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OREGON
ENVIRONMENTAL QUALITY
COMMISSION MEETING
MATERIALS 03/08/2004

State of Oregon
Department of Environmental Quality

HARDY MYERS
Attorney General

PETER D. SHEPHERD
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: March 31, 2004

TO: Environmental Quality Commission
Stephanie Hallock, Director DEQ

FROM: Larry Knudsen and Lynne Perry, Assistant Attorneys General
Natural Resources Section

SUBJECT: Application of the Oregon Public Meetings Law (ORS 192.610 to ORS 192.690) to Commission site visits and field trips

Introduction

The Environmental Quality Commission often combines field trips or site visits with its regularly scheduled meetings. These trips are announced in the Commission's regular meeting notice and agenda. Typically, however, the public is not able to accompany the Commission during the van trip to the specific location, and sometime due to issues of security or logistics, the public is unable to be present at the location that is being viewed. Given Oregon's strong public meeting laws and the Commission's own policies favoring public involvement, issues sometimes arise regarding the proper procedures that should be followed during these trips.

Legal Background

The purpose of the Public Meetings Law is to ensure that, with limited exceptions, the decisions of governing bodies are arrived at openly. ORS 192.620. To that end, ORS 192.630(1) provides that:

> All meetings of the governing body of a public body shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by ORS 192.610 to 192.690.

If the meeting is a "public meeting" a number of requirements apply in addition to allowing public attendance. These include the provision of proper notice, preparation of written minutes and accommodating the needs of those with disabilities. ORS 192.630 and 192.650

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As interpreted by the courts, the public meetings law requirements are triggered by the "convening" of the governing body regardless of whether that body actually deliberates or makes a decision at the meeting. *See e.g. Oregonian Publishing Co. v. Board of Parole,* 95 Or App 501, 505-506 (1989). Thus, a governing body is deemed to "meet" for purposes of ORS 192.630(1) even when it convenes solely for purposes of gathering information. *Id.*[1] The legislature has, however, carved out an exception for information-gathering in the context of an "on-site inspection of any project or program." ORS 192.610(5).

Recommendations

Public Notice

Commission site visits and field trips are generally part of a larger meeting agenda. Continued care should be taken in drafting the meeting notice to ensure that travel that falls within the exemption for on-site inspections is properly characterized as such. We recommend that the notice refer to such travel as an on-site inspection and describe the nexus between the travel and a "project or program."[2] A carefully drafted notice can help avoid confusion regarding the Public Meetings Law obligations (or lack thereof) with respect to that agenda item, particularly if the Commission ultimately decides, as a courtesy, to open an otherwise exempt on-site inspection to the public.

Travel Time

As a practical matter, the Commission convenes to travel to and from the site of an inspection or field trip. If the travel is not associated with an "on-site inspection" exempted under ORS 192.610(5), the Commission will be deemed to be "meeting" for purposes of the Public Meetings Law. Further, even if the travel is associated with an on-site inspection, we have some question as to whether the travel itself would be considered part of the inspection. Finally, ORS 192.630(2) prohibits a quorum from meeting privately to make a decision or deliberate toward a decision, even if a meeting has not been convened.

In an abundance of caution, we recommend that the Commissioners, whether traveling as a group, or separately in numbers that constitute a quorum, not only avoid deliberations but avoid discussion of Commission business altogether. For purposes of the Public Meetings Law, Commission business will generally include anything within the Commission's jurisdiction or authority, regardless of whether there is a specific matter before the Commission at the time. In the context of a site visit or field trip, this would include the application of Commission policy or the laws administered by the Department to the type of site, project, or program being observed.

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[1] Further, even if the governing body has not "convened" in a manner that implicates ORS 192.630(1), the Public Meetings Law prohibits a quorum of its members from assembling in private for the purpose of making a decision or deliberating toward a decision. ORS 192.630(2). Unlike 192.630(1), this section does not appear to implicate information gathering. *Harris v. Nordquist,* 96 Or App 19, 25, (1989). Purely social gatherings of a quorum are not covered by the Public Meetings Law.

[2] Exceptions to the Public Meetings Law are narrowly construed. 95 Or App at 506. ORS 192.610(5) does not, however, place limits on the nature of the project or program being inspected or expressly require that the project or program fall within the jurisdiction of the governing body performing the inspection.

On-site Conduct

(1) Public Participation

It is worth noting that the Public Meetings Law allows public *attendance*, not public participation.[3] To the extent the Commission elects either to open an on-site inspection to the public or to convene for purposes that cannot reasonably be characterized as an on-site inspection, the Commission need not allow public participation and may, in any case, impose reasonable restrictions for the orderly conduct of the inspection or field trip.

(2) Information Gathering

On-site inspections or field trips may be "hosted" or attended by persons having factual information necessary for the Commission to make the most of the inspection or field trip. We think it reasonable for the Commissioners to be briefed on what they are or will be seeing, be provided with relevant background factual information, and be able to ask factual questions during the inspection or field trip. We recommend, however, that the Commission follow the same rules of thumb outlined above with respect to travel time for all inspections and field trips, namely, not discuss Commission business during the inspection or field trip.

Further, in the context of an inspection or field trip, there may be times during which the Commission is necessarily separated from the public (e.g. on-site van or bus rides etc). If members of the public are in attendance (either because the event constitutes a "meeting" covered by the Public Meetings Law or because the Commission has elected to open an otherwise exempt inspection to the public as a courtesy), the Commission should be sensitive to the *appearance* that it is meeting in private. To that end (and to the extent such an approach does not impair the free flow of information and the purposes of the inspection or field trip), we recommend that an effort be made to relay background factual information and ask nontime-sensitive questions when the group has reassembled.

Enforcement

As a general matter, enforcement of the Public Meetings Law is focused on rather egregious violations, not inadvertent missteps by members of a governing body.[4] A person affected by a decision of a governing body may sue in Circuit Court to prevent violation of, require compliance with, or otherwise determine the applicability of the Public Meetings Law. ORS 192.680(2). A decision made in violation of the Public Meetings Law is not automatically void (and can be reinstated by subsequent action by the governing body in compliance with the Public Meetings Law). ORS 192.680(1). Such a decision would only be voided in the unlikely event that a Court found that the public meetings law violation was the result of intentional disregard

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[3] A right of public participation (e.g. public comment or testimony) may arise independently under other statutes. This possibility seems remote in the context of inspections, however.

[4] A notable exception exists for violations of the requirements relating to the conduct of executive sessions. ORS 192.685. The Government Standards and Practices Commission is authorized to impose civil penalties for these violations.

of the law or willful misconduct by a quorum of the members and that other equitable relief was not available. ORS 192.680(3). The Court may, however, order the governing body to pay attorneys' fees to a prevailing plaintiff (or in the unlikely event that the violation is found to be the result of willful misconduct by a member or members of the governing body, find those members jointly and severally liable for such fees). ORS 192.680(3) and (4).

cc. Mikell O'Mealy

GENI6107

Oregon Environmental Quality Commission Meeting
April 8-9, 2004

Crook County Library, Claudia Broughton Room
175 NW Meadow Lakes Drive
Prineville, Oregon

On Wednesday April 7, 2004, at approximately 6:00 p.m., the Commission will meet with Department of Environmental Quality (DEQ) staff to discuss local environmental issues over dinner. The dinner will be held in the banquet room at Meadow Lakes Golf Course, 300 SW Meadow Lakes Drive, in Prineville. On Thursday morning, beginning at 8:00 a.m., the Commission will tour local environmental projects and visit businesses in the Prineville area. The Commission will have a working lunch before beginning the regular meeting at 2:00 p.m.

Thursday, April 8, beginning at 2:00 p.m. at the Crook County Library

A. Director's Dialogue, Stephanie Hallock
Stephanie Hallock, DEQ Director, will discuss current events and issues involving the Department and the state with Commissioners.

B. *Rule Adoption: Clean Water Act Section 401 Certification Procedures and Fees
Section 401 of the federal Clean Water Act authorizes states to certify that activities requiring federal licenses or permits will comply with state water quality requirements and standards. Applicants for a federal permit or license to conduct work that may discharge to Oregon waters must have a water quality certification issued by the DEQ, which is the designated agency for certifying activities in Oregon. Hydropower licensing, river dredging, wetland filling, and other instream activities typically require §401 certification. At this meeting, Holly Schroeder, DEQ Water Quality Division Administrator, will propose rule revisions to update the DEQ's procedures and fees associated with issuing §401 certifications to conform with current practices and authorities.

C. *Rule Adoption: Air Quality New Source Review and Modeling Rule
Congress established the national New Source Review (NSR) program as part of the 1977 Clean Air Act Amendments to ensure that (1) air quality does not worsen where the air is currently unhealthy to breathe, and (2) air quality is not significantly degraded where the air is currently clean. NSR requires sources to obtain permits and evaluate the air quality effects of their emissions. Pat Vernon, DEQ Air Quality Division Manager, will propose changes to the rules to clarify the requirements in Oregon and allow emission offsets to come from outside of a designated air quality maintenance area in some cases.

D. Action Item: Three Basin Rule Findings to Modify Wastewater Treatment Permits for Big Valley Woods and Currinsville Mobile Home Park
The Commission adopted the Three Basin Rule in 1977 to protect the pristine watersheds of the North Santiam, Clackamas, and McKenzie River subbasins, which provide drinking water to over seventeen percent of Oregonians. The rule was amended in 1995 to

prohibit new or expanded wastewater discharges to these subbasins without specific Commission and DEQ findings to protect water quality. At this meeting, Holly Schroeder, DEQ Water Quality Division Administrator, and Anne Cox, DEQ Northwest Region Water Quality Manager, will request that the Commission find that proposals from Big Valley Woods LLC and Currinsville Mobile Home Park LLC to improve wastewater treatment systems in the Clackamas River subbasin satisfy requirements of the Three Basin Rule.

E. Informational Item: DEQ's On-site Sewage Treatment and Disposal Program and the La Pine Demonstration Project

A key initiative in DEQ's efforts to improve customer service to individual Oregonians and small businesses involves taking a fresh look at on-site sewage treatment and disposal rules. Last year, DEQ launched a statewide stakeholder advisory committee to evaluate the on-site sewage treatment and disposal program and identify improvements based on feedback from customers and stakeholder interviews. This year, DEQ plans to propose rule changes for on-site sewage disposal that will incorporate concepts recommended by the advisory committee and from recent customer service surveys. Holly Schroeder, DEQ Water Quality Division Administrator, and Mark Cullington, DEQ Surface Water Manager, will discuss the potential rule changes with the Commission and give an overview of an on-site system demonstration project in the La Pine area.

On Thursday evening, the Commission will have dinner with DEQ staff at approximately 5:30 p.m. in the banquet room at Meadow Lakes Golf Course, 300 SW Meadow Lakes Drive, in Prineville. Beginning at 7:00 p.m., the Commission will hold an open meeting with local and tribal officials in the banquet room to discuss environmental and economic issues and opportunities.

Friday, April 9, beginning at 9:00 a.m. at the Crook County Library, including a working lunch

Prior to the regular meeting, the Commission will hold an executive session at 8:00 a.m. to consult with counsel concerning legal rights and duties regarding current and potential litigation against the Department. Executive session is held pursuant to ORS 192.660(1)(h). Only representatives of the media may attend, and media representatives may not report on any deliberations during the session.

F. Approval of Minutes

The Commission will review, amend if necessary, and approve draft minutes of the February 5-6, 2004, Environmental Quality Commission meeting.

G. Informational Item: Activities to Optimize the Brine Reduction Area at the Umatilla Chemical Agent Disposal Facility (UMCDF)

Representatives of the Army and the Washington Demilitarization Company will present information to the Commission on their progress in complying with the requirement in

the UMCDF Hazardous Waste Permit that the Brine Reduction Area be operational and ready to treat brines prior to the start of chemical agent operations.

H. Informational Item: Update on the Umatilla Chemical Agent Disposal Facility
Dennis Murphey, DEQ Chemical Demilitarization Program Administrator, will update the Commission on the status of the UMCDF and preparations to potentially begin agent operations later this year.

I. Informational Item: Proposed Noise Rules for Wind Energy Facilities and Public Testimony *Note: this item is scheduled to begin at approximately 10:30 a.m.*
Wind and other renewable energy can reduce the amount of pollution that otherwise would occur by using fossil-fueled power plants. The special characteristics of wind energy facilities were not taken into account when state noise control rules were adopted in 1974, however. As a result, complying with the rules is more complicated and costly for wind energy facilities than for other industrial sources and competing types of electric generating facilities. Mike Grainey, Director of the Oregon Department of Energy, and Larry Knudsen, Assistant Attorney General, will brief the Commission on proposed changes to the noise regulations, designed to streamline the application of noise standards to wind facilities and make the rules easier to administer. The proposed rules would maintain protections for noise sensitive areas without unnecessarily constraining the development of renewable energy sources. After the briefing, the Commission will take testimony from audience members on the proposed changes, in anticipation of adopting changes to the rules in May.

J. Commissioners' Reports

Adjourn

Future Environmental Quality Commission meeting dates in 2004 include:
May 20-21 July 15-16 September 9-10 October 28-29 December 9-10

Agenda Notes

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

Copies of staff reports for individual agenda items are available by contacting Andrea Bonard in the Director's Office of the Department of Environmental Quality, 811 SW Sixth Avenue, Portland, Oregon 97204; telephone 503-229-5990, toll-free 1-800-452-4011 extension 5990, or 503-229-6993 (TTY). Please specify the agenda item letter when requesting reports. If special physical, language or other accommodations are needed for this meeting, please advise Andrea Bonard as soon as possible, but at least 48 hours in advance of the meeting.

Public Forum: The Commission will break the meeting at approximately 11:30 a.m. on Friday, April 9 to provide members of the public an opportunity to speak to the Commission on environmental issues not part of the agenda for this meeting. Individuals wishing to speak to the Commission must sign a request form at the meeting and limit presentations to five minutes. The Commission may discontinue public forum after a reasonable time if a large number of speakers wish to appear. In accordance with ORS 183.335(13), no comments may be presented on Rule Adoption items for which public comment periods have closed.

Note: Because of the uncertain length of time needed for each agenda item, the Commission may hear any item at any time during 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 participants agree. Those wishing to hear discussion of an item should arrive at the beginning of the meeting to avoid missing the item.

Environmental Quality Commission Members

The Environmental Quality Commission is a five-member, all volunteer, citizen panel appointed by the governor for four-year terms to serve as DEQ's policy and rule-making board. Members are eligible for reappointment but may not serve more than two consecutive terms.

Mark Reeve, Chair
Mark Reeve is an attorney with Reeve Kearns in Portland. He received his A.B. at Harvard University and his J.D. at the University of Washington. Commissioner Reeve was appointed to the EQC in 1997 and reappointed for a second term in 2001. He became Chair of the EQC in 2003. Commissioner Reeve also serves as Co-Chair of the Oregon Watershed Enhancement Board.

Deirdre Malarkey, Commissioner
Deirdre Malarkey is a graduate of Reed college, with graduate degrees from the University of Oregon. She has served previously on two state natural resource boards and on the Water Resources Commission and retired as a land use planner. Commissioner Malarkey was appointed to the EQC in 1999 and lives in Eugene.

Lynn Hampton, Commissioner
Lynn Hampton serves as Tribal Prosecutor for the Confederated Tribes of the Umatilla Indian Reservation and previously was Deputy District Attorney for Umatilla County. She received her B.A. at University of Oregon and her J.D. at University of Oregon School of Law. Commissioner Hampton was appointed to the EQC in July 2003 and lives in Pendleton.

