the criteria in 340-208-0310 to guide the staff in responding to a nuisance complaint.

17. W20

The proposed revision to the definition of nuisance should include the reference to the source of the nuisance.

The Department disagrees. Nuisance law requires the complainant to show that a particular source is causing the harm.

DETERMINING A NUISANCE

18. W2A, W3A, W3B, W4A, W4B, W9A, W29

Additional considerations should be used in determining whether a nuisance exists such as, geographic extent of impact, existence of cost effective controls, compliance with a permit, compliance with statutes or regulations, extent and character of the harm and the parties' ability to prevent or avoid harm.

The Department agrees that there are many helpful in elements in the balancing used to determine a nuisance. This is why proposed OAR 340-208-0310 says "the department may consider factors including, but not limited to, the following:". However, for the reasons discussed below, compliance with statutes or regulations will not be a limiting factor.

19. W2A, W3A, W3B, W4A, W4B, W9A, W29

Where a source has already complied with a specific standard directed at controlling emissions from a particular process, that process should not then be subject to additional controls under the nuisance program. We must assume that when DEQ adopts specific standards, these standards are intended to prevent "substantial and unreasonable interference" with public and private rights. The general nuisance rule should simply be a safety net to fill in any gaps not addressed by specific standards.

The Department disagrees. First, it is erroneous to assume that specific standards adopted by the EQC are intended to prevent "substantial and unreasonable interference" with public and private rights. In many cases, standards are based on categorical controls that do not consider health or nuisance impacts. Even health-based standards may not be designed to address near-source impacts. Second, Oregon courts have upheld private nuisance claims against sources operating under a permit from the Department. The Oregon court of appeals has ruled that "conformance with pollution standards does not preclude a suit in private nuisance." Lunda v. Matthews 46 Or. App.701, 706-707 (1980).

20. W6A, W6C, W6E, W10B, W12B

Compliance with a permit should in no way exempt industry from the nuisance rule. Examples are evident where a facility in compliance with its permit can still be creating a nuisance. Delete the provision in proposed OAR 340-208-0310 (2).

The Department agrees with this comment, but proposed OAR 340-208-0310(2) is not intended to protect permit holders from nuisance action as the commentor suggests. The Department will modify the language to make it clearer.

21. W23

The Department has many programs mandated by federal law that are incorporated into permits. However, none of these standards is directly connected to a standard of "substantial and unreasonable interference with public and private rights." Therefore, the existence of a permit is not a legal defense to nuisance.

The Department agrees with this comment.

22. W1, W2A, W3A, W4A, W4B, W9A, W19, W29

Definition of a nuisance needs to include site specific factors like zoning. Sources should be exempted if operating within substantive permit requirements and appropriately located in areas zoned for the use.

The Department disagrees with this comment. Case law developed around nuisance complaints indicates that neither zoning nor compliance with pollutant standards provides an absolute defense against nuisance legal actions.

23. W6C, W6D, W6E, W10B, W12B, W14

The criteria for a nuisance should not include "the suitability of each party's use and character of the locality." This places the burden entirely on the public affected rather than on the parties impacting the public and isn't acceptable.

The Department disagrees. While several commenters believe this criterion to offer a defense against nuisance based on the source's zoning, it actually applies more broadly and fairly. The criterion requires a review of each party's use and its suitability to the character of the location. One result of this analysis could be that while a source of nuisance complaints was operating properly in its commercial or industrial zone, the complainants residing in their appropriately zoned residential area are nonetheless entitled to an expectation of property enjoyment suitable to residential areas.

24. W23

Oregon law establishes very clearly that "zoning is not an approval of manner of conducting business which causes private nuisance." Lunda v. Matthews 46 Or. App.701, 706-707 (1980).

The Department agrees and notes that this speaks directly to the comment above.

25. W6A, W6B

Evaluation of the true costs of a nuisance must also include not only the cost of controls but also the costs to the health and well being of people living near the polluter. For instance, a recent health survey indicated that residents of NW and SE Portland had significantly higher asthma rates than anywhere else in the state and higher than the national average.

The Department agrees with this comment. Determining whether to require nuisance abatement involves balancing, among other things, the harm done compared against the cost of controls or shutting down a source. To the extent that these costs can be accurately characterized and specifically drawn to the cause of the problem, they can be included in any complaint for relief from suspected nuisances.

26. W6E, W12B

Do not include "geographic extent of impact" and "existence of cost effective controls" as criterion to determine a nuisance. These exclusions have been suggested by industry. This issue represents a serious public health matter and should not be treated as an inconvenience to industry.

The Department disagrees. Regardless of who made the suggestion, the Department's goal in evaluating these comments is to develop an effective, enforceable rule.

Both of these criteria are relevant to a complete balancing test for assessing a nuisance complaint. The geographic extent of the impact clearly affects how we would characterize the scope of the problem. Assessing the scope of a problem is a first step in judging the seriousness of an issue and the total cost imposed on the public. Considering cost-effective controls is also time-tested in pollution control and nuisance determinations and contributes to a reasonable evaluation process for the Department.

27. W6C, W6D, W10B, W12B

Retain the originally proposed criterion of "proximity to residential and commercial areas" and delete the criterion of "extent and character of the harm to complainants." The revised proposal appears to favor industry and makes it more difficult for DEQ to enforce any nuisance rule. Isn't the difficulty of legal enforcement supposed to be the reason for

changing the rule that is presently on the books – and not enforced?

The Department disagrees. Physical proximity is not necessarily a compelling indicator of nuisance in and of itself. The revised proposal offers considerations that are actually more central to the protection of people's use and enjoyment of their life and property, for instance, "number of people impacted" and "extent and character of the harm to complainants". The revised proposal offers a limited list of criteria that outlines the main elements of a balancing test required under nuisance law.

It is true that an unclear policy on nuisance determination has prevented prompt action in some cases, however Department staff have field tested these criteria and found them to be very helpful in improving confidence in making a nuisance determination.

28. W6D, W6E, W22, W25

Add "toxicity of emissions" to the original list of criteria determining a nuisance.

This is reflected in the criterion "the extent and character of the harm to the complainants."

29. W6A

It is wrong to not consider harm on a smaller scale and to require a test that shows an extended area of harm before action can be taken. Our airshed is in the state it is because of a thousand small cuts of neglect and ignoring or not responding to complaints. No neighbor should be exposed to air toxics that will cause harm.

The Department disagrees with the conclusion that the commentor has drawn from the listing of criteria for nuisance. Many factors must be considered in the evaluation process, any one of which is seldom conclusive. The determination of a nuisance does not require that an aggrieved action must score high on all factors, although that certainly strengthens the case. A demonstration of harm in a relatively small geographic area may be sufficient to prove a nuisance if other considerations are especially compelling.

30. W12B

How does one prove that his breathing is seriously compromised by nuisance dust or odor – indeed, is that a necessity for constituting a nuisance, an annoyance or inconvenience? How better could DEQ determine what constitutes a nuisance? Do not consider extent and character of the harm but consideration of the parties' ability to prevent or avoid harm seems reasonable. Rewrite the criterion regarding number of people impacted to specify a compilation of complaints that specify frequency, duration, intensity and impacts on complainants, testing or monitoring, DEQ inspections or the use of odor contractors who might identify chemicals that cause objectionable smell.

Evidence can be presented anecdotally, but generally the case will be stronger and the likelihood of prevailing will increase if it is built on accurate, unbiased and documentable observation. Also, the more dramatic the action required by a source to abate a nuisance, the more strongly the case must be built on a compelling demonstration of harm. For instance, a cement plant was compelled to water roadways on its property upon a demonstration that blowing particulate on a nearby property interfered with the use of that land, while an aluminum plant was required to install extensive controls to reduce fluoride emissions following a demonstration that low levels of ambient fluoride was the sole cause of damage to agriculturally significant plants.

The criteria concerning extent and character of the harm and number of people impacted are not meant to be unduly limiting. Again, they are factors to consider when confronted with the facts of a nuisance claim. They also serve to direct the Department's limited resources to addressing claims of the greatest seriousness.

The Department disagrees with the suggestion that claims necessarily require testing, monitoring or the use of independent odor contractors. Requiring such conditions would serve to increase the expense and thus discourage steps to action. Conditions such as these would reduce flexibility in responding to legitimate claims to nuisance abatement and ignore that nuisance can take many forms other than odor intrusions.

31. W25

The originally proposed list of criteria is preferable. The existence of any one factor should be sufficient to find a nuisance. The language should be amended to indicate that the list is disjunctive.

The Department disagrees. The list of criteria for determining a nuisance is meant to reflect a balancing test that includes numerous considerations. While one factor may weigh strongly in the facts of a particular case, it may be irrelevant in another case. Nuisance determination will depend upon weighing numerous elements, including those listed in the proposed rule.

32. W26

More emphasis should be placed on prevention. Some nuisances are potentially a problem and government can order them abated prior to actual harm being endured. The section in 340-208-0310 is heavy on actual harm and light on potential harm, in contrast to most current policy regarding nuisance abatement.

The Department disagrees. In common law action, the plaintiff bringing the case must establish the causation between the harm and the defendant's conduct. The Department intends to apply the nuisance rule to complaints that demonstrate actual harm.

33. W23

The organization of OAR 340-208-0310 is flawed in that it merges the distinct concepts of defining a nuisance and curing a nuisance. For instance, the suitability of each party's use criterion is not relevant, see Lunda v. Matthews. Even if a polluter is zoned and permitted, it may constitute a nuisance. Therefore, the suitability of an offending party's use to the locality should be considered only in terms of penalties assessed and mandated efforts to cure the nuisance and not to the determination of a nuisance itself. This language should be deleted and relocated, if at all, to another section on penalties.

The Department disagrees. It is true that the process of a nuisance determination could occur in two steps: assessing the scope and nature of the intrusion and its effects, followed by assessing the cost of control and other mitigating factors on the source's behalf. However, the Department believes that it is more efficient to combine the steps and consider all factors when making a declaration of nuisance.

34. W24

The revised proposal adequately addresses several of our concerns, particularly related to the criteria for determining when a nuisance exists and the details of the Best Work Practices Agreement.

The Department appreciates the comments.

35. W25

The Bridgeview Community is a residential facility that serves as home for chronic mentally ill people. Earlier this year, another residential building nearby began operating an emergency diesel generator. The generator ran on a weekly basis, for about 20 minutes, for routine maintenance purposes. Depending upon the prevailing wind the Bridgeview's interior would fill with exhaust fumes and, on occasion, set off the smoke alarms or cause an informal evacuation. We support DEQ's effort to fashion a regulatory scheme that recognizes that urban nuisances can come from an otherwise unregulated, nonpermitted source and have unusual or annoying impacts upon the rights of residential neighbors. We are not confident that the revised proposal would allow the Department to address this situation quickly and with few staff hours involved.

The situation described has elements that are very typical of the circumstances surrounding many of the nuisance complaints the Department receives and the rule was drafted to address. In this case, DEQ field staff responded to this complaint used the draft criteria as

a framework to guide evaluation of the nuisance. They concluded that the complaint was valid and the source was a nuisance. We believe the proposed rule will continue to provide a framework for staff around the state to promptly and effectively address nuisance complaints.

PRESUMPTIVE COMPLIANCE

36. W2A, W3A, W3D, W4A, W4B, W4D, W9A, W18B, W28, W29

The current regulations, OAR 340-208-0510, contain an express statement that sources complying with industry specific standards are not subject to the county odor regulations in OAR 340-208-0550. By moving the nuisance rules from –0550 to –0300 without correspondingly moving the presumptive compliance regulation exposes industries having already installed reasonable levels of controls to defend those standards against nuisance complaints. These standards take into account the specific impact of particular industries and are necessarily a reflection of balancing impact and what is reasonable. While compliance with general standards may not be a defense against a nuisance claim, compliance with industry specific standards should presumptively be a defense to nuisance.

The Department disagrees. The commentor incorrectly construes 340-208-0510 as exempting sources from a nuisance complaint if industry-specific standards are established and adhered to. Even if some of the rules in 340-208-0500 through –0630 relate to air contaminants that could create a nuisance does not necessarily extend this exemption to any nuisance action. A general prohibition on creating nuisances never existed in the region-specific rules. The commenter's proposed revision represents a substantial departure from a long-standing policy and ignores courts' opinions that nuisance issues may still be addressed with sources that comply with specific regulations and standards.

NUISANCE PENALTIES 340-208-0300(2)

37. W2A, W3A, W4A, W4B, W9A, W29

Penalties should not be assessed from the date of the notice of a potential nuisance. The determination of what constitutes a nuisance is necessarily a difficult one. A source should not be penalized for arriving at a different subjective conclusion. In addition, a source can rarely abate a nuisance from the date of first notice. Issuing a penalty because the source believed that it was not a nuisance is not an appropriate means of responding to an issue. The proposal contradicts the department's guidance and procedure for enforcement of

violations. The lack of notice conflicts with ORS 468.126 and does not even allow for mailing and receipt by the alleged offender.

The Department agrees with elements of this comment. The purpose of assessing civil penalties is to ensure that sources adhere to the state's environmental regulations. The Department has a progressive enforcement program that allows sources to come into compliance without being assessed penalties. . The Department's objective is to use civil penalties to compel a source to adopt abatement strategies. The Department also intends to convey to the source that bad faith efforts to abate the nuisance will not be tolerated, and that civil penalties will accrue in the face of continued nonperformance. We will make changes to the rule to incorporate these elements in the final draft.

38. W2A, W4A, W4B

Penalties may not be appropriate in the case of a nuisance. The department should instead issue an order requiring an assessment of appropriate responses and require implementation within a reasonable time frame.

The Department disagrees. Notice of noncompliance and other informal efforts will likely be the first stage of any effort to abate a nuisance. However, the issues represented by a complaint for nuisance can be as compelling as many other environmental matters and deserve the same level of attention. Informal approaches can still be employed but the potential for penalty enforcement must remain in order to make sure that the system is effective.

39. W3B, W8A, W26

The concept of "suspected" nuisance agrees more directly with the department's intent for work practices orders and preliminary investigations into whether or not a nuisance exists. Suggest deleting the word "potential" and replacing with "suspected".

The Department agrees and will make the change.

BEST WORK PRACTICES AGREEMENT

40. W2A, W3A, W4A, W4B, W9A, W29

The best resolution of any suspected nuisance is through cooperative efforts. The requirement that a source enter into a permanent enforcement order in order to have a defense against penalties is antagonistic. The Best Work Practices Order proposal may have initial appeal but has three serious problems: 1) Reliance on additional formal enforcement orders when such mechanisms are already available; 2) tying the orders to

formal enforcement; and 3) creating orders that run forever. The proposed Best Work Practices Order is unnecessary and is unreasonably harsh.

The Department disagrees. Entering into an agreement is completely voluntary so anyone who views it as too harsh can consider other options. We view this as a midway approach between a wholly informal process for resolution and a typical enforcement procedure. Department field staff have worked with sources of complaints on a number of occasions to resolve issues raised by their operations and have often met success with this level of interaction. Not all cases lend themselves to this approach and nuisance enforcement can prove particularly demanding. The Best Work Practices Agreement outlines a process that combines elements of these other approaches. Backing up these agreements with a formal enforcement process is important under these circumstances where a wholly voluntary nuisance abatement has not been achieved.

The Department will propose changes to the Best Work Practices Agreement that outline how the Agreement can be terminated if superceded by other circumstances such as incorporation into a permit.

41. W2A, W3A, W4A, W4B, W29

Although a "safe harbor" is appealing tying it to an enforcement order doesn't make sense and ultimately discourage cooperation with the department. An order will be construed as an admission of noncompliance that can be used by third parties in furthering their own civil actions against the source. In addition, we are unaware of other precedent where the department requires a source that has not been determined to be in violation of any rule to enter into an order so as to avoid enforcement. Less formal alternative approaches like determination letters documenting reasonable measures to combat a particular nuisance or source specific permit modifications addressing particular nuisance issues would be more effective.

The Department disagrees. A "safe harbor" can represent a significant value to an entity that is the source of nuisance complaints and the Department is unwilling to cede that value without ensuring that public rights are still being protected. The possibility that an agreement could be used in a third party action is eliminated if the agreement effectively addresses the nuisance and the source is complies with its elements. No court would order action against a source that is already moving forward with an effective plan to address the problem.

The Department may still use less formal measures to abate nuisances when, in its judgment, the opportunities for success are high. The Best Work Practices Agreement

provides more structure, certainty and enforceability when the problems are not so easily resolved.

42. W1, W2A, W4A, W4B

A Best Work Practices Order needs to provide more binding assurances to the source than is provided in 340-208-0320 (1). It is important that sources are provided a level of relief from ongoing complaints and enforcement threats. Sources will not sign Best Work Practices Orders that allow the Department at any future time to require more measures.

If the source agrees to a Best Work Practices Agreement both the source and the Department are motivated to promptly address the problems that gave rise to the complaints. The source wants to be free of complaints and enforcement threats and the Department wants to close files with a resolution. The Department has extensive experience providing technical assistance to enable sources to meet environmental requirements in the most effective way possible.

43. W1

Reasonably available controls considered for Best Work Practices must consider site specific factors, cost and the extent of the nuisance problem.

The Department agrees with this comment. As noted earlier in the discussion on criteria for nuisance, the cost of controls is a factor considered in concert with all the other elements of the case.

44. W3A, W9A, W29

The typical notice of noncompliance procedure has been effectively used to gain compliance. The NON process allows steps to be taken to address an alleged nuisance. Recalcitrant offenders can be penalized promptly but good faith responders are encouraged.

The Department agrees and there is nothing in the proposed rule to prevent this approach from being used. But it may not be the best approach in all situations. The Best Work Practices Agreement represents an additional tool for ensuring success.

45. W6A, W6B, W23

It is totally unacceptable for the department to ask a company to reduce an odor by taking one or two inadequate steps, possibly contributing to a worsening of the airshed or leaving only a slightly reduced odor. The department should reserve the ability to revisit the adequacy of controls if they prove inadequate. A best work practices agreement should not shield a source from further enforcement actions unless or until the citizens making the complaint are satisfied that sufficient progress has been made toward abating the nuisance. To do otherwise would simply give an offending party a greater shield from liability than

they would otherwise have in the absence of these rules.

An agreement can always be revisited if the Department determines that the nuisance has not been adequately addressed by controls, perhaps if better reasonably available control options become available over time. The Department agrees that there is little value in obtaining an agreement that is not effective in producing results. Such a development would be extremely wasteful of scarce Department resources. This need to efficiently deploy staff effort to promptly resolve these issues is a strong motivating force underlying these rule proposals.

In matters such as these, which are typically complaint driven, the Department has relied upon citizens feedback to ensure that the problem has been resolved. The Department will continue to consult with citizens under the new program.

46. W14

Any language that takes away the department's ability to continue to revisit a complaint is undesirable and should be removed.

The Department agrees that it would be an unacceptable result if the proposal resulted in a continuing nuisance and reasonable measures were available but not deployed to abate the nuisance.

47. W6C, W10B

Retain the provision in the originally proposed draft in 340-208-0320 (1) that specifies the agreement will remain in effect unless or until the department determines that further reasonably available practices are necessary to reduce the nuisance. Retain the provisions in the revised proposal in –0320 (2), -0320 (3)(b) and –0320 (3)(c). Delete the provision in the revised proposal in –0320 (3)(a).

The original language in –0320(1) was moved to (3)(c) to combine all references in the rule that affect the term of the Best Work Practices Agreement. The Department agrees with the commentor to retain the three cited provisions. The Department disagrees with the comment to delete -0320(3)(a). This subsection provides that an agreement will be superseded by conditions and requirements established in a permit as outlined in –0320(2), a provision that the commentor otherwise supports.

48. W6D, W22

Delete –0310(2) in the revised proposal and replace –0320 (b) with "The department determines the activities that were the subject of the agreement no longer occur and that agreed-upon emission levels are consistently met as demonstrated through monitoring." With this addition –0320(3)(c) becomes redundant and should be deleted.

The Department disagrees. The subsection in –0310(2) specifies the extent to which an effective Best Work Practices Agreement will shield a source from further action addressing a nuisance. This is an important element to make the agreement attractive to sources. The shield when it exists will reflect the result of an effective abatement program. We believe that we can create an agreement that will marry these elements of providing certainty to the source and relief for the public.

The Department also disagrees with the suggestion to add the provision requiring monitoring. While some sources of nuisance may be responsive to a monitoring network, most will not. It would be inappropriate to always require monitoring when other less expensive and more appropriate techniques are available to determine if the nuisance has been abated.

49. W12B, W13

340-208-0310 (2) does not say clearly enough that a permitted release can still be considered a nuisance. This provision, -0310 (2), stands in contradiction to –0320 (3)(c) and will allow minimal reductions in odor to occur.

The Department will clarify that compliance with specific permit conditions that effectively address the source of the nuisance will be considered as indicating compliance with the nuisance rule.

50. W17, W29

Subsection (2) provides that compliance with permit conditions or a Best Work Practices Agreement will constitute compliance with 340-208-0300, which prohibits nuisances. Similar protections should apply equally to 340-208-210, especially subsection (4). OAR 340-208-0310 (2) should be modified to reflect this.

The Department disagrees. Not all violations of 340-208-0210 will be themselves a nuisance. To the extent that they are determined to be nuisances in violation of –0210, a fully implemented Best Work Practices Agreement will be sufficient. The provisions in subsection (2) would apply in that case anyway.

51. W12B

The original proposed 340-208-0320 (1) should be retained but substituting "abatement" for

"manage and reduce". Subsection (3)(a) makes no sense but the word "later" should be inserted between the words "established" and "in a permit".

The Department agrees to make the changes regarding "abatement" in the interest of maintaining consistent phrasing throughout the rule. However, we want to make it clear that nuisance abatement does include reducing, but not necessarily eliminating, the emissions associated with it. Factors such as the cost and availability of controls, plus other mitigating factors, may indicate that complete eradication of the problem emissions is inappropriate.

The Department will also agree to make the other recommended change to add clarity to the passage.

52. W8B

Regarding 340-208-0320(3)(b) in the revised proposal: this focuses on when the activities no longer occur, but what about the instance where the complainer goes away? The language should be modified to say that the Department determines that the circumstances that originally warranted the agreement have changed.

The Department disagrees. While a complaint may be initiated by one or more individuals, the continuance of any action is not contingent on the continued presence of those individuals. The agreement to abate the nuisance is based on the test of what a reasonable person balancing a number of competing concerns judges to be a significant and unreasonable interference with the enjoyment of life and property. The final determination is not dependent upon the opinion or the continued presence of the complaining individual in order to remain in effect.

53. W6E

It is a particularly offensive suggestion that if the complainant moves away, the Best Work Practices Agreement should end as well. People should not be forced out of their homes and then polluters allowed to continue freely.

The Department agrees. See response to Comment 52.

54. W6C, W10B

When a nuisance exists the rule should require an independent audit to prove that a chemical is absolutely necessary and that a better, safer alternative is not possible. The audit should be at the company's expense.

The Department disagrees with adding this as a requirement. Nuisance can take many forms and not all of them are chemically based. Often, though, the first step in addressing a

nuisance complaint is to take stock of an operation. Audits can be useful tools in breaking down the steps in a process and identifying where practices lead to nuisance issues. The Department has used this technique with a number of sources. This approach sometimes results in improvements in process and the final product while reducing environmental pollutants and sometimes costs. Audits will be considered to resolve nuisances where appropriate.

55. W6D, W22, W25

A provision should be added stating that all correspondence, documentation and data relating to this agreement are public information and will be readily available to the public.

All records are public records and are available for public review pursuant to ORS 192.420. A specific provision to this effect in this rule is unnecessary.

56. W23, W25

The proposal for the Best Work Practices Agreement does not include any element of public participation. This is a fatal flaw and is significant because the offending party may achieve a benefit of finality and certainty by entering into a best work practices agreement. The victim and the public are not provided any assurance that the cure contemplated in the agreement will be effective.

The Department agrees and will add a provision to require a consultation with the affected public when developing a Best Work Practices Agreement.

57. W13B

The best work practices proposal satisfies no one. It will neither satisfy the complainer if the nuisance still exists nor the industry if you allow complainers to revisit the complaint if the best work practices do not work. Instead develop a process that results in a Nuisance Abatement Plan, which would have the following elements:

1. Logging of nuisance complaints at a central location using a standard procedure.
2. If complaints exceed some reasonable level, the creation of a specific nuisance project.
3. Evaluate the complaints and determine if it meets the criteria of Division 208 to be a nuisance and to require action. Note: the public will be extremely disappointed if industry can hide a nuisance behind zoning or permitted release regulations!
4. If it is determined by DEQ that a nuisance exists then start the NAP creation process:

a. DEQ sets up a face to face meeting between the public and the polluter to discuss the issue.
b. People identified by both the polluter and the public to participate in creating a NAP
c. The group above meets, attempts to identify the problem, determines what might be measured to achieve success, and establishes goals.
d. DEQ insures that the NAP is technically sound and meets the needs of both parties.
e. Execute the NAP under DEQ supervision.
f. Hopefully achieve success - but it is unlikely that all NAP will succeed, it will be a learning process for all.

Many of the elements offered by the commentor are components of the proposed Best Work Practices Agreement. The Department disagrees, however, with the proposal to establish a threshold that predetermines a nuisance. While a catalogue of complaints helps to build a history that this event is not infrequent or a single occurrence, an effective nuisance program cannot be forced to move forward on the basis of a persistent complainer pushing for action on what is otherwise not a nuisance. Neither should a person suffering significant harm be forced to endure the nuisance while complaints accumulate toward a preordained threshold.

The Department will commit to consult with the complainants throughout the process but cannot guarantee the level of direct involvement that the commentor suggests. The Department is acting as an agent enforcing its rules on behalf of the complainant to resolve the nuisance. Although there may be circumstances that warrant the direct and continuous involvement that the commentor proposes, there may also be instances where that level of contact is unwarranted, undesired or counterproductive.

58. W27

Have you consulted with attorneys on whether they feel that the Best Work Practices Agreement will be easier to fight in court than the existing nuisance laws?

The Department has consulted with attorneys from the Department of Justice and DEQ's enforcement section. We believe that the Best Work Practices Agreement will be easier to enforce than a typical nuisance case because the elements of compliance and infraction will be easier to determine.

59. W8B

In 340-208-0300(2), the final two words "this notice" are not clear to which notice it is referring.

This subsection is about the notice the Department provides to sources suspected of creating a nuisance. There is no other reference to a notice and the Department does not feel it necessary to burden the subsection with further references to the main point of the subsection.

60. W26

I am encouraged by the concept of the Best Work Practices Agreement (Section 340-208-0320) that would have force of an order. This solves a very substantial problem with the current approach embedded in civil law. Even if parties can agree on their own now, even so far as a contract, remedy of a future violation of such agreement or contract could be sought only by one party suing the other for damages. Under current legal theory, a private aggrieved party cannot ask a court for enforcement of performance of the contract by the other party, even to things that were agreed to in the contract; a private party can only sue for damages incurred by non-performance. The effect of this is to return the whole matter back to where everything started in the absence of any private agreement or contract: suing for damages. The nuisance continues and nothing is ultimately resolved.

The Department agrees that the Best Work Practices Agreement offers a more conclusive resolution than can sometimes be found under typical private nuisance suit actions.

FUGITIVE EMISSION REQUIREMENTS 340-208-0210

61. W17, W29

OAR 340-208-0010 (1) includes "odor" as an air contaminant; however, subsection (7) defines odor to be an "air contaminant that affects the sense of smell." This creates a circular definition that can be resolved by striking odor from the definition of air contaminants in 340-208-0010(1).

The Department disagrees. The definition of "air contaminants" in the rule is precisely that found in ORS 468A. The definition of odor in the rule is a refinement to the list of to-be-regulated air contaminants, adds to the understanding of the term and is not circular.

62. W2A, W4A, W4B, W18B, W28

There appears to be a technical error in the proposed addition of the words "or odors" to this rule. The definition of fugitive emissions already includes odor. Therefore it is redundant to add the words "or odors" and would lead reviewing courts to extend the phrase to include something more than the use of the term "odor" in the definition of air contaminant.

While the rule is entitled "Fugitive Emissions" and one can explore the interlocking layers of definition to ultimately conclude that odors can be regulated as well, it is not perfectly clear. This is reflected in uncertainty by staff as to whether this rule can be directed to fugitive odor emissions, a confusion that is exacerbated by section (2) which highlights work practices relating to controlling fugitive particulate emissions. The Department originally proposed adding the words "or odors" to clarify that fugitive emissions include odors.

Given that attorneys representing business interests have noted that odors are covered by the scope of this rule and can be addressed as fugitives, the Department will withdraw from consideration the originally proposed revision including the proposed sections 3 and 4 in the interim draft. Returning to the original language still confers some advantages to environmental protection. While nuisance odors will probably be better addressed under the proposed nuisance rules, the current rules in 340-208-0200 through –0210 also cover additional circumstances that cannot be otherwise addressed under nuisance. This approach also retains the advantage of continuing the protection provided by this rule within the State Implementation Plan. While EPA argues (Comment 65) that odors per se are not criteria pollutants, odors typically are associated with criteria air pollutants like volatile organic compounds and particulate matter and could be considered appropriately for control under the SIP .

63. W6E, W23

Do not take out the words "or odors" in outlining applicable fugitive emissions.

The Department agrees that adding the term clarifies the extent of scope intended by this rule. However, keeping the original language retains advantages in regards to certain types of infractions. The Department is confident, given an agreement by business interests that odors are included within the current language that the rule provides the environmental protection intended by the original rule language.

64. W6E

Regarding the suggested differentiation between odors and fugitive emissions, how can you separate them? They are not separate.

The Department disagrees. Fugitive emissions can take a number of forms and could include particulate matter, which may have an odorous component, or gases, which may not be odorous.

65. W5

Odor control rules are inappropriate for inclusion into the State Implementation Plan (SIP) because these are non-criteria pollutants. EPA cannot separate out particular words in

approving a rule subsection for inclusion within the SIP. EPA suggests that a separate subsection be created. Is the intention to only control odors from buildings or equipment or are there other sources of odor intended to be controlled under this rule?

The Department had considered this comment and proposed an approach in the revised rule proposal to add separate but parallel sections (3) and (4) that would specifically address odor fugitive emissions. After further review of the comments received on the proposal and consideration of what will provide the most effective means of air quality protection, the Department decided to withdraw the proposed sections.

As noted above, while odors may not be considered criteria pollutants on their face, they are typically associated with volatile organic compounds or particulate matter, both of which are regulated pollutants under the Clean Air Act.

66. W2B, W3C, W3D, W4B, W4D, W8B, W9B, W18B

The inclusion of section (3) and (4) to the rule add nothing to improve protection of the environment. In fact they represent two parts of the same rule addressing the same thing as in sections (1) and (2). The provisions in the proposed nuisance rule will adequately address odor control without this additional confusing rule.

The Department disagrees but the point is moot considering that the Department is recommending that additional sections (3) and (4) not be adopted into the rule package.

67. W17, W29

The first sentence of subsection (3) is unclear because it is not evident what the Department would be seeking when bringing a "facility into compliance". Suggest the following modification:

> When fugitive emissions as odors escape from a building or equipment in such a manner and amount as to create a nuisance or to violate any regulation, the department may order the owner or operator to mitigate or eliminate the nuisance or to bring the facility into compliance.

The Department agrees. Section (1) has a parallel structure to the proposed section (3). To establish a violation the rule requires a demonstration that the fugitive emissions create a nuisance or otherwise violate any regulation. This is the standard against which compliance will be measured. The suggested change will clarify this point and will be recommended to be incorporated into section (1) of the rule.

68. W8B

Adopting an approach for odors that is just like fugitive emissions is not workable and

ignores the whole concept of odors. The language in (4) would make it risky to drive a diesel engine car. Also, odors by their definition are already airborne, so how does the source "prevent odors from becoming airborne?"

The Department disagrees. Fugitive emission rules cannot apply to a diesel engine car because tailpipe emissions are not fugitive.

As to the second point, the Department's intention is to implement a rule that addresses emissions to the ambient air. As the definition provides, fugitive emissions are those that escape to the atmosphere. A source seeking to be in compliance with the rule engages in good housekeeping and pollution control practices to manage and control offensive odor emissions resulting from its processes and operations.

69. W17, W29

Proposed section (4) is overbroad. Odors are by definition airborne and as drafted this provision would require virtually every outdoor activity to have "reasonable precautions" to prevent <u>any</u> odors, noxious or pleasant from becoming airborne. The Department should describe the odors it is restricting and establish clear grounds for compliance.

The point regarding section (4) is moot as the Department will enforce the rule under provisions specified in section (1), which has a specified application. The rule applies geographically in Special Control Areas and otherwise where a nuisance exists and can be controlled. Once either of those conditions is met then the rule is applied to fugitive emissions that create a nuisance or violate any regulation.

70. W3B, W8A

The proposed wording in section 1 is over broad and creates a practical impossibility. The department can accomplish its goal more straightforwardly by drawing a direct connection between the control and removal of air contaminants and the emission of those contaminants to the open air.

The Department agrees. The originally proposed change was intended to clarify the problem in the current rules regarding the "discharge" of fugitive emissions. The commentor proposes a better fix by suggesting that the "air contaminants are controlled or removed before <u>being</u> emitted to the outside air."

71. W13A

The use of the word "practicable" without a definition opens the barn door to any polluter. The term must be defined in the rule.

The Department disagrees. Practicable is a term with a common meaning of feasible. It is a relatively simple test of "practicable" to demonstrate feasibility or possibility by reference to application in similar settings. Many other requirements in air quality regulations are defined more prescriptively but then they are established for discrete pollutants. Fugitive emissions by their nature are diffuse and multiform. This approach allows the needed flexibility to effectively address the wide range of circumstances that constitute fugitive emissions. Its appropriateness in the rule is demonstrated by the fact that this term is a longstanding component of the rule and evidence has not been provided that the Department has failed to achieve the rule's intent with this language in place.

72. W4C, W18A

Unless "reasonable precautions", as used in section (4), are defined specifically within the rules, the rules will be inconsistently applied. The examples provided do not give enough specific guidance to effectively implement the regulatory intent of this section.

The Department disagrees. Similarly, as in the response to comment 71, these are terms of art that are not absolutely prescriptive. The examples provided are meant to provide guidance, in the form of a listing of other controls commonly and readily applied to solve the problems addressed by the rule. Fugitive emissions are not a class of pollutants that lend themselves to a more definitive and prescriptive list of controls.

73. W13A

The fugitive emission requirements are relatively useless as a business would only have to put a cover, blower or duct on a pollution source to avoid the requirements.

The Department disagrees. Managing emissions through a collection system as represented by a cover, blower or duct is typically the first and oftentimes most challenging step to ultimately controlling emissions. Department inspectors can rely on other rules to ensure that emission standards at the duct or blower are being met, so the strategy proposed by the commentor will not avoid requirements to control fugitive emissions.

74. W6C, W10B, W12B

Add to the definition of fugitive emissions the phrase "or the emission of any unfiltered contaminant that escapes accidentally to the air."

The Department disagrees. This language would require an additional test to prove the intentions of the owner/operator as to whether the release was accidental. This would be a difficult standard to prevail upon and unduly burden any action to appropriately secure relief from troublesome fugitive emissions.

MASKING OF EMISSIONS 340-208-0400

75. W5

EPA suggests adding a prohibition against the masking of emissions to also avoid compliance with regulations and requirements.

The Department agrees and will make the change.

76. W6A

The provision to prevent masking of emissions is encouraging.

The Department agrees that this change will strengthen the rule.

PARTICULATE MATTER SIZE STANDARD 340-208-0450

77. W20

There is no practical, objective or definitive method currently available to demonstrate compliance. We understand that studies using particle fallout buckets for measuring offsite deposition of particulate >250 microns are almost always inconclusive. Particulate matter captured in buckets of water cannot be accurately measured for size nor can they be analyzed to accurately identify sources.

The Department disagrees. It is true that it would be impossible to determine, using a particle fallout bucket (PFO), the original size of any material that is water-soluble or readily decomposes in water. Fine wood dust would be an example. PFO sampling isn't a very precise science. A single leaf or deposit by a bird can significantly impact the results. Still, most PFO studies are conclusive. We can measure what is collected in the bucket, not just the weight but chemically. If the sources have a distinctive chemical "fingerprint" it can be detected. Most often, the problem is collecting a representative sample. In no cases is a determination of a fallout problem made based on a single bucket. Most studies involve 4 or 5 sites with buckets collected over many months. The Department collects duplicate buckets, background buckets, upwind/downwind buckets, etc. In the end it is usually possible to determine if there is a violation of the standard.

That said, if the Department was asked if fallout particulate was > 250 micros in size, we wouldn't use a PFO bucket. We would collect a dry surface deposition sample or use sticky paper and look at the particulate under a microscope. It would be easy to determine its size. In most cases the microscopist can also identify the type of material: pollen, wood fiber, mineral dust, etc.

78. W2A, W2B, W3C, W4A, W4B, W9B, W20, W24

The proposed rule extends a prohibition on emitting larger particles (>250 microns) from landing on another's property from nine counties to statewide applicability. Current rules allow the imposition of TACT whenever there is documentation of a nuisance and provides a means to address this issue. The proposed rule can result in a source being penalized regardless of whether the particulate emitted is causing a substantial or unreasonable impact and regardless of the measures taken by the source. The rule should be deleted or include a "reasonableness" component.

The Department disagrees. The Typically Achievable Control Technology (TACT) rule does not necessarily apply in situations that are addressed by this rule. While TACT can be invoked to resolve a documented nuisance condition, its application is limited to permitted sources emitting above selected thresholds. The 250-micron fallout rule was originally drafted to reflect the issue of transport of particles offsite to another's property. The numeric standard was adopted to reflect the expected transport rate of large particles to a property line, i.e., larger particles will deposit quickly so evidence of particles greater than 250 microns indicates a problem. Requiring an additional test of reasonableness before enforcement seriously reduces the effectiveness of an existing rule used by the Department and its predecessor local air authorities for thirty years. This longstanding but narrowly applied rule is being proposed for statewide applicability to establish uniform expectations and protections for all citizens and sources within the state and to quickly address issues of obvious concern without applying nuisance criteria.

79. W9B

The prohibition on 250-micron particulate deposition appears inconsistent with limiting nuisance to substantial and unreasonable interference with the use and enjoyment of land. While the proposed standard may articulate the common law standard for trespass, the Department may wish to eliminate any potential that it could be drawn into issues of trespass law.

The Department disagrees. As noted above, the rule was drafted to describe the transport of large particles and, as such, establishes a numeric standard to reflect an unreasonable and substantial impact.

80. W2A, W3A, W3B, W3C, W3D, W4A, W4B, W8A, W9A, W9B, W28, W29

The 250-micron rule creates a class of pollutant with no applicable standard or assumes that any non-zero number is unreasonable and does not consider whether a nuisance has been created. Any impact from large particulate can be best addressed through the nuisance rule. The existing rule actually limits the Department's ability to deal with a condition, which may create a nuisance with various particulate sizes. This rule should be deleted.

The Department disagrees. Large particle fallout is an air pollution issue and, in and of itself, represents a substantial and unreasonable interference that can be readily addressed by the offending source. The Department, and its predecessors, have used this standard effectively for more than 30 years to quickly resolve air pollution complaints.

81. W4C, W9B, W18A, W18B

The language as proposed could easily cause unintended consequences as routinely encountered wind events could transport naturally exposed dry or sandy soil conditions or even pine needles or leaves leading to deposition on neighboring property. If the rule is adopted as written, the majority of oceanfront property owners in Oregon could bring nuisance complaints against their neighbors for blowing sand.

The Department disagrees. Department staff does not indulge in unreasonable enforcement practices as evidenced by prevailing on a significant number of appeals. This 250-micron rule has never been applied to such examples; the Department does not intend to apply the proposed rule to them now.

82. W9B

Particulate matter greater than 250 microns appears to have no connection to the improvement of recognized air quality standards, which are usually associated with smaller particulate. The department should reevaluate the appropriateness of the 250-micron limitation.

The Department disagrees. Air quality standards are developed to be protective of primary and secondary effects. The primary standards are designed to be protective of human health while the secondary standards are intended to protect against other adverse welfare effects. While most of the concern is correctly focused on protecting human health, protecting for other welfare effects is equally compelling in some circumstances. The 250-micron standard is designed to restrict large particle fallout leading to soiling and physical damage to adjoining property.

83. W6E, W22

The definition of particulate should cover particulates from 250 down to 2.5. Particles smaller than 250 microns can accumulate in sufficient quantity to cause a nuisance. Furthermore, if the particles contain toxic substances they can also pose a health risk.

The proposed rule is intended to extend an existing standard that protects adjoining property against intrusion of large particles. To extend this rule to cover the circumstances suggested would completely separate it from the problem it was originally designed to address. Other standards and rules exist to more directly address the concerns raised by the commentor.

84. W1

The 250-micron rule provides little protection from particle fallout, as larger particles are unlikely to be transported by the wind. Most particle fallout subject to wind borne travel will be smaller than 250 microns and could be better addressed through the nuisance rule.

The Department agrees. A well-managed facility will not provide the opportunity for larger particles to be transported by the wind for deposition on another's property. However, transport and deposition are not uncommon and the Department has used the rule to respond effectively to these situations in the past.

85. W3D, W4D

Changing the rule to require an observable deposition does not address our concerns, because if the deposition were not observable, then there could never be a violation anyway.

The Department is aware of the concerns raised but believes that the value of this rule is enhanced by its ready use in situations where deposition of large particles is evident. The Department will consider other modifications to the rule that retains the ease of use factor in responding to complaints caused by deposition.

86. W23

The agency's discretion will be exercised reasonably to determine when an "observable deposition" has occurred. There will be no greater risk of uncertainty in this provision than there will be in the section on best work practices under 340-208-0320.

The Department agrees with this comment.

87. W3D, W4D

If the Department insists on keeping this antiquated rule, it should be rewritten in one of two ways. One would be to add language to make the rule consistent with the nuisance requirements, since it is a restatement of the nuisance prohibition. The second proposal

would be to add language to make this rule consistent with the approach used in OAR 340-208-0210(1) where the Department may order the owner/operator to take reasonable measures to minimize or eliminate the source of the emissions.

As noted earlier in comment 78, the first proposal unacceptably limits the effectiveness of this rule. However the second comment has merit and the Department will incorporate the elements into the rule proposed for adoption.

88. W6A

The rule on prohibiting emissions of large particulates is encouraging and commenter strongly objects to eliminating the 250-micron standard.

The Department agrees and does not intend to eliminate this standard.

ODOR CONTROL MEASURES 340-208-0550

89. W1, W3B, W4A, W9A

It is burdensome and unreasonable to set incinerator and afterburner operating parameters for odor control systems that are more appropriate for VOC control systems. Odor control systems, based on sound engineering design, that can be employed to control odors using less than the "highest and best practical treatment currently available" should be allowed. The goal should be nuisance abatement and not emission reductions. The rule should be deleted.

The Department disagrees. The rule consists of two elements but is wholly directed towards odor control. Despite what the commenter suggests, not all odor controls will be afterburners or incinerators. Section (1) is not prescriptive in this regard. Section (2) provides the specifications for operation incinerators or afterburners, if those technologies are used, and also allows for other controls determined to be equally effective.

This rule was originally written and is still intended to control odor emissions. Although it appears in a Division denoted as "Visible and Fugitive Emissions" this is only because of a recent reorganization of the Air Quality Program's rules, having been a rule of the former Columbia Willamette Air Pollution Control Authority.

90. W2A, W4A

The "highest and best" portion of the rule is unnecessary given the TACT rule in Division 226. The incinerator/afterburner portion of the rule is antiquated and reflects equipment no longer in use.

The Department disagrees. The rule outlining Typically Achievable Control Technology (TACT) does not necessarily apply in all situations that would be governed by this rule. While the incinerator/afterburner portion of this rule has been part of expected practice since the 1970s, the Department believes that it is still applicable and that there is flexibility in the rule to allow control "in another manner determined by the department to be equally or more effective." (340-208-0550 (2))

COMMENTS ON THE PROCESS

91. W2A

The department should withdraw the rulemaking so as to allow the opportunity to work with affected sources to gain consensus about a practical means of approaching nuisance issues in Oregon.

See response following Comment 94.

92. W3B

Considering the scope of anticipated rule changes, the rule should be re-proposed rather than being issued as final.

See response following Comment 94.

93. W3C, W9B

The continuing opening and productive dialogue is greatly appreciated.

See response following Comment 94.

94. W6C, W10B

The process has been flawed in that we did not have sufficient notice of the rule change to prepare testimony. Although we have twice submitted written comments, industry representatives have been able to insert language that is obviously not in the public interest. We would like to have a public hearing on the rule.

Some commenters from business and citizen interests have expressed concerns about the opportunity to comment during this rulemaking. In order to accommodate the evolving interest in the proposed rules the Department not only adhered to the required process for public notification but also took extraordinary steps to make sure that all relevant and interested parties had an opportunity to contribute to the development of these rules.

The Department first proposed these rules for public consideration in May 2000. The public comment period was scheduled to close on July 27 but was extended to August 10 to accommodate the late interest in the rulemaking. The comment period was opened again from September 1 to September 13 and a draft was circulated to reflect a proposal to incorporate some of the comments received by the Department at that time. Review of interim drafts is neither mandated nor common practice in rulemaking. This extra step was intended to provide a further opportunity for all interested parties to continue to contribute to development of this rule.

The timeframe for this second review was constrained by internal deadlines to prepare for the December Commission meeting. Based on concerns regarding the limited comment period, the Department reopened the comment period again from October 1 to November 1. In addition, a public workshop on the rule was conducted on October 26, which was attended by persons representing citizen and business interests. Ultimately the response to these extended opportunities has been positive.

The Department values the input it receives during rulemaking and believes that this rule package is stronger because of it.

COMMENTS ON OTHER RULES

95. W14

In addition to 340-208-0570, emissions from ships, the Department should also regulate emissions from locomotives, which are also a problem in NW Portland.

We note your concerns. Regulation of locomotives is restricted by federal law to the U.S. Environmental Protection Agency, which has issued regulations calling for more emission controls on these types of engines. The South Coast Air Quality Management District has been able to negotiate a voluntary agreement with rail service providers in the Los Angeles basin to operate late model locomotives there. While it is possible to consider a similar approach here, the prospects for success are likely limited by an inability to demonstrate as compelling an air quality need as Los Angeles.

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Air Quality Nuisance Control Rules

Detailed Changes to the Original Rulemaking Proposal Made in Response to Public Comment

340-208-0010
Definitions

(1) "Abate" means to reduce or manage emissions so as to eliminate the nuisance. It does not necessarily mean completely eliminate the emissions. The degree of abatement will depend on an evaluation of all of the circumstances of each case.

(6) "Nuisance" means a substantial and unreasonable interference with another's use and enjoyment of real property, or the substantial and unreasonable invasion of a right common to members of the general public.

(8) "Opacity" means the degree to which an emission reduces transmission of light and obscures the view of an object in the background as measured in accordance with OAR 340-212-0120 and 212-0140. Unless otherwise specified by rule, opacity shall be measured in accordance with EPA Method 9. For all standards, the minimum observation period shall be six minutes, though longer periods may be required by a specific rule or permit condition. Aggregate times (e.g. 3 minutes in any one hour) consist of the total duration of all readings during the observation period that exceed the opacity percentage in the standard, whether or not the readings are consecutive. Alternatives to EPA Method 9, such as a continuous opacity monitoring system (COMS), alternate Method 1 (LIDAR), or EPA Methods 22, or 203, may be used if approved in advance by the ~~Department~~department, in accordance with the Source Sampling Manual.

(9) "Particulate matter" means all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by an applicable reference method in accordance with OAR 340-212-0120 and OAR 340-212-0140. Sources with exhaust gases at or near ambient conditions may be tested with DEQ Method 5 or DEQ Method 8, as approved by the department. Direct heat transfer sources shall be tested with DEQ Method 7; indirect heat transfer combustion sources and all other non-fugitive emissions sources not listed above shall be tested with DEQ Method 5 or an equivalent method approved by the ~~Department~~department;

(12) "Standard cubic foot" means the amount of gas that would occupy a volume of one cubic foot, if the gas were free of uncombined water at standard conditions. When applied to combustion flue gases from fuel ~~or refuse burning~~, "standard cubic foot" also implies adjustment of gas volume to that which would result at a concentration of 12% carbon dioxide or 50% excess air.

Fugitive Emission Requirements

340-208-0200
Applicability

(2) In other areas when the ~~Department~~ department determines a nuisance exists and should be controlled, and the control measures are practicable.

340-208-0210
Requirements

(1) When fugitive emissions ~~or odors~~ escape from a building or equipment in such a manner and amount as to create a nuisance or to violate any regulation, the ~~Department~~ department may order the owner or operator to abate the nuisance or to bring the facility into compliance. In addition to other means of obtaining compliance the ~~Department~~ department may order that the building or equipment in which processing, handling and storage are done be tightly closed and ventilated in such a way that air contaminants are controlled or removed before ~~any air from the building is~~being emitted to the open air.

Nuisance Control Requirements

340-208-0300
Nuisance Prohibited

(2) Upon determining a nuisance may exist, the department will provide written notice to the person creating the ~~potential~~ suspected nuisance. ~~The date of this notice will serve as the first day of violation for purposes of assessing any civil penalties if the department determines a nuisance exists under OAR 340-208-0310 and proceeds with a formal enforcement action pursuant to Chapter 340 Division 12.~~ The department will endeavor to resolve observed nuisances in keeping with the policy outlined in OAR 340-12-0026. If the department determines a nuisance exists under OAR 340-208-0310 and proceeds with a formal enforcement action, pursuant to Chapter 340 Division 12, the first day for determining penalties will be no earlier than the date of this notice.

340-208-0310
Determining Whether A Nuisance Exists

(1) In determining a nuisance, the department may consider factors including, but not limited to, the following:

~~(1)~~(a) Frequency of the emission;

~~(2)~~(b) Duration of the emission;

~~(3)~~(c) Strength or intensity of the emissions, odors or other offending properties;

~~(4)~~(d) ~~Proximity to residential and commercial areas~~Number of people impacted;

~~(5)~~(e) ~~Impacts on complainants.~~The suitability of each party's use to the character of the locality in which it is conducted;

(f) Extent and character of the harm to complainants;

(g) The source's ability to prevent or avoid harm.

(2) Compliance with a Best Work Practices Agreement that identifies and abates a suspected nuisance constitutes compliance with OAR 340-208-0300 for the identified nuisance. For sources subject to OAR 340-216-0020 or 340-218-0020, compliance with specific permit conditions that results in the abatement of a nuisance associated with an operation, process or other pollutant emitting activity constitutes compliance with OAR 340-208-0300 for the

identified nuisance. For purposes of this section, "permit condition" does not include a general condition prohibiting the creation of nuisances.

340-208-0320
Best Work Practices ~~Order~~Agreement

(1) A person may voluntarily enter into ~~a voluntary~~ an agreement with the department to implement specific practices to ~~manage and reduce~~abate the ~~emission of air contaminants~~ suspected ~~of creating a~~ nuisance. This agreement may be modified by mutual consent of both parties. This agreement will be an Order for the purposes of enforcement under OAR 340 Division 12. ~~This Agreement will remain in effect unless or until the department determines that further reasonably available practices are necessary to manage or reduce the emission of air contaminants suspected of creating a nuisance.~~

(2) For any source subject to OAR 340-216-0020 or 340-218-0020 the conditions outlined in the Best Work Practices Agreement will be incorporated into the permit at the next permit renewal or modification.

(3) This agreement will remain in effect unless or until the department provides written notification to the person subject to the agreement that:
  (a) The agreement is superseded by conditions and requirements established later in a permit;
  (b) The department determines the activities that were the subject of the agreement no longer occur; or
  (c) The department determines that further reasonably available practices are necessary to abate the suspected nuisance.

(4) The agreement will include one or more specific practices to ~~manage and reduce air contaminant emissions~~abate the suspected nuisance. The agreement may contain other requirements including, but not limited to:
  (a) Monitoring and tracking the emission of air contaminants;
  (b) Logging complaints and the source's response to the complaint;
  (c) Conducting a study to propose further refinements to best work practices.

~~(3)Compliance with a Best Work Practices Order constitutes compliance with OAR 340-208-0300.~~

(5) The department will consult, as appropriate, with complainants with standing in the matter throughout the development, preparation, implementation, modification and evaluation of a Best Work Practices Agreement. The department will not require that complainants identify themselves to the source as part of the investigation and development of the Best Work Practices Agreement.

340-208-0400
Masking of Emissions

No person may cause or permit the installation or use of any device or use of any means designed to mask the emission of an air contaminant that causes or is likely to cause detriment to health, safety, or welfare of any person or otherwise violate any other regulation or requirement.

340-208-0450
~~Particulate Matter Size Standard~~Particle Fallout Limitation

No person ~~shall~~ may cause or permit the emission of any particulate matter ~~which is~~ larger than 250 microns in size ~~provided if such particulate matter does or will deposit~~ at sufficient duration or quantity as to create an observable deposition upon the real property of another person when notified by the department that the deposition exists and must be controlled.

Clackamas, Columbia, Multnomah, and Washington Counties

340-208-0510
Exclusions

(1) The requirements contained in OAR 340-208-0500 through 340-208-~~0620~~ 0630 apply to all activities conducted in Clackamas, Columbia, Multnomah, and Washington Counties, other than those for which specific industrial standards have been adopted (Divisions 230, 234, 236, and 238), and except for the reduction of animal matter, OAR 236-0310(1) and (2).

340-208-0550
Odor Control Measures

(1) Control apparatus and equipment, using the highest and best practicable treatment currently available, ~~shall~~ must be installed and operated to reduce to a minimum odor-bearing gases or odor-bearing particulate matter emitted into the atmosphere.

(2) Gas effluents from incineration operations and process after-burners ~~shall~~installed under section (1) of this rule must be maintained at a temperature of 1,400° Fahrenheit for at least a 0.5 second residence time, or controlled in another manner determined by the ~~Department~~ department to be equally or more effective.

340-208-0630
Sulfur Dioxide Emission Standard

For any air contaminant source that may emit sulfur dioxide, no person may cause or permit emission of sulfur dioxide in excess of 1,000 ppm from any air contamination source as measured in accordance with the ~~Department's~~ department's Source Test Manual, except those persons burning natural gas, liquefied petroleum gas, or fuel conforming to provisions of rules relating to the sulfur content of fuels. This rule applies to sources installed, constructed, or modified after October 1, 1970.

Attachment F

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Air Quality Nuisance Control Rules

Rule Implementation Plan

Summary of the Proposed Rule

This proposal would refine the definition of an air quality nuisance, outline criteria to determine a nuisance and propose an alternative to traditional enforcement tools to abate the nuisance. This Division also contains other rules originally adopted in 1973 by the Environmental Quality Commission from the former, and now defunct Columbia-Willamette and Mid-Willamette Air Pollution Control Authorities that are no longer applicable or have been superseded by subsequent rule adoptions by the Commission. Most of these rules are proposed for deletion. Two requirements are proposed to apply statewide, i.e., a prohibition on masking otherwise harmful emissions and a prohibition on large (greater than 250 microns) particle fallout. Other proposed changes include housekeeping changes intended to improve the readability and enforceability of the rules.

Proposed Effective Date of the Rule

February 1, 2001

Proposal for Notification of Affected Persons

The adopted rules will be provided to all parties who commented on the rule. Since the application of the rule is driven by complaints, and it is not possible to otherwise identify affected persons ahead of time.

Proposed Implementing Actions

These rule amendments are expected to help the Department handle existing work more efficiently. A guidance document will be prepared according to the procedures outlined in the formal guidance development process for the Air Quality Program. The document will be prepared in consultation with the Department of Justice, the Air Quality program management team and appropriate Department staff. The completed document will be distributed to air quality field staff statewide and will also be presented as a training at a regularly scheduled Inspectors' Forum.

Another part of the implementation process will be coordination with local nuisance control efforts. This proposal is not expected to result in a greater workload demand on local government. In fact, they may experience a more prompt response by the Department to referrals due to improved process. As a second phase of implementation, the Department will approach local jurisdictions in the state to discuss further improvements to the nuisance program. The goal of this second step will be to better integrate and coordinate state and local nuisance programs and reduce workload for both state and local governments.

This draft was circulated on September 1, 2000 in response to initial public comments to the draft rule placed on public notice in June 2000. Attachment G also notes the changes in rule language proposed in the initial draft rule according to the following key.

Language proposed in original draft
~~Language struck in original draft~~
[Language proposed in the interim draft]
[~~Language struck in the interim draft~~]

DIVISION 208

VISIBLE EMISSIONS AND NUISANCE REQUIREMENTS

340-208-0010
Definitions

The definitions in OAR 340-200-0020 and this rule apply to this division. If the same term is defined in this rule and OAR 340-200-0020, the definition in this rule applies to this division.

(1) "Air Contaminant" means a dust, fume, gas, mist, odor, smoke, pollen, vapor, soot, carbon, acid or particulate matter, or any combination thereof.

(2) "Emission" means a release into the outdoor atmosphere of air contaminants.

(3) "Fuel Burning Equipment" means a device ~~which~~ that burns a solid, liquid, or gaseous fuel, the principal purpose of which is to produce heat or power by indirect heat transfer, except marine installations and internal combustion engines that are not stationary gas turbines.

(4) "Fugitive Emissions" means emissions of any air contaminant that escape to the atmosphere from any point or area not identifiable as a stack, vent, duct, or equivalent opening.

(5) "New source" means, for purposes of OAR 340-208-0110, any air contaminant source installed, constructed, or modified after June 1, 1970.

(6) "Nuisance ~~condition~~" means ~~unusual or annoying amounts of fugitive emissions traceable directly to one or more specific sources. In determining whether a nuisance condition exists, consideration shall be given to all of the circumstances, including density of population, duration of the activity in question, and other applicable factors.~~ a substantial and unreasonable interference with another's use and enjoyment of real property, or the [substantial and unreasonable]invasion of a right common to members of the general public.

(7) "Odor" means that property of an air contaminant that affects the sense of smell.

(8) "Opacity" means the degree to which an emission reduces transmission of light and obscures the view of an object in the background as measured in accordance with OAR 340-212-0120 and 212-0140. Unless otherwise specified by rule, opacity shall be measured in accordance with EPA Method 9. For all standards, the minimum observation period shall be six minutes, though longer periods may be required by a specific rule or permit condition. Aggregate times (e.g. 3 minutes in any one hour) consist of the total duration of all readings during the observation period that exceed the opacity percentage in the standard, whether or not the readings are consecutive. Alternatives to EPA Method 9, such as a continuous opacity monitoring system (COMS), alternate Method 1 (LIDAR), or EPA Methods 22, or 203, may be used if approved in advance by the Department, in accordance with the Source Sampling Manual.

(9) "Particulate matter" means all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by an applicable reference method in accordance with OAR 340-212-0120 and OAR 340-212-0140. Sources with exhaust gases at or near ambient conditions may be tested with DEQ Method 5 or DEQ Method 8, as approved by the Department. Direct heat transfer sources shall be tested with DEQ Method 7; indirect heat transfer combustion sources and

all other non-fugitive emissions sources not listed above shall be tested with DEQ Method 5 or an equivalent method approved by the Department;

~~(10) "Refuse" means unwanted matter.~~

~~(11) "Refuse burning equipment" means a device designed to reduce the volume of solid, liquid, or gaseous refuse by combustion.~~

(~~12~~10) "Special Control Area" means an area designated in OAR 340-204-0070.

(~~13~~11) "Standard conditions" means a temperature of 68° Fahrenheit and a pressure of 14.7 pounds per square inch absolute.

(~~14~~12) "Standard cubic foot" means the amount of gas that would occupy a volume of one cubic foot, if the gas were free of uncombined water at standard conditions. When applied to combustion flue gases from fuel or refuse burning, "standard cubic foot" also implies adjustment of gas volume to that which would result at a concentration of 12% carbon dioxide or 50% excess air.

[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.]
[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 & ORS 468A
Stats. Implemented: ORS 468.020 & ORS 468A.025
Hist.: [DEQ 16, f. 6-12-70, ef. 7-11-70; DEQ 1-1984, f. & ef. 1-16-84; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 3-1996, f. & cert. ef. 1-29-96]; [DEQ 37, f. 2-15-72, ef. 3-1-72; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 3-1996, f. & cert. ef. 1-29-96]; [DEQ 4-1978, f. & ef. 4-7-78; DEQ 9-1979, f. & ef. 5-3-79; DEQ 3-1980, f. & ef. 1-28-80; DEQ 14-1981, f. & ef. 5-6-81; DEQ 22-1989, f. & cert. ef. 9-26-89; DEQ 23-1991, f. & cert. ef. 11-13-91; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 10-1995, f. & cert. ef. 5-1-95; DEQ 4-1995, f. & cert. ef. 2-17-95; DEQ 10-1995, f. & cert. ef. 5-1-95; DEQ 3-1996, f. & cert. ef. 1-29-96]; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0005, 340-021-0050, 340-030-0010

Visible Emissions

340-208-0100
Applicability

OAR 340-208-0100 through 340-208-0110 apply in all areas of the state.

[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 468 & ORS 468A
Stats. Implemented:ORS 468A.025
Hist.: DEQ 10-1995, f. & cert. ef. 5-1-95; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0012

340-208-0110
Visible Air Contaminant Limitations

(1) Existing sources outside special control areas. No person ~~shall~~ may ~~cause, suffer, allow, or permit the emission of~~emit or allow to be emitted any air contaminant into the atmosphere from any existing air contaminant source located outside a special control area for a period or periods aggregating more than three minutes in any one hour which is equal to or greater than 40% opacity.

(2) New sources in all areas and existing sources within special control areas: No person ~~shall~~ may ~~cause, suffer, allow, or permit the emission of~~emit or allow to be emitted any air contaminant into the atmosphere from any new air contaminant source, or from any existing source within a special control area, for a period or periods aggregating more than three minutes in any one hour which is equal to or greater than 20% opacity.

(3) Exceptions to sections (1) and (2) of this rule:

(a) Where the presence of uncombined water is the only reason for failure of any emission to meet the requirements of sections (1) and (2) of this rule, such sections shall not apply;

(b) Existing fuel burning equipment utilizing wood wastes and located within special control areas shall comply with the emission limitations of section (1) of this rule in lieu of section (2) of this rule.

[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 468 & ORS 468A
Stats. Implemented: ORS 468.020 & ORS 468A.025
Hist.: DEQ 16, f. 6-12-70, ef. 7-11-70; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 3-1996, f. & cert. ef. 1-29-96; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0015

~~Nuisance~~ Fugitive Emission Requirements

340-208-0200
Applicability

OAR 340-208-0200 through 340-208-0210 ~~shall~~ apply:

(1) Within Special Control Areas, ~~as established~~ designated in OAR 340-204-0070~~,~~ and

(2) ~~When ordered by the Department, i~~In other areas when the ~~need for application of these rules~~Department determines a nuisance exists and should be controlled, and the control measures are practicable.~~, and the practicability of control measures, have been clearly demonstrated.~~

[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 468 & ORS 468A

Stats. Implemented: ORS 468A.025

Hist.: DEQ 37, f. 2-15-72, ef. 3-1-72; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0055

340-208-0210
Requirements

(1) When fugitive emissions [~~or odors~~]escape from a building or equipment in such a manner and amount as to create a nuisance ~~conditions~~ or to violate any regulation, the Department may~~,~~ order the owner or operator to bring the facility into compliance. ~~I~~In addition to other means of obtaining compliance~~,~~ the Department may order that the building or equipment in which processing, handling and storage are done be tightly closed and ventilated in such a way that air contaminants are controlled or removed before ~~discharge~~ [any air from the building is][being]emitted to the open air.

(2) No person ~~shall~~ may cause~~, suffer, allow,~~ or permit any materials to be handled, transported, or stored; or a building, its appurtenances, or a road to be used, constructed, altered, repaired or demolished; or any equipment to be operated, without taking reasonable precautions to prevent particulate matter from becoming airborne. Such reasonable precautions ~~shall~~ may include, but not be limited to the following:

(a) [The ~~U~~u]se, where possible, of water or chemicals for control of dust in the demolition of existing buildings or structures, construction operations, the grading of roads or the clearing of land;

(b) Application of asphalt, oil, water, or other suitable chemicals on unpaved roads, materials stockpiles, and other surfaces which can create airborne dusts;

(c) Full or partial enclosure of materials stockpiles in cases where application of oil, water, or chemicals are not sufficient to prevent particulate matter from becoming airborne;

(d) Installation and use of hoods, fans, and fabric filters to enclose and vent the handling of dusty materials;

(e) Adequate containment during sandblasting or other similar operations;

(f) Covering, at all times when in motion, open bodied trucks transporting materials likely to become airborne;

(g) The prompt removal from paved streets of earth or other material ~~which~~ that does or may become airborne.