Ken Williamson, Commissioner
Ken Williamson is head of the Department of Civil, Construction and Environmental Engineering at Oregon State University and serves as Co-Director of the Center for Water and Environmental Sustainability. He received his B.S. and M.S. at Oregon State University and his Ph.D. at Stanford University. Commissioner Williamson was appointed to the EQC in February 2004 and he lives in Corvallis.

The fifth Commission seat is currently vacant.

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Mikell O'Mealy, Assistant to the Commission
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State of Oregon
Department of Environmental Quality Memorandum

To: Environmental Quality Commission **Date:** April 5, 2004

From: Stephanie Hallock, Director

Subject: Director's Dialogue

EPA Approves New Water Quality Standards
On March 2, EPA approved new water quality standards that were adopted by the EQC in December to protect aquatic life, including temperature criteria, intergravel dissolved oxygen standards and antidegradation provisions. The new rules were directed by a March 2003 Oregon District Court decision that overturned the EPA's 1999 approval of Oregon's existing temperature criteria and ruled that the intergravel dissolved oxygen criteria were not protective of salmonid spawning activities. The new rules include colder water temperature standards than previously called for in some rivers, but less stringent targets in others, based on an updated analysis of the requirements of salmon and trout. The standards will serve as the basis for developing new TMDLs and renewing permits from this point forward.

DEQ Issues First in the Nation Watershed-Based Permit
In late February, the DEQ issued the first in the nation watershed-based permit to Clean Water Services (CWS), a wastewater utility that serves 473 residents in Washington County near Portland. The permit rolls five previous permits into one by covering four municipal wastewater treatment facilities and urban storm water runoff. In addition, the permit requires CWS to help lower river temperatures during the summer months by channeling more cold water from Hagg Lake into the river's flow, planting trees along the river and its tributaries, and finding more uses for cleaned wastewater. The permit also allows two CWS treatment plants to offset each other's pollutant discharges as long as the river exceeds dissolved oxygen water quality standards. The permit has received national attention and is in line with DEQ's efforts to address multiple environmental impacts on watersheds and to encourage broader reuse of wastewater.

Governor Will Tour Willamette River in Mid-April
In Governor Kulongoski's March 5 State of the State speech, he emphasized his priority to clean up the Willamette River – "my top environmental priority over the next three years is to clean up the crown jewel of Oregon's river system - the Willamette River. I don't just mean parts of the river - I mean the entire river - from the headwaters east of Eugene all the way to the Columbia." The Governor's office asked DEQ to be the lead agency on this initiative, which includes developing a "gap analysis" of actions needed on the Willamette as a foundation for the Governor's strategy. In addition, we are helping the Governor's office plan a two-day tour from the headwaters through the lower Willamette on April 14 and 15. The tour will spotlight current issues and opportunities on the River, including the Black Butte abandoned mine site south of Cottage Grove, riverfront restoration in Corvallis, recreation in the mid-Willamette, reclamation of Ross Island, redevelopment of the South Waterfront area near downtown Portland and other activities. The Governor's office will likely ask DEQ to continue in a leadership role after conclusion of the tour and gap analysis, which will be finalized by June.

Site Selection Process for New DEQ/Public Health Lab Reopened
In February, I reported that the Department of Administrative Services (DAS) had selected a building for the new DEQ-Oregon Public Health Laboratory (PHL) facility. As you know, we have been working with DAS and PHL over the past two years to relocate the labs. After evaluating eleven properties in the Portland metro area, in January DAS selected a new, vacant building in Hillsboro with about 83,000 square feet to house 75 DEQ lab staff and 75 PHL staff. As part of its due-diligence review, however, DAS discovered that large-scale electric power lines could be built adjacent to the building at some point in the near future, which would constrain parking and building expansion. With this information, the decision was made to cancel the offer on the Hillsboro building and reopen the search process to take advantage of the softened market for qualified buildings. DAS estimates that reopening the search will delay the purchase of a new building by no more than three months. Our goal is to continue working with DAS on the purchase of a building this summer, and then to design the new lab facility over the next year and move sometime in mid to late-2006.

DEQ Responds to Fire at the Thermo Fluids Oil Recycling Facility
On March 15, a massive fire destroyed a building at Thermo Fluids, an oil recycling facility in Southeast Portland, and caused the release of oil and water treatment chemicals into nearby Johnson Creek, killing thousands of fish. The fire began after workers operating a welding torch ignited a holding pool of diesel fuel and oil at the facility. DEQ responded immediately in a "unified command" with the EPA, Thermo Fluids representatives, and private contractors to investigate and clean up the area. Debris from the fire reached properties within several miles of the burned facility, and test results revealed that some of the debris contained asbestos. Within days of the fire, DEQ issued warnings to local residents not to handle the debris, held evening neighborhood meetings to explain the situation, and mobilized asbestos cleanup crews to collect debris from the neighborhood and dispose of it safely. Other crews worked at Johnson Creek to cleanup 700 gallons of sulfuric acid and 100 gallons of sodium hydroxide (chemicals that Thermo Fluids used for water treatment) that spilled as a result of the fire. DEQ treated and disposed of about 380,000 gallons of contaminated waste water and contained 6,000 gallons of oil that was released during the incident.

The magnitude of this fire, the off-site spread of asbestos waste, and the liquid chemical contamination were all of a magnitude greater than DEQ has experienced before. We have begun a thorough investigation of the cause of the fire, including any violations that may have existed at the time it started to determine appropriate enforcement actions. In addition, I've written John Iani, EPA Region 10 Administrator, a letter (attached) asking for some changes in their emergency response procedures to ensure the process goes smoothly for future response events.

Post Cards to Encourage Residents to Reduce Pesticide Use in Tigard, Tualatin and Eugene
DEQ is partnering with Metro, Clean Water Services (a Washington County wastewater utility) and the City of Eugene on the *Clean Water Action Project* to reduce pesticide use and chemical runoff from lawns in the Portland and Eugene areas. The project will provide information and incentives to community members in these areas who traditionally use lawn pesticides and offer them natural lawn care alternatives. The project will not only seek to decrease the use of "weed and feed" type products but will test a number of new educational methods that promote best management practices for maintaining a healthy lawn without threatening water quality and producing household hazardous waste.

Attached is the first in a series of postcards with the message "Is Your Lawn Chemical Free? Maybe it should be" that will be sent by Metro to residents in the Tualatin River Watershed. The City of Eugene will issue the second version of the postcard with the message "Lawn Chemicals: Are there better alternatives?" to residents in the Upper Willamette River Watershed. This initiative is in line with DEQ's Strategic Directions to *involve Oregonians in solving environmental problems* and to *protect Oregon's water* by providing the information and tools needed to make choices that help protect watershed health.

ECOS Officers Meeting with Leavitt in Washington D.C.

On March 9, the officers of the Environmental Council of the States (ECOS) met with EPA Administrator, Mike Leavitt, and other senior EPA officials. The issues discussed were: 1) States' concern about the $1 billion gap in funding nation-wide to administer federal programs in states; 2) need for the EPA Office of Enforcement and Compliance to better integrate with EPA programs and the overall poor relationship between OECA and states; 3) Inability of small communities to comply with EPA drinking water and wastewater requirements and the need for funding and/or regulatory relief; 4) Need for EPA to have a higher profile and more money for states in responding to homeland security issues; 5) States' unhappiness with EPA air MACT rule on mercury emissions for power plants. The meeting lasted one hour, so discussion was brief on each topic. Administrator Leavitt was sympathetic on the money issues, concerned about the enforcement relationship, and optimistic about EPA's role in homeland security being more on the radar screen. Since the meeting, EPA has decided to take a second look at the MACT rule.

Changes in DEQ's Executive Management Team

Three significant changes have occurred in DEQ's executive management team since the last EQC meeting:

- In late February, Holly Schroeder took over as Water Quality Division Administrator when Mike Llewelyn resigned. Holly has since hit the ground running, bringing her experience as Acting Management Services Division Administrator, budget and legislative coordinator, organizational improvement coordinator, and most recently Surface Water Management manager working with the Blue Ribbon Committee to benefit the Water program.
- On April 1, Paul Slyman returned to DEQ's Headquarters building to resume duties as full time Deputy Director after doing double-duty as Deputy and Northwest Region Administrator for the past year. I had asked Paul to fill both roles so that Neil Mullane could devote full-time energy to reducing the wastewater permit backlog and helping develop a long-term strategy for managing the workload in the wastewater program. With the improvements achieved in our water program over the past year, Neil is staying on permanently as the Northwest Region "water czar" to continue leading these efforts.
- Dick Pedersen has stepped into the role of Northwest Region Administrator, bringing with him his experience as Land Quality Division Administrator, manager of the TMDL water quality program and the Clean up program, and 18 years of environmental management experience in Montana. We have initiated an open competitive recruitment to fill the Land Quality Administrator position, and Al Kiphut, DEQ's Environmental Cleanup manager, is now serving Acting Administrator until the new administrator is hired. We hope to begin interviews in mid-May.

Oregon
Theodore R. Kulongoski, Governor

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April 5, 2004

John Iani
Regional Administrator
US Environmental Protection Agency, Region 10
1200 Sixth Avenue
Seattle, WA 98101

Dear Mr. Iani:

I am writing you because I am very concerned about the premature departure of EPA's Federal On-Scene Coordinator from a recent fire and oil discharge at Thermo Fluids, a Portland area environmental services company. EPA stated that they were required to leave because they could not remain without funding or statutory authority. I have two concerns:

First, I am dismayed by the National Pollution Fund Center's (NPFC's) decision to overrule a Federal On-Scene Coordinator's characterization of the spill. Based on news releases and fragmentary information, the NPFC determined that the oil discharged to Johnson Creek (a tributary to the Willamette River in Portland) was ineligible for funding under the Oil Pollution Act (OPA) because it contained other contaminants or was mixed with hazardous substances also released by the fire. The Federal On-Scene Coordinator is in the best position to determine the product(s) discharged or released, not NPFC thousands of miles away. NPFC's position that oil contaminated with any amount of hazardous substances makes OPA funding "not the appropriate mechanism" is arbitrary and contrary to the intent of and the definition of oil in OPA. In this case, there were several products discharged or released as a result of a fire, including used oil and sulfuric acid. There were no response actions taken to the acid released. It was flushed quickly through the creek and diluted with the large volume of water in the Willamette River. The response effort was strictly to the oil discharged.

Second, I am concerned by EPA's decision to withdraw the Federal On-Scene Coordinator from an ongoing response because of what appears to us to be a bureaucratic funding dispute. This is not in the best interest of human health, the environment, or good government. It is our understanding that EPA took the position that OPA was the appropriate statute and funding source under which to carry out the response. Therefore, EPA felt they could not remain on scene after that authority and associated funding source were taken away by NPFC's decision. EPA further felt they could not continue the response under CERCLA authorities due to the lack of threat posed by the low concentrations of hazardous substances. When EPA was not successful in changing the initial determination made by NPFC, EPA demobilized from the site. This action left DEQ to manage a serious oil discharge with potential impacts to human health, the environment, and endangered species without a Federal On-Scene Coordinator and staff. Our interaction with federal natural resource agencies like the US Fish and Wildlife Service, whose participation was also curtailed by the funding decision, and interested Native American Tribes was made very awkward and – in the case of the Tribes – inappropriate by the lack of a Federal On-Scene Coordinator.

While Oregon had sufficient authorities and resources to handle this particular incident, EPA's decision to leave an ongoing emergency calls into question the reliability of our federal emergency response partner. In other situations, EPA's participation is the only way that a response can be effectively and efficiently managed. For example, the US Army Corps of Engineers recently discharged several thousand gallons of oil to the Columbia River from The Dalles Dam. Because the Corps refuses to recognize that they are subject to state oversight

under the Clean Water Act, EPA withdrawal would have left the response totally in the Corps' hands. Because PCBs contaminated the oil at a low level, it is our understanding that a similar funding dispute ensued between EPA and NPFC. Fortunately, in this case EPA prevailed and NPFC deferred to the Federal On-Scene Coordinator's determination that the response being conducted was for the oil discharged, not the small amount of hazardous substances contained in the oil. This basic funding dispute between EPA and the NPFC has apparently festered for many years without resolution. Failure to resolve it reflects poorly on both organizations.

Beyond our immediate concern about EPA's reliability as an emergency response partner, is the issue of the public's expectation that government will deal effectively and efficiently with emergencies. Oregon DEQ could not walk away from an ongoing emergency because of a dispute over funds. Our Governor, and the public we serve, would expect us to deal with the emergency and resolve the funding issue after we did our job. Clearly, the intent of OPA and CERCLA is to ensure federal response authorities and funding exist to cover a response such as that required by the Thermo Fluids incident. The technicalities over which program to charge should not have resulted in EPA's premature departure from the site. That kind of action simply confirms the worst allegations of those who distrust government.

On behalf of The State of Oregon, I request immediate action in two areas:

1. EPA and NPFC develop policies and procedures to ensure that, at a minimum, states can count on our federal response partners to provide a Federal On-Scene Coordinator to stand with us during future emergencies to their successful conclusion, and
2. EPA and NPFC seek early resolution of this longstanding funding and authorities issue at the national level so that future responses are not imperiled.

If you have questions or would like to discuss this request, please contact Paul Slyman, my Deputy, at 503-229-5078.

Sincerely,

Stephanie Hallock

Stephanie Hallock
Director

Attachment: Thermo Fluids Funding Chronology

Cc:
Marianne Horinko, EPA, Office of Solid Waste and Emergency Response
Jan Lane, National Pollution Funds Center
Michael Gearheard, EPA R10, Office of Environmental Cleanup
Dan Opalski, EPA, Oregon Operations Office
Chris Field, EPA, RRT Co-Chair
CAPT Myles Boothe, USCG District 13, RRT Co-Chair
CAPT Paul Jewell, Marine Safety Office Portland
CAPT Danny Ellis, Marine Safety Office Puget Sound
Dale Jensen, Washington Department of Ecology
Preston Sleeger, U.S. Department of the Interior
Philip Berns, U.S. Department of Justice
Gordon Taxer, U.S. Army Corps of Engineers
Ken Murphy, Director, Oregon Emergency Management
Craig Campbell, Senior Policy Advisor, Office of the Governor

Thermo Fluids Funding Chronology – March 15 – 31, 2004

March 15/0928	DEQ was alerted by Oregon Emergency Response System of a petroleum storage building fire at Thermo Fluids in SE Portland. DEQ dispatched a State On-Scene Coordinator.
15	DEQ requested USEPA assistance on-scene.
15	A Unified Command consisting of USEPA, DEQ, and Thermo Fluids was formed.
15	EPA accessed the NPFC's electronic system to request access to the Oil Spill Liability Trust Fund. EPA requested a ceiling of $25,000 for initial response activities and a preliminary assessment.
16	EPA requested a ceiling increase from $25,000 to $46,200 to cover EPA, START contractor, and a PRFA with USFWS.
17	EPA reported a telephone conversation between EPA and NPFC regarding concerns related to the proper funding of the response. EPA and NPFC reportedly agreed to separate CERCLA and OPA funding as appropriate.
18	EPA reported a telephone call from NPFC to the FOSC stating funding had been capped at $46,200 because NPFC ruled that EPA was responding to a mixed waste spill and thus CERCLA was the appropriate funding mechanism.
18	EPA received an e-mail from Greg Buie, NPFC, confirming the conversation with the FOSC. A portion of that e-mails is as follows: "...the National Pollution Funds Center has determined that the Oil Spill Liability Trust Fund is not the appropriate funding mechanism for response activities associated with the release of waste oil and other hazardous substances into Johnson Creek as a result of the March 15 fire at the Thermo Fluids facility in Portland, Oregon."
19/1000	Region 10 Regional Response Team (RRT 10) activation conference call informed members of the issue. EPA received support from all key agencies on use of OSLTF and an agreement to raise the issue to the NRT if not resolved.
19/1130	EPA reported EPA/NPFC conference call failed to resolve the issue.
19	EPA HQ decided not to raise the issue to NRT.
19/1530	EPA FOSC and staff reached their funding ceiling and demobilized from the incident.
31	DEQ continues to provide on-scene oversight of the cleanup.


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Department of Environmental Quality Memorandum

Date: March 18, 2004

To: Environmental Quality Commission

From: Stephanie Hallock, Director S. Hallock

Subject: Agenda Item B, Rule Adoption: Section 401 Certification Procedures and Fees
April 8, 2004, EQC Meeting

Department Recommendation

The Department recommends that the Environmental Quality Commission (Commission) adopt proposed rules amending procedures and fees for certifying activities under §401 of the Clean Water Act (CWA), as presented in Attachment A.

Background and Need for Rulemaking

Section 401 of the CWA authorizes states to certify that activities requiring federal licenses or permits will comply with state water quality standards and requirements. Applicants for a federal permit or license to conduct an activity that may discharge to waters of Oregon must provide the permitting agency with a water quality certification issued by the Department, the designated agency for certifying activities in Oregon. Hydropower licensing, river dredging, wetland filling, and other instream activities typically require §401 certification.

The Department may certify an activity as proposed or with conditions to ensure water quality standards will be met. The Department must deny certification if an activity cannot meet water quality standards and requirements. If the Department does not issue a certification decision within the time frames specified, typically one year after an application for certification is deemed complete, the federal agency may issue the license or permit without state certification.

The Department coordinates the §401 certification process for hydroelectric projects with the hydroelectric water rights program administered by the Water Resources Department (WRD). WRD coordinates the water rights program through Hydroelectric Application Review Teams (HARTs) comprised of state natural resource management agencies who review and condition hydroelectric water rights applications. The Department, Oregon Department of Fish and Wildlife (ODFW), and WRD are members of all HARTs.

The proposed revisions update the Department's procedures for issuing §401 certifications to conform with current practices and authorities governing certification, including:

- 1997 and 1999 amendments to ORS 543A, which established the HART process to coordinate hydroelectric licensing reviews among state agencies;
- ORS 468B.040 and 468B.045;
- Related statues and rules governing WRD and ODFW license reviews;
- §401 of the CWA; and
- Other improvements identified by the Department that clarify the rules.

The proposed rules revise the certification fees for river dredging (removal) and wetland filling activities. This proposal also clarifies, but does not change, the certification fee that applies to other instream activities. The proposal does not affect the fees for certifying the licensing of hydroelectric projects. A detailed analysis of the proposed fee changes and their fiscal and economic impacts is provided in Attachment F, the Statement of Need and Fiscal and Economic Impact.

The existing fee schedule for removal and fill projects generates sufficient revenue to cover the Department's costs for certifying these projects (roughly 1 FTE per biennium plus costs). Several fee payers, primarily ports, asked the Department to revise this fee schedule because they thought that they were paying more than their fair share of the Department's costs for removal and fill certifications. To address these concerns, the Department compared fees to labor costs for the removal and fill projects certified between 7/99 and 6/02 and found that the existing fee schedule overcharges large projects and undercharges most small and medium projects. The proposed fee schedule more equitably assesses fees based on certification costs.

The proposed fee schedule is designed to generate the same amount of revenue as existing fees, but reallocates fees among various sizes of projects so that fees more closely match Department costs. The restructuring significantly reduces fees for the few large, primarily Corps of Engineer projects and significantly increases fees for most small and medium projects. As a result, small and medium-sized projects will generate a larger proportion of §401 certification fee revenue. The smallest dredge and fill projects remain exempt from §401 fees (i.e., removals of less than 500 cubic yards of material and fills of less than 2 acres); general funds cover certification costs for those projects.

Effect of Rule

The proposed rules:

- Clarify the Department's authority to certify and condition federal permits;
- Update references to state laws;
- Clarify procedures for submission and evaluation of §401 applications, and modification of §401 certificates;
- Provide an equitable fee schedule for §401 certification of dredge, fill, and other instream activities except hydroelectric licensing.

Commission Authority

The Commission has authority to take this action under ORS 468.035, 468.065, 468B.035, and 468B.047.

Stakeholder Involvement

The Department convened an advisory committee with representatives from the various types of §401 certification fee payers to help develop the proposed fee changes. The advisory committee supported the proposed fee schedule. The Department also consulted a workgroup of hydropower project stakeholders to develop the proposed procedural changes, since most of the changes affect this sector. Members of both advisory groups are shown in Attachment C.

Public Comment

A public comment period extended from October 15, 2003, through December 5, 2003, and included public hearings in Redmond, Portland, and Eugene. Significant issues raised in comments are addressed under Key Issues below. Results of public input are provided in Attachment B.

Key Issues

1. *Does §401 of the CWA authorize the Department to certify activities with conditions to ensure water quality standards and requirements are met?*

   One commenter suggested the Department's authority under §401 is limited to certifying "discharges" and does not include the authority to certify "activities" causing those discharges, citing *PUD #1 of Jefferson County v., Washington Department of Ecology, 511 US 700 (1994).* The Department interprets *PUD #1* and §401 to provide the broader authority to certify activities and to condition as necessary to support certification. (See Comment 1, page 1, in Attachment B.)

2. *Should the Department require applicants for hydroelectric licenses to submit draft applications for §401 certification to the Department a year before submitting their final licensing applications to the Federal Energy Regulatory Commission (FERC), as proposed in OAR 340-048-0020(5)?*

Two commenters questioned the need for submittal of a *draft* in addition to a *final* §401 application. Throughout the decade the Department has been reviewing applications for FERC hydroelectric licenses, timely development of environmental analyses has been a continuing problem. The Department is convinced that early submittal of a draft §401 application will address the need for more complete and specific water quality-related information earlier in the licensing process. Currently, only final applications are required.

Dropping the proposed requirement would delay the Department's review of the §401 application to identify deficiencies and issues until after the FERC receives the final FERC license application and determines the information is sufficient to complete its environmental assessment. This delay would comprise a few months to several years, during which the rest of the FERC and HART reviews would continue. Requiring a draft §401 application concurrent with the draft FERC license application, as proposed, would enable the Department to participate fully in timely development of unified state positions through the HART process and would alleviate the pressure on §401 certification late in the licensing process with fewer options for resolving issues. (A timeline for FERC licensing is included in the response to Comment 5, page 3, in Attachment B.)

The Department expects most applicants to have the information required for a §401 application at the time the proposed draft application must be submitted; if not, only available information is required. Requiring a draft application will force applicants to put their water quality analyses into application form earlier in the process, but their total effort for §401 certification should not change significantly. Moreover, earlier information should improve coordination of the HART and FERC reviews and streamline licensing and certification. Since applicants for hydroelectric licensing reimburse the Department's actual review costs, more efficient reviews may pare those costs for applicants. (See Comment 5 in Attachment B.)

Next Steps

The adopted rules will be become effective upon filing with the Secretary of State. The Department is already using the proposed procedures to certify projects. A rule implementation plan is available upon request.

Attachments

A. Proposed Rule Revisions
   A1. Final Rule
   A2. Redline of Rule Revisions
B. Summary of Public Comments and Agency Responses
C. Advisory Committee Membership
D. Presiding Officer's Report on Public Hearings
E. Relationship to Federal Requirements Questions
F. Statement of Need and Fiscal and Economic Impact
G. Land Use Evaluation Statement
H. ORS 468B.040 and 468B.045

Available Upon Request

1. Legal Notice of Hearing
2. Cover Memorandum from Public Notice
3. Written Comment Received
4. Rule Implementation Plan

Approved:

Section: _____
Robert P. Baumgartner

Division: _____
Holly R. Schroeder

Report Prepared By: Gregory McMurray
and Loretta Pickerell

Phone: 503-229-6978

DIVISION 48

CERTIFICATION OF COMPLIANCE WITH WATER QUALITY STANDARDS AND REQUIREMENTS

340-048-0005

Purpose

The purpose of these rules is to describe procedures for processing applications for certification pursuant to Section 401 of the Clean Water Act, 33 USC § 1341, and ORS 468B.035 through 468B.047.

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: ORS 468B.035 – 468B.047 & 33 USC 1341

340-048-0010

Definitions

As used in these rules:

(1) "Certification" means a written determination by the Director that an activity subject to Section 401 of the Clean Water Act will comply with applicable provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act, 33 U.S.C. §§ 1311, 1312, 1313, 1316, and 1317, including water quality standards established pursuant to Section 303 as set forth in OAR chapter 340 division 041, and with other water quality requirements set forth in this division. "Certification" also includes any requirements set forth as conditions of a certification pursuant to Subsection 401(d) of the Clean Water Act to ensure compliance with Sections 301, 302, 306, and 307 of the Clean Water Act, with water quality standards established pursuant to Section 303 of the Clean Water Act as set forth in OAR chapter 340, division 041, and with any other appropriate requirement of state law.

(2) "Clean Water Act" means the Federal Water Pollution Control Act of 1972, Public Law 92-500, as amended.

(3) "Coast Guard" means the U.S. Coast Guard.

(4) "Commission" means the Oregon Environmental Quality Commission.

(5) "Corps" means the U.S. Army Corps of Engineers.

(6) "Department" or "DEQ" means the Oregon Department of Environmental Quality.

(7) "Director" means the Director of the Department of Environmental Quality or the Director's delegate.

(8) "HART" means a Hydroelectric Application Review Team convened pursuant to ORS 543A.075 or ORS 543A.400(4)(b) for the purpose of coordinating state agency actions regarding the federal relicensing and, where applicable, state reauthorization of water rights for an existing hydroelectric project.

(9) "Person" means the United States and agencies thereof, a state and agencies thereof, Tribe and agencies thereof, individual, public or private corporation, political subdivision, local government, partnership, association, firm, trust, estate, or any other legal entity.

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: ORS 468B.035 – 468B.047 & 33 USC 1341

340-048-0015

When Certification Required

Pursuant to Section 401 of the Clean Water Act, an applicant for a federal license or permit to conduct any activity that may result in any discharge to navigable waters, including but not limited to the construction, operation, or decommissioning of facilities, must provide the federal licensing or permitting agency a certification from the department.

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: ORS 468B.035 – 468B.047 & 33 USC 1341

340-048-0020

Application for Certification

(1) Applications for certification must be filed with the department, except for applications filed with the Corps pursuant to OAR 340-048-0032.

(2) An application filed with the department must contain, at a minimum, the following information:

(a) The legal name and address of the activity's owner or operator;

(b) The legal name and address of the owner's or operator's authorized representative, if any;

(c) A description of the activity's location sufficient to locate and distinguish existing and proposed facilities and other features relevant to the water quality effects of the activity;

(d) The names and addresses of contiguous property owners;

(e) A complete written description of the activity, including maps, diagrams, and other necessary information;

(f) The names of affected waterways, lakes, or other water bodies;

(g) Copies of and, as appropriate, cross-references to environmental information submitted to the federal licensing or permitting agency and other environmental information and evaluations as necessary to demonstrate that the activity will comply with applicable provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act, including water quality standards set forth in OAR chapter 340, division 041, and other appropriate requirements of state law;

(h) A copy of any public notice and supporting information issued by the federal licensing or permitting agency for the activity;

(i) An exhibit that:

(A) Includes land use compatibility findings for the activity prepared by the local planning jurisdiction;

(B) If land use compatibility findings have not been obtained, identifies the specific provisions of the local land use plan and implementing regulations applicable to the activity and describes the relationship between the activity and each of the land use provisions identified in paragraph (A) of this subsection; and

(C) Discusses the potential direct and indirect relationship to water quality of each finding or land use provision;

(j) An exhibit that identifies and describes other requirements of state law applicable to the activity that have any relationship to water quality, including but not limited to requirements under ORS chapter 454 regarding onsite disposal of sewage, ORS chapter 466 regarding spills of petroleum and hazardous substances, ORS chapter 496 regarding fish and wildlife, and ORS chapter 390 regarding recreation and scenic waterways;

(k) For new hydroelectric projects requiring certification, in addition to the information required under subsections (a) through (j) of this section, an exhibit that:

(A) Describes current water quality potentially affected by the proposed project, describes the impact of the proposed project to water quality, evaluates whether the proposed project will cause or contribute to violations of water quality standards adopted pursuant to OAR chapter 340 division 041, and identifies steps to be undertaken by the applicant to prevent violation of water quality standards;

(B) Identifies applicable standards of ORS 543.017, rules adopted by the Water Resources Commission implementing such standards, and rules or standards adopted by other state and local agencies that are consistent with ORS 543.017;

(C) Describes the relationship between the proposed project and each standard or rule identified in accordance with paragraph (B) of this subsection; and

(D) Discusses the potential direct and indirect relationship to water quality of each standard or rule.

(l) For existing hydroelectric projects requiring both certification and reauthorization of water rights, in addition to the information required under subsections (a) through (j) of this section, an exhibit that:

(A) Describes current water quality potentially affected by the existing project or activity, describes the impact of the existing project or activity to water quality, evaluates whether the existing project or activity causes or contributes to violations of water quality standards adopted pursuant to OAR chapter 340 division 041, and identifies steps to be undertaken by the applicant to mitigate or eliminate violation of water quality standards;

(B) Identifies applicable standards under ORS 543A.025(2) through (4), rules adopted by the Water Resources Commission implementing such standards, and rules or standards adopted by other state and local agencies that are consistent with such standards;

(C) Describes the relationship between the project and each of the standards or rules identified in accordance with paragraph (B) of this subsection; and

(D) Discusses the potential direct and indirect relationship to water quality of each standard or rule.

(3) The department may request any additional information necessary to complete an application or to assist the department in evaluating an activity's impacts on water quality. An applicant's failure to complete an application or provide requested additional information within the time specified by the department is grounds for denial of certification if the failure prevents the department from processing the application within the time allowed by law.

(4) Except for applications coordinated with the Corps as described in OAR 340-048-0032, the department must notify the applicant by certified mail of the date the application is determined to be complete. The application is deemed complete if the department's preliminary review indicates that the information required by section (2) of this rule is provided and that the exhibit required by subsection (2)(i) contains findings of the local planning jurisdiction. If findings of the local planning jurisdiction are not included, the department must forward the exhibit submitted under subsection (2)(i) to the local planning jurisdiction for review and comment. The application is deemed complete when the local planning jurisdiction provides comments to the department, or when 60 days have elapsed, whichever occurs first. If no comment is received from the local planning jurisdiction within the 60 day period, the department must continue to seek information from the planning jurisdiction and proceed with evaluation of the application for certification.

(5) For hydroelectric projects requiring certification, in addition to complying with requirements under these rules applicable to application for certification, the applicant must submit to the department a draft application for certification no later than one year before the applicant files a final application with the Federal Energy Regulatory Commission for a license for the hydroelectric project, unless the department and the applicant agree to a different time for submission of the draft certification application. The draft certification application must contain the information described in section (2) of this rule that is available at the time required for submission of the draft application.

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: 33 USC 1341 & ORS 468B.035 – 468B.047, 543A.095

340-048-0027

Public Participation

(1) Except as provided in sections (2) and (3) of this rule, the department must provide written public notice of any proposed certification decision to potentially interested persons and adjacent property owners identified in the application. The notice must describe public participation opportunities, request comments, and identify the proposed certification decision and any related documents as available for public inspection and copying. The department must provide at least 35 days for submission of written comments. If, within 20 days of the public notice, 10 or more persons or an organization representing 10 or more members request a public hearing on the proposed certification decision, the department must provide a hearing within the 35-day public comment period or as soon thereafter as reasonably practicable. The department may also provide a public hearing on a proposed certification decision or provide informational meetings regarding a certification application as it deems appropriate. The Director must consider all comments received in making the final certification decision.