[(3) When fugitive emissions as odors escape from a building or equipment in such a manner and amount as to create a nuisance or to violate any regulation, the department may order the owner or operator to bring the facility into compliance. In addition to other means of obtaining compliance the department may order that the building or equipment in which processing, handling and storage are done be tightly closed and ventilated in such a way that air contaminants are controlled or removed before being emitted to the open air.]

[(4) No person may cause or permit any materials to be handled, transported, or stored; or a building, and its appurtenances, constructed, altered, repaired or demolished; or any equipment to be

operated, without taking reasonable precautions to prevent odors from becoming airborne. Such reasonable precautions may include, but not be limited to the following:
(a) Condensation;
(b) Carbon filtration;
(c) Wet scrubbers;
(d) Afterburners;
(e) Process control;
(f) Material substitution.]

[NOTE: [~~This rule is~~Sections (1) and (2) of this rule are] 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 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 37, f. 2-15-72, ef. 3-1-72; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0060

Nuisance Control Requirements

340-208-0300
Nuisance Prohibited

(1) No person may cause or allow air contaminants from any source subject to regulation by the department to cause a nuisance.
(2) Upon determining a nuisance may exist, the department will provide written notice to the person creating the[~~potential~~][suspected] nuisance. [~~The date of this notice will serve as the first day of violation for purposes of assessing any civil penalties if the department determines a nuisance exists under OAR 340-208-0310 and proceeds with a formal enforcement action pursuant to Chapter 340 Division 12.~~] The department will endeavor to resolve observed nuisances in keeping with the policy outlined in OAR 340-12-0026. If the department subsequently determines a nuisance exists under OAR 340-208-0310 and proceeds with a formal enforcement action, pursuant to Chapter 340 Division 12, the first day for determining penalties will be no earlier than the date of this notice.

340-208-0310
Determining Whether A Nuisance Exists

[(1)]In determining a nuisance, the department may consider factors including, but not limited to, the following:
[~~(1)~~(a)] Frequency of the emission;
[~~(2)~~(b)] Duration of the emission;
[~~(3)~~(c)] Strength or intensity of the emissions, odors or other offending properties;
[~~(4)~~(d)] [~~Proximity to residential and commercial areas~~][Number of people impacted];
[~~(5)~~(e)] [~~Impacts on complainants~~][The suitability of each party's use to the character of the locality in which it is conducted];
[(f) Extent and character of the harm to complainants]
[(g) The parties' ability to prevent or avoid harm].
[(2) For sources subject to OAR340-216-0020 or 340-218-0020, compliance with permit conditions or a Best Work Practices Agreement specifically addressing abatement of a nuisance associated with an operation, process or other pollutant emitting activity constitutes compliance with OAR 340-208-0300. For sources not required to have a permit, compliance with a Best Work Practices Agreement constitutes compliance with OAR 340-208-0300.]

340-208-0320
Best Work Practices [~~Order~~][Agreement]

(1) A person may enter into a voluntary agreement with the department to implement specific practices to manage and reduce the emission of air contaminants suspected of creating a nuisance. This

agreement will be an Order for the purposes of enforcement under OAR 340 Division 12. [~~This agreement will remain in effect unless or until the department determines that further reasonably available practices are necessary to manage and reduce the emission of air contaminants suspected of creating a nuisance.~~]

[(2)For any source subject to OAR 340-216-0020 or 340-218-0020 the conditions outlined in the Best Work Practices Order will be incorporated into the permit at the next permit renewal or other administrative opportunity].

[(3) This agreement will remain in effect unless or until:

(a) The agreement is superseded by conditions and requirements established in a permit;

(b) The department determines the activities that were the subject of the agreement no longer occur; or

(c) The department determines that further reasonably available practices are necessary to manage and reduce the emission of air contaminants suspected of creating a nuisance.]

[~~(2)~~][(4)] The agreement will include one or more specific practices to manage and reduce air contaminant emissions. The agreement may contain other requirements including but not limited to:

(a) Monitoring and tracking the emission of air contaminants;

(b) Logging complaints and the source's response to the complaint;

(c) Conducting a study to propose further refinements to best work practices.

[~~(3) Compliance with a Best Work Practices Order constitutes compliance with OAR 340-208-0300.~~]

340-208-0400
Masking of Emissions

No person may cause or permit the installation or use of any device or use of any means designed to mask the emission of an air contaminant that causes or is likely to cause detriment to health, safety, or welfare of any person.

340-208-~~0620~~ 0450
[~~Particulate Matter Size~~ Standard][Particle Fallout Limitation]

No person ~~shall~~ may cause or permit the emission of any particulate matter ~~which is~~ larger than 250 microns in size ~~provided~~ if [~~such particulate matter does or will deposit~~][at sufficient duration or quantity as to create an observable deposition]upon [the]real property of another person.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 11-1982, f. & ef. 6-18-82; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-029-0030; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0520

Clackamas, Columbia, Multnomah, and Washington Counties

340-208-0500
Application

OAR 340-208-0500 through 340-208-~~0640~~ 0630 apply in Clackamas, Columbia, Multnomah, and Washington Counties.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0001; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0400

340-208-0510
Exclusions

(1) The requirements contained in OAR 340-208-0500 through 340-208-~~0640~~ [~~0620~~][0630]~~shall~~ apply to all activities conducted in Clackamas, Columbia, Multnomah, and Washington Counties, other

than those for which specific industrial standards have been adopted (Divisions 230, 234, 236, and 238), and except for the reduction of animal matter, OAR 236-0310(1) and (2).

(2) The requirements outlined in OAR 340-208-0500 through 340-208-0630 do not apply to activities related to a domestic residence of four or fewer family-living units.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0003; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0410

~~**340-208-0520**~~
~~**Incinerators and Refuse Burning Equipment**~~

~~(1) No person shall cause, permit, or maintain any emission from any refuse burning equipment which does not comply with the emission limitations of this rule.~~

~~(2) Refuse Burning Hours:~~

~~(a) No person shall cause, permit, or maintain the operation of refuse burning equipment at any time other than one half hour before sunrise to one half hour after sunset, except with prior approval of the Department;~~

~~(b) Approval of the Department for the operation of such equipment may be granted upon the submission of a written request stating:~~

~~(A) Name and address of the applicant;~~

~~(B) Location of the refuse burning equipment;~~

~~(C) Description of refuse burning equipment and its control apparatus;~~

~~(D) Type and quantity of refuse;~~

~~(E) Good cause for issuance of such approval;~~

~~(F) Hours during which the applicant seeks to operate the equipment;~~

~~(G) Time duration for which approval is sought.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0025; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0420

~~**340-208-0530**~~
~~**Concealment and Masking of Emissions**~~

~~(1) No person shall willfully cause or permit the installation or use of any device or use of any means such as dilution, which, without resulting in a reduction in the total amount of air contaminant emitted, conceals an emission of air contaminants which would otherwise violate OAR Chapter 340.~~

~~(2) No person shall cause or permit the installation or use of any device or use of any means designed to mask the emission of an air contaminant, which air contaminant causes or is likely to cause detriment to health, safety, or welfare of any person.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0030; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0430,

~~**340-208-0540**~~
~~**Effective Capture of Air Contaminant Emissions**~~

~~Air contaminants which are, or may be, emitted to the atmosphere through doors, windows, or other openings in a structure or which are, or may be, emitted from any process not contained in a structure, shall be captured and transferred to air pollution control equipment using the most efficient and best practicable hooding, shrouding, or ducting equipment available. New sources shall comply at the time of installation.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. &cert. ef. 3-10-93; Renumbered from 340-028-0040; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0440

340-208-0550
Odor Control Measures

(1) Control apparatus and equipment, using the highest and best practicable treatment currently available, [~~shall~~][must]be installed and operated to reduce to a minimum odor-bearing gases or odor-bearing particulate matter emitted into the atmosphere.

(2) Gas effluents from incineration operations and process after-burners [~~shall~~][installed under section (1) of this rule must]be maintained at a temperature of 1,400° Fahrenheit for at least a 0.5 second residence time, or controlled in another manner determined by the Department to be equally or more effective.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0045; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0450

340-208-0560
Storage and Handling of Petroleum Products

(1) In volumes of greater than 40,000 gallons, gasoline or any volatile petroleum distillate or organic liquid having a vapor pressure of 1.5 psia or greater under actual storage conditions ~~shall~~ must be stored in pressure tanks or reservoirs, or ~~shall be stored~~ in containers equipped with a floating roof or vapor recovery system or other vapor emission control device.

(2) Gasoline or petroleum distillate tank car or tank loading facilities handling 20,000 gallons per day or more ~~shall~~ must be equipped with submersible filling devices or other vapor emission control systems.

(3) Gasoline tanks with a capacity of 500 gallons or more~~,~~ that were installed after January 1, 1970~~,~~ ~~shall~~must be equipped with a submersible filling device or other vapor emission control systems.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0050; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0460

340-208-0570
Ships

While in those portions of the Willamette River and Columbia River ~~which~~ that pass through or adjacent to Clackamas, Columbia, and Multnomah Counties, each ship ~~shall minimize emissions from soot blowing and shall be~~ is subject to the emission standards and rules for visible emissions and particulate matter size and must minimize soot emissions. The owner, operator or other responsible party must ensure that these standards and requirements are met.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0055; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0470

~~**340-208-0580**~~
~~**Upset Condition**~~

~~Emission of air contaminants in excess of applicable standards as a result of equipment breakdown shall be subject to OAR 340-214-0300 through 340-214-0360.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. &cert. ef. 3-10-93; Renumbered from 340-028-0060; DEQ4-1995, f. & cert. ef. 2-17-95; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0480

340-208-0590
Emission Standards — General

Compliance with any specific emission standard in this Division does not preclude required compliance with any other applicable emission standard or requirement contained in OAR Chapter 340.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0065; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0490

340-208-0600
Visible Air Contaminant Standards

No person ~~owning, operating, or maintaining non-fuel-burning equipment sources of emissions shall discharge into the atmosphere from any single source of emission whatsoever any air contaminant for a period or periods aggregating more than 30 seconds in any one hour which is equal to or greater than 20 percent opacity~~may allow any non-fuel-burning-equipment to discharge any air contaminant that is 20 percent opacity or greater into the atmosphere for a period of or periods totaling more than 30 seconds in any one hour.

Stat. Auth.: ORS 468 & ORS 468A.
Stats. Implemented: ORS 468.020 & ORS 468A.025.
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0070; DEQ 3-1996, f. & cert. ef. 1-29-96; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0500

340-208-0610
Particulate Matter Weight Standards

~~(1)~~ Except for equipment burning natural gas and liquefied petroleum gas, the maximum allowable emission of particulate matter~~,~~ from any fuel burning equipment ~~shall~~:

(~~a~~1) ~~Be~~ Is a function of maximum heat input ~~and be~~as determined from **Figure 1**, except that from existing fuel burning equipment utilizing wood residue, it ~~shall be~~is 0.2 grain, and from new fuel burning equipment utilizing wood residue, it ~~shall be~~is 0.1 grain per standard cubic foot of exhaust gas, corrected to 12 percent carbon dioxide;

(~~b~~2) Must ~~N~~not exceed Smoke Spot #2 for distillate fuel and #4 for residual fuel, measured by ASTM D2156-65, "Standard Method for Test for Smoke Density of the Flue Gases from Distillate Fuels".

~~(2) The maximum allowable emission of particulate matter from any refuse burning equipment shall be a function of the maximum heat input from the refuse only and shall be determined from **Figure 2.**~~

[Publications: The publication(s) referred to or incorporated by reference in this rule is available from the office of the agency.]
[ED. NOTE: The Figures referenced in this rule are not printed in the OAR Compilation. Copies are available from the agency.]
Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468.020 & ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0075; DEQ 3-1996, f. & cert. ef. 1-29-96; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0510

~~340-208-0620~~
~~Particulate Matter Size Standard~~

~~No person shall cause or permit the emission of any particulate matter which is larger than 250 microns in size provided such particulate matter does or will deposit upon the real property of another person.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0080; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0520, Moved to 340-208-0450.

340-208-0630
Sulfur Dioxide Emission Standard

For any air contaminant source that may emit sulfur dioxide, no person ~~shall~~ may cause or permit emission of sulfur dioxide in excess of 1,000 ppm from any air contamination source as measured in accordance with the Department's Source Test Manual, except those persons burning natural gas, liquefied petroleum gas, or fuel conforming to provisions of rules relating to the sulfur content of fuels. This rule applies to sources installed, constructed, or modified after October 1, 1970.

[Publications: The publication(s) referred to or incorporated by reference in this rule is available from the office of the agency.]
Stat. Auth.: ORS 468 & ORS 468A.
Stats. Implemented: ORS 468.020 & ORS 468A.025.
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0085; DEQ 3-1996, f. & cert. ef. 1-29-96; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0530

~~340-208-0640~~
~~Odors~~

~~(1) No person shall cause or permit the emission of odorous matter in such manner as to contribute to a condition of air pollution, or exceed:~~

~~(a) A Scentometer No. 0 odor strength or equivalent dilution in residential and commercial areas;~~

(b) A Scentometer No. 2 odor strength or equivalent dilution in all other land use areas;
(c) Scentometer Readings: Scentometer No. and Concentration Range – No. of Thresholds, respectively:
(A) 0 – 1 to 2;
(B) 1 – 2 to 8;
(C) 2 – 8 to 32;
(D) 3 – 32 to 128.

(2) A violation of this rule shall have occurred when two measurements made within a period of one hour, separated by at least 15 minutes, off the property surrounding the air contaminant source exceeds the limitations of section (1) of this rule.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0090; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0540

Benton, Linn, Marion, Polk, and Yamhill Counties

340-208-0650
Application

OAR 340-208-0650 through 340-208-0670 shall apply in Benton, Linn, Marion, Polk and Yamhill Counties.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 109, f. 3-15-76, ef. 3-25-76; DEQ 11-1982, f. & ef. 6-18-82; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-029-0001; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0600

340-208-0660
Odors

(1) Unless otherwise regulated by specific odor regulation or standard, no person shall cause or permit the emission of odorous matter:
(a) In such a manner as to cause a public nuisance; or
(b) That occurs for sufficient duration or frequency so that two measurements made within a period of one hour, separated by at least 15 minutes, off the property surrounding the emission point, that is equal to or greater than a Scentometer No. 0 or equivalent dilutions in areas used for residential, recreational, educational, institutional, hotel, retail sales or other similar purposes.

(2) In all land use areas other than those specified in subsection (1)(b) of this rule, release of odorous matter shall be prohibited if equal to or greater than a Scentometer No. 2 odor strength, or equivalent dilutions.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 11-1982, f. & ef. 6-18-82; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-029-0011; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0610

340-208-0670
Particulate Matter Size Standard

No person shall cause or permit the emission of any particulate matter which is larger than 250 microns in size provided such particulate matter does or will deposit upon real property of another person.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 11-1982, f. & ef. 6-18-82; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-029-0030; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0620

DIVISION 208

VISIBLE EMISSIONS AND NUISANCE REQUIREMENTS

340-208-0010
Definitions

The definitions in OAR 340-200-0020 and this rule apply to this division. If the same term is defined in this rule and OAR 340-200-0020, the definition in this rule applies to this division.

(1) "Abate" means to eliminate the nuisance or suspected nuisance by reducing or managing the emissions using reasonably available practices. The degree of abatement will depend on an evaluation of all of the circumstances of each case and does not necessarily mean completely eliminating the emissions.

(~~1~~2) "Air Contaminant" means a dust, fume, gas, mist, odor, smoke, pollen, vapor, soot, carbon, acid or particulate matter, or any combination thereof.

(~~2~~3) "Emission" means a release into the outdoor atmosphere of air contaminants.

(~~3~~4) "Fuel Burning Equipment" means a device ~~which~~ that burns a solid, liquid, or gaseous fuel, the principal purpose of which is to produce heat or power by indirect heat transfer, except marine installations and internal combustion engines that are not stationary gas turbines.

(~~4~~5) "Fugitive Emissions" means emissions of any air contaminant that escape to the atmosphere from any point or area not identifiable as a stack, vent, duct, or equivalent opening.

(~~5~~6) "New source" means, for purposes of OAR 340-208-0110, any air contaminant source installed, constructed, or modified after June 1, 1970.

(~~6~~7) "Nuisance ~~condition~~" means ~~unusual or annoying amounts of fugitive emissions traceable directly to one or more specific sources. In determining whether a nuisance condition exists, consideration shall be given to all of the circumstances, including density of population, duration of the activity in question, and other applicable factors.~~ a substantial and unreasonable interference with another's use and enjoyment of real property, or the substantial and unreasonable invasion of a right common to members of the general public.

(~~7~~8) "Odor" means that property of an air contaminant that affects the sense of smell.

(~~8~~9) "Opacity" means the degree to which an emission reduces transmission of light and obscures the view of an object in the background as measured in accordance with OAR 340-212-0120 and 212-0140. Unless otherwise specified by rule, opacity shall be measured in accordance with EPA Method 9. For all standards, the minimum observation period shall be six minutes, though longer periods may be required by a specific rule or permit condition. Aggregate times (e.g. 3 minutes in any one hour) consist of the total duration of all readings during the observation period that exceed the opacity percentage in the standard, whether or not the readings are consecutive. Alternatives to EPA Method 9, such as a continuous opacity monitoring system (COMS), alternate Method 1 (LIDAR), or EPA Methods 22, or 203, may be used if approved in advance by the ~~Department~~department, in accordance with the Source Sampling Manual.

(~~9~~10) "Particulate matter" means all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by an applicable reference method in accordance with OAR 340-212-0120 and OAR 340-212-0140. Sources with exhaust gases at or near ambient conditions may be tested with DEQ Method 5 or DEQ Method 8, as approved by the ~~Department~~department. Direct heat transfer sources shall be tested with DEQ Method 7; indirect heat transfer combustion sources and all other non-fugitive emissions sources not listed above shall be tested with DEQ Method 5 or an equivalent method approved by the ~~Department~~department;

~~(10) "Refuse" means unwanted matter.~~

~~(11) "Refuse burning equipment" means a device designed to reduce the volume of solid, liquid, or gaseous refuse by combustion.~~

(~~12~~11) "Special Control Area" means an area designated in OAR 340-204-0070.

(~~13~~12) "Standard conditions" means a temperature of 68° Fahrenheit and a pressure of 14.7 pounds per square inch absolute.

(~~14~~13) "Standard cubic foot" means the amount of gas that would occupy a volume of one cubic foot, if the gas were free of uncombined water at standard conditions. When applied to combustion flue gases from fuel ~~or refuse burning~~, "standard cubic foot" also implies adjustment of gas volume to that which would result at a concentration of 12% carbon dioxide or 50% excess air.

[**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.]
[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 & ORS 468A
Stats. Implemented: ORS 468.020 & ORS 468A.025
Hist.: [DEQ 16, f. 6-12-70, ef. 7-11-70; DEQ 1-1984, f. & ef. 1-16-84; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 3-1996, f. & cert. ef. 1-29-96]; [DEQ 37, f. 2-15-72, ef. 3-1-72; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 3-1996, f. & cert. ef. 1-29-96]; [DEQ 4-1978, f. & ef. 4-7-78; DEQ 9-1979, f. & ef. 5-3-79; DEQ 3-1980, f. & ef. 1-28-80; DEQ 14-1981, f. & ef. 5-6-81; DEQ 22-1989, f. & cert. ef. 9-26-89; DEQ 23-1991, f. & cert. ef. 11-13-91; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 10-1995, f. & cert. ef. 5-1-95; DEQ 4-1995, f. & cert. ef. 2-17-95; DEQ 10-1995, f. & cert. ef. 5-1-95; DEQ 3-1996, f. & cert. ef. 1-29-96]; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0005, 340-021-0050, 340-030-0010

Visible Emissions

340-208-0100
Applicability

OAR 340-208-0100 through 340-208-0110 apply in all areas of the state.

[**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 468 & ORS 468A
Stats. Implemented:ORS 468A.025
Hist.: DEQ 10-1995, f. & cert. ef. 5-1-95; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0012

340-208-0110
Visible Air Contaminant Limitations

(1) Existing sources outside special control areas. No person ~~shall~~ may ~~cause, suffer, allow, or permit the emission of~~emit or allow to be emitted any air contaminant into the atmosphere from any existing air contaminant source located outside a special control area for a period or periods aggregating more than three minutes in any one hour which is equal to or greater than 40% opacity.

(2) New sources in all areas and existing sources within special control areas: No person ~~shall~~ may ~~cause, suffer, allow, or permit the emission of~~emit or allow to be emitted any air contaminant into the atmosphere from any new air contaminant source, or from any existing source within a special control area, for a period or periods aggregating more than three minutes in any one hour which is equal to or greater than 20% opacity.

(3) Exceptions to sections (1) and (2) of this rule:

(a) Where the presence of uncombined water is the only reason for failure of any emission to meet the requirements of sections (1) and (2) of this rule, such sections shall not apply;

(b) Existing fuel burning equipment utilizing wood wastes and located within special control areas shall comply with the emission limitations of section (1) of this rule in lieu of section (2) of this rule.

[**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 468 & ORS 468A
Stats. Implemented: ORS 468.020 & ORS 468A.025
Hist.: DEQ 16, f. 6-12-70, ef. 7-11-70; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 3-1996, f. & cert. ef. 1-29-96; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0015

~~Nuisance~~ Fugitive Emission Requirements

340-208-0200
Applicability

OAR 340-208-0200 through 340-208-0210 ~~shall~~ apply:

(1) Within Special Control Areas, ~~as established~~ designated in OAR 340-204-0070~~.~~and

(2) ~~When ordered by the Department, i~~In other areas when the ~~need for application of these rules~~department determines a nuisance exists and should be controlled, and the control measures are practicable.~~, and the practicability of control measures, have been clearly demonstrated.~~

[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 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 37, f. 2-15-72, ef. 3-1-72; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0055

340-208-0210
Requirements

(1) When fugitive emissions escape from a building or equipment in such a manner and amount as to create a nuisance ~~conditions~~ or to violate any regulation, the ~~Department~~ department may~~,~~ order the owner or operator to abate the nuisance or to bring the facility into compliance. ~~I~~In addition to other means of obtaining compliance~~,~~ the department may order that the building or equipment in which processing, handling and storage are done be tightly closed and ventilated in such a way that air contaminants are controlled or removed before ~~discharge~~ being emitted to the open air.

(2) No person ~~shall~~ may cause~~, suffer, allow,~~ or permit any materials to be handled, transported, or stored; or a building, its appurtenances, or a road to be used, constructed, altered, repaired or demolished; or any equipment to be operated, without taking reasonable precautions to prevent particulate matter from becoming airborne. Such reasonable precautions ~~shall~~ may include, but not be limited to the following:

(a) Use, where possible, of water or chemicals for control of dust in the demolition of existing buildings or structures, construction operations, the grading of roads or the clearing of land;

(b) Application of asphalt, oil, water, or other suitable chemicals on unpaved roads, materials stockpiles, and other surfaces which can create airborne dusts;

(c) Full or partial enclosure of materials stockpiles in cases where application of oil, water, or chemicals are not sufficient to prevent particulate matter from becoming airborne;

(d) Installation and use of hoods, fans, and fabric filters to enclose and vent the handling of dusty materials;

(e) Adequate containment during sandblasting or other similar operations;

(f) Covering, at all times when in motion, open bodied trucks transporting materials likely to become airborne;

(g) The prompt removal from paved streets of earth or other material ~~which~~ that does or may become airborne.

[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 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 37, f. 2-15-72, ef. 3-1-72; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0060

Nuisance Control Requirements

340-208-0300
Nuisance Prohibited

(1) No person may cause or allow air contaminants from any source subject to regulation by the department to cause a nuisance.

(2) Upon determining a nuisance may exist, the department will provide written notice to the person creating the suspected nuisance. The department will endeavor to resolve observed nuisances in keeping with the policy outlined in OAR 340-12-0026. If the department subsequently determines a nuisance exists under OAR 340-208-0310 and proceeds with a formal enforcement action, pursuant to Chapter 340 Division 12, the first day for determining penalties will be no earlier than the date of this notice.

340-208-0310
Determining Whether A Nuisance Exists

(1) In determining a nuisance, the department may consider factors including, but not limited to, the following:
  (a) Frequency of the emission;
  (b) Duration of the emission;
  (c) Strength or intensity of the emissions, odors or other offending properties;
  (d) Number of people impacted;
  (e) The suitability of each party's use to the character of the locality in which it is conducted;
  (f) Extent and character of the harm to complainants;
  (g) The source's ability to prevent or avoid harm.

(2) Compliance with a Best Work Practices Agreement that identifies and abates a suspected nuisance constitutes compliance with OAR 340-208-0300 for the identified nuisance. For sources subject to OAR 340-216-0020 or 340-218-0020, compliance with specific permit conditions that results in the abatement of a nuisance associated with an operation, process or other pollutant emitting activity constitutes compliance with OAR 340-208-0300 for the identified nuisance. For purposes of this section, "permit condition" does not include the general condition prohibiting the creation of nuisances.

340-208-0320
Best Work Practices Agreement

(1) A person may voluntarily enter into an agreement with the department to implement specific practices to abate the suspected nuisance. This agreement may be modified by mutual consent of both parties. This agreement will be an Order for the purposes of enforcement under OAR 340 Division 12.

(2) For any source subject to OAR 340-216-0020 or 340-218-0020, the conditions outlined in the Best Work Practices Agreement will be incorporated into the permit at the next permit renewal or modification.

(3) This agreement will remain in effect unless or until the department provides written notification to the person subject to the agreement that:
  (a) The agreement is superseded by conditions and requirements established later in a permit;
  (b) The department determines the activities that were the subject of the agreement no longer occur; or
  (c) The department determines that further reasonably available practices are necessary to abate the suspected nuisance.

(4) The agreement will include one or more specific practices to abate the suspected nuisance. The agreement may contain other requirements including, but not limited to:
  (a) Monitoring and tracking the emission of air contaminants;
  (b) Logging complaints and the source's response to the complaint;
  (c) Conducting a study to propose further refinements to best work practices.

(5) The department will consult, as appropriate, with complainants with standing in the matter throughout the development, preparation, implementation, modification and evaluation of a Best Work Practices Agreement. The department will not require that complainants identify themselves to the source as part of the investigation and development of the Best Work Practices Agreement.

340-208-0400
Masking of Emissions

No person may cause or permit the installation or use of any device or use of any means designed to mask the emission of an air contaminant that causes or is likely to cause detriment to health, safety, or welfare of any person or otherwise violate any other regulation or requirement.

340-208-0450
Particle Fallout Limitation

No person ~~shall~~ may cause or permit the emission of particulate matter ~~which is~~ larger than 250 microns in size ~~provided if such particulate matter does or will deposit~~at sufficient duration or quantity as to create an observable deposition upon the real property of another person when notified by the department that the deposition exists and must be controlled.

Clackamas, Columbia, Multnomah, and Washington Counties

340-208-0500
Application

OAR 340-208-0500 through 340-208-~~0640~~ 0630 apply in Clackamas, Columbia, Multnomah, and Washington Counties.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0001; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0400

340-208-0510
Exclusions

(1) The requirements contained in OAR 340-208-0500 through 340-208-~~0640~~ 0630 ~~shall~~ apply to all activities conducted in Clackamas, Columbia, Multnomah, and Washington Counties, other than those for which specific industrial standards have been adopted (Divisions 230, 234, 236, and 238), and except for the reduction of animal matter, OAR 236-0310(1) and (2).

(2) The requirements outlined in OAR 340-208-0500 through 340-208-0630 do not apply to activities related to a domestic residence of four or fewer family-living units.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0003; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0410

~~**340-208-0520**~~
~~**Incinerators and Refuse Burning Equipment**~~

~~(1) No person shall cause, permit, or maintain any emission from any refuse burning equipment which does not comply with the emission limitations of this rule.~~

~~(2) Refuse Burning Hours:~~

~~(a) No person shall cause, permit, or maintain the operation of refuse burning equipment at any time other than one-half hour before sunrise to one-half hour after sunset, except with prior approval of the Department;~~

~~(b) Approval of the Department for the operation of such equipment may be granted upon the submission of a written request stating:~~

~~(A) Name and address of the applicant;~~

~~(B) Location of the refuse burning equipment;~~

~~(C) Description of refuse burning equipment and its control apparatus;~~

~~(D) Type and quantity of refuse;~~

~~(E) Good cause for issuance of such approval;~~

~~(F) Hours during which the applicant seeks to operate the equipment;~~

~~(G) Time duration for which approval is sought.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0025; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0420

~~340-208-0530~~
~~Concealment and Masking of Emissions~~

~~(1) No person shall willfully cause or permit the installation or use of any device or use of any means such as dilution, which, without resulting in a reduction in the total amount of air contaminant emitted, conceals an emission of air contaminants which would otherwise violate OAR Chapter 340.~~

~~(2) No person shall cause or permit the installation or use of any device or use of any means designed to mask the emission of an air contaminant, which air contaminant causes or is likely to cause detriment to health, safety, or welfare of any person.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0030; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0430

~~340-208-0540~~
~~Effective Capture of Air Contaminant Emissions~~

~~Air contaminants which are, or may be, emitted to the atmosphere through doors, windows, or other openings in a structure or which are, or may be, emitted from any process not contained in a structure, shall be captured and transferred to air pollution control equipment using the most efficient and best practicable hooding, shrouding, or ducting equipment available. New sources shall comply at the time of installation.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. &cert. ef. 3-10-93; Renumbered from 340-028-0040; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0440

340-208-0550
Odor Control Measures

(1) Control apparatus and equipment, using the highest and best practicable treatment currently available, ~~shall~~ must be installed and operated to reduce to a minimum odor-bearing gases or odor-bearing particulate matter emitted into the atmosphere.

(2) Gas effluents from incineration operations and process after-burners ~~shall~~ installed under section (1) of this rule must be maintained at a temperature of 1,400° Fahrenheit for at least a 0.5 second residence time, or controlled in another manner determined by the ~~Department~~ department to be equally or more effective.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0045; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0450

340-208-0560
Storage and Handling of Petroleum Products

(1) In volumes of greater than 40,000 gallons, gasoline or any volatile petroleum distillate or organic liquid having a vapor pressure of 1.5 psia or greater under actual storage conditions ~~shall~~ must be stored in pressure tanks or reservoirs, or ~~shall be stored~~ in containers equipped with a floating roof or vapor recovery system or other vapor emission control device.

(2) Gasoline or petroleum distillate tank car or tank loading facilities handling 20,000 gallons per day or more ~~shall~~ must be equipped with submersible filling devices or other vapor emission control systems.

(3) Gasoline tanks with a capacity of 500 gallons or more~~,~~ that were installed after January 1, 1970~~,~~ ~~shall~~must be equipped with a submersible filling device or other vapor emission control systems.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0050; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0460

340-208-0570
Ships

While in those portions of the Willamette River and Columbia River ~~which~~ that pass through or adjacent to Clackamas, Columbia, and Multnomah Counties, each ship ~~shall minimize emissions from soot blowing and shall be~~ is subject to the emission standards and rules for visible emissions and particulate matter size and must minimize soot emissions. The owner, operator or other responsible party must ensure that these standards and requirements are met.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0055; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0470

~~340-208-0580~~
~~Upset Condition~~

~~Emission of air contaminants in excess of applicable standards as a result of equipment breakdown shall be subject to OAR 340-214-0300 through 340-214-0360.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. &cert. ef. 3-10-93; Renumbered from 340-028-0060; DEQ4-1995, f. & cert. ef. 2-17-95; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0480

340-208-0590
Emission Standards — General

Compliance with any specific emission standard in this Division does not preclude required compliance with any other applicable emission standard or requirement contained in OAR Chapter 340.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0065; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0490

340-208-0600
Visible Air Contaminant Standards

No person ~~owning, operating, or maintaining non-fuel-burning equipment sources of emissions shall discharge into the atmosphere from any single source of emission whatsoever any air contaminant for a period or periods aggregating more than 30 seconds in any one hour which is equal to or greater than 20 percent opacity~~may allow any non-fuel-burning-equipment to discharge any air contaminant that is 20 percent opacity or greater into the atmosphere for a period of or periods totaling more than 30 seconds in any one hour.

Stat. Auth.: ORS 468 & ORS 468A.
Stats. Implemented: ORS 468.020 & ORS 468A.025.
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0070; DEQ 3-1996, f. & cert. ef. 1-29-96; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0500

340-208-0610
Particulate Matter Weight Standards

~~(1)~~ Except for equipment burning natural gas and liquefied petroleum gas, the maximum allowable emission of particulate matter~~,~~ from any fuel burning equipment ~~shall~~:

(~~a~~1) ~~Be~~ Is a function of maximum heat input ~~and be~~as determined from **Figure 1**, except that from existing fuel burning equipment utilizing wood residue, it ~~shall be~~is 0.2 grain, and from new fuel burning equipment utilizing wood residue, it ~~shall be~~is 0.1 grain per standard cubic foot of exhaust gas, corrected to 12 percent carbon dioxide;

(~~b~~2) Must ~~N~~not exceed Smoke Spot #2 for distillate fuel and #4 for residual fuel, measured by ASTM D2156-65, "Standard Method for Test for Smoke Density of the Flue Gases from Distillate Fuels".

~~(2) The maximum allowable emission of particulate matter from any refuse burning equipment shall be a function of the maximum heat input from the refuse only and shall be determined from **Figure 2.**~~

[Publications: The publication(s) referred to or incorporated by reference in this rule is available from the office of the agency.]
[ED. NOTE: The Figures referenced in this rule are not printed in the OAR Compilation. Copies are available from the agency.]
Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468.020 & ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0075; DEQ 3-1996, f. & cert. ef. 1-29-96; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0510

~~340-208-0620~~
~~Particulate Matter Size Standard~~

~~No person shall cause or permit the emission of any particulate matter which is larger than 250 microns in size provided such particulate matter does or will deposit upon the real property of another person.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0080; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0520, Moved to 340-208-0450.

340-208-0630
Sulfur Dioxide Emission Standard

For any air contaminant source that may emit sulfur dioxide, no person ~~shall~~ may cause or permit emission of sulfur dioxide in excess of 1,000 ppm from any air contamination source as measured in accordance with the ~~Department's~~ department's Source Test Manual, except those persons burning natural gas, liquefied petroleum gas, or fuel conforming to provisions of rules relating to the sulfur content of fuels. This rule applies to sources installed, constructed, or modified after October 1, 1970.

[Publications: The publication(s) referred to or incorporated by reference in this rule is available from the office of the agency.]
Stat. Auth.: ORS 468 & ORS 468A.
Stats. Implemented: ORS 468.020 & ORS 468A.025.
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0085; DEQ 3-1996, f. & cert. ef. 1-29-96; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0530

~~340-208-0640~~
~~Odors~~

~~(1) No person shall cause or permit the emission of odorous matter in such manner as to contribute to a condition of air pollution, or exceed:~~

~~(a) A Scentometer No. 0 odor strength or equivalent dilution in residential and commercial areas;~~

~~(b) A Scentometer No. 2 odor strength or equivalent dilution in all other land use areas;~~

~~(c) Scentometer Readings: Scentometer No. and Concentration Range — No. of Thresholds, respectively:~~

~~(A) 0 — 1 to 2;~~

~~(B) 1 — 2 to 8;~~

~~(C) 2 — 8 to 32;~~

~~(D) 3 — 32 to 128.~~

~~(2) A violation of this rule shall have occurred when two measurements made within a period of one hour, separated by at least 15 minutes, off the property surrounding the air contaminant source exceeds the limitations of section (1) of this rule.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025

Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0090; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0540

Benton, Linn, Marion, Polk, and Yamhill Counties

340-208-0650
Application

OAR 340-208-0650 through 340-208-0670 shall apply in Benton, Linn, Marion, Polk and Yamhill Counties.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 109, f. 3-15-76, ef. 3-25-76; DEQ 11-1982, f. & ef. 6-18-82; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-029-0001; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0600

340-208-0660
Odors

(1) Unless otherwise regulated by specific odor regulation or standard, no person shall cause or permit the emission of odorous matter:

(a) In such a manner as to cause a public nuisance; or

(b) That occurs for sufficient duration or frequency so that two measurements made within a period of one hour, separated by at least 15 minutes, off the property surrounding the emission point, that is equal to or greater than a Scentometer No. 0 or equivalent dilutions in areas used for residential, recreational, educational, institutional, hotel, retail sales or other similar purposes.

(2) In all land use areas other than those specified in subsection (1)(b) of this rule, release of odorous matter shall be prohibited if equal to or greater than a Scentometer No. 2 odor strength, or equivalent dilutions.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 11-1982, f. & ef. 6-18-82; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-029-0011; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0610

340-208-0670
Particulate Matter Size Standard

No person shall cause or permit the emission of any particulate matter which is larger than 250 microns in size provided such particulate matter does or will deposit upon real property of another person.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 11-1982, f. & ef. 6-18-82; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-029-0030; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0620

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
Stats. 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. 1-25-99; DEQ 5-1999, f. & cert. ef. 3-25-99; DEQ 6-1999, f. & cert. ef. 5-21-99; DEQ 10-1999, f. & cert. ef. 7-1-99; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-020-0047; DEQ 15-1999, f. & cert. ef. 10-22-99; DEQ 2-2000, f. 2-17-00, cert. ef. 6-1-01; DEQ 6-2000, f. & cert. ef. 5-22-00; DEQ 8-2000, f. & cert. ef. 6-6-00; DEQ 13-2000, f. & cert. ef. 7-28-00; DEQ 16-2000, f. & cert. ef. 10-25-00; DEQ 17-2000, f. & cert. ef. 10-25-00.

Secretary of State

NOTICE OF PROPOSED RULEMAKING HEARING

A Statement of Need and Fiscal Impact accompanies this form.

DEQ – 200 & 208
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

Hearing Date	Time	Location	Hearings Officer
July 18, 2000	7:00 PM	Newmark Center Building (across from Walmart) Room 228 1988 Newmark Avenue Coos Bay	Martin Abts
July 18, 2000	7:00 PM	La Sells Stewart Center – OSU Agricultural Production Room 875 SW 26th Street Corvallis	Kevin Downing
July 18, 2000	7:00 PM	Madras Fire Station Main Hall 765 S. Adams Drive Madras	Larry Calkins
July 19, 2000	7:00 PM	Tillamook County Courthouse Commissioners' Meeting Room 201 Laurel Avenue Tillamook	Duane Altig
July 20, 2000	7:00 PM	Gresham City Hall Springwater Trail Room 1333 NW Eastman Parkway Gresham	Kevin Downing
July 20, 2000	7:00 PM	Pendleton City Hall Community Room 500 SW Dorion Pendleton	Tom Hack

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.

340-208-0300; 340-208-0310; 340-208-0320

AMEND:
340-200-0040; 340-208-0010; 340-208-0110; 340-208-0200; 340-208-0210; 340-208-0500; 340-208-0510; 340-208-0560; 340-208-0570; 340-208-0600; 340-208-0610

REPEAL:

340-208-0520; 340-208-0540; 340-208-0580; 340-208-0640; 340-208-0650; 340-208-0660; 340-208-0670

RENUMBER:
Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

AMEND AND RENUMBER:
Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

340-208-0530 to 340-208-0400; 340-208-0620 to 340-208-0450

Stat. Auth.: ORS 468A.010
Stats. Implemented: ORS 468A.025

RULE SUMMARY

This proposal would refine the definition of an air quality nuisance, outline criteria to determine a nuisance and propose an alternative to traditional enforcement tools to abate the nuisance. This Division also contains other rules originally adopted in 1973 by the Environmental Quality Commission from the former, and now defunct Columbia-Willamette and Mid-Willamette Air Pollution Control Authorities that are no longer applicable or have been superseded by subsequent rule adoptions by the Commission. Most of these rules are proposed for deletion. Two requirements are proposed to apply statewide, i.e., a prohibition on masking otherwise harmful emissions and a prohibition on large (greater than 250 microns) particle fallout. Other proposed changes include housekeeping changes intended to improve the readability and enforceability of the rules. If adopted, the rules in OAR 340-208-0010 through 340-208-0210 will be submitted to the U.S. Environmental Protection Agency (EPA) as a revision to the State Implementation Plan, which is a requirement of the Clean Air Act.

July 27, 2000
Last Day for Public Comment

Susan M. Greco 5/15/00
Authorized Signer and Date

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Air Quality Nuisance Control Rules

Fiscal and Economic Impact Statement

Introduction

The proposed rules clarify the Department's procedure for evaluating a nuisance air quality complaint and provide a process for abating the nuisance outside the traditional enforcement route. Parties suspected of or proven to be creating a nuisance will face increased cost associated with implementing controls to remove or reduce the nuisance air contaminants. Providing a precise estimate of the economic impact and benefit of nuisance abatement is difficult, given the wide range of sources that potentially create nuisances. The cost of abating the nuisance is influenced by the scale of the operation creating the nuisance but also the type of contaminant, whether particle fallout, odor or visible emissions. Historically, the cost of any nuisance control is considered on a case-by-case basis and is weighed against the costs relative to the benefit anticipated.

General Public

The public exposed to air quality nuisance would receive an indeterminate benefit related to greater enjoyment of their personal real property once the nuisance is abated. These benefits could include reduced cleaning costs, enhanced enjoyment of vistas, more opportunities to be outside and/or reduced damage to plantings or structures. Overall the public's quality of life is better without the exposure to nuisances.

Small Business

Nuisance air contaminants are typically classified as three types: particle fallout, odors and visible emissions. Control strategies vary by type and size of source. Effective nuisance control could be as simple as moving the operation indoors, covering solvents when not in use, repairing or maintaining existing filters and controls and/or rearranging the process flow that is creating nuisance emissions. Particle fallout control could involve installing a cyclone for dust control (estimated at between $10,000 and $20,000). Larger operations may require more than one cyclone. Dust control from vehicle traffic could be managed by paving (estimated at $37 to $45 per square yard) or chemical dust suppression (approximately $0.77 a square yard per application. Reapplication rates depend on the volume of traffic but could necessitate 1 to 3 reapplications per

year.). Covering truck loads to reduce wind blown dust could cost between $1,500 to $5,000 per vehicle. Other techniques to manage particle fallout include erecting walls to contain the source pile of materials. Costs of this control depend upon the size and number of material piles at each facility.

Nuisance odor could be managed by installing a carbon bed or afterburners, modifying the production process and/or changing the stack height. The cost of these controls is very sensitive to the size and type of facility. As an example, an afterburner for a mid-sized coffee roaster would cost about $32,000. Afterburners could also be used to reduce visible emissions. Changing the stack height to reduce the odor impact of styrene emissions could cost about $2,200.

Each source will require an evaluation of appropriate controls and it is not possible to predict the types of nuisance abatement practices that would be typically implemented.

Large Business

This rule will have less effect on larger businesses than smaller businesses as many of these operations are already subject to existing permit requirements regarding management of nuisance air contaminants. If a large business not otherwise subject to permit requirements is creating a nuisance, the costs and controls will be as outlined above but tending toward the upper end of any range of estimated costs.

Local Governments

No impact to local governments except to the extent that their activities may contribute to a nuisance. The fiscal impacts would be similar to those outlined above depending upon the type of air contaminant requiring abatement.

State Agencies

- DEQ
  - FTEs (0.86)
  - Revenues $ 0
  - Expenses ($173,533)

- Other Agencies Not applicable

Assumptions

The Department receives over 1500 complaints a year not associated with permitted sources. The time required to investigate and resolve a complaint ranges from 2 hours to 28 hours, with the average at 10 hours. The savings in fiscal impact for the Department outlined above comes

from the use of the more effective tools proposed in this rulemaking. Implementation of the Best Work Practices Order protocol is estimated to result in a 10 percent reduction in staff effort associated with nuisance complaint resolution.

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
Air Quality Nuisance Control Rules

Land Use Evaluation Statement

1. Explain the purpose of the proposed rules.

This proposal would refine the definition of an air quality nuisance, outline criteria to determine a nuisance and propose an alternative to traditional enforcement tools to abate the nuisance. This Division also contains other rules originally adopted in 1973 by the Environmental Quality Commission from the former and now defunct Columbia-Willamette and Mid-Willamette Air Pollution Control Authorities that are now longer applicable or have been superseded by subsequent rule adoptions by the Commission. Most of these rules are proposed for deletion. Two requirements are proposed to apply statewide, i.e., a prohibition on masking otherwise harmful emissions and a prohibition on large (greater than 250 microns) particle fallout. Other proposed changes include housekeeping intended to improve the readability and enforceability of the rules.

2. Do the proposed rules affect existing rules, programs or activities that are considered land use programs in the DEQ State Agency Coordination (SAC) Program? ☒ Yes ☐ No

a. If yes, identify existing program/rule/activity:

Nuisances may be caused by permitted sources. Resolution of these types of complaints for these sources are typically handled by procedures outlined in their permits. The air quality permitting programs are an existing land use program under OAR 340-18-030.

b. If yes, do the existing statewide goal compliance and local plan compatibility procedures adequately cover the proposed rules? ☐ Yes ☐ No (if no, explain):

Not applicable

c. If no, apply the following criteria to the proposed rules.

Staff should refer to Section III, subsection 2 of the SAC document in completing the evaluation form. Statewide Goal 6 - Air, Water and Land Resources is the primary goal that relates to DEQ authorities. However, other goals may apply such as Goal 5 - Open Spaces, Scenic and Historic Areas, and Natural Resources; Goal 11 - Public Facilities and Services; Goal 16 - Estuarine

Resources; and Goal 19 - Ocean Resources. DEQ programs and rules that relate to statewide land use goals are considered land use programs if they are:

1. Specifically referenced in the statewide planning goals; or

2. Reasonably expected to have significant effects on
   a. resources, objectives or areas identified in the statewide planning goals, or
   b. present or future land uses identified in acknowledged comprehensive plans.

In applying criterion 2 above, two guidelines should be applied to assess land use significance:
- The land use responsibilities of a program/rule/action that involved more than one agency, are considered the responsibilities of the agency with primary authority.
- A determination of land use significance must consider the Department's mandate to protect public health and safety and the environment.

In the space below, state if the proposed rules are considered programs affecting land use. State the criteria and reasons for the determination.

The proposed rules do not have a significant affect on land use. The Department may need to coordinate with local governments in regard to their role in approving the siting of uses that may contribute to creating a nuisance.

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

Intergovernmental Coordinator — Date 5/16/00

Attachment B-4

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Air Quality Nuisance Control Rules

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. Nuisance abatement is a fundamental issue in environmental regulation with a long history of consideration under common law. However, nuisances tend to be local and not often associated with the health concerns identified as priority concerns within the federal Clean Air Act. Resolution of nuisance issues has traditionally fallen within state and local government responsibilities.

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?

Yes. Nuisance issues are often difficult to resolve but can become contentious nevertheless. The voluntary Best Work Practices Order provides an opportunity for a source suspected of contributing to a nuisance to undertake one or more reasonable

steps to control the problem and, as a result, achieving some certainty regarding expectations for compliance. The agreement will be drafted to implement the most effective, reasonably available controls, reducing or eliminating the need to revisit the issue again. This approach will avoid ongoing involvement in continuous negotiations or enforcement actions, allowing the most immediate relief for complaints and letting the source go back to its primary activity and Department staff to work on higher priority air quality issues.

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?

Yes, the voluntary agreement, known as the Best Work Practices Order, will provide assurance to the source of what is expected to comply with the state of Oregon nuisance rules and will also provide more timely relief from exposure for those experiencing the nuisance.

7. Does the proposed requirement establish or maintain reasonable equity in the requirements for various sources? (level the playing field)

Yes. The Department will be preparing guidance for implementation to assist field staff across the state in evaluating the criteria for determining a nuisance in the same way. This will ensure that similar activities located in differing parts of the state will experience the same level of consideration and enforcement in regard to potential nuisance violations. This guidance will also outline a menu of potential abatement options so that sources could expect to be presented with the same choices for control as any other nuisance source in the state.

8. Would others face increased costs if a more stringent rule is not enacted?

Sources suspected of contributing to a nuisance may face challenges to abate the nuisance from many different fronts including local government enforcement and third party lawsuits. Voluntarily signing and complying with the Best Work Practices Order would ensure no further enforcement by the Department. The agreement may also serve as a demonstration of reasonable controls as a defense to other complaints.

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. The circumstances from one situation to the next will vary widely. Not all nuisance situations may be resolved with a reasonably available control device. However, depending on the nuisance, there are typically a wide variety of options available representing reasonable abatement practices.

11. Will the proposed requirement contribute to the prevention of pollution or address a potential problem and represent a more cost-effective environmental gain?

Yes. The nuisance abatement process outlined in the rule will reduce the amount of air contaminants emitted once controls are in place. The Department has also a number of case histories that show where sources of air pollution have been approached after complaints have been received, the resulting solution has often resulted in reduced operating costs for the business. Similar results can be expected in enforcing this rule, as offers of technical assistance are often the first tool used in interactions with problem sources.

State of Oregon
Department of Environmental Quality **Memorandum**

Date: May 16, 2000

To: Interested and Affected Public

Subject: Rulemaking Proposal and Rulemaking Statements - Air Quality Nuisance Control Rules, OAR 340 Division 208; 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/rule amendments regarding air quality nuisances. 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 refine the definition of an air quality nuisance, outline criteria to determine a nuisance and propose an alternative to traditional enforcement tools to abate the nuisance. This Division also contains other rules originally adopted in 1973 by the Environmental Quality Commission from the former, and now defunct Columbia-Willamette and Mid-Willamette Air Pollution Control Authorities that are no longer applicable or have been superseded by subsequent rule adoptions by the Commission. Most of these rules are proposed for deletion. Two requirements are proposed to apply statewide, i.e., a prohibition on masking otherwise harmful emissions and a prohibition on large (greater than 250 microns) particle fallout. Other proposed changes include housekeeping changes intended to improve the readability and enforceability of the rules.

The Department has the statutory authority to address this issue under ORS 468A.010. These rules implement ORS 468A.025. If adopted, the rules in OAR 340-208-0010 through -0210 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 rule (amendments).
Attachment D-2	State Implementation Plan rule

Hearing Process Details

The Department is conducting public hearings at which comments will be accepted either orally or in writing. The hearings will be held as follows:

Date	Time	Place
July 18	7:00 PM	Coos Bay Newmark Center Building (across from Walmart) 1988 Newmark Avenue Room 228
July 18	7:00 PM	Corvallis Agricultural Production Room LaSells Stewart Center - OSU 875 SW 26th Street
July 18	7:00 PM	Madras Main Hall Madras Fire Station 765 S. Adams Drive
July 19	7:00 PM	Tillamook Commissioner's Meeting Room Tillamook County Courthouse 201 Laurel Avenue
July 20	7:00 PM	Gresham Springwater Trail Room Gresham City Hall 1333 NW Eastman Parkway
July 20	7:00 PM	Pendleton Pendleton City Hall Community Room 500 SW Dorion

A question and answer period from 6:30 PM to 7:00 PM will precede each hearing.

Deadline for submittal of Written Comments: 5:00 p.m., July 27, 2000

Department staff will be the Presiding Officer at the hearing.

Written comments can be presented at the hearing or to the Department any time prior to the date above. Comments should be sent to: Department of Environmental Quality, Attn: Kevin Downing, 811 S.W. 6th Avenue, Portland, Oregon 97204; fax 503 229-5675; email downing.kevin@deq.state.or.us .

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 September 29, 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

Why is there a need for the rule?

The need to effectively address air quality nuisances was identified as a priority action within the Air Quality program's evaluation of process improvement opportunities. Air quality nuisance

complaints may involve health issues but are typically driven by aesthetic concerns such as odor, opacity and particle fallout. Nevertheless, nuisance issues can be very compelling for both the complainant and the offending party, and represent a substantial commitment of staff time to resolve. In part, this is due to the nature of nuisances themselves but also to the lack of a well-developed process in the Department's rules. Under current rules, staff respond to complaints with an investigation that involve several site visits to isolate and document the offending nature of the air contaminants. Following that, effective resolution of nuisance concerns often depends upon a resource intensive enforcement action.

The nuisance rules proposed here include a clearer definition of nuisance, criteria for determining a nuisance and a process to address nuisances as an alternative to the typical enforcement process. This process would begin with a voluntarily signed negotiated agreement with a source suspected of creating a nuisance. Under the agreement the source would commit to implementing specific steps which have been identified as being reasonable approaches to abating the nuisance at hand. Sources adhering to the agreement and implementing the outlined steps would be deemed to be in compliance with the rule and shielded from further enforcement action by the Department. This approach is expected to be more successful than the traditional approach because it encourages the application of controls to address the problem rather than seeking resolution through a potentially lengthy and contentious enforcement process.

As previously noted, many of the other rules in the Division are remnant from now defunct regional air pollution control authorities that predated the establishment of the Department of Environmental Quality. Several of the rules are now outdated and are unenforceable or have been superseded by subsequent rule adoptions by the Commission that apply statewide. These rules are proposed for deletion.

This rulemaking also proposes to extend statewide two rules that had previously applied either within the mid-Willamette valley and/or the Portland area. The first rule prohibits the masking of emissions that would otherwise cause a detriment to health, safety or welfare of people. The second rule would prohibit the emission of particulate matter greater than 250 microns in size that would be deposited on another person's property. Each of these rules addresses environmental problems that occur in the rest of the state as has historically occurred in the Portland and mid-Willamette Valley. Extending the applicability of the rule enhances the Department's ability to resolve the relevant air quality problems statewide.

How was the rule developed?

A workgroup consisting of DEQ air quality and enforcement staff as well as Department of Justice staff worked over several months to research and develop this rulemaking proposal. This work grew out of a broader Air Quality Program streamlining effort.

Copies of the documents relied upon in the development of this rulemaking proposal can be reviewed at the Department of Environmental Quality's office at 811 S.W. 6th Avenue, Portland, Oregon. Please contact Kevin Downing 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?

This rule directly affects persons under whose control air contaminants are released that are creating a nuisance. Persons deemed to be creating a nuisance would be directed to abate the nuisance or face civil penalty enforcement. As an alternative, persons suspected of creating a nuisance would be provided the option to sign a voluntary agreement with the Department to implement specific steps to control or mitigate the source of offending air pollution.

These rules also propose to extend statewide two provisions that had applied previously only in the Portland area and other portions of the Willamette Valley.

How will the rule be implemented?

The effective date of the rule will be November 1, 2000. Guidance on nuisance determination and the effective use of the alternative nuisance abatement process proposed in this rulemaking will be prepared and distributed to air quality staff responsible for enforcing these rules. Enforcement staff of the Department will be involved in the development of this guidance and the protocols needed to ensure that Best Work Practices Orders are written so that enforcement action can be taken if necessary.

Are there time constraints?

There are no outside time constraints regarding adoption of this rule. The Air Quality Division has identified nuisance control rule amendments as a priority in its process improvement program identified within the Air Quality Strategic Plan. Successful implementation of this program will help streamline program operations and allow resources, both inside and outside the agency, to address more environmentally protective issues.

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 Division
811 SW 6th Avenue
Portland, Oregon 97204

503 229-6549
Fax: 503 229-5675
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: November 20, 2000

To: Environmental Quality Commission

From: Kevin Downing, DEQ Air Quality Planning
Martin Abts, DEQ Coos Bay
Duane Altig, DEQ Portland
Larry Calkins, DEQ Bend

Subject: Presiding Officer's Report for Rulemaking Hearing
Air Quality Nuisance Control Rules

Hearing Date	Time	Place
July 18, 2000	7:00 PM	Coos Bay Newmark Center Building (across from Walmart) 1988 Newmark Avenue Room 228
July 18	7:00 PM	Corvallis Agricultural Production Room LaSells Stewart Center - OSU 875 SW 26th Street
July 18	7:00 PM	Madras Main Hall Madras Fire Station 765 S. Adams Drive
July 19	7:00 PM	Tillamook Commissioner's Meeting Room Tillamook County Courthouse 201 Laurel Avenue
July 20	7:00 PM	Gresham Springwater Trail Room Gresham City Hall 1333 NW Eastman Parkway
July 20	7:00 PM	Pendleton Pendleton City Hall Community Room 500 SW Dorion

In addition, information meetings on the nuisance rules along with the open burning rules were held in Lyons on June 26th, Falls City on June 28th and Corvallis on July 6th. Persons attending these meetings were briefed on the rules by staff and any questions they had about the proposal were answered at that time. They were also encouraged to either attend the scheduled public hearings or submit written comments to ensure that comments could be included in the public

record. At the hearings people were asked to sign registration forms if they wished to provide comments. People were also advised that the hearing was being recorded. Prior to receiving comments, staff briefly explained the specific rulemaking proposal and the procedures to be followed during the hearing.

The Coos Bay hearing was attended by 8 people; in Corvallis, 15 people; in Madras, 2 people; in Tillamook and Gresham, none; in Pendleton, 3 people. No one provided testimony on the nuisance rules at the public hearings. Thirty-three persons submitted additional written testimony outside of the public hearings.

The public comment period was reopened on three occasions at the request of several individuals and groups who felt they did not have enough time to adequately review the proposal. The comment period was initially extended to August 10. Comments from this initial round were incorporated into a revised rule draft (see Attachment G) and circulated to commenters during a second comment period from September 1 until September 13. The comment period was reopened again from October 1 to November 1. In addition, a public workshop was held on the proposed rules on October 26th at the State Office Building, 800 NE Oregon in Portland. Comments on Attachment G are referred to as comments on the revised draft, as opposed to the initial draft. Several persons submitted written comments on the rules during more than one of the comment periods and are noted in the Testimony Reference Table.

The following report provides a summary of written and oral comments received, including written comments received outside of the public hearings. The department's response to the comments is provided in a separate document. Comments are grouped by similar subject areas. 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.

Written Testimony References

No.	Name and Affiliation
W1	Kurt Anderson Monaco Coach P.O. Box 465 Wakarusa, Indiana

W2A, W2B	Thomas Wood Stoel Rives 900 SW Fifth Ave Suite 2600 Portland
W3A, W3B, W3C, W3D	John Ledger Associated Oregon Industries 1149 Court St NE Salem
W4A, W4B, W4C, W4D	Kathryn VanNatta Northwest Pulp and Paper Association 7874 Jani Court NE Keizer
W5	Debra Suzuki Environmental Protection Agency 1200 Sixth Avenue Seattle
W6A, W6B, W6C, W6D, W6E	Sharon Genasci NW District Association Health and Environment Committee 2217 NW Johnson Portland
W7	Caroline Skinner Elizabeth Meyer James Knight Crystal Rummell Judith Hill Renae Nifus 2420 NW Quimby St Portland
W8A, W8B	David F. Bartz, Jr. Schwabe, Williamson & Wyatt 1211 SW Fifth Ave Portland

W9A, W9B	Calvin Pittman Kingsford 3315 Marcola Road Springfield
W10A, W10B	Caroline Skinner 2420 NW Quimby St. Portland
W11	Stacey Vallas 2856 NW Thurman St Portland
W12A, W12B	Robert Davies 2518 NW Savier Portland
W13A, W13B	Bob Holmström 2924 NW 53rd Dr Portland
W14	Elizabeth Patte 3204 NW Wilson Portland
W15	Martha Gannett 2466 NW Thurman St Portland
W16	Judith Hill 2420 NW Quimby Portland
W17	G. Frank Hammond Cable, Huston, Benedict, Haagensen & Lloyd LLP 1001 SW 5th Ave, Suite 2000 Portland
W18A, W18B	Marvin Lewallen Weyerhaeuser Co. Tualatin

W19	Lori Luchak Miles Fiberglass and Composites 8855 SE Otty Rd. Portland
W20	Mike Elder SP Newsprint Co. P.O. Box 70 Newberg
W21	Jerry Bramwell U. S. Forest Industries Medford
W22	Dr. Robert G. Amundson 1616 Harbor Way #403 Portland
W23	David Paul Paul & Sugerman 520 SW Sixth Avenue, Suite 920 Portland
W24	Mathew Cusma Schnitzer Steel Products Co. 12005 N. Burgard Road Portland
W25	Robin Hochtritt, RN, MSW 707 NW Everett Street Portland
W26	Paul Engelking P. O. Box 236 Lowell
W27	Kim Strahm 91233 Rustic Ct. Coburg

W28

Dale F. Wonn
Trus Joist MacMillan
P.O. Box 22508
Eugene

W29

Kristan S. Mitchell
Oregon Refuse and Recycling Association
P. O. Box 2186
Salem

Testimony Summary/Issues **Whose Comment**

GENERAL COMMENTS ABOUT THE RULES

1. W6A, W7, W11, W12A, W13, W14, W15, W16

We write to voice our strong concerns about air quality in our homes in NW Portland, being periodically invaded with noxious burnt odors that may be indicative of any of a number of hazardous air pollutants including metals. The odors get so bad at times as to interfere with our use of the public sidewalks and roadways in the neighborhood. The frequency and uncertainty of the odor events make it impossible for residents to rely on outdoor ventilation to cool their homes in the summertime. People also report headaches and sore throats. We cannot stress enough the need for tough, enforceable air quality nuisance control rules.

2. W6C, W10B

We are concerned about our health and the health of our children. We do not know the consequences of breathing the 34 HAPs the foundry, for example, is permitted to emit. We do know that the HAPs we have monitored are extremely dangerous. It is unreasonable to expect neighbors to bear this burden of pollution year after year to save the company the expense of modernizing a very old plant.

3. W6C, W10B

Many types of fugitive emissions from these nearby facilities are not dissimilar to open burning, e.g., the pouring of molten metal poured into low level radioactive sand molds treated with a resin material. There is no attempt to control these emissions.

4. W3D, W4D

AOI understands the intent of the proposed action is to clarify and simplify the existing nuisance rules and not to create new regulatory requirements or authorities. It is also apparent that some parties wish to use the nuisance rules to combat hazardous air pollutants

when this issue will be addressed more comprehensively in the program proposed by the HAP Consensus Group. The agency should more clearly state the intent and scope of these rules so as to avoid ambiguity in their application.

5. W4B

The proposed rule that prohibits a nuisance establishes a process that we believe is fundamentally unfair and, importantly, unworkable.

6. W10B

I am only a citizen, not a scientist or politician or government employee so I need simple and effective tools to be able to give feedback to the appropriate agency when I am affected by bad air quality as I have been so much this summer. I understand industry's wish for less regulation, however, there has to be a counter-balance to represent the needs of the ordinary citizen who must live with industrial outputs that can affect both quality of life, esthetically, and can potentially cause ill-health as well.

7. W2A, W4A

It is not clear that the legislature has granted DEQ authority to address private nuisances involving a limited number of parties. The authority to regulate nuisances arises from the definition of air contaminants (ORS468A.005) that are described as substances that "interfere unreasonably with enjoyment of life and property throughout such area of the state as shall be affected thereby." "Area of the state" is defined in the statute as a specific geographical area designated by the EQC. The definition does not authorize DEQ to address nuisances that apply on a limited basis or in areas that have not been specifically designated by the EQC.

8. W17, W29

We are concerned that the Department's modifications to nuisance law may create constitutional questions. Determination of whether an activity results in "substantial and unreasonable" interference with a private or public right is generally a question of fact, often subject to decision by a jury in a civil action for nuisance. The proposed rules create civil penalties for a nuisance, in section 340-208-0300, while putting the fact-finding function into administrative hands. Similarly, the rules might violate the separation of powers doctrine because they might be read to impair common law nuisance remedies and defenses. Furthermore, under the Constitution the decision to impair a common law remedy must be left to the legislature, and then its powers are limited.

9. W27

Have you considered or previously tried a rule that if you have a source causing a consistent nuisance to neighboring areas and the agency receives a specific number of calls/complaints

within a determined amount of time and it is verified by the agency then the source is cited as a nuisance?

10. W2A

The cost assumptions used by the Department to determine the fiscal impact are inaccurate.

DEFINING NUISANCE

11. W21

The definition of nuisance is too broad. Without specific definitions of "odor" and "nuisance" every type of business activity would be open for arbitrary enforcement by the Department. The list of criteria for determining a nuisance does not define specific criterion to follow in making these determinations, making the final result based on no more than biased opinion. Test criterion has to be established regarding all odor emissions.

12. W3A, W4A, W9A, W18B, W29

The definition of a nuisance must be modified to correctly state the law. Specifically, both public and private nuisances must be unreasonable and substantial to be classified as a nuisance.

13. W6C, W10B, W12B

Since the proposed definition is not the actual definition of nuisance, we propose from the American Heritage Dictionary, "A use of property or course of conduct that interferes with the legal rights of others by causing damage, annoyance or inconvenience."

14. W6D, W22

We suggest a definition of nuisance closer to the May 16 draft: "Nuisance means unusual or annoying amounts of emissions traceable directly to one or more specific sources, resulting in interference with another's use and enjoyment of real property or the invasion of a right common to members of the general public."