(2) For certification applications subject to coordination with the Corps, public participation will be provided as set forth in OAR 340-048-0032.

(3) For certification applications subject to coordination with a HART, public participation will be provided as set forth in OAR 340-048-0037.

(4) Upon request, the department must add the name of any person or group to the list of recipients of written public notice regarding an activity.

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: ORS 468B.035– 468B.047

340-048-0032

Dredge and Fill

The department will coordinate with the Corps in the processing of certification applications for activities requiring permits from the Corps pursuant to Section 404 of the Clean Water Act, as follows:

(1) An application to the Corps for a permit constitutes an application for certification, provided that the department may request additional information as described in OAR 340-048-0020(2).

(2) The Corps provides public notice of and opportunity to comment on the applications, including the application for certification, provided that the department, in its discretion, may provide additional opportunity for public comment, including public hearing.

(3) The department must evaluate the certification application in accordance with OAR 340-048-0042(2) and any public comments.

(4) The Director's certification decision must be forwarded to the applicant and the Corps.

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: ORS 468B.035 & 33USC 1341

340-048-0037

HART Coordination

(1) Certification of an existing hydroelectric project requiring federal relicensing for which a HART is convened must be coordinated through the HART in accordance with ORS 543A.100 through 543A.115. This rule applies to such coordination occurring after the department's receipt of an application for certification. This rule does not apply to the department's participation in the HART for a project in accordance with ORS 543A.075 through 543A.095 before the department's receipt of an application for certification. This rule does not apply to an existing hydroelectric project requiring federal relicensing for which a HART has not been convened; that certification will be processed as otherwise provided in this division. Nothing in this rule affects the authority of the Director to act on an application for certification as necessary to avoid certification being deemed waived under the one-year period prescribed in 33 USC 1341(a)(1).

(2) Upon receipt of proposed recommendations for certification of a hydroelectric project developed by a HART in accordance with ORS 543A.105, the department must provide public notice and at least 60 days for comment on a proposed certification decision based on the HART's recommendations. The department's notice and comment period must run concurrently with the notice and comment period provided by the HART on a proposed unified state position under ORS 543A.105(2). The department notice must be provided in writing to interested persons, request comments within the comment period, and identify the proposed certification decision and related documents as available for public inspection and copying. If within 30 days of the public notice, 10 or more persons or an organization representing more than 10 members request a public hearing on the proposed certification, the department must provide a hearing within the 60-day public comment period or as soon thereafter as is reasonably practicable.

(3) Upon completion of the public comment period, the department must evaluate the application for certification in accordance with OAR 340-048-0042(2) and (4). The Director must make a final certification decision in accordance with the recommendations submitted by the HART under ORS 543A.105(2), unless the Director finds, based on public comment or new information, that certification as recommended by the HART would not ensure that the project will comply with water quality standards set forth in OAR chapter 340, division 041 or be consistent with other appropriate requirements of state law. If the Director's certification decision would differ from the HART recommendations, the Director must seek further recommendation from the HART before issuing a final certification decision. The Director must consider any further recommendation from the HART, then issue a final certification decision to the applicant and the HART.

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: ORS 468B.040-468B.046, 543A.100-543A.110

340-048-0042

Certification Decision

(1) Within 90 days after an application is deemed complete by the department pursuant to OAR 340-048-0020(4), the department must provide written notice to the applicant that the certification is granted or denied or that a further specified time period is required to process the application. Any extension of time may not exceed one year from the date the application is deemed complete, except that any extension of time regarding certification of a hydroelectric project subject to licensing by the Federal Energy Regulatory Commission may not exceed one year from the date the application is received by the department.

(2) The department must evaluate whether the activity for which certification is sought will comply with applicable provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act, water quality standards set forth in OAR chapter 340, division 041, and other appropriate requirements of state law. In making this evaluation, the department may consider, among other things:

(a) Potential alterations to water quality that would either contribute to or cause violations of water quality standards established in OAR chapter 340, division 041;

(b) Existing and potential designated beneficial uses of surface water or groundwater that might be affected by the activity;

(c) Potential water quality impacts from the activity's use, generation, storage, or disposal of hazardous substances, waste chemicals, or sludges;

(d) Potential modifications of surface water quality or of water quantity that might affect water quality;

(e) Potential modifications of groundwater quality that might affect surface water quality;

(f) Potential water quality impacts from the construction of intake, outfall, or other structures associated with the activity;

(g) Potential water quality impacts from wastewater discharges;

(h) Potential water quality impacts from construction activities; and

(i) Compliance with plans applicable under Section 208 of the Clean Water Act.

(3) For new hydroelectric projects requiring certification, the department must evaluate, in addition to the criteria set forth in section (2) of this rule, whether the project will be consistent with:

(a) Standards set forth in ORS 543.017;

(b) Rules adopted by the Water Resources Commission implementing such standards; and

(c) Rules or standards of other state and local agencies that are consistent with the standards set forth in ORS 543.017 and that the Director determines are other appropriate requirements of state law according to 33 USC § 1341(d).

(4) For existing hydroelectric projects requiring certification and reauthorization of water rights, the department must evaluate, in addition to the criteria set forth in section (2) of this rule, whether the project will be consistent with:

(a) Standards set forth in ORS 543A.025(2) through (4);

(b) Rules adopted by the Water Resources Commission implementing such standards; and

(c) Rules or standards of other state or local agencies that are consistent with the standards set forth in ORS 543A.025(2) through (4) and that the Director determines are other appropriate requirements of state law according to 33 USC § 1341(d).

(5) Upon completion of the department's evaluation, including consideration of public comment and, if applicable, coordination through a HART in accordance with OAR 340-048-0037, the Director must issue a decision approving or denying certification for the activity, containing:

(a) The name of the applicant;

(b) The activity's name and federal identification number, if any;

(c) The type of activity;

(d) The name of the affected water body;

(e) The general location of the activity;

(f) Findings whether the activity will comply with the standards and requirements set forth in sections (2) through (4) of this rule, as applicable; and

(g) If certification is approved, conditions the Director determines are necessary to assure compliance with applicable standards and requirements set forth in sections (2) through (4) of this rule for the duration of the federal license or permit.

(6) A certification granted pursuant to this division is valid for the applicant only and is not transferable to another person without the written approval of the department. The

department may approve the transfer of a certification to a new owner or operator of the certified activity if the department is provided assurance that the new owner or operator will comply with the certification.

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: ORS 468B.035-468B.047, ORS 543.017, ORS 543A.025 & 33 USC 1341

340-048-0045

Issuance and Appeal of Certification Decision

(1) The department must provide a certification decision to the applicant by mail or personal delivery in the same manner as provided for service of notice under OAR 340-011-0097 and provide written notice by appropriate means to public commenters on the proposed certification decision. Any certification decision must include or be accompanied by a notice of the applicant's opportunity to request a contested case hearing regarding the certification decision.

(2) An applicant dissatisfied with a certification decision, including any conditions to an approved certification, may request a contested case hearing by filing an answer and request for hearing in accordance with OAR 340-011-0107 within 20 days of mailing or personal delivery of the notice of the certification decision by the department. The hearing must be conducted in accordance with OAR chapter 340, division 011 regarding contested cases.

(3) For purposes of the one-year period prescribed in 33 USC § 1341, the certification decision is effective upon the Director's issuance of the decision, notwithstanding any request for a contested case hearing by the applicant or other judicial review.

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: ORS 468B.035-468B.047, ORS 543.017, ORS 543A.025 & 33 USC 1341

340-048-0050

Modification or Revocation of a Certificate

(1) A certification may be modified or revoked by the Director if:

(a) The federal license or permit for the activity is revoked or terminated;

(b) The federal license or permit or the federal licensing or permitting agency allows modification of the activity in a manner inconsistent with the certification;

(c) The certification application contained false or inaccurate information regarding the activity that affects or might affect compliance with water quality standards and requirements;

(d) Changes in conditions regarding the activity or affected waterways since the certification was issued affect or might affect compliance with water quality standards and requirements;

(e) Certification conditions are violated; or

(f) Water quality standards, applicable federal laws, or other appropriate requirements of state law have changed since the certification was issued.

(2) Before modification or revocation of a certification, the department must provide the certification holder and the public with written notice of the department's intent to modify or revoke the certification and at least 30 days to submit written comment. If the certification is for a hydroelectric project, the department must also consult with the HART for the project, if any. Upon request by the certification holder, 10 or more persons, or an organization representing 10 or more members, the department must provide a public hearing on the proposed modification or revocation. After consideration of public comment and, if applicable, consultation with a HART, the Director must determine whether to modify or revoke the certification.

(3) Notice of any modification or revocation must be provided by the department to the certification holder by mail or personal delivery in the same manner as provided for service of notice under OAR 340-011-0097 and to the federal permitting or licensing agency and public commenters by appropriate means. The notice must include or be accompanied by a notice of the certification holder's opportunity to request a contested case hearing regarding the modification or revocation.

(4) A certification holder dissatisfied with a modification or revocation may request a contested case hearing by filing an answer and request for hearing in accordance with OAR 340-011-0107 within 20 days of the department's mailing or personal delivery of the notice. The hearing must be conducted in accordance with OAR chapter 340, division 011 regarding contested cases.

(5) The requirements in this rule governing modification or revocation of a certification do not apply to implementation of certification conditions that by their own terms require modification of an activity to ensure compliance with water quality standards and requirements (e.g., based on monitoring results, adaptive management).

(6) This rule does not apply to new certification requirements the department imposes in response to a notice that a federal agency is considering a license or permit application related to a change to a hydroelectric project or proposed hydroelectric project previously certified by the Director. In such event, the procedures and standards set forth in ORS 468B.045 apply.

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: ORS 183, 468B.035-468B.046 & 33 USC 1341

340-048-0055

Fee Schedule for Certifications

(1) Persons applying for a certification must pay the fees established in this rule. When fees are based on total volume or area, the fees will be based on the total volume or area specified in the application, not actual volume or area ultimately affected during the term of the certification.

(2) Fees for removal of materials from waters of the state are as follows:

(a) 500 to 9,999 cubic yards -- $950;

(b) 10,000 to 99,999 cubic yards - $2,800;

(c) 100,000 to 999,999 cubic yards -- $4,700;

(d) 1,000,000 to 9,999,999 cubic yards -- $14,000; and

(e) 10,000,000 cubic yards or more -- $16,000 or the amount specified in section (7) of this rule, whichever is greater.

(3) The fees established in section (2) of this rule will be reduced by 25% in those cases where the Dredged Material Evaluation Framework (DMEF) exclusion criteria for sediment testing are met. [Reference: Dredged Material Evaluation Framework, Lower Columbia River Management Area, November 1998.]

(4) Fees for filling of waters of the state are as follows:

(a) 2 to 4.99 acres -- $950;

(b) 5 to 9.99 acres -- $2,800;

(c) 10 to 14.99 acres -- $4,700; and

(d) 15 acres or more -- $8,000 or the amount specified in section (7) of this rule, whichever is greater.

(5) Only one certification fee is required for a project that includes both removal of material under section (2) of this rule and filling of material under section (4) of this rule in the immediate area of the excavation. The higher of the two fees applies.

(6) The fee for application of salt in ski areas is $5,000.

(7) For activities described in subsections (2)(e) and (4)(d) of this rule and activities not elsewhere classified in this rule, fees will be based on the estimated number of months of full-time staff equivalent (FTE) required to certify the activity multiplied by $8,000 (number of months x $8,000 = fee amount). The estimate of required FTE months will be made by the department. There is no fee for activities requiring less than 2 weeks of FTE.

(8) Fees for certification of a hydroelectric project must be paid in accordance with ORS 468.065(3).

(9) Fees for multi-year projects may be paid on a schedule approved by the department.

(10) All fees are payable to the Business Office, Oregon Department of Environmental Quality.

(11) A fee may be refunded if the department determines that no certification is required or that the wrong application has been filed.

(12) Fees are not charged for activities:

(a) Requiring an operating permit for surface mining under ORS chapter 517;

(b) Relating to commercial sand and gravel removal operations;

(c) Involving removal of less than 500 cubic yards of material; or

(d) Involving a fill of less than two acres.

Stat. Auth.: ORS 468.068, 468B.047
Stats. Implemented: ORS 468.068

DIVISION 48

CERTIFICATION OF COMPLIANCE WITH WATER QUALITY ~~REQUIREMENTS AND~~ STANDARDS AND REQUIREMENTS

340-048-0005

Purpose

The purpose of these rules is to describe the procedures ~~to be used by the Department of Environmental Quality~~ for ~~receiving and~~ processing applications for certification ~~of compliance with water quality requirements and standards for projects which are subject to federal agency permits or licenses and which may result in any discharge into navigable waters or impact water quality. In this certification process, the Department of Environmental Quality acts~~ pursuant to Section 401 of the ~~Federal~~ Clean Water Act ~~The Department will also comply with state law to the extent that federal law does not supersede state law.~~, 33 USC § 1341, and ORS 468B.035 through 468B.047.

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: ORS 468b.035 – 468B.047 & 33 USC 1341
~~Hist.: DEQ 18-1985, f. & ef. 12-3-85; DEQ 1-1987, f. & ef. 1-30-87~~

340-048-0010

Definitions

As used in these rules ~~unless otherwise required by context~~:

(1) "Certification" means a written ~~declaration~~ determination by the ~~Department of Environmental Quality, signed by the Director, that a project or activity subject to federal permit or license requirements will not violate applicable water quality requirements or standards.~~ Director that an activity subject to Section 401 of the Clean Water Act will comply with applicable provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act, 33 U.S.C. §§ 1311, 1312, 1313, 1316, and 1317, including water quality standards established pursuant to Section 303 as set forth in OAR chapter 340 division 041, and with other water quality requirements set forth in this division. "Certification" also includes any requirements set forth as conditions of a certification pursuant to Subsection 401(d) of the Clean Water Act to ensure compliance with Sections 301, 302, 306, and 307 of the Clean Water Act, with water quality standards established pursuant to Section 303 of the Clean Water Act as set forth in OAR chapter 340, division 041, and with any other appropriate requirement of state law.

(2) "Clean Water Act" means the Federal Water Pollution Control Act of 1972, Public Law 92-500, as amended.

(3) "Coast Guard" means the U.S. Coast Guard.

(4) "Commission" means the Oregon Environmental Quality Commission.

(5) "Corps" means the U.S. Army Corps of Engineers.

(6) "Department" or "DEQ" means the Oregon Department of Environmental Quality.

(7) "Director" means Director of the Department of Environmental Quality or the Director's ~~authorized representative.~~ delegate.

(8) ~~"Local Government" means county and city government.~~ "HART" means a Hydroelectric Application Review Team convened pursuant to ORS 543A.075 or ORS 543A.400(4)(b) for the purpose of coordinating state agency actions regarding the federal relicensing and, where applicable, state reauthorization of water rights for an existing hydroelectric project.

(9) "Person" means the United States and agencies thereof, ~~any~~ a state, ~~any~~ and agencies thereof, Tribe and agencies thereof, individual, public or private corporation, political subdivision, ~~governmental agency,~~ local government, ~~municipality, co~~partnership, association, firm, trust, estate or any other legal entity ~~whatever~~.

~~(10) "Water" or "waters of the state" has the meaning given in ORS 468B.005(8).~~

Stat. Auth.: ~~ORS 468B.020,~~ ORS 468.035, 468.065, 468B.035 ~~& ORS 561.191~~
Stats. Implemented: ORS 468B.035 – 468B.047 & 33 USC 1341
~~Hist.: DEQ 18-1985, f. & ef. 12-3-85; DEQ 5-1997(Temp), f. & cert. ef. 3-3-97; DEQ 1-1998, f. & cert. ef. 3-3-98; DEQ 19-2000, f. & cert. ef. 12-15-00~~

340-048-0015

When Certification Required

~~Any~~ Pursuant to Section 401 of the Clean Water Act, an applicant for a federal license or permit to conduct any activity~~,~~ that may result in any discharge to navigable waters, including but not limited to the construction or operation or decommissioning of facilities ~~which may result in any discharge to waters of the state~~, must provide the federal licensing or permitting agency a certification from the ~~D~~department ~~that any such activity~~

~~will comply with Sections 301, 302, 303, 306, and 307 of the Clean Water Act which generally prescribe effluent limitations, water quality related effluent limitations, water quality standards and implementation plans, national standards of performance for new sources, and toxic and pretreatment effluent standards~~.

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: ~~ORS 468B.030,~~ ORS 468B.035~~,~~ – 468B.047 & 33 USC 1341 ~~ORS 468B.040, ORS 468B.045 & ORS 468B.048~~
~~Hist.: DEQ 18-1985, f. & ef. 12-3-85~~

340-048-0020

Application for Certification

(1) ~~Completed a~~Applications for ~~project~~ certification ~~shall~~ must be filed ~~directly~~ with the ~~DEQ. This rule does not apply to applications filed with Division of State Lands~~ department, except for applications filed with the Corps pursuant to ~~OAR 340-048-0022 .~~ OAR 340-048-0032.

(2) ~~A completed~~ An application filed with ~~DEQ~~ the department ~~shall~~ must contain, at a minimum, the following information:

(a) The ~~L~~legal name and address of the ~~project~~ activity's owner or operator;

(b) The ~~L~~legal name and address of owner's or operator's ~~designated official~~ authorized representative, if any;

(c) A description of the ~~project~~ activity's location sufficient to locate and distinguish existing and proposed ~~project~~ facilities and other features relevant to the water quality effects of the activity;

(d) The ~~N~~names and addresses of ~~immediately adjacent~~ contiguous property owners;

(e) A complete written description of the ~~project proposal~~, ~~using written discussion,~~ activity, including maps, diagrams, and other necessary ~~materials~~ information;

(f) The ~~N~~names of ~~involved~~ affected waterways, lakes, or other water bod~~y~~ies;

(g) Copies of ~~the~~ and, as appropriate, cross-references to environmental ~~background~~ information ~~required by~~ submitted to the federal ~~permitting or~~ licensing or permitting agency ~~or such~~ and other environmental ~~background~~ information and evaluations as ~~may be~~ necessary to demonstrate that the ~~proposed project or~~ activity will comply with applicable provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act,

including water quality standards set forth in OAR chapter 340, division 041, and other appropriate requirements of state law;

(h) A ~~C~~copy of any public notice and supporting information~~,~~ issued by the federal ~~permitting or~~ licensing or permitting agency for the ~~project~~ activity;

(i) An exhibit ~~which~~ that:

(A) ~~Identifies and cites the specific provisions of the appropriate local~~ Includes land use ~~plan and implementing regulations that are applicable to the proposed project~~ compatibility findings for the activity prepared by the local planning jurisdiction ~~if such findings have not been obtained~~;

(B) If land use compatibility findings have not been obtained, identifies the specific provisions of the local land use plan and implementing regulations applicable to the activity and ~~D~~describes the relationship between the ~~proposed project~~ activity and each of the land use provisions identified in paragraph (A) of this subsection; and

(C) Discusses the potential direct and indirect relationship to water quality of each ~~item described in paragraph (B) of this section.~~ finding or land use provision;

~~(D) If specific land use compatibility findings have been prepared by the local planning jurisdiction, these findings should be submitted as part of this exhibit and may be substituted for the requirements in paragraphs (A) and (B) of this section.~~

(j) ~~For hydroelectric projects, a~~An exhibit ~~which~~ that identifies and describes other requirements of state law applicable to the activity that have any relationship to water quality, including but not limited to requirements under ORS chapter 454 regarding onsite disposal of sewage, ORS chapter 466 regarding spills of petroleum and hazardous substances, ORS chapter 496 regarding fish and wildlife, and ORS chapter 390 regarding recreation and scenic waterways~~:~~ ;

~~(A) Identifies and cites the applicable provisions of ORS 469.371 and 543.017 and implementing rules adopted by the Energy Facility Siting Council and Water Resources Commission;~~

~~(B) Describes the relationship between the proposed project and each of the provisions identified in paragraph (A) of this section; and~~

~~(C) Discusses the potential direct and indirect relationship to water quality each item described in paragraph (B) of this section.~~

(k) ~~An exhibit which identifies and describes any other~~ For new hydroelectric projects requiring certification, in addition ~~ements of state law applicable~~ to the ~~proposed project which may have a direct or indirect relationship to water quality.~~ information required under subsections (a) through (j) of this section, an exhibit that:

(A) Describes current water quality potentially affected by the proposed project, describes the impact of the proposed project to water quality, evaluates whether the proposed project will cause or contribute to violations of water quality standards adopted pursuant to OAR chapter 340 division 041, and identifies ~~activities~~ to be undertaken by the applicant to prevent violation of water quality standards;

(B) Identifies applicable standards of ORS 543.017, rules adopted by the Water Resources Commission implementing such standards, and rules or standards adopted by other state and local agencies that are consistent with ORS 543.017;

(C) Describes the relationship between the proposed project and each standard or rule identified in accordance with paragraph (B) of this subsection; and

(D) Discusses the potential direct and indirect relationship to water quality of each standard or rule~~;~~ .

(l) For existing hydroelectric projects requiring both certification and reauthorization of water rights, in addition to the information required under subsections (a) through (j) of this section, an exhibit that:

(A) Describes current water quality potentially affected by the existing project or activity, describes the impact of the existing project or activity to water quality, evaluates whether the existing project or activity causes or contributes to violations of water quality standards adopted pursuant to OAR chapter 340 division 041, and identifies steps to be undertaken by the applicant to mitigate or eliminate violation of water quality standards;

(B) Identifies applicable standards under ORS 543A.025(2) through (4), rules adopted by the Water Resources Commission implementing such standards, and rules or standards adopted by other state and local agencies that are consistent with such standards;

(C) Describes the relationship between the project and each of the standards or rules identified in accordance with paragraph (B) of this subsection; and

(D) Discusses the potential direct and indirect relationship to water quality of each standard or rule.

(3) The ~~DEQ reserves the right to~~ department may request any additional information necessary to complete an application or to assist the ~~DEQ to adequately~~ department in evaluate~~ing the project~~ an activity's impacts on water quality. An applicant's ~~F~~failure to complete an application or provide ~~any~~ requested additional information within the time specified ~~in~~ by the ~~request shall be~~ department is grounds for denial of certification if the failure prevents the department from processing the application within the time allowed by law.

(4) Except for applications coordinated with the Corps as described in OAR 340-048-0032, ~~T~~the ~~D~~department ~~shall~~ must notify the applicant by certified mail of the date the application is determined to be complete. The application ~~will be immediately~~ is deemed complete if ~~a~~ the department's preliminary review indicates that ~~all~~ the information required by section (2) of this rule is provided and that the exhibit required by subsection (2)(i) ~~of this rule~~ contains findings of the local planning jurisdiction. If findings of the local planning jurisdiction are not included, the ~~D~~department ~~shall~~ must forward the exhibit submitted ~~in response to~~ under subsection (2)(i) ~~of this rule~~ to the local planning jurisdiction for review and comment. The application ~~shall not be~~ is deemed complete ~~until~~ when the local planning jurisdiction provides comments to the ~~D~~department, or when 60 days have elapsed, whichever occurs first. If no comment is received from the local planning jurisdiction within the 60 day period, the ~~D~~department ~~will~~ must continue to seek information from the planning jurisdiction~~, but will deem the application complete~~ and proceed with evaluation of ~~public notice as provided in section (5) of this rule~~ the application for certification.

(5) ~~In order to inform potentially interested persons of the application, a public notice announcement shall be prepared and circulated in a manner approved by the Director. Notice will be mailed to adjacent property owners as cited in the application. The notice shall tell of public participation opportunities, shall encourage comments by interested individuals or agencies, and shall tell of any related documents available for public inspection and copying. The Director shall specifically solicit comments from affected state agencies. The Director shall provide a period of not less than 30 days following the date of the public notice during which time interested persons may submit written views and comments. All comments received during the 30-day period shall be considered in formulating the Department's position. The Director shall add the name of any person or group upon request to a mailing list to receive copies of public notice~~ For hydroelectric projects requiring certification, in addition to complying with requirements under these rules applicable to application for certification, the applicant must submit to the department a draft application for certification no later than one year before the applicant files a final application with the Federal Energy Regulatory Commission for a license for the hydroelectric project, unless the department and the applicant agree to a different time for submission of the draft certification application. The draft certification application must contain the information described in section (2) of this rule that is available at the time required for submission of the draft application.

~~(6) The Director shall provide an opportunity for the applicant, any affected state, or any interested agency, person, or group of persons to request or petition for a public hearing with respect to certification applications. If the Director determines that new information may be produced thereby, a public hearing will be held prior to the Director's final determination. Instances of doubt shall be resolved in favor of holding the hearing. There shall be public notice of such a hearing.~~

~~(7) In order to make findings required by OAR 340-048-0025(2), the Department's evaluation of an application for project certification may include but need not be limited to the following:~~

~~(a) Existing and potential beneficial uses of surface or groundwater which could be affected by the proposed facility;~~

~~(b) Potential impact from the generation and disposal of waste chemicals or sludges at a proposed facility;~~

~~(c) Potential modification of surface water quality or water quantity as it affects water quality;~~

~~(d) Potential modification of groundwater quality;~~

~~(e) Potential impacts from the construction of intake or outfall structures;~~

~~(f) Potential impacts from waste water discharges;~~

~~(g) Potential impacts from construction activities;~~

~~(h) The project's compliance with plans applicable to Section 208 of the Federal Clean Water Act;~~

~~(i) The project's compliance with water quality related standards established in Sections 3 and 5 of Chapter 569, Oregon Laws 1985 (ORS 543.017 and 469.371) and rules adopted by the Water Resources Commission and the Energy Facility Siting Council implementing such standards.~~

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: 33 USC 1341 & ORS 468B.035 – 468B.047, 543A.095
~~Hist.: DEQ 18-1985, f. & ef. 12-3-85; DEQ 1-1987, f. & ef. 1-30-87; DEQ 5-1997(Temp), f. & cert. ef. 3-3-97; DEQ 1-1998, f. & cert. ef. 3-3-98; DEQ 19-2000, f. & cert. ef. 12-15-00~~

~~340-048-0024~~

~~**Division of State Lands Coordination**~~

~~For projects or activities where the Division of State Lands is responsible for compiling coordinaed state response (normally applications requiring permits from the Corps or Coast Guard), the following procedures for application and certification shall apply:~~

~~(1) Application to the federal agency for a permit constitutes application for certification;~~

~~(2) Applications are forwarded by the federal agency to the Division of State Lands for distribution to affected agencies;~~

~~(3) Notice is given by the federal agency and Division of State Lands through their procedures. Notice of request for DEQ certification is circulated with the federal agency notice;~~

~~(4) All comments including DEQ Water Quality Certification are forwarded to the Division of State Lands for evaluation and coordination of response. The Division of State Lands is responsible for assuring compatibility with the local comprehensive plan or compliance with statewide planning goals;~~

~~(5) Evaluation of the application will be consistent with the provisions of OAR 340-048-0020(8).~~

~~Stat. Auth.: ORS 468.020 & ORS 468B.035~~
~~Stats. Implemented: ORS 468B.035 & 33USC 1341~~
~~Hist.: DEQ 12-1999, f. & cert. ef. 8-11-99~~

(340-048-0024 amended and renumbered 340-048-0032)

~~**340-048-0025**~~

~~**Issuance of a Certificate**~~

~~(1) Within 90 days after an application is deemed complete pursuant to OAR 340-048-0020(4), the DEQ shall serve written notice upon the applicant that the certification is granted or denied or that a further specified time period is required to process the application. Written notice shall be served in accordance with the provisions of OAR 340-011-0097 except that granting of certification may be by regular mail. Any extension of time shall not exceed one year from the date of filing a completed application.~~

~~(2) DEQ's certification for a project shall contain the following:~~

~~(a) Name of applicant;~~

~~(b) Project's name and federal identification number (if any);~~

~~(c) Type of project activity;~~

~~(d) Name of water body;~~

~~(e) General location;~~

~~(f) Findings that the proposed project is consistent with:~~

~~(A) Rules adopted by the EQC on Water Quality;~~

~~(B) Provisions of Sections 301, 302, 303, 306 and 307 of the Federal Water Pollution Control Act, Public Law 92-500, as amended;~~

~~(g) Such conditions as the Director determines necessary to require compliance with:~~

~~(A) For hydroelectric projects, those standards established in Sections 3 and 5 of Chapter 569, Oregon Laws 1985 (ORS 543.017 and 469.371) and rules adopted by the Water Resources Commission and Energy Facility Siting Council implementing such standards that the Director determines are water quality related;~~

~~(B) Standards of other state and local agencies that the Director determines are water quality related and are other appropriate requirements of state law according to Section 401 of the Federal Water Pollution Control Act, Public Law 92-500, as amended.~~

~~(h) A condition which requires the certificate holder to notify the Department of all changes in the project proposal subsequent to certification.~~

~~(3) If the applicant is dissatisfied with the conditions of any granted certification, the applicant may request a hearing before the Commission. Such requests for a hearing shall be made in writing to the Director within 20 days of the date of mailing of the certification. Any hearing shall be conducted pursuant to the rules of the Commission for contested cases.~~

~~(4) Certifications granted pursuant to these rules are valid for the applicant only and are not transferable.~~

~~Stat. Auth.: ORS 468~~
~~Stats. Implemented: ORS 183, ORS 468B.035, ORS 468B.040, ORS 468B.045, ORS 468B.065 & ORS 543.017~~
~~Hist.: DEQ 18-1985, f. & ef. 12-3-85; DEQ 1-1987, f. & ef. 1-30-87~~

(340-048-0025 amended and renumbered 340-048-0045)

340-048-0027

Public Participation

(1) Except as provided in sections (2) and (3) of this rule, the department must provide written public notice of any proposed certification decision to potentially interested persons and adjacent property owners identified in the application. The notice must describe public participation opportunities, request comments, and identify the proposed certification decision and any related documents as available for public inspection and copying. The department must provide at least 35 days for submission of written comments. If, within 20 days of the public notice, 10 or more persons or an organization representing 10 or more members request a public hearing on the proposed certification decision, the department must provide a hearing within the 35-day public comment period or as soon thereafter as reasonably practicable. The department may also provide a public hearing on a proposed certification decision or provide informational meetings regarding a certification application as it deems appropriate. The Director must consider all comments received in making the final certification decision.

(2) For certification applications subject to coordination with the Corps, public participation will be provided as set forth in OAR 340-048-0032.

(3) For certification applications subject to coordination with a HART, public participation will be provided as set forth in OAR 340-048-0037.

(4) Upon request, the department must add the name of any person or group to the list of recipients of written public notice regarding an activity.