15. W26

The distinction between public and private nuisances is not relevant in the case of airborne contaminants, as any airborne discharge that leaves the airspace above a property becomes an intrusion into the public domain and potentially an expectation of the reasonable use of air.

16. W1

Definition of a nuisance also needs to quantify the difference between a public and private

nuisance, including factors like the number of complaints, the duration of the incident, the intensity and verification of complaints by regulatory agency.

17. W20

The proposed revision to the definition of nuisance should include the reference to the source of the nuisance.

DETERMINING A NUISANCE

18. W2A, W3A, W3B, W4A, W4B, W9A, W29

Additional considerations should be used in determining whether a nuisance exists such as, geographic extent of impact, existence of cost effective controls, compliance with a permit, compliance with statutes or regulations, extent and character of the harm and the parties' ability to prevent or avoid harm.

19. W2A, W3A, W3B, W4A, W4B, W9A, W29

Where a source has already complied with a specific standard directed at controlling emissions from a particular process, that process should not then be subject to additional controls under the nuisance program. We must assume that when DEQ adopts specific standards, these standards are intended to prevent "substantial and unreasonable interference" with public and private rights. The general nuisance rule should simply be a safety net to fill in any gaps not addressed by specific standards.

20. W6A, W6C, W6E, W10B, W12B

Compliance with a permit should in no way exempt industry from the nuisance rule. Examples are evident where a facility in compliance with its permit can still be creating a nuisance. Delete the provision in proposed OAR 340-208-0310 (2).

21. W23

The Department has many programs mandated by federal law that are incorporated in to permits. However, none of these standards is directly connected to a standard of "substantial and unreasonable interference with public and private rights." Therefore, the existence of a permit is not a legal defense to nuisance.

22. W1, W2A, W3A, W4A, W4B, W9A, W19, W29

Definition of a nuisance needs to include site specific factors like zoning. Sources should

be exempted if operating within substantive permit requirements and appropriately located in areas zoned for the use.

23. W6C, W6D, W6E, W10B, W12B, W14

The criteria for a nuisance should not include "the suitability of each party's use and character of the locality." This places the burden entirely on the public affected rather than on the parties impacting the public and isn't acceptable.

24. W23

Oregon law establishes very clearly that "zoning is not an approval of manner of conducting business which causes private nuisance." Lunda v. Matthews 46 Or. App.701, 706-707 (1980).

25. W6A, W6B

Evaluation of the true costs of a nuisance must also include not only the cost of controls but also the costs to the health and well being of people living near the polluter. For instance, a recent health survey indicated that residents of NW and SE Portland had significantly higher asthma rates than anywhere else in the state and higher than the national average.

26. W6E, W12B

Do not include "geographic extent of impact" and "existence of cost effective controls" as criterion to determine a nuisance. These exclusions have been suggested by industry. This issue represents a serious public health matter and should not be treated as an inconvenience to industry.

27. W6C, W6D, W10B, W12B

Retain the originally proposed criterion of "proximity to residential and commercial areas" and delete the criterion of "extent and character of the harm to complainants." The revised proposal appears to favor industry and makes it more difficult for DEQ to enforce any nuisance rule. Isn't the difficulty of legal enforcement supposed to be the reason for changing the rule that is presently on the books – and not enforced?

28. W6D, W6E, W22, W25

Add "toxicity of emissions" to the original list of criteria determining a nuisance.

29. W6A

It is wrong to not consider harm on a smaller scale and to require a test that shows an extended area of harm before action can be taken. Our airshed is in the state it is because of a thousand small cuts of neglect and ignoring or not responding to complaints. No neighbor should be exposed to air toxics that will cause harm.

30. W12B

How does one prove that his breathing is seriously compromised by nuisance dust or odor – indeed, is that a necessity for constituting a nuisance, an annoyance or inconvenience? How better could DEQ determine what constitutes a nuisance? Do not consider extent and character of the harm but consideration of the parties' ability to prevent or avoid harm seems reasonable. Rewrite the criterion regarding number of people impacted to specify a compilation of complaints that specify frequency, duration, intensity and impacts on complainants, testing or monitoring, DEQ inspections or the use of odor contractors who might identify chemicals that cause objectionable smell.

31. W25

The originally proposed list of criteria is preferable. The existence of any one factor should be sufficient to find a nuisance. The language should be amended to indicate that the list is disjunctive.

32. W26

More emphasis should be placed on prevention. Some nuisances are potentially a problem and government can order them abated prior to actual harm being endured. The section in 340-208-0310 is heavy on actual harm and light on potential harm, in contrast to most current policy regarding nuisance abatement.

33. W23

The organization of OAR 340-208-0310 is flawed in that it merges the distinct concepts of defining a nuisance and curing a nuisance. For instance, the suitability of each party's use criterion is not relevant, see Lunda v. Matthews. Even if a polluter is zoned and permitted, it may constitute a nuisance. Therefore, the suitability of an offending party's use to the locality should be considered only in terms of penalties assessed and mandated efforts to cure the nuisance and not to the determination of a nuisance itself. This language should be deleted and relocated, if at all, to another section on penalties.

34. W24

The revised proposal adequately addresses several of our concerns, particularly related to the criteria for determining when a nuisance exists and the details of the Best Work Practices Agreement.

35. W25

The Bridgeview Community is a residential facility that serves as home for chronic mentally ill people. Earlier this year, another residential building nearby began operating an emergency diesel generator. The generator ran on a weekly basis, for about 20 minutes, for routine maintenance purposes. Depending upon the prevailing wind the Bridgeview's

interior would fill with exhaust fumes and, on occasion, set off the smoke alarms or cause an informal evacuation. We support DEQ's effort to fashion a regulatory scheme that recognizes that urban nuisances can come from an otherwise unregulated, nonpermitted source and have unusual or annoying impacts upon the rights of residential neighbors. We are not confident that the revised proposal would allow the Department to address this situation quickly and with few staff hours involved.

PRESUMPTIVE COMPLIANCE

36. W2A, W3A, W3D, W4A, W4B, W4D, W9A, W18B, W28, W29

The current regulations, OAR 340-208-0510, contain an express statement that sources complying with industry specific standards are not subject to the county odor regulations in OAR 340-208-0550. By moving the nuisance rules from –0550 to –0300 without correspondingly moving the presumptive compliance regulation exposes industries having already installed reasonable levels of controls to defend those standards against nuisance complaints. These standards take into account the specific impact of particular industries and are necessarily a reflection of balancing impact and what is reasonable. While compliance with general standards may not be a defense against a nuisance claim, compliance with industry specific standards should presumptively be a defense to nuisance.

NUISANCE PENALTIES 340-208-0300(2)

37. W2A, W3A, W4A, W4B, W9A, W29

Penalties should not be assessed from the date of the notice of a potential nuisance. The determination of what constitutes a nuisance is necessarily a difficult one. A source should not be penalized for arriving at a different subjective conclusion. In addition, a source can rarely abate a nuisance from the date of first notice. Issuing a penalty because the source believed that it was not a nuisance is not an appropriate means of responding to an issue. The proposal contradicts the department's guidance and procedure for enforcement of violations. The lack of notice conflicts with ORS 468.126 and does not even allow for mailing and receipt by the alleged offender.

38. W2A, W4A, W4B

Penalties may not be appropriate in the case of a nuisance. The department should instead issue an order requiring an assessment of appropriate responses and require implementation within a reasonable time frame.

39. W3B, W8A, W26

The concept of "suspected" nuisance agrees more directly with the department's intent for work practices orders and preliminary investigations into whether or not a nuisance exists. Suggest deleting the word "potential" and replacing with "suspected".

BEST WORK PRACTICES AGREEMENT

40. W2A, W3A, W4A, W4B, W9A, W29

The best resolution of any suspected nuisance is through cooperative efforts. The requirement that a source enter into a permanent enforcement order in order to have a defense against penalties is antagonistic. The Best Work Practices Order proposal may have initial appeal but has three serious problems: 1) Reliance on additional formal enforcement orders when such mechanisms are already available; 2) tying the orders to formal enforcement; and 3) creating orders that run forever. The proposed Best Work Practices Order is unnecessary and is unreasonably harsh.

41. W2A, W3A, W4A, W4B, W29

Although a "safe harbor" is appealing tying it to an enforcement order doesn't make sense and ultimately discourage cooperation with the department. An order will be construed as an admission of noncompliance that can be used by third parties in furthering their own civil actions against the source. In addition, we are unaware of other precedent where the department requires a source that has not been determined to be in violation of any rule to enter into an order so as to avoid enforcement. Less formal alternative approaches like determination letters documenting reasonable measures to combat a particular nuisance or source specific permit modifications addressing particular nuisance issues would be more effective.

42. W1, W2A, W4A, W4B

A Best Work Practices Order needs to provide more binding assurances to the source than is provided in 340-208-0320 (1). It is important that sources are provided a level of relief from ongoing complaints and enforcement threats. Sources will not sign Best Work Practices Orders that allow the Department at any future time to require more measures.

43. W1

Reasonably available controls considered for Best Work Practices must consider site specific factors, cost and the extent of the nuisance problem.

44. W3A, W9A, W29

The typical notice of noncompliance procedure has been effectively used to gain compliance. The NON process allows steps to be taken to address an alleged nuisance. Recalcitrant offenders can be penalized promptly but good faith responders are encouraged.

45. W6A, W6B, W23

It is totally unacceptable for the department to ask a company to reduce an odor by taking one or two inadequate steps, possibly contributing to a worsening of the airshed or leaving only a slightly reduced odor. The department should reserve the ability to revisit the adequacy of controls if they prove inadequate. A best work practices agreement should not shield a source from further enforcement actions unless or until the citizens making the complaint are satisfied that sufficient progress has been made toward abating the nuisance. To do otherwise would simply give an offending party a greater shield from liability than they would otherwise have in the absence of these rules.

46. W14

Any language that takes away the department's ability to continue to revisit a complaint is undesirable and should be removed.

47. W6C, W10B

Retain the provision in the originally proposed draft in 340-208-0320 (1) that specifies the agreement will remain in effect unless or until the department determines that further reasonably available practices are necessary to reduce the nuisance. Retain the provisions in the revised proposal in –0320 (2), -0320 (3)(b) and –0320 (3)(c). Delete the provision in the revised proposal in –0320 (3)(a).

48. W6D, W22

Delete –0310(2) in the revised proposal and replace –0320 (b) with "The department determines the activities that were the subject of the agreement no longer occur and that agreed-upon emission levels are consistently met as demonstrated through monitoring." With this addition –0320(3)(c) becomes redundant and should be deleted.

49. W12B, W13

340-208-0310 (2) does not say clearly enough that a permitted release can still be considered a nuisance. This provision, -0310 (2), stands in contradiction to –0320 (3)(c) and will allow minimal reductions in odor to occur.

50. W17, W29

Subsection (2) provides that compliance with permit conditions or a Best Work Practices Agreement will constitute compliance with 340-208-0300, which prohibits nuisances. Similar protections should apply equally to 340-208-210, especially subsection (4). OAR

340-208-0310 (2) should be modified to reflect this.

51. W12B

The original proposed 340-208-0320 (1) should be retained but substituting "abatement" for "manage and reduce". Subsection (3)(a) makes no sense but the word "later" should be inserted between the words "established" and "in a permit".

52. W8B

Regarding 340-208-0320(3)(b) in the revised proposal: this focuses on when the activities no longer occur, but what about the instance where the complainer goes away? The language should be modified to say that the Department determines that the circumstances that originally warranted the agreement have changed.

53. W6E

It is a particularly offensive suggestion that if the complainant moves away, the Best Work Practices Agreement should end as well. People should not be forced out of their homes and then polluters allowed to continue freely.

54. W6C, W10B

When a nuisance exists the rule should require an independent audit to prove that a chemical is absolutely necessary and that a better, safer alternative is not possible. The audit should be at the company's expense.

55. W6D, W22, W25

A provision should be added stating that all correspondence, documentation and data relating to this agreement are public information and will be readily available to the public.

56. W23, W25

The proposal for the Best Work Practices Agreement does not include any element of public participation. This is a fatal flaw and is significant because the offending party may achieve a benefit of finality and certainty by entering into a best work practices agreement. The victim and the public are not provided any assurance that the cure contemplated in the agreement will be effective.

57. W13B

The best work practices proposal satisfies no one. It will neither satisfy the complainer if the nuisance still exists nor the industry if you allow complainers to revisit the complaint if the best work practices do not work. Instead develop a process that results in a Nuisance Abatement Plan, which would have the following elements:

1. Logging of nuisance complaints at a central location using a standard procedure.

2. If complaints exceed some reasonable level, the creation of a specific nuisance project.
3. Evaluate the complaints and determine if it meets the criteria of Division 208 to be a nuisance and to require action. Note: the public will be extremely disappointed if industry can hide a nuisance behind zoning or permitted release regulations!
4. If it is determined by DEQ that a nuisance exists then start the NAP creation process:
   a. DEQ sets up a face to face meeting between the public and the polluter to discuss the issue.
   b. People identified by both the polluter and the public to participate in creating a NAP
   c. The group above meets, attempts to identify the problem, determines what might be measured to achieve success, and establishes goals.
   d. DEQ insures that the NAP is technically sound and meets the needs of both parties.
   e. Execute the NAP under DEQ supervision.
   f. Hopefully achieve success - but it is unlikely that all NAP will succeed, it will be a learning process for all.

58. W27

Have you consulted with attorneys on whether they feel that the Best Work Practices Agreement will be easier to fight in court than the existing nuisance laws?

59. W8B

In 340-208-0300(2), the final two words "this notice" are not clear to which notice it is referring.

60. W26

I am encouraged by the concept of the Best Work Practices Agreement (Section 340-208-0320) that would have force of an order. This solves a very substantial problem with the current approach embedded in civil law. Even if parties can agree on their own now, even so far as a contract, remedy of a future violation of such agreement or contract could be sought only by one party suing the other for damages. Under current legal theory, a private aggrieved party cannot ask a court for enforcement of performance of the contract by the other party, even to things that were agreed to in the contract; a private party can only sue for damages incurred by non-performance. The effect of this is to return the whole matter back to where everything started in the absence of any private agreement or contract: suing for damages. The nuisance continues and nothing is ultimately resolved.

FUGITIVE EMISSION REQUIREMENTS 340-208-0210

61. W17, W29

OAR 340-208-0010 (1) includes "odor" as an air contaminant; however, subsection (7) defines odor to be an "air contaminant that affects the sense of smell." This creates a circular definition that can be resolved by striking odor from the definition of air contaminants in 340-208-0010(1).

62. W2A, W4A, W4B, W18B, W28

There appears to be a technical error in the proposed addition of the words "or odors" to this rule. The definition of fugitive emissions already includes odor. Therefore it is redundant to add the words "or odors" and would lead reviewing courts to extend the phrase to include something more than the use of the term "odor" in the definition of air contaminant.

63. W6E, W23

Do not take out the words "or odors" in outlining applicable fugitive emissions.

64. W6E

Regarding the suggested differentiation between odors and fugitive emissions, how can you separate them? They are not separate.

65. W5

Odor control rules are inappropriate for inclusion into the State Implementation Plan (SIP) because these are non-criteria pollutants. EPA cannot separate out particular words in approving a rule subsection for inclusion within the SIP. EPA suggests that a separate subsection be created. Is the intention to only control odors from buildings or equipment or are there other sources of odor intended to be controlled under this rule?

66. W2B, W3C, W3D, W4B, W4D, W8B, W9B, W18B

The inclusion of section (3) and (4) to the rule add nothing to improve protection of the environment. In fact they represent two parts of the same rule addressing the same thing as in sections (1) and (2). The provisions in the proposed nuisance rule will adequately address odor control without this additional confusing rule.

67. W17, W29

The first sentence of subsection (3) is unclear because it is not evident what the Department would be seeking when bringing a "facility into compliance". Suggest the following modification:

> When fugitive emissions as odors escape from a building or equipment in such a manner and amount as to create a nuisance or to violate any regulation, the department may order the owner or operator to mitigate or eliminate the nuisance or to bring the facility into compliance.

68. W8B

Adopting an approach for odors that is just like fugitive emissions is not workable and ignores the whole concept of odors. The language in (4) would make it risky to drive a diesel engine car. Also, odors by their definition are already airborne, so how does the source "prevent odors from becoming airborne?"

69. W17, W29

Proposed section (4) is overbroad. Odors are by definition airborne and as drafted this provision would require virtually every outdoor activity to have "reasonable precautions" to prevent any odors, noxious or pleasant from becoming airborne. The Department should describe the odors it is restricting and establish clear grounds for compliance.

70. W3B, W8A

The proposed wording in section 1 is over broad and creates a practical impossibility. The department can accomplish its goal more straightforwardly by drawing a direct connection between the control and removal of air contaminants and the emission of those contaminants to the open air.

71. W13A

The use of the word "practicable" without a definition opens the barn door to any polluter. The term must be defined in the rule.

72. W4C, W18A

Unless "reasonable precautions", as used in section (4), are defined specifically within the rules, the rules will be inconsistently applied. The examples provided do not give enough specific guidance to effectively implement the regulatory intent of this section.

73. W13A

The fugitive emission requirements are relatively useless as a business would only have to put a cover, blower or duct on a pollution source to avoid the requirements.

74. W6C, W10B, W12B

Add to the definition of fugitive emissions the phrase "or the emission of any unfiltered

contaminant that escapes accidentally to the air."

MASKING OF EMISSIONS 340-208-0400

75. W5

EPA suggests adding a prohibition against the masking of emissions to also avoid compliance with regulations and requirements.

76. W6A

The provision to prevent masking of emissions is encouraging.

PARTICULATE MATTER SIZE STANDARD 340-208-0450

77. W20

There is no practical, objective or definitive method currently available to demonstrate compliance. We understand that studies using particle fallout buckets for measuring offsite deposition of particulate >250 microns are almost always inconclusive. Particulate matter captured in buckets of water cannot be accurately measured for size nor can they be analyzed to accurately identify sources.

78. W2A, W2B, W3C, W4A, W4B, W9B, W20, W24

The proposed rule extends a prohibition on emitting larger particles (>250 microns) from landing on another's property from nine counties to statewide applicability. Current rules allow the imposition of TACT whenever there is documentation of a nuisance and provides a means to address this issue. The proposed rule can result in a source being penalized regardless of whether the particulate emitted is causing a substantial or unreasonable impact and regardless of the measures taken by the source. The rule should be deleted or include a "reasonableness" component.

79. W9B

The prohibition on 250-micron particulate deposition appears inconsistent with limiting nuisance to substantial and unreasonable interference with the use and enjoyment of land. While the proposed standard may articulate the common law standard for trespass, the Department may wish to eliminate any potential that it could be drawn into issues of trespass law.

80. W2A, W3A, W3B, W3C, W3D, W4A, W4B, W8A, W9A, W9B, W28, W29

The 250-micron rule creates a class of pollutant with no applicable standard or assumes that any non-zero number is unreasonable and does not consider whether a nuisance has been created. Any impact from large particulate can be best addressed through the nuisance rule. The existing rule actually limits the Department's ability to deal with a condition, which may create a nuisance with various particulate sizes. This rule should be deleted.

81. W4C, W9B, W18A, W18B

The language as proposed could easily cause unintended consequences as routinely encountered wind events could transport naturally exposed dry or sandy soil conditions or even pine needles or leaves leading to deposition on neighboring property. If the rule is adopted as written, the majority of oceanfront property owners in Oregon could bring nuisance complaints against their neighbors for blowing sand.

82. W9B

Particulate matter greater than 250 microns appears to have no connection to the improvement of recognized air quality standards, which are usually associated with smaller particulate. The department should reevaluate the appropriateness of the 250-micron limitation.

83. W6E, W22

The definition of particulate should cover particulates from 250 down to 2.5. Particles smaller than 250 microns can accumulate in sufficient quantity to cause a nuisance. Furthermore, if the particles contain toxic substances they can also pose a health risk.

84. W1

The 250-micron rule provides little protection from particle fallout, as larger particles are unlikely to be transported by the wind. Most particle fallout subject to wind borne travel will be smaller than 250 microns and could be better addressed through the nuisance rule.

85. W3D, W4D

Changing the rule to require an observable deposition does not address our concerns, because if the deposition were not observable, then there could never be a violation anyway.

86. W23

The agency's discretion will be exercised reasonably to determine when an "observable deposition" has occurred. There will be no greater risk of uncertainty in this provision than there will be in the section on best work practices under 340-208-0320.

87. W3D, W4D

If the Department insists on keeping this antiquated rule, it should be rewritten in one of two ways. One would be to add language to make the rule consistent with the nuisance requirements, since it is a restatement of the nuisance prohibition. The second proposal would be to add language to make this rule consistent with the approach used in OAR 340-208-0210(1) where the Department may order the owner/operator to take reasonable measures to minimize or eliminate the source of the emissions.

88. W6A

The rule on prohibiting emissions of large particulates is encouraging and commenter strongly objects to eliminating the 250-micron standard.

ODOR CONTROL MEASURES 340-208-0550

89. W1, W3B, W4A, W9A

It is burdensome and unreasonable to set incinerator and afterburner operating parameters for odor control systems that are more appropriate for VOC control systems. Odor control systems, based on sound engineering design, that can be employed to control odors using less than the "highest and best practical treatment currently available" should be allowed. The goal should be nuisance abatement and not emission reductions. The rule should be deleted.

90. W2A, W4A

The "highest and best" portion of the rule is unnecessary given the TACT rule in Division 226. The incinerator/afterburner portion of the rule is antiquated and reflects equipment no longer in use.

COMMENTS ON THE PROCESS

91. W2A

The department should withdraw the rulemaking so as to allow the opportunity to work with affected sources to gain consensus about a practical means of approaching nuisance issues in Oregon.

92. W3B

Considering the scope of anticipated rule changes, the rule should be re-proposed rather than being issued as final.

93. W3C, W9B

The continuing opening and productive dialogue is greatly appreciated.

94. W6C, W10B

The process has been flawed in that we did not have sufficient notice of the rule change to prepare testimony. Although we have twice submitted written comments, industry representatives have been able to insert language that is obviously not in the public interest. We would like to have a public hearing on the rule.

COMMENTS ON OTHER RULES

95. W14

In addition to 340-208-0570, emissions from ships, the Department should also regulate emissions from locomotives, which are also a problem in NW Portland.

Attachment D

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Air Quality Nuisance Control Rules

Department's Evaluation of Public Comment

Testimony Summary/Issues **Whose Comment**

GENERAL COMMENTS ABOUT THE RULES

1. W6A, W7, W11, W12A, W13, W14, W15, W16

We write to voice our strong concerns about air quality in our homes in NW Portland, being periodically invaded with noxious burnt odors that may be indicative of any of a number of hazardous air pollutants including metals. The odors get so bad at times as to interfere with our use of the public sidewalks and roadways in the neighborhood. The frequency and uncertainty of the odor events make it impossible for residents to rely on outdoor ventilation to cool their homes in the summertime. People also report headaches and sore throats. We cannot stress enough the need for tough, enforceable air quality nuisance control rules.

The Department has developed and implemented several programs designed to improve air quality. As a result, emissions from a variety of sectors, including industrial, have been reduced and air quality has improved. Nonetheless, we recognize that continuing challenges remain, among them addressing the impact of toxic air contaminants. The Department has implemented elements of the federal air toxics program in the state and recognizes that further work is needed. With the assistance of citizens and businesses, the Department is developing a toxics reduction program tailored to the Oregon's circumstances. The Department encourages the commenters to participate in the development of this program.

The proposed nuisance rules clarify the Department's ability to address certain air quality issues. Nuisance as an air quality improvement tool is, however, inherently limited and is not effective for addressing general air quality concerns raised by nonspecific complaints. Where several sources create pollution, no one of which alone causes harm, it is difficult to assign responsibility for any harm caused by the cumulative effects of the pollution. Moreover, nuisance actions are a case-by-case, one-shot action, aimed to resolve a

particular problem.

2. W6C, W10B

We are concerned about our health and the health of our children. We do not know the consequences of breathing the 34 HAPs the foundry, for example, is permitted to emit. We do know that the HAPs we have monitored are extremely dangerous. It is unreasonable to expect neighbors to bear this burden of pollution year after year to save the company the expense of modernizing a very old plant.

The Department is also concerned about the health of people in the community. The Department's air toxics program, not the nuisance rule, will be the most effective in addressing these concerns. Over the past year the Department has been monitoring for hazardous air pollutants at five sites in Portland and will now use those results to describe the potential for health effects from these pollutants in those neighborhoods. None of the hazardous air pollutants measured at levels that would cause health concerns in NW Portland can be attributed solely to ESCO. Many of the hazardous air pollutants emitted by ESCO were measured at similar concentrations at all of the Portland monitoring sites, all below a level of concern for health safety. Information like this is essential to targeting pollution reduction efforts where they will make the greatest improvements in air quality. We are continuing our efforts to build a state air toxics program based on people within communities working together to resolve health concerns. These community-based programs will only make good decisions about pollution reduction strategies if they rely on good scientific information, like that provided by monitoring the air that people breathe.

3. W6C, W10B

Many types of fugitive emissions from these nearby facilities are not dissimilar to open burning, e.g., the pouring of molten metal poured into low level radioactive sand molds treated with a resin material. There is no attempt to control these emissions.

The Department disagrees. These two processes are dissimilar. Open burning is the combustion of waste products for the purpose of disposal. The foundry process involves pyrolization for the purpose of casting of materials. The process is subject to the controls outlined in the permit for the facility.

4. W3D, W4D

AOI understands the intent of the proposed action is to clarify and simplify the existing nuisance rules and not to create new regulatory requirements or authorities. It is also apparent that some parties wish to use the nuisance rules to combat hazardous air pollutants when this issue will be addressed more comprehensively in the program proposed by the HAP Consensus Group. The agency should more clearly state the intent and scope of these

rules so as to avoid ambiguity in their application.

The Department agrees that hazardous air pollutants will be comprehensively addressed under the air toxics program but disagrees with the need to establish an intended scope for the nuisance rules outside of the rule language itself. Establishing the criteria for determining a nuisance is the mechanism for guiding the scope of the rule's application. It is impossible to know beforehand the full range or limitation of future applicability because each nuisance case is fact-specific. As the court noted in Gronn v. Rogers Construction, Inc., *"what is a reasonable use and whether a particular use is a nuisance cannot be determined by any fixed general rules, but depend upon the facts of each particular case, such as location, character of the neighborhood, nature of the use, extent and frequency of the injury, the effect upon the enjoyment of life, health, and property, and the like."*

The commentor notes correctly that there will be more effective and proactive methods to control toxic air contaminants through the developing Air Toxic Pollutants Program. But the functional limitations inherent in nuisance law do not necessarily preclude its use in abating the harm associated with toxic air contaminants. For example, consider several of the cases successfully brought by farmers and orchardists against aluminum smelters requiring control of fluoride emissions from their facilities. In these cases, the plaintiffs prevailed because they were able to demonstrate an unreasonable and significant harm from the deposit of this toxic air contaminant on fruit trees and forage grasses.

5. W4B

The proposed rule that prohibits a nuisance establishes a process that we believe is fundamentally unfair and, importantly, unworkable.

Nuisance law admittedly has its limitations. This is why Congress and most states adopted statutes to address problems created by pollution. Still, existing statutory law is not, and probably cannot be, entirely successful in addressing all nuisance conditions caused by pollution. Prohibitions against nuisance are in existing rules. The proposed rule contains criteria that are well within the common law for determining nuisance conditions. The proposed Best Work Practices Agreement provides an additional option not otherwise available in the usual nuisance abatement action. The Department has considered many concerns raised by commenters about the feasibility of the process associated with developing an Agreement and has incorporated many of those comments into the proposed rule to make it more fair and workable.

6. W10B

I am only a citizen, not a scientist or politician or government employee so I need simple and effective tools to be able to give feedback to the appropriate agency when I am affected by bad air quality as I have been so much this summer. I understand industry's wish for

less regulation, however, there has to be a counter-balance to represent the needs of the ordinary citizen who must live with industrial outputs that can affect both quality of life, esthetically, and can potentially cause ill-health as well.

The Department appreciates that citizens are not experts on all matters that come before the Department for rulemaking. Comments of a general nature that express a desire, a direction or a goal are also helpful in crafting an effective rule.

The legislature has directed the Department to implement the state's policy 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 believes this rulemaking is a balanced approach to a challenging problem. It reflects the expertise and judgment of environmental staff, tempered by the comments and concerns raised by citizens and business interests.

7. W2A, W4A

It is not clear that the legislature has granted DEQ authority to address private nuisances involving a limited number of parties. The authority to regulate nuisances arises from the definition of air contaminants (ORS468A.005) that are described as substances that "interfere unreasonably with enjoyment of life and property throughout such area of the state as shall be affected thereby." "Area of the state" is defined in the statute as a specific geographical area designated by the EQC. The definition does not authorize DEQ to address nuisances that apply on a limited basis or in areas that have not been specifically designated by the EQC.

The Department disagrees. The argument requires a very narrow reading of the definition of "area of the state" that ignores historic precedent (see response to Comment 8) and would preclude the operation of long standing air pollution prevention programs like Prevention of Significant Deterioration. Furthermore, ORS 468A.025 directs the Commission to establish standards for air purity and emission standards for the entire state or an area of the state differentiating "between different areas of the state, different air contaminants and different air contamination sources or classes thereof." The Commission, through the Department, may then establish conditions for operation based on claims of nuisance in selected and limited areas of the state.

8. W17, W29

We are concerned that the Department's modifications to nuisance law may create constitutional questions. Determination of whether an activity results in "substantial and unreasonable" interference with a private or public right is generally a question of fact, often subject to decision by a jury in a civil action for nuisance. The proposed rules create civil penalties for a nuisance, in section 340-208-0300, while putting the fact-

finding function into administrative hands. Similarly, the rules might violate the separation of powers doctrine because they might be read to impair common law nuisance remedies and defenses. Furthermore, under the Constitution the decision to impair a common law remedy must be left to the legislature, and then its powers are limited.

Oregon historically addressed air quality problems, like many other pollution problems, through nuisance enforcement. Oregon's first statewide statute aimed at controlling air pollution was enacted in 1951. The statute authorized the state to institute legal proceedings to abate public nuisances created by air pollution, enforceable by penalties. This approach to controlling air pollution through nuisance actions continued for another ten years until the legislature enacted a new law authorizing the Sanitary Authority of Oregon to develop a general comprehensive plan for the control, abatement and prevention of air pollution throughout the state. The Department's authority to address nuisances follows from the statutes governing air quality protection, and is not reliant on the common law.

Although the legislature simultaneously repealed the 1951 provision declaring that air pollution is a public nuisance, that did not deny an opportunity for a nuisance claim. ORS 468.100 (4) expressly states that "the provisions of this section shall not prevent the maintenance of actions for legal or equitable remedies relating to private or public nuisances brought by any other person, or by the state on relation of any person without prior order of the commission." Individuals may continue to bring either private or public nuisance suits if the EQC adopts the proposed rule.

9. W27

Have you considered or previously tried a rule that if you have a source causing a consistent nuisance to neighboring areas and the agency receives a specific number of calls/complaints within a determined amount of time and it is verified by the agency then the source is cited as a nuisance?

Other agencies have developed rules that apply thresholds similar to that proposed by this commentor. We believe the proposed approach offers the greatest flexibility to effectively address nuisances, which can be wide ranging in their nature and impact. The proposal to have a nuisance status triggered solely by a selected volume of complaints, leaves a source open to a campaign of harassment by individuals or groups and provides insufficient protection for individuals from an infrequent, significant, and unreasonable interference with their enjoyment of life and property.

10. W2A

The cost assumptions used by the Department to determine the fiscal impact are inaccurate.

The Department compiled the cost estimates in consultation with representative businesses that were similar to or had been subject to nuisance abatement actions. The Fiscal Impact Statement noted that a precise estimate is difficult because each case will vary based on the type and size of the facility and the nature of the nuisance.

DEFINING NUISANCE

11. W21

The definition of nuisance is too broad. Without specific definitions of "odor" and "nuisance" every type of business activity would be open for arbitrary enforcement by the Department. The list of criteria for determining a nuisance does not define specific criterion to follow in making these determinations, making the final result based on no more than biased opinion. Test criterion has to be established regarding all odor emissions.

The Department disagrees. The proposed definition of nuisance reflects Oregon case law. Although courts have ruled on nuisance cases for over 400 years, the legal concept of a nuisance remains imprecise because the test reflects a balancing of considerations peculiar to each case. According to nuisance law, each person is privileged, within reasonable limits, to make use of his own property for his own benefit, even at the expense of harm to his neighbors. The reasonableness of a person's conduct depends upon the circumstances and varies from case to case. The ultimate question is whether the challenged use is reasonable under the circumstances. The Department believes that the proposed criteria will sufficiently guide a reasonable person's judgment of the facts relating to nuisance cases presented to the Department.

12. W3A, W4A, W9A, W18B, W29

The definition of a nuisance must be modified to correctly state the law. Specifically, both public and private nuisances must be unreasonable and substantial to be classified as a nuisance.

The Department agrees and will make the change. We are choosing to be consistent, but could be more stringent than common law.

13. W6C, W10B, W12B

Since the proposed definition is not the actual definition of nuisance, we propose from the American Heritage Dictionary, "A use of property or course of conduct that interferes with the legal rights of others by causing damage, annoyance or inconvenience."

The Department disagrees. The change in the definition of nuisance was originally proposed to correct legal deficiencies. The proposed definition incorporates the legal definition of nuisance developed in case law.

14. W6D, W22

We suggest a definition of nuisance closer to the May 16 draft: "Nuisance means unusual or annoying amounts of emissions traceable directly to one or more specific sources, resulting in interference with another's use and enjoyment of real property or the invasion of a right common to members of the general public."

The Department disagrees. See the discussion above regarding definition of a nuisance for legal purposes.

15. W26

The distinction between public and private nuisances is not relevant in the case of airborne contaminants, as any airborne discharge that leaves the airspace above a property becomes an intrusion into the public domain and potentially an expectation of the reasonable use of air.

While both forms of nuisance inconvenience someone, they are different legal concepts. A public nuisance is a substantial and unreasonable interference with a right common the general public, while a private nuisance is a substantial and unreasonable interference with the use and enjoyment of one's land. Air pollution may cause either a public nuisance, a private nuisance, or both. The nuisance rule could apply to both types of nuisance.

16. W1

Definition of a nuisance also needs to quantify the difference between a public and private nuisance, including factors like the number of complaints, the duration of the incident, the intensity and verification of complaints by regulatory agency.

The proposed definition of nuisance is taken from the common law. The difference between the two classes of nuisance is not necessarily related to the number of people affected but, rather, the nature of the nuisance itself. The Department agrees that the proposed definition in OAR 340-208-0010 (6) is insufficient on its own to provide direction to staff or guidance to citizens or businesses as to what constitutes a nuisance. This is why we propose the criteria in 340-208-0310 to guide the staff in responding to a nuisance complaint.

17. W20

The proposed revision to the definition of nuisance should include the reference to the source of the nuisance.

The Department disagrees. Nuisance law requires the complainant to show that a particular source is causing the harm.

DETERMINING A NUISANCE

18. W2A, W3A, W3B, W4A, W4B, W9A, W29

Additional considerations should be used in determining whether a nuisance exists such as, geographic extent of impact, existence of cost effective controls, compliance with a permit, compliance with statutes or regulations, extent and character of the harm and the parties' ability to prevent or avoid harm.

The Department agrees that there are many helpful in elements in the balancing used to determine a nuisance. This is why proposed OAR 340-208-0310 says "the department may consider factors including, but not limited to, the following:". However, for the reasons discussed below, compliance with statutes or regulations will not be a limiting factor.

19. W2A, W3A, W3B, W4A, W4B, W9A, W29

Where a source has already complied with a specific standard directed at controlling emissions from a particular process, that process should not then be subject to additional controls under the nuisance program. We must assume that when DEQ adopts specific standards, these standards are intended to prevent "substantial and unreasonable interference" with public and private rights. The general nuisance rule should simply be a safety net to fill in any gaps not addressed by specific standards.

The Department disagrees. First, it is erroneous to assume that specific standards adopted by the EQC are intended to prevent "substantial and unreasonable interference" with public and private rights. In many cases, standards are based on categorical controls that do not consider health or nuisance impacts. Even health-based standards may not be designed to address near-source impacts. Second, Oregon courts have upheld private nuisance claims against sources operating under a permit from the Department. The Oregon court of appeals has ruled that "conformance with pollution standards does not preclude a suit in private nuisance." Lunda v. Matthews 46 Or. App.701, 706-707 (1980).

20. W6A, W6C, W6E, W10B, W12B

Compliance with a permit should in no way exempt industry from the nuisance rule. Examples are evident where a facility in compliance with its permit can still be creating a nuisance. Delete the provision in proposed OAR 340-208-0310 (2).

The Department agrees with this comment, but proposed OAR 340-208-0310(2) is not intended to protect permit holders from nuisance action as the commentor suggests. The Department will modify the language to make it clearer.

21. W23

The Department has many programs mandated by federal law that are incorporated into permits. However, none of these standards is directly connected to a standard of "substantial and unreasonable interference with public and private rights." Therefore, the existence of a permit is not a legal defense to nuisance.

The Department agrees with this comment.

22. W1, W2A, W3A, W4A, W4B, W9A, W19, W29

Definition of a nuisance needs to include site specific factors like zoning. Sources should be exempted if operating within substantive permit requirements and appropriately located in areas zoned for the use.

The Department disagrees with this comment. Case law developed around nuisance complaints indicates that neither zoning nor compliance with pollutant standards provides an absolute defense against nuisance legal actions.

23. W6C, W6D, W6E, W10B, W12B, W14

The criteria for a nuisance should not include "the suitability of each party's use and character of the locality." This places the burden entirely on the public affected rather than on the parties impacting the public and isn't acceptable.

The Department disagrees. While several commenters believe this criterion to offer a defense against nuisance based on the source's zoning, it actually applies more broadly and fairly. The criterion requires a review of each party's use and its suitability to the character of the location. One result of this analysis could be that while a source of nuisance complaints was operating properly in its commercial or industrial zone, the complainants residing in their appropriately zoned residential area are nonetheless entitled to an expectation of property enjoyment suitable to residential areas.

24. W23

Oregon law establishes very clearly that "zoning is not an approval of manner of conducting business which causes private nuisance." Lunda v. Matthews 46 Or. App.701, 706-707 (1980).

The Department agrees and notes that this speaks directly to the comment above.

25. W6A, W6B

Evaluation of the true costs of a nuisance must also include not only the cost of controls but also the costs to the health and well being of people living near the polluter. For instance, a recent health survey indicated that residents of NW and SE Portland had significantly higher asthma rates than anywhere else in the state and higher than the national average.

The Department agrees with this comment. Determining whether to require nuisance abatement involves balancing, among other things, the harm done compared against the cost of controls or shutting down a source. To the extent that these costs can be accurately characterized and specifically drawn to the cause of the problem, they can be included in any complaint for relief from suspected nuisances.

26. W6E, W12B

Do not include "geographic extent of impact" and "existence of cost effective controls" as criterion to determine a nuisance. These exclusions have been suggested by industry. This issue represents a serious public health matter and should not be treated as an inconvenience to industry.

The Department disagrees. Regardless of who made the suggestion, the Department's goal in evaluating these comments is to develop an effective, enforceable rule.

Both of these criteria are relevant to a complete balancing test for assessing a nuisance complaint. The geographic extent of the impact clearly affects how we would characterize the scope of the problem. Assessing the scope of a problem is a first step in judging the seriousness of an issue and the total cost imposed on the public. Considering cost-effective controls is also time-tested in pollution control and nuisance determinations and contributes to a reasonable evaluation process for the Department.

27. W6C, W6D, W10B, W12B

Retain the originally proposed criterion of "proximity to residential and commercial areas" and delete the criterion of "extent and character of the harm to complainants." The revised proposal appears to favor industry and makes it more difficult for DEQ to enforce any nuisance rule. Isn't the difficulty of legal enforcement supposed to be the reason for

changing the rule that is presently on the books – and not enforced?

The Department disagrees. Physical proximity is not necessarily a compelling indicator of nuisance in and of itself. The revised proposal offers considerations that are actually more central to the protection of people's use and enjoyment of their life and property, for instance, "number of people impacted" and "extent and character of the harm to complainants". The revised proposal offers a limited list of criteria that outlines the main elements of a balancing test required under nuisance law.

It is true that an unclear policy on nuisance determination has prevented prompt action in some cases, however Department staff have field tested these criteria and found them to be very helpful in improving confidence in making a nuisance determination.

28. W6D, W6E, W22, W25

Add "toxicity of emissions" to the original list of criteria determining a nuisance.

This is reflected in the criterion "the extent and character of the harm to the complainants."

29. W6A

It is wrong to not consider harm on a smaller scale and to require a test that shows an extended area of harm before action can be taken. Our airshed is in the state it is because of a thousand small cuts of neglect and ignoring or not responding to complaints. No neighbor should be exposed to air toxics that will cause harm.

The Department disagrees with the conclusion that the commentor has drawn from the listing of criteria for nuisance. Many factors must be considered in the evaluation process, any one of which is seldom conclusive. The determination of a nuisance does not require that an aggrieved action must score high on all factors, although that certainly strengthens the case. A demonstration of harm in a relatively small geographic area may be sufficient to prove a nuisance if other considerations are especially compelling.

30. W12B

How does one prove that his breathing is seriously compromised by nuisance dust or odor – indeed, is that a necessity for constituting a nuisance, an annoyance or inconvenience? How better could DEQ determine what constitutes a nuisance? Do not consider extent and character of the harm but consideration of the parties' ability to prevent or avoid harm seems reasonable. Rewrite the criterion regarding number of people impacted to specify a compilation of complaints that specify frequency, duration, intensity and impacts on complainants, testing or monitoring, DEQ inspections or the use of odor contractors who might identify chemicals that cause objectionable smell.

Evidence can be presented anecdotally, but generally the case will be stronger and the likelihood of prevailing will increase if it is built on accurate, unbiased and documentable observation. Also, the more dramatic the action required by a source to abate a nuisance, the more strongly the case must be built on a compelling demonstration of harm. For instance, a cement plant was compelled to water roadways on its property upon a demonstration that blowing particulate on a nearby property interfered with the use of that land, while an aluminum plant was required to install extensive controls to reduce fluoride emissions following a demonstration that low levels of ambient fluoride was the sole cause of damage to agriculturally significant plants.

The criteria concerning extent and character of the harm and number of people impacted are not meant to be unduly limiting. Again, they are factors to consider when confronted with the facts of a nuisance claim. They also serve to direct the Department's limited resources to addressing claims of the greatest seriousness.

The Department disagrees with the suggestion that claims necessarily require testing, monitoring or the use of independent odor contractors. Requiring such conditions would serve to increase the expense and thus discourage steps to action. Conditions such as these would reduce flexibility in responding to legitimate claims to nuisance abatement and ignore that nuisance can take many forms other than odor intrusions.

31. W25

The originally proposed list of criteria is preferable. The existence of any one factor should be sufficient to find a nuisance. The language should be amended to indicate that the list is disjunctive.

The Department disagrees. The list of criteria for determining a nuisance is meant to reflect a balancing test that includes numerous considerations. While one factor may weigh strongly in the facts of a particular case, it may be irrelevant in another case. Nuisance determination will depend upon weighing numerous elements, including those listed in the proposed rule.

32. W26

More emphasis should be placed on prevention. Some nuisances are potentially a problem and government can order them abated prior to actual harm being endured. The section in 340-208-0310 is heavy on actual harm and light on potential harm, in contrast to most current policy regarding nuisance abatement.

The Department disagrees. In common law action, the plaintiff bringing the case must establish the causation between the harm and the defendant's conduct. The Department intends to apply the nuisance rule to complaints that demonstrate actual harm.

33. W23

The organization of OAR 340-208-0310 is flawed in that it merges the distinct concepts of defining a nuisance and curing a nuisance. For instance, the suitability of each party's use criterion is not relevant, see Lunda v. Matthews. Even if a polluter is zoned and permitted, it may constitute a nuisance. Therefore, the suitability of an offending party's use to the locality should be considered only in terms of penalties assessed and mandated efforts to cure the nuisance and not to the determination of a nuisance itself. This language should be deleted and relocated, if at all, to another section on penalties.

The Department disagrees. It is true that the process of a nuisance determination could occur in two steps: assessing the scope and nature of the intrusion and its effects, followed by assessing the cost of control and other mitigating factors on the source's behalf. However, the Department believes that it is more efficient to combine the steps and consider all factors when making a declaration of nuisance.

34. W24

The revised proposal adequately addresses several of our concerns, particularly related to the criteria for determining when a nuisance exists and the details of the Best Work Practices Agreement.

The Department appreciates the comments.

35. W25

The Bridgeview Community is a residential facility that serves as home for chronic mentally ill people. Earlier this year, another residential building nearby began operating an emergency diesel generator. The generator ran on a weekly basis, for about 20 minutes, for routine maintenance purposes. Depending upon the prevailing wind the Bridgeview's interior would fill with exhaust fumes and, on occasion, set off the smoke alarms or cause an informal evacuation. We support DEQ's effort to fashion a regulatory scheme that recognizes that urban nuisances can come from an otherwise unregulated, nonpermitted source and have unusual or annoying impacts upon the rights of residential neighbors. We are not confident that the revised proposal would allow the Department to address this situation quickly and with few staff hours involved.

The situation described has elements that are very typical of the circumstances surrounding many of the nuisance complaints the Department receives and the rule was drafted to address. In this case, DEQ field staff responded to this complaint used the draft criteria as

a framework to guide evaluation of the nuisance. They concluded that the complaint was valid and the source was a nuisance. We believe the proposed rule will continue to provide a framework for staff around the state to promptly and effectively address nuisance complaints.

PRESUMPTIVE COMPLIANCE

36. W2A, W3A, W3D, W4A, W4B, W4D, W9A, W18B, W28, W29

The current regulations, OAR 340-208-0510, contain an express statement that sources complying with industry specific standards are not subject to the county odor regulations in OAR 340-208-0550. By moving the nuisance rules from –0550 to –0300 without correspondingly moving the presumptive compliance regulation exposes industries having already installed reasonable levels of controls to defend those standards against nuisance complaints. These standards take into account the specific impact of particular industries and are necessarily a reflection of balancing impact and what is reasonable. While compliance with general standards may not be a defense against a nuisance claim, compliance with industry specific standards should presumptively be a defense to nuisance.

The Department disagrees. The commentor incorrectly construes 340-208-0510 as exempting sources from a nuisance complaint if industry-specific standards are established and adhered to. Even if some of the rules in 340-208-0500 through –0630 relate to air contaminants that could create a nuisance does not necessarily extend this exemption to any nuisance action. A general prohibition on creating nuisances never existed in the region-specific rules. The commenter's proposed revision represents a substantial departure from a long-standing policy and ignores courts' opinions that nuisance issues may still be addressed with sources that comply with specific regulations and standards.

NUISANCE PENALTIES 340-208-0300(2)

37. W2A, W3A, W4A, W4B, W9A, W29

Penalties should not be assessed from the date of the notice of a potential nuisance. The determination of what constitutes a nuisance is necessarily a difficult one. A source should not be penalized for arriving at a different subjective conclusion. In addition, a source can rarely abate a nuisance from the date of first notice. Issuing a penalty because the source believed that it was not a nuisance is not an appropriate means of responding to an issue. The proposal contradicts the department's guidance and procedure for enforcement of

violations. The lack of notice conflicts with ORS 468.126 and does not even allow for mailing and receipt by the alleged offender.

The Department agrees with elements of this comment. The purpose of assessing civil penalties is to ensure that sources adhere to the state's environmental regulations. The Department has a progressive enforcement program that allows sources to come into compliance without being assessed penalties. . The Department's objective is to use civil penalties to compel a source to adopt abatement strategies. The Department also intends to convey to the source that bad faith efforts to abate the nuisance will not be tolerated, and that civil penalties will accrue in the face of continued nonperformance. We will make changes to the rule to incorporate these elements in the final draft.

38. W2A, W4A, W4B

Penalties may not be appropriate in the case of a nuisance. The department should instead issue an order requiring an assessment of appropriate responses and require implementation within a reasonable time frame.

The Department disagrees. Notice of noncompliance and other informal efforts will likely be the first stage of any effort to abate a nuisance. However, the issues represented by a complaint for nuisance can be as compelling as many other environmental matters and deserve the same level of attention. Informal approaches can still be employed but the potential for penalty enforcement must remain in order to make sure that the system is effective.

39. W3B, W8A, W26

The concept of "suspected" nuisance agrees more directly with the department's intent for work practices orders and preliminary investigations into whether or not a nuisance exists. Suggest deleting the word "potential" and replacing with "suspected".

The Department agrees and will make the change.

BEST WORK PRACTICES AGREEMENT

40. W2A, W3A, W4A, W4B, W9A, W29

The best resolution of any suspected nuisance is through cooperative efforts. The requirement that a source enter into a permanent enforcement order in order to have a defense against penalties is antagonistic. The Best Work Practices Order proposal may have initial appeal but has three serious problems: 1) Reliance on additional formal enforcement orders when such mechanisms are already available; 2) tying the orders to

formal enforcement; and 3) creating orders that run forever. The proposed Best Work Practices Order is unnecessary and is unreasonably harsh.

The Department disagrees. Entering into an agreement is completely voluntary so anyone who views it as too harsh can consider other options. We view this as a midway approach between a wholly informal process for resolution and a typical enforcement procedure. Department field staff have worked with sources of complaints on a number of occasions to resolve issues raised by their operations and have often met success with this level of interaction. Not all cases lend themselves to this approach and nuisance enforcement can prove particularly demanding. The Best Work Practices Agreement outlines a process that combines elements of these other approaches. Backing up these agreements with a formal enforcement process is important under these circumstances where a wholly voluntary nuisance abatement has not been achieved.

The Department will propose changes to the Best Work Practices Agreement that outline how the Agreement can be terminated if superceded by other circumstances such as incorporation into a permit.

41. W2A, W3A, W4A, W4B, W29

Although a "safe harbor" is appealing tying it to an enforcement order doesn't make sense and ultimately discourage cooperation with the department. An order will be construed as an admission of noncompliance that can be used by third parties in furthering their own civil actions against the source. In addition, we are unaware of other precedent where the department requires a source that has not been determined to be in violation of any rule to enter into an order so as to avoid enforcement. Less formal alternative approaches like determination letters documenting reasonable measures to combat a particular nuisance or source specific permit modifications addressing particular nuisance issues would be more effective.

The Department disagrees. A "safe harbor" can represent a significant value to an entity that is the source of nuisance complaints and the Department is unwilling to cede that value without ensuring that public rights are still being protected. The possibility that an agreement could be used in a third party action is eliminated if the agreement effectively addresses the nuisance and the source is complies with its elements. No court would order action against a source that is already moving forward with an effective plan to address the problem.

The Department may still use less formal measures to abate nuisances when, in its judgment, the opportunities for success are high. The Best Work Practices Agreement

provides more structure, certainty and enforceability when the problems are not so easily resolved.

42. W1, W2A, W4A, W4B

A Best Work Practices Order needs to provide more binding assurances to the source than is provided in 340-208-0320 (1). It is important that sources are provided a level of relief from ongoing complaints and enforcement threats. Sources will not sign Best Work Practices Orders that allow the Department at any future time to require more measures.

If the source agrees to a Best Work Practices Agreement both the source and the Department are motivated to promptly address the problems that gave rise to the complaints. The source wants to be free of complaints and enforcement threats and the Department wants to close files with a resolution. The Department has extensive experience providing technical assistance to enable sources to meet environmental requirements in the most effective way possible.

43. W1

Reasonably available controls considered for Best Work Practices must consider site specific factors, cost and the extent of the nuisance problem.

The Department agrees with this comment. As noted earlier in the discussion on criteria for nuisance, the cost of controls is a factor considered in concert with all the other elements of the case.

44. W3A, W9A, W29

The typical notice of noncompliance procedure has been effectively used to gain compliance. The NON process allows steps to be taken to address an alleged nuisance. Recalcitrant offenders can be penalized promptly but good faith responders are encouraged.

The Department agrees and there is nothing in the proposed rule to prevent this approach from being used. But it may not be the best approach in all situations. The Best Work Practices Agreement represents an additional tool for ensuring success.

45. W6A, W6B, W23

It is totally unacceptable for the department to ask a company to reduce an odor by taking one or two inadequate steps, possibly contributing to a worsening of the airshed or leaving only a slightly reduced odor. The department should reserve the ability to revisit the adequacy of controls if they prove inadequate. A best work practices agreement should not shield a source from further enforcement actions unless or until the citizens making the complaint are satisfied that sufficient progress has been made toward abating the nuisance. To do otherwise would simply give an offending party a greater shield from liability than

they would otherwise have in the absence of these rules.

An agreement can always be revisited if the Department determines that the nuisance has not been adequately addressed by controls, perhaps if better reasonably available control options become available over time. The Department agrees that there is little value in obtaining an agreement that is not effective in producing results. Such a development would be extremely wasteful of scarce Department resources. This need to efficiently deploy staff effort to promptly resolve these issues is a strong motivating force underlying these rule proposals.

In matters such as these, which are typically complaint driven, the Department has relied upon citizens feedback to ensure that the problem has been resolved. The Department will continue to consult with citizens under the new program.

46. W14

Any language that takes away the department's ability to continue to revisit a complaint is undesirable and should be removed.

The Department agrees that it would be an unacceptable result if the proposal resulted in a continuing nuisance and reasonable measures were available but not deployed to abate the nuisance.

47. W6C, W10B

Retain the provision in the originally proposed draft in 340-208-0320 (1) that specifies the agreement will remain in effect unless or until the department determines that further reasonably available practices are necessary to reduce the nuisance. Retain the provisions in the revised proposal in –0320 (2), -0320 (3)(b) and –0320 (3)(c). Delete the provision in the revised proposal in –0320 (3)(a).

The original language in –0320(1) was moved to (3)(c) to combine all references in the rule that affect the term of the Best Work Practices Agreement. The Department agrees with the commentor to retain the three cited provisions. The Department disagrees with the comment to delete -0320(3)(a). This subsection provides that an agreement will be superseded by conditions and requirements established in a permit as outlined in –0320(2), a provision that the commentor otherwise supports.

48. W6D, W22

Delete –0310(2) in the revised proposal and replace –0320 (b) with "The department determines the activities that were the subject of the agreement no longer occur and that agreed-upon emission levels are consistently met as demonstrated through monitoring." With this addition –0320(3)(c) becomes redundant and should be deleted.

The Department disagrees. The subsection in –0310(2) specifies the extent to which an effective Best Work Practices Agreement will shield a source from further action addressing a nuisance. This is an important element to make the agreement attractive to sources. The shield when it exists will reflect the result of an effective abatement program. We believe that we can create an agreement that will marry these elements of providing certainty to the source and relief for the public.

The Department also disagrees with the suggestion to add the provision requiring monitoring. While some sources of nuisance may be responsive to a monitoring network, most will not. It would be inappropriate to always require monitoring when other less expensive and more appropriate techniques are available to determine if the nuisance has been abated.

49. W12B, W13

340-208-0310 (2) does not say clearly enough that a permitted release can still be considered a nuisance. This provision, -0310 (2), stands in contradiction to –0320 (3)(c) and will allow minimal reductions in odor to occur.

The Department will clarify that compliance with specific permit conditions that effectively address the source of the nuisance will be considered as indicating compliance with the nuisance rule.

50. W17, W29

Subsection (2) provides that compliance with permit conditions or a Best Work Practices Agreement will constitute compliance with 340-208-0300, which prohibits nuisances. Similar protections should apply equally to 340-208-210, especially subsection (4). OAR 340-208-0310 (2) should be modified to reflect this.

The Department disagrees. Not all violations of 340-208-0210 will be themselves a nuisance. To the extent that they are determined to be nuisances in violation of –0210, a fully implemented Best Work Practices Agreement will be sufficient. The provisions in subsection (2) would apply in that case anyway.

51. W12B

The original proposed 340-208-0320 (1) should be retained but substituting "abatement" for

"manage and reduce". Subsection (3)(a) makes no sense but the word "later" should be inserted between the words "established" and "in a permit".

The Department agrees to make the changes regarding "abatement" in the interest of maintaining consistent phrasing throughout the rule. However, we want to make it clear that nuisance abatement does include reducing, but not necessarily eliminating, the emissions associated with it. Factors such as the cost and availability of controls, plus other mitigating factors, may indicate that complete eradication of the problem emissions is inappropriate.

The Department will also agree to make the other recommended change to add clarity to the passage.

52. W8B

Regarding 340-208-0320(3)(b) in the revised proposal: this focuses on when the activities no longer occur, but what about the instance where the complainer goes away? The language should be modified to say that the Department determines that the circumstances that originally warranted the agreement have changed.

The Department disagrees. While a complaint may be initiated by one or more individuals, the continuance of any action is not contingent on the continued presence of those individuals. The agreement to abate the nuisance is based on the test of what a reasonable person balancing a number of competing concerns judges to be a significant and unreasonable interference with the enjoyment of life and property. The final determination is not dependent upon the opinion or the continued presence of the complaining individual in order to remain in effect.

53. W6E

It is a particularly offensive suggestion that if the complainant moves away, the Best Work Practices Agreement should end as well. People should not be forced out of their homes and then polluters allowed to continue freely.

The Department agrees. See response to Comment 52.

54. W6C, W10B

When a nuisance exists the rule should require an independent audit to prove that a chemical is absolutely necessary and that a better, safer alternative is not possible. The audit should be at the company's expense.

The Department disagrees with adding this as a requirement. Nuisance can take many forms and not all of them are chemically based. Often, though, the first step in addressing a

nuisance complaint is to take stock of an operation. Audits can be useful tools in breaking down the steps in a process and identifying where practices lead to nuisance issues. The Department has used this technique with a number of sources. This approach sometimes results in improvements in process and the final product while reducing environmental pollutants and sometimes costs. Audits will be considered to resolve nuisances where appropriate.

55. W6D, W22, W25

A provision should be added stating that all correspondence, documentation and data relating to this agreement are public information and will be readily available to the public.

All records are public records and are available for public review pursuant to ORS 192.420. A specific provision to this effect in this rule is unnecessary.

56. W23, W25

The proposal for the Best Work Practices Agreement does not include any element of public participation. This is a fatal flaw and is significant because the offending party may achieve a benefit of finality and certainty by entering into a best work practices agreement. The victim and the public are not provided any assurance that the cure contemplated in the agreement will be effective.

The Department agrees and will add a provision to require a consultation with the affected public when developing a Best Work Practices Agreement.

57. W13B

The best work practices proposal satisfies no one. It will neither satisfy the complainer if the nuisance still exists nor the industry if you allow complainers to revisit the complaint if the best work practices do not work. Instead develop a process that results in a Nuisance Abatement Plan, which would have the following elements:

1. Logging of nuisance complaints at a central location using a standard procedure.
2. If complaints exceed some reasonable level, the creation of a specific nuisance project.
3. Evaluate the complaints and determine if it meets the criteria of Division 208 to be a nuisance and to require action. Note: the public will be extremely disappointed if industry can hide a nuisance behind zoning or permitted release regulations!
4. If it is determined by DEQ that a nuisance exists then start the NAP creation process:

a. DEQ sets up a face to face meeting between the public and the polluter to discuss the issue.
b. People identified by both the polluter and the public to participate in creating a NAP
c. The group above meets, attempts to identify the problem, determines what might be measured to achieve success, and establishes goals.
d. DEQ insures that the NAP is technically sound and meets the needs of both parties.
e. Execute the NAP under DEQ supervision.
f. Hopefully achieve success - but it is unlikely that all NAP will succeed, it will be a learning process for all.

Many of the elements offered by the commentor are components of the proposed Best Work Practices Agreement. The Department disagrees, however, with the proposal to establish a threshold that predetermines a nuisance. While a catalogue of complaints helps to build a history that this event is not infrequent or a single occurrence, an effective nuisance program cannot be forced to move forward on the basis of a persistent complainer pushing for action on what is otherwise not a nuisance. Neither should a person suffering significant harm be forced to endure the nuisance while complaints accumulate toward a preordained threshold.

The Department will commit to consult with the complainants throughout the process but cannot guarantee the level of direct involvement that the commentor suggests. The Department is acting as an agent enforcing its rules on behalf of the complainant to resolve the nuisance. Although there may be circumstances that warrant the direct and continuous involvement that the commentor proposes, there may also be instances where that level of contact is unwarranted, undesired or counterproductive.

58. W27

Have you consulted with attorneys on whether they feel that the Best Work Practices Agreement will be easier to fight in court than the existing nuisance laws?

The Department has consulted with attorneys from the Department of Justice and DEQ's enforcement section. We believe that the Best Work Practices Agreement will be easier to enforce than a typical nuisance case because the elements of compliance and infraction will be easier to determine.

59. W8B

In 340-208-0300(2), the final two words "this notice" are not clear to which notice it is referring.

This subsection is about the notice the Department provides to sources suspected of creating a nuisance. There is no other reference to a notice and the Department does not feel it necessary to burden the subsection with further references to the main point of the subsection.

60. W26

I am encouraged by the concept of the Best Work Practices Agreement (Section 340-208-0320) that would have force of an order. This solves a very substantial problem with the current approach embedded in civil law. Even if parties can agree on their own now, even so far as a contract, remedy of a future violation of such agreement or contract could be sought only by one party suing the other for damages. Under current legal theory, a private aggrieved party cannot ask a court for enforcement of performance of the contract by the other party, even to things that were agreed to in the contract; a private party can only sue for damages incurred by non-performance. The effect of this is to return the whole matter back to where everything started in the absence of any private agreement or contract: suing for damages. The nuisance continues and nothing is ultimately resolved.

The Department agrees that the Best Work Practices Agreement offers a more conclusive resolution than can sometimes be found under typical private nuisance suit actions.

FUGITIVE EMISSION REQUIREMENTS 340-208-0210

61. W17, W29

OAR 340-208-0010 (1) includes "odor" as an air contaminant; however, subsection (7) defines odor to be an "air contaminant that affects the sense of smell." This creates a circular definition that can be resolved by striking odor from the definition of air contaminants in 340-208-0010(1).

The Department disagrees. The definition of "air contaminants" in the rule is precisely that found in ORS 468A. The definition of odor in the rule is a refinement to the list of to-be-regulated air contaminants, adds to the understanding of the term and is not circular.

62. W2A, W4A, W4B, W18B, W28

There appears to be a technical error in the proposed addition of the words "or odors" to this rule. The definition of fugitive emissions already includes odor. Therefore it is redundant to add the words "or odors" and would lead reviewing courts to extend the phrase to include something more than the use of the term "odor" in the definition of air contaminant.

While the rule is entitled "Fugitive Emissions" and one can explore the interlocking layers of definition to ultimately conclude that odors can be regulated as well, it is not perfectly clear. This is reflected in uncertainty by staff as to whether this rule can be directed to fugitive odor emissions, a confusion that is exacerbated by section (2) which highlights work practices relating to controlling fugitive particulate emissions. The Department originally proposed adding the words "or odors" to clarify that fugitive emissions include odors.

Given that attorneys representing business interests have noted that odors are covered by the scope of this rule and can be addressed as fugitives, the Department will withdraw from consideration the originally proposed revision including the proposed sections 3 and 4 in the interim draft. Returning to the original language still confers some advantages to environmental protection. While nuisance odors will probably be better addressed under the proposed nuisance rules, the current rules in 340-208-0200 through –0210 also cover additional circumstances that cannot be otherwise addressed under nuisance. This approach also retains the advantage of continuing the protection provided by this rule within the State Implementation Plan. While EPA argues (Comment 65) that odors per se are not criteria pollutants, odors typically are associated with criteria air pollutants like volatile organic compounds and particulate matter and could be considered appropriately for control under the SIP .

63. W6E, W23

Do not take out the words "or odors" in outlining applicable fugitive emissions.

The Department agrees that adding the term clarifies the extent of scope intended by this rule. However, keeping the original language retains advantages in regards to certain types of infractions. The Department is confident, given an agreement by business interests that odors are included within the current language that the rule provides the environmental protection intended by the original rule language.

64. W6E

Regarding the suggested differentiation between odors and fugitive emissions, how can you separate them? They are not separate.

The Department disagrees. Fugitive emissions can take a number of forms and could include particulate matter, which may have an odorous component, or gases, which may not be odorous.

65. W5

Odor control rules are inappropriate for inclusion into the State Implementation Plan (SIP) because these are non-criteria pollutants. EPA cannot separate out particular words in

approving a rule subsection for inclusion within the SIP. EPA suggests that a separate subsection be created. Is the intention to only control odors from buildings or equipment or are there other sources of odor intended to be controlled under this rule?

The Department had considered this comment and proposed an approach in the revised rule proposal to add separate but parallel sections (3) and (4) that would specifically address odor fugitive emissions. After further review of the comments received on the proposal and consideration of what will provide the most effective means of air quality protection, the Department decided to withdraw the proposed sections.

As noted above, while odors may not be considered criteria pollutants on their face, they are typically associated with volatile organic compounds or particulate matter, both of which are regulated pollutants under the Clean Air Act.

66. W2B, W3C, W3D, W4B, W4D, W8B, W9B, W18B

The inclusion of section (3) and (4) to the rule add nothing to improve protection of the environment. In fact they represent two parts of the same rule addressing the same thing as in sections (1) and (2). The provisions in the proposed nuisance rule will adequately address odor control without this additional confusing rule.

The Department disagrees but the point is moot considering that the Department is recommending that additional sections (3) and (4) not be adopted into the rule package.

67. W17, W29

The first sentence of subsection (3) is unclear because it is not evident what the Department would be seeking when bringing a "facility into compliance". Suggest the following modification:

> When fugitive emissions as odors escape from a building or equipment in such a manner and amount as to create a nuisance or to violate any regulation, the department may order the owner or operator to mitigate or eliminate the nuisance or to bring the facility into compliance.

The Department agrees. Section (1) has a parallel structure to the proposed section (3). To establish a violation the rule requires a demonstration that the fugitive emissions create a nuisance or otherwise violate any regulation. This is the standard against which compliance will be measured. The suggested change will clarify this point and will be recommended to be incorporated into section (1) of the rule.

68. W8B

Adopting an approach for odors that is just like fugitive emissions is not workable and

ignores the whole concept of odors. The language in (4) would make it risky to drive a diesel engine car. Also, odors by their definition are already airborne, so how does the source "prevent odors from becoming airborne?"

The Department disagrees. Fugitive emission rules cannot apply to a diesel engine car because tailpipe emissions are not fugitive.

As to the second point, the Department's intention is to implement a rule that addresses emissions to the ambient air. As the definition provides, fugitive emissions are those that escape to the atmosphere. A source seeking to be in compliance with the rule engages in good housekeeping and pollution control practices to manage and control offensive odor emissions resulting from its processes and operations.

69. W17, W29

Proposed section (4) is overbroad. Odors are by definition airborne and as drafted this provision would require virtually every outdoor activity to have "reasonable precautions" to prevent any odors, noxious or pleasant from becoming airborne. The Department should describe the odors it is restricting and establish clear grounds for compliance.

The point regarding section (4) is moot as the Department will enforce the rule under provisions specified in section (1), which has a specified application. The rule applies geographically in Special Control Areas and otherwise where a nuisance exists and can be controlled. Once either of those conditions is met then the rule is applied to fugitive emissions that create a nuisance or violate any regulation.

70. W3B, W8A

The proposed wording in section 1 is over broad and creates a practical impossibility. The department can accomplish its goal more straightforwardly by drawing a direct connection between the control and removal of air contaminants and the emission of those contaminants to the open air.

The Department agrees. The originally proposed change was intended to clarify the problem in the current rules regarding the "discharge" of fugitive emissions. The commentor proposes a better fix by suggesting that the "air contaminants are controlled or removed before being emitted to the outside air."

71. W13A

The use of the word "practicable" without a definition opens the barn door to any polluter. The term must be defined in the rule.

The Department disagrees. Practicable is a term with a common meaning of feasible. It is a relatively simple test of "practicable" to demonstrate feasibility or possibility by reference to application in similar settings. Many other requirements in air quality regulations are defined more prescriptively but then they are established for discrete pollutants. Fugitive emissions by their nature are diffuse and multiform. This approach allows the needed flexibility to effectively address the wide range of circumstances that constitute fugitive emissions. Its appropriateness in the rule is demonstrated by the fact that this term is a longstanding component of the rule and evidence has not been provided that the Department has failed to achieve the rule's intent with this language in place.

72. W4C, W18A

Unless "reasonable precautions", as used in section (4), are defined specifically within the rules, the rules will be inconsistently applied. The examples provided do not give enough specific guidance to effectively implement the regulatory intent of this section.

The Department disagrees. Similarly, as in the response to comment 71, these are terms of art that are not absolutely prescriptive. The examples provided are meant to provide guidance, in the form of a listing of other controls commonly and readily applied to solve the problems addressed by the rule. Fugitive emissions are not a class of pollutants that lend themselves to a more definitive and prescriptive list of controls.

73. W13A

The fugitive emission requirements are relatively useless as a business would only have to put a cover, blower or duct on a pollution source to avoid the requirements.

The Department disagrees. Managing emissions through a collection system as represented by a cover, blower or duct is typically the first and oftentimes most challenging step to ultimately controlling emissions. Department inspectors can rely on other rules to ensure that emission standards at the duct or blower are being met, so the strategy proposed by the commentor will not avoid requirements to control fugitive emissions.

74. W6C, W10B, W12B

Add to the definition of fugitive emissions the phrase "or the emission of any unfiltered contaminant that escapes accidentally to the air."

The Department disagrees. This language would require an additional test to prove the intentions of the owner/operator as to whether the release was accidental. This would be a difficult standard to prevail upon and unduly burden any action to appropriately secure relief from troublesome fugitive emissions.

MASKING OF EMISSIONS 340-208-0400

75. W5

EPA suggests adding a prohibition against the masking of emissions to also avoid compliance with regulations and requirements.

The Department agrees and will make the change.

76. W6A

The provision to prevent masking of emissions is encouraging.

The Department agrees that this change will strengthen the rule.

PARTICULATE MATTER SIZE STANDARD 340-208-0450

77. W20

There is no practical, objective or definitive method currently available to demonstrate compliance. We understand that studies using particle fallout buckets for measuring offsite deposition of particulate >250 microns are almost always inconclusive. Particulate matter captured in buckets of water cannot be accurately measured for size nor can they be analyzed to accurately identify sources.

The Department disagrees. It is true that it would be impossible to determine, using a particle fallout bucket (PFO), the original size of any material that is water-soluble or readily decomposes in water. Fine wood dust would be an example. PFO sampling isn't a very precise science. A single leaf or deposit by a bird can significantly impact the results. Still, most PFO studies are conclusive. We can measure what is collected in the bucket, not just the weight but chemically. If the sources have a distinctive chemical "fingerprint" it can be detected. Most often, the problem is collecting a representative sample. In no cases is a determination of a fallout problem made based on a single bucket. Most studies involve 4 or 5 sites with buckets collected over many months. The Department collects duplicate buckets, background buckets, upwind/downwind buckets, etc. In the end it is usually possible to determine if there is a violation of the standard.

That said, if the Department was asked if fallout particulate was > 250 micros in size, we wouldn't use a PFO bucket. We would collect a dry surface deposition sample or use sticky paper and look at the particulate under a microscope. It would be easy to determine its size. In most cases the microscopist can also identify the type of material: pollen, wood fiber, mineral dust, etc.

78. W2A, W2B, W3C, W4A, W4B, W9B, W20, W24

The proposed rule extends a prohibition on emitting larger particles (>250 microns) from landing on another's property from nine counties to statewide applicability. Current rules allow the imposition of TACT whenever there is documentation of a nuisance and provides a means to address this issue. The proposed rule can result in a source being penalized regardless of whether the particulate emitted is causing a substantial or unreasonable impact and regardless of the measures taken by the source. The rule should be deleted or include a "reasonableness" component.

The Department disagrees. The Typically Achievable Control Technology (TACT) rule does not necessarily apply in situations that are addressed by this rule. While TACT can be invoked to resolve a documented nuisance condition, its application is limited to permitted sources emitting above selected thresholds. The 250-micron fallout rule was originally drafted to reflect the issue of transport of particles offsite to another's property. The numeric standard was adopted to reflect the expected transport rate of large particles to a property line, i.e., larger particles will deposit quickly so evidence of particles greater than 250 microns indicates a problem. Requiring an additional test of reasonableness before enforcement seriously reduces the effectiveness of an existing rule used by the Department and its predecessor local air authorities for thirty years. This longstanding but narrowly applied rule is being proposed for statewide applicability to establish uniform expectations and protections for all citizens and sources within the state and to quickly address issues of obvious concern without applying nuisance criteria.

79. W9B

The prohibition on 250-micron particulate deposition appears inconsistent with limiting nuisance to substantial and unreasonable interference with the use and enjoyment of land. While the proposed standard may articulate the common law standard for trespass, the Department may wish to eliminate any potential that it could be drawn into issues of trespass law.

The Department disagrees. As noted above, the rule was drafted to describe the transport of large particles and, as such, establishes a numeric standard to reflect an unreasonable and substantial impact.

80. W2A, W3A, W3B, W3C, W3D, W4A, W4B, W8A, W9A, W9B, W28, W29

The 250-micron rule creates a class of pollutant with no applicable standard or assumes that any non-zero number is unreasonable and does not consider whether a nuisance has been created. Any impact from large particulate can be best addressed through the nuisance rule. The existing rule actually limits the Department's ability to deal with a condition, which may create a nuisance with various particulate sizes. This rule should be deleted.

The Department disagrees. Large particle fallout is an air pollution issue and, in and of itself, represents a substantial and unreasonable interference that can be readily addressed by the offending source. The Department, and its predecessors, have used this standard effectively for more than 30 years to quickly resolve air pollution complaints.

81. W4C, W9B, W18A, W18B

The language as proposed could easily cause unintended consequences as routinely encountered wind events could transport naturally exposed dry or sandy soil conditions or even pine needles or leaves leading to deposition on neighboring property. If the rule is adopted as written, the majority of oceanfront property owners in Oregon could bring nuisance complaints against their neighbors for blowing sand.

The Department disagrees. Department staff does not indulge in unreasonable enforcement practices as evidenced by prevailing on a significant number of appeals. This 250-micron rule has never been applied to such examples; the Department does not intend to apply the proposed rule to them now.

82. W9B

Particulate matter greater than 250 microns appears to have no connection to the improvement of recognized air quality standards, which are usually associated with smaller particulate. The department should reevaluate the appropriateness of the 250-micron limitation.

The Department disagrees. Air quality standards are developed to be protective of primary and secondary effects. The primary standards are designed to be protective of human health while the secondary standards are intended to protect against other adverse welfare effects. While most of the concern is correctly focused on protecting human health, protecting for other welfare effects is equally compelling in some circumstances. The 250-micron standard is designed to restrict large particle fallout leading to soiling and physical damage to adjoining property.

83. W6E, W22

The definition of particulate should cover particulates from 250 down to 2.5. Particles smaller than 250 microns can accumulate in sufficient quantity to cause a nuisance. Furthermore, if the particles contain toxic substances they can also pose a health risk.

The proposed rule is intended to extend an existing standard that protects adjoining property against intrusion of large particles. To extend this rule to cover the circumstances suggested would completely separate it from the problem it was originally designed to address. Other standards and rules exist to more directly address the concerns raised by the commentor.

84. W1

The 250-micron rule provides little protection from particle fallout, as larger particles are unlikely to be transported by the wind. Most particle fallout subject to wind borne travel will be smaller than 250 microns and could be better addressed through the nuisance rule.

The Department agrees. A well-managed facility will not provide the opportunity for larger particles to be transported by the wind for deposition on another's property. However, transport and deposition are not uncommon and the Department has used the rule to respond effectively to these situations in the past.

85. W3D, W4D

Changing the rule to require an observable deposition does not address our concerns, because if the deposition were not observable, then there could never be a violation anyway.

The Department is aware of the concerns raised but believes that the value of this rule is enhanced by its ready use in situations where deposition of large particles is evident. The Department will consider other modifications to the rule that retains the ease of use factor in responding to complaints caused by deposition.

86. W23

The agency's discretion will be exercised reasonably to determine when an "observable deposition" has occurred. There will be no greater risk of uncertainty in this provision than there will be in the section on best work practices under 340-208-0320.

The Department agrees with this comment.

87. W3D, W4D

If the Department insists on keeping this antiquated rule, it should be rewritten in one of two ways. One would be to add language to make the rule consistent with the nuisance requirements, since it is a restatement of the nuisance prohibition. The second proposal

would be to add language to make this rule consistent with the approach used in OAR 340-208-0210(1) where the Department may order the owner/operator to take reasonable measures to minimize or eliminate the source of the emissions.

As noted earlier in comment 78, the first proposal unacceptably limits the effectiveness of this rule. However the second comment has merit and the Department will incorporate the elements into the rule proposed for adoption.

88. W6A

The rule on prohibiting emissions of large particulates is encouraging and commenter strongly objects to eliminating the 250-micron standard.

The Department agrees and does not intend to eliminate this standard.

ODOR CONTROL MEASURES 340-208-0550

89. W1, W3B, W4A, W9A

It is burdensome and unreasonable to set incinerator and afterburner operating parameters for odor control systems that are more appropriate for VOC control systems. Odor control systems, based on sound engineering design, that can be employed to control odors using less than the "highest and best practical treatment currently available" should be allowed. The goal should be nuisance abatement and not emission reductions. The rule should be deleted.

The Department disagrees. The rule consists of two elements but is wholly directed towards odor control. Despite what the commenter suggests, not all odor controls will be afterburners or incinerators. Section (1) is not prescriptive in this regard. Section (2) provides the specifications for operation incinerators or afterburners, if those technologies are used, and also allows for other controls determined to be equally effective.

This rule was originally written and is still intended to control odor emissions. Although it appears in a Division denoted as "Visible and Fugitive Emissions" this is only because of a recent reorganization of the Air Quality Program's rules, having been a rule of the former Columbia Willamette Air Pollution Control Authority.

90. W2A, W4A

The "highest and best" portion of the rule is unnecessary given the TACT rule in Division 226. The incinerator/afterburner portion of the rule is antiquated and reflects equipment no longer in use.

The Department disagrees. The rule outlining Typically Achievable Control Technology (TACT) does not necessarily apply in all situations that would be governed by this rule. While the incinerator/afterburner portion of this rule has been part of expected practice since the 1970s, the Department believes that it is still applicable and that there is flexibility in the rule to allow control "in another manner determined by the department to be equally or more effective." (340-208-0550 (2))

COMMENTS ON THE PROCESS

91. W2A

The department should withdraw the rulemaking so as to allow the opportunity to work with affected sources to gain consensus about a practical means of approaching nuisance issues in Oregon.

See response following Comment 94.

92. W3B

Considering the scope of anticipated rule changes, the rule should be re-proposed rather than being issued as final.

See response following Comment 94.

93. W3C, W9B

The continuing opening and productive dialogue is greatly appreciated.

See response following Comment 94.

94. W6C, W10B

The process has been flawed in that we did not have sufficient notice of the rule change to prepare testimony. Although we have twice submitted written comments, industry representatives have been able to insert language that is obviously not in the public interest. We would like to have a public hearing on the rule.

Some commenters from business and citizen interests have expressed concerns about the opportunity to comment during this rulemaking. In order to accommodate the evolving interest in the proposed rules the Department not only adhered to the required process for public notification but also took extraordinary steps to make sure that all relevant and interested parties had an opportunity to contribute to the development of these rules.

The Department first proposed these rules for public consideration in May 2000. The public comment period was scheduled to close on July 27 but was extended to August 10 to accommodate the late interest in the rulemaking. The comment period was opened again from September 1 to September 13 and a draft was circulated to reflect a proposal to incorporate some of the comments received by the Department at that time. Review of interim drafts is neither mandated nor common practice in rulemaking. This extra step was intended to provide a further opportunity for all interested parties to continue to contribute to development of this rule.

The timeframe for this second review was constrained by internal deadlines to prepare for the December Commission meeting. Based on concerns regarding the limited comment period, the Department reopened the comment period again from October 1 to November 1. In addition, a public workshop on the rule was conducted on October 26, which was attended by persons representing citizen and business interests. Ultimately the response to these extended opportunities has been positive.

The Department values the input it receives during rulemaking and believes that this rule package is stronger because of it.

COMMENTS ON OTHER RULES

95. W14

In addition to 340-208-0570, emissions from ships, the Department should also regulate emissions from locomotives, which are also a problem in NW Portland.

We note your concerns. Regulation of locomotives is restricted by federal law to the U.S. Environmental Protection Agency, which has issued regulations calling for more emission controls on these types of engines. The South Coast Air Quality Management District has been able to negotiate a voluntary agreement with rail service providers in the Los Angeles basin to operate late model locomotives there. While it is possible to consider a similar approach here, the prospects for success are likely limited by an inability to demonstrate as compelling an air quality need as Los Angeles.

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Air Quality Nuisance Control Rules

Detailed Changes to the Original Rulemaking Proposal Made in Response to Public Comment

340-208-0010
Definitions

(1) "Abate" means to reduce or manage emissions so as to eliminate the nuisance. It does not necessarily mean completely eliminate the emissions. The degree of abatement will depend on an evaluation of all of the circumstances of each case.

(6) "Nuisance" means a substantial and unreasonable interference with another's use and enjoyment of real property, or the substantial and unreasonable invasion of a right common to members of the general public.

(8) "Opacity" means the degree to which an emission reduces transmission of light and obscures the view of an object in the background as measured in accordance with OAR 340-212-0120 and 212-0140. Unless otherwise specified by rule, opacity shall be measured in accordance with EPA Method 9. For all standards, the minimum observation period shall be six minutes, though longer periods may be required by a specific rule or permit condition. Aggregate times (e.g. 3 minutes in any one hour) consist of the total duration of all readings during the observation period that exceed the opacity percentage in the standard, whether or not the readings are consecutive. Alternatives to EPA Method 9, such as a continuous opacity monitoring system (COMS), alternate Method 1 (LIDAR), or EPA Methods 22, or 203, may be used if approved in advance by the ~~Department~~department, in accordance with the Source Sampling Manual.

(9) "Particulate matter" means all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by an applicable reference method in accordance with OAR 340-212-0120 and OAR 340-212-0140. Sources with exhaust gases at or near ambient conditions may be tested with DEQ Method 5 or DEQ Method 8, as approved by the department. Direct heat transfer sources shall be tested with DEQ Method 7; indirect heat transfer combustion sources and all other non-fugitive emissions sources not listed above shall be tested with DEQ Method 5 or an equivalent method approved by the ~~Department~~department;

(12) "Standard cubic foot" means the amount of gas that would occupy a volume of one cubic foot, if the gas were free of uncombined water at standard conditions. When applied to combustion flue gases from fuel ~~or refuse burning~~, "standard cubic foot" also implies adjustment of gas volume to that which would result at a concentration of 12% carbon dioxide or 50% excess air.

Fugitive Emission Requirements

340-208-0200
Applicability

(2) In other areas when the ~~Department~~ department determines a nuisance exists and should be controlled, and the control measures are practicable.

340-208-0210
Requirements

(1) When fugitive emissions ~~or odors~~ escape from a building or equipment in such a manner and amount as to create a nuisance or to violate any regulation, the ~~Department~~ department may order the owner or operator to abate the nuisance or to bring the facility into compliance. In addition to other means of obtaining compliance the ~~Department~~ department may order that the building or equipment in which processing, handling and storage are done be tightly closed and ventilated in such a way that air contaminants are controlled or removed before ~~any air from the building is~~being emitted to the open air.

Nuisance Control Requirements

340-208-0300
Nuisance Prohibited

(2) Upon determining a nuisance may exist, the department will provide written notice to the person creating the ~~potential~~ suspected nuisance. ~~The date of this notice will serve as the first day of violation for purposes of assessing any civil penalties if the department determines a nuisance exists under OAR 340-208-0310 and proceeds with a formal enforcement action pursuant to Chapter 340 Division 12.~~ The department will endeavor to resolve observed nuisances in keeping with the policy outlined in OAR 340-12-0026. If the department determines a nuisance exists under OAR 340-208-0310 and proceeds with a formal enforcement action, pursuant to Chapter 340 Division 12, the first day for determining penalties will be no earlier than the date of this notice.

340-208-0310
Determining Whether A Nuisance Exists

(1) In determining a nuisance, the department may consider factors including, but not limited to, the following:

~~(1)~~(a) Frequency of the emission;

~~(2)~~(b) Duration of the emission;

~~(3)~~(c) Strength or intensity of the emissions, odors or other offending properties;

~~(4)~~(d) ~~Proximity to residential and commercial areas~~Number of people impacted;

~~(5)~~(e) ~~Impacts on complainants.~~The suitability of each party's use to the character of the locality in which it is conducted;

(f) Extent and character of the harm to complainants;

(g) The source's ability to prevent or avoid harm.

(2) Compliance with a Best Work Practices Agreement that identifies and abates a suspected nuisance constitutes compliance with OAR 340-208-0300 for the identified nuisance. For sources subject to OAR 340-216-0020 or 340-218-0020, compliance with specific permit conditions that results in the abatement of a nuisance associated with an operation, process or other pollutant emitting activity constitutes compliance with OAR 340-208-0300 for the

identified nuisance. For purposes of this section, "permit condition" does not include a general condition prohibiting the creation of nuisances.

340-208-0320
Best Work Practices ~~Order~~Agreement

(1) A person may voluntarily enter into ~~a voluntary~~ an agreement with the department to implement specific practices to ~~manage and reduce~~abate the ~~emission of air contaminants~~ suspected ~~of creating a~~ nuisance. This agreement may be modified by mutual consent of both parties. This agreement will be an Order for the purposes of enforcement under OAR 340 Division 12. ~~This Agreement will remain in effect unless or until the department determines that further reasonably available practices are necessary to manage or reduce the emission of air contaminants suspected of creating a nuisance.~~

(2) For any source subject to OAR 340-216-0020 or 340-218-0020 the conditions outlined in the Best Work Practices Agreement will be incorporated into the permit at the next permit renewal or modification.

(3) This agreement will remain in effect unless or until the department provides written notification to the person subject to the agreement that:
   (a) The agreement is superseded by conditions and requirements established later in a permit;
   (b) The department determines the activities that were the subject of the agreement no longer occur; or
   (c) The department determines that further reasonably available practices are necessary to abate the suspected nuisance.

(4) The agreement will include one or more specific practices to ~~manage and reduce air contaminant emissions~~abate the suspected nuisance. The agreement may contain other requirements including, but not limited to:
   (a) Monitoring and tracking the emission of air contaminants;
   (b) Logging complaints and the source's response to the complaint;
   (c) Conducting a study to propose further refinements to best work practices.

~~(3)Compliance with a Best Work Practices Order constitutes compliance with OAR 340-208-0300.~~

(5) The department will consult, as appropriate, with complainants with standing in the matter throughout the development, preparation, implementation, modification and evaluation of a Best Work Practices Agreement. The department will not require that complainants identify themselves to the source as part of the investigation and development of the Best Work Practices Agreement.

340-208-0400
Masking of Emissions

No person may cause or permit the installation or use of any device or use of any means designed to mask the emission of an air contaminant that causes or is likely to cause detriment to health, safety, or welfare of any person or otherwise violate any other regulation or requirement.

340-208-0450
~~Particulate Matter Size Standard~~Particle Fallout Limitation

No person ~~shall~~ may cause or permit the emission of any particulate matter ~~which is~~ larger than 250 microns in size ~~provided if such particulate matter does or will deposit~~ at sufficient duration or quantity as to create an observable deposition upon the real property of another person when notified by the department that the deposition exists and must be controlled.

Clackamas, Columbia, Multnomah, and Washington Counties

340-208-0510
Exclusions

(1) The requirements contained in OAR 340-208-0500 through 340-208-~~0620~~ 0630 apply to all activities conducted in Clackamas, Columbia, Multnomah, and Washington Counties, other than those for which specific industrial standards have been adopted (Divisions 230, 234, 236, and 238), and except for the reduction of animal matter, OAR 236-0310(1) and (2).

340-208-0550
Odor Control Measures

(1) Control apparatus and equipment, using the highest and best practicable treatment currently available, ~~shall~~ must be installed and operated to reduce to a minimum odor-bearing gases or odor-bearing particulate matter emitted into the atmosphere.

(2) Gas effluents from incineration operations and process after-burners ~~shall~~installed under section (1) of this rule must be maintained at a temperature of 1,400° Fahrenheit for at least a 0.5 second residence time, or controlled in another manner determined by the ~~Department~~ department to be equally or more effective.

340-208-0630
Sulfur Dioxide Emission Standard

For any air contaminant source that may emit sulfur dioxide, no person may cause or permit emission of sulfur dioxide in excess of 1,000 ppm from any air contamination source as measured in accordance with the ~~Department's~~ department's Source Test Manual, except those persons burning natural gas, liquefied petroleum gas, or fuel conforming to provisions of rules relating to the sulfur content of fuels. This rule applies to sources installed, constructed, or modified after October 1, 1970.

Attachment F

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Air Quality Nuisance Control Rules

Rule Implementation Plan

Summary of the Proposed Rule

This proposal would refine the definition of an air quality nuisance, outline criteria to determine a nuisance and propose an alternative to traditional enforcement tools to abate the nuisance. This Division also contains other rules originally adopted in 1973 by the Environmental Quality Commission from the former, and now defunct Columbia-Willamette and Mid-Willamette Air Pollution Control Authorities that are no longer applicable or have been superseded by subsequent rule adoptions by the Commission. Most of these rules are proposed for deletion. Two requirements are proposed to apply statewide, i.e., a prohibition on masking otherwise harmful emissions and a prohibition on large (greater than 250 microns) particle fallout. Other proposed changes include housekeeping changes intended to improve the readability and enforceability of the rules.

Proposed Effective Date of the Rule

February 1, 2001

Proposal for Notification of Affected Persons

The adopted rules will be provided to all parties who commented on the rule. Since the application of the rule is driven by complaints, and it is not possible to otherwise identify affected persons ahead of time.

Proposed Implementing Actions

These rule amendments are expected to help the Department handle existing work more efficiently. A guidance document will be prepared according to the procedures outlined in the formal guidance development process for the Air Quality Program. The document will be prepared in consultation with the Department of Justice, the Air Quality program management team and appropriate Department staff. The completed document will be distributed to air quality field staff statewide and will also be presented as a training at a regularly scheduled Inspectors' Forum.

Another part of the implementation process will be coordination with local nuisance control efforts. This proposal is not expected to result in a greater workload demand on local government. In fact, they may experience a more prompt response by the Department to referrals due to improved process. As a second phase of implementation, the Department will approach local jurisdictions in the state to discuss further improvements to the nuisance program. The goal of this second step will be to better integrate and coordinate state and local nuisance programs and reduce workload for both state and local governments.

This draft was circulated on September 1, 2000 in response to initial public comments to the draft rule placed on public notice in June 2000. Attachment G also notes the changes in rule language proposed in the initial draft rule according to the following key.

Language proposed in original draft
~~Language struck in original draft~~
[Language proposed in the interim draft]
[~~Language struck in the interim draft~~]

DIVISION 208

VISIBLE EMISSIONS AND NUISANCE REQUIREMENTS

340-208-0010
Definitions

The definitions in OAR 340-200-0020 and this rule apply to this division. If the same term is defined in this rule and OAR 340-200-0020, the definition in this rule applies to this division.

(1) "Air Contaminant" means a dust, fume, gas, mist, odor, smoke, pollen, vapor, soot, carbon, acid or particulate matter, or any combination thereof.

(2) "Emission" means a release into the outdoor atmosphere of air contaminants.

(3) "Fuel Burning Equipment" means a device ~~which~~ that burns a solid, liquid, or gaseous fuel, the principal purpose of which is to produce heat or power by indirect heat transfer, except marine installations and internal combustion engines that are not stationary gas turbines.

(4) "Fugitive Emissions" means emissions of any air contaminant that escape to the atmosphere from any point or area not identifiable as a stack, vent, duct, or equivalent opening.

(5) "New source" means, for purposes of OAR 340-208-0110, any air contaminant source installed, constructed, or modified after June 1, 1970.

(6) "Nuisance ~~condition~~" means ~~unusual or annoying amounts of fugitive emissions traceable directly to one or more specific sources. In determining whether a nuisance condition exists, consideration shall be given to all of the circumstances, including density of population, duration of the activity in question, and other applicable factors.~~ a substantial and unreasonable interference with another's use and enjoyment of real property, or the [substantial and unreasonable]invasion of a right common to members of the general public.

(7) "Odor" means that property of an air contaminant that affects the sense of smell.

(8) "Opacity" means the degree to which an emission reduces transmission of light and obscures the view of an object in the background as measured in accordance with OAR 340-212-0120 and 212-0140. Unless otherwise specified by rule, opacity shall be measured in accordance with EPA Method 9. For all standards, the minimum observation period shall be six minutes, though longer periods may be required by a specific rule or permit condition. Aggregate times (e.g. 3 minutes in any one hour) consist of the total duration of all readings during the observation period that exceed the opacity percentage in the standard, whether or not the readings are consecutive. Alternatives to EPA Method 9, such as a continuous opacity monitoring system (COMS), alternate Method 1 (LIDAR), or EPA Methods 22, or 203, may be used if approved in advance by the Department, in accordance with the Source Sampling Manual.

(9) "Particulate matter" means all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by an applicable reference method in accordance with OAR 340-212-0120 and OAR 340-212-0140. Sources with exhaust gases at or near ambient conditions may be tested with DEQ Method 5 or DEQ Method 8, as approved by the Department. Direct heat transfer sources shall be tested with DEQ Method 7; indirect heat transfer combustion sources and

all other non-fugitive emissions sources not listed above shall be tested with DEQ Method 5 or an equivalent method approved by the Department;

~~(10) "Refuse" means unwanted matter.~~

~~(11) "Refuse burning equipment" means a device designed to reduce the volume of solid, liquid, or gaseous refuse by combustion.~~

(~~12~~10) "Special Control Area" means an area designated in OAR 340-204-0070.

(~~13~~11) "Standard conditions" means a temperature of 68° Fahrenheit and a pressure of 14.7 pounds per square inch absolute.

(~~14~~12) "Standard cubic foot" means the amount of gas that would occupy a volume of one cubic foot, if the gas were free of uncombined water at standard conditions. When applied to combustion flue gases from fuel or refuse burning, "standard cubic foot" also implies adjustment of gas volume to that which would result at a concentration of 12% carbon dioxide or 50% excess air.

[**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.]
[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 & ORS 468A
Stats. Implemented: ORS 468.020 & ORS 468A.025
Hist.: [DEQ 16, f. 6-12-70, ef. 7-11-70; DEQ 1-1984, f. & ef. 1-16-84; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 3-1996, f. & cert. ef. 1-29-96]; [DEQ 37, f. 2-15-72, ef. 3-1-72; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 3-1996, f. & cert. ef. 1-29-96]; [DEQ 4-1978, f. & ef. 4-7-78; DEQ 9-1979, f. & ef. 5-3-79; DEQ 3-1980, f. & ef. 1-28-80; DEQ 14-1981, f. & ef. 5-6-81; DEQ 22-1989, f. & cert. ef. 9-26-89; DEQ 23-1991, f. & cert. ef. 11-13-91; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 10-1995, f. & cert. ef. 5-1-95; DEQ 4-1995, f. & cert. ef. 2-17-95; DEQ 10-1995, f. & cert. ef. 5-1-95; DEQ 3-1996, f. & cert. ef. 1-29-96]; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0005, 340-021-0050, 340-030-0010

Visible Emissions

340-208-0100
Applicability

OAR 340-208-0100 through 340-208-0110 apply in all areas of the state.

[**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 468 & ORS 468A
Stats. Implemented:ORS 468A.025
Hist.: DEQ 10-1995, f. & cert. ef. 5-1-95; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0012

340-208-0110
Visible Air Contaminant Limitations

(1) Existing sources outside special control areas. No person ~~shall~~ may ~~cause, suffer, allow, or permit the emission of~~emit or allow to be emitted any air contaminant into the atmosphere from any existing air contaminant source located outside a special control area for a period or periods aggregating more than three minutes in any one hour which is equal to or greater than 40% opacity.

(2) New sources in all areas and existing sources within special control areas: No person ~~shall~~ may ~~cause, suffer, allow, or permit the emission of~~emit or allow to be emitted any air contaminant into the atmosphere from any new air contaminant source, or from any existing source within a special control area, for a period or periods aggregating more than three minutes in any one hour which is equal to or greater than 20% opacity.

(3) Exceptions to sections (1) and (2) of this rule:

(a) Where the presence of uncombined water is the only reason for failure of any emission to meet the requirements of sections (1) and (2) of this rule, such sections shall not apply;

(b) Existing fuel burning equipment utilizing wood wastes and located within special control areas shall comply with the emission limitations of section (1) of this rule in lieu of section (2) of this rule.

[**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 468 & ORS 468A
Stats. Implemented: ORS 468.020 & ORS 468A.025
Hist.: DEQ 16, f. 6-12-70, ef. 7-11-70; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 3-1996, f. & cert. ef. 1-29-96; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0015

~~Nuisance~~ Fugitive Emission Requirements

340-208-0200
Applicability

OAR 340-208-0200 through 340-208-0210 ~~shall~~ apply:

(1) Within Special Control Areas, ~~as established~~ designated in OAR 340-204-0070~~,~~ and

(2) ~~When ordered by the Department, i~~In other areas when the ~~need for application of these rules~~Department determines a nuisance exists and should be controlled, and the control measures are practicable.~~, and the practicability of control measures, have been clearly demonstrated.~~

[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 468 & ORS 468A

Stats. Implemented: ORS 468A.025

Hist.: DEQ 37, f. 2-15-72, ef. 3-1-72; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0055

340-208-0210
Requirements

(1) When fugitive emissions [~~or odors~~]escape from a building or equipment in such a manner and amount as to create a nuisance ~~conditions~~ or to violate any regulation, the Department may~~,~~ order the owner or operator to bring the facility into compliance. ~~i~~In addition to other means of obtaining compliance~~,~~ the Department may order that the building or equipment in which processing, handling and storage are done be tightly closed and ventilated in such a way that air contaminants are controlled or removed before ~~discharge~~ [any air from the building is][being]emitted to the open air.

(2) No person ~~shall~~ may cause~~, suffer, allow,~~ or permit any materials to be handled, transported, or stored; or a building, its appurtenances, or a road to be used, constructed, altered, repaired or demolished; or any equipment to be operated, without taking reasonable precautions to prevent particulate matter from becoming airborne. Such reasonable precautions ~~shall~~ may include, but not be limited to the following:

(a) [The ~~U~~u]se, where possible, of water or chemicals for control of dust in the demolition of existing buildings or structures, construction operations, the grading of roads or the clearing of land;

(b) Application of asphalt, oil, water, or other suitable chemicals on unpaved roads, materials stockpiles, and other surfaces which can create airborne dusts;

(c) Full or partial enclosure of materials stockpiles in cases where application of oil, water, or chemicals are not sufficient to prevent particulate matter from becoming airborne;

(d) Installation and use of hoods, fans, and fabric filters to enclose and vent the handling of dusty materials;

(e) Adequate containment during sandblasting or other similar operations;

(f) Covering, at all times when in motion, open bodied trucks transporting materials likely to become airborne;

(g) The prompt removal from paved streets of earth or other material ~~which~~ that does or may become airborne.

[(3) When fugitive emissions as odors escape from a building or equipment in such a manner and amount as to create a nuisance or to violate any regulation, the department may order the owner or operator to bring the facility into compliance. In addition to other means of obtaining compliance the department may order that the building or equipment in which processing, handling and storage are done be tightly closed and ventilated in such a way that air contaminants are controlled or removed before being emitted to the open air.]

[(4) No person may cause or permit any materials to be handled, transported, or stored; or a building, and its appurtenances, constructed, altered, repaired or demolished; or any equipment to be

operated, without taking reasonable precautions to prevent odors from becoming airborne. Such reasonable precautions may include, but not be limited to the following:
(a) Condensation;
(b) Carbon filtration;
(c) Wet scrubbers;
(d) Afterburners;
(e) Process control;
(f) Material substitution.]

[NOTE: [~~This rule is~~Sections (1) and (2) of this rule are] 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 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 37, f. 2-15-72, ef. 3-1-72; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-021-0060

Nuisance Control Requirements

340-208-0300
Nuisance Prohibited

(1) No person may cause or allow air contaminants from any source subject to regulation by the department to cause a nuisance.
(2) Upon determining a nuisance may exist, the department will provide written notice to the person creating the[~~potential~~][suspected] nuisance. [~~The date of this notice will serve as the first day of violation for purposes of assessing any civil penalties if the department determines a nuisance exists under OAR 340-208-0310 and proceeds with a formal enforcement action pursuant to Chapter 340 Division 12.~~] The department will endeavor to resolve observed nuisances in keeping with the policy outlined in OAR 340-12-0026. If the department subsequently determines a nuisance exists under OAR 340-208-0310 and proceeds with a formal enforcement action, pursuant to Chapter 340 Division 12, the first day for determining penalties will be no earlier than the date of this notice.

340-208-0310
Determining Whether A Nuisance Exists

[(1)]In determining a nuisance, the department may consider factors including, but not limited to, the following:
[~~(1)~~(a)] Frequency of the emission;
[~~(2)~~(b)] Duration of the emission;
[~~(3)~~(c)] Strength or intensity of the emissions, odors or other offending properties;
[~~(4)~~(d)] [~~Proximity to residential and commercial areas~~][Number of people impacted];
[~~(5)~~(e)] [~~Impacts on complainants~~][The suitability of each party's use to the character of the locality in which it is conducted];
[(f) Extent and character of the harm to complainants]
[(g) The parties' ability to prevent or avoid harm].

[(2) For sources subject to OAR340-216-0020 or 340-218-0020, compliance with permit conditions or a Best Work Practices Agreement specifically addressing abatement of a nuisance associated with an operation, process or other pollutant emitting activity constitutes compliance with OAR 340-208-0300. For sources not required to have a permit, compliance with a Best Work Practices Agreement constitutes compliance with OAR 340-208-0300.]

340-208-0320
Best Work Practices [~~Order~~][Agreement]

(1) A person may enter into a voluntary agreement with the department to implement specific practices to manage and reduce the emission of air contaminants suspected of creating a nuisance. This

agreement will be an Order for the purposes of enforcement under OAR 340 Division 12. [~~This agreement will remain in effect unless or until the department determines that further reasonably available practices are necessary to manage and reduce the emission of air contaminants suspected of creating a nuisance.~~]

[(2)For any source subject to OAR 340-216-0020 or 340-218-0020 the conditions outlined in the Best Work Practices Order will be incorporated into the permit at the next permit renewal or other administrative opportunity].

[(3) This agreement will remain in effect unless or until:

(a) The agreement is superseded by conditions and requirements established in a permit;

(b) The department determines the activities that were the subject of the agreement no longer occur; or

(c) The department determines that further reasonably available practices are necessary to manage and reduce the emission of air contaminants suspected of creating a nuisance.]

[~~(2)~~][(4)] The agreement will include one or more specific practices to manage and reduce air contaminant emissions. The agreement may contain other requirements including but not limited to:

(a) Monitoring and tracking the emission of air contaminants;

(b) Logging complaints and the source's response to the complaint;

(c) Conducting a study to propose further refinements to best work practices.

[~~(3) Compliance with a Best Work Practices Order constitutes compliance with OAR 340-208-0300.~~]

340-208-0400
Masking of Emissions

No person may cause or permit the installation or use of any device or use of any means designed to mask the emission of an air contaminant that causes or is likely to cause detriment to health, safety, or welfare of any person.

340-208-~~0620~~ 0450
[~~Particulate Matter Size~~ Standard][Particle Fallout Limitation]

No person ~~shall~~ may cause or permit the emission of any particulate matter ~~which is~~ larger than 250 microns in size ~~provided~~ if [~~such particulate matter does or will deposit~~][at sufficient duration or quantity as to create an observable deposition]upon [the]real property of another person.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 11-1982, f. & ef. 6-18-82; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-029-0030; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0520

Clackamas, Columbia, Multnomah, and Washington Counties

340-208-0500
Application

OAR 340-208-0500 through 340-208-~~0640~~ 0630 apply in Clackamas, Columbia, Multnomah, and Washington Counties.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0001; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0400

340-208-0510
Exclusions

(1) The requirements contained in OAR 340-208-0500 through 340-208-~~0640~~ [~~0620~~][0630]~~shall~~ apply to all activities conducted in Clackamas, Columbia, Multnomah, and Washington Counties, other

than those for which specific industrial standards have been adopted (Divisions 230, 234, 236, and 238), and except for the reduction of animal matter, OAR 236-0310(1) and (2).

(2) The requirements outlined in OAR 340-208-0500 through 340-208-0630 do not apply to activities related to a domestic residence of four or fewer family-living units.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0003; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0410

~~**340-208-0520**~~
~~**Incinerators and Refuse Burning Equipment**~~

~~(1) No person shall cause, permit, or maintain any emission from any refuse burning equipment which does not comply with the emission limitations of this rule.~~

~~(2) Refuse Burning Hours:~~

~~(a) No person shall cause, permit, or maintain the operation of refuse burning equipment at any time other than one half hour before sunrise to one half hour after sunset, except with prior approval of the Department;~~

~~(b) Approval of the Department for the operation of such equipment may be granted upon the submission of a written request stating:~~

~~(A) Name and address of the applicant;~~

~~(B) Location of the refuse burning equipment;~~

~~(C) Description of refuse burning equipment and its control apparatus;~~

~~(D) Type and quantity of refuse;~~

~~(E) Good cause for issuance of such approval;~~

~~(F) Hours during which the applicant seeks to operate the equipment;~~

~~(G) Time duration for which approval is sought.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0025; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0420

~~**340-208-0530**~~
~~**Concealment and Masking of Emissions**~~

~~(1) No person shall willfully cause or permit the installation or use of any device or use of any means such as dilution, which, without resulting in a reduction in the total amount of air contaminant emitted, conceals an emission of air contaminants which would otherwise violate OAR Chapter 340.~~

~~(2) No person shall cause or permit the installation or use of any device or use of any means designed to mask the emission of an air contaminant, which air contaminant causes or is likely to cause detriment to health, safety, or welfare of any person.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0030; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0430

~~**340-208-0540**~~
~~**Effective Capture of Air Contaminant Emissions**~~

~~Air contaminants which are, or may be, emitted to the atmosphere through doors, windows, or other openings in a structure or which are, or may be, emitted from any process not contained in a structure, shall be captured and transferred to air pollution control equipment using the most efficient and best practicable hooding, shrouding, or ducting equipment available. New sources shall comply at the time of installation.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. &cert. ef. 3-10-93; Renumbered from 340-028-0040; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0440

340-208-0550
Odor Control Measures

(1) Control apparatus and equipment, using the highest and best practicable treatment currently available, [~~shall~~][must]be installed and operated to reduce to a minimum odor-bearing gases or odor-bearing particulate matter emitted into the atmosphere.

(2) Gas effluents from incineration operations and process after-burners [~~shall~~][installed under section (1) of this rule must]be maintained at a temperature of 1,400° Fahrenheit for at least a 0.5 second residence time, or controlled in another manner determined by the Department to be equally or more effective.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0045; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0450

340-208-0560
Storage and Handling of Petroleum Products

(1) In volumes of greater than 40,000 gallons, gasoline or any volatile petroleum distillate or organic liquid having a vapor pressure of 1.5 psia or greater under actual storage conditions ~~shall~~ must be stored in pressure tanks or reservoirs, or ~~shall be stored~~ in containers equipped with a floating roof or vapor recovery system or other vapor emission control device.

(2) Gasoline or petroleum distillate tank car or tank loading facilities handling 20,000 gallons per day or more ~~shall~~ must be equipped with submersible filling devices or other vapor emission control systems.

(3) Gasoline tanks with a capacity of 500 gallons or more~~,~~ that were installed after January 1, 1970~~,~~ ~~shall~~must be equipped with a submersible filling device or other vapor emission control systems.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0050; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0460

340-208-0570
Ships

While in those portions of the Willamette River and Columbia River ~~which~~ that pass through or adjacent to Clackamas, Columbia, and Multnomah Counties, each ship ~~shall minimize emissions from soot blowing and shall be~~ is subject to the emission standards and rules for visible emissions and particulate matter size and must minimize soot emissions. The owner, operator or other responsible party must ensure that these standards and requirements are met.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0055; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0470

~~340-208-0580~~
~~Upset Condition~~

~~Emission of air contaminants in excess of applicable standards as a result of equipment breakdown shall be subject to OAR 340-214-0300 through 340-214-0360.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. &cert. ef. 3-10-93; Renumbered from 340-028-0060; DEQ4-1995, f. & cert. ef. 2-17-95; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0480

340-208-0590
Emission Standards — General

Compliance with any specific emission standard in this Division does not preclude required compliance with any other applicable emission standard or requirement contained in OAR Chapter 340.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0065; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0490

340-208-0600
Visible Air Contaminant Standards

No person ~~owning, operating, or maintaining non-fuel-burning equipment sources of emissions shall discharge into the atmosphere from any single source of emission whatsoever any air contaminant for a period or periods aggregating more than 30 seconds in any one hour which is equal to or greater than 20 percent opacity~~may allow any non-fuel-burning-equipment to discharge any air contaminant that is 20 percent opacity or greater into the atmosphere for a period of or periods totaling more than 30 seconds in any one hour.

Stat. Auth.: ORS 468 & ORS 468A.
Stats. Implemented: ORS 468.020 & ORS 468A.025.
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0070; DEQ 3-1996, f. & cert. ef. 1-29-96; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0500

340-208-0610
Particulate Matter Weight Standards

~~(1)~~ Except for equipment burning natural gas and liquefied petroleum gas, the maximum allowable emission of particulate matter~~,~~ from any fuel burning equipment ~~shall~~:

(~~a~~1) ~~Be~~ Is a function of maximum heat input ~~and be~~as determined from **Figure 1**, except that from existing fuel burning equipment utilizing wood residue, it ~~shall be~~is 0.2 grain, and from new fuel burning equipment utilizing wood residue, it ~~shall be~~is 0.1 grain per standard cubic foot of exhaust gas, corrected to 12 percent carbon dioxide;

(~~b~~2) Must ~~N~~not exceed Smoke Spot #2 for distillate fuel and #4 for residual fuel, measured by ASTM D2156-65, "Standard Method for Test for Smoke Density of the Flue Gases from Distillate Fuels".

~~(2) The maximum allowable emission of particulate matter from any refuse burning equipment shall be a function of the maximum heat input from the refuse only and shall be determined from **Figure 2.**~~

[Publications: The publication(s) referred to or incorporated by reference in this rule is available from the office of the agency.]
[ED. NOTE: The Figures referenced in this rule are not printed in the OAR Compilation. Copies are available from the agency.]
Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468.020 & ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0075; DEQ 3-1996, f. & cert. ef. 1-29-96; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0510

~~340-208-0620~~
~~Particulate Matter Size Standard~~

~~No person shall cause or permit the emission of any particulate matter which is larger than 250 microns in size provided such particulate matter does or will deposit upon the real property of another person.~~

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0080; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0520, Moved to 340-208-0450.

340-208-0630
Sulfur Dioxide Emission Standard

For any air contaminant source that may emit sulfur dioxide, no person ~~shall~~ may cause or permit emission of sulfur dioxide in excess of 1,000 ppm from any air contamination source as measured in accordance with the Department's Source Test Manual, except those persons burning natural gas, liquefied petroleum gas, or fuel conforming to provisions of rules relating to the sulfur content of fuels. This rule applies to sources installed, constructed, or modified after October 1, 1970.

[Publications: The publication(s) referred to or incorporated by reference in this rule is available from the office of the agency.]
Stat. Auth.: ORS 468 & ORS 468A.
Stats. Implemented: ORS 468.020 & ORS 468A.025.
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0085; DEQ 3-1996, f. & cert. ef. 1-29-96; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0530

~~340-208-0640~~
~~Odors~~

~~(1) No person shall cause or permit the emission of odorous matter in such manner as to contribute to a condition of air pollution, or exceed:~~

~~(a) A Scentometer No. 0 odor strength or equivalent dilution in residential and commercial areas;~~

(b) A Scentometer No. 2 odor strength or equivalent dilution in all other land use areas;
(c) Scentometer Readings: Scentometer No. and Concentration Range – No. of Thresholds, respectively:
(A) 0 – 1 to 2;
(B) 1 – 2 to 8;
(C) 2 – 8 to 32;
(D) 3 – 32 to 128.

(2) A violation of this rule shall have occurred when two measurements made within a period of one hour, separated by at least 15 minutes, off the property surrounding the air contaminant source exceeds the limitations of section (1) of this rule.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 61, f. 12-5-73, ef. 12-25-73; DEQ4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-028-0090; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0540

Benton, Linn, Marion, Polk, and Yamhill Counties

340-208-0650
Application

OAR 340-208-0650 through 340-208-0670 shall apply in Benton, Linn, Marion, Polk and Yamhill Counties.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 109, f. 3-15-76, ef. 3-25-76; DEQ 11-1982, f. & ef. 6-18-82; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-029-0001; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0600

340-208-0660
Odors

(1) Unless otherwise regulated by specific odor regulation or standard, no person shall cause or permit the emission of odorous matter:
(a) In such a manner as to cause a public nuisance; or
(b) That occurs for sufficient duration or frequency so that two measurements made within a period of one hour, separated by at least 15 minutes, off the property surrounding the emission point, that is equal to or greater than a Scentometer No. 0 or equivalent dilutions in areas used for residential, recreational, educational, institutional, hotel, retail sales or other similar purposes.

(2) In all land use areas other than those specified in subsection (1)(b) of this rule, release of odorous matter shall be prohibited if equal to or greater than a Scentometer No. 2 odor strength, or equivalent dilutions.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 11-1982, f. & ef. 6-18-82; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-029-0011; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0610

340-208-0670
Particulate Matter Size Standard

No person shall cause or permit the emission of any particulate matter which is larger than 250 microns in size provided such particulate matter does or will deposit upon real property of another person.

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468A.025
Hist.: DEQ 11-1982, f. & ef. 6-18-82; DEQ 4-1993, f. & cert. ef. 3-10-93; Renumbered from 340-029-0030; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0620

State of Oregon

Department of Environmental Quality Memorandum

To: Environmental Quality Commission **Date:** December 22, 2000

From: Stephanie Hallock, Director

Subject: Agenda Item G, January 12, 2001, EQC Meeting. Information Item: Remote Sensing of Vehicle Exhaust; Project Results in Central Oregon; Clean Air Committee of Central Oregon Recognition of DEQ Efforts

Statement of Purpose

The purpose of this information item is to provide the Environmental Quality Commission (EQC) with an overview of the Remote Sensing Project in Oregon, with emphasis on project coordination, participation and results in Central Oregon. The Clean Air Committee (CAC) of Bend awarded the Department of Environmental Quality (DEQ) a Clean Air Award as a result of the project success. A representative of the CAC will discuss the importance of the project with the EQC.

Background

DEQ received a grant from the U.S. Environmental Protection Agency to conduct remote sensing projects using specialized equipment from Georgia Tech. The purpose of the project was to measure combustion pollutants in the exhaust of on-the-road motor vehicles. The term "Remote Sensing" indicates that the monitoring equipment is not attached to the vehicle being tested. An infrared beam is cast across the road, measuring hydrocarbon, carbon monoxide and nitrogen oxide emission levels as the vehicle passes by. The quick instrument analysis allows the Department to test a large number of vehicles over a short period of time. This real time exhaust analysis is in contrast to tail pipe testing or dynomometer testing at a station where the vehicle is tested under conditions somewhat different than when on the road. The monitoring results are generally compared to vehicle emission standards and testing results from DEQ's Clean Air Stations in the Portland Metro area. In previous years the ambient air in Bend was close to failing the National Ambient Air Quality Standards (NAAQS) for carbon monoxide and fine particulate matter (PM10). The Clean Air Committee of Bend has been a volunteer-based advocate for air quality pollution prevention for over 10 years, striving to keep Central Oregon in attainmment with the NAAQS and improve awareness of air quality problems and solutions.

Vehicle emissions Remote Sensing was conducted in Salem, Woodburn, Bend, Redmond, Eugene, and Portland. DEQ-Vehicle Inspection Program (VIP) staff, consultants from Georgia Tech, and local DEQ Air Quality staff supported the field work. The Air Quality Division helped apply for the grant and coordinate the overall project. For the Bend and Redmond program, the Department

partnered with the Clean Air Committee of Bend and the Automobile Service Association (ASA) to leverage as much outreach and value out of the opportunity as possible. The use of local media and press releases and general mail helped to inform the public about the project and the importance of maintaining performance of vehicles. Approximately 20 auto repair shops joined the effort by offering discounts on tune-ups and repairs on participants' vehicles.

Procedure

Passenger cars and trucks passing through the testing area and would see either a "low", "medium" or "high" emission level indication on a readerboard. A low reading indicated that the vehicle was properly tuned and would likely pass a normal vehicle emission test, whereas a medium or high reading would not. As the vehicle approached the readerboard (where possible), a volunteer or staff person would briefly discuss the results of the test with the driver and hand them some information concerning the program. People were informed that the higher emitting vehicles actually cost the driver money because of inefficient combustion. Generally a tune up would fix the problem and save the owner fuel costs and release fewer pollutants into the air.

Results

A good response was received from the public, both during the tests and as reflected by the large number of vehicles passing through the test areas. Over 24,000 vehicles were tested during the entire project, with 9,350 vehicles tested in Central Oregon. In Bend, the DEQ and many local agencies had their entire motor pool tested. Some participants drove through the test multiple times, and the overall level of participation in Central Oregon was very good. Many participants asked why vehicle testing is not required in Central Oregon, and wanted to make sure that their vehicle was not overly contributing to local pollution problems. Although we did not collect any demographic information on the participants, all types of people and vehicles seemed to be represented.

General results showed that areas outside of Portland had twice the failure rate (approximately 11.5%) as vehicles that fail at a Clean Air Station in the Portland area (6%). The Central Oregon failure rate was slightly higher (13.9%) than other testing areas outside of Portland. The data clearly shows us that a vehicle inspection program does result in cleaner operating vehicles, and that there are many vehicles with "medium" and "high" emissions in non-VIP areas. Vehicle inspection programs are only required in areas that have exceeded the NAAQS. Programs that promote clean vehicle operations are useful as establishing an inspection program would be controversial and expensive in more rural locations.

Conclusions

The Remote Sensing equipment can be an efficient tool to measure the effectiveness of an established vehicle inspection program and to gather emissions data in areas that do not have vehicle inspection and maintenance requirements. Emissions from motor vehicles cause a large amount of pollution in Oregon, and the use of Remote Sensing equipment may be of benefit in

achieving the goal of clean, healthy air for Oregon. The testing program was a successful way to provide education and awareness in a community that does not have a vehicle inspection program. This project also provided the Clean Air Committee with information to assist their campaign of education and behaviour change as to achieve clean, healthy air.

Intended Future Actions

The Department's Vehicle Inspection Program is evaluating the purchase of similar equipment for use throughout Oregon.

Attachments
Press Release
News Articles
Remote Sensing Diagram

Approved:

Division: Peter Brewer for Joni Hammond

Report prepared by: Peter Brewer, Eastern Region AQ
Phone: 541-388-6146, ext. 243
Date: Dec. 12, 2000

Remote Sensing: A Tool for Measuring Vehicle Emissions

What is Remote Sensing?

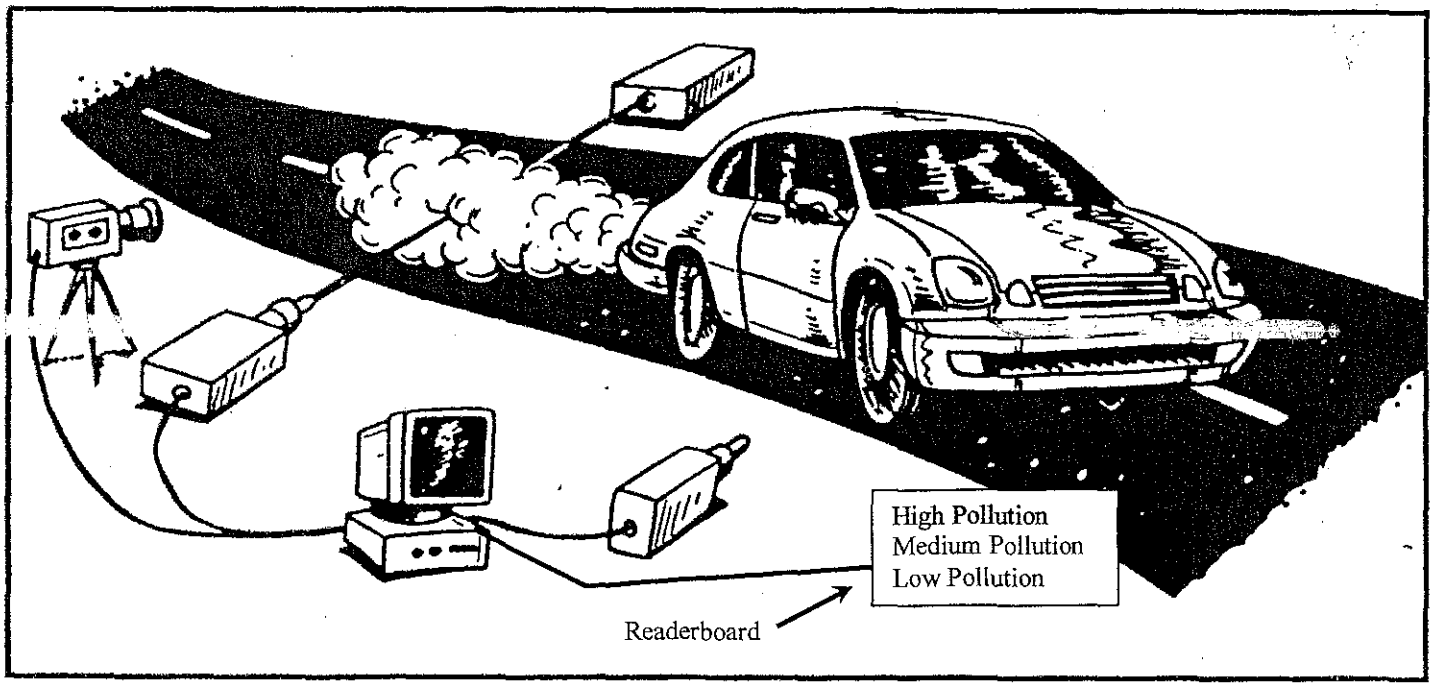
Remote sensing is a way to measure Pollutant levels in a vehicle's exhaust while the vehicle is traveling down the road. Unlike most equipment used to measure vehicle emissions today, remote sensing devices (RSD) do not need to be physically connected to the vehicle.

What Pollutants are Measured by Remote Sensing Devices?

Current RSD systems can measure a number of pollutants in the exhaust stream, including hydrocarbons, carbon monoxide and nitrogen oxides. However, RSD systems cannot measure 'evaporative" emissions - gasoline vapors that vent into the air from hot engines and fuel systems. Fuel evaporation is a very significant source of hydrocarbon pollution that can exceed tailpipe emissions on hot days.

How does Remote Sensing Work?

Commercial RSD systems employ an infrared absorption principle to measure hydrocarbon (HC) and carbon monoxide (CO) emissions. These systems operate by continuously projecting a beam of infrared radiation across a roadway.



As a vehicle passes through the beam of an RSD, the device measures the ratio of CO to carbon dioxide In front of the vehicle and in the exhaust plume behind. The system uses the 'before' measurement as a base and calculates the vehicles CO emission rate by comparing the 'behind' measurement to the expected ratio for ideal combustion.

Exhaust HC and nitrogen oxides are calculated in a similar manner.

PRESS RELEASE:

FOR MORE INFORMATION CONTACT

Dennis Hanson, Bend Clean Air Committee (541) 382-5843

Debra Elkins, Automobile Service Association (503) 682-8630

Larry Calkins, DEQ Eastern Region Air Quality Program (541) 388-6146 ext. 245

March 17, 2000

VOLUNTARY VEHICLE POLLUTION TESTING PROJECT PLANNED FOR BEND AND REDMOND

Emissions from cars are an increasing threat to air quality in Central Oregon as the population – and the number of cars of the road – continues to grow. But soon drivers in Central Oregon will be able to determine whether their cars are emitting more pollution than they should, and get a discounted tune-up if they are.

Between April 7 and April 27, 2000, the Bend Clean Air Committee, the Automobile Service Association (ASA), and the Oregon Department of Environmental Quality (DEQ) will offer free, voluntary automobile emission testing at six locations in Bend and Redmond. To participate all drivers need to do is drive past one of emission testing sites between 9:30am and 4:30pm.

Emissions are tested using a process known as remote sensing. Vehicles passing a remote sensing unit will be analyzed by an infrared sensor that determines the levels of carbon monoxide and other pollutants that are in their car's exhaust. A reader board connected to the remote sensing unit will inform drivers whether their car's emissions are "low", "medium", or "high".

A reading of medium or high indicates emissions could be reduced by a simple tune-up. ASA member shops throughout Central Oregon will offer discounted tune-ups.

Remote sensing technology is usually used in larger metropolitan areas, such as the Portland area, where emission testing is required to meet Federal Clean Air Standards. However, Greg McClarren with the Bend Clean Air Committee stresses that the testing being done in Bend and Redmond is strictly voluntary and that tune-ups are not required for cars that receive medium or high ratings.

"The intent of this project is to let people know whether their cars are running efficiently or not, and to offer discounted tune-ups if they're not. By being proactive and keeping our cars well-maintained, we can avoid the kind of air quality problems other communities in Oregon are having to deal with", said McClarren.

In other areas where remote sensing has been used, data indicates "gross polluters", about 10-15% of the cars tested, are responsible for 50% of all automobile related pollution.

For more information on remote sensing contact DEQ at TOLL FREE NUMBER 1-800-452-4011.

CLEAN AIR COMMITTEE OF BEND

NEWS RELEASE

FOR MORE INFORMATION CONTACT
Gregory McClarren, Bend Clean Air Committee (541) 923-6670
Larry Calkins, Eastern Region Air Quality Program (541) 388-6146

April 11, 2000

REMOTE SENSING UPDATE:
FREE VEHICLE POLLUTION TESTING LOCATIONS FOR APRIL 12-15

Last week over 500 Bend residents took advantage of the free, drive by vehicle pollution testing being offered by the Bend Clean Air Committee, the Automobile Service Association (ASA), and the Oregon Department of Environmental Quality.

This week the drive by testing equipment will be located on southbound 27th Street south of Neff Road on Wednesday and Thursday and at the Fred Meyer parking lot in Redmond on Friday and Saturday. To participate all drivers need to do is drive past the emission testing sites between 9:30am and 4:30pm.

Car-shaped refrigerator magnets will be offered to drivers who have their emissions tested Friday or Saturday at the Fred Meyer parking lot in Redmond.

Emissions are tested using a process known as remote sensing. Vehicles passing a remote sensing unit will be analyzed by an infrared sensor that determines the levels of carbon monoxide and other pollutants that are in their car's exhaust. A readerboard connected to the remote sensing unit will inform drivers whether their car's emissions are "low", "medium", or "high".

A reading of medium or high indicates emissions could be reduced by a simple tune-up. Discounted tune-up will be offered by ASA member shops throughout Central Oregon.

For more information on remote sensing contact DEQ at (541) 388-6146 extension 245.

Car emission testing is being offered at the following locations between 9:30am and 4:30pm:

April 12-13	Bend	Southbound 27th Street south of Neff Road
April 14-15	Redmond	Fred Meyer parking lot
April 19-20	Bend	Southbound Division Street south of Highway 97
April 21-22	Bend	Bend River Mall behind Bon Marche
April 26-27	Bend	Eastbound Reed Market Road east of 15th Street
April 28-29	Bend	Southbound 27th Street south of Butler Market Store

Bend Clean Air Committee

TRUCKING & TRANSPORTATIO

Central Oregon Motorists Care About Clean Air

This f

by TOM HAMILTON, CBN Feature Writer

Central Oregonian motorists really do care about clean air. That much was evident as nearly 10,000 motorists in Bend and Redmond volunteered to have their auto emissions tested during a month-long free program conducted by the Bend Clean Air Committee, the Automobile Service Association and the Oregon Department of Environmental Quality.

The program [illegible] motorists whether their

EDITORIALS

Bend Bulletin 4/07/00

No reason to skip emissions test

Starting today at the Bend Wal-Mart, the Department of Environmental Quality will offer free auto emissions testing to Central Oregonians. While there is no law against driving a pollution-spewing vehicle, it is in everyone's best interest for car and truck owners to take a few minutes and have the test done.

The test itself could hardly be easier. Vehicle owners simply drive past an infrared detector which analyzes exhaust gases. A computer looks at the data and figures out what the exhaust contains. If there are borderline or dangerous levels of environmentally harmful pollutants present, the owner is informed immediately.

The DEQ will not and cannot hand out tickets or fines for failing the test. The only possible penalty is a guilty conscience upon discovering that one has been polluting the air we all breathe. Excessive pollutants in the exhaust also indicate one's automobile is not running optimally. Poor engine efficiency means more money spent on gas, a costly proposition these days.