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: ORS 468B.035– 468B.047

~~340-048-0030~~

~~Certification Delivery~~

~~For projects where application for certification is filed directly with DEQ by the applicant, the DEQ certification will be returned directly to the applicant. For those applications that are coordinated by the Division of State Lands, DEQ certification will be delivered to the Division of State Lands for distribution to the applicant and the federal permitting agencies as part of the Oregon coordinated response.~~

~~Stat. Auth.: ORS 468~~
~~Stats. Implemented: ORS 183~~
~~Hist.: DEQ 18-1985, f. & ef. 12-3-85~~

(340-048-0030 amended and renumbered 340-048-0045)

340-048-0032

Dredge and Fill

The department will coordinate with the Corps in the processing of certification applications for activities requiring permits from the Corps pursuant to Section 404 of the Clean Water Act, as follows:

(1) An application to the Corps for a permit constitutes an application for certification, provided that the department may request additional information as described in OAR 340-048-0020(2).

(2) The Corps provides public notice of and opportunity to comment on the applications, including the application for certification, provided that the department, in its discretion, may provide additional opportunity for public comment, including public hearing.

(3) The department must evaluate the certification application in accordance with OAR 340-048-0042(2) and any public comments.

(4) The Director's certification decision must be forwarded to the applicant and the Corps.

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: ORS 468B.035 & 33USC 1341

~~**340-048-0035**~~

~~**Denial of Certification**~~

~~If the Department proposes to deny certification for a project, a written notice setting forth the reasons for denial shall be served upon the applicant following procedures in OAR 340-011-0097. The written notice shall advise the applicant of appeal rights and procedures. A copy shall also be provided to the federal permitting agency. The denial shall become effective 20 days from the date of mailing such notice unless within that time the applicant requests a hearing before the Commission or its authorized~~

~~representative. Such a request for hearing shall be made in writing to the Director and shall state the grounds for the request. Any hearing held shall be conducted pursuant to the rules of the Commission for contested cases.~~

~~Stat. Auth.: ORS 468~~
~~Stats. Implemented: ORS 183~~
~~Hist.: DEQ 18-1985, f. & ef. 12-3-85~~

340-048-0037

HART Coordination

(1) Certification of an existing hydroelectric project requiring federal relicensing for which a HART is convened must be coordinated through the HART in accordance with ORS 543A.100 through 543A.115. This rule applies to such coordination occurring after the department's receipt of an application for certification. This rule does not apply to the department's participation in the HART for a project in accordance with ORS 543A.075 through 543A.095 before the department's receipt of an application for certification. This rule does not apply to an existing hydroelectric project requiring federal relicensing for which a HART has not been convened; that certification will be processed as otherwise provided in this division. Nothing in this rule affects the authority of the Director to act on an applicatio for certification as necessary to avoid certification being deemed waived under the one-year period prescribed in 33 USC 1341(a)(1).

(2) Upon receipt of proposed recommendations for certification of a hydroelectric project developed by a HART in accordance with ORS 543A.105, the department must provide public notice and at least 60 days for comment on a proposed certification decision based on the HART's recommendations. The department's notice and comment period must run concurrently with the notice and comment period provided by the HART on a proposed unified state position under ORS 543A.105(2). The department notice must be provided in writing to interested persons, request comments within the comment period, and identify the proposed certification decision and related documents as available for public inspection and copying. If within 30 days of the public notice, 10 or more persons or an organization representing more than 10 members request a public hearing on the proposed certification, the department must provide a hearing within the 60-day public comment period or as soon thereafter as is reasonably practicable.

(3) Upon completion of the public comment period, the department must evaluate the application for certification in accordance with OAR 340-048-0042(2) and (4). The Director must make a final certification decision in accordance with the recommendations submitted by the HART under ORS 543A.105(2), unless the Director finds, based on public comment or new information, that certification as recommended by the HART would not ensure that the project will comply with water quality standards

set forth in OAR chapter 340, division 041 or be consistent with other appropriate requirements of state law. If the Director's certification decision would differ from the HART recommendations, the Director must seek further recommendation from the HART before issuing a final certification decision. The Director must consider any further recommendation from the HART, then issue a final certification decision to the applicant and the HART.

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: ORS 468B.040-468B.046, 543A.100-543A.110

~~**340-048-0040**~~

~~**Revocation or Suspension of Certification**~~

~~(1) Certification granted pursuant to these rules may be suspended or revoked if the Director determines that:~~

~~(a) The federal permit or license for the project is revoked;~~

~~(b) The federal permit or license allows modification of the project in a manner inconsistent with the certification;~~

~~(c) The application contained false information or otherwise misrepresented the project;~~

~~(d) Conditions regarding the project are or have changed since the application was filed;~~

~~(e) Special conditions or limitations of the certification are being violated.~~

~~(2) Written notice of intent to suspend or revoke shall be served upon the applicant following procedures in OAR 340-011-0097. The suspension or revocation shall become effective 20 days from the date of mailing such notice unless within that time the applicant requests a hearing before the Commission or its authorized representative. Such a request for hearing shall be filed with the Director and shall state the grounds for the request. Any hearing held shall be conducted pursuant to the rules of the Commission for contested cases.~~

~~Stat. Auth.: ORS 468~~
~~Stats. Implemented: ORS 183~~
~~Hist.: DEQ 18-1985, f. & ef. 12-3-85~~

(340-048-0040 amended and renumbered 340-048-0050)

340-048-0042

Certification Decision

(1) Within 90 days after an application is deemed complete by the department pursuant to OAR 340-048-0020(4), the department must provide written notice to the applicant that the certification is granted or denied or that a further specified time period is required to process the application. Any extension of time may not exceed one year from the date the application is deemed complete, except that any extension of time regarding certification of a hydroelectric project subject to licensing by the Federal Energy Regulatory Commission may not exceed one year from the date the application is received by the department.

(2) The department must evaluate whether the activity for which certification is sought will comply with applicable provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act, water quality standards set forth in OAR chapter 340, division 041, and other appropriate requirements of state law. In making this evaluation, the department may consider, among other things:

(a) Potential alterations to water quality that would either contribute to or cause violations of water quality standards established in OAR chapter 340, division 041;

(b) Existing and potential designated beneficial uses of surface water or groundwater that might be affected by the activity;

(c) Potential water quality impacts from the activity's use, generation, storage, or disposal of hazardous substances, waste chemicals, or sludges;

(d) Potential modifications of surface water quality or of water quantity that might affect water quality;

(e) Potential modifications of groundwater quality that might affect surface water quality;

(f) Potential water quality impacts from the construction of intake, outfall, or other structures associated with the activity;

(g) Potential water quality impacts from wastewater discharges;

(h) Potential water quality impacts from construction activities; and

(i) Compliance with plans applicable under Section 208 of the Clean Water Act.

(3) For new hydroelectric projects requiring certification, the department must evaluate, in addition to the criteria set forth in section (2) of this rule, whether the project will be consistent with:

(a) Standards set forth in ORS 543.017;

(b) Rules adopted by the Water Resources Commission implementing such standards; and

(c) Rules or standards of other state and local agencies that are consistent with the standards set forth in ORS 543.017 and that the Director determines are other appropriate requirements of state law according to 33 USC § 1341(d).

(4) For existing hydroelectric projects requiring certification and reauthorization of water rights, the department must evaluate, in addition to the criteria set forth in section (2) of this rule, whether the project will be consistent with:

(a) Standards set forth in ORS 543A.025(2) through (4);

(b) Rules adopted by the Water Resources Commission implementing such standards; and

(c) Rules or standards of other state or local agencies that are consistent with the standards set forth in ORS 543A.025(2) through (4) and that the Director determines are other appropriate requirements of state law according to 33 USC § 1341(d).

(5) Upon completion of the department's evaluation, including consideration of public comment and, if applicable, coordination through a HART in accordance with OAR 340-048-0037, the Director must issue a decision approving or denying certification for the activity, containing:

(a) The name of the applicant;

(b) The activity's name and federal identification number, if any;

(c) The type of activity;

(d) The name of the affected water body;

(e) The general location of the activity;

(f) Findings whether the activity will comply with the standards and requirements set forth in sections (2) through (4) of this rule, as applicable; and

(g) If certification is approved, conditions the Director determines are necessary to assure compliance with applicable standards and requirements set forth in sections (2) through (4) of this rule for the duration of the federal license or permit.

(6) A certification granted pursuant to this division is valid for the applicant only and is not transferable to another person without the written approval of the department. The department may approve the transfer of a certification to a new owner or operator of the certified activity if the department is provided assurance that the new owner or operator will comply with the certification.

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: ORS 468B.035-468B.047, ORS 543.017, ORS 543A.025 & 33 USC 1341

340-048-0045

Issuance and Appeal of Certification Decision

(1) The department must provide a certification decision to the applicant by mail or personal delivery in the same manner as provided for service of notice under OAR 340-011-0097 and provide written notice by appropriate means to public commenters on the proposed certification decision. Any certification decision must include or be accompanied by a notice of the applicant's opportunity to request a contested case hearing regarding the certification decision.

(2) An applicant dissatisfied with a certification decision, including any conditions to an approved certification, may request a contested case hearing by filing an answer and request for hearing in accordance with OAR 340-011-0107 within 20 days of mailing or personal delivery of the notice of the certification decision by the department. The hearing must be conducted in accordance with OAR chapter 340, division 011 regarding contested cases.

(3) For purposes of the one-year period prescribed in 33 USC § 1341, the certification decision is effective upon the Director's issuance of the decision, notwithstanding any request for a contested case hearing b the applicant or other judicial review.

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: ORS 468B.035-468B.047, ORS 543.017, ORS 543A.025 & 33 USC 1341

340-048-0050

Modification or Revocation of a Certificate

(1) A certification may be modified or revoked by the Director if:

(a) The federal license or permit for the activity is revoked or terminated;

(b) The federal license or permit or the federal licensing or permitting agency allows modification of the activity in a manner inconsistent with the certification;

(c) The certification application contained false or inaccurate information regarding the activity that affects or might affect compliance with water quality standards and requirements;

(d) Changes in conditions regarding the activity or affected waterways since the certification was issued affect or might affect compliance with water quality standards and requirements;

(e) Certification conditions are violated; or

(f) Water quality standards, applicable federal laws, or other appropriate requirements of state law have changed since the certification was issued.

(2) Before modification or revocation of a certification, the department must provide the certification holder and the public with written notice of the department's intent to modify or revoke the certification and at least 30 days to submit written comment. If the certification is for a hydroelectric project, the department must also consult with the HART for the project, if any. Upon request by the certification holder, 10 or more persons, or an organization representing 10 or more members, the department must provide a public hearing on the proposed modification or revocation. After consideration of public comment and, if applicable, consultation with a HART, the Director must determine whether to modify or revoke the certification.

(3) Notice of any modification or revocation must be provided by the department to the certification holder by mail or personal delivery in the same manner as provided for service of notice under OAR 340-011-0097 and to the federal permitting or licensing agency and public commenters by appropriate means. The notice must include or be accompanied by a notice of the certification holder's opportunity to request a contested case hearing regarding the modification or revocation.

(4) A certification holder dissatisfied with a modification or revocation may request a contested case hearing by filing an answer and request for hearing in accordance with OAR 340-011-0107 within 20 days of the department's mailing or personal delivery of the notice. The hearing must be conducted in accordance with OAR chapter 340, division 011 regarding contested cases.

(5) The requirements in this rule governing modification or revocation of a certification do not apply to implementation of certification conditions that by their own terms require modification of an activity to ensure compliance with water quality standards and requirements (e.g., based on monitoring results, adaptive management).

(6) This rule does not apply to new certification requirements the department imposes in response to a notice that a federal agency is considering a license or permit application related to a change to a hydroelectric project or proposed hydroelectric project previously certified by the Director. In such event, the procedures and standards set forth in ORS 468B.045 apply.

Stat. Auth.: ORS 468.035, 468.065, 468B.035
Stats. Implemented: ORS 183, 468B.035-468B.046 & 33 USC 1341

340-048-0055

Fee Schedule for Certifications

(1) Persons applying for a certification must pay the fees established in this rule. When fees are based on total volume or area, the fees will be based on the total volume or area specified in the application, not actual volume or area ultimately affected during the term of the certification.

(2) Fees for removal of materials from waters of the state are as follows:

(a) 500 to 9,999 cubic yards -- $950;

(b) 10,000 to 99,999 cubic yards - $2,800;

(c) 100,000 to 999,999 cubic yards -- $4,700;

(d) 1,000,000 to 9,999,999 cubic yards -- $14,000; and

(e) 10,000,000 cubic yards or more -- $16,000 or the amount specified in section (7) of this rule, whichever is greater.

(3) The fees established in section (2) of this rule will be reduced by 25% in those cases where the Dredged Material Evaluation Framework (DMEF) exclusion criteria for sediment testing are met. [Reference: Dredged Material Evaluation Framework, Lower Columbia River Management Area, November 1998.]

(4) Fees for filling of waters of the state are as follows:

(a) 2 to 4.99 acres -- $950;

(b) 5 to 9.99 acres -- $2,800;

(c) 10 to 14.99 acres -- $4,700; and

(d) 15 acres or more -- $8,000 or the amount specified in section (7) of this rule, whichever is greater.

(5) Only one certification fee is required for a project that includes both removal of material under section (2) of this rule and filling of material under section (4) of this rule in the immediate area of the excavation. The higher of the two fees applies.

(6) The fee for application of salt in ski areas is $5,000.

(7) For activities described in subsections (2)(e) and (4)(d) of this rule and activities not elsewhere classified in this rule, fees will be based on the estimated number of months of full-time staff equivalent (FTE) required to certify the activity multiplied by $8,000 (number of months x $8,000 = fee amount). The estimate of required FTE months will be made by the department. There is no fee for activities requiring less than 2 weeks of FTE.

(8) Fees for certification of a hydroelectric project must be paid in accordance with ORS 468.065(3).

(9) Fees for multi-year projects may be paid on a schedule approved by the department.

(10) All fees are payable to the Business Office, Oregon Department of Environmental Quality.

(11) A fee may be refunded if the department determines that no certification is required or that the wrong application has been filed.

(12) Fees are not charged for activities:

(a) Requiring an operating permit for surface mining under ORS chapter 517;

(b) Relating to commercial sand and gravel removal operations;

(c) Involving removal of less than 500 cubic yards of material; or

(d) Involving a fill of less than two acres.

Stat. Auth.: ORS 468.068, 468B.047
Stats. Implemented: ORS 468.068

~~**340-048-0200**~~

~~**Fee Schedule for Certification of Compliance with Water Quality Requirements and Standards**~~

~~(1) Persons applying for a 401 water quality certification for removal of material shall pay the following fees:~~

~~(a) 500 cubic yards -- $500;~~

~~(b) Greater than 500 cubic yards -- $500 plus $.025 for each additional cubic yard of removal up to a maximum of $40,000.~~

~~(2) Persons applying for a 401 water quality certification for filling of material shall pay the following fees:~~

~~(a) 2 acres -- $500;~~

~~(b) Greater than 2 acres -- $500 plus $250 for each additional acre of fill up to a maximum of $40,000.~~

~~(3) Persons applying for a 401 water quality certification for activities not otherwise classified requiring detailed analyses shall pay the following fee:~~

~~(a) Application of salt in ski areas -- $5,000.~~

~~(4) Only one water quality certification fee shall be applicable for a project which requires both removal of material and filling of material in the immediate area of the excavation1. The highest fee shall apply.~~

~~(5) All fees shall be made payable to the Business Office, Oregon Department of Environmental Quality.~~

~~(6) The water quality certification fee may be refunded if either of the following conditions exist:~~

~~(a) The Department determines that no certification will be required;~~

~~(b) The Department determines that the wrong application has been filed.~~

~~(7) Fees will not be charged for activities:~~

~~(a) That have an operating permit for surface mining under ORS chapter 517;~~

~~(b) Relating to commercial sand and gravel removal operations;~~

~~(c) Involving removal of less than 500 cubic yards of material;~~

~~(d) Involving a fill of less than two acres.~~

~~1Example where only one fee will apply--removal of material for a trench followed by back filling of the trench.~~

~~Stat. Auth.: ORS 468.068~~
~~Stats. Implemented: ORS 468.068~~
~~Hist.: DEQ 28-1998, f. & cert. ef. 12-22-98~~

(340-048-0200 amended and renumbered 340-048-0055)

Attachment B
Summary of Public Comment and Agency Response
§401 Certification Procedures and Fees

Prepared by: Gregory McMurray **Date: January 2004**

Comment period

The public comment period opened on October 15, 2003, and closed at 5:00 p.m. on December 5, 2003. The Department held public hearings on November 17 in Redmond, November 18 in Portland, and November 19 in Eugene. One person attended a hearing but did not comment. Four persons submitted written comments during the public comment period.