The good news is that in most cases, eliminating the excess pollution from the exhaust and restoring the engine to peak performance is as simple as a tune-up or minor repair. While one will not be required to make these repairs after failing the test, the DEQ has partnered with several certified repair shops that will offer discounts on pollution-related work. DEQ staff at the testing sites can provide the details.

There is no reason for vehicle owners not to participate in the test during the next few weeks. We owe it to everyone else who breathes in Central Oregon and might just save ourselves a few dollars in the process.

For details on test days and locations visit the DEQ Web site at www.deq.state.or.us.

Metro CLOSE-UP **Commuting**

Monday	Commuting	221-8199
Tuesday	Schools	294-5064
Wednesday	Public Life	294-5123
Thursday	Public Safety	294-5055
Friday	Environment	294-5122

The Oregonian 4/03/00

DEQ offers motorists in rural areas chance to test their autos' emissions

CLEAR The Air

For Citizens of Deschutes County from the Clean Air Committee "Dedicated to Keeping Our Air Clean" Spring/Summer 2000

CLEAN AIR AWARDS

Award Shared By Cascade Pumice And DEQ

Two seeming adversaries in the pollution arena are co-winners of the 1999 Clear The Air Award. Cascade Pumice Company and the Oregon Department of Environmental Quality were honored by the Clean Air Committee for their efforts to reduce Central Oregon's air pollution at the July 5 Bend City Council meeting.

Dugan Pearsall, President of Cascade Pumice, led a unique corporate effort to mitigate any air pollution associated with a mining pit operation near Tumalo. Concerned about the effects of its pumice mine on neighboring residents, Cascade Pumice voluntarily prepared a dust abatement plan and performed on-going air monitoring over the lifetime of the mine's five-year operation. While continuously monitoring meteoro- necessary to operate a surface mine," said John Head, a Clean Air Committee member. "It proved that mines can be operated without adversely impacting ambient air quality."

The annual honor was shared with the Oregon Department of Environment Quality's Vehicle Inspection Program. DEQ promoted Central Oregon over other nationwide applicants for a month-long introduction of the laser-based technology. The technology, developed by Georgia Tech University, was nationally introduced in Bend. "The DEQ people in Portland really pulled this off for Bend," said Gregory McClarren. "They devoted a tremendous amount of personal time and effort to make this pollution-awareness effort a success here."

State of Oregon Department of Environmental Quality

The Clear The Air Award is given annually by the Clean Air Committee to those who have made an outstanding contribution toward improvement of the area's air quality.

BULLETIN FILE PHOTO

Central Oregon Cars Pass Physical

Over 9,800 Central Oregonians tested their vehicles for emissions during the Clean Air crossed the roadway. The light was reflected back to an analyzer and information sent to a com-

State of Oregon

Department of Environmental Quality Memorandum

Date: December 22, 2000

To: Environmental Quality Commission

From: Stephanie Hallock, Director S. Hallock

Subject: Agenda Item H, January 12, 2001, EQC Meeting. Information Item; Revisions to Point Source Air Management Rules (New Source Review, Plant Site Emission Limit, and Air Quality Permitting Requirements)

Statement of Purpose

The purpose of this information item is to provide the Environmental Quality Commission (EQC, Commission) with an overview of proposed major rule revisions to Oregon's Air Quality point source permitting program. This information is a preview of changes the Department of Environmental Quality (DEQ, Department) will present to the Commission for action at the March, 2001 meeting. The overview will highlight the rationale, process, and key proposed changes to the permitting program.

Background

The Department is proposing to modify sixteen Air Quality Administrative Rule Divisions; two new Divisions will also be created. These proposed changes are designed to clarify existing rules and improve the efficiency of Air Quality's permitting work. The proposed improvements include:

- Simpler permitting procedures
- Greater use of general permits
- Less need for permit modifications
- Simpler emission trading options
- Improved construction approval procedures
- Better targeted public involvement
- Simpler fees and billings
- Clearer applications and other requirements

A full explanation of the major concepts proposed in this rulemaking package is attached, and includes a division-by-division detail of the location of the proposed changes.

The Department expects resource savings of approximately five full time positions once the proposed rule revisions are fully implemented over the next seven years. The proposed rules will allow the Department to maintain the same level of environmental protection from permitted

facilities with fewer resources, allowing the Department to focus on high priority work to protect air quality. It is important to note that the proposed rules are not intended to increase or decrease the overall stringency of the point source regulatory program but will allow the Department to achieve the current level of environmental protection with fewer resources.

Rule Development and Outreach

This rulemaking has undergone one of the most extensive public outreach efforts in the history of the Air Quality Permitting Program. This proposed rulemaking was developed by a Department work group plus representatives from Lane Regional Air Pollution Authority (LRAPA) and the United States Environmental Protection Agency (EPA). The work group's efforts stemmed from previous recommendations by Industrial Source Advisory Committees from 1994 through 1996. The work group also relied on results of an intensive internal process assessment conducted in 1998. The work group conducted multiple, multi-day work sessions during 1999 to develop issues and propose solutions. That effort resulted in an extensive list of recommended changes that were subsequently critiqued by Department permit writers and inspectors.

Over the last year and one-half, Department staff presented the rulemaking proposal to approximately 260 individuals representing small to large industry, consultants, attorneys, and environmental groups. Presentations were made to permitted sources and interested parties in Portland, Salem, Springfield, Bend, Pendleton and Medford. Department permit writers and inspectors, the Oregon Department of Justice, and EPA also thoroughly reviewed initial versions of the draft rules.

A pre-public notice draft of the proposed rules was presented in a large meeting to industry and environmental stakeholders at the Department's headquarters in Portland on September 27, 2000. This presentation outlined the changes, identified where the work group recommendations were located in the draft rules, and answered questions about the proposal. Issues identified during this process were addressed and are included in the rulemaking proposal.The Department also conducted 6 workshops in conjunction with the rulemaking public hearings December 5 through 7, 2000. Approximately forty individuals, representing small to large industry, consultants, lawyers, and environmental interests attended the workshops. A complete list of those who attended the statewide presentations and workshops is available for review.

The Department is still in the process of reviewing public input on this rulemaking. However, some general findings can be made at this time:

- There is a great deal of support for the Department's streamlining objectives from all stakeholders;

- Several specifics (highlighted in the attachment) have become controversial, notably:
  - combining and splitting sources (definition of "adjacent");
  - reduction of unassigned emissions;
  - elimination of short term Plant Site Emission Limits;
  - the proposed method for identifying impacts from ozone precursors;
- These proposals may be perceived by stakeholders as more or less stringent than the current rules depending on the particular circumstance;
- Much of the concern about these proposals stems from the overall volume of changes and the interdependencies of the requirements.

Conclusions

- The proposed revisions are essential to implement the permitting program in an efficient manner.
- An extensive outreach effort has been conducted.
- Streamlining, efficiency and resource savings will be accomplished by the proposed rule revisions.
- The proposed rules are not intended to increase or decrease the overall environmental protection provided by the point source permitting program. However, the expected streamlining will allow the Department to achieve the current level of environmental protection more efficiently.

Intended Future Actions

The Department will review and evaluate the rulemaking proposal in light of all information received during the comment period. Following review, the rules may be presented to the EQC as originally proposed or with modifications made in response to public comments received. The targeted EQC meeting date for consideration of this rulemaking proposal is March 9, 2001. This date may be delayed if needed to provide additional time for evaluation and response to comments received in the hearing process.

Once the rules are adopted, the Department will issue new general permits, and assign all existing permitted sources to the appropriate permit type. This activity must be completed by Fall, 2001 so that permit fee invoicing will be accurate.

It is important to note that the total fee revenue generated under the restructured ACDP Program will be equal to the current fee revenue, although individual permitees may have higher or lower fees depending on the permit type they require. In addition, the Governor's recommended budget includes a fee increase to replace general fund and maintain the current staffing level in the program. If approved by the Legislature, this fee increase will be proposed for adoption by the Commission in Summer, 2001.

Attachments

Attached is a summary of the proposed rule revisions that was provided to the public during the comment period. This summary describes the proposed changes and the expected effects on the permitting process.

Reference Documents (available upon request)

Public Notice Draft copy of proposed rule revisions (redline/strike-out version)
Fifteen major rule revision concepts, developed by internal work groups
Fact sheets and stakeholder outreach materials
Stakeholder outreach attendee lists

Approved:

Section:

Division:

Report Prepared By: David Kauth
Phone: 503-229-5655
Date Prepared: December 22, 2000

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal

for

Revisions to Point Source Air Management Rules (New Source Review, Plant Site Emission Limit, and Air Quality permitting Requirements)

Summary of Rule Changes

Summary of Proposed Major Concept Changes

The Air Quality Division is proposing significant changes to its permitting rules in an effort to maximize efficiencies in the program, while maintaining the existing level of environmental protection. These changes are part of the implementation phase of the Department's air permit streamlining project.

The major concepts covered by the proposed changes to the AQ permitting rules are listed below. Concepts that are expected to receive substantial comments are highlighted with "*" and **bold**.

Permitting:

- General Permits – increased use of permits that apply to categories of businesses that are all subject to the same requirements
- * **Combining and splitting sources –a standard procedure to address netting basis, New Source Review (NSR) and Plant site Emission Limit (PSEL) for multiple sources that become one or one source that becomes multiple**
- Generic bubble authority – realignment of bubble authority with EPA rules and guidance
- Notice of Construction – combine and simplify construction approval requirements

Plant Site Emission Limits:

- Generic PSELs – alternative to individual limits for smaller emission sources
- Potential to Emit (PTE)– make the PSEL into a PTE limit by changing it to a rolling 12 month rather than a calendar year limit
- * **Short Term PSEL – eliminate the short term PSEL where there is not existing authority to deny an increase**
- * **Unassigned Emissions – define and limit approved emissions that exceed a facility's ability to emit due to changes made that have reduced capacity**

New Source Review:

- NSR streamlining– simplify applicability and eliminate procedures with no environmental value
- Netting Basis – define emission level that is used for comparison to proposed increases, for the purpose of determining the appropriate review requirements
- Emission Reduction Credit (ERC) – clarify procedures to create and bank emission reductions due to over control or shutdown.

- Offsets – standard procedure to determine the required offsets when a source triggers NSR
- Pre-construction Monitoring – establish alternatives to pre-construction monitoring through modeling and post construction monitoring
- * **Ozone precursors – improve the analysis of ambient impacts on ozone areas due to NOx and VOC emissions increases**

Public Participation:

- Public Participation – improves effectiveness of public's ability to comment on proposed permit actions and focuses the Department's resources on changes that have environmental significance

The following summaries briefly explain each of the above listed major concepts.

Permitting

General Air Contaminant Discharge Permits:

The proposed rule changes expand the Department's ability to write permits for categories of businesses instead of individual permits. These permits, known as General Air Contaminant Discharge Permits (ACDPs), allow the permittee to operate as if it had a source specific permit. Individual businesses are 'assigned' to the General ACDP if they meet the criteria for the General ACDP. Businesses that are required to have a permit but do not fit the parameters of an existing General ACDP will still need an individual ACDP.

Expanding the use of general permits will be possible because of changes in the PSEL rules to allow for "Generic PSELs" (see below).

For example, the Department currently has 214 issued permits for rock crushers. Of these, 143 rock crushers have individualized permits with PSELs established based on the source's expected amount of rock crushed per year for the next five years. Almost all of these permits have the same conditions, whether the business crushes 10,000 tons of rock per year or 1,000,000 tons of rock per year. In fact, stricter regulations do not apply to these businesses unless they crush more than 1,180,000 tons of rock in any twelve-month period. Therefore, a general ACDP can be issued for most rock crushers with a generic PSEL set below the level that triggers new requirements.

Fees for General ACDPs will be less than fees for other types of ACDPs. General ACDPs will have three cost categories that are based on the type of source.

The proposed rule changes will not affect how the Department conducts inspections and enforcement because inspections and enforcement are not dependent on whether a business is on a general or individual permit.

Combining and splitting sources:

The proposed rule changes set forth procedures for combining facilities when they meet the definition of a single source, and for splitting one source into multiple sources when they no longer meet the definition of one source. Two sources that become one source

could combine their netting basis, but would get only one significant emission rate (SER). One source that splits could divide its netting basis and SER however it wants, but the new sources will not get multiple SERs unless one or more of them satisfies the New Source Review requirements.

A formal process is needed to ensure that sources are being treated consistently statewide when they combine or split their operations. The proposed rules define source as: 1) Being under common ownership or control, 2) Having a common 2 digit standard industrial classification or supporting the major 2 digit SIC, and 3) Being on contiguous or adjacent properties. The proposed rules define "adjacent" as interdependent and nearby, consistent with EPA guidance. This will allow for simplified processing of requests to split or combine operations and also will allow a source to move to a new adjacent site without having to get a new permit if the time between operation at the old and new sites is less than six months.

Generic bubble authority

A "bubble" is an alternative emission control concept that allows one device to exceed a specific limit if another device at the same site is over-controlled and the combined emissions will meet the limit of all devices included in the bubble. Bubbles must be specifically addressed in a permit if they are going to be used. The proposed rule revisions make the Department's bubble authority consistent with EPA's requirements. The Department will have authority to approve simple bubbles on its own. Complex bubbles will require EPA approval either through a SIP revision or a Title V permit.

Notice of Intent to Construct and Notice of Approval:

The proposed rule changes combine the two construction approval programs into one set of rules to clarify and streamline the procedural requirements. Those changes with the highest environmental and public health significance will receive the most scrutiny. Proposed changes that are of low environmental and public health significance may proceed ten days after submitting the required information. The proposed changes establish different levels of review and approval for four types of construction changes:

1. Type 1 changes have no increase in emissions from individual stationary sources and no increase in PSEL. Type 1 changes have a 10 day notice to the Department and approval procedure.
2. Type 2 changes may have increased emissions from individual stationary sources less than the significance level but with no increase in the PSEL. Type 2 changes have a 60 day notice and approval procedure.
3. Type 3 changes may increase emissions from individual stationary sources by less than the significance level and may increase the PSEL up to the significance levels. A Construction ACDP or a new or modified Standard ACDP is required for approval of Type 3 changes.
4. Type 4 changes increase emissions from individual stationary sources by more than the significance level or may increase the PSEL by more than the significance level. A new or modified Standard ACDP is required for approval of Type 4 changes.

The proposed rules exempt certain activities, such as installing a domestic heating system, from notice of construction. The proposal also clarifies the types of construction changes that need operating permits before operation can begin.

Plant Site Emissions Limit

Generic Plant Site Emission Limit:
The proposed rule revisions will create an optional Generic PSEL as an alternative to individually calculated PSELs. This Generic PSEL streamlines the permitting process by eliminating source-specific emission calculations for the purpose of setting limits in the permit. It also greatly reduces the number of permit modifications that must be processed because it eliminates the need for small increases in the PSEL.

The proposed rules set generic PSELs at a level just below the significant emission rate, which is the level where additional air quality analysis is required. Sources with emissions less than the significant emission rate will qualify for a Generic PSEL instead of a source-specific PSEL. A source may opt for a generic PSEL for one or more pollutants. A source may not retain baseline emissions for pollutants with generic PSELs. Any increase above the Generic PSEL will require a source-specific PSEL and additional air quality analysis.

Generic PSELs can be used within General Permits (see above). Generic PSELs can also be used to establish enforceable limits to keep emissions below the thresholds for major New Source Review and Title V.

Make the PSEL into a potential to emit (PTE) limit:

By establishing a rolling 12 month PSEL, instead of a calendar year PSEL, the PSEL would limit a source's potential to emit. The rolling 12 month basis is needed to make a limit of a source's potential to emit practically enforceable. This will eliminate the need for other production-related emission caps to keep sources from triggering other air quality requirements, such as New Source Review and Title V. Generic, as well as source-specific PSELs, may be used to establish the PTE limit. Demonstration of compliance with the PSEL will also show compliance with the PTE limit. Permittees will have the opportunity to adjust their baseline emission rate (see netting basis below) to a rolling 12 month basis, if needed.

Eliminate the Short Term PSEL:
The existing rules require a short term PSEL in all regular permits. But in most of the state there are no restrictions or trigger levels that require additional analysis to increase the short term limit. The proposed rule revisions eliminate the short term PSEL for all pollutants in all areas of the state except where there is a short term SER established in the rules. The only area that currently has a short term SER is the Medford/Ashland Air Quality Maintenance Area for PM_{10}. Other areas of the state may be added in the future if it is determined that short term Plant Site Emission Limits are necessary to attain or maintain the ambient air quality standards. This change reduces the work load of establishing short term PSELs where there is no environmental benefit, and eliminates permit modifications to change a short term PSEL where there is no basis to deny the change. This change does not affect other existing short term limits, such as opacity or grain loading, in the rules that are important to protect air quality.

Unassigned Emissions:
The proposed rule revisions define unassigned emissions as the difference between the netting basis (see below) and the source's current PTE, after taking into account banked emission reduction credits (see below). If current PTE is equal to or greater than the netting basis, then a facility has no unassigned emissions.

This proposed rule revision sets up a consistent way of establishing and managing unassigned emissions. If a facility adds new emitting equipment, unassigned emissions can be used to offset the emissions increase through a permit modification. The proposed rule also limits the total amount of unassigned emissions that can be maintained at a facility and establishes a process to reduce excess unassigned emissions over time. The owner or operator may maintain part or all of the unassigned emissions for one permit cycle by submitting a plan for use in internal netting within that permit cycle. This time period can be extended by 10 years if a facility banks a voluntary reduction of actual emissions within two years of the reduction. This allows facilities to plan for growth and streamlines the Department's process of meeting and maintaining air quality standards.

New Source Review

New Source Review Streamlining:
The proposed rules transfer approval of emission increases at smaller sources (below federal emission thresholds) to the Plant Site Emission Limit Rules rather than the NSR rules if located in areas that meet air quality standards. This results in the same level of environmental protection with less administrative burden. The changes also eliminate some procedural steps that duplicate other requirements or do not add environmental value for facilities below federal emission thresholds. In addition, the changes clarify and consolidate analytical requirements and exempt environmentally beneficial pollution control facilities from NSR. This eliminates the administrative burden without jeopardizing air quality.

Netting Basis:
The Department proposes to add the definition of netting basis to clarify permitting requirements relating to emission increases.

The proposed definition of netting basis is:

Baseline emission rate

MINUS	reductions required by rule or order
MINUS	unassigned emissions that have been reduced
MINUS	emission reduction credits transferred offsite
PLUS	increases approved by NSR

When a facility proposes to increase emissions, the netting basis is compared to the requested PSEL to determine if more stringent review is required.

In addition to defining the netting basis, the Department also proposes that all baseline emission rates be frozen with the first permitting action after July 1, 2002. Re-establishing the baseline emission rate for any business is very resource intensive because finding adequate 1977 or 1978 records to justify the change is very difficult. The time between July 1, 2001, the effective date of the rules, and July 1, 2002 will allow facilities to make changes needed to correspond to changes in the PSEL rule (e.g., 12 month

rolling vs. calendar year limit). The proposed rule allows future changes to the baseline emission rate only when better emission factors are established, an emissions unit that is part of the current facility's operation was erroneously believed to have negligible emissions, or when a new pollutant is added to, or removed from, the list of regulated pollutants.

Emission Reduction Credits (ERC):

The proposed changes to OAR 340 Division 268 clarify what constitutes a valid ERC, how to create one and how to extend its life through banking. Only actual emission reductions will be used as ERCs. Existing source over-control, partial and total source shutdowns, and curtailments are acceptable for creating ERCs if the emission reductions are actual, permanent, surplus, and enforceable. Previous restrictions on banking shutdown credits will be removed as a result of the unassigned emissions program (see Unassigned Emissions above). These two changes must go hand-in-hand to maintain the current level of environmental protection.

Applications for banking ERCs must be made within the two-year contemporaneous time period starting when the actual emission reduction occurs. Banking extends the life of ERCs to ten years from the actual reduction. Banked ERCs would be protected from rule-required reductions during the banked period unless the Environmental Quality Commission specifically determines that they must be reduced as part of attainment or maintenance plan requirements.

All unbanked ERCs, that are not transferred offsite, would expire at the end of the contemporaneous 2 year time period and become unassigned emissions.

Banked ERCs are different from unassigned emissions because they can be transferred to another source through a NSR action for up to 10 years after the reduction occurred. Unassigned emissions can only be used at the source that created them after the 2 year contemporaneous period expires.

Requirements for offsets:

The New Source Review rules use the term "offsets" to refer to an equal or greater reduction in emissions at one site to mitigate the increase in emissions from a second site. Offsets may come from ERCs at other sources that were created during the prior 2 years or banked within the past 10 years. The intent of offsets is to improve the air quality in the area of the new or modified facility. The proposed rule revisions clarify the offset requirements and bring them all together in one location in the rules.

Alternatives to preconstruction monitoring:

Major new sources and major modifications at existing sources that are subject to New Source Review, may also be subject to preconstruction ambient air quality monitoring. The proposed rule revisions allow an alternative to preconstruction monitoring if worst case modeling shows that impacts will not cause or contribute to a violation of ambient air quality standards. The alternative also requires post-construction monitoring after the facility is built and operating.

Ambient impacts of ozone precursors

Volatile Organic Compound (VOC) and Nitrogen Oxide (NO_x) emissions promote the formation of ozone and are regulated under the NSR rules for ozone. The Department has conducted modeling to determine what size source at what distance will cause an impact on ozone nonattainment and maintenance areas. The proposed rules include an equation relating size and distance to determine if VOC and NO_x sources within 100 kilometers of a sensitive area cause impacts on the area. This evaluation is necessary to satisfy EPA requirements that ozone impacts from precursors are being addressed sufficiently. Sources found to cause impacts on nonattainment or maintenance areas must address these impacts as required by the PSEL or NSR rules.

Public Participation

Public Participation:

The proposed rule changes establish four different categories of proposed permit actions:

1. Category I changes are not environmentally significant and do not involve choices made by the Department (e.g., facility name change). For these actions, there is no prior public notice, but a list of permit actions will periodically be made available for public review after the changes have been made;
2. Category II changes have the potential for low to medium environmental and public health significance (e.g., renewing a simple permit). For these actions, there will be a 30 day public notice period, but there will not be a public hearing;
3. Category III changes have the potential for medium to high environmental and public health significance (e.g., increasing the Plant Site Emission Limit). For these actions there will be a 35 day public notice period and a hearing if requested by 10 or more people or if pre-scheduled by the Department;
4. Category IV changes have the potential for high environmental and public health significance (e.g., siting a new major facility). For these actions, there will be a public notice when the **application** is submitted and an informational hearing prior to drafting a proposed permit. Once the proposed permit is drafted, there will be a 40-day public notice period and a public hearing is required.

These changes are consistent with changes recently adopted for the Department's Solid Waste and Water Quality programs. The Department believes that the proposed changes will improve the effectiveness of the public's ability to participate in the appropriate public notice process.

In addition, the changes will help the Department to streamline the public notice process by focusing public comment on changes that have the potential for environmental significance and permit conditions that involve choices made by the Department under the rules.

Rule-by-Rule Description of Changes

Rule number	Description of changes
DIVISION 12 – ENFORCEMENT PROCEDURES AND CIVIL PENALTIES	
340-012-0042	Added violation class and associated penalties that are not in table form, so they will be included in the Secretary of State version of the rules.
340-012-0050 & 0065	Added and changed specific items to address problems with enforcement and to correctly relate to the changes in the permitting system.
DIVISION 14 – PROCEDURES FOR ISSUANCE, DENIAL, MODIFICATION, AND REVOCATION OF AIR CONTAMINANT DISCHARGE PERMITS; GREEN PERMITS	
340-014	Deleted permit issuance procedures from this division and transferred them to divisions 209, 210 and 216
DIVISION 200 – GENERAL AIR POLLUTION PROCEDURES AND DEFINITIONS	
340-200-0020	Created new definitions for: • Adjacent facilities • Capacity • De minimis emission level • Generic PSEL • Modification • Unassigned Emissions • Netting Basis • Federal Major • Year Modified definitions for: • Actual emissions • Air Contaminant Discharge Permit (removes review report from definition) • Large Source (Definition moved to division 214) • Major Modification • Small Source (Definition moved to division 214) • Total Suspended Particulate (Definition deleted) • Significant Emission Rate (Deleted hourly rate for Medford-Ashland AQMA.
340-200-0025	Created a list of Abbreviations and Acronyms
DIVISION 202 – AMBIENT AIR QUALITY STANDARDS AND PSD INCREMENTS	
340-202-0010	Deleted definitions also contained in division 200 • CFR • Federal Land Manager • Particulate Matter • PM_{10} • Total Suspended Particulate or TSP (deleted)
340-202-0060	Deleted reference to Total Suspended Particulate and TSP. This standard was replaced by PM_{10} but never removed from the rules.

Rule number	Description of changes
340-202-0120	Deleted
DIVISION 204 – DESIGNATION OF AIR QUALITY AREAS	
340-204-0030	Added the Salem-Kaiser Area Transportation Study as a designated Ozone nonattainment area due to a change in the federal designation and requirements for New Source Review.
DIVISION 209 – PUBLIC PARTICIPATION	
340-209	This is a new division that contains all of the public participation procedures and requirements for issuing permits that used to be in Divisions 14 (general requirements), 216 (ACDPs), 218 (Title V permits), and 224 (New Source Review). This new division incorporates the public participation policies recently developed as a result of an agency-wide review. Public participation procedures for four categories of permit actions are established in 340-209-0030. (Divisions 210, 216 and 218 assign permit actions to public participation procedures established in division 209)
DIVISION 210 – STATIONARY SOURCE NOTIFICATION REQUIREMENTS	
340-210	Repealed old provisions for approving construction or modification activities and replaced them with revised provisions for improving the effectiveness of the program and combining the Notice of Approval requirements from the Title V permit program.
340-210-0205	Clarifies the applicability of the notice rules.
340-210-0215	Clarifies the notice requirements.
340-210-0225	Defines 4 types of construction and modification changes based on magnitude of the emission changes and the degree to which the Department has discretion in implementing the regulations.
340-210-0230	Clarifies the information required in a notice.
340-210-0240	Adds approval provisions for each type of construction and modification change.
340-210-0250	Adds provisions and links to other regulations for approval to operate construction/modification changes.
DIVISION 212 – STATIONARY SOURCE TESTING AND MONITORING	
340-212-0160	Deleted. Moved to division 214.
DIVISION 214 – STATIONARY SOURCE REPORTING REQUIREMENTS	
340-214-0010	Added definitions moved from division 200 for: • Large Source • Small Source
340-214-0114	Added "Records; Maintaining and Reporting" moved from 340-212-0160.
DIVISION 216 – AIR CONTAMINANT DISCHARGE PERMITS	
340-216-0010	Clarifies the purpose of the ACDP division
340-216-0020	Clarifies the applicability provisions, including adding a road map to the type of permits.
340-216-0030	Adds a definition of "permit modification"
340-216-0040	Clarifies the permit application requirements and incorporates the provisions from old Division 14.
340-216-0050	Public Notice provisions are repealed and incorporated into Division 209.

Rule number	Description of changes
340-216-0052	Adds provisions for a new Construction ACDP for type 3 changes defined in Division 210. This is an optional permit for ACDP sources and a mandatory permit for Title V sources undergoing construction or modification that requires public notice for type 3 changes.
340-216-0054	Adds provisions for issuing a Short Term ACDP in emergency situations. A Short Term ACDP expires in 60 days.
340-216-0056	Adds provisions for issuing a Regulated Source ACDP to sources required to obtain a permit, but not required to obtain a Simple or Standard ACDP. A Regulated Source ACDP is a letter permit that may be issued for up to 10 years.
340-216-0060	Revises the General ACDP permit requirements to address both issuing the permits and assigning sources to the permits.
340-216-0064	Adds provisions for issuing Simple ACDPs that can be used for sources required to obtain permits but have emissions less than the significant emission rate for all pollutants. These permits are issued for 5 years.
340-216-0066	Adds provisions for issuing Standard ACDPs.
340-216-0070	Revises the requirements for permitting multiple sources at a single adjacent or contiguous site.
340-216-0080	Repeals the provisions for issuing synthetic minor permits because with the other changes being made to the PSEL rules, it will no longer be necessary to issue synthetic minor permits. ACDP will be or could be a synthetic minor permit.
340-216-0082	Adds the provisions to terminate and revoke ACDPs from old Division 14.
340-216-0084	Adds provisions for Department initiated modifications from old Division 14.
340-216-0090	Revises the fee structure to be based on the type of permit issued rather than the type of source and establishes what type of permit is required for each type of source.
DIVISION 218 – OREGON TITLE V OPERATING PERMITS	
340-218-0190	Construction and Operation Modifications are deleted from this rule. Moved to division 210.
340-218-0210	Deleted Public Participation procedures and moved them to division 209
DIVISION 220 – OREGON TITLE V OPERATING PERMIT FEES	
340-220-0020	Deletes outdated cross references.
340-220-0060	Adds requirement regarding fee applicability for newly regulated pollutants.
DIVISION 222 – STATIONARY SOURCE PLANT SITE EMISSION LIMITS	
340-222-0020	Clarifies applicability and establishes de minimis levels for the PSEL.
340-222-0040 to 0043	Modifies procedures for establishing and increasing PSELs.
340-222-0045	Adds formal procedures for handling unassigned emissions.
340-222-0080	Adds PSEL compliance method requirements for permits.
340-222-0090	Adds formal procedure for combining and splitting sources and associated emissions.
DIVISION 224 – MAJOR NEW SOURCE REVIEW	
340-224-0030	Deleted procedural requirements for permit application and processing

Rule number	Description of changes
	of a permit. Incorporated into division 216.
340-224-0050	Expanded Lowest Achievable Emission Rate language to address prior changes that become subject to New Source Review after they are legally permitted. Deleted redundant requirements for non federal major sources.
340-224-0060	Expanded Best Available Control Technology language to address prior changes that become subject to NSR after they are legally permitted. Consolidated growth allowance requirements into this rule from other areas of the rules for clarity. Deleted references to the Medford Ashland AQMA for ozone because there is no established growth allowance in this area.
340-224-0070	Expanded Best Available Control Technology language to address prior changes that become subject to NSR after they are legally permitted. Deleted Air Quality analysis, Air Quality monitoring, and Additional Impact analysis. These requirements have been incorporated into the new division 225.
340-224-0080	Deleted most exemptions from the NSR requirements. These exemptions are moved to the definition of Major Modification.
340-224-0090	Deleted requirements for Net Air Quality Benefit. These requirements have been moved to 340-225-0090.
340-224-0110	Deleted Visibility Impact. The requirements are now in division 225.
DIVISION 225 – AIR QUALITY ANALYSIS REQUIREMENTS	
340-225	New division incorporates all of the Modeling, Monitoring, Impact Analysis, and Net Air Quality Benefit requirements that are necessary to ensure air quality standards are being met. These requirements were previously addressed in division 224.
DIVISION 226 – GENERAL EMISSION STANDARDS	
340-226-0400	Updates and clarifies the requirements for Alternative Emission Controls (Bubble).
DIVISION 240 – RULES FOR AREAS WITH UNIQUE AIR QUALITY NEEDS	
340-240-0180, 0190 & 0242	Modifies the wording for consistency with the revisions to the permit types in the permitting program.
340-240-0260	Rule deleted. Requirements moved to Net Air Quality Benefit in 340-225-0090.
DIVISION 268 – EMISSION REDUCTION CREDITS	
340-268	Establishes specific procedures to generate, bank and use Emission Reduction Credits (ERC). Creates a new ERC Permit to allow the implementation of the ERC rules where other permits are not required for the source.
ALL DIVISIONS	
All rules	Wording changes that clarify the meaning and correct the grammar without affecting the intent of the rule are being made as part of this rulemaking package.

State of Oregon
Department of Environmental Quality **Memorandum**

Date: December 29, 2000

To: Environmental Quality Commission

From: Stephanie Hallock

Subject: Agenda Item I, Repeal of OAR 340-41-0470(9) - The Tualatin Sub-basin TMDL Rule for Total Phosphorus and Ammonia, EQC Meeting January 11-12, 2001

Background

On October 3, 2000, the Director authorized the Northwest Region to proceed to a rulemaking hearing on the proposed repeal of Oregon Administrative Rule (OAR) 340-41-0470(9) which is the Tualatin Sub-basin Total Maximum Daily Load (TMDL) Rule for Total Phosphorus and Ammonia.

Pursuant to the authorization, a hearing notice was published in the Secretary of State's Bulletin on November 15, 2000. 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 in the Tualatin Sub-basin.

A Public Hearing was held on December 18, 2000 with Neil Mullane serving as Presiding Officer. Written comment was received through December 19, 2000. The Presiding Officer's Report (Attachment C) summarizes the oral testimony presented at the hearing and the written comments received. (Written comments received are included in Attachment C)

Department staff have evaluated the comments received (Attachment D). Based upon that evaluation, modifications to the initial repeal 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 and a recommendation for Commission action.

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

Issue this Proposed Rulemaking Action is Intended to Address

This proposal would repeal OAR 340-41-0470(9). OAR 340-41-0470(9) established the following, in 1988, by rule:

- the total phosphorus and ammonia Total Maximum Daily Loads (TMDLs), expressed in terms of monthly median concentrations at the mouths of tributaries and along the mainstem of the Tualatin River (which were submitted to the Environmental Protection Agency (EPA) and subsequently approved);
- requirements for program plans to be submitted to the Department; and
- a date for achieving the concentrations.

The Department proposes to repeal this rule as it is redundant and covered under other authorities. When submitted to EPA, the TMDLs are in the form of a Department Order. As required under the Federal Clean Water Act (CWA), TMDLs are approved by EPA and Waste Load Allocations are assigned to point sources by the Department and incorporated into NPDES permits. Load Allocations for forest operations on private and state forest lands are implemented through rules adopted by the Board of Forestry under the Forest Practices Act (ORS 468B.110; 527.765; 527.770). Load allocations for agriculture are implemented through Agricultural Water Quality Management Area Plans developed by the Oregon Department of Agriculture or other statutorily available authority (ORS 561.191; 568.900 to 568.933). Other Load Allocations are implemented by the Department or by federal or local agencies.

The Department is currently reviewing public comment on revised TMDLs in the Tualatin Sub-basin for phosphorus and ammonia and new TMDLs for temperature, bacteria and volatile solids. The Department is proposing to repeal OAR 340-41-0470(9) upon EPA approval of the revised TMDLs for phosphorus and ammonia.

Relationship to Federal and Adjacent State Rules

Establishment of TMDLs is in accordance with Section 303 of the Clean Water Act and 40 CFR, part 130.7 and OAR 340-41-026(4)(d). OAR 340-41-0470(9) was originally developed to implement TMDLs for phosphorus and ammonia in the Tualatin Sub-basin in 1988.

Authority to Address the Issue

The 1988 rules promulgated by the EQC amend OAR 340-41-470 by establishing instream criteria (TMDLs) for both total phosphorus and ammonia-nitrogen at various locations on the main stem Tualatin River and at the mouths of selected tributaries.

Establishment of TMDLs is in accordance with Section 303 of the Clean Water Act and 40 CFR, part 130.7 and OAR 340-41-026(4)(d). ORS 468B.020, ORS 468B.035 and ORS 468B.048 provide authority for implementation of the Clean Water Act and the setting of water quality standards. ORS 183.310 to 183.550 provide authority to adopt, modify or repeal rules for the administration of water quality standards.

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

The proposed repeal of OAR 340-41-0470(9) was developed by the Department of Envirnoment Quality and draws upon the following documents:

1. Memorandum of Agreement between the United States Environmental Protection Agency and the State of Oregon Department of Environmental Quality Regarding the Implementation of Section 303(d) of the Federal Clean Water Act. February 1, 2000.
2. Consent Decree between Northwest Environmental Defense Center (NEDC) and Northwest Environmental Advocates (NWEA) vs Carol Browner, Administrator of the United States Environmental Protection Agency. May 2000.
3. EQC Agenda Item O, Status Report on the Establishment of TMDLs, December 13, 1990.

The Department will be developing general rules for TMDL development and implementation in 2001 that will draw upon much that has been agreed upon in the MOA with EPA. An advisory committee will be used in that process.

Alternatives to repealing OAR 340-41-0470(9) include:

- Taking no action until after EPA approves the revised TMDLs for phosphorus and ammonia. The rule could either be repealed or modified to incorporate new values approved by EPA and a set of actions after EPA approval of the revised TMDLs.

The Department did not choose this option as there would be a period of time where two sets of numbers would be in place (the EPA approved numbers based on the revised TMDLs and numbers that are currently in OAR 340-41-0470(9)) which would be confusing for implementation. Work on rule revision or repeal after EPA approval would delay work on incorporating new and revised TMDLs in the management plans and permits. The Department discussed the issue of establishing TMDLs by rule with the Commission in 1990. At that time, the Commission agreed to a process whereby the Department would establish TMDLs by Department Order and implementation would occur via permit modifications and other means, rather than through rulemaking. It would also allow the Department to approve program plans rather than the EQC The EQC concurred with this course of action and the Department has been developing TMDLs under this process since that

period of time. Repealing the Tualatin Sub-basin TMDL rule rather than implementing by rule is consistent with this approach.

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

The proposal to repeal OAR 340-41-0479(9) can be found in Attachment B. In 1988, the EQC approved rules (OAR 340-41-0479(9)) which established limits for total phosphorus and ammonia concentrations in the Tualatin and its major tributaries. These rules established concentration limits that were not to be exceeded between May 1 and October 31 for Total Phosphorus and May 1 and November 15 for Ammonia. The rule established dates for implementation and set up timeframes for developing guidance by the Department and for submitting program plans by specified management agencies. The Tualatin TMDLs were the first of many TMDLs that have been developed by the Department. Similar rules were developed for the Bear Creek (OAR 340-41-0385), Yamhill (OAR 340-41-0470 (10) and the Upper Grande Ronde (OAR 340-41-0745) Total Maximum Daily Loads.

In 1990, given the number of TMDLs that the Department would be developing at that time, the Department proposed the following process to the EQC which was discussed and accepted:

> *A new TMDL process is proposed which will reduce staff workload demands by reducing the involvement of the Commission in each individual TMDL decision if it is not necessary. To date, TMDLs and implementation schedules have been established by rule, and the program plans have been approved by the Commission. The new TMDL process would establish TMDLs and implementation schedules via permit modifications and memoranda of agreement, rather than through rulemaking. It would also allow Department staff to approve program plans.*
>
> *The new procedure for establishing TMDLs without rulemaking will be applicable only under the following conditions:*
>
> - *new instream water quality criteria are not required because existing standards are sufficient,*
> - *Waste Load Allocations (WLAs) can be implemented through permits, and*
> - *Load Allocations (LAs) can be implemented through Memoranda of Agreement with Designated Management Agencies (DMAs).*

Since that time (1990), the Department has committed to a more aggressive schedule for developing TMDLs. To date, there have been been 331 TMDLs developed for 14 waterbodies, watersheds or sub-basins (there are 91 sub-basins in Oregon). Of these, 146 TMDLs are covered by rule for the 4

sub-basins listed above. The Department is planning to complete more than 1,500 TMDLs on 1,158 Water Quality Limited Segments (WQLS) in 91 sub-basins by 2007.

In approving TMDLs, EPA looks for "reasonable assurance" that the TMDLs will be implemented. DEQ has agreed to provide Implementation Plans (under its MOA with EPA) with the TMDLs as they are submitted to EPA. Generally, reasonable assurance for point sources is provided through National Pollutant Discharge Elimination System (NPDES) permits. For nonpoint sources, assurances can be regulatory, non-regulatory or incentive-based, consistent with applicable laws and programs.

Since the adoption of the Tualatin Sub-basin TMDL rule, additional authorities have been developed for implementing WLAs through permits and LAs through the authorities of other agencies. These authorities include:

NPDES Permit Authority for Municipal and Industrial Storm Water: The 1972 Amendments to the Federal Water Pollution Control Act (Clean Water Act or CWA) prohibit the discharge of any pollutant to waters of the United States from a point source unless the discharge is authorized by a NPDES Permit. The NPDES permitting program is designed to track point sources, monitor the discharge of pollutants from specific sources to surface waters, and require the implementation of the controls necessary to minimize the discharge of pollutants. Initial efforts to improve water quality under the NPDES program primarily focused on reducing pollutants in industrial process wastewater and discharges from municipal sewage treatment plants.

In 1987, the CWA was again amended by Congress to require implementation of a comprehensive national program for addressing problematic non-agricultural sources of storm water discharges. As required by the amended CWA, the NPDES Storm Water Program is being implemented in two phases:

Phase I, developed by EPA in 1990, required NPDES permits for:

- storm water discharges from municipal separate storm sewer systems (MS4) generally serving or located in incorporated areas with populations of 100,000 or more people; and
- eleven categories of industrial activity, one of which is construction activity that disturbs five acres or greater of land.

Phase II, developed by EPA in 1999, requires NPDES permit coverage for storm water discharges from certain regulated small MS4s (primarily all those located in urbanized areas) and construction activity disturbing between 1 and 5 acres of land.

Agricultural Implementation Authority: The Oregon Legislature authorized the Oregon Department of Agriculture (ODA) to be the lead state agency working with agriculture to address nonpoint source water pollution. In 1993, Senate Bill 1010 (ORS 568.900 - 568.933) or the Agricultural Water Quality Management Act was passed which authorizes ODA to develop and carry out a water quality management plan for any agricultural or rural lands area whenever a water quality management plan is required by state or federal law. One example of such a "trigger" for the planning process is a listing under section 303(d) of the federal CWA. OAR 340-41-0120(10) calls for a cooperative agreement between ODA and DEQ to implement these provisions.

Forestry Implementation Authority: Pollution control measures necessary to address forestry sources are implemented through the Forest Practices Program pursuant to ORS 527.765 as well as through voluntary landowner actions consistent with the Oregon Plan. The Forest Practices Program is implemented through best management practices adopted as administrative rules, operator/landowner education and assistance and rule enforcement through civil orders, civil penalties and, in extreme cases, criminal prosecution. The Oregon Department of Forestry is the Designated Management Agency for private and non-federal public forestlands. OAR 340-41-0026(9) and OAR 340-41-0120(11)(e) recognizes this arrangement.

Federal Lands Implementation: DEQ will work with federal agencies (e.g. USFS, BLM) to develop and modify water quality management plans to address waters listed on federal lands.

The Department has Memorandum of Understandings with these implementing agencies to undertake the work necessary to implement the TMDLs. In addition, portions of the Department's rules now specify management planning requirements (e.g. OAR 340-41-0026(3)(a)(D) and OAR 340-41-0120(11)(e) describes surface water temperature management plans; OAR 340-41-0026(3)(a)(I) and OAR340-41-0120(12-17) describe bacteria management plans) which were not in place when the Tualatin Sub-basin TMDL rule was originally adopted.

The Department is proposing to repeal OAR 340-41-0470(9) (Attachment A). The rationale for deleting the rule at this time is that:

- the TMDLs, which have been approved by EPA, and any modifications to these TMDLs, based on recent action initiated by the Department, can be implemented through Departmental Order;
- implementation planning requirements in the rule have expired and are covered through other authorities.

Summary of Significant Public Comment and Changes Proposed in Response

The Department received 6 written comments and one oral comment which was supported by written testimony. These can be found in Attachment C.

Significant issues raised in Public Comment include:

Several Designated Management Agencies requested that the *Tualatin Sub-basin Nonpoint Source Management Implementation/Compliance Schedule and Order for Designated Management Agencies (DMAs)* be extended effective December 31, 2000 with its expiration conconcurrent with the approval by EPA of the new TMDLs (Attachment F). This would be to address any potential liability arising from time gaps where the compliance order is not in effect and a new TMDL has not been approved:

The Department believes that EQC should extend the Compliance Schedule and Order. In addition to the concern that about potential liability with the rules until the rules are repealed (upon approval of the revised TMDLs by EPA), the Compliance Schedule and Order that was developed in 1993 is referenced in the current Municipal Separate Storm Sewer System (MS4) Dicharge Permits. While the Department feels that potential liability is low if the Compliance Order is not extended, as the rule is a seasonal rule which applies from May 1 to November 15 of each year and the original order is referenced in the permits, extension of the Compliance Order will clarify that current programs should be continued until new permits can be developed that incorporate the new and revised TMDLs and their waste load allocations. Therefore, the Department recommends the EQC extend the *Tualatin Sub-basin Nonpoint Source Management Implementation/Compliance Schedule and Order for Designated Management Agencies (DMAs)* effective December 31, 2000 until current MS4 permits can be revised.

Several Designated Management Agencies requested to know the anticipated role of the EQC in the TMDL process particularly, as the TMDL would be required under Department Order rather than rule, would there be a procedure by which the order could be appealed to the EQC:

The Department indicated to the EQC at its December 1, 2000 meeting (Agenda Item F, Total Maximum Daily Load (TMDL) Process and Update on the Tualatin TMDL) that it will be developing general rules regarding TMDLs that will clarify TMDL development and implementation. These rules will be based upon much that has been agreed upon in February 2000 MOA with EPA. The Department will be bringing these proposed rules to the EQC for approval, likely towards the end of 2001. The Department will consider the EQC role in the development of these rules.

Implementation of TMDLs will occur through various management programs that are currently available – each with their own review process described by rule or statute. For example, in the case of waste load allocations being incorporated into permits, procedures for issuance, denial and modifications of permits are decribed in Divisions 14 and 45. An

applicant can request a hearing before the EQC or its authorized representative if dissatisfied with the conditions or limitations.

Several environmental groups felt that it is premature to repeal the rule as the revised TMDLs have not yet been approved. They expressed concern that the revised TMDLs would not be quantifiable, enforceable and subject to a compliance schedule and felt the rule provided this assurance. They requested that the public comment period remain open until 30 days after EPA approval of the revised Tualatin TMDL:

The Department has proposed that rule repeal be effective upon EPA approval of the revised TMDLs. TMDLs are required under the Clean Water Act and must meet federal regulations in order to be approved by EPA. Regulations require a description of the applicable standard, identification of the waterbody's loading capacity for the applicable pollutant and identification of WLAs for point sources and LAs for nonpoint sources. Reasonable Assurance that nonpoint source reductions must be explained and the Department has agreed to submit implementation plans with the TMDLs. The Department believes that EPA is in position and is required to make the judgment that the TMDLs, WLAs and LAs are properly quantified, enforceable and subject to a compliance schedule. Furthermore, judicial review of TMDLs is based on EPA's written decision and the administrative record supporting that decision.

Compliance schedules in permits would need to be within 5 years unless otherwise specified. In EPA's recent TMDL guidance (Federal Register Volume 65, Number 135, page 43668), the following timeframes are recommended:

- A schedule, which is as expeditious as practicable, for implementing the management meaures or other control actions to achieve load allocations in the TMDL within 5 years, when implementation within this period is practicable;
- For all impaired waterbodies, the implementation plan must be based on a goal of attaining and maintaining the applicable water quality standards within ten years whenever attainment and maintenance within this period is practicable.

The Department has not extended the comment period. The EQC may choose not to take action on the rule repeal at this time.

Several environmental groups felt that the repeal of the Tualatin Rule would weaken TMDL enforcement and that enforcement of the TMDL has been avoided through a series of extensions to the compliance schedule. Although DEQ may have the authority to enforce the TMDL through existing mechanisms, it has opted not to do so:

The Department does not believe that repeal of the rule would weaken TMDL enforcement. The enforcement mechanism for TMDLs is generally through the permit requirements or specified in statute and rule for Agricultural Water Quality Management Area Plans (ORS 561.191; 568.900 to 568.933) and under the Forest Practices Act (ORS 468.110; 527.765; 527.770).

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

The Department proposes to repeal this rule as it is redundant and covered under other authorities. When submitted to EPA, the TMDLs are in the form of a Department Order. As required under the Federal Clean Water Act (CWA), TMDLs are approved by EPA and Waste Load Allocations are assigned to point sources by the Department and incorporated into NPDES permits. Load Allocations for forest operations on private and state forest lands are implemented through rules adopted by the Board of Forestry under the Forest Practices Act (ORS 468B.110; 527.765; 527.770). Load allocations for agriculture are implemented through Agricultural Water Quality Management Area Plans developed by the Oregon Department of Agriculture or other statutorily available authority (ORS 561.191; 568.900 to 568.933). Other Load Allocations are implemented by the Department or by federal or local agencies.

Recommendation for Commission Action

It is recommended that the Commission repeal OAR 340-41-0470(9), effective as of EPA approval of the revised Tualatin Sub-basin TMDLs for phophorus and ammonia, as presented in Attachment A of the Department Staff Report. In addition, it is recommended that the Commission extend approval of the *Tualatin Sub-basin Nonpoint Source Management Implementation/Compliance Schedule and Order for Designated Management Agencies (DMAs)* effective December 31, 2000 until current MS4 permits for the basin are revised (Attachment F).

Attachments

A. Rule (Amendments) Proposed for Adoption
B. Supporting Procedural Documentation:
    1. Legal Notice of Hearing
    2. Memorandum from Public Notice
    3. Fiscal and Economic Impact Statement
    4. Land Use Evaluation Statement
    5. Questions to be Answered to Reveal Potential Justification for Differing from Federal Requirements
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. Tualatin Basin DMA Implementation and Compliance Order, June 11-12, 1998

Reference Documents (available upon request)

1. Memorandum of Agreement between the United States Environmental Protection Agency and the State of Oregon Department of Environmental Quality Regarding the Implementation of Section 303(d) of the Federal Clean Water Act. February 1, 2000.
2. Consent Decree between Northwest Environmental Defense Center (NEDC) and Northwest Environmental Advocates (NWEA) vs Carol Browner, Administrator of the United States Environmental Protection Agency. May 2000.
3. EQC Agenda Item O, Status Report on the Establishment of TMDLs, December 13, 1990.

Approved:

Section: Andrew L Schaedel

Division: Neil Mullane

Report Prepared By: Andy Schaedel

Phone: 503-229-6121

Date Prepared: 12/29/00

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ATTACHMENT A
PROPOSED REPEAL OF OAR 340-41-0470(9)

~~OAR 340-41-0470(9) In order to improve water quality within the Tualatin River subbasin to meet the existing water quality standard for dissolved oxygen, and the 15 ug/l chlorophyll *a* action level stated in OAR 340-041-0150, the following special rules for total maximum daily loads, waste load allocations, load allocations, and implementation plans are established:~~

~~(a)After completion of wastewater control facilities and implementation of management plans approved by the Commission under this rule and no later than June 30, 1993, no activities shall be allowed and no wastewater shall be discharged to the Tualatin River or its tributaries without the specific authorization of the Commission that cause the monthly median concentration of total phosphorus at the mouths of the tributaries listed below and the specified points along the main stream of the Tualatin River, as measured during the low flow period between May 1 and October 31*, of each year, unless otherwise specified by the Department, to exceed the following criteria:~~

~~Mainstream (RM)~~	~~ug/l~~	~~Tributaries~~	~~ug/l~~
~~Cherry Grove (67.8)~~	~~20~~	~~Scoggins Creek~~	~~60~~
~~Dilley (58.8)~~	~~40~~	~~Gales Creek~~	~~45~~
~~Golf Course Road (52.8)~~	~~45~~	~~Dairy Creek~~	~~45~~
~~Rood Rd. (38.5)~~	~~50~~	~~McKay Creek~~	~~45~~
~~Farmington (33.3)~~	~~70~~	~~Rock Creek~~	~~70~~
~~Elsner (16.2)~~	~~70~~	~~Fanno Creek~~	~~70~~
~~Stafford (5.4)~~	~~70~~	~~Chicken Creek~~	~~70~~

~~(b)After completion of wastewater control facilities and implementation of management plans approved by the Commission under this rule and no later than June 30, 1993, no activities shall be allowed and no wastewater shall be discharged to the Tualatin River or its tributaries without the specific authorization of the Commission that cause the monthly median concentration of ammonia nitrogen at the mouths of the tributaries listed below and the specified points along the mainstream of the Tualatin River, as measured between May 1 and November 15*, of each year, unless otherwise specified by the Department, to exceed the following target concentrations:~~

~~Mainstream (RM)~~	~~ug/l~~	~~Tributaries~~	~~ug/l~~
~~Cherry Grove (67.8)~~	~~30~~	~~Scoggins Creek~~	~~30~~
~~Dilley (58.8)~~	~~30~~	~~Gales Creek~~	~~40~~
~~Golf Course Road (52.8)~~	~~40~~	~~Dairy Creek~~	~~40~~
~~Rood Rd. (38.5)~~	~~50~~	~~McKay Creek~~	~~40~~
~~Farmington (33.3)~~	~~1000~~	~~Rock Creek~~	~~100~~
~~Elsner (16.2)~~	~~850~~	~~Fanno Creek~~	~~100~~
~~Stafford (5.4)~~	~~850~~	~~Chicken Creek~~	~~100~~

~~(c)The sum of tributary load allocations and waste load allocations for total phosphorus and ammonia nitrogen can be converted to pounds per day by multiplying the instream criteria by flow in the tributary in cfs and by the conversion factor 0.00539. The sum of load allocations waste load allocations for existing or future nonpoint sources and point source discharges to the mainstream Tualatin River not allocated in a tributary load allocation or waste load allocation may be calculated as the difference between the mass (criteria multiplied by flow) leaving a segment minus the mass entering the segment (criteria multiplied by flow) from all sources plus instream assimilation;~~

~~(d)The waste load allocation (WLA) for total phosphorus and ammonia nitrogen for Unified Sewerage Agency of Washington County is determined by subtracting the sum of the calculated load at Rood Road and Rock Creek from the calculated load at Farmington;~~

~~(e)Subject to the approval of the Environmental Quality Commission, the Director may modify existing waste discharge permits for the Unified Sewerage Agency of Washington County and allow temporary additional waste discharges to the Tualatin River provided the Director finds that facilities allowed by the modified permit are not inconsistent and will not impede compliance with the June 30, 1993 date for final compliance and the Unified Sewerage Agency is in compliance with the Commission approved program plan;~~

~~(f)Within 90 days of the adoption of these rules, the Unified Sewerage Agency of Washington County shall submit a program** plan and time schedule to the Department describing how and when the Agency will modify its sewerage facilities to comply with this rule. The program plan shall include provisions and time schedule for developing and implementing a management plan under an agreement with the Lake Oswego Corporation for addressing nuisance algal growth in Lake Oswego;~~

~~(g)Within 18 months after the adoption of these rules, Washington, Clackamas, Multnomah Counties and all incorporated cities within the Tualatin River and Oswego Lake subbasins shall submit to the Department a program plan** for controlling the quality of urban storm runoff within their respective jurisdictions to comply with the requirements of subsections (a) and (b) of this section;~~

~~(h)After July 1, 1989, Memorandums of Agreements between the Departments of Forestry and Agriculture and the Department of Environmental Quality shall include a time schedule for submitting a program plan** for achieving the requirements of subsections (a) and (b) of this section. The program plans shall be submitted to the Department within 18 months of the adoption of this rule;~~

~~(i)Within 120 days of submittal of the program plans** and within 60 days of the public hearing, the Environmental Quality Commission shall either approve or reject the plan. If the Commission rejects the plan, it shall specify a compliance schedule for resubmittal for approval and shall specify the reasons for the rejection. If the Commission determines that an agency has not made a good faith effort to provide an approvable plan within a reasonable time, the Commission may invoke appropriate enforcement action as allowed under law. The Commission shall reject the plan if it determines that the plan will not meet the requirements of this rule within a reasonable amount of time. Before approving a final program plan, the Commission shall reconsider and may revise the June 30, 1993 date stated in subsections (a), (b), and (e) of this section. Significant components of the program plans shall be inserted into permits or memorandums of agreement as appropriate;~~

~~(j)For the purpose of assisting local governments in achieving the requirements of this rule, the Department shall:~~

~~(A)Within 90 days of the adoption of these rules, distribute initial waste load allocations and load allocations among the point source and nonpoint source management agencies in the basin. These allocations shall be considered interim and may be redistributed based upon the conclusions of the approved program plans;~~

~~(B)Within 120 days of the adoption of these rules, develop guidance to nonpoint source management agencies as to the specific content of the programs plans;~~

~~(C)Within 180 days of the adoption of these rules, propose additional rules for permits issued to local jurisdictions to address the control of storm water from new development within the Tualatin and Oswego Lake subbasins. The rules shall consider the following factors:~~
~~(i)Alternative control systems capable of complying with subsections (a) and (b) of this section;~~
~~(ii)Maintenance and operation of the control systems;~~
~~(iii)Assurance of erosion control during as well as after construction.~~

~~(D)In cooperation with the Department of Agriculture, within 180 days of the adoption of this rule develop a control strategy for addressing the runoff from container nurseries.~~

~~*Precise dates for complying with this rule may be conditioned on physical conditions (i.e., flow, temperature) of the receiving water and shall be specified in individual permits or memorandums of understanding issued by the Department. The Department shall consider system design flows, river travel times, and other relevant information when establishing the specific conditions to be inserted in the permits or memorandums of understanding. Conditions shall be consistent with Commission approved program plans** and the intent of this rule.~~

~~**For the purpose of this section of the rules, program plan is defined as the first level plan for developing a wastewater management system and describes the present physical and institutional infrastructure and the proposed strategy for changes including alternatives. A program plan should also include intergovernmental agreements and approvals, as appropriate; time schedules for accomplishing goals, including interim objectives; and a financing plan.~~

Attachment B – Supporting Procedural Documentation

Notice Of Public Hearing

Oregon Department Of Environmental Quality

Notice Issued: November 17, 2000

Close Of Comment Period: December 19, 2000
Public Hearings: December 18, 2000 2 p.m.

Repeal of Oregon Administrative Rule (OAR) 340-41-0470(9) The Tualatin Sub-basin TMDL Rule for Total Phosphorus and Ammonia

PUBLIC PARTICIPATION:

Public Hearing
A Public hearing will be held at:

2:00 p.m. on Monday, December 18, 2000 in Conference Room A/B on the fourth floor, Oregon DEQ NW Regional Office, 2020 SW 4th Ave, Portland, OR.

Written comments:
People do not need to attend the public hearing in order to submit comments. Written comments on the proposed repeal of OAR 340-41-0470(9) can be submitted at any time between the opening of the comment period (November 17, 2000) and the close of the comment period (December 19, 2000). All comments must be received at the Oregon Department of Environmental Quality by 5 p.m. on December 19, 2000. Written comments should be mailed to Oregon Department of Environmental Quality, Attn: Andy Schaedel, 2020 SW 4th Ave., Suite 400, Portland, OR 97201. ***People wishing to send comments via e-mail should be aware that if there is a delay between servers or if a server is not functioning properly, e-mails may not be received prior to the close of the public comment period.*** People wishing to send comments via e-mail should send them in Microsoft Word (through version 7.0), WordPerfect (through version 6.x) or plain text format. Otherwise, due to conversion difficulties, DEQ recommends that comments be sent in hard copy. The email address is:

schaedel.andrew.l@deq.state.or.us

WHO IS THE APPLICANT: Oregon Department of Environmental Quality

LOCATION: The Tualatin Subbasin includes all lands, public and private, draining to the Tualatin River or its tributaries from the confluence of the Tualatin and Willamette rivers at West Linn, Oregon upstream to the Tualatin River headwaters.

WHAT IS PROPOSED: The Department of Environmental Quality proposes to repeal OAR 340-41-0470(9). OAR 340-41-0470(9) established the following, in 1988, by rule:

- the total phosphorus and ammonia Total Maximum Daily Loads (TMDLs), expressed in terms of monthly median concentrations at the mouths of tributaries and along the mainstem of the Tualatin River (which were submitted to the Environmental Protection Agency (EPA) and subsequently approved);
- requirements for program plans to be submitted to the Department; and
- a date for achieving the concentrations.

The Department proposes to repeal this rule, as it is redundant and covered under other authorities.

As required under the Federal Clean Water Act (CWA), TMDLs are approved by EPA and Waste Load Allocations are assigned to point sources by the Department. Load Allocations for forest operations on private and state forest lands are implemented through rules adopted by the Board of Forestry under the Forest Practices Act (ORS 468B.110; 527.765; 527.770). Load allocations for agriculture are implemented through Agricultural Water Quality Management Area Plans developed by the Oregon Department of Agriculture or other statutorily available authority (ORS 561.191; 568.900 to 568.933). Other Load Allocations are implemented by the Department or by federal or local agencies.

The Department will ask the Environmental Quality Commission to time the effectiveness of the repeal to correspond with the promulgation and approval of the revised Tualatin TMDLs.

WHO IS AFFECTED:

Local public and private land owners and managers, industrial sources, public wastewater treatment facilities, cities and counties located within the Tualatin Subbasin, residents within the subbasin, persons interested in local water quality, and persons interested in the Department's implementation of Section 303(d) of the federal Clean Water Act.

As this rule change would repeal OAR 340-41-0470(9) but activities required under the TMDL would be carried out under other authorities currently available, the Department deems that there would be no fiscal and economic impact by the repeal of OAR 340-41-0470(9).

NEED FOR ACTION:

The Clean Water Act requires that TMDLs be established for waters that do meet state water quality standards. In Oregon, TMDLs are developed by the Department of Environmental Quality and submitted to EPA for approval. Initial TMDLs, developed in the 1980's were also established by rule with Tualatin Sub-basin rule (OAR 340-41-0470(9)) for total phosphorus and ammonia being the first rule established. In 1990, the Department proposed to the Environmental Quality Commission (EQC) to streamline the TMDL process to reduce staff workload demands and establish TMDLs and implementation schedules via permit modifications and memoranda of agreement, rather than through rulemaking. The Department is currently planning to complete more than 1,500 TMDLs throughout Oregon in 91 sub-basins by 2007. Since the Tualatin Rule was established, additional authorities for implementation of TMDLs have been established by federal or state authority including Storm Water Permits to control urban and industrial runoff and Agricultural Water Quality Management Act (SB1010) to address nonpoint source of pollution from agricultural activities. Therefore, the Tualatin Rule is not needed as other authorities cover it.

WHERE TO FIND DOCUMENTS:

Documents and related materials are available for examination at:

Oregon DEQ – Water Quality Program, NW Regional Office, 2020 SW 4th Ave., Suite 400, Portland, OR (503-229-5552).

While not required, scheduling an appointment will ensure documents are readily accessible during your visit. Documents are also available for viewing or down-loading from the DEQ Web Site: waterquality.deq.state.or.us/wq/

Any questions on the proposed actions may be addressed to Andy Schaedel at 503-229-6121, Rob Burkhart at 503-229-5566 or toll free within Oregon at 800-452-4011. People with hearing impairments may call DEQ's TTY at 503-229-5471.

WHAT HAPPENS NEXT:

DEQ will review and consider all comments received during the public comment period. Following this review, the rule repeal may be presented to the Environmental Quality Commission (targeting the January 11-12, 2001 EQC meeting) as is currently proposed, or in a modified form. You will be notified of DEQ's final decision if you present either oral or written comments during the comment period. Otherwise, if you wish to receive notification, please call or write DEQ at the above address to be placed on the mailing list.

ACCOMODATION OF DISABILITIES:

DEQ is committed to accommodating people with disabilities. Please notify DEQ of any special physical or language accommodations you may need as far in advance of the date as possible. To make these arrangements, 503-229-6232 or by calling toll free within Oregon at 800-452-4011. People with hearing impairments can call DEQ's TTY at 503-229-5471.

ACCESSIBILITY INFORMATION:

This publication is available in alternate format (e.g. large print, Braille) upon request. Please contact DEQ Public Affairs at 503-229-6232 or toll free within Oregon 1-800-452-4011 to request an alternate format. People with a hearing impairment can receive help by calling DEQ's TTY at 503-229-5471.

State of Oregon
Department of Environmental Quality — Memorandum

Date: November 15, 2000

To: Interested and Affected Public

Subject: Rulemaking Proposal and Rulemaking Statements - Repeal of Oregon Administrative Rule (OAR) 340-41-0470(9)

This memorandum contains information on a proposal by the Department of Environmental Quality (Department) to ask the Environmental Quality Commission (EQC) to repeal OAR 340-41-0470(9). This notice is issued pursuant to ORS 183.335.

This proposal would repeal OAR 340-41-0470(9). OAR 340-41-0470(9) established the following, in 1988, by rule:

- the total phosphorus and ammonia Total Maximum Daily Loads (TMDLs), expressed in terms of monthly median concentrations at the mouths of tributaries and along the mainstem of the Tualatin River (which were submitted to the Environmental Protection Agency (EPA) and subsequently approved);
- requirements for program plans to be submitted to the Department; and
- a date for achieving the concentrations.

The Department proposes to repeal this rule as it is redundant and covered under other authorities.

As required under the Federal Clean Water Act (CWA), TMDLs are approved by EPA and Waste Load Allocations are assigned to point sources by the Department. Load Allocations for forest operations on private and state forest lands are implemented through rules adopted by the Board of Forestry under the Forest Practices Act (ORS 468B.110; 527.765; 527.770). Load allocations for agriculture are implemented through Agricultural Water Quality Management Area Plans developed by the Oregon Department of Agriculture or other statutorily available authority (ORS 561.191; 568.900 to 568.933). Other Load Allocations are implemented by the Department or by federal or local agencies.

The Department will ask the Environmental Quality Commission to time the effectiveness of the repeal to correspond with the promulgation and approval of the revised Tualatin TMDLs.

HEARING PROCESS DETAILS: The Department is conducting a public hearing during which comments will be accepted either orally or in writing. The hearing will be held as follows:

Date: December 18, 2000
Time: 2 PM
Place: Oregon Department of Environmental Quality, Northwest Region
2020 SW 4th Avenue, Portland, OR 97201-4987
Conference Room A/B on the 4th floor

Deadline for submittal of Written Comments: **5 PM December 19, 2000**

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, Northwest Region
Attn: Andy Schaedel
2020 S.W. 4th Avenue, Suite 4
Portland, Oregon 97201-4987.

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 be submitted as early as possible to allow adequate time for review and evaluation.

WHAT'S IN THIS PACKAGE?: Attachments to this memorandum provide details on the proposal as follows:

Attachment A Existing Tualatin Basin Total Phosphorus and Ammonia Rule
Attachment B Proposed Repeal of OAR 340-41-0470(9)

Attachment C The official statement describing the fiscal and economic impact of the proposed rule. (required by ORS 183.335)
Attachment D A statement providing assurance that the proposed rules are consistentwith statewide land use goals and compatible with local land use plans.
Attachment E Questions to be Answered to Reveal Potential Justification for Differing from Federal Requirements.

WHAT HAPPENS AFTER THE PUBLIC COMMENT PERIOD CLOSES: Following close of the public comment period, a report will be develped which summarizes the oral and written testimony presented and Department responses. The Environmental Quality Commission (EQC) will receive a copy of the report.

The Department will review and evaluate the rulemaking proposal in light of all information received during the comment period. Following the review, the rule repeal 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 the rule repeal during one of their regularly scheduled

public meetings. The targeted meeting date for consideration of this rulemaking proposal is January 11-12, 2001. 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 PROPOSED REPEAL OF OAR 340-41-0470(9):

What is a TMDL: A Total Maximum Daily Load (TMDL) is a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards, and an allocation of that amount to the pollutant's sources. Under Section 303(d) (33 USC Section 1313) of the Clean Water Act (as Amended by the Water Quality Act of 1987, Public Law 10-4), States are required to develop a prioritized list of waters not meeting water quality standards (this is called the 303(d) List) and submit it to the EPA for approval. States are also required to establish TMDLs for pollutants for the waters identified on the 303(d) list. TMDLs are to be submitted to EPA for approval. EPA generally takes 30 days to act on these submittals. If they disapprove, either the state modifies the TMDL to satisfy the concerns or EPA establishes the TMDL.

In Oregon, the Department of Environmental Quality (DEQ) has the responsibility for the designation of Water Quality Limited Segments and the establishment of TMDLs pursuant to Section 303(d) of the Clean Water Act. The Department has committed to a schedule for developing TMDLs for pollutants for all waterbodies on the 1998 303(d) List by 2007 as part of its Oregon Plan commitments and under a 2000 Memorandum of Agreement with EPA.

Development of Tualatin and other Sub-Basin TMDL Rules: In 1988, the EQC approved rules (OAR 340-41-0479(9)) which established limits for total phosphorus and ammonia concentrations in the Tualatin and its major tributaries (Attachment A). These rules established concentration limits that were not to be exceeded between May 1 and October 31 for Total Phosphorus and May 1 and November 15 for Ammonia. The rule established dates for implementation and set up timeframes for developing guidance by the Department and for submitting program plans by specified management agencies. The Tualatin TMDLs were the first of many TMDLs that have been developed by the Department. Similar rules were developed for the Bear Creek (OAR 340-41-0385), Yamhill (OAR 340-41-0470 (10) and the Upper Grande Ronde (OAR 340-41-0745) Total Maximum Daily Loads.

Number of TMDLs that DEQ will be developing: To date, there have been been 331 TMDLs developed for 14 waterbodies, watersheds or sub-basins (there are 91 sub-basins in Oregon). Of these, 146 TMDLs are covered by rule for the 4 sub-basins listed above. The Department is planning to complete more than 1,500 TMDLs on 1,158 Water Quality Limited Segment (WQLS) in 91 sub-basins by 2007. [Note: For the purposes of counting the number of TMDLs above, TMDLs were counted per pollutant and per WQLS, based on the 1998 303(d) List. For example, if a sub-basin had 4 WQLS, each of which is listed for 3 pollutants, a total of 12 TMDLs would be required.]

1990 EQC Item on TMDLs process that DEQ would be using: In 1990, given the number of TMDLs that the Department would be developing at that time, the Department proposed the following process to the EQC which was discussed and accepted:

A new TMDL process is proposed which will reduce staff workload demands by reducing the involvement of the Commission in each individual TMDL decision if it is not necessary. To date, TMDLs and implementation schedules have been established by rule, and the program plans have been approved by the Commission. The new TMDL process would establish TMDLs and implementation schedules via permit modifications and memoranda of agreement, rather than through rulemaking. It would also allow Department staff to approve program plans.

The new procedure for establishing TMDLs without rulemaking will be applicable only under the following conditions:

- *new instream water quality criteria are not required because existing standards are sufficient,*
- *Waste Load Allocations (WLAs) can be implemented through permits, and*
- *Load Allocations (LAs) can be implemented through Memoranda of Agreement with Designated Management Agencies (DMAs).*

Since that time (1990), the Department has committed to a more aggressive schedule for developing TMDLs.

Methods for TMDL Implementation: In approving TMDLs, EPA looks for "reasonable assurance" that the TMDLs will be implemented. DEQ has agreed to provide Implementation Plans (under its MOA with EPA) with the TMDLs as they are submitted to EPA. Generally, reasonable assurance for point sources is provided through National Pollutant Discharge Elimination System (NPDES) permits. For nonpoint sources, assurances can be regulatory, non-regulatory or incentive-based, consistent with applicable laws and programs.

Since the time of development of the Tualatin Sub-basin TMDL rule, additional authorities have been developed for implementing WLA through permits and LAs through other programs authorities. These authorities include:

NPDES Permits for Municipal and Industrial Wastewater and Storm Water: The 1972 Amendments to the Federal Water Pollution Control Act (Clean Water Act or CWA) prohibit the discharge of any pollutant to waters of the United States from a point source unless the discharge is authorized by a NPDES Permit. The NPDES permitting program is designed to track point sources, monitor the discharge of pollutants from specific sources to surface waters, and require the implementation of the controls necessary to minimize the discharge of pollutants. Initial efforts to improve water quality under the NPDES program primarily focused on reducing pollutants in industrial process wastewater and discharges from municipal sewage treatment plants.

In 1987, the CWA was again amended by Congress to require implementation of a comprehensive national program for addressing problematic non-agricultural sources of storm water discharges. As required by the amended CWA, the NPDES Storm Water Program is being implemented in two phases:

Phase I, developed by EPA in 1990, required NPDES permits for:

- storm water discharges from municipal separate storm sewer systems (MS4) generally serving or located in incorporated areas with populations of 100,000 or more people; and
- eleven categories of industrial activity, one of which is construction activity that disturbs five acres or greater of land.

Phase II, developed by EPA in 1999, requires NPDES permit coverage for storm water discharges from certain regulated small MS4s (primarily all those located in urbanized areas) and construction activity disturbing

between 1 and 5 acres of land.

Agricultural Activity: The Oregon Legislature authorized the Oregon Department of Agriculture (ODA) to be the lead state agency working with agriculture to address nonpoint source water pollution. In 1993, Senate Bill 1010 (ORS 568.900 - 568.933) or the Agricultural Water Quality Management Act was passed which authorizes ODA to develop and carry out a water quality management plan for any agricultural or rural lands area whenever a water quality management plan is required by state or federal law. One example of such a "trigger" for the planning process is a listing under section 303(d) of the federal CWA. OAR 340-41-0120(10) calls for a cooperative agreement between ODA and DEQ to implement these provisions.

Forestry Activity: Pollution control measures necessary to address forestry sources are implemented through the Forest Practices Program pursuant to ORS 527.765 as well as through voluntary landowner actions consistent with the Oregon Plan. The Forest Practices Program is implemented through best management practices adopted as administrative rules, operator/landowner education and assistance and rule enforcement through civil orders, civil penalties and, in extreme cases, criminal prosecution. The Oregon Department of Forestry is the Designated Management Agency for private and non-federal public forestlands. OAR 340-41-0026(9) and OAR 340-41-0120(11)(e) recognizes this arrangement.

Federal Lands: DEQ will work with federal agencies (e.g. USFS, BLM) to develop and modify water quality management plans to address waters listed on federal lands.

The Department has Memorandum of Understandings with these implementing agencies for undertaking the work necessary for implementing TMDLs. In addition, portions of the rules specify management planning requirements (e.g. OAR 340-41-0026(3)(a)(D) and OAR 340-41-0120(11)(e) describes surface water temperature management plans; OAR 340-41-0026(3)(a)(I) and OAR340-41-0120(12-17) describe bacteria management plans)

DEPARTMENTAL PROPOSAL: The Department is proposing to repeal OAR 340-41-0470(9) (Attachment B). The rationale for deleting the rule at this time is that the TMDLs, which have been approved by EPA, and any modifications to these TMDLs, based on recent action initiated by the Department, can be implemented through Departmental Order. Implementation planning requirements in the rule have expired and are covered through other authorities. A more detailed breakdown of this rationale follows:

OAR 340-41-0470(9)(a): Delete – these criteria (loading capacities) and their WLA/LA have been approved by EPA in order to meet the pH standard and address the chlorophyll a criteria. New ones have been proposed and are under review by the Department following the public comment period. These do not need to be incorporated by rule as they would be part of the TMDL and would become a Departmental Order. WLAs and LAs will be incorporated into permits and management plans.

OAR 340-41-0470(9)(b): Delete – these criteria (loading capacities) and their WLA/LA have been approved by EPA in order to meet the dissolved oxygen standard. New ones have been proposed and are under review by the Department following the public comment period. These do not need to be incorporated by rule as they would be part of the TMDL and would become a Departmental Order. WLAs and LAs will be incorporated into permits and management plans.

OAR 340-41-0470(9)(c): Delete, not needed as part of a rule. WLAs and LAs were submitted as part of the TMDL to EPA

OAR 340-41-0470(9)(d): Delete, not needed as part of a rule. WLAs and LAs were submitted as part of the TMDL to EPA

OAR 340-41-0470(9)(e): Delete, not needed anymore. Facilities have been constructed.

OAR 340-41-0470(9)(f): Delete, not needed anymore. Facility plans have been submitted and facilities have been developed. Facility plans would be required as part of a permit condition anyway.

OAR 340-41-0470(9)(g): Delete, not needed anymore. Plans have been submitted and are being implemented. Storm water permits are now required.

OAR 340-41-0470(9)(h): Delete - Agreements have been worked out between ODF (and mechanisms described by statute ORS 527.765) and ODA (and described by statute ORS 568.900-933 and ORS 561.191)) and plans have been submitted.

OAR 340-41-0470(9)(i): Delete – not needed. There is public comment and review of permits and the EQC has statutory ability to challenge Forest Practices and Agricultural Water Quality Management Area Plans (AWQMAP).

OAR 340-41-0470(9)(j): Delete – this work is completed.

TIMING OF THE REPEAL: The Department will ask the Environmental Quality Commission to time the effectiveness of the repeal to correspond with the promulgation and approval of the revised Tualatin TMDLs.

HOW WAS THE RULE DEVELOPED: This rule repeal was developed by the Department of Environmental Quality and draws upon the following documents:

1. Memorandum of Agreement between the United States Environmental Protection Agency and the State of Oregon Department of Environmental Quality Regarding the Implementation of Section 303(d) of the Federal Clean Water Act. February 1, 2000.
2. Consent Decree between Northwest Environmental Defense Center (NEDC) and Northwest Environmental Advocates (NWEA) vs Carol Browner, Administrator of the United States Environmental Protection Agency. May 2000.
3. EQC Agenda Item O, Status Report on the Establishment of TMDLs, December 13, 1990.

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 Northwest Region 2020 SW 4th Avenue, Portland, OR 97201-4987. Please contact Andy Schaedel (503-229-6121) for copies or times when the documents are available for review.

WHOM DOES THIS RULE AFFECT INCLUDING THE PUBLIC, REGULATED COMMUNITY OR OTHER AGENCIES, AND DOES IT AFFECT THESE GROUPS?

The Tualatin Basin Phosphorus and Ammonia TMDL would affect local public and private land owners and

managers, industrial sources, public wastewater treatment facilities, cities and counties located within the Tualatin Sub-Basin, residents with the Tualatin Sub-Basin and persons interested in local water quality, and persons interested in the Department's implementatin of Section 303(d) of the federal Clean Water Act. The repeal of OAR 340-41-0470(9) should not affect these groups, however, as existing authorities will be utilized for approval and implementation of the TMDLs.

HOW WILL THE RULE BE IMPLEMENTED: TMDLs will be implemented according to methods described under "Methods for TMDL Implementation" above.

ARE THERE TIME CONSTRAINTS: The current Tualatin TMDLs for Total Phosphorus and Ammonia apply seasonally between May 1 and October 31 for Total Phosphorus and May 1 and November 15 for Ammonia. Under this rule, no activities would be allowed or wastewater discharged to the Tualatin River or its tributaries after June 30, 1993 would be allowed that would cause the monthly median concentrations to be exceeded unless authorized by the Commission. The Commission recently gave its authorization until December 31, 2000. The Phosphorus concentrations are not being achieved and the Ammonia concentrations are being achieved. The Department has proposed to revised the Total Phosphorus TMDL based on recommendations from the Tualatin Basin Policy Advisory Committee and accounting for high background (groundwater) concentrations. The Department is currently reviewing testimony on draft revisions and new TMDLs including the revision to the Total Phosphorus TMDL. Upon completion of this review, modifications to the draft revised Phosphorus TMDL may be made and finalized TMDLs would be submitted to EPA for approval. Pending action by the Commission on this rule repeal and by EPA on the proposed revised TMDLs, OAR 340-41-0470(9) could be repealed before May 1, 2001 and work to incorporate new phosphorus requirements into permits and management plans would be initiated.

INTENDED FUTURE ACTIONS: The Department is currently reviewing public comment on modifications to the existing TMDLs and proposed new TMDLs for the Tualatin. Response to comments and the modified TMDL package will be submitted to EPA. In addition, the Department will be developing some general rules regarding TMDLs that will enhance and clarify TMDL development and implementation. These rules will be based upon much that has been agreed upon in the MOA with EPA. The Department will be bringing these proposed rules to the EQC for approval, likely towards the end of 2001.

CONTACT FOR MORE INFORMATION: If you would like more information on this rulemaking proposal, wish to submit comments or would like to be added to the mailing list, please contact:

Department of Environmental Quality, Northwest Region
Attn: Andy Schaedel
2020 S.W. 4th Avenue, Suite 4
Portland, Oregon 97201-4987.
Phone: 503-229-6121
Toll Free: 1-800-452-4011
Fax: 503-229-6957
Email: schaedel.andrew.l@deq.state.or.us

ATTACHMENT A
EXISTING TUALATIN BASIN TOTAL PHOSPHORUS AND AMMONIA RULE

OAR 340-41-0470(9) In order to improve water quality within the Tualatin River subbasin to meet the existing water quality standard for dissolved oxygen, and the 15 ug/1 chlorophyll *a* action level stated in OAR 340-041-0150, the following special rules for total maximum daily loads, waste load allocations, load allocations, and implementation plans are established:

(a) After completion of wastewater control facilities and implementation of management plans approved by the Commission under this rule and no later than June 30, 1993, no activities shall be allowed and no wastewater shall be discharged to the Tualatin River or its tributaries without the specific authorization of the Commission that cause the monthly median concentration of total phosphorus at the mouths of the tributaries listed below and the specified points along the main-stream of the Tualatin River, as measured during the low flow period between May 1 and October 31*, of each year, unless otherwise specified by the Department, to exceed the following criteria:

Mainstream (RM)	ug/1	Tributaries	ug/1
Cherry Grove (67.8)	20	Scoggins Creek	60
Dilley (58.8)	40	Gales Creek	45
Golf Course Road (52.8)	45	Dairy Creek	45
Rood Rd. (38.5)	50	McKay Creek	45
Farmington (33.3)	70	Rock Creek	70
Elsner (16.2)	70	Fanno Creek	70
Stafford (5.4)	70	Chicken Creek	70

(b) After completion of wastewater control facilities and implementation of management plans approved by the Commission under this rule and no later than June 30, 1993, no activities shall be allowed and no wastewater shall be discharged to the Tualatin River or its tributaries without the specific authorization of the Commission that cause the monthly median concentration of ammonia-nitrogen at the mouths of the tributaries listed below and the specified points along the mainstream of the Tualatin River, as measured between May 1 and November 15*, of each year, unless otherwise specified by the Department, to exceed the following target concentrations:

Mainstream (RM)	ug/l	Tributaries	ug/l
Cherry Grove (67.8)	30	Scoggins Creek	30
Dilley (58.8)	30	Gales Creek	40
Golf Course Road (52.8)	40	Dairy Creek	40
Rood Rd. (38.5)	50	McKay Creek	40
Farmington (33.3)	1000	Rock Creek	100
Elsner (16.2)	850	Fanno Creek	100
Stafford (5.4)	850	Chicken Creek	100

(c) The sum of tributary load allocations and waste load allocations for total phosphorus and ammonia-nitrogen can be converted to pounds per day by multiplying the instream criteria by flow in the tributary in cfs and by the conversion factor 0.00539. The sum of load allocations waste load allocations for existing or future nonpoint sources and point source discharges to the mainstream Tualatin River not allocated in a tributary load allocation or waste load allocation may be calculated as the difference between the mass (criteria multiplied by flow) leaving a segment minus the mass entering the segment (criteria multiplied by flow) from all sources plus instream assimilation;

(d) The waste load allocation (WLA) for total phosphorus and ammonia-nitrogen for Unified Sewerage Agency of Washington County is determined by subtracting the sum of the calculated load at Rood Road and Rock Creek from the calculated load at Farmington;

(e) Subject to the approval of the Environmental Quality Commission, the Director may modify existing waste discharge permits for the Unified Sewerage Agency of Washington County and allow temporary additional waste discharges to the Tualatin River provided the Director finds that facilities allowed by the modified permit are not inconsistent and will not impede compliance with the June 30, 1993 date for final compliance and the Unified Sewerage Agency is in compliance with the Commission approved program plan;

(f) Within 90 days of the adoption of these rules, the Unified Sewerage Agency of Washington County shall submit a program** plan and time schedule to the Department describing how and when the Agency will modify its sewerage facilities to comply with this rule. The program plan shall include provisions and time schedule for developing and implementing a management plan under an agreement with the Lake Oswego Corporation for addressing nuisance algal growth in Lake Oswego;

(g) Within 18 months after the adoption of these rules, Washington, Clackamas, Multnomah Counties and all incorporated cities within the Tualatin River and Oswego Lake subbasins shall submit to the Department a program plan** for controlling the quality of urban storm runoff within their respective jurisdictions to comply with the requirements of subsections (a) and (b) of this section;

(h) After July 1, 1989, Memorandums of Agreements between the Departments of Forestry and Agriculture and the Department of Environmental Quality shall include a time schedule for submitting a program plan** for achieving the requirements of subsections (a) and (b) of this section. The program plans shall be submitted to the Department within 18 months of the adoption of this rule;

(i) Within 120 days of submittal of the program plans** and within 60 days of the public hearing, the Environmental Quality Commission shall either approve or reject the plan. If the Commission rejects the plan, it shall specify a compliance schedule for resubmittal for approval and shall specify the reasons for the rejection. If the Commission determines that an agency has not made a good faith effort to provide an approvable plan within a reasonable time, the Commission may invoke appropriate enforcement action as allowed under law. The Commission shall reject the plan if it determines that the plan will not meet the requirements of this rule within a reasonable amount of time. Before approving a final program plan, the Commission shall reconsider and may revise the June 30, 1993 date stated in subsections (a), (b), and (e) of this section. Significant components of the program plans shall be inserted into permits or memorandums of agreement as appropriate;

(j) For the purpose of assisting local governments in achieving the requirements of this rule, the Department shall:

(A) Within 90 days of the adoption of these rules, distribute initial waste load allocations and load allocations among the point source and nonpoint source management agencies in the basin. These allocations shall be considered interim and may be redistributed based upon the conclusions of the approved program plans;

(B) Within 120 days of the adoption of these rules, develop guidance to nonpoint source management agencies as to the specific content of the programs plans;

(C) Within 180 days of the adoption of these rules, propose additional rules for permits issued to local jurisdictions to address the control of storm water from new development within the Tualatin and Oswego Lake subbasins. The rules shall consider the following factors:
  (i) Alternative control systems capable of complying with subsections (a) and (b) of this section;
  (ii) Maintenance and operation of the control systems;
  (iii) Assurance of erosion control during as well as after construction.

(D) In cooperation with the Department of Agriculture, within 180 days of the adoption of this rule develop a control strategy for addressing the runoff from container nurseries.

*Precise dates for complying with this rule may be conditioned on physical conditions (i.e., flow, temperature) of the receiving water and shall be specified in individual permits or memorandums of understanding issued by the Department. The Department shall consider system design flows,
river travel times, and other relevant information when establishing the specific conditions to be inserted in the permits or memorandums of understanding. Conditions shall be consistent with Commission-approved program plans** and the intent of this rule.

**For the purpose of this section of the rules, program plan is defined as the first level plan for developing a wastewater management system and describes the present physical and institutional
infrastructure and the proposed strategy for changes including alternatives. A program plan should also include intergovernmental agreements and approvals, as appropriate; time schedules for accomplishing goals, including interim objectives; and a financing plan.

ATTACHMENT B

PROPOSED REPEAL OF OAR 340-41-0470(9)

~~OAR 340-41-0470(9) In order to improve water quality within the Tualatin River subbasin to meet the existing water quality standard for dissolved oxygen, and the 15 ug/l chlorophyll *a* action level stated in OAR 340-041-0150, the following special rules for total maximum daily loads, waste load allocations, load allocations, and implementation plans are established:~~

~~(k)After completion of wastewater control facilities and implementation of management plans approved by the Commission under this rule and no later than June 30, 1993, no activities shall be allowed and no wastewater shall be discharged to the Tualatin River or its tributaries without the specific authorization of the Commission that cause the monthly median concentration of total phosphorus at the mouths of the tributaries listed below and the specified points along the main stream of the Tualatin River, as measured during the low flow period between May 1 and October 31*, of each year, unless otherwise specified by the Department, to exceed the following criteria:~~

~~Mainstream (RM)~~	~~ug/l~~	~~Tributaries~~	~~ug/l~~
~~Cherry Grove (67.8)~~	~~20~~	~~Scoggins Creek~~	~~60~~
~~Dilley (58.8)~~	~~40~~	~~Gales Creek~~	~~45~~
~~Golf Course Road (52.8)~~	~~45~~	~~Dairy Creek~~	~~45~~
~~Rood Rd. (38.5)~~	~~50~~	~~McKay Creek~~	~~45~~
~~Farmington (33.3)~~	~~70~~	~~Rock Creek~~	~~70~~
~~Elsner (16.2)~~	~~70~~	~~Fanno Creek~~	~~70~~
~~Stafford (5.4)~~	~~70~~	~~Chicken Creek~~	~~70~~

~~(l)After completion of wastewater control facilities and implementation of management plans approved by the Commission under this rule and no later than June 30, 1993, no activities shall be allowed and no wastewater shall be discharged to the Tualatin River or its tributaries without the specific authorization of the Commission that cause the monthly median concentration of ammonia nitrogen at the mouths of the tributaries listed below and the specified points along the mainstream of the Tualatin River, as measured between May 1 and November 15*, of each year, unless otherwise specified by the Department, to exceed the following target concentrations:~~

~~Mainstream (RM)~~	~~ug/l~~	~~Tributaries~~	~~ug/l~~
~~Cherry Grove (67.8)~~	~~30~~	~~Scoggins Creek~~	~~30~~
~~Dilley (58.8)~~	~~30~~	~~Gales Creek~~	~~40~~
~~Golf Course Road (52.8)~~	~~40~~	~~Dairy Creek~~	~~40~~
~~Rood Rd. (38.5)~~	~~50~~	~~McKay Creek~~	~~40~~
~~Farmington (33.3)~~	~~1000~~	~~Rock Creek~~	~~100~~
~~Elsner (16.2)~~	~~850~~	~~Fanno Creek~~	~~100~~
~~Stafford (5.4)~~	~~850~~	~~Chicken Creek~~	~~100~~

~~(m)The sum of tributary load allocations and waste load allocations for total phosphorus and ammonia nitrogen can be converted to pounds per day by multiplying the instream criteria by flow in the tributary in cfs and by the conversion factor 0.00539. The sum of load allocations waste load allocations for existing or future nonpoint sources and point source discharges to the mainstream Tualatin River not allocated in a tributary load allocation or waste load allocation may be calculated as the difference between the mass (criteria multiplied by flow) leaving a segment minus the mass entering the segment (criteria multiplied by flow) from all sources plus instream assimilation;~~

~~(n)The waste load allocation (WLA) for total phosphorus and ammonia nitrogen for Unified Sewerage Agency of Washington County is determined by subtracting the sum of the calculated load at Rood Road and Rock Creek from the calculated load at Farmington;~~

~~(o)Subject to the approval of the Environmental Quality Commission, the Director may modify existing waste discharge permits for the Unified Sewerage Agency of Washington County and allow temporary additional waste discharges to the Tualatin River provided the Director finds that facilities allowed by the modified permit are not inconsistent and will not impede compliance with the June 30, 1993 date for final compliance and the Unified Sewerage Agency is in compliance with the Commission approved program plan;~~

~~(p)Within 90 days of the adoption of these rules, the Unified Sewerage Agency of Washington County shall submit a program** plan and time schedule to the Department describing how and when the Agency will modify its sewerage facilities to comply with this rule. The program plan shall include provisions and time schedule for developing and implementing a management plan under an agreement with the Lake Oswego Corporation for addressing nuisance algal growth in Lake Oswego;~~

~~(q)Within 18 months after the adoption of these rules, Washington, Clackamas, Multnomah Counties and all incorporated cities within the Tualatin River and Oswego Lake subbasins shall submit to the Department a program plan** for controlling the quality of urban storm runoff within their respective jurisdictions to comply with the requirements of subsections (a) and (b) of this section;~~

~~(r)After July 1, 1989, Memorandums of Agreements between the Departments of Forestry and Agriculture and the Department of Environmental Quality shall include a time schedule for submitting a program plan** for achieving the requirements of subsections (a) and (b) of this section. The program plans shall be submitted to the Department within 18 months of the adoption of this rule;~~

~~(s)Within 120 days of submittal of the program plans** and within 60 days of the public hearing, the Environmental Quality Commission shall either approve or reject the plan. If the Commission rejects the plan, it shall specify a compliance schedule for resubmittal for approval and shall specify the reasons for the rejection. If the Commission determines that an agency has not made a good faith effort to provide an approvable plan within a reasonable time, the Commission may invoke appropriate enforcement action as allowed under law. The Commission shall reject the plan if it determines that the plan will not meet the requirements of this rule within a reasonable amount of time. Before approving a final program plan, the Commission shall reconsider and may revise the June 30, 1993 date stated in subsections (a), (b), and (c) of this section. Significant components of the program plans shall be inserted into permits or memorandums of agreement as appropriate;~~

~~(t)For the purpose of assisting local governments in achieving the requirements of this rule, the Department shall:~~

~~(E)Within 90 days of the adoption of these rules, distribute initial waste load allocations and load allocations among the point source and nonpoint source management agencies in the basin. These allocations shall be considered interim and may be redistributed based upon the conclusions of the approved program plans;~~

~~(F)Within 120 days of the adoption of these rules, develop guidance to nonpoint source management agencies as to the specific content of the programs plans;~~

~~(G)Within 180 days of the adoption of these rules, propose additional rules for permits issued to local jurisdictions to address the control of storm water from new development within the Tualatin and Oswego Lake subbasins. The rules shall consider the following factors:~~
~~(iv)Alternative control systems capable of complying with subsections (a) and (b) of this section;~~
~~(v)Maintenance and operation of the control systems;~~
~~(vi)Assurance of erosion control during as well as after construction.~~

~~(H)In cooperation with the Department of Agriculture, within 180 days of the adoption of this rule develop a control strategy for addressing the runoff from container nurseries.~~

~~*Precise dates for complying with this rule may be conditioned on physical conditions (i.e., flow, temperature) of the receiving water and shall be specified in individual permits or memorandums of understanding issued by the Department. The Department shall consider system design flows, river travel times, and other relevant information when establishing the specific conditions to be inserted in the permits or memorandums of understanding. Conditions shall be consistent with Commission approved program plans** and the intent of this rule.~~

~~**For the purpose of this section of the rules, program plan is defined as the first level plan for developing a wastewater management system and describes the present physical and institutional infrastructure and the proposed strategy for changes including alternatives. A program plan should also include intergovernmental agreements and approvals, as appropriate; time schedules for accomplishing goals, including interim objectives; and a financing plan.~~

ATTACHMENT C
FISCAL AND ECONOMIC IMPACT STATEMENT
FOR REPEAL OF OAR 340-41-0470(9)

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal for
REPEAL OF OAR 340-41-0470(9)

Fiscal and Economic Impact Statement

Introduction

This proposal would repeal OAR 340-41-0470(9). OAR 340-41-0470(9) established the following by rule:

- the total phosphorus and ammonia Total Maximum Daily Loads (TMDLs), expressed in terms of monthly median concentrations at the mouths of tributaries and along the mainstem of the Tualatin River (which were submitted to the Environmental Protection Agency (EPA) and subsequently approved);
- requirements for program plans to be submitted to the Department; and
- a date for achieving the concentrations.

The Department proposes to repeal this rule as it is redundant and covered under other authorities.

As required under the Federal Clean Water Act (CWA), TMDLs are approved by EPA and Waste Load Allocations are assigned to point sources by the Department. Load Allocations for forest operations on private and state forest lands are implemented through rules adopted by the Board of Forestry under the Forest Practices Act (ORS 468B.110; 527.765; 527.770). Load allocations for agriculture are implemented through Agricultural Water Quality Management Area Plans developed by the Oregon Department of Agriculture or other statutorily available authority (ORS 561.191; 568.900 to 568.933). Other Load Allocations are implemented by the Department or by federal or local agencies.

As this rule change would repeal OAR 340-41-0470(9) but activities required under the TMDL would be carried out under other authorities currently available, the Department deems that there would be no fiscal and economic impact by the repeal of OAR 340-41-0470(9).

Impact on the General Public, Small Business, Large Business, Local Governments, State Agencies, and Assumptions: As this rule change would repeal OAR 340-41-0470(9) but activities required under the TMDL would be carried out under other authorities currently available, the Department deems that there would be no fiscal and economic impact by the repeal of OAR 340-41-0470(9).

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 D
LAND USE EVALUATION STATEMENT

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal

for
REPEAL OF OAR 340-41-0470(9)

Land Use Evaluation Statement

1. Explain the purpose of the proposed rules.

This proposal would repeal OAR 340-41-0470(9). OAR 340-41-0470(9) established the following by rule:

- the total phosphorus and ammonia Total Maximum Daily Loads (TMDLs), expressed in terms of monthly median concentrations at the mouths of tributaries and along the mainstem of the Tualatin River (which were submitted to the Environmental Protection Agency (EPA) and subsequently approved);
- requirements for program plans to be submitted to the Department; and
- a date for achieving the concentrations.

The Department proposes to repeal this rule as it is redundant and covered under other authorities.

As required under the Federal Clean Water Act (CWA), TMDLs are approved by EPA and Waste Load Allocations are assigned to point sources by the Department. Load Allocations for forest operations on private and state forest lands are implemented through rules adopted by the Board of Forestry under the Forest Practices Act (ORS 468B.110; 527.765; 527.770). Load allocations for agriculture are implemented through Agricultural Water Quality Management Area Plans developed by the Oregon Department of Agriculture or other statutorily available authority (ORS 561.191; 568.900 to 568.933). Other Load Allocations are implemented by the Department or by federal or local agencies.

2. Do the proposed rules affect existing rules, programs or activities that are considered land use programs in the DEQ State Agency Coordination (SAC) Program?

Yes_X_ No___
a. If yes, identify existing program/rule/activity:

National Pollutant Discharge Elimination System (NPDES) Permits

b. If yes, do the existing statewide goal compliance and local plan compatibility procedures adequately cover the proposed rules?

Yes_X___ No_____ (if no, explain):

Existing DEQ procedures require city or county approval of a Land Use Compatibility Statement (LUCS) before water quality permits are issued. TMDL related permitting under Department Order and implementation requirements would continue to rely on the LUCS approval process.

c. If no, apply the following criteria to the proposed rules.

Staff should refer to Section III, subsection 2 of the SAC document in completing the evaluation form. Statewide Goal 6 - Air, Water and Land Resources is the primary goal that relates to DEQ authorities. However, other goals may apply such as Goal 5 - Open Spaces, Scenic and Historic Areas, and Natural Resources; Goal 11 - Public Facilities and Services; Goal 16 - Estuarine Resources; and Goal 19 - Ocean Resources. DEQ programs and rules that relate to statewide land use goals are considered land use programs if they are:

1. Specifically referenced in the statewide planning goals; or

2. Reasonably expected to have significant effects on
   a. resources, objectives or areas identified in the statewide planning goals, or
   b. present or future land uses identified in acknowledged comprehensive plans.

In applying criterion 2 above, two guidelines should be applied to assess land use significance:
- The land use responsibilities of a program/rule/action that involved more than one agency, are considered the responsibilities of the agency with primary authority.
- A determination of land use significance must consider the Department's mandate to protect public health and safety and the environment.

In the space below, state if the proposed rules are considered programs affecting land use. State the criteria and reasons for the determination.

3. If the proposed rules have been determined a land use program under 2. above, but are not subject to existing land use compliance and compatibility procedures, explain the new procedures the Department will use to ensure compliance and compatibility.

N/A

Division | Intergovernmental Coord. | Date

ATTACHMENT E
QUESTIONS TO BE ANSWERED TO REVEAL POTENTIAL JUSTIFICATION FOR DIFFERING FROM FEDERAL REQUIREMENTS.

Questions to be Answered to Reveal
Potential Justification for Differing from Federal Requirements.

This proposal would repeal OAR 340-41-0470(9). OAR 340-41-0470(9) established the following by rule:

- the total phosphorus and ammonia Total Maximum Daily Loads (TMDLs), expressed in terms of monthly median concentrations at the mouths of tributaries and along the mainstem of the Tualatin River (which were submitted to the Environmental Protection Agency (EPA) and subsequently approved);
- requirements for program plans to be submitted to the Department; and
- a date for achieving the concentrations.

The Department proposes to repeal this rule as it is redundant and covered under other authorities.

As required under the Federal Clean Water Act (CWA), TMDLs are approved by EPA and Waste Load Allocations are assigned to point sources by the Department. Load Allocations for forest operations on private and state forest lands are implemented through rules adopted by the Board of Forestry under the Forest Practices Act (ORS 468B.110; 527.765; 527.770). Load allocations for agriculture are implemented through Agricultural Water Quality Management Area Plans developed by the Oregon Department of Agriculture or other statutorily available authority (ORS 561.191; 568.900 to 568.933). Other Load Allocations are implemented by the Department or by federal or local agencies.

This rule repeal does not establish any new requirements and would use existing federal and state authorities.

1. Are there federal requirements that are applicable to this situation? If so, exactly what are they?

Under Section 303(d) (33 USC Section 1313) of the Clean Water Act (as Amended by the Water Quality Act of 1987, Public Law 10-4), States are required to develop a prioritized list of waters not meeting water quality standards (this is called the 303(d) List) and submit it to the EPA for approval. States are also required to establish Total Maximum Daily Loads (TMDLs) for pollutants for the waters identified on the 303(d) list. TMDLs are to be submitted to EPA for approval. EPA generally takes 30 days to act on these submittals. If they disapprove, either the state modifies the TMDL to satisfy the concerns or EPA establishes the TMDL.

In Oregon, the Department of Environmental Quality (DEQ) has the responsibility for the designation of Water Quality Limited Segments and the establishment of TMDLs pursuant to Section 303(d) of the Clean Water Act. The Department has committed to a schedule for developing TMDLs for pollutants for all waterbodies on the 1998 303(d) List by 2007 as part of its Oregon Plan commitments and under a 2000 Memorandum of Agreement with EPA.

2. Are the applicable federal requirements performance based, technology based, or both with the most stringent controlling?

Federal TMDLs requirements are performance based requirements.

3. Do the applicable federal requirements specifically address the issues that are of concern in Oregon? Was data or information that would reasonably reflect Oregon's concern and situation considered in the federal process that established the federal requirements?

Yes – TMDLs address concerns with complaince with water quality standards. The federal requirement were established with the passage of the Clean Water Act 1972. It is not know if Oregon data or information was considered in the federal process.

4. Will the proposed requirement improve the ability of the regulated community to comply in a more cost effective way by clarifying confusing or potentially conflicting requirements (within or cross-media), increasing certainty, or preventing or reducing the need for costly retrofit to meet more stringent requirements later?

The repeal or OAR 340-41-0470(9) is being suggested as existing requirements and processes for the regulated community are already in place so there should be less confusion or potential conflict by the rule repeal.

5. Is there a timing issue which might justify changing the time frame for implementation of federal requirements?

Under the Oregon Plan and recent MOA with EPA, the Department has committed to completing TMDLs for pollutants for waters identified on the 1998 303(d) list by 2007. The repeal of OAR 340-41-0470(9) would help to streamline this process.

6. Will the proposed requirement assist in establishing and maintaining a reasonable margin for accommodation of uncertainty and future growth?

TMDLs are to have a margin of safety and a reserve for future growth. The repeal of OAR 340-41-0470(9) would not affect the margin of safety and reserve for future growth in the TMDL.

7. Does the proposed requirement establish or maintain reasonable equity in the requirements for various sources? (level the playing field)

The TMDLs assigns waste load allocations (WLA) to point sources and load allocations (LA) to nonpoint sources. The repeal of OAR 340-41-0470(9) would not affect the equity of the WLA and LA in the TMDL.

8. Would others face increased costs if a more stringent rule is not enacted?

As this rule change would repeal OAR 340-41-0470(9) but activities required under the TMDL would be carried out under other authorities currently available, the Department deems that there would be no fiscal and economic impact by the repeal of OAR 340-41-0470(9).

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, reporting and monitoring requirements are to be developed as part of the Implementation Plan that is being submitted with the TMDLs. The repeal of OAR 340-41-0470(9) would not affect these requirements.

10. Is demonstrated technology available to comply with the proposed requirement?

Technology used to achieve TMDLs will be identified in management plans developed by Designated Management Agencies. The repeal of OAR 340-41-0470(9) would not affect these requirements.

11. Will the proposed requirement contribute to the prevention of pollution or address a potential problem and represent a more cost effective environmental gain?

TMDLs and their implementation will address pollution prevention and address water quality problems. The repeal of OAR 340-41-0470(9) would not affect these requirements.

Attachment C
Presiding Officer Report on Public Hearing

A Public Hearing was held starting at 2 PM on Monday December 18, 2000 in Conference Room A/B at Oregon DEQ NW Regional Office, 2020 SW 4th Avenue, Portland, OR. The Hearing was to receive oral and/or written testimony on the proposal to repeal OAR 340-41-0470(9) – the Tualatin Sub-basin TMDL Rule for Total Phosphorus and Ammonia. Neil Mullane was the Hearings Officer and Andy Schaedel and Rob Burkhart were staff that were present who had worked on the proposal. A brief overview of the proposal was given by Andy Schaedel prior to the hearing.

One person, Sue Marshall, who represented the Tualatin Riverkeepers gave oral testimony, which was the same as the written testimony that was provided. In addition, the Department received written testimony from the following:

Name	Organization	Testimony
1. William Gilham		Written
2. Ela Whelan	Water Environment Services, Clackamas County	Written
3. Sue Marshall	Tualatin Riverkeepers	Oral/Written
4. Mark Riskedahl	Northwest Environmental Defense Center	Written
5. Charles Logue	Unified Sewerage Agency of Washington County	Written
6. John Rosenberger	Washington County	Written

Written testimony is attached.

Issues raised in the testimony were as follows:

- Several Designated Management Agencies requested that the *Tualatin Sub-basin Nonpoint Source Management Implementation/Compliance Schedule and Order for Designated Management Agencies (DMAs)* be extended effective December 31, 2000 with its expiration conconcurrent with the approval by EPA of the new TMDLs (Attachment F). This would be to address any potential liability arising from time gaps where the compliance order is not in effect and a new TMDL has not been approved.
- Several Designated Management Agencies requested to know the anticipated role of the EQC in the TMDL process particularly, as the TMDL would be required under Department Order rather than rule, would there be a procedure by which the order could be appealed to the EQC.
- Several environmental groups felt that it is premature to repeal the rule as the revised TMDLs have not yet been approved. They expressed concern that the revised TMDLs would not be quantifiable, enforceable and subject to a compliance schedule and felt the rule provided this

assurance. They requested that the public comment period remain open until 30 days after EPA approval of the revised Tualatin TMDL.

- Several environmental groups felt that the repeal of the Tualatin Rule would weaken TMDL enforcement and that enforcement of the TMDL has been avoided through a series of extensions to the compliance schedule. Although DEQ may have the authority to enforce the TMDL through existing mechanisms, it has opted not to do so.

Re: ~~Repeal~~ of OAR 340-41-0470(9)

Mr. William F. Gilham
8320 SW Ellman Ln.
Portland, OR 97224

Dec. 14, 2000

Dear Mr. Schaedel;

Thank you for this opportunity to comment. After living, loving and working on the Tualatin River for sixty years, I remain more interested than ever in water quality. I definitely would appreciate being included on your mailing list.

It seems to me that there is an overlapping of TMDL agencies and regulations.

In short; in the outcome, whoever will be responsible for water quality in the Tualatin should never set any acceptable TMDL's, because there is none. The only justification for the existence of any agency is to uphold the standards and set no limits on quality. The public

does not budget money for talented chemists and engineers to sit back and be satisfied with any standard. They should operate like a private company which is never satisfied with their efficiency and progress.

I am glad to congratulate the DEQ and the U.S.A. for the excellent results in restoring the water quality, especially in the last ten years.

I love this river, she is long and curvy and beautiful. I will soon leave her in your care, so continue your good efforts, and don't stop at any point.

With heartfelt thanks, Bill Gilbam

WATER ENVIRONMENT SERVICES
Water Quality Protection • Surface Water Management
Wastewater Collection and Treatment

J. Michael Read
Director

December 18, 2000

Andy Schaedel,
DEQ, NW Region
2020 SW 4th Ave., Suite 400,
Portland, Oregon 97201.

Dear Andy,

Thank you for the opportunity to comment on the proposed repeal of the Tualatin sub-basin TMDL rule for total phosphorus and ammonia. The Department of Environmental Quality ("DEQ") deserves praise for its efforts on behalf of the health of the Tualatin River. We hope these efforts continue to be cooperative and focused on effective measures for improvements in water quality.

The issues involved in the Tualatin TMDL process are scientifically complex and the validity of that process is of vital importance. While we understand DEQ's desire to implement a more streamlined process for promulgating TMDLs, we believe that the Environmental Quality Commission ("EQC") must remain significantly involved in establishing the Tualatin TMDLs. In addition, there are several procedural issues that the EQC and the Department must address in considering the Tualatin TMDL rule.

Surface Water Management Agency of Clackamas County has the following comments:

The Designated Management Agency Implementation and Compliance Order is currently set to expire on December 31, 2000. There is a possibility that the designated management agencies would be out of compliance with OAR 340-41-470 (9)(a) if that compliance order is not in effect. However, once the new TMDL is approved by EPA, the existing compliance order will no longer be necessary. We are acutely aware of the potential liability arising from any time gaps where the compliance order is not in effect and a new TMDL has not been approved. There is currently one lawsuit focused on the Tualatin River being litigated and there are several outstanding 60-day notices that have been submitted to various agencies that could result in further litigation.

Therefore, we request that the EQC extend the compliance order, making its expiration concurrent with the approval by EPA of the new TMDLs. In addition, the

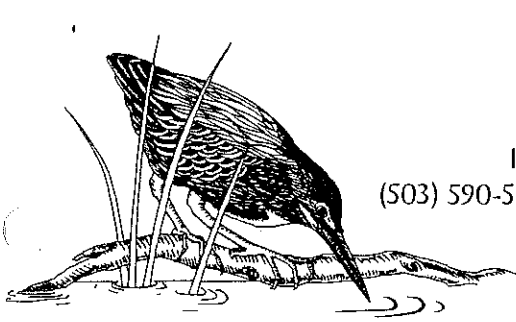
extension should be made effective December 31, 2000, ensuring that there are no gaps in coverage. This extension would only be for a very limited time. Comments on the draft version of the new TMDLs are currently being considered by DEQ and a final version of the TMDLs should be sent to EPA for approval early in 2001.

If the Tualatin River TMDL Rule is repealed, we would like to know about the EQC's involvement with the TMDL going forward. The issues involved in the promulgation of the Tualatin River TMDLs, and TMDLs generally, are of great importance to the citizens of this state. They are also issues that should be followed closely by the EQC. The EQC, as the policy making body for DEQ, should continue to play a significant role in guiding the development of TMDLs. If the Tualatin River TMDLs are to be promulgated by Departmental Order rather than by Rule, we request that the Department describe the procedures by which that order could be appealed to the EQC.

Thank you for considering our comments.

Ela Whelan

Ela Whelan, PE
Surface Water Manager



TUALATIN Riverkeepers

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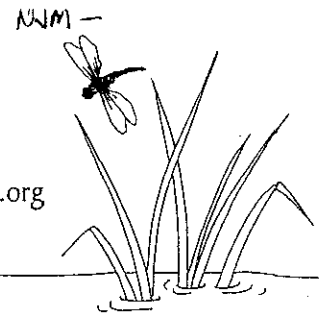

December 18, 2000

Andy Schaedel
Oregon Department of Environmental Quality
2020 SW 4th Ave.
Portland, OR 97201

RE: Comments on Repeal of Tualatin Sub-Basin Rule for Total Phosphorus and Ammonia (OAR) 340-41-0470(9)

Dear Mr. Schaedel,

My name is Sue Marshall, Executive Director of the Tualatin Riverkeepers. Please accept the following comments on behalf of our organization and its 700 members.

The Tualatin Riverkeepers believes it is premature to consider a repeal of the Tualatin Rule for Total Phosphorus and Ammonia (OAR) 340-41-0470(9). The revised Tualatin TMDL, which replaces this existing TMDL set out in the Tualatin Rule (OAR) 340-41-0470(9), has not yet been approved by the Environmental Protection Agency. Assessing the adequacy of the new Tualatin TMDL is essential in determining whether or not a Tualatin TMDL should be enforced by an Oregon Administrative Rule.

At this time, the Tualatin Riverkeepers opposes the repeal of the Tualatin Rule, (OAR) 340-41-0470(9), and we request the public comment period remain open until 30 days after EPA approval of the revised Tualatin TMDL.

The existing Tualatin Rule clearly sets monthly median concentrations for total phosphorus and ammonia-nitrogen for 14 specified sites in the basin, it allocates identifiable waste load allocations (WLA) and load allocations (LA), and sets a schedule (specific dates) when actions and standards are expected to be achieved. Fundamentally, for TMDLs to be successful there is a need for them to be quantifiable, enforceable, and subject to a compliance schedule. The Tualatin Rule, OAR 340-41-0470(9), provides this assurance.

It is unclear whether or not the new Tualatin TMDL will include identifiable and enforceable WLA and LA, or be subject to a compliance schedule. The proposed Tualatin TMDL is lacking identifiable pollutant WLA and LA, does not include a schedule for compliance, and includes only a vague Water Quality Management Plan. To judge the need for a Tualatin TMDL rule based on the proposed new TMDL, we conclude that the rule is the only enforceable mechanism and it should be retained.

If the final EPA approved Tualatin TMDL includes identifiable, enforceable, WLA and LA, and a WQMP that describes specific actions to be taken by specific dates designed to meet the pollutant loadings... we may agree that a Tualatin Rule is not needed. Again, until we have an

opportunity to evaluate the final TMDL we cannot agree to the elimination of the only enforceable mechanism.

We believe the repeal of the Tualatin Rule would weaken TMDL enforcement. DEQ has, it appears to us, successfully avoided enforcement of the existing TMDL through a series of extensions to a compliance order that was set in 1990, the basis of this rule. This coupled with the inadequacy of the proposed Tualatin TMDL implementation plan now being developed by DEQ with the designated management agencies leaves us worried. DEQ may have the authority to enforce the TMDL through existing mechanisms, but they opt not to do so.

We believe there is a serious issue of public trust with the implementation of the Tualatin TMDL. While the Tualatin Rule does provide an enforceable mechanism, enforcement of the existing TMDL has been avoided by a series of extensions to a "compliance order". This "compliance order" was negotiated in 1993 when it was apparent that the Designated Management Agencies would not meet the compliance order set out in the TMDL Rule. I have attached a summary of Tualatin TMDL Milestones and the following summary of the "compliance order" extensions.

Summary of TMDL "Enforcement" since 1993

- **Oregon Administrative Rules require that the TMDL criteria for phosphorus and ammonia be met by June 30, 1993.**
- **In 1993 USA and DEQ prepare a "non-point source compliance order" which does not include a requirement for compliance with storm water Waste Load Allocations and non-point Load Allocations.**
- **The "compliance order" was extended five times over the next five years. Each new "compliance order" fails to include storm water and non-point source Waste Load and Load Allocations or a schedule to achieve the allocations.**
- **Nov. 2000 - DEQ proposes a repeal of the Tualatin TMDL rule, OAR 340-41-0470.**

Extending the public the comment period until 30 days after EPA approval of the revised Tualatin TMDL will reassure the public that the proposed repeal of the Tualatin Rule is not another avenue to avoid TMDL enforcement.

Again, at this time, the Tualatin Riverkeepers opposes the repeal of the Tualatin Rule, (OAR) 340-41-1470(9), and we request that the public comment period remain open until 30 days after EPA approval of the revised Tualatin TMDL.

Thank you for your consideration and for the opportunity to comment on this proposed rule change.

Sincerely,

Sue Marshall

Sue Marshall, Executive Director
Tualatin Riverkeepers

Tualatin River TMDL Milestones

August 16, 1986	Northwest Environmental Defense Center [NEDC] sends a Clean Water Act 60-day notice to the Environmental Protection Agency [EPA], based on failure of the Department of Environmental Quality [DEQ] to complete TMDL's [Total Maximum Daily Load] in Oregon.
December 12, 1986	NEDC and Jack Churchill file suit in Federal District Court in Oregon, under the Clean Water Act, against EPA and its administrator Lee Thomas, based on DEQ failure to set TMDL's. Case name is NEDC v. Thomas. Complaint identifies Tualatin River as one of the many waters needing TMDL's.
January 6, 1987	NEDC sends a second Clean Water Act 60-day notice to EPA for DEQ failure to set TMDL's in Oregon. Notice specifically identifies the Tualatin River.
June 3, 1987	Consent Decree in NEDC v. Thomas entered by court. Decree requires DEQ/EPA to complete a Loading Capacity analysis for the Tualatin River and submit it to EPA by May 1987. Tualatin is first water on list of required TMDL work. The Decree also requires DEQ/EPA to complete adoption of TMDL's for all waters listed then and in the future by DEQ as Water Quality Limited, at the rate of 20% of all Water Quality Limited Streams annually.
1988	**Oregon Administrative Rule, 340-41-0470, sets criteria for ammonia and phosphorus TMDL's for the main stem and 5 tributaries. The criteria must be achieved by June 30, 1993.**
1988	NEDC gives a Clean Water Act 60-day notice to USA for failure to comply with NPDES permits and unauthorized discharges. Over 13,800 treatment plant violations are sited.
December 1988	NEDC, Tualatin Riverkeepers, Lower Tualatin Valley Home Owners Association, Tualatin Dam Park Home Owners League, and others file suit in federal court against USA. Case name is NEDC v. USA.
1989	TMDL's, Waste Load Allocations [WLA's], Load Allocations [LA's] for the Tualatin River established by DEQ and approved by EPA, for ammonia and phosphorus.
August 2, 1990	A Consent Decree in NEDC v. USA is entered. Requires submission by USA of a draft compliance schedule for compliance with NPDES permit by 12/1/90 and creation by DEQ of a final compliance schedule due by 12/29/90.
1992	USA achieves WLA's for treatment plant discharges.
1993	As the June 30th deadline approaches, **USA and DEQ prepare a "nonpoint source compliance order" which does not include a requirement for compliance of the Load Allocations for nonpoint.** The Environmental Quality Commission [EQC] approves this "compliance order/schedule" for 18-months.

Nov. 16-17, 1995	**EQC extends the "Non-Point Source Compliance Order"** for an additional 18 months. DEQ appoints a Technical Advisory Committee.
1997	**EQC again extends the "Non-point Source Compliance Order",** this time for 6 months. DEQ appoints a Policy Advisory Committee. The Designated Management Agencies through USA hire staff to facilitate and set the agenda for those meetings.
February 27, 1998	A Subcommittee on TMDL Implementation issues a report to DEQ clarifying persistent confusion regarding natural vs. human caused sources of phosphorus and the relationship of TMDL's to water quality programs of the DMA's.
April 4, 1998	**EQC extends the "Non-point Source Compliance Order" for one month** and directs DEQ to provide a plan and schedule for implementing TMDL's for the Tualatin. The EQC further directed DEQ to incorporate the recommendations developed by the TMDL Subcommittee of the Tualatin Basin Policy Advisory Committee.
June 11, 1998	**EQC adopts a new "Compliance Order" that must be implemented by July 1999.** Rather than laying out an actual schedule by which the non-point source Load Allocations will be met, the "Compliance Order" describes **a process for developing a new implementation program for non-point source,** updating existing WLA's for phosphorus and ammonia and developing additional TMDL's for temperature, pH, bacteria.
June 1998	DEQ, with USA funding and assistance, hires a Tualatin basin Coordinator to accomplish the new "Compliance Order".
June 2000	**DEQ again requests and EQC grants an extension to the "compliance order" until December 2000.**
December 2000	**DEQ proposes a repeal of the Tualatin TMDL Rule, OAR 340-41-0470, they reason that there is no need for the rule and that the TMDL rules place an administrative burden on DEQ staff.**

Summary of TMDL "Enforcement" since 1993

- **Oregon Administrative Rules require that the TMDL criteria for phosphorus and ammonia be met by June 30, 1993.**
- **In 1993 USA and DEQ prepare a "non-point source compliance order" which does not include a requirement for compliance with storm water Waste Load Allocations and non-point Load Allocations.**
- **The "compliance order" was extended five times over the next five years. Each new "compliance order" fails to include storm water and non-point source Waste Load and Load Allocations or a schedule to achieve the allocations.**
- **Nov. 2000 - DEQ proposes a repeal of the Tualatin TMDL rule, OAR 340-41-0470.**

Compiled by the Tualatin Riverkeepers, revised December 2000.

December 19, 2000

Andy Schaedel
Oregon Department of Environmental Quality
2020 SW 4th Ave.
Portland, OR 97201

RE: Comments on Repeal of Tualatin Sub-Basin TMDL Rule for Total Phosphorus and Ammonia (OAR) 340-41-0470(9)

Andy:

I wanted to pass on a few concerns the Northwest Environmental Defense Center (NEDC) has with the Department's proposed repeal of the Tualatin TMDL Rule. Although the Department has determined that the workability of future TMDLs may be hampered by the rule-making process, the expenditure of the Department's limited public resources for the purpose of repealing an already existing rule is highly questionable. This attempt seems premature as it is not yet clear what WLAs and LAs will take the place of those set forth in the rule. Further, the Department's numerous extensions of the nonpoint-source compliance schedule deriving from the original rule would appear to implicate the Department's unwillingness to effectively enforce the provisions of the rule, rather than to serve as providing a rationale for repealing the rule.

It is unfortunate that the Department is once again engaged in backsliding that is expressly contrary to the goals and objectives of the Clean Water Act. There is no evidence in the memo accompanying the proposed rule repeal that the repeal would actually serve to protect, restore or even maintain the chemical, physical and biological integrity of the Tualatin River. In fact, the Department's enforcement authority concerning nonpoint source pollution in the Tualatin basin provided through the "reasonable assurances" outlined in the memo appears to be less stringent than its existing enforcement authority under the Tualatin Rule. In addition to the above-mentioned concerns, NEDC would also like to incorporate by reference the issues raised in the comments submitted on December 18, 2000 by Sue Marshall on behalf Tualatin Riverkeepers.

Sincerely,

Mark Riskedahl
President, NEDC
10015 SW Terwilliger Blvd.
Portland, OR 97219

UNIFIED SEWERAGE AGENCY OF WASHINGTON COUNTY

December 19, 2000

Mr. Andy Schaedel
Oregon Department of Environmental Quality
2020 SW 4th Ave., Suite 400
Portland, OR 97201

Re: Repeal of Oregon Administrative Rule (OAR) 340-41-0470(9)
The Tualatin Sub-basin TMDL Rule for Total Phosphorus and Ammonia

Dear Mr. Schaedel:

Thank you for the opportunity to comment on the proposed repeal of the Tualatin sub-basin TMDL rule for total phosphorus and ammonia. The Department of Environmental Quality ("DEQ") deserves praise for its efforts on behalf of the health of the Tualatin River. We hope these efforts continue to be cooperative and focused on effective measures for improvements in water quality.

The issues involved in the Tualatin TMDL process are scientifically complex and the validity of that process is of vital importance. While we understand DEQ's desire to implement a more streamlined process for promulgating TMDLs, there are several procedural issues that should be addressed before the proposed repeal of the Tualatin TMDL is finalized.

The Unified Sewerage Agency's comments are as follow:

The Designated Management Agency Implementation and Compliance Order is currently set to expire on December 31, 2000. There is a possibility that the designated management agencies would arguably be out of compliance with OAR 340-41-470 (9)(a) if that compliance order is not in effect. However, once the new TMDL is approved by EPA, the existing compliance order will no longer be necessary. We are acutely aware of the potential liability arising from any time gaps where the compliance order is not in effect and a new TMDL has not been approved. There is currently one lawsuit focused on the Tualatin River being litigated and there are several outstanding 60 day notices that have been submitted to various agencies that could result in further litigation.

Therefore, we request that the Environmental Quality Commission ("EQC") extend the compliance order, making its expiration concurrent with the approval by EPA of the new TMDL. In addition, the extension should be made effective December 31, 2000,

ensuring that there are no gaps in coverage. This extension would only be for a very limited time. Comments on the draft version of the new TMDL are currently being considered by DEQ and a final version of the TMDL should be sent to EPA for approval early in 2001.

If the Tualatin River TMDL Rule is repealed, we would like to know the anticipated role of EQC in the TMDL process. The issues involved in the promulgation of the Tualatin River TMDL, and TMDLs generally, are of great importance to the citizens of this state. They are also issues that should be followed closely by the EQC. The EQC, as the policy making body for DEQ, should continue to play a significant role in guiding the development of TMDLs. If the Tualatin River TMDL is to be promulgated by Departmental Order rather than by Rule, we would like to know the procedure by which that order could be appealed to the EQC.

Again, the Agency appreciates the opportunity to provide comments on this proposed Agency action.

Sincerely,

Charles Logue
Technical Services Department Director

Cc: Bill Gaffi
Jerry Linder
Craig Dye

WASHINGTON COUNTY
OREGON

December 19, 2000

Mr. Andy Schaedel
OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY
2020 SW 4th Avenue Suite 400
Portland, OR 97201

Proposed Repeal of OAR 340-41-0470(9);
Tualatin Sub-basin TMDL Rule for Total Phosphorus and Ammonia

Dear Mr. Schaedel:

Thank you for the opportunity to comment on the proposed repeal of the Tualatin sub-basin TMDL rule for total phosphorus and ammonia. The Department of Environmental Quality ("DEQ") deserves praise for its efforts on behalf of the health of the Tualatin River. We hope these efforts continue to be cooperative and focused on effective measures for improvements in water quality.

The issues involved in the Tualatin TMDL process are scientifically complex and the validity of that process is of vital importance. While we understand DEQ's desire to implement a more streamlined process for promulgating TMDLs, we believe that the Environmental Quality Commission ("EQC") must remain significantly involved in establishing the Tualatin TMDLs. In addition, there are several procedural issues that the EQC and the Department must address in considering the Tualatin TMDL rule.

Washington County's comments are as follows:

The Designated Management Agency Implementation and Compliance Order is currently set to expire on December 31, 2000. There is a possibility that the designated management agencies would be out of compliance with OAR 340-41-470 (9)(a) if that compliance order is not in effect. However, once the new TMDL is approved by EPA, the existing compliance order will no longer be necessary. We are acutely aware of the potential liability arising from any time gaps where the compliance order is not in effect and a new TMDL has not been approved. There is currently one lawsuit focused on the Tualatin River being litigated and there are several outstanding 60-day notices that have been submitted to various agencies that could result in further litigation.

Department of Land Use & Transportation • Administration
155 N First Avenue, Suite 350-16, Hillsboro, OR 97124-3072
phone: (503) 846-4530 • fax: (503) 846-4412

Therefore, we request that the EQC extend the compliance order, making its expiration concurrent with the approval by EPA of the new TMDL. In addition, the extension should be made effective December 31, 2000, ensuring that there are no gaps in coverage. This extension would only be for a very limited time. Comments on the draft version of the new TMDL are currently being considered by DEQ and a final version of the TMDL should be sent to EPA for approval early in 2001.

If the Tualatin River TMDL Rule is repealed, we would like to know about the EQC's involvement with the TMDLs going forward. The issues involved in the promulgation of the Tualatin River TMDLs, and TMDLs generally, are of great importance to the citizens of this state. They are also issues that should be followed closely by the EQC. The EQC, as the policy making body for DEQ, should continue to play a significant role in guiding the development of TMDLs. If the Tualatin River TMDL is to be promulgated by Departmental Order rather than by Rule, we request that the Department describe the procedures by which that order could be appealed to the EQC.

Thank you for the opportunity to comment on this proposed rule.

Sincerely yours,

John Rosenberger
Director

LS\LTR\DEQ-Rule Repeal_1.DOCsb

Attachment D – Department's Evaluation of Public Comment

Background: The Department developed the request to repeal the OAR 340-41-0470(9) as it is able to implement TMDLs under a Department Order using existing authorities. When the phosphorus and ammonia TMDLs in the Tualatin were developed in 1988, the TMDL process was new and some authorities (SB1010 and Storm Water Permits) were not available. In 1990, the Department discussed a process with the EQC, which was agreed to, whereby TMDLs would not be implemented by rule. Currently, TMDLs for phosphorus and ammonia in the Tualatin can be implemented under NPDES permits, Agricultural Water Quality Management Area Plans (ORS 561.191; 568.900 to 568.933) and under the Forest Practices Act (ORS 468.110; 527.765; 527.770).

Several Designated Management Agencies requested that the *Tualatin Sub-basin Nonpoint Source Management Implementation/Compliance Schedule and Order for Designated Management Agencies (DMAs)* be extended effective December 31, 2000 with its expiration conconcurrent with the approval by EPA of the new TMDLs (Attachment F). This would be to address any potential liability arising from time gaps where the compliance order is not in effect and a new TMDL has not been approved:

> The Department believes that EQC should extend the Compliance Schedule and Order. In addition to the concern that about potential liability with the rules until the rules are repealed (upon approval of the revised TMDLs by EPA), the Compliance Schedule and Order that was developed in 1993 is referenced in the current Municipal Separate Storm Sewer System (MS4) Dicharge Permits. While the Department feels that potential liability is low if the Compliance Order is not extended, as the rule is a seasonal rule which applies from May 1 to November 15 of each year and the original order is referenced in the permits, extension of the Compliance Order will clarify that current programs should be continued until new permits can be developed that incorporate the new and revised TMDLs and their waste load allocations. Therefore, the Department recommends the EQC extend the *Tualatin Sub-basin Nonpoint Source Management Implementation/Compliance Schedule and Order for Designated Management Agencies (DMAs)* effective December 31, 2000 until current MS4 permits can be revised.