Organization of comments and responses

Summaries of individual comments and the Department's responses are provided below. Comments are summarized by rule. The persons or organizations that provided each comment are referenced by number. A list of commenters and their reference numbers follows the summary of comments and responses.

Summary of Comments and Agency Responses	
Comment 1 340-048-0005 (1)	(1) The definition of certification should be based on the word "discharge" instead of the word "activity." This will limit the Department's certification authority to the discharge, as distinguished from the Department's authority to condition the activity, consistent with the Supreme Court holding in *PUD No.1*. (2) The reference to other water quality requirements set forth in division 041 should be deleted from the definition. (3) The second reference to section 401(d) of the Clean Water Act should be deleted from the definition. (1)
Response	(1) The Department does not read *PUD No.1* as narrowly as the commenter and believes the Department's certification authority extends to the water quality impacts of the entire activity, including certifying the activity and conditioning as necessary to support certification. Further, the use of the term "activity" comports with the Department's enabling statute, ORS 468B.040. No change. (2) The reference to "other water quality requirements" has been retained, consistent both with ORS 468B.040 and the remainder of division 048. No change. (3) The Department agrees that the second reference to section 401(d) in the rule is redundant and has deleted it.

Comment 2 340-048-0015	The commenter suggests using "may" instead of "might" because "might" suggests a less likely occurrence than "may" and "may" is used in section 401 of the Clean Water Act. (1)
Response	The Department agrees and has replaced the word "might" with the wor

	"may".

Comment 3 340-048-0020(2)(d)	The commenter requests that the Department not delete the word "immediately" as a modifier to "adjacent property owners" in the proposed rule. "Adjacent" property owners may only be near the activity for which certification is sought, whereas the "immediately adjacent" property owners must abut the activity. (1)
Response	"Immediately" was deleted because it was redundant next to "adjacent." The Department agrees that the intent of the rule is to require the identification of property owners contiguous to the activity and has replaced the word "adjacent" with the word "contiguous" in lieu of retaining "immediately."

Comment 4 340-048-0020(4)	The commenter requests that "will" be used instead of "must" because "must" might imply that the Department could not grant a certification in the absence of comment by the local land use planning jurisdiction. (1)
Response	The Department has used "must" to clarify where the Department has discretion and where it does not. In this case, the Department does not have discretion and believes that "must" is appropriate and clear. No change.

Comment 5 340-048-0020(5)	The commenters request that the Department drop the proposed requirement for submittal of a draft §401 application one year before the Federal Energy Regulatory Commission (FERC) final license application is submitted. (1) A draft §401 application is an unnecessary burden to the applicant and the Department. (2) The HART statutes require specific information on water quality for the water right application. (3) FERC has changed the timing requirement for the §401 submittal to the state relative to the rest of the FERC process. FERC rules promulgated during 2003 now require the §401 application to be submitted to the state within 60 days of FERC's declaring that the FERC application is ready for environmental analysis. (1,2)
Response	(1) The Department has acquired considerable FERC licensing-related experience over the past decade, and the timely development of environmental analysis has been a continuing problem. The Department is convinced that early submittal of a draft §401 application will address its need for better and more specific water quality related information earlier in the licensing process. The Department expects more effort will be required of the applicant earlier in the process to put the water quality analysis required by ORS 543A.095 into a draft application, but the total amount of effort for the applicant will remain roughly the same, while for the Department it will likely go down. (2) The requirement for a draft §401 application will also address the need for the Department to more fully participate in the timely development of unified state positions through the HART process.

(3) The Department does not believe the changes noted in FERC's rule warrant dropping the proposed requirement for early submittal of a draft §401 application to the Department. In fact, FERC's rule change further delays submittal of the §401 application, making the draft §401 application even more imperative.

The FERC licensing process begins 5½ years before expiration of the previous license with an applicant's notice of intent to license the facility (see timeline below). A draft license application is submitted to FERC 3 years before expiration, and the final license application 2 years before license expiration. Under the old FERC rules, an applicant submitted a final §401 application to the Department at the time the final license application was submitted to FERC. FERC now requires the final §401 application to be submitted sometime after the final license application when FERC staff declare that the project is ready for their environmental analysis. This latter step is the last major step in FERC's process before FERC awards the new license.

FERC LICENSING TIMELINE						
Year						
0	***1***	***2***	***3***	***4***	***5***	***6***
Old Process						
NOI			DLA	FLA F401	<EA>	New License
New Process						
NOI			DLA D401	FLA	<EA> F401	New License
NOI – Notice of intent to license facility						
DLA – Draft FERC license application						
FLA – Final FERC license application						
EA – Environmental analysis						
D401 – Draft §401 application						
F401 – Final §401 application						

As the timeline shows, dropping this proposed draft §401 application requirement would delay the Department's review of a §401 application to identify deficiencies until at least 4 years into the FERC licensing process. This delay could comprise a few months or a few years, during which the rest of the FERC and HART processes, whose timing has not changed, would continue. Requiring the draft §401 application to be submitted concurrent with the draft FERC license application would give the Department an opportunity to identify deficiencies earlier, participate more fully in the HART process, and avoid having to deny §401 applications because required information was not timely submitted. No change.

Comment 6 340-048-0020	(1) The commenter proposes that a new section be added to the §401 application requirements, consisting of a waiver of information not needed by the Department. The rule should make clear that the Department has the discretion to judge when an application is sufficient, whether or not all the components specified in the rule have been supplied. (2) Further, the commenter proposes that the certification itself constitute a waiver of any information not supplied in the application. The commenter believes that these two additions are needed to prevent legal challenges to a certificate on the grounds that the applicant did not submit information specified in the requirements, even though that information was not needed by the Department. (1)
Response	(1) The Department's discretion to determine whether an application is sufficient is clear in Section 5, which states that the Department can "request any additional information necessary to complete an application or assist the Department in evaluating an activity's impacts on water quality." By inference, the Department can act on applications based on the information it determines is sufficient. No change. (2) The Department does not believe that specifically waiving information not submitted or deeming certification to be a waiver is necessary to prevent legal challenges. Moreover, because Department rules do not typically include waivers of information not submitted in other applications, adding waivers here would be inconsistent and potentially confusing. No change.

Comment 7 340-048-0027	The commenter proposes this rule be amended to require that requests for hearings be made within 20 days of the public notice. This addition would avoid a request for hearing that could ostensibly prevent the Department from making a determination within the one-year allowed by the Clean Water Act. (1)
Response	The comment anticipates a situation in which the Department has delayed action on a §401 application until late in the one-year time period in which it must act or the certification will be deemed waived by the federal agency. The Department agrees with the comment and has revised the rule to read: *If, within 20 days of the public notice, 10 or more persons or an organization representing 10 or more members request a public hearing on the proposed certification decision, the department must provide a hearing within the 35-day public comment period or as soon thereafter as reasonably practicable.*

Comment 8 340-048-0042(1)	The commenter requests that the rule on certification decisions be amended to assure that any extension of time for acting on a §401 application for hydroelectric projects not go beyond the one-year time period for action beginning from receipt of the §401 application. (1)
Response	The clock for the one-year deadline for certification decisions starts at

	different times for certification decisions on non-hydroelectric and hydroelectric projects. For §401 applications for non-hydroelectric projects, the Department, in accordance with the Clean Water Act, uses the date the application *is deemed complete* by the Department as the starting point for the one-year clock. For §401 applications for FERC-licensed hydroelectric projects, to be consistent with FERC rules, the Department specifies the *date of receipt* as the starting point even if the application is deficient. The commenter requests a rule amendment to assure the deadline for action on hydroelectric projects is not extended beyond one year from *receipt* of the §401 application. Because the rule establishes that date as the deadline for these projects and does not authorize extensions beyond that date, no further amendments are needed to assure this as the firm deadline. No change.

Comment 9 340-048-0042(6)	The commenter believes that the wording of the Department's proposed rule on transfer of a certification would require it to recertify the activity, while the focus should be the new owner's ability to comply with the certification. (1)
Response	The Department agrees with the comment, and has revised the proposed language as follows: *"The Department may approve the transfer of a certification to a new owner or operator if the Department is provided assurance the new owner or operator will comply with the certification."* For this assurance, the Department intends to obtain a written agreement from the new owner to meet the terms and conditions of the existing certification.

Comment 10 340-048-0032	The commenter pointed out that the proposed rule on dredge and fill coordination does not appropriately describe present practice with respect to the Department of State Lands. (3)
Response	Based on discussions with Department of State Lands (DSL) staff, the Department agrees with DSL that references in this rule to "DSL" should be changed to the "US Army Corps of Engineers (Corps)" since the Corps grants the federal 404 permits discussed in this rule. The Department will coordinate with DSL on 404 projects as appropriate. This rule has been revised to read: ***Dredge and Fill*** *The department will coordinate with the Corps in the processing of certification applications for activities requiring permits from the Corps pursuant to Section 404 of the Clean Water Act, as follows:* *(1) An application to the Corps for a permit constitutes an application for certification, provided that the department may request additional information as described in OAR 340-048-0020(2).* *(2) The Corps provides public notice of and opportunity to comment on the applications, including the application for certification, provided that*

	the department, in its discretion, may provide additional opportunity for public comment, including public hearing. *(3) The department must evaluate the certification application in accordance with OAR 340-048-0042(2) and any public comments.* *(4) The Director's certification decision must be forwarded to the applicant and the Corps.*

Comment 11 Fiscal impacts	Commenter complains that a financial analysis was not conducted to assess the impact of the fee increase to small business, the Department is part of a state effort to destroy small business in Oregon, and this fee change is a job creation "scam" to increase the size of government. (4)
Response	The Department considered fiscal and economic impacts on small businesses in developing the proposed fee schedule. An analysis of projected impacts was provided in the *Statement of Need and Fiscal and Economic Impact Analysis* (Attachment F of this report) and included in the notice package for public comment in this rulemaking. That package was mailed to interested persons, posted on the Department's website for proposed rulemaking, and made available upon request. As noted in that Statement, the Department restructured the proposed fee schedule to generate the same amount of revenue as existing fees. The Department does not expect revenues to increase as a result of the fee changes. The new fee structure simply reallocates fees among the various sizes of projects to more equitably match the Department's certification costs.

List of Commenters and Reference Numbers

Reference Number	Name	Organization	Address	Date on comments
1	John Sample	Pacific Power Corporation	825 NE Multnomah Portland, OR 97232	12/04/03
2	Mike McCann	Eugene Water and Electric Board	500 East Fourth Street Eugene, OR 97440	12/04/03
3	Eric Metz	Oregon Division of State Lands	775 Summer Street NE, Suite 100 Salem, OR 97301	11/24/03
4	Rich Morten	NA	St. Helens, Oregon	12/05/03

Oregon Department of Environmental Quality
Section 401 Certification Procedures and Fees
Advisory Groups

Section 401 Dredge and Fill Fees Technical Advisory Committee

Name	Affiliation
Bob Willis	US Army Corps of Engineers
John Breiling	ÚS Army Corps of Engineers
Mike Gaul	Port of Coos Bay
Peter Gearin	Port of Astoria
Ken Armstrong	Oregon Ports Association
Dorothy Sperry	Port of Portland
Dave Cady	Centex Homes
Phil Quarterman	W&H Pacific
Ken Franklin	ODOT
Dave Hendricks	Multnomah Drainage District
Dal Ollek	City of Eugene

Section 401 Procedures *Ad Hoc* Attorney Working Group

Name	Affiliation
Don Haagensen	Cable Huston
Michael Campbell	Stoel Rives
John Sample	PacifiCorp – Pacific Power & Light
Julie Keil	Portland General Electric
Rick Glick	Davis Wright Tremaine
Brian King	Schwabe, Williamson & Wyatt
Jim Noteboom	Karnop Peterson & Noteboom
John Breiling	US Army Corps of Engineers
Frank Flynn	Perkins Coie
Brett Swift	American Rivers
Karl Anuta	Sokol Anuta
Chris Winter	Cascade Resources Advocacy Group

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

Date: November 18, 2003

To: Environmental Quality Commission

From: Paul DeVito

Subject: Presiding Officer's Report for Rulemaking Hearing
Title of Proposal: § 401 Certification Procedures and Fees
Hearing Date and Time: November 17, 2003; 1:00 to 3:00 p.m.
Hearing Location: Redmond Police Department – City Council Chambers

The Department convened the rulemaking hearing on the proposal referenced above at 1:00 p.m. and closed it at 3:00 p.m. No one attended the hearing.

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

Date: November 19, 2003

To: Environmental Quality Commission

From: Mark Charles

Subject: Presiding Officer's Report for Rulemaking Hearing
Title of Proposal: § 401 Certification Procedures and Fees
Hearing Date and Time: November 18, 2003; 1:00 to 3:00 p.m.
Hearing Location: Portland, DEQ Headquarters

The Department convened the rulemaking hearing on the proposal referenced above at 1:00 p.m. and closed it at 3:00 p.m. No one attended the hearing.

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

Date: November 20, 2003

To: Environmental Quality Commission

From: Mark Charles

Subject: Presiding Officer's Report for Rulemaking Hearing
Title of Proposal: § 401 Certification Procedures and Fees
Hearing Date and Time: November 19, 2003; 1:00 to 3:00 p.m.
Hearing Location: Eugene Public Library

The Department convened the rulemaking hearing on the proposal referenced above at 1:00 p.m. and closed it at 3:00 p.m. Greg McMurray briefly explained the rulemaking proposal and procedures for the hearing. One person attended the hearing but did not testify.

Relationship to Federal Requirements
Revisions to Clean Water Act §401 Certification Procedures and Fees

Answers to the following questions identify how the proposed rulemaking relates to federal requirements and potential justification for differing from federal requirements. The questions are required by OAR 340-011-0029.

1. **Are there federal requirements that are applicable to this situation? If so, exactly what are they?**
   Yes. The Clean Water Act Section 401 and 40 CFR Part 121 establish requirements for state water quality certifications. Under Section 401, an applicant for a federal license or permit for an activity that may result in discharge to navigable waters must provide the permitting agency a certification from the state that the activity will comply with water quality standards.

2. **Are the applicable federal requirements performance based, technology based, or both with the most stringent controlling?**
   Neither; the requirements are procedural.

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. The Clean Water Act considered the needs of states in certifying activities such as dredging and filling and hydroelectric project operation.

4. **Will the proposed requirement improve the ability of the regulated community to comply in a more cost effective way by clarifying confusing or potentially conflicting requirements (within or cross-media), increasing certainty, or preventing or reducing the need for costly retrofit to meet more stringent requirements later?**
   Yes. The proposed rules will be clearer and more consistent with other state laws.

5. **Is there a timing issue which might justify changing the time frame for implementation of federal requirements?**
   No.

6. **Will the proposed requirement assist in establishing and maintaining a reasonable margin for accommodation of uncertainty and future growth?** No.

7. **Does the proposed requirement establish or maintain reasonable equity in the requirements for various sources? (level the playing field)**
   Yes. The proposed fee schedule is designed to generate the same amount of revenue as existing fees, but redistributes fees among various types of project to more closely reflect the Department's costs for certifying projects. The procedural changes will help ensure DEQ follows consistent procedures when certifying activities.

8. **Would others face increased costs if a more stringent rule is not enacted?**
   No, but without the proposed fee changes, certain projects would continue to pay a disproportionate share of the Department's §401 certification program costs under the existing fee schedule.

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 difference from federal requirements.

10. **Is demonstrated technology available to comply with the proposed requirement?**
    Not applicable.

11. **Will the proposed requirement contribute to the prevention of pollution or address a potential problem and represent a more cost effective environmental gain?** Yes. Water quality certification addresses pollution prevention.

DEPARTMENT OF ENVIRONMENTAL QUALITY
Chapter 340 - Proposed Rulemaking
STATEMENT OF NEED AND FISCAL AND ECONOMIC IMPACT

Title of Proposed Rulemaking	**Revisions to Clean Water Act §401 Certification Procedures and Fees** OAR chapter 340, division 048
Proposed Rule Changes and Need	**Procedural changes**. The Oregon Department of Environmental Quality (DEQ) is proposing to update its procedures for certifying that activities requiring federal licenses or permits will comply with state water quality requirements and standards. DEQ certifies compliance as authorized by §401 of the federal Clean Water Act. DEQ is updating these rules to: • be consistent with statutory amendments and current practices; • better conform the DEQ's rules to Section 401 of the federal Clean Water Act; and • remove internal inconsistencies and make the rules clearer. Division 48 rules governing DEQ's §401 certification of hydroelectric projects are inconsistent with 1997 and 1999 amendments to ORS 543A, which established a Hydroelectric Application Review Team (HART) process to coordinate hydroelectric license reviews conducted by state agencies, and with current DEQ practices. These rules are also inconsistent with related statutes and rules governing the Oregon Water Resources Department (OWRD) and Oregon Department of Fish & Wildlife (ODFW) license reviews. The proposed changes align DEQ's rules with governing statutes, rules of coordinating agencies, current DEQ practices, and the Clean Water Act. **Fee changes**. DEQ is also proposing to amend the fees it charges for certifying that activities requiring federal licenses and permits comply with water quality requirements and standards. The proposed fees apply to most river dredging, wetland filling, and other instream activities. The fees do not apply to hydropower licensing. Fee payers requested a more equitable fee structure. The existing fee structure overcharges large projects and undercharges most small and medium projects compared to DEQ's costs for certifying those projects. The proposed fee schedule is designed to generate the same amount of revenue as existing fees, but reallocates fees among various sizes of projects to more closely match certification costs. The proposal also clarifies the fee that applies to activities other than dredging or filling. Fees for the §401 certifications generate approximately $109,000 per year, which supports the costs for 1 FTE of staff resources in DEQ plus associated direct and indirect costs. The proposed fee structure yields $860 (or 0.26%) less than existing fees. **Other options**: As part of its public comment process, DEQ is also requesting comment on whether other options should be considered to achieve the proposed rule's substantive goals while reducing any negative economic impact of the rule on business.
Documents Relied Upon for Rulemaking	The following documents are available at *http://www.deq.state.or.us/news/publicnotices/index.asp* or by contacting Loretta Pickerell as described at the end of this document. *Comparison of §401 Certification Fee Revenue under Existing and Proposed Fee Schedules Using §401 Projects Certified 7/1/99 - 6/28/02* (DEQ, 4/03) Compares the fee revenue from the 136 fee-paying projects DEQ certified between 7/1/99 and

6/28/02 to the revenue the projects would generate under the proposed fee schedule.

Sector Comparison of §401 Certification Fee Revenue under Existing and Proposed Fee Schedules Using §401 Projects Certified 7/1/99 - 6/28/02 (DEQ, 4/03)
Compares fee revenue from the four major fee-paying sectors (Corps of Engineers, Other Governments, Private, and Ports) under the existing and proposed fee schedules. Compares revenue to DEQ's certification costs for each sector.

Analysis of Model Fee Structures Using §401 Projects Certified 7/1/99 – 6/28/02 (DEQ, 2002)
Applies different model fee structures to past projects to identify the model most closely matching fees to DEQ's labor costs for certifying various sized projects.

Economic Impact

Overview

Procedural changes. The proposed update to the procedural rules for certification will conform rules to current practices and clarify those practices. Since they will not change practices, no economic impact is expected from the procedural rules.

Fee changes. The proposed fee rule changes will restructure DEQ's §401 certification fees for various sizes of river dredging, wetland filling, and other instream activities (excluding hydropower licensing) to generate the same amount of revenue as existing fees. This restructuring significantly reduces fees for large projects and increases fees for most small and medium projects so that fees more closely match DEQ's certification costs. As a result, small and medium-sized projects will generate a larger proportion of §401 certification fee revenue. Certain very small projects remain exempt from §401 certification fees.

Comparison of Existing and Proposed §401 Certification Fees			
Removal Fees			
Existing Fees		**Proposed Fees**	
500 yd^3	$500	500 yd^3 – 9,999 yd^3	$950
>500 yd^3	$500 + $.025/addnl yd^3; max $40,000	10,000 – 99,999 yd^3	$2,800
		100,000–999,999 yd^3	$4,700
		1,000,000 – 9,999,999 yd^3	$14,000
		≥10,000,000	Greater of $16,000 or FTE calc[1]
Fill Fees			
Existing Fees		**Proposed Fees**	
2 acres of fill	$500	2 – 4.99 acres of fill	$950
>2 acres	$500 + $250/addnl acre; max. $40,000	5 - 9.99 acres	$2,800
		10 – 14.99 acres	$4,700
		≥ 15 acres	$8,000 or FTE calc[1]
Salt Application in Ski Areas			
Existing Fees		**Proposed Fees**	
All applications	$5,000	All applications	$5,000
Unclassified Activities			
Existing Fees		**Proposed Fees**	

	No fees	All applications	FTE calc[1]

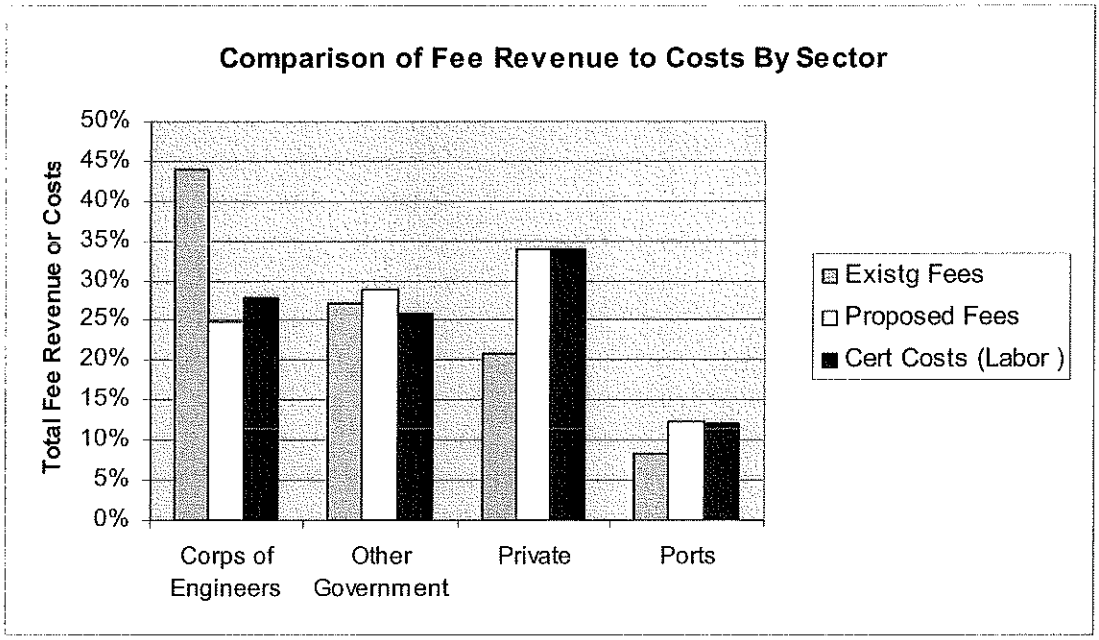
[1] **FTE Calculation**: Estimated number of months of full-time staff equivalent (FTE) required to certify the activity multiplied by $8,000 (# months x $8000 = fee). No fee for unclassified activities requiring less than 2 weeks of FTE.

This shift will significantly reallocate fee revenue among the four major §401 fee-paying sectors, the Corps of Engineers, Other Government, Private, and Ports. The following summary shows the expected fee changes for each sector based on a comparison of the fee revenue DEQ collected from the 136 fee-paying projects certified between 7/1/99 and 6/28/02 to the revenue the projects would generate under the proposed fee schedule.

SUMMARY OF FEE REVENUE BY SECTOR						
	Existing Fees		Proposed Fees		Change	
Sector (# of projects)[1]	Fee Rev	Av/ project	Fee Rev	Av/ project	Av/proj + or -	% +or-
Removal Projects						
Corps of Engineers						
Small projects (3)	$1,796	$599	$2,850	$950	$351	59%
Medium projects (11)	$36,531	$3,321	$36,500	$3,318	-$3	0%
Large projects (3)	$105,488	$35,163	$42,000	$14,000	-$21,163	-60%
Total (17)	**$143,815**	**$8,460**	**$81,350**	**$4,785**	**-$3,675**	**-43%**
Other Government						
Small projects (24)	$13,670	$570	$22,800	$950	$380	67%
Medium projects (9)	$22,291	$2,477	$27,100	$3,011	$534	22%
Total (33)	**$35,961**	**$1,090**	**$49,900**	**$1,512**	**$422**	**39%**
Private						
Small projects (13)	$7,487	$576	$12,350	$950	$374	65%
Medium projects (19)	$35,091	$1,847	$58,900	$3,100	$1,253	68%
Total (32)	**$42,578**	**$1,331**	**$71,250**	**$2,227**	**$896**	**67%**
Ports						
Small projects (3)	$1,845	$615	$2,494	$831	$216	35%
Medium projects (12)	$22,063	$1,839	$34,388	$2,866	$1,027	56%
Total (15)	**$23,908**	**$1,594**	**$36,881**	**$2,459**	**$865**	**54%**
Fill Projects						
Other Government						
Small projects (6)	$4,833	$805	$5,700	$950	$145	18%
Medium projects (9)	$48,013	$5,335	$38,600	$4,289	-$1,046	-20%
Total (15)	**$52,845**	**$3,523**	**$44,300**	**$2,953**	**-$570**	**-16%**
Private						
Small projects (14)	$10,628	$759	$13,300	$950	$191	25%
Medium projects (8)	$14,895	$1,862	$26,200	$3,275	$1,413	76%
Total (22)	**$25,523**	**$1,160**	**$39,500**	**$1,795**	**$635**	**55%**
Ports						
Small projects (1)	$1,100	$1,100	$950	$950	-$150	-14%
Medium projects (1)	$2,063	$2,063	$2,800	$2,800	$737	36%
Total (2)	**$3,163**	**$1,581**	**$3,750**	**$1,875**	**$294**	**19%**
Totals for Removal and Fill Projects						
Corps of Engineers (17)	$143,815	$8,460	$81,350	$4,785	-$3,675	-43%
Other Government (48)	$88,806	$1,850	$94,200	$1,963	$113	6%
Private (54)	$68,101	$1,261	$110,750	$2,051	$790	63%
Ports (17)	$27,070	$1,592	$40,631	$2,390	$798	50%
Total (136)	**$327,792**	**$2,410**	**$326,931**	**$2,404**	**-$6**	**0%**

[1]Project Sizes	Removal /cubic yds	Fill /acres
small	500 - 9,999	2 - 4.99
medium	10,000 - 999,999	5 - 14.99
large	1,000,000+	15+

Assuming this mix of 136 projects represents future projects, the Private sector followed by Ports, both with all small and medium-sized projects, will pay the largest fee increases for both removal

	and fill projects. The Other Government sector, mostly local with some state and federal governments, also with a mix of small and medium projects, will pay higher fees for removal projects but slightly lower fees for fill projects for a small net overall increase under the new fee structure. The Corps of Engineers, with mostly medium and large projects, will pay significantly lower fees for removal projects and had no fill projects. Overall, each sector will pay fees that more fairly reflect DEQ's labor costs for certifying their projects. The following chart compares the percentage of total fees paid by each sector to DEQ's labor costs for certifying projects in that sector.  See *Sector Comparison of Existing and Proposed Fees Using §401 Projects Certified 7/1/99 - 6/28/02 (Sector Comparison)*, referenced above, for a more detailed analysis of the proposed fee changes.
General public	Increases and decreases in fees paid for projects under the proposed fee schedule might be passed through to the general public as increased costs or savings for services or goods the projects produce. See, for example, the Housing Costs analysis below. DEQ expects any resulting costs or savings to the public to be small because the fee changes will not alter overall project costs significantly and will be further attenuated when spread among the goods or services produced.
Small and Large Business	Marinas and other facilities typically require certification for projects to maintain river channels and ocean terminals, stabilize banks, restore habitat, remove gravel bars, and develop property. Construction businesses typically require certification for fills related to residential and commercial development. These small and large businesses comprise the Private sector in the fee revenue analyses above. The proposed fee changes are expected to have the same impacts on both small and large businesses, although the fee increases may represent a larger portion of small business' costs. Both small and large businesses usually engage in small and medium-sized removal and fill projects. None of this sector's projects in the revenue analyses above were large. Based on the *Revenue Summary* above, average certification fees for removal projects for the private sector will increase by $896 per project, from $1,331 to $2,227, under the proposed fee schedule. Average certification fees for fill projects will increase by $635 per project, from $1,160 to $1,795. The more detailed *Sector Comparison* referenced above shows that fees would increase for 30 of the 32 removal projects and decrease for 2 (the biggest medium-sized removals). Fees would increase

	for 16 fill projects and decrease or stay the same for 6 (the biggest small-sized fills). The proposed fee changes are expected to have a relatively small impact on project costs. See, for example, Housing Costs below.
Local Government	***Local governments*:** Cities, counties, and local service districts engage in a number of activities, such as road building, wetland mitigation, and enhancement of park facilities, that require §401 certifications. These local government projects are included with state and federal government projects in the Other Government sector in the fee revenue analyses above. The mix of small and medium-sized local government projects are representative of the Other Government sector as a whole. None of the Other Government projects were large. Based on the *Revenue Summary* above, average certification fees for removal projects for local governments (and the Other Government sector as a whole) will increase by $422 per project, from $1,090 to $1,512 under the proposed fee schedule. The average fee for a fill project will decrease by $570, from $3,523 to $2,953. The *Sector Comparison*, referenced above, shows that fees for 32 of the 33 removal projects in this sector would increase; fees for the largest project would decrease. Fees would increase for 13 of the 15 fill projects and decrease for 2 (the largest in the small and medium-sized categories). Proposed changes in the certification fees for this sector are expected to have a relatively small impact on project costs. ***Ports*:** Ports engage mostly in removal with some fill projects, typically small or medium in size. No port projects in the revenue analyses above were large. Based on the *Revenue Summary* above, average certification fees for removal projects for ports will increase by $865 per project, from $1,594 to $2,459. Fees for the average fill project will increase by $294, from $1,581 to $1,875. The *Sector Comparison* shows that fees would increase for 14 of 15 removal projects and decrease for the largest project. Fees would increase for the 2 fill projects. Proposed changes in the certification fees for local governments and ports are expected to have a relatively small impact on project costs.
Federal Agencies	***US Army Corps of Engineers*:** The Corps engages primarily in medium and large-sized removal projects, with a few small projects. The Corps had no fill projects in the analysis