Several Designated Management Agencies requested to know the anticipated role of the EQC in the TMDL process particularly, as the TMDL would be required under Department Order rather than rule, would there be a procedure by which the order could be appealed to the EQC:

> The Department indicated to the EQC at its December 1, 2000 meeting (Agenda Item F, Total Maximum Daily Load (TMDL) Process and Update on the Tualatin TMDL) that it will

be developing general rules regarding TMDLs that will clarify TMDL development and implementation. These rules will be based upon much that has been agreed upon in February 2000 MOA with EPA. The Department will be bringing these proposed rules to the EQC for approval, likely towards the end of 2001. The Department will consider the EQC role in the development of these rules.

Implementation of TMDLs will occur through various management programs that are currently available – each with their own review process described by rule or statute. For example, in the case of waste load allocations being incorporated into permits, procedures for issuance, denial and modifications of permits are decribed in Divisions 14 and 45. An applicant can request a hearing before the EQC or its authorized representative if dissatisfied with the conditions or limitations.

Several environmental groups felt that it is premature to repeal the rule as the revised TMDLs have not yet been approved. They expressed concern that the revised TMDLs would not be quantifiable, enforceable and subject to a compliance schedule and felt the rule provided this assurance. They requested that the public comment period remain open until 30 days after EPA approval of the revised Tualatin TMDL:

The Department has proposed that the rule repeal be effective upon EPA approval of the revised TMDLs. TMDLs are required under the Clean Water Act and must meet federal regulations in order to be approved by EPA. Regulations require a description of the applicable standard, identification of the waterbody's loading capacity for the applicable pollutant and identification of WLAs for point sources and LAs for nonpoint sources. Reasonable Assurance that nonpoint source reductions must be explained and the Department has agreed to submit implementation plans with the TMDLs. The Department believes that EPA is in position and is required to make the judgment that the TMDLs, WLAs and LAs are properly quantified, enforceable and subject to a compliance schedule. Furthermore, judicial review of TMDLs is based on EPA's written decision and the administrative record supporting that decision.

Compliance schedules in permits would need to be within 5 years unless otherwise specified. In EPA's recent TMDL guidance (Federal Register Volume 65, Number 135, page 43668), the following timeframes are recommended:

- A schedule, which is as expeditious as practicable, for implementing the management meaures or other control actions to achieve load allocations in the TMDL within 5 years, when implementation within this period is practicable;

- For all impaired waterbodies, the implementation plan must be based on a goal of attaining and maintaining the applicable water quality standards within ten years whenever attainment and maintenance within this period is practicable.

The Department has not extended the comment period. The EQC may choose not to take action on the rule repeal at this time.

Several environmental groups felt that the repeal of the Tualatin Rule would weaken TMDL enforcement and that enforcement of the TMDL has been avoided through a series of extensions to the compliance schedule. Although DEQ may have the authority to enforce the TMDL through existing mechanisms, it has opted not to do so:

The Department does not believe that repeal of the rule would weaken TMDL enforcement. The enforcement mechanism for TMDLs is generally through the permit requirements or specified in statute and rule for Agricultural Water Quality Management Area Plans (ORS 561.191; 568.900 to 568.933) and under the Forest Practices Act (ORS 468.110; 527.765; 527.770).

Attachment E
Changes to Original Proposal in Response to Public Comment

Based on Public Comment, the Department is recommending the following changes to the original proposal to repeal OAR 340-41-0479(9) upon EPA approval of the revised TMDLs:

- The Department recommends that the EQC extend the *Tualatin Sub-basin Nonpoint Source Management Implementation/Compliance Schedule and Order for Designated Management Agencies (DMAs)* effective December 31, 2000 until current MS4 permits can be revised (Attachment F).

Atttachment F

Tualatin Sub-basin Nonpoint Source Management Implementation/Compliance Schedule and Order for Designated Management Agencies (DMAs)

Tualatin Basin DMA Implementation and Compliance Order, June 11-12, 1998

Designated Management Agencies (DMAs):
The Unified Sewerage Agency of Washington County, representing participating cities
Clackamas County and River Grove
Washington County
Multnomah County
City of Lake Oswego
City of West Linn
City of Portland
Oregon Department of Agriculture
Oregon Department of Forestry

Purpose:

This order has three purposes.

1) The order assures continued implementation of plans developed under the Tualatin Basin TMDL and the ongoing activities contained in the Tualatin Sub-basin Nonpoint Source Management Implementation / Compliance Schedule and Order for Designated Management Agencies adopted by the EQC as Attachment A to Agenda Item F on January 9-10, 1997.
2) The order defines the specific reporting requirements which provide the enforceable mechanism for assuring implementation of the TMDLs during the period covered by the compliance order. The compliance period allows implementation of the schedule of activities identified in Agenda Item E of the June 11-12, 1998 EQC meeting. These activities are being conducted either by the DMAs or in cooperation with the DEQ to update the basin TMDLs and basin plans. The compliance order will be in effect until the completion of the activities in the schedule which will result in an updated basin plan and implementation strategy, but will not extend beyond the end of May 2000.
3) The compliance order represents the EQC policy for appropriate actions to continue implementation of pollution control efforts while the TMDLs and implementation strategies are being updated.

DMA Tasks

The first four (4) DMA tasks are ongoing tasks required by previous orders. Tasks 5 and 6 are new tasks.

1. The DMAs will continue existing monitoring programs in the basin. The data will be submitted to DEQ annually for upload into STORET data base. The DMAs will review data annually and submit a data analysis report in January of each year. The DMAs will submit a coordinated monitoring strategy to DEQ by the end of April of each year.

2. The DMAs will continue with existing Public Awareness / Education programs. A public awareness report will be submitted to DEQ by the end of January each year.

3. The DMAs will provide an annual report to DEQ. The annual report will describe:
   3.1. implementation of management practices;
   3.2. resolution of site specific problems;
   3.3. revision of rules and ordinances;
   3.4. evaluation of ongoing activities taken by the DMA to implement the TMDLs

4. The DMAs will continue the existing program for compliance with the Tualatin TMDL. These tasks include:
   4.1. the continued implementation of best management practices to insure widespread adoption and implementation of management measures;
   4.2. the continuing inventories to identify pollution problems and the development of the site specific solutions;
   4.3. the inventory, prioritization and development of schedules for the protection, enhancement or restoration of riparian areas;
   4.4. continue erosion control programs, plans and enforcement activities, review of the erosion control program for new development, investigation of the need for control of erosion and runoff from no-development activities throughout the basin, and review of the need to adopt or refine existing ordinances;
   4.5. continue implementation of program that on a priority basis maintains roadside ditches in such a way to minimize transportation of sediment, nutrients and other pollutants to waters of the state.

Tasks 5 and 6 are included in the scheduled TMDL and basin plan update:

5. By the end of February, 1999 the DMAs will provide DEQ a draft report describing how their existing programs for present and future development assures compliance with TMDLs, how

their current programs for pollution control compares to the TMDLs and appropriate allocations. The draft report will describe any actions necessary to update their program to implement bacteria management plans, temperature management plans, and changes to achieve substantial compliance with METRO Goal 6, title 3 model ordinances as appropriate. This report will describe any modifications or updates to the existing plans that will be implemented prior to the final reports described in Task 6.

6. By the end of June, 1999 the DMAs will each provide a report to the DEQ that evaluates their existing programs, describes how the program will comply with existing allocations and water quality standards. The report will describe what actions are needed to update existing programs to comply with the TMDLs and a schedule of activities that will be taken to update existing programs as needed.

State of Oregon

Department of Environmental Quality Memorandum

Date: December 11, 2000

To: Environmental Quality Commission

From: Stephanie Hallock, Director

Subject: Agenda Item J, EQC Meeting January 11-12, 2001

Statement of Purpose

This is a status report for the La Pine National On-site Demonstration Project. The project has made significant strides in the past eight months and the project team wishes to keep the Environmental Quality Commission abreast of the activity and the issues involved.

Background

Deschutes County recognized, in 1995, that the "La Pine Area," an area stretching from Sunriver south and covering about 100 square miles, needed assistance in solving its unique land use problems. In the 1960's and 1970's more than 200 subdivisions were platted in this area prior to Oregon's land use laws. Of the original 15,000 lots, over half are developed. It is a rural area surrounded by federal, state and county land. Problems related to continued development included:

- Contamination of high water tables, wetlands and riparian areas associated with the Deschutes and Little Deschutes Rivers;
- Loss of deer migration corridors in an area of the largest mule deer population in Oregon;
- Wildland fire hazards and limited evacuation routes;
- Conflicting priorities and coordination efforts between state and federal agencies.

The most significant problem for the Department of Environmental Quality and Deschutes County Environmental Health has been water quality and sewage disposal. Water tables can be one or two feet below the surface, or even above ground, and shallow wells can be contaminated by septic tank drain fields. Rapidly draining soils allow nitrogen rich effluent to reach the groundwater quickly with little treatment in the soil column. Compounding the problem are the extremely low ambient soil and groundwater temperatures that reduce the effectiveness of de-nitrifying processes.

DEQ and the County monitored wells and found high nitrate concentrations in some areas. DEQ's Rodney Weick, developed a two-dimensional model using well locations and water quality data to predict potential migration of nitrates if development patterns continued.

From 1996 to 2000, Deschutes County Community Development Department received funding under the Regional Problem Solving program from Oregon's Department of Land Conservation and Development to address the many problems of the area. During that time, the County worked with all of the state and federal agencies involved in the region. Agencies worked with citizens and local communities as stakeholders in a collaborative effort to understand the problems and define solutions.

The innovative program resulted in a variety of achievements, including:

- An Act of Congress to allow the purchase of 500 acres Bureau of Land Management Land and develop a new community that will concentrate development where a sewer already exists. The Act will enable the BLM to obtain more environmentally sensitive land for protection in Oregon.
- State legislation for transferable development credits that could reduce development in more sensitive areas;
- Higher focus from other state agencies and national organizations on the region;
- Grants from FEMA and from USFS through the Oregon Department of Forestry.
- Leveraged funds and participation with USGS to develop a three-dimensional model to determine potential groundwater impacts on the Deschutes River.

All of the work achieved under the RPS process paved the way for the Department of Environmental Quality (DEQ) to receive a grant of $5.5 million from the EPA to test experimental on-site systems in what is known as the La Pine National On-site Demonstration Program. Congressional support from our senators came in part because this study would allow possible future uses of alternatives in other regions of Oregon where nitrate levels exceed state and federal standards.

Current Status

The La Pine National On-site Demonstration Project, a collaborative effort between the DEQ, Deschutes County Environmental Health, and the US Geological Survey, is funded by the EPA for five years to accomplish four major tasks:

1. Install and monitor experimental on-site sewage disposal systems
    - Preparation: Before we could begin any installations in the south county area we needed to establish working agreements with three very different groups: The vendors of the experimental systems, the owners of property where the systems are to be installed, and the installers for the experimental systems and the control systems.
    - Experimental System Installation: Currently we have installed eight experimental units, seven of which are currently in operation with the remainder to come on

line in the next couple of weeks. We anticipated installing 14 experimental systems during 2000 but ran into difficulties with the remainder primarily due to residences not being completed in time.

- Control System Installation: We have also installed eight control systems. These are the conventional systems that are installed in the south county area. We planned to install three standard drain field systems, three pressure distribution systems, and three bottomless sand filter systems. We have currently installed eight of the control systems; the ninth was postponed until spring due to adverse weather conditions.

2. Develop a hydrologic and nitrogen fate and transport model for the La Pine sub-basin. Data collection for the fate and transport model began in June 1999. Tasks completed include the completion of fall and spring samplings of a regional network of drinking water and monitoring wells, analyzing the ages of groundwater using chlorofluorocarbon dating methods, installing monitoring well networks for each on-site system in the study, and measuring stream flow and stream bed gradients to determine recharge and discharge reaches of the Deschutes and Little Deschutes rivers in the study area.

3. Establish an on-site system maintenance entity.
   We are currently defining a working group to tackle the issue on long-term maintenance of on-site systems. The group will include residents of the south county area, an installer a realtor, a lender, and a service provider. The primary goal of the group will be to identify the model that will best serve the area and define how that model will be implemented.

4. Create a low interest loan fund program.
   The project team will start this task during the last year or two of the project's life. We envision partnering with a local lending institution to provide low interest loans to repair or replace failing or improperly located on-site systems. We anticipate that we will be able to use this loan fund to install the experimental systems that we accepted after the first phase of the project

Authority of the Commission with Respect to the Issue

It is important that the Commission remain aware of the issues that arise from the La Pine National On-site Demonstration Project for two major reasons. First, a major goal of the project is to identify innovative on-site systems that are successful in providing advanced treatment for residential wastewater and recommend that those systems be approved statewide for use under some kind of operating permit that is easier for homeowners to obtain than the current Water Pollution Control Facilities permit. This will require a change to the on-site sewage disposal

rules. Second, proper long-term operation and maintenance of on-site systems is critical to the protection of our ground and surface water resources. On-site systems are one of the major sources of non-point source pollution in rural areas and as a nation we are coming to the realization that it will be impossible to sewer the entire country. All systems require regular care in order to ensure that they will perform for their designed lifetime.

Conclusions

The project will provide high quality and practical information on:

- Experimental systems and their application in a less than friendly environment and in Oregon generally
- The groundwater regime and nutrient fate and transport in south Deschutes County
- Operation and maintenance of on-site systems
- Public perceptions of and willingness to engage in on-site issues
- Useful tools to help engage the public in on-site and groundwater issues

Intended Future Actions

Complete the three-dimensional groundwater and nitrogen fate and transport model
Create the working group to develop a long-term on-site maintenance program
Develop a low interest loan program to replace failing or improperly placed on-site systems

Reference Documents (available upon request)

Project Work Plan & related documents (available via the DEQ On-site web page)

Approved:

Section: Ed Woods

Division: Mark D. Chalker for ML.

Report Prepared By: Barbara J. Rich

Phone: (541) 617-4713

Date Prepared: December 7, 2000

Environmental Quality Commission

☒Rule Adoption Item

☐ Action Item

☐ Information Item

Agenda Item K

January 12, 2000 Meeting

Title:

Rules for Nonpoint Source Pollution Control Tax Credit

Summary:

Legislation passed in 1999 expanded eligibility for pollution control facilities tax credits (ORS 468.155(2)) to include nonpoint source pollution control activities. The proposed rule amends definitions to include nonpoint source pollution. It also amends the list of eligible activities for accomplishing pollution control to include nonpoint source pollution.

Department Recommendation:

The Department recommends that the Commission adopt the amendments to the Pollution Control Facilities Tax Credit rules to include nonpoint source pollution control activities as presented in Attachment A of the Staff Report.

Margaret E. Vandehey — Report Author

Lydia Lottridge — Division Administrator

Stephanie Hallock — Director

December 22, 2000

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

State of Oregon
Department of Environmental Quality Memorandum

Date: December 22, 2000

To: Environmental Quality Commission

From: Stephanie Hallock, Director S. Hallock

Subject: Agenda Item K,
Rules for Nonpoint Source Pollution Control Tax Credit
EQC Meeting January 12, 2001

Background

On October 12, 2000, the Interim Director of the Department of Environmental Quality (DEQ, Department) authorized the Management Services Division to proceed to a rulemaking hearing on proposed rules, which would amend the pollution control facilities tax credit rules to include nonpoint source pollution controls. The proposed amendments would implement 1999 legislation. Other types of tax credits would not be changed by this proposed rule amendment.

On October 13, 2000, a Hearing Notice and informational materials were mailed to persons who asked to be notified of rulemaking actions, and to persons known by the Department to be potentially affected by or interested in the proposed rulemaking action . This included the mailing list for the Oregon Nonpoint Source Control Program Plan. Hearing Notice was published in the Secretary of State's Bulletin on November 1, 2000.

A Public Hearing was held on November 14, 2000 at 1:30 P.M. in Room 10 at 811 S.W. Sixth Avenue., Portland, Oregon. Roberta Young served as Presiding Officer. Written comment was received through November 17, 2000. The Presiding Officer's Report in Attachment C reflects the fact that no oral testimony was presented at the hearing and lists the two written comments received.

Department staff evaluated the comments received. That evaluation is presented in Attachment D with copies of the two written comments. 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 included activities known to reduce or control a significant amount of nonpoint source pollution as being eligible for tax credits. House Bill 2181 was codified in ORS 468.155(2) as follows:

> (a) As used in ORS 468.155 to 468.190, 'pollution control facility' or 'facility' includes a nonpoint source pollution control facility.
>
> (b) As used in this subsection, 'nonpoint source pollution control facility' means a facility that the Environmental Quality Commission has identified by rule as reducing or controlling significant amounts of nonpoint source pollution.

The proposed amendments to Division 16 of Chapter 340 of the Oregon Administrative Rules would implement this legislation.

Oregon recognizes that a comprehensive approach to protecting watersheds and ecosystems from diffuse or unconfined sources of pollution is imperative to:

- restore the salmon population;
- protect clean drinking water supplies;
- support and sustain economic activities; and to
- support Oregon's scenic beauty.

The 1999 legislation added nonpoint source pollution control to the list of activities eligible for the pollution control facilities tax credit, broadening the incentives for Oregon taxpaying entities to partner in protecting Oregon's environment.

Relationship to Federal and Adjacent State Rules

There are no federal rules applicable to the Pollution Control Facilities Tax Credit. The rules provide for a credit against an Oregon taxpayer's state tax liability. Adjacent states have various mechanisms for providing incentives to reduce or control pollution. Their programs are not, however, directly comparable to Oregon's Pollution Control Facilities Tax Credit.

Authority to Address the Issue

The Environmental Quality Commission and the Department have the statutory authority to address this issue under ORS 468.020 and 468.155(2). If adopted, these rules would implement ORS 468.155 through .190.

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

An Advisory Committee was not used in this rulemaking process. Nonpoint source tax credits are identical to all other tax credits, with the exception of the method for determining if a substantial quantity of pollution control is accomplished.

DEQ requested input from several natural resource organizations including the Oregon Department of Agriculture, Oregon Department of Fish and Wildlife, Water Resources Department, Oregon Farm Bureau, Oregon Department of Transportation, and the Oregon Watershed Enhancement Board. The Oregon Department of Agriculture provided input and indicated general support of nonpoint source pollution tax credits.

The Department considered limiting the nonpoint source tax credit to equipment that has been researched and documented to be effective in reducing nonpoint source pollution. The reasons that the Department abandoned this was because:

- the research was limited to agricultural activities;
- documented equipment was minimal;
- legislation does not limit the term "facility" to just equipment;
- legislation and legislative history refers to nonpoint source pollution not just water pollution; and
- sources that do not have a point source also include area and mobile sources of air pollution.

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

The proposed rule amendment adds a definition of "nonpoint source pollution." It also adds nonpoint source pollution to the list of eligible activities for accomplishing pollution control by identifying the types of facilities that reduce or control a significant amount of nonpoint source pollution.

The nonpoint source pollution tax credit is no different than the air, water or noise pollution tax credit. All other pollution control facilities tax credit rules apply to the nonpoint source pollution control facilities:

The applicant
- must be an Oregon taxpayer;
- must make a qualifying investment; and
- must be the owner and operator of the facility.

The investment
- must be land, structure, building, installation, excavation, machinery, equipment or devices;
- must not include investments that do not meet the definition of a pollution control facility. This list includes items such as air conditioners; septic tanks or other facilities for human waste; asbestos abatement; or any investment used for cleanup of emergency spills or unauthorized releases;
- must not include distinctive portions that make an insignificant contribution to the purpose of the facility. The list includes such items as automobiles, landscaping, parking lots, and roadways; and it
- must be reasonably used for a pollution control purpose.

The purpose of the investment
- must be in response to a requirement of the federal Environmental Protection Agency, Oregon Department of Environmental Quality, or a regional air pollution authority; or
- must exclusively function to control, prevent or reduce nonpoint source pollution; and
- must control, reduce or prevent air, water or noise pollution.

Summary of Significant Public Comment and Changes Proposed in Response

One person was in attendance. No oral testimony was given and two written comments were submitted from Joe Hobson, Sr., PO Box 21510, Keizer, OR 97307; and Peter S. Test, Oregon Farm Bureau, 3415 Commercial St. SE, Suite 117, Salem, OR 97302-5169.

Two sets of written comments, shown in Attachment D, were received which expressed similar concerns. One significant comment was that the proposed rule should not require applicants to belong to or participate in the partnerships listed in the Oregon Nonpoint Source Control Program Plan*. The concern was that some agricultural equipment would not be eligible for the credit as was the intent of the legislature. The public comment included the following alternative language to address this concern:

> *"any equipment or facility that has been documented by Oregon State University, Agricultural Experiment Station (OSU-AES), United States Department of Agriculture, Agriculture Research Service (USDA-ARS) or Oregon Department of Agriculture (ODA) to be effective in reducing nonpoint source pollution..."*

Though the proposed rule did not anticipate that an applicant would be required to belong to a partnership or participate directly in a partnership listed in the Oregon Nonpoint Source Control Program Plan, the concern was addressed by including the intent of the alternative language in the proposed rule.

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

Nonpoint source pollution controls became eligible for the pollution control facilities tax credit on January 1, 2000. The proposed rules amendments would become effective for all applications received after filing the amended rules with the Secretary of State – most likely on February 1, 2001. Facilities completed in the year 2000 would have two years after the date that construction was completed to file their application with the Department.

The nonpoint source tax credit is intended to cover expenditures for "on-the-ground" management practices and improvements. It is not intended to cover education, outreach or monitoring costs. In order to be eligible for this tax credit, nonpoint source expenditures must be documented. Similarly, these expenditures must be incurred as part of implementation of at least one of the following elements of the State's federally-approved nonpoint source control plan:

- agricultural plans developed in response to the requirements of Senate Bill 1010;
- forest management practices plans;
- total maximum daily load (TMDL) implementation plans;
- groundwater management area action plans;

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* The Oregon Nonpoint Source Control Program Plan is the State of Oregon's unified nonpoint source document submitted to the United States Environmental Protection Agency. The document satisfies the nonpoint source pollution control program update mandated under Section 1329(a) and (b) of the Federal Water Pollution Control Act, as amended by the Water Quality Act of 1987, and generally referred to as Section 319 of the Clean Water Act, or CWA.

- estuary plans;
- expenditures to supplement a Clean Water Act section 319 grant project; or
- any other similar watershed restoration plans approved by a State or Federal agency.

Fact Sheets will be provided to the Oregon Nonpoint Source Control Program Plan mailing list. This will include natural resource agencies operating in Oregon, watershed councils, Soil and Water Conservation Districts, and Oregon State University. The Department will rely on these groups to provide tax credit information as needed.

Tax credits under this rule would be processed like all other pollution control facilities tax credits. The Department will develop an application specific to nonpoint source pollution control facilities. The application would be similar to the alternatives to open field burning applications. Applications for lower cost facilities would be an abbreviated form.

The Oregon Department of Agriculture already participates in tax credit application processing. Their involvement in reviewing nonpoint source applications will be at their discretion.

The Department does not know if the application fees for nonpoint source pollution control facilities will pay for the actual cost of certifying the facilities. This rule amendment does not propose an application fee increase but the Department may seek an increase if the fees are insufficient.

Once the Environmental Quality Commission certifies that an investment is eligible for a tax credit, the Oregon taxpayer may take up to 50% of the investment cost as a direct credit against their state income tax liability. The credit may be spread over a period of up to 10 years.

The proposed rule amendment does not change the Oregon Department of Revenue's participation in that they process income tax returns that redeem pollution control tax credit.

Recommendation for Commission Action

Staff recommends that the Commission adopt the amendments to the pollution control facilities tax credit rules to include nonpoint source activities 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 as listed in Attachment C.
House Bill 2181
Nonpoint Source Binders

Approved:

Section:

Division:

Report Prepared by: Margaret C. Vandehey
Phone: (503) 229-6878
Date Prepared: December 22, 2000

F:\TEMPLATE\FORMS\QCRULE.DOT
10/19/95

Attachment A:

Rule (Amendments) Proposed for Adoption

DEPARTMENT OF ENVIRONMENTAL QUALITY

DIVISION 16
POLLUTION CONTROL TAX CREDITS

340-016-0005
Purpose
The purpose of these rules is to prescribe procedures and criteria to be used by the Department and Commission for issuance of tax credit certificates for pollution control facilities. These rules are to be used in connection with ORS 468.150 to 468.190. These rules become effective upon filing with the Secretary of State or on ~~May 1, 1998~~February 1, 2001 whichever is the later date and apply to all applications received by the Department on or after that date except where otherwise noted herein. An applicant with an application pending Commission action on the date these rules become effective may elect to proceed under these rules by informing the Department in writing.

Stat. Auth.: ORS 468.150
Stats. Implemented: ORS 468.150 - ORS 468.190
Hist.: DEQ 12-1984, f. & ef. 7-13-84; DEQ 5-1998, f. 4-24-98, cert. ef. 5-1-98

340-016-0010
Definitions
The definitions in this rule give meaning to the term or phrase as used in OAR 340-016-0005 through OAR 340-016-0080.
(1) "Applicant" means any person who applies for a pollution control tax credit under these rules.
(2) "Circumstances Beyond the Control of the Applicant" means facts, conditions and circumstances which the applicant's due care and diligence would not have avoided.
(3) "Commission" means Environmental Quality Commission or the Commission's delegate.
(4) "Department" means Department of Environmental Quality.
(5) "Facility" as used in context means:
(a) A pollution control facility as set forth in ORS 468.150 and ORS 468.155; or
(b) The facility as claimed on the application.
(6) "Like-for-Like Replacement Cost" means the current price of providing a new facility of the same type, size and construction materials as the facility that is being replaced based upon the Consumer Price Index (CPI) - All Urban Consumers as published by the Bureau of Labor Statistics.
(7) "Material Recovery" means any process, such as pre- segregation, for obtaining materials from solid waste, hazardous waste or used oil. The recovered materials shall still have useful physical or chemical properties after serving a specific purpose and can, therefore, be reused or recycled for the same or other purpose. The recovered material shall have useful physical or chemical properties that yield a competitive end-product of real economic value. The material recovery process does not include processes:

(a) In which the major purpose is the production of fuel from solid waste, hazardous waste or used oil which can be utilized for heat content or other forms of energy; or
(b) That burns waste to produce energy or to reduce the amount of waste. However, it does not eliminate from eligibility a pollution control device associated with a process which burns waste if such device is otherwise eligible for pollution control tax credit under these rules.
(8) "Nonpoint Source Pollution" means pollution that comes from numerous, diverse, or widely scattered sources of pollution that together have an adverse effect on the environment. The meaning includes:
(a) The definition provided in OAR 340-041-0006(17); or
(b) Any sources of air pollution that are:
(A) Mobile sources that can move on roads or off roads; or
(B) Area sources.
~~(8)~~(9) "Pollution Control" means the elimination, prevention, control or reduction of air, water or noise pollution; or the utilization of solid waste, hazardous waste, or the recycling or properly disposing of used oil except where otherwise noted herein.
~~(9)~~(10) "Reconstruction or Replacement" means the provision of a new facility with qualities and pollution control characteristics equivalent to the facility that is being replaced. This does not include repairs or work done to maintain the facility in good working order.
~~(10)~~(11) "Spill or Unauthorized Release" means
(a) The discharge, deposit, injection, dumping, spilling, emitting, releasing, leakage or placing of oil, hazardous materials or other polluting substances into the air or into or on any land or waters of the state, as defined in ORS 468.700, except as authorized by a permit issued under ORS Chapter 454, 459, 468 or 469, ORS 466.005 to 466.385, 466.880(1) and (2), 466.890 and 466.995(1) and (2) or federal law while being stored or used for its intended purpose; and
(b) For purposes of determining eligibility for tax credits under these rules, polluting substances released into the environment in conjunction with operation of a previously approved facility or activity where such facility or activity was operated in compliance with requirements imposed by the Department or the Federal Environmental Protection Agency, and where the polluting substances which must now be cleaned up are determined by the Department to have been an unanticipated result of the approved facility or activity and are not deemed to be a "spill or unauthorized release".
~~(11)~~(12) "Substantial Completion" means the completion of the erection, installation, modification, or construction of all elements of the claimed facility which are essential to perform its purpose.
~~(12)~~(13) "Useful Life" means the number of years the claimed facility is capable of operating before replacement or disposal. The applicant shall provide a statement of how the useful life of the facility was determined. The minimum useful life shall not be less than three years or the Asset Guideline Period used to report the depreciation of the facility to the Internal Revenue Service.

Stat. Auth.: ORS 468.150
Stats. Implemented: ORS 468.150 - ORS 468.190

Hist.: DEQ 12-1984, f. & ef. 7-13-84; DEQ 5-1985, f. & ef. 3-12-85; DEQ 20-1987, f. & ef. 12-16-87; DEQ 6-1990, f. & cert. ef. 3-13-90; DEQ 5-1998, f. 4-24-98, cert. ef. 5-1-98

340-016-0060
Eligibility

(1) Eligible Facilities. Facilities eligible for pollution control tax credit certification shall include any land, structure, building, installation, excavation, machinery, equipment or device, or alternative methods for field sanitation and straw utilization and disposal. An eligible facility shall be reasonably used, erected, constructed or installed as:
(a) A new facility;
(b) An addition or improvement to an existing facility; or
(c) The reconstruction or replacement of an existing facility.
(2) Purpose of Facility. The facility shall meet the principal purpose requirement to be eligible for a pollution control facility tax credit certification, or if the facility is unable to meet the principal purpose requirement, the facility shall meet the sole purpose requirement to be eligible for a pollution control tax credit:
(a) Principal Purpose Requirement. The principal purpose of the facility is the most important or primary purpose of the facility. Each facility shall have only one principal purpose. The facility shall be established to comply with environmental requirements imposed by the Department, the federal Environmental Protection Agency or a regional air pollution authority to control, reduce, or prevent air, water or noise pollution, or for the material recovery of solid waste, hazardous waste or used oil; or
(b) Sole Purpose Requirement. The sole purpose of the facility shall be the exclusive purpose of the facility. The only function or use of the facility shall be the control, reduction, or prevention of pollution; or for the material recovery of solid waste, hazardous waste or used oil.
(3) Facility Compliance. The facility shall achieve compliance with Department statutes and rules, or Commission orders or permit conditions before the Commission issues certification as a pollution control facility.
(4) Eligible Activities. The facility shall prevent, reduce, control, or eliminate:
(a) Air contamination by use of air cleaning devices as defined in ORS 468A.005 or through equipment designed to prevent, reduce or eliminate air contaminants prior to discharge to the outdoor atmosphere;
(b) Alternatives to Open Field Burning. The facility shall reduce or eliminate:
(A) Open field burning and may include equipment, facilities, and land for gathering, densifying, handling, storing, transporting and incorporating grass straw or straw based products;
(B) Air quality impacts from open field burning and may include propane burners or mobile field sanitizers; or
(C) Grass seed acreage that requires open field burning. The facility may include:
(i) Production of alternative crops that do not require open field burning;
(ii) Production of rotation crops that support grass seed production without open field burning; or
(iii) Drainage tile installations and new crop processing facilities.

(c) Hazardous Waste. The facility shall treat, substantially reduce or eliminate hazardous waste as defined in ORS 466.005 or utilize material as set forth in subsection (4)(e) of this rule;
(d) Industrial Waste. The facility shall dispose of, eliminate or be redesigned to eliminate industrial waste and the use of treatment works for industrial wastewater as defined in ORS 468B.005;
(e) Hazardous Waste, Solid Waste and Used Oil Material Recovery. The facility shall eliminate or obtain useful material from material that would otherwise be solid waste as defined in ORS 459.005, hazardous waste as defined in ORS 466.005, or used oil as defined in ORS 468.850. The facility shall produce an end product of utilization that is an item of real economic value and is competitive with an end product produced in another state. The facility shall produce the end product by mechanical processing, chemical processing; or through the production, processing, pre-segregation, or use of materials which:
(A) Have useful chemical or physical properties and which may be used for the same or other purposes; or
(B) May be used in the same kind of application as its prior use without change in identity.
(f) Noise Pollution. The facility shall substantially reduce, eliminate or be redesigned to eliminate noise pollution or noise emission sources set forth in OAR 340-035-0005 through OAR 340-035-0100;
(g) Spills or Unauthorized Releases. The facility shall be used to detect, defer or prevent spills or unauthorized releases. This does not include any facility installed, constructed or used for cleanup after a spill or unauthorized release has occurred~~.~~; or
(h) Nonpoint Source Pollution. Pursuant to ORS 468.155(2)(b), the EQC has determined that the following facilities reduce, or control significant amounts of nonpoint source pollution:
(A) Any facility that implements a plan, project, or strategy to reduce or control nonpoint source pollution as documented:
(i) By one or more partners listed in the Oregon Nonpoint Source Control Program Plan; or
(ii) In a Federal Clean Air Act State Implementation Plan for Oregon; or
(B) Any facility effective in reducing nonpoint source pollution as documented in supporting research by:
(i) Oregon State University, Agricultural Experiment Station; or
(ii) The United States Department of Agriculture, Agriculture Research Service; or
(iii) The Oregon Department of Agriculture; or
(C) Wood chippers used to reduce openly burned woody debris; or
(D) The retrofit of diesel engines with a diesel emission control device, certified by the U.S. Environmental Protection Agency.

Stat. Auth.: ORS 468.150
Stats. Implemented: ORS 468.150 - ORS 468.190
Hist.: DEQ 5-1998, f. 4-24-98, cert. ef. 5-1-98

Attachment B:

Supporting Procedural Documentation

1. Legal Notice of Hearing

Secretary of State

NOTICE OF PROPOSED RULEMAKING HEARING

A Statement of Need and Fiscal Impact accompanies this form.

DEQ - MSD
Agency and Division

Chapter 16, Division 340
Administrative Rules Chapter Number

Susan M. Greco
Rules Coordinator

(503) 229-5213
Telephone

811 S.W. 6th Avenue, Portland, OR 97213
Address

Tuesday, 11/14/00 1:30 PM. 811 SW 6th Ave., Portland Room 5B Barrett MacDougall
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.

AMEND:
OAR 340-016-0005
OAR 340-016-0010
OAR 340-016-0060

REPEAL:

RENUMBER:
Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

AMEND AND RENUMBER:
Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

Stat. Auth.: ORS
Stats. Implemented: ORS

RULE SUMMARY
The rule incorporates 1999 Legislation amending ORS 468.155 to explicitly allow tax credits for nonpoint source activities.

November 17, 2000 5:00 PM
Last Day for Public Comment

Susan Greco 10/12/00
Authorized Signer and Date

Attachment B:

Supporting Procedural Documentation

2. Fiscal and Economic Impact Statement

Attachment A
State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Nonpoint Source Pollution Control Facility Tax Credit

Fiscal and Economic Impact Statement

Introduction
The 1999 Legislature amended ORS 468.155 (HB2181) to specifically include nonpoint source pollution control facilities in the eligibility for tax credits. The proposed rule amendment reflects this inclusion in the pollution control tax credit rules. Prior to the passage of House Bill 2181 some nonpoint source pollution control facilities were implicitly included under the tax credit for controlling industrial waste with the use of a treatment works.

General Public
These rules apply to any Oregon taxpayer seeking tax credits. Tax credits certified by the Environmental Quality Commission can be claimed by a certificate holder as a direct credit against the certificate holder's state income tax liability, or for cooperatives and non-profit corporations, as a credit against ad valorem taxes. There is no direct impact to the general public. There will be an indirect effect on the general public in that the amount of tax credit taken by businesses for nonpoint source pollution control facilities represents the amount by which tax collections, and hence the state's General Fund, will diminish.

Small Business
Small businesses with 50 or fewer employees submit over eighty percent of the number of applications received by the Department. Small businesses utilize the tax credit program for investments such as automotive refrigerant recovery equipment, alternatives to open field burning, oil/water separators, animal waste treatment systems, and underground and aboveground storage tank systems. Nonpoint source pollution control activities that could be undertaken by small businesses would include agricultural enterprises and developers. The fiscal impact on each of these small businesses is positive, but undetermined.

Large Business
Large businesses submit less than 20% of the number of applications received by the Department. These rule amendments have no negative fiscal impact on large businesses. However, there is a potential for a positive fiscal impact for large businesses that install facilities to control nonpoint source pollution.

Local Governments
Local governments are not eligible for certification of a pollution control tax credit and therefore, a change in program benefits will not have a direct financial impact on local governments.

The tax credit statutes and rules allow cooperatives and non-profit corporations to claim credits against ad valorem taxes. Any change in tax credit program benefits to such organizations could potentially result in an increase or decrease in ad valorem tax collections by local governments. However, this proposal does not change the impact on ad valorem tax collection from the current rule.

State Agencies
The Department of Environmental Quality (DEQ) is already involved in processing tax credit applications. The proposed rule amendment could increase staffing by .5 FTE should the number of applications received in any one year exceed 45. The Environmental Quality Commission has the authority to increase the application fees to be sufficient to cover the cost to administer the tax credit program. The average cost to certify a facility is currently $1,979. This amendment to the rule does not include amending the application fee, which is 1% of the facility cost up to a maximum of $15,000.

Over 822 certificates have been issued under the pollution control tax credit program over the last five years with a value of about $150 million. The median facility cost claimed on tax credit applications is $41,317. Staff anticipates that the number of lower cost facilities will increase with this amendment.

The Oregon Department of Agriculture (ODA) already participates in tax credit application reviews. ODA would continue to be involved in the reviewing tax credit applications. This amendment does not change the Oregon Department of Revenue's participation in that they process income tax returns redeeming the credit.

Assumptions
The proposed amendment specifically identifies nonpoint source pollution control facility investments as being eligible for pollution control tax credits. The Department does not know if the application fees for nonpoint source pollution control facilities will pay for the actual cost of certifying the facilities. This rule amendment does not increase the application fee but the Department may be seek an increase once staff determines the actual cost of certifying nonpoint source pollution control facilities.

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:

Supporting Procedural Documentation

3. Land Use Evaluation Statement

Attachment B
State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Nonpoint Source Pollution Control Facility Tax Credits

Land Use Evaluation Statement

1. **Explain the purpose of the proposed rules.**

   The 1999 Legislature amended ORS 468.155 (HB2181) to explicitly include the eligibility of nonpoint source pollution control facilities that reduce or control a significant amount of nonpoint source pollution for tax credit purposes.

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.**

   Staff should refer to Section III, subsection 2 of the SAC document in completing the evaluation form. Statewide Goal 6 - Air, Water and Land Resources is the primary goal that relates to DEQ authorities. However, other goals may apply such as Goal 5 - Open Spaces, Scenic and Historic Areas, and Natural Resources; Goal 11 - Public Facilities and Services; Goal 16 - Estuarine Resources; and Goal 19 - Ocean Resources. DEQ programs and rules that relate to statewide land use goals are considered land use programs if they are:

   1. Specifically referenced in the statewide planning goals; or

   2. Reasonably expected to have significant effects on
      a. resources, objectives or areas identified in the statewide planning goals, or
      b. present or future land uses identified in acknowledged comprehensive plans.

   In applying criterion 2 above, two guidelines should be applied to assess land use significance:
   - The land use responsibilities of a program/rule/action that involved more than one agency, are considered the responsibilities of the agency with primary authority.

- A determination of land use significance must consider the Department's mandate to protect public health and safety and the environment.

In the space below, state if the proposed rules are considered programs affecting land use. State the criteria and reasons for the determination.

Through applying the criteria in 2(c), DEQ has determined that the Pollution Control Facility Tax Credit program is not a program 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.**

N/A

for
Division
H. LOTRIDGE

Intergovernmental Coordinator

10-12-00
Date

Attachment B:

Supporting Procedural Documentation

4. Questions to be Answered to Reveal Potential Justification for Differing from Federal Requirements

Attachment C
State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Nonpoint Source Pollution Control Facility Tax Credit

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. This is a state tax credit.

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?

Not applicable

7. Does the proposed requirement establish or maintain reasonable equity in the requirements for various sources? (level the playing field)

Not applicable

8. Would others face increased costs if a more stringent rule is not enacted?

Not applicable

9. Does the proposed requirement include procedural requirements, reporting or monitoring requirements that are different from applicable federal requirements? If so, Why? What is the "compelling reason" for different procedural, reporting or monitoring requirements?

Not applicable

10. Is demonstrated technology available to comply with the proposed requirement?

Not applicable

11. Will the proposed requirement contribute to the prevention of pollution or address a potential problem and represent a more cost effective environmental gain?

Not applicable

Attachment B:

Supporting Procedural Documentation

5. Cover Memorandum from Public Notice

State of Oregon
Department of Environmental Quality **Memorandum**

Date: October 12, 2000

To: Interested and Affected Public

Subject: Rulemaking Proposal and Rulemaking Statements
Nonpoint Source Pollution Control Facility Tax Credit

This memorandum contains information on a proposal by the Department of Environmental Quality (Department) to adopt rule/rules amendments regarding Pollution Control Facilities Tax Credits. Pursuant to ORS 183.335, this memorandum also provides information about the Environmental Quality Commission's intended action to adopt this rule.

The 1999 legislature included activities known to reduce or control a significant amount of nonpoint source pollution as being eligible for tax credits. The proposed amendments to Division 16 of Chapter 340 of the Oregon Administrative Rules would implement this legislation. The eligibility of the other types of tax credits would not be affected by this amendment.

The Department has the statutory authority to address this issue under ORS 468.020 and 468.155(2). If adopted, these rules would implement ORS 468.155 through .190.

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	Actual language of the proposed rule amendments.

Hearing Process Details

The Department is conducting a public hearing at which comments will be accepted either orally or in writing. Barrett MacDougall will be the Presiding Officer at the hearing. The hearing will be held as follows:

Date: Tuesday November 14, 2000
Time: 1:30 PM
Place: Excutive Bldg, Conference Room 3A
811 SW Sixth Avenue
Portland, OR 97204

Deadline for submittal of Written Comments:

The closure of the public record is 5:00 p.m., November 17, 2000.

Written comments can be presented at the hearing or to the Department any time prior to November 17, 2000 at 5:00 PM. Comments should be sent to: Department of Environmental Quality, Attn.: Margaret C. Vandehey, 811 SW Sixth Avenue, Portland, Oregon 97204-1390; fax (503) 229-6730; email vandehey.maggie@deq.state.or.us.

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 be 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 comments 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 January 12, 2000. This date may be delayed if needed to provide additional time for evaluation and response to comments received in the hearing process.

You will be notified of the time and place for final EQC action if you present oral comments at the hearing or submit written comment during the comment period. Otherwise, if you wish to be kept advised of this proceeding, you should request that your name be placed on the mailing list.

Background on Development of the Rulemaking Proposal

Why is there a need for the rule?

The 1999 Legislature passed House Bill 2181 creating provisions for nonpoint source investments to be eligible for a tax credit. This amendment implements that legislation. The legislature amended ORS 468.155, .165 and .170.

Any Oregon taxpayer that makes a capital investment in a pollution control may qualify for a tax credit. Eligible capital investments include land, structures, buildings, installations, excavation, machinery, equipment or devices if reasonably used for a pollution control purpose. The investment must be for either of the following purposes:

- In response to a requirement of the federal Environmental Protection Agency (EPA), Oregon Department of Environmental Quality (DEQ), or regional air pollution authority; or
- For the exclusive function to control, prevent or reduce nonpoint source pollution.

This rule amendment adds nonpoint source pollution controls to the list of eligible methods for accomplishing a reduction in pollution. Tax credits for the other methods of accomplishing pollution control are not affected by this amendment.

For a nonpoint source investment to be eligible it must reduce or control a significant amount of nonpoint source pollution as identified through: any partnerships identified in the Oregon Nonpoint Source Control Program Plan; or in the Federal Clean Air Act State Implementation Plan for Oregon. One of these plans may identify strategies or projects that reduce or control nonpoint source pollution. Any Oregon taxpayer may be eligible for a tax credit for making a capital investment that fully supports one of these plan or strategies for reducing or controlling nonpoint source pollution as defined in this rule amendment.

Two devices are also specifically named as reducing air impacts and thereby, atmospheric deposition. They are wood chippers for reducing the effects of open burning of wood debris and emission control devices used to retrofit diesel engines.

A few examples of the partnerships listed in the Oregon Nonpoint Source Control Program Plan are: Watershed Councils, Soils and Water Conservation Districts, The Oregon Plan, Agricultural Water Quality Management Plans (SB 1010), Healthy Streams Partnership, Unified Watershed Assessment Interagency Group and the Oregon Watershed Enhancement Board.

Examples of eligible investments would reduce or control the effects of runoff and habitat destruction from various land uses such as urban storm water, agriculture, or land disturbances. Several among many types of investments could be mulching equipment, barriers preventing livestock access to stream banks, an alternate water supply, or the cost of riparian restoration.

Once the Environmental Quality Commission determines that an investment is eligible for a tax credit, the Oregon taxpayer may take up to 50% of the investment cost as a direct credit against their state income tax liability. The credit may be spread over a period of up to 10 years.

How was the rule developed?

The proposed amendments were not developed through the advisory committee process because the referenced plans, projects and strategies that define eligibility were developed through public participation, various advisory committees and locally driven groups.

Program staff consulted with the Department of Agriculture, Oregon Fish and Wildlife, the Water Resources Department, and divisions within DEQ. Staff also consulted with the Department of Justice to resolve various legal issues.

The Department relied upon the Oregon Nonpoint Source Control Program Plan, State Improvement Plans, the Oregon Administrative Rules and other nonpoint source documents. Copies of the documents relied upon in the development of this rulemaking proposal can be reviewed at the Department of Environmental Quality's office at 811 SW 6th Avenue, Portland, Oregon. Please contact Margaret C. Vandehey at (503) 229-6878 for times when the documents are available for review. The Oregon Nonpoint Source Control Program Plan is online at http://waterquality.deq.state.or.us/wq/nonpoint/NPSPlan.htm.

Whom does this rule affect including the public, regulated community or other agencies, and how does it affect these groups?

This rule will effect any Oregon taxpayer that constructed or will construct a nonpoint source pollution control facility as defined in the rule. The provisions in this rule could provide the

taxpayer with a credit to offset their Oregon tax liability. The value of the tax credit could be for as much as 50% of the construction cost of a certified nonpoint source pollution control facility.

There is no direct impact to the general public. However, there is an indirect effect in that the amount of tax credit taken by businesses for nonpoint source pollution controls represents the amount by which tax collections, and hence the state's General Fund, will diminish.

The tax credit statutes and rules allow cooperatives and non-profit corporations to claim credits against ad valorem taxes. Any change in tax credit program benefits to such organizations could potentially result in an increase or decrease in ad valorem tax collections by local governments. Less than a dozen cooperatives and non-profit corporations have filed a pollution control tax credit application over the life of the program.

State Agencies

The Department of Environmental Quality (DEQ) is already involved in processing tax credit applications and the proposed rule amendments have the potential to impact staffing.

The Oregon Department of Agriculture (ODA) processes alternatives to open field burning applications for the Oregon Department of Environmental Quality (DEQ). ODA may be involved in processing nonpoint source pollution control facility applications.

How will the rule be implemented?

Tax credit program staff will provide the partners identified in the Oregon Nonpoint Source Control Program Plan with Fact Sheets regarding the tax credit for nonpoint pollution control facilities. Staff does not intend to develop any additional public outreach strategy. However, staff will continue to support any agency or public interest group in their outreach endeavors.

This tax credit will be processed like all other "pollution control facilities tax credit" applications and most like applications for Confined Animal Feeding Operations where plans are developed through Soil and Water Conservation Districts. Staff will develop an abbreviated application for lower cost facilities. Staff will process the applications in batches according to plan criteria. This is similar to the current processing of applications for automotive refrigerant recovery systems.

The department anticipates an increase in the number of applications. Implementation would require an additional .5 FTE should the number of applications exceed 45 per year. The additional expense would be paid through the application fee.

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:

Margaret C. Vandehey
Tax Credit Manager
811 SW Sixth Ave.
Portland OR 97204-1390

Phone: (503)229-6878
Toll Free in Oregon: 800-452-4011
TTY: (503) 229-6993
email: vandehey.maggie@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:

Presiding Officer's Report on Public Hearing

State of Oregon
Department of Environmental Quality **Memorandum**

Date: 11/18/00

To: Environmental Quality Commission

From: Roberta Young, Intergovernmental Coordinator

Subject: Presiding Officer's Report for Rulemaking Hearing
Hearing Date and Time: November 14, 2000 at 1:30
Hearing Location: DEQ Headquarters, 811 SW 6th, Rm. 10, Portland, Oregon
Title of Proposal: Rulemaking on Oregon Administrative Rules Chapter 340, Division 16 - Pollution Control Tax Credits

The rulemaking hearing on the above titled proposal was convened at 1:35 P.M. The hearing was closed at 1:45 P.M. People were asked to sign registration forms if they wished to present comments. It was also stated that the hearing was being recorded.

One person was in attendance. No oral testimony was given and two written comments were submitted from Joe Hobson, Sr., PO Box 21510, Keizer, OR 97307; and Peter S. Test, Oregon Farm Bureau, 3415 Commercial St. SE, Suite 117, Salem, OR 97302-5169.

Prior to receiving comments, Hearings Officer, Roberta Young briefly explained the specific rulemaking proposal and the procedures to be followed during the hearing. The 1999 Legislature amended ORS 468.155 (HB 2181) to explicitly include eligibility of nonpoint source pollution control facilities for tax credit purposes. The proposed amendments to Division 16 of Chapter 340 of the Oregon Administrative Rules would implement this legislation. The eligibility of the other types of tax credits would not be affected by these amendments. The closure of the public record is 5:00 p.m., November 17, 2000.

In accordance with ORS 183.335(13), no comments from any party can be accepted after the deadline for submission of comments has passed. In order to be considered by the Department in the development of these rules, comments must be received prior to the close of the comment period.

Attachment D:

Department's Evaluation of Public Comment

Attachment D
Department's Evaluation of Public Comment

Two public comments were received before the deadline of November 17, 2000. No other comments were received.

1. Peter S. Test
   Oregon Farm Bureau
   3415 Commercial St. SE, Suite 117
   Salem, OR 97302-5169
   (503) 399-1701

2. Joe Hobson, Sr.
   PO Box 21510
   Keizer, OR 97307
   (503) 463-6966

Comment 1 **(made by 1 and 2 above)**

Amend proposed rulemaking language to include "any *equipment or* facility" wherever there is any reference to a facility.

Response 1

ORS 468.155(2) does not limit nonpoint source pollution controls to equipment. The definition of "facility" as defined in ORS 468.155(1)(a) means any land, structure, building, installation, excavation, machinery, **equipment** or device, or any addition to, reconstruction of or improvement of, land or an existing structure, building, installation, excavation, machinery, equipment or device reasonably used, erected, constructed or installed by any person…

No changes made in response to Comment 1.

Comment 2 **(made by 1 and 2 above)**

The proposed rule should not require applicants to belong or participate in any partnerships to control pollution. Alternative language suggested "*any equipment or facility that has been documented by Oregon State University, Agricultural Experiment Station (OSU-AES), United States Department of Agriculture, Agriculture Research Service (USDA-ARS) or Oregon Department of Agriculture (ODA) to be effective in reducing nonpoint source pollution...*"

Response 2

The proposed rule does not require an applicant belong to a partnership or participate in directly in the partnership listed in the Oregon Nonpoint Source Control Program Plan. The proposed rule allows a tax credit for implementing a plan, project or strategy identified by one of the partnerships listed in the Oregon Nonpoint Source Control Program Plan.

The proposed rule includes the eligibility criteria as suggested in the public comment. It is used in conjunction with, not in replacement of, the eligibility of any facility that implements a documented plan, project, or strategy identified by any one of the partnerships listed in the Oregon Nonpoint Source Control Program Plan.

- End of Comments -

OREGON farm bureau

3415 Commercial St. S.E. • Suite 117 • Salem, OR 97302-5169 • (503) 399-1701 • FAX (503) 399-8082

November 15, 2000

Margarate C. Vandehey
Tax Credit Coordinator
Oregon /Dept. Of Environmental Quality
811 Sixth Avenue
Portland, OR 97204

RE: Proposed Amendments to Division 16 of Chapter 340 of Oregon Administrative Rules Dealing with Non-Point Source Pollution Control Facility Tax Credit

Dear Ms. Vandehey,

The Oregon Farm Bureau Federation (OFBF) would like to provide the following comments on the proposed rule amendments to Division 16 of Chapter 340 of ORS relating to Non-Point Source Pollution Control Facility Tax Credit resulting from the HB 2181 passed at the 1997 Legislature. The Oregon Farm Bureau Federation is the State's largest general farm organization, with over 25,000 member families. Oregon agricultural producers have accepted the responsibility for nonpoint source pollution that they have caused. They have done so by making control of nonpoint source a primary goal. The all out efforts to develop Area 10-10 Water Quality Management Plans and provide .ncentives for landowners to correct conditions on their land caused by agriculture activities makes these rules important.

These rules governing the tax credit for equipment to be used to reduce non-point pollution should be easy to understand and require the producer to be based on participation in any of the partnerships listed in the Oregon Non-Point Program Plan. The accepted 10-10 process is one that requires the individual to correct problems. There is no requirement in the 10-10 process for the producer to belong or participate in any partnership to control pollution. He is responsible and there should be no such requirement in this rule as it applies to the equipment tax credit. There was no intent on the part of any legislator or others involved in HB 2181 for the tax credit for equipment used to help control agriculture non-point pollution to be conditioned as is written into the rule amendment. This language should be removed and agree with the addition of the language that Mr. Joe Hobson Sr. recommended in his comments.

The OFBF has and still is a supporter of this tax credit incentive and strongly suggests that the conditions necessary to receive the credit be minimal and simple. If the DEQ insists on participation in any partnerships or other such activities the maximum benefit the states waters could receive from this incentive will not be realized.

Sincerely,

Peter S. Test,
Associate Director of
Governmental Affairs

Margaret C. Vandehey
Tax Credit Coordinator
Oregon Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204

November 7, 2000

Re: Rulemaking Proposal
for
Nonpoint Source Pollution Control Facility Tax Credit

Mr. Barrett MacDougall, Presiding Officer

My name is Joe Hobson Sr. I reside at 7349 O'Neil Road, Keizer, Oregon. My mailing address is P.O. Box 21510 Keizer, Oregon 97307.

I am presenting a statement addressing the implementation of House Bill 2181.

The original HB 2181 was introduced at the request of the Oregon Department of Environmental Quality (DEQ). The bill had one hearing in the House Water and Environment Committee. According to a Committee official, the bill was not going to get any further consideration by the Committee.

I asked the DEQ representative if I could use HB 2181 as a vehicle to extend Tax Credit to farmers who purchase equipment that reduce nonpoint source pollution. The DEQ representative agreed to the request and said that the Department would support the amended bill.

I was the principal proponent of the idea of including agricultural equipment that provides significant reduction in nonpoint source pollution, in the Tax Credit program administrated by the Oregon Department of Environmental Quality (DEQ). See EXHIBIT A

I was joined in this effort by the following groups: The Oregon Farm Bureau (OFB), The Oregon Cattlemen Association (OCA), The Oregon Wheat League, The Oregon Seed Growers, The Oregonians for Food and Shelter, The Oregon Dept. of Agriculture (ODA), The Governor's Watershed Enhancement Board (GWEB) now (OWEB) and DEQ.

Representative Richard Devlin, Tualatin took the lead in getting the correct wording put into the bill to reflect what we had in mind namely; to provide farmers Tax Credit benefits when they invest in equipment which, when used, will reduce nonpoint source pollution.

The House Water and Environment, House Revenue and Senate Rules and Elections Committees all gave the amended bill a unanimous do-pass recommendation. There was no suggestion that this program was to be in any way tied to any other program.

The House passed the bill 54 to 5. Everyone who spoke supported the bill as a positive step for Oregon to take.

The Senate passed the bill 25 to 1. The Senators who spoke were generous in their commendations.

During the deliberation, no Representative or Senator suggested that the Tax Credit for nonpoint source pollution control equipment should be based on participation in any of the partnerships listed in the Oregon Nonpoint Source Control Program Plan.

However, it does not prohibit a farmer from participating in any of the partnerships.

Governor Kitzhaber signed the bill July 21, 1999.

Section 4 of HB 2181 states that: "The amendments to ORS 468.165 and 468.170 by sections 1 to 3 of this 1999 Act apply to pollution control facility certifications made on or after January 1, 2000".

The law also states in 468.155 (2) (b) "As used in this subsection, " nonpoint source pollution control facility" means a facility that the Environmental Quality Commission has identified by rule as reducing or controlling significant amounts of nonpoint pollution".

I want to commend the Environmental Quality Commission (EQC) for holding this hearing.

To bring ATTACHMENT D, Proposed Rule Language, DIVISION 16, POLLUTION CONTROL TAX CREDITS in line with what is the Legislative intent; I am making the following recommendations.

1. In accordance with language used at the top of page 4, attachment D. I ask that on line 1 of the last paragraph on that page between the words, Any facility, insert the words, equipment or. It would read "Any *equipment or* facility *that* implements a plan, a project or a strategy identified:

2. In the same paragraph, between the lines 3 and 4 insert the following wording:
(B) Any equipment or facility that has been documented by Oregon State University, Agricultural Experiment Station (OSU-AES), United States Department of Agriculture, Agriculture Research Service (USDA-ARS) or Oregon Department of Agriculture (ODA) to be effective in reducing nonpoint source pollution: or

3. On the next line, change (B) to (C), on the following line change (C) to (D).

The last two paragraphs would read as follows:

(h) Nonpoint Source Pollution. Pursuant to ORS 468.155(2)(b), the EQC has determined that the following facilities reduce or control significant amounts of nonpoint source pollution:
(A) Any *equipment or* facility that implements a plan, a project or a strategy identified:
(i) By any partnership listed in the Oregon Nonpoint Source Control Program Plan: or
(ii) In a Federal Clean Air Act State Implementation Plan for Oregon: or
(B) Any equipment or facility that has been documented by Oregon State University, Agricultural Experiment Station (OSU-AES), United States Department of Agriculture, Agriculture Research Service (USDA-ARS) or Oregon Department of Agriculture (ODA) to be effective in reducing nonpoint source pollution: or
(~~B~~)(C) Wood chippers used to reduce openly burned wood debris: or
(~~C~~)(D) Diesel emission control devices used to retrofit diesel engines to meet current diesel engine emission standards.

Stat. Auth.: ORS 468.150
Stats. Implemented: ORS 468.150 - ORS 468.190
Hist.: DEQ 5-1998, f. 4-24-98, cert. ef. 5-1-98

The Legislative intent is to give Tax Credit on equipment or facility that provides proven reduction in Nonpoint Source Pollution.

Attachment E:

Detailed Changes to Original Rulemaking Proposal made in Response to Public Comment

Attachment E
Detailed Changes to Original Rulemaking Proposal made in Response to Public Comment

Rule Amendment for Public Comment:	Rule Amendment Proposed for Adoption: *Significant changes italicized*
OAR 340-016-0060(4):	OAR 340-016-0060(4):
h) Nonpoint Source Pollution. Pursuant to ORS 468.155(2)(b), the EQC has determined that the following facilities reduce or control significant amounts of nonpoint source pollution:	(h) Nonpoint Source Pollution. Pursuant to ORS 468.155(2)(b), the EQC has determined that the following facilities reduce, or control significant amounts of nonpoint source pollution:
(A) Any facility that implements a plan, a project or a strategy identified:	(A) Any facility that implements a plan, project, or strategy *to reduce or control nonpoint source pollution as documented*:
(i) By any partnership listed in the Oregon Nonpoint Source Control Program Plan; or	(i) By one or more partners listed in the Oregon Nonpoint Source Control Program Plan; or
(ii) In a Federal Clean Air Act State Implementation Plan for Oregon; or	(ii) In a Federal Clean Air Act State Implementation Plan for Oregon; or
	(B) Any facility effective in reducing nonpoint source pollution as documented in supporting research by:
	(i) Oregon State University, Agricultural Experiment Station; or
	(ii) The United States Department of Agriculture, Agriculture Research Service; or
	(iii) The Oregon Department of Agriculture; or
(B) Wood chippers used to reduce openly burned woody debris; or	(C) Wood chippers used to reduce openly burned woody debris; or
(C) Diesel emission control devices used to retrofit diesel engines to meet current diesel engine emission standards.	(D) The retrofit of diesel engines with a diesel emission control device, certified by the U.S. Environmental Protection Agency.

Attachment F:

Rule Implementation Plan

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Nonpoint Source Pollution Control Facility Tax Credit

Rule Implementation Plan

Summary of the Proposed Rule
The 1999 Legislature amended ORS 468.155 (HB2181) to explicitly include the eligibility of nonpoint source pollution control facilities that reduce or control a significant amount of nonpoint source pollution for tax credit purposes. This rule amendment implements this legislation.

Proposed Effective Date of the Rule
The effective date of the rule would be February 1, 2001.

Proposal for Notification of Affected Persons
Tax credit program staff will provide Fact Sheets to the Oregon Nonpoint Source Control Program Plan mailing list and Oregon State University. Staff does not intend to develop any additional public outreach strategy. However, staff will continue to support any agency or public interest group in their outreach endeavors.

Proposed Implementing Actions
Tax credit staff will provide information regarding the final Environmental Quality Commission action on the DEQ web page under tax credits. Staff will develop an application that is specific to nonpoint source pollution control facilities similar to the alternatives to open field burning application.

The nonpoint source tax credit is intended to cover expenditures for "on-the-ground" management practices and improvements. It is not intended to cover education, outreach or monitoring costs. In order to be eligible for this tax credit, nonpoint source expenditures must be documented. Similarly, these expenditures must be incurred as part of implementation of at least one of the following elements of the State's federally-approved nonpoint source control plan:

- agricultural plans developed in response to the requirements of Senate Bill 1010;
- forest management practices plans;
- total maximum daily load (TMDL) implementation plans;
- groundwater management area action plans;
- estuary plans;
- expenditures to supplement a Clean Water Act section 319 grant project; or
- any other similar watershed restoration plans approved by a State or Federal agency.

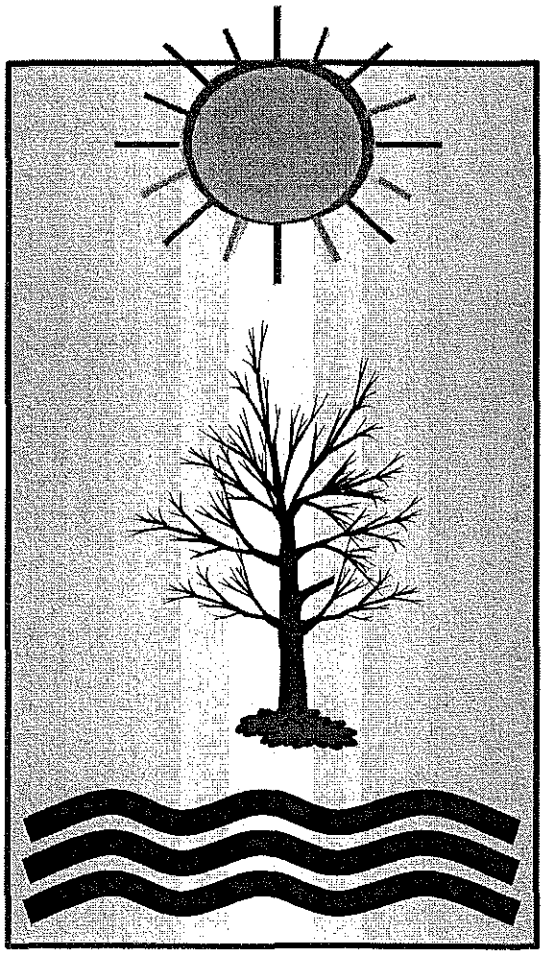
Nonpoint source pollution control facility reviews would be most like Confined Animal Feeding Operation reviews. In these applications, the applicant provides any plans and the recommendation from the Soil and Water Conservation District as part of the application.

Applications for lower cost facilities would be an abbreviated form. These facilities would be processed in batches similar to how staff processes automobile refrigerant recovery equipment. The department anticipates there could be an increase in the number of applications. Implementation would require an additional .5 FTE should the number of applications exceed 45 per year. The additional expense would be paid through the application fee.

Proposed Training/Assistance Actions

The Department contracts with environmental engineering groups to perform application reviews. All engineers under contract with the Department have been trained on performing tax credit reviews. Any new contractors will be trained upon award of new contracts. Application review requirements specific to nonpoint source will be developed by tax credit program staff on an as-needed basis. This approach is consistent with program implementation.

FINAL



OREGON NONPOINT SOURCE CONTROL PROGRAM PLAN

2000 Update

October 2000

DEQ

Oregon Department of Environmental Quality
Water Quality Division — Watershed Management Section
811 S.W. Sixth Avenue ✧ Portland, Oregon 97204

Printed on recycled paper

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This publication is available in alternate format (e.g., large type, braille) by calling DEQ Public Affairs at (503) 229-5317 or toll free within Oregon at 1-800-452-4011. People with hearing impairments can call DEQ's TTY number at (503) 229-6993.

EXECUTIVE SUMMARY

The Oregon ecosystems are renowned for their beauty, vitality and diversity. However, approximately 14,000 stream and river miles are not achieving full compliance with the State's water quality standards. Moreover, several species of salmon and steelhead have been placed on the threatened and *endangered* list. In 2000, the State and Federal governments committed more than $35 million dollars to begin to reverse this degradation of water quality.

This document summarizes the State of Oregon's nonpoint source water pollution control program quality implemented under the State Environmental Quality, the CZARA Section 6217 Coastal NPS Control Program, the National Estuary Program, the Forest Practices Act, The Healthy Stream Partnership, Agricultural Water Quality Act, drinking water and groundwater protection programs.

The Oregon nonpoint source program was originally established in 1978 and has been revised and in 1991 and updated every year in the Intended Use Document 319-proposal submittal to EPA. The program was established to address non-discreet pollutant discharges to surface waters not otherwise regulated by Federal or State point source control programs. The goal of the program has been broadened to safeguard groundwater resources as well as surface water.

Historically, the Oregon nonpoint source program has been a "stand alone" effort. Several individual, dedicated ODEQ staff sponsored education and awareness programs, provided technical assistance, developed "how to" guidance, and distributed Federal money available for nonpoint source projects throughout the State. However, recognizing the significance and magnitude of nonpoint source pollution contributions, the State has determined that the program's goals will more effectively and efficiently be achieved by integrating nonpoint source concerns into the fabric of the State's basic water pollution programs. Rather than being considered in isolation, each component of Oregon's water quality program now includes nonpoint source concerns. Similarly, ODEQ has reached out to other Federal, State, Tribal, Local and Private partners to assist in program development and implementation beyond ODEQ's regulatory jurisdiction and financial abilities.

The centerpiece of the State nonpoint source program is the Oregon Plan for Salmon and Watersheds (Oregon Plan). Adopted in April 1997, the Oregon Plan is designed to restore the healthy function of the State's natural aquatic systems. The Plan calls for salmonid fish populations to be restored to productive and sustainable levels. In order for this effort to succeed, the Plan requires all government agencies that could potentially impact aquatic systems to coordinate their activities and ensure that they are consistent with watershed restoration efforts. The Oregon Plan meshes science with public support and local decision-making, and anticipates the use of regulatory controls as well as voluntary and cooperative actions. The

future direction and priorities of the nonpoint source program must be considered in the context of this larger backdrop.

Nine Key Elements

The Oregon nonpoint source program can be described through an examination of the nine key elements set out below.

Key Element #1: *Explicit short and long-term goals, objectives and strategies to protect surface and groundwater.*

Oregon has embarked upon both a short term and long term approach to addressing water quality concerns. In the short term, the emphasis is placed on restoration, that is reducing the level of existing pollution preventing the aquatic environment from realizing its proper functionality and biological diversity. The long-term strategy relies more on prevention to ensure that future waterways do not become impaired in the first place. In each case, a wide variety of partnering efforts, and regulatory and non-regulatory tools and methodologies will be brought to bear to respond to pollution threats, both real and potential.

Oregon has already completed a comprehensive inventory of the health of its surface waters and has identified those waterways that are not yet meeting water quality standards. Likewise, existing and potential threats to drinking water sources, including ground water wells are being assessed. Over the next seven years (by 2007), each of the impaired surface waters will be individually analyzed to determine the cause of the impairment and to identify all viable options to returning the waterway to complete health. Throughout much of Oregon, nonpoint sources will be identified as substantial contributors to both the existing water quality impairment, and the solutions making it possible for stream restoration. Please refer to Chapter 2 for a thorough discussion on this theme.

Key Element #2: *Strong working partnerships and collaboration with appropriate State, interstate, Tribal, regional, and local entities (including conservation districts), private sector groups, citizen groups, and Federal agencies.*

"Vigorous partnerships" are a dominant theme of the Oregon water quality program. Various State and Federal laws, including the State Northwest Forest Practices Act, the Agricultural Water Quality Management Act, the Healthy Streams Partnership Act, the Environmental Quality Act, the federal Coastal Zone Management Act, the federal Endangered Species Act and the federal Clean Water Act require government agencies, including Tribes and some private organizations, to undertake their respective missions in a manner that facilitates watershed restoration. Activities of mutual interest are to be discussed and coordinated. To the extent practical, priorities and resources should be aligned and consistent. Similarly, watershed decisions will be locally driven. In order to ensure this consistency, ODEQ has entered into formal "memoranda of understanding" with several of these federal and state entities. Local watershed councils, conservation districts and other watershed residents will actively participate in the development of watershed solutions. Finally, funders, such as the Oregon Watershed

Enhancement Board and OEDQ will exchange information on needs, criteria and priorities for available resources. Additional information on the theme of partnerships and what they mean to Oregon NPS program could be found in Chapter 3.

Key Element #3: *A balanced approach that emphasizes both statewide nonpoint source programs and on-the-ground management of individual watersheds where waters are impaired or threatened.*

Oregon has put a number of monitoring and assessment systems in place to enable the State to maintain a vigilant watch on all of its waters. As noted above, while watershed restoration continues to be a primary focus over the next seven years, the State has not loss sight of the importance of prevention and the need to protect healthy aquatic systems from becoming impaired in the future.

Over the next 7 years, ODEQ will focus much of its efforts on completing total maximum daily load (TMDLs) evaluations of impaired State waters. Nonpoint source pollutant contributions and pollutant reduction opportunities will be a major consideration in this analysis. Similarly, although a portion of nonpoint source funds will continue to be used for outreach and awareness activities across the State, we anticipate the majority of those funds will support on-the-ground changes in the watershed to aid in restoration.

Beyond the TMDL initiative, the State continues to sponsor and participate in statewide water quality assessments and watershed restoration efforts, including debris removal. Support to local watershed councils and advisory groups, as well as technical assistance to private and public entities, continues to be available throughout the State.

Key Element #4: *The State program (a) abates known water quality impairments resulting from nonpoint source pollution; and, (b) prevents significant threats to water quality from present and future nonpoint source activities.*

As noted above, all of the State's nonpoint source energy and resources will be used in pursuit of the two goals set out in this element.

Key Element #5: *An identification of waters and watersheds impaired or threatened by nonpoint source pollution and a process to progressively address these waters.*

Oregon and its federal, tribal, local and private sector partners are committed to collecting sufficient data to determine compliance with water quality standards, trends in pollutant loading, effects on biota, and determine the effectiveness of watershed restoration actions. The State has identified a precise timetable for TMDL development and implementation for both point and nonpoint sources of water quality degradation. In addition to surface waters, Oregon has an active program to assess and protect sources groundwater, particularly groundwater used as a current source of drinking water.

Key Element #6: *The State reviews, upgrades, and implements all program components required by section 319 of the Clean Water Act, and establishes flexible, targeted, iterative approaches to achieve and maintain beneficial uses of water as expeditiously as practicable.*

Oregon makes full use of an array of tools in its nonpoint source program including economic incentives, regulatory and non-regulatory actions, enforcement, technical assistance, financial support education, training, technology transfer and demonstration projects. Moreover, Oregon's federal, tribal, local and private sector partners are actively pursuing similar strategies to accomplish common water quality goals. Please refer to Chapter 5 for further discussion on BMPs and water quality.

Key Element #7: *An identification of Federal lands and activities, which are not managed consistently with State nonpoint, source program objectives.*

Federal land managers, including the U.S. Forest Service and the Bureau of Land Management, and natural resource agencies such as the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and the Natural Resources Conservation Service, are all working in an active and close partnership with Oregon departments and agencies to improve State water quality and to further the goals of the Oregon Plan.

Key Element #8: *Efficient and effective management and implementation of the State's nonpoint source program including necessary financial management.*

ODEQ is committed to targeting federal 319 dollars at projects and activities that provide significant water quality benefits, both short and long term. The Department has adopted specific criteria to use in evaluating proposals generated around the State. The money is awarded on an annual basis, and project expenditures and accomplishments are tracked to ensure these financial resources are used efficiently and appropriately. The specific process for grant distribution is described in Chapter 7 of this document.

Key Element #9: *A feedback loop whereby the State reviews, evaluates, and revises its nonpoint source assessment and its management program at least every five years.*

While ODEQ is constantly on the watch for continuous program improvement opportunities, the State plans a more formal evaluation of the nonpoint source program by the year 2004. At that time, the program will be reviewed to determine its effectiveness in three distinct areas: (a) its effect on impair waters, (b) its effect at preventing additional waters from becoming impaired, and (c) its efficiency in delivering funding to the geographic areas and highest priority projects. The resulting revisions to the State's nonpoint source plan will guide the program through the year 2009.

Document Organization

The document is organized as follows:

Chapter One sets out a brief introduction that provides additional context and background information regarding the Oregon Nonpoint Source Program.

Chapter Two provides an overview of the State Nonpoint Source strategy, and a detailed implementation schedule covering the anticipated activities in years 2000-2004. Many of these activities are organized and described by subbasin and indicates their relative priority. Short and long term objectives are documented. Unified Watershed Assessment is noted as a tool to prioritize statewide efforts dealing with watershed based strategies.

Chapter Three describes the means by which the State, as a part of its 5-year strategy, will implement its Nonpoint Source goals. Heavily tilted toward cooperative efforts and partnerships, Oregon employs a variety of formal and informal methods to coordinate the water quality, watershed health and aquatic habitat related activities. Additional discussion of this strategy can be found in Chapters 5 and 6.

Chapter Four describes specific challenges facing the State's waters. The major causes of impairment are discussed as well as a brief description of stressors and pollution sources. The Chapter also includes information on groundwater.

Chapter Five sets out the 10 objectives the State is pursuing to reverse watershed degradation. The Chapter also presents a summary of progress to date.

As noted above, Chapter Six discusses the unified watershed assessment and restoration strategies to be used to evaluate stream health and recovery efforts.

Also as noted above, Chapter Seven provides background on the State's distribution of 319 nonpoint source grants.

Finally, a series of Appendices have been attached. These documents provide additional detailed information on various aspects of the State's program. Some of these documents are:

Unified watershed assessment and restoration priorities,
Memoranda of Understanding with partner agencies,
A list of Oregon Watershed Councils, and
A description of the nonpoint source program as it affects coastal areas.

Conclusion

The State of Oregon has submitted this document to the U.S. Environmental Protection Agency in satisfaction of the requirements of Title 33, section 1329 of the United States Code [also known as section 319 of the Clean Water Act. The document captures the breadth and scope of the State's unified, integrated approach to water quality planning, program development and

implementation Statewide, and reflects the prominence of nonpoint source controls within that more comprehensive framework.

While nonpoint source issues continue to be addressed both locally and State-wide, integration of these efforts with other water quality elements will minimize or avoid undue duplication of effort, and facilitate State efforts to focus available resources on high priority issues.

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3. PARTNERSHIPS

3.1 SUMMARY

The State of Oregon uses a variety of formal and informal methods to coordinate the many water quality, watershed health, and aquatic habitat related activities. There are a myriad of partnerships engaged in work that addresses control of nonpoint source pollution. The focus and ultimate goal of many of these partnerships is salmonid recovery under *The Oregon Plan*. Others meet and coordinate in order to make funding decisions. Geographically-based partnerships focus on area-specific resource management issues. The State is discussing better ways to coordinate agency efforts through a regional structure. The Nonpoint Source Program used regional interagency review teams to make grant funding decisions for FY 2000. Southwest Oregon is working on a model for a regional structure to streamline delivery of support and technical assistance to Watershed Councils. For purposes of this document, key partnerships that deal most directly with control of nonpoint source pollution will be described. Those key partnerships are:

3.1.1 Statewide

- Unified Watershed Assessment Interagency group—State, Federal, and Tribal participants collaborated on the statewide Unified Watershed Assessment, and make funding decisions for Watershed Restoration Action Strategies.
- The Healthy Streams Partnership, a coordinated effort under *The Oregon Plan*, headed by Oregon Department of Agriculture and Department of Environmental Quality - addressing water quality limited streams by developing and implementing TMDLs and Agricultural Water Quality Management Plans.
- Forest Practices Advisory Committee and other partnerships formed under *The Oregon Plan* to conduct sufficiency and effectiveness reviews of Oregon's Forest Practices Act.
- Oregon Watershed Enhancement Board—provides technical and financial support for Watershed Councils throughout the State.
- State Technical Committee, headed by USDA Natural Resources Conservation Service—makes decisions on EQIP and other agricultural programs.
- *The Oregon Plan* Monitoring Team and Scientific Workgroups.

3.1.2 Geographically-Based

- Watershed Councils, Soil and Water Conservation districts and local committees involved in Healthy Streams Partnership activities.
- Forest Province coordinating and advisory groups implementing the President's Forest Plan.
- Committees carrying out the Interior Columbia Basin Ecosystem Management Project.

- National Estuary Program committees for Tillamook Bay Estuary and the Lower Columbia Estuary.

- The Willamette Restoration Initiative.

The ensuing few paragraphs will briefly discuss each partnership, with specific focus on its role in controlling nonpoint source pollution.

3.2 STATEWIDE

3.2.1 Unified Watershed Assessment Interagency Group

In 1998, as a result of the Clean Water Action Plan, an interagency group was convened to develop a Unified Watershed Assessment for Oregon, under the leadership of Oregon Department of Environmental Quality and the U.S. Natural Resources Conservation Service's Oregon office. State, Federal, and Tribal participants collaborated on the statewide Unified Watershed Assessment, agreeing on and using criteria to determine watershed condition for purposes of restoration needs. For the two subsequent years, this group has met to review proposals for funding under CWA Section 319, making recommendations to DEQ based on technical and programmatic expertise as well as combined knowledge of situations in watersheds within the context of assessments and plans that function as Watershed Restoration Action Strategies. Agency representatives at the table are beginning to discuss ways to better coordinate other sources of funds, particularly SRF and the OWEB grants. Participating agencies are:

- Columbia River Intertribal Fisheries Commission,
- Oregon Department of Agriculture,
- Oregon Department of Environmental Quality,
- Oregon Department of Forestry,
- Oregon Watershed Enhancement Board,
- The U.S. Farm Services Agency,
- U.S. Bureau of Land Management,
- U.S. Environmental Protection Agency,
- U.S. Forest Service, and
- U.S. Natural Resources Conservation Service.

In the FY 2000 funding cycle, regional interagency groups evaluated proposals and made recommendations to the statewide group. This approach has great value and it is anticipated that, with some modifications, it will continue.

3.2.2 Healthy Streams Partnership

The Healthy Streams Partnership brings together public and private resources to improve the health of Oregon's aquatic systems and enhance beneficial uses of water for future generations using specific, focused efforts in watersheds such as development and implementation of TMDLs and Agricultural Water Quality Management Plans. The Partnership is comprised of representatives from agriculture, forestry, interest groups, local government, State agencies and the Governor's office. The Healthy Streams Partnership Agreement was initially developed by a diverse group of Oregonians assembled by Governor Kitzhaber. The 1997 Oregon Legislative Assembly subsequently approved and funded the partnership and created the Healthy Streams Partnership Committee, through Senate Bill 924. Groups represented on the Healthy Streams Partnership Committee are:

- Bureau of Land Management,
- Governor of Oregon,
- Oregon Cattlemen's Association,
- Oregon Dairy Farmers,
- Oregon Department of Agriculture,
- Oregon Department of Envelopment,
- Oregon Department of Fish and Wildlife,
- Oregon Division of State Lands,
- Oregon Farm Bureau,
- Oregon Forest Industry Counsel,
- Oregon Governor's Office,
- Oregon Trout,

- Oregon Water Resources Department,
- Oregonians for Food and Shelter Quality,
- Wallowa County Commissioner,
- Water for Life, and
- Water Watch.

The role of the Healthy Streams Partnership Committee is to provide information to the Joint Legislative Committee on Salmon and Stream Enhancement about the implementation of the programs from a local and regional perspective, and to recommend changes necessary to facilitate more efficient implementation of the initiative and other stream improvement programs at the local level. The Oregon Legislature endorsed the Healthy Streams Partnership through a funding package, which included $5.8 million for 19 FTE's each in the Department of Agriculture and the Department of Environmental Quality. In addition, a stakeholders' oversight committee was created. Details of these can be found in Chapter 9 of *The Oregon Plan.*

Another important function performed by the Healthy Streams Partnership is to bring together many of the public and private agencies and interest groups involved in watershed management issues. Even those interests not formally represented on the Committee nevertheless have regular opportunities to participate in the process, often at the local level in conjunction with Watershed Councils and/or the field-based staff of the HSP agencies. One result of this is a clearer understanding by all involved of the range of issues, opinions, preferences, and priorities of the various interests. This understanding then factors prominently into all of the policy processes of *The Oregon Plan* partners, including DEQ, and specifically including the development of priorities and projects for OWEB and Section 319 grant funding.

3.2.3 Forestry And Agricultural Practices

The Oregon departments of Forestry (ODF) and Agriculture (ODA) have statutory authority to manage programs designed to protect water quality on State and private forest lands and on agricultural lands in the state. ODF is required to establish "best management practices" and other rules to ensure that to the maximum extent practicable nonpoint source pollution from forest operations do not impair the achievement and maintenance of water quality standards established by DEQ (through its policy-making body, the Environmental Quality Commission). ODA is similarly charged with regulating agricultural practices for the same purpose. In both cases, a close partnership with DEQ is explicitly required by Oregon law. DEQ signed MOUs with ODF and ODA (in April and June of 1998, respectively) to formalize this relationship.

The agreement with ODF is focused on a bilateral review of the sufficiency of the Forest Practices Act (FPA) rules to protect water quality. The agreement with ODA is focused on the roles and responsibilities of the two partners in carrying out the Senate Bill 1010 program to develop and implement Agricultural Water Quality Management Area Plans. The FPA sufficiency review has been overshadowed during 1999 and 2000 by the larger, multi-partner Forest Practices Advisory Committee (see below), but with the FPAC recommendations due soon, DEQ and ODF will again continue their cooperation on studies to evaluate FPA water quality impacts.

Meanwhile, DEQ has participated closely with the SB 1010 Local Advisory Committees and with ODA's statewide staff in development of the AWQMAPs drafted to date. DEQ and ODA also have begun work on a "programmatic" description of the 1010 program intended to explain how the program as a whole addresses the requirements of the Clean Water Act and the Endangered Species Act. This new document is due for completion before the end of 2000. Copies of the MOUs are in Appendix D.

3.2.4 Forest Practices Advisory Committee

Forest Practices Advisory Committee and other partnerships formed under *The Oregon Plan* to conduct sufficiency and effectiveness reviews of Oregon's Forest Practices Act. The Board of Forestry has formed the Forest Practices Advisory Committee to review the FPA and make recommendations for needed changes if any are identified. The foundation of this committee's work is the body of scientific analysis and data that establish relationships between forest landscape condition, forest land management, and condition of the aquatic resources.

Participants in the FPAC process include both voting and non-voting members who represent a variety of public and private agencies and interest groups involved with forest practices and their effect on forest ecosystems, including water quality and aquatic habitat. The full membership is listed in Appendix E. As of June 2000, the FPAC had not yet published final recommendations for FPA rule changes. However, the direction of the group's deliberations suggests that additional riparian and stream channel protections will be recommended.

3.2.5 Agricultural Water Quality Management/Senate Bill 1010/Cafos

In 1993, the Oregon Legislature adopted Senate Bill 1010, an agricultural water quality management program. This legislation gives the Oregon Department of Agriculture (ODA) the authority to develop and implement water quality management plans for agricultural and rural lands where such plans are required by State or Federal law. The goal of the plans is to prevent and control water pollution from agricultural activities. The program applies to 303d listed waters, to groundwater management areas, and to the coastal zone management area. ODA consults with DEQ in the development of the plans, and the two agencies coordinate in a number of ways to facilitate implementation and monitoring of the program.

In addition to the SB 1010 program, DEQ and ODA are partners in addressing confined animal feeding operations (CAFOs). Details on these programs may be found under the discussion of Oregon Plan management measures "ODA1" and "ODA2" in Section 5.3.

3.2.6 Oregon Watershed Enhancement Board

The Oregon Watershed Enhancement Board (OWEB) (formerly the Governor's Watershed Enhancement Board, GWEB) plays a key role in assisting Watershed Councils and Soil and Water Conservation Districts with technical support and funding. The OWEB administers a watershed restoration grant program, which annually disperses millions of dollars to local groups and individuals.

The OWEB recognizes that a vast number of grant opportunities are available to local groups and has an interest in providing a coordination function in this area. Some of the many funding sources that may be coordinated by the OWEB include:

- Agricultural Conservation Program,
- Clean Water Act grants,
- Conservation Reserve Enhancement Program,
- FEMA grants, and Farmers Home Administration programs,
- Hire-the-Fisher Program,
- Jobs-in-the-Woods Program,
- Lottery funds/local government grants,
- ODFW Restoration and Enhancement Board, and
- Stewardship Incentives Program.

The 1997 Legislative Assembly increased OWEB funding to over $20,000,000 to provide grants to local Watershed Councils and others for watershed assessment, monitoring, technical assistance, action plan development and implementation, education and outreach, and

watershed coordinators. A watershed assessment guidance manual for local Watershed Councils was drafted and is being used by several Watershed Councils. A stream and watershed restoration inventory is being developed to track public and private efforts to restore watershed health. OWEB, after input from the Joint Legislative Committee on Salmon and Stream Enhancement, adopted priorities for funding for the Watershed Improvement Grant Fund, with emphasis on whole watershed approaches, beginning in the headwaters and uplands and working downslope and downstream.

Members of the Oregon Governor's Watershed Enhancement Board include one person from each of the bodies listed below:

Voting Board Members:

- Oregon Environmental Quality Commission;
- Oregon Water Resources Commission;
- Oregon Board of Agriculture;
- Oregon Fish and Wildlife Commission;
- Oregon Board of Forestry;
- Six members representing Watershed Councils, citizens, and First Nation Tribes.

Non-Voting Board Members:

- USDA Forest Service;
- USDI Bureau of Land Management;
- Oregon State University Cooperative Extension Service;
- USDA Natural Resources Conservation Service;
- Environmental Protection Agency; and
- National Marine Fisheries Service.

3.2.7 OWEB–DEQ Partnership

OWEB plays a very large and an ever-increasing role in Oregon's NPS control program. It is the principal funding source for implementation of *The Oregon Plan*, including the financial and technical support of Watershed Councils. In recent years, OWEB has published several important documents to guide watershed processes, including those mentioned at the end of Section 2.1 that address watershed assessment, water quality monitoring, aquatic habitat restoration, and watershed scale restoration action plans. Each of these documents was prepared with DEQ input, and each has become central to the functioning of our NPS program. OWEB's regional and statewide advisory committees, as well as the Board itself, serve as highly energized forums for discussion and action on watershed issues of all kinds. DEQ personnel participate actively in all these groups, as well as in ad hoc groups formed to address particular topics (such as guidance development or interagency grant coordination reforms). From the first days of the Section 319(h) grant program, those CWA Federal funds have been deliberately matched with OWEB State funds to support many successful and important projects addressing water quality, habitat, watershed management, and public awareness of watershed functions and issues. DEQ pledges to continue and expand this successful partnership in the future.

3.2.8 USDA State Technical Advisory Committee

Jointly led by NRCS and FSA, the STAC makes policy and technical recommendations to those agencies on a number of programs relating to conservation practices and environmental quality. These include:

- Conservation Reserve Enhancement Program,
- Conservation Reserve Program,
- Environmental Quality Incentives Program,
- Farmland Protection Program,
- The Wetland Reserve Program, and
- Wildlife Habitat Incentives Program.

The STAC includes representatives from a number of public agencies and private interests concerned with natural resources and environmental quality. This group provides an excellent opportunity to coordinate policies and priorities on watershed enhancement technical and financial assistance programs.

3.2.9 The Oregon Plan Monitoring Team And Scientific Workgroups

The Monitoring Team and Science Workgroups provide leadership on scientific issues and coordinated inter-agency monitoring. Staff of the Governor's Natural Resource Office leads the monitoring team and science workgroups. Membership on the Monitoring Team includes State and Federal agency scientists, as well as representatives from industry and environmental groups. The Monitoring Team is charged with developing the monitoring strategy and protocols.

Science Workgroups are assembled strategically as needed to, for example, continue to refine understanding of the factors for decline for various species and how measures can support restoration. The Independent Multidisciplinary Science Team (IMST) was formed under Senate Bill 924 to:

- Review the implementation of programs for achieving healthy streams,
- Prepare and submit an annual report on the implementation of *The Oregon Plan*, including any recommendations for changes or adjustments,
- Serve as an independent scientific peer review panel to the State agencies responsible for developing and implementing *The Oregon Plan* and other salmon or stream enhancement programs throughout the State; and
- Report regularly to the Joint Legislative Committee on Salmon and Stream Enhancement concerning these duties. See Chapter 7 of *The Oregon Plan*: "Independent Multidisciplinary Science Team," as well as Chapter 15B: "Implementation of Monitoring Program" for more details.

A stream and watershed restoration inventory is being developed by the coordinator to track both public and private efforts to restore habitat and improve the condition of watersheds in Oregon. The inventory is designed to capture information on a range of restoration approaches, including instream habitat structures, riparian fencing and planting, wetlands enhancement, upland grazing and vegetation management, and road improvements.

The purpose of the inventory is two-fold:

1. To provide watershed, ecoregion, and statewide summaries of restoration activities; and,
2. To support future research on the effectiveness of current restoration strategies.

3.3 GEOGRAPHICALLY-BASED

3.3.1 Watershed Councils, Soils And Water Conservation Districts, And Local Committees Involved In Health Streams Partnership Activities

There is a tremendous amount of coordination occurring among Watershed Councils and Soil and Water Conservation Districts regarding implementation of *The Oregon Plan*. The Governor's Watershed Enhancement Board provides coordination and capacity-building services to councils. The Healthy Streams Partnership uses the expertise of councils, districts, and local committees as analyses and plans are developed. Membership of councils and committees are intended to be fair representation of interested and affected parties. Membership varies widely, depending on the scale of the planning area or watershed, land ownership, and the issues at hand. As of publication of this updated NPS Program Plan, there are 87 Watershed Councils recognized by the Oregon Watershed Enhancement Board (see list in Appendix F).

3.3.2 Oregon's Coastal Nonpoint Pollution Control Program

Oregon's Coastal Nonpoint Pollution Control Program (CNPCP) has been developed in compliance with requirements adopted as part of the Coastal Zone Management Act Reauthorization Amendments of 1990 (CZARA). CZARA is administered at the federal level by the U.S. Environmental Protection Agency (EPA) and the National Oceanic and Air Administration (NOAA). The new requirements were designed to restore and protect coastal waters from nonpoint source pollution and require coastal states to implement a set of management measures based on guidance published by EPA. The guidance contains 56 management measures separated into six groups. There are measures for the following areas: agricultural activities, forestry activities, urban areas, marinas, hydromodification activities, and protecting wetlands.

In July of 1995, Oregon completed its Program Submittal for the CNPCP. Oregon's CNPCP Submittal described existing programs and proposed work tasks that would meet the terms of CZARA and EPA's guidance and work to improve water quality in Oregon's coastal zone. Current state water quality, wetland, and land use laws, as well as the Forest Practices Act and the early development of *The Oregon Plan* for Salmon and Watersheds, insured that the state already met many requirements of CZARA. In January 1998, after reviewing the state's program submittal, EPA and NOAA returned their findings to the state that granted a conditional approval to Oregon's program. The findings included 13 conditions of approval. To better respond to the conditions of approval, DEQ and Department of Land Conservation and Development (DLCD) divided them into 40 discrete tasks. The focus of the implementation activities for the CNPCP over the last two years has been addressing these tasks.

Since receipt of the conditional approval of the state's CNPCP the following activities have occurred:

- A statewide urban storm water task force has been formed of stakeholders to draft recommendations on a strategic approach to mitigating environmental impacts of urban runoff. The task force has prepared recommendations on construction site erosion and sediment control. The proposed program would provide support for voluntary adoption of more stringent erosion controls by local governments. Other storm water issues are to be addressed by the task force over the next several months. (DEQ)

- Received tentative approval by NOAA and EPA of the state's request to maintain the CNPCP boundary for the Columbia River at the existing Coastal Program boundary at Puget Island. (DEQ and DLCD)

- Received a Section 319 grant to facilitate the adoption of local ordinances designed to meet load reduction requirements resulting from TMDLs. (DLCD)

- Received tentative agreement by both EPA and NOAA to approve existing Oregon Plan commitments, along with provisions in current land use laws as meeting the urban watershed management measures. (DLCD)

- Received tentative agreement by both EPA and NOAA to exempt the state from meeting state and federal highway management measure due to ODOT's intention of covering all construction and maintenance activities under a statewide municipal storm sewer system National Pollutant Discharge Elimination System permit. (ODOT and DEQ)

The Flexibility Guidance stipulates that NOAA and EPA can approve those program elements for which states have proposed voluntary or incentive-based programs which are backed by existing state enforcement authorities, if the following is provided:

- A legal opinion from the state attorney general stating that existing enforcement authorities can be used to prevent nonpoint

pollution and require management measure implementation, as necessary;

- A description of the voluntary or incentive-based programs, including the methods for tracking and evaluating those programs, the states will use to encourage implementation of the management measures; and

- A description of the mechanisms or process that links the implementing agency with the enforcement agency and a commitment to use the existing enforcement authorities where necessary.

The following are prioritized (DEQ and DLCD) tasks under the CNPCP:

- Develop technical assistance program for local governments to facilitate the adoption of the urban component of basin-wide water quality management plans.

- Implement remaining management measures prioritized as commitments under *The Oregon Plan.* Continue monthly progress reporting by implementing state agencies as part of *The Oregon Plan.* Continue to prepare CNPCP yearly progress reports to NOAA and EPA on meeting program requirements and implementation of CNPCP Management Measures.

- Obtain federal funding (through EPA's Section 319 and Unified Watershed Assessment and NOAA) and state general funds for DEQ and DLCD's CNPCP Coordinator positions and to develop implementing mechanisms such as model ordinances, rules changes, guidance documents and education and technical training. In addition, funds will be requested for state and local agencies to provide start-up staffing and program development in implementing CNPCP Management Measures.

- Implement CNPCP Management Measures through Water Quality Management Plans being developed as required by the TMDL process, the agricultural water quality plans (SB1010 Rules) and the State Forest Practices Act in the following *The Oregon Plan* priority basins: Umpqua, Rogue, South Coast, and Tillamook/North Coast Basins.

3.3.3 Forest Province Coordinating And Advisory Groups Implementing The President's Forest Plan

One of the foremost cooperative efforts that assists in achieving the goals and objectives of *The Oregon Plan* is the Northwest Forest Plan, which has established an interagency organization to coordinate and facilitate plan implementation. The objective of the aquatic conservation strategy (ACS) in the Northwest Forest Plan is to restore and maintain the ecological health of watersheds and aquatic ecosystems on lands managed by the U.S. Forest Service and the Bureau of Land Management within the range of the northern spotted owl. The ACS in the Northwest Forest Plan is considered by the State to be the cornerstone of salmon habitat restoration efforts in *The Oregon Plan.* Successful integration of the ACS in the Northwest Forest Plan with *The Oregon Plan,* along with changes in harvest, hatcheries, and hydropower programs, will promote recovery of salmon and steelhead populations and habitats across whole basins, regardless of ownership.

The NFP prescribes a comprehensive long-term management approach for 19 National Forests and six Bureau of Land Management districts in Oregon, Washington, and California. The NFP represents a shift to an ecosystem approach that crosses jurisdictional boundaries and puts in place analysis at the watershed scale to support decision making; active and meaningful public participation; and a balanced approach to management of Federal lands that accommodates both commodity outputs and ecosystem viability. The committee structure under the NFP coordinates policy and efforts at national, large region, and smaller region or province scales. The following describes these committees.

- The Regional Interagency Executive Committee serves as the senior regional entity to assure the prompt, coordinated, and successful implementation of the Northwest Forest Plan at the regional level, including ecosystem-scale monitoring and adaptive management. It serves as the principal conduit for communications between the region and the national Interagency Steering Committee. It is responsible for implementing the directives of the Interagency Steering Committee, reporting regularly on implementation progress, and referring issues relating to the policies or procedures for implementing the Northwest Forest Plan to the Interagency Steering Committee.

- The Regional Interagency Executive Committee is comprised of the chief regional official or director (as appropriate) of the Forest Service, Natural Resources Conservation Service, Bureau of Land Management, Fish and Wildlife Service, National Park Service, Bureau of Indian Affairs, National Marine Fisheries Service, Environmental Protection Agency, us Army Corps of Engineers, Pacific Northwest Research Station of the Forest Service, Office of Research and Development of the Environmental Protection Agency, and the Biological Resources Division of the U.S. Geological Survey.

- The Chair of the Committee will alternate between the Forest Service and the Bureau of Land Management representatives.

- The Intergovernmental Advisory Committee will continue to be chartered under the provisions of the Federal Advisory Committee Act to advise the Regional Interagency Executive Committee regarding implementation of the Northwest Forest Plan on Federal lands and to provide a forum for better integration of forest ecosystem management activities among Federal and non-Federal governmental entities across jurisdictional boundaries.

- The Committee provides policy advice concerning Northwest Forest Plan issues including but not limited to:

  1. Concerns of Federal, State and local programs for economic, labor, and community assistance.

  2. Interagency research and monitoring goals.

  3. Complementary programs of Federal, State, Tribal, and local efforts to restore and maintain ecosystem health.

  4. Priorities for data management and applications.

The Intergovernmental Advisory Committee is comprised of:

- Members of the Regional Interagency Executive Committee,
- Representatives from State governments in California, Oregon, and Washington,
- Representatives from governments of affected counties in California, Oregon, and Washington,
- Representatives of Tribal governments, and
- Representation from regional and/or State Community Economic Revitalization Teams.

Province-Level Organizations: Provincial Interagency Executive Committees have been established for each of 12 provinces to support the successful implementation of the Northwest Forest Plan at the province level, under the general direction of the Regional Interagency Executive Committee. Each Provincial Interagency Executive Committee may, under guidance from the Regional Interagency Executive Committee, undertake specific activities within its province, including but not limited to:

- Coordinating landscape analyses to assess the health and condition of watersheds and to consider socio-economic conditions in local communities.
- Sharing information to support better decisions regarding the health of the ecosystem, including watersheds and local communities.
- Identifying mutual goals, objectives, and priorities to support coordinated watershed restoration and conservation strategies.
- Sharing technology and expertise within the province.
- Coordinating and conducting monitoring within the province.
- Encouraging complementary ecosystem management among Federal and non-Federal landowners within the province while respecting the rights of non-Federal landowners.
- Coordinating ecosystem management activities in concert with Federal, State, Tribal, and local programs for economic, labor, and community assistance.
- Landscape-level data analysis (such as river basin assessments) and monitoring undertaken by the Provincial Interagency Executive Committees should be based on appropriate joint data standards that tier to regional or watershed scales.

Provincial Advisory Committees will continue to be chartered under the provisions of the Federal Advisory Committee Act. Membership includes representatives of Federal, State, local and Tribal governments, and a variety of other interests. Provincial Advisory Committees shall make recommendations to Federal agencies through the Provincial Interagency Executive Committees regarding coordination and implementation of ecosystem strategies pursuant to the Northwest Forest Plan. They shall also participate, where appropriate, in collaborative planning at the province level across Federal and non-Federal boundaries. In appropriate cases, Provincial Interagency Executive Committees may find it desirable to use mechanisms other than, or in addition to, Provincial Advisory Committees in order to obtain advice from non-Federal entities.

3.3.4 Interior Columbia Basin Ecosystem Management Project

An approach similar to the NFP is being proposed by the Interior Columbia Basin Ecosystem Management Project (ICBEMP) for aquatic habitats on public lands in the Middle and Upper Columbia River ESUs, and the Snake River Basin ESU. ICBEMP is a broad-scale, ecosystem-based project, developed in open collaboration with multiple agencies, governments, and tribes, and with unprecedented public input. It will guide future management of 72 million acres of public lands administered by the Forest Service (FS) and Bureau of Land Management (BLM) in the interior Columbia Basin and portions of the Klamath and Great Basins. One of the most important goals of the ICBEMP is to address, through the development of big-picture ecosystem management strategies, broad-scale issues such as the protection and recovery of a wide range of fish species.

3.3.5 National Estuary Program Committee For The Tillamook Bay Estuary And The Lower Columbia Estuary

The Coordinated Conservation and Management Plans (CCMPs) for these estuaries have been completed and adopted by the multiple committees that are formed to develop and carry out the estuary programs. Both plans address control of nonpoint source pollution and enhancement of habitat for fish. Summary materials from both CCMPs are located in Appendix G.

3.3.6 The Willamette Restoration Initiative

The Willamette Restoration Initiative is a new effort seeking to promote, integrate and coordinate efforts to protect and restore the health of the Willamette watershed. Designed as a public/private partnership, the Initiative will work closely with State and Federal agencies, while bringing a new focus to exploring the restoration interests and capabilities of businesses, landowners, non-profit organizations, local governments, and Watershed Councils in the basin.

WRI will develop a basin-wide strategy addressing:

- Accountable Institutions,
- Clean Water,
- Healthy Native Habitats,
- High Quality of Life,
- Shared Community Stewardship, and
- Strong Economy.

A wide-variety of organizations deal with impacts on the Willamette watershed, including more than 20 Watershed Councils, 11 Soil and Water Conservation Districts, about 100 cities, 10 counties, four regional government structures, and two resource conservation and development (RCandD) area councils. The basin is also subject to programs of at least nine State agencies and more than a dozen Federal agencies. The Initiative is charged to work closely with existing groups and programs, including Watershed Councils, the Lower Columbia River Estuary Program, and the Willamette Valley Livability Forum. In addition, WRI is to coordinate with all other relevant efforts, including Soil and Water Conservation Districts, local governments and *The Oregon Plan* for Salmon and Watersheds.

The WRI Board has also agreed to oversee the American Heritage River (AHR) program in the basin in order to assure that the local interests of the basin's communities are not only protected, but benefit. While the Willamette was designated an American Heritage River before the Initiative was formed, the WRI Board supports AHR's stated purpose-getting Federal resources to implement local plans to restore and protect rivers environmentally, economically, and culturally. The Board is also aware that a number of communities have concerns about the Heritage River program and will address them, at a minimum, by guaranteeing local input on program development, requiring the river navigator (a Federally-funded AHR position) serve local needs, and explicitly recognizing property rights in AHR agreements.

Executive Order 98-18 directs WRI to "Oversee the preparation of a Willamette Restoration Strategy, including developing Willamette Basin amendments and supplements to *The Oregon Plan* for Salmon and Watersheds for approval by the Governor and the Legislature." The Initiative will fulfill this charge by working closely with the Legislature and the Governor's Office, using existing Oregon Plan structures and processes (including the Core, Implementation, Monitoring, and Outreach Teams; and the Independent MultiDisciplinary Science Team.) WRI has neither the authority, desire, or resources for a solo effort in this regard. Its contribution to *The Oregon Plan* will come primarily from WRI's ability to help engage new Willamette basin audiences (e.g., local governments, businesses, agriculture, watershed groups) in designing and implementing a plan that works for this unique basin.

WRI is overseen by a 26-member Board of Directors chaired by OSU President Paul Risser. The Board includes members from businesses, local government, utilities, tribes, communication media, academia, Watershed Councils, Soil and Water Conservation Districts, agriculture, forestry, environmental groups, and State and Federal government. The day-to-day activities of WRI are managed by an executive director under direction of the Board. The interim director is Rick Bastasch.

3.3.7 Willamette Restoration Initiative Board

Oregon Environmental Council, private fisheries biologist, Mayor of the City of Corvallis, the Eugene Water and Electric Board, Portland Metro, Stahlbush Island Farms, Inc., the Unified Sewerage Agency (USA) of Washington County, the Confederated Tribes of Grand Ronde Community of Oregon, editor of the Albany Democrat-Herald, the Conifer Group (real estate), the Smurfit Newsprint Corporation, the Oregon Department of Environmental Quality, Stop Oregon Litter and Vandalism, private individual well versed in urban design and development, commissioner for the Port of Portland, hunting and sports supply representative, president of Oregon State University, farmer of grass and legume seeds, watershed council coordinator, Linn County Commissioner, Portland City Council Commissioner, Defenders of Wildlife, Weyerhaeuser, the Oregon Business Council, Department of the Interior's Bureau of Land Management.

WRI has an informal committee and workgroup structure. Groups are formed to respond to ongoing or task-specific needs. With the exception of the Executive Committee and the American Heritage River Oversight Committee, members are not appointed; rather, participation is entirely voluntary and open to all interested parties.

Generally, "committees" have been authorized at Board meetings. Board members volunteer for participation; attendance varies by meeting. WRI "workgroups" have been formed as spin-offs of committees or in pursuit of Board action priorities. Again, Board members volunteer for participation. Both committees and workgroups are supported by staff volunteers from Board members' organizations and other interested groups. Participation varies by meeting.

Committees and workgroups report to the full Board. The following committees have tasks most closely related to nonpoint source issues:

3.3.8 Strategy Committee

Purpose: This committee is charged with articulating a restoration vision, principles and goals; developing an integrated framework for basin restoration strategies; conducting a restoration inventory; and designing a stakeholder and public involvement process.

1. Strategy Development Workgroups
Purpose: Refine issues and identify strategy, actions, timelines, and indicators to recommend to WRI Board for inclusion in Willamette Restoration Strategy. The Strategy Committee will help coordinate and integrate workgroup recommendations, as well as act as a resource for workgroup requests for assistance. The four workgroups focus on WRI restoration goals:

- Accountable Institutions,
- Clean Water,
- Healthy Native Habitats,
- High Quality of Life,
- Shared Community Stewardship, and
- Strong Economy.

2. Watershed Partnership Workgroup
Purpose: Promote close working relationships between basin watershed groups and WRI; identify issues and opportunities relating to watershed group operation in the basin.

3. Urban Coordination Forum
Purpose/Origin: The forum results from a spontaneous eruption of urban efforts in the basin to deal with ESA. WRI does not "run" the forum, but acts to support it and to promote a basin-wide approach to ESA issues in the urban landscape, and to channel thinking toward the development of urban-oriented provisions in the Willamette Restoration Strategy.

4. Technical Workgroup
Purpose: Aid in design of white paper and advise Strategy Committee and Board on other technical matters relating to strategy.

3.4 FEDERAL CONSISTENCY

The management of Federal lands is crucial to the control of NPS in Oregon, as well as to the implementation of TMDLs and most other water quality programs. Fortunately, all Federal agencies whose policies and activities have significant water quality implications are full and active partners in *The Oregon Plan* and its key components. As described in Chapter 5, several Federal agencies have committed to a number of critical objectives relating to water quality. In addition, Federal agency partnership in *The Oregon Plan* has resulted in considerable scrutiny of their policies and programs for consistency with the Plan. At this point, no Federal policies or programs have been determined to be inconsistent or in conflict with any aspect of this NPS Plan nor with any aspect of the overarching Oregon Plan.

As with any partnership, a clarification of details is in order. Accordingly, DEQ has undertaken the development of new interagency agreements (MOUs) with key partners, particularly with the Bureau of Land Management and the Forest Service. Development of these new MOUs began in early 2000 and is expected to produce final products by early 2001, one reason for the delay being the long process of developing new Federal rules for the Section 303d/TMDL program.

Along with the content listed below, the MOUs will be coordinated with the content of the latest version of the "Forest Service and Bureau of Land Management Protocol for Addressing Clean Water Act Section 303(d) Listed Waters." An update of this important Protocol is now being readied, with input from DEQ, and further progress in drafting the new MOUs will follow shortly thereafter. The MOUs will include:

- Adaptive management processes, timeframes, and products, and how adaptive management will be used,
- Communication mechanisms,
- Contacts,
- Expectations,
- Federal policies, programs, projects, or practices to review for consistency with Oregon water quality objectives,
- Geographic and programmatic priorities,
- Goals, objectives, and tasks, with products and timeframes specified,
- Integration of other related mandates and programs (e.g., the ESA, SB 1010, CZARA 6217),
- Monitoring, data development, handling, and sharing,
- Responsibilities,
- Review processes (for the Federal policies, the MOUs themselves, and for progress on the objectives),
- Roles,
- Site-specific projects, and
- The use of analytical tools for modeling.

Governor's Budget 2001 - 2003

Presented to the
Environmental Quality Commission

by Helen Lottridge

Management Services Division Administrator

Foundation for 2001 Session

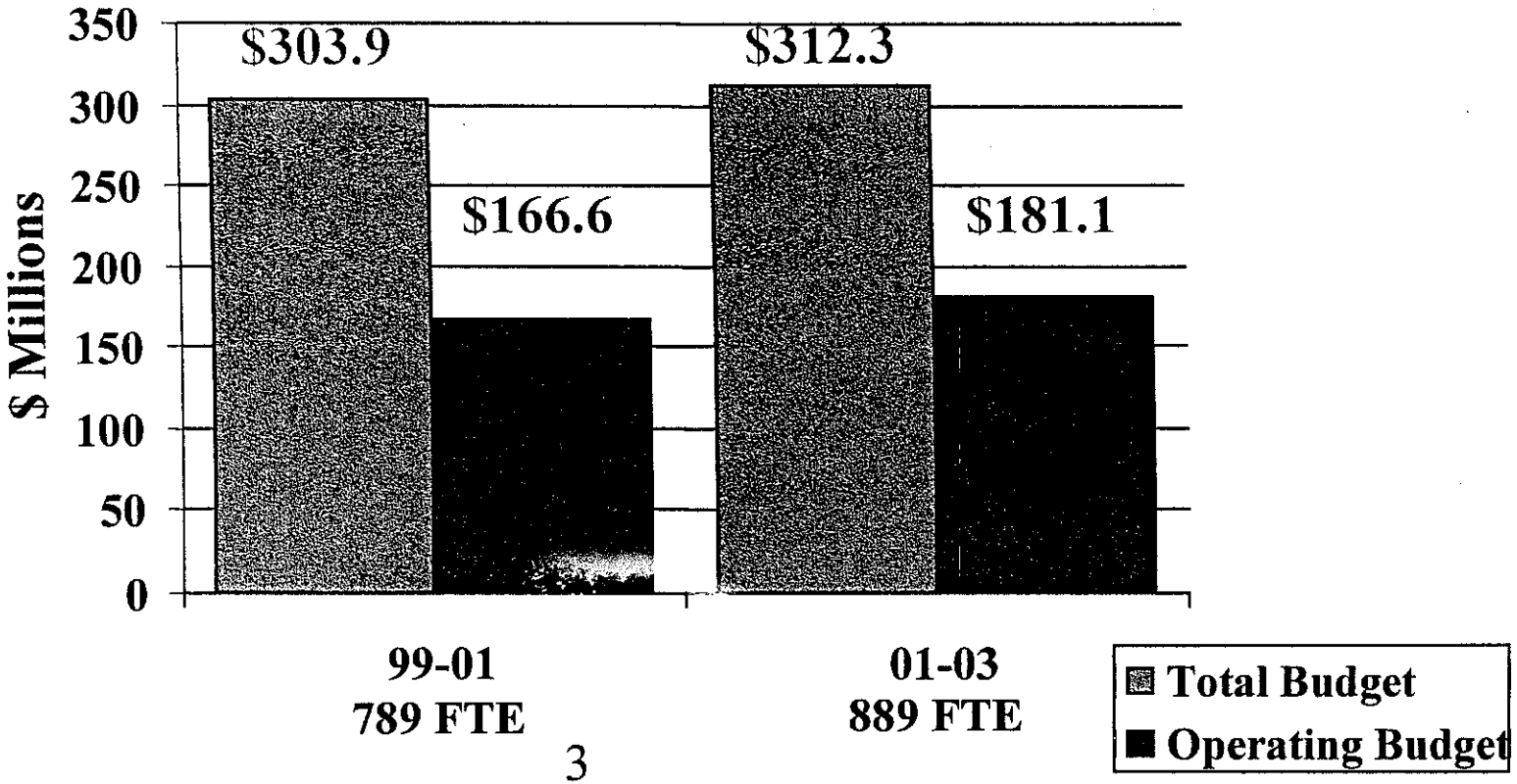
Governor's Budget 2001-03

- Permitting work group
- Wastewater Program Advisory Committee
- Time Accounting System
- Fee Report
- Cleanup Customer Survey
- Cleanup Alternative Dispute Resolution
- Cleanup separate division
- Air Quality process improvements

Current and Requested Budgets

Governor's Budget 2001-03

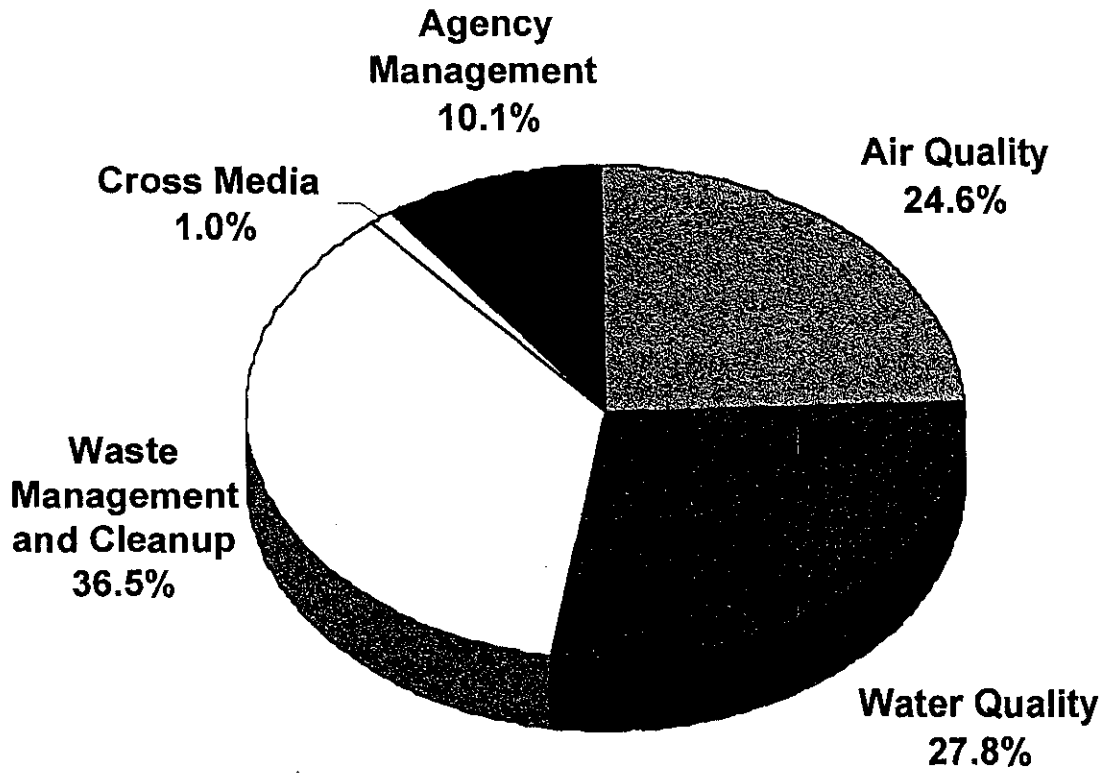
58% can be used for agency operations



Operating Budget

Governor's Budget 2001-03

$181,072,205



Key Features of Budget Request

Governor's Budget 2001-03

- Concentrates on Environmental Priorities
  - Protect and restore Oregon's rivers and streams
  - Protect people's health from toxic chemicals
  - Involve more Oregonians in solving environmental problems
- Shifts General Fund to High Priorities
  - Requesting fees to replace one-time GF and to replace shifts

Budget Priority: Rivers and Streams

Governor's Budget 2001-03

- Shift $866.5k GF from Hazardous Waste to Oregon Plan and Stormwater
- Shift $557.8k GF from EPOC and Operator Certification to Wastewater Permitting
- Increase Wastewater Permitting staff size from 56 to 68 for adequate service
- Fund implementation of TMDLs
- Expedite Willamette River TMDLs

Foundation for 2001 Session

Governor's Budget 2001-03

- Permitting work group
- Wastewater Program Advisory Committee
- Time Accounting System
- Fee Report
- Cleanup Customer Survey
- Cleanup Alternative Dispute Resolution
- Cleanup separate division
- Air Quality process improvements

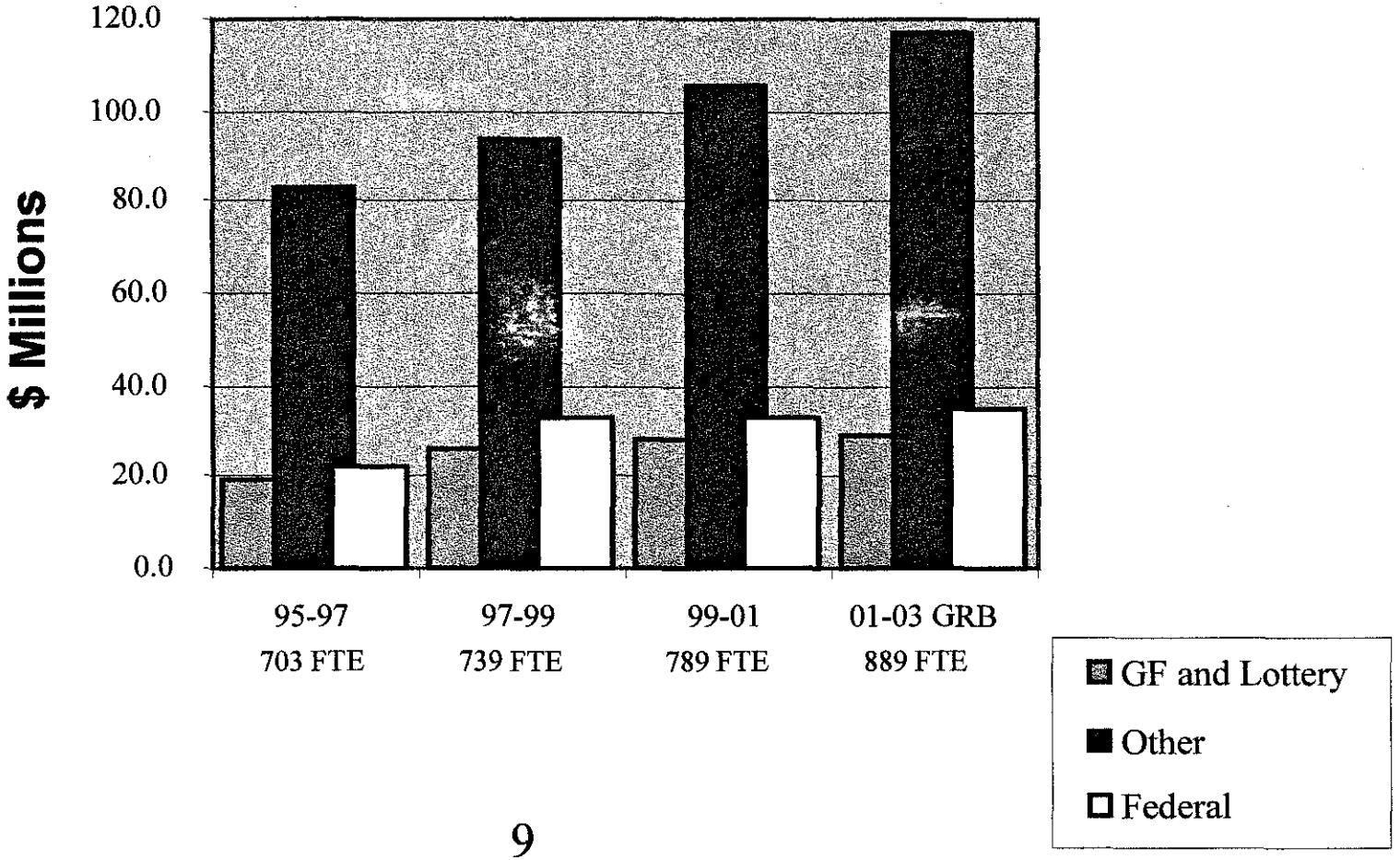
Budget Priority: Involve Oregonians

Governor's Budget 2001-03

- Community Solutions Teams
- Better access to environmental information
- Increase internet capability
- Environmental performance measures

Other Fund Share Outpaces General Fund Share

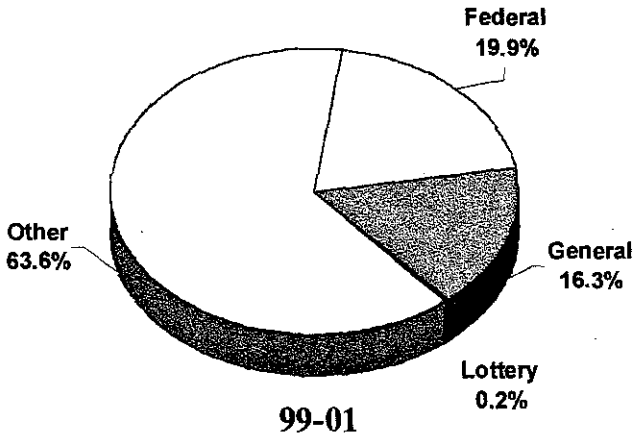
Governor's Budget 2001-03



Increasing Reliance on Fees

Governor's Budget 2001-03

- New Fees or Increases:
  - ACDP
  - Wastewater Permitting
  - EPOC - (New)
  - USTs
  - HOTs
  - Open Burning
  - Operator Certification
  - Marine Spills



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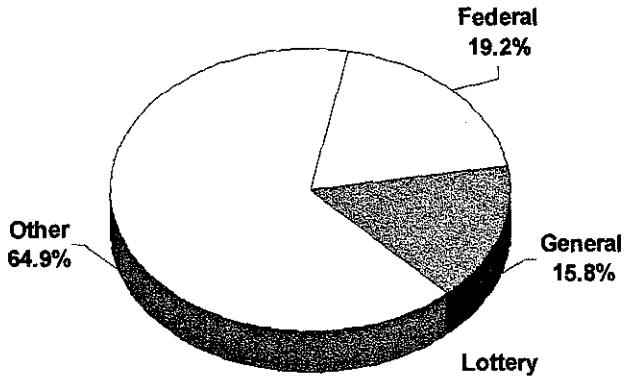

01-03

Fee Request Summary and Legislative Concepts

Governor's Budget 2001-03

- Fees
  - ACDP
  - Wastewater Permitting
  - EPOC - (New)
  - USTs
  - HOTs
  - Open Burning
  - Operator Certification
  - Marine Spills
- Legislative Concepts

Department of Environmental Quality
Memorandum

DATE: January 12, 2001

TO: Environmental Quality Commission

FROM: Stephanie Hallock, Director

RE: Director's Report

Energy Crisis

DEQ is working with the Governor's office and other agencies to address the emerging energy shortage. The Governor's Natural Resources cabinet met on January 3rd to discuss the issue from the perspective of a variety of agencies. In the near term, it appears that distributed systems - such as small scale emergency generators and medium scale co-generators - may be used to meet peak demand. DEQ's Air Quality Division is working on a strategy to facilitate permitting these systems while protecting air quality. The agency has also had a request from one company for "regulatory relief" from AQ permitting limits of the amount of oil used in boilers. DEQ's Water Quality Division is gearing up to review water quality issues during license renewal of hydropower facilities.

DEQ-ODF Sufficiency Analysis: Stream Temperature

DEQ and Oregon Department of Forestry have released its peer review draft of the ODF/DEQ Sufficiency Analysis: Stream Temperature. The draft report analyses the current Forest Practices Act rules and its sufficiency in meeting water quality standards for temperature. Comments from approximately 20 peer reviewers representing a variety of interests are expected. The comment period will close on February 5. The Commission received a letter from the Pacific Rivers Council after the EQC/ODF forestry tour expressing concern regarding the evaluation of the Forest Practices Act rules governing water quality standards compliance. The Temperature Sufficiency Analysis process will result in DEQ's evaluation of whether the Forest Practices Act rules need to be revised in order to meet DEQ's temperature standards and/or load allocations driven by the TMDL program.

Waste Policy Leadership Group Makes Recommendations

The Waste Policy Leadership Group has made the following recommendations to DEQ regarding future policy and program directions in solid waste management.

- A legislative proposal that sets new recovery goals for wastesheds and extends the 50% recovery goal to 2009, with an interim goal of 45% by 2005. This proposal also sets waste prevention goals: 0% annual increase in waste generation per capita by 2005 and 0% annual increase in total waste generation by 2009. Finally, the proposal calls for keeping PBT-containing products out of landfills by 2009.
- A product stewardship legislative proposal covering electronics, mercury-containing products and carpet. This proposal creates a stakeholder process to develop goals, strategies and timelines for increasing producer responsibility for the life cycle impacts of these products.
- DEQ should increase its efforts in waste prevention. DEQ should emphasize those waste prevention activities which target the commercial sector and which address toxicity (with particular attention to PBTs) and greenhouse gas emissions, as well as large volumes of material.

Note: DEQ is not introducing legislation on these issues, but others may. There may be opposition to the proposals and interest in spending solid waste tipping fee dollars in other ways.

Update on Canyon City

In August 2000, a DEQ compliance inspection determined that piping at the Jackson Oil bulk plant on US 395 in Canyon City was not in compliance with state release detection requirements. As a result Jackson Oil began contacting contractors to replace the entire piping system. System replacement was completed in November 2000. That same month gasoline contamination was found in the soil and groundwater at the bulk plant after gasoline fumes forced a resident living next to the bulk plant to be evacuated from his home. One-week later gasoline fumes forced the evacuation of a second residence ½ mile down gradient from the bulk plant.

In response to a second evacuation a Unified Command which included DEQ, Canyon City, Grant County, and Jackson Oil was formed to determine the extent and source of gasoline contamination to the soil and groundwater. It was later determined that 5,100 gallons of gasoline was released before the faulty piping system was replaced. Sampling results indicate that a gasoline plume currently extends approximately 500 feet north of the bulk plant (toward John Day) impacting a residential and commercial property. The plume, however, is being diluted and dispersed by continuous groundwater flow. No contamination was found in recent air and water samples taken at the down-gradient residence. The resident was returned to her home December 28, 2000. A corrective action plan to address the risk caused by contamination at the bulk plant and the two remaining impacted properties should be completed by February 2001.

Outreach efforts included public meetings, an information line for residents, daily newspaper an radio updates, and contacts to Senator Ferrioli, Grant County Judge Dennis Reynolds, and city and school officials.

DEQ to Hold Public Meeting Jan. 16 on Cleanup Plan for Van Osten Property

DEQ will host a public meeting on Tuesday, Jan. 16 in Bend to share information and take public comment on the final proposal to clean up dioxin contamination at the former Van Osten Post and Pole wood treatment site and its adjacent properties. Under DEQ's cleanup proposal, dioxin-contaminated soil will be removed from portions of the former Van Osten Post and Pole site on U.S. Highway 20 east of Bend and from all adjacent properties. Remaining contaminated soils will be capped in place using pavement and protective berms to prevent human and animal exposure.

Director to Meet with EPA Region 10 Acting Administrator

Stephanie Hallock will meet with Chuck Findley at EPA Region 10 at the end of January to discuss EPA-DEQ issues.

Oregon Signs Columbia-Snake TMDL MOA

DEQ has signed a Memorandum of Agreement that sets out roles and responsibilities for how EPA, Oregon, Idaho, and Washington will coordinate development of TMDLs for the Columbia and Snake River mainstems. Very broadly, the MOA provides for EPA to take the lead on developing temperature TMDLs, and for the States to take the lead on total dissolved gas, and other parameters listed on the 303(d) list for the lower river. As of this date, Oregon is the only signature on the MOA.

Follow-up to EQC Strategic Action Items

DEQ senior executive staff is following up on the issues died at the EQC November 29 retreat and will report back at the May EQC meeting.

Administrative Updates

- Neil Mullane, Regional Administrator for NWR will serve as acting Deputy Director upon Lydia Taylor's retirement. Andy Schaedel will serve as acting RA for NWR.
- Initial interviews for Lab Administrator will be held in late January and early February.
- Three finalists for the Special Assistant to the Commission & Director will be interviewed on January 23. Commissioner Eden will participate in the selection process.

Retirement Party for Rick Gates & Lydia Taylor March 1st

The retirement party for Rick Gates and Lydia Taylor, commemorating almost 50 years of combined service to the State of Oregon, will be held on March 1st at the World Trade Center in Portland from 4:30 to 7:30pm. The party will include a "roast" of entertainment and an open microphone. All current and former employees and other colleagues are invited. Tickets are $15 if purchased before March 15 and $20 at the door. Funds will cover food and room rental. Please contact Sarah Bott at (503) 229-6271 for more information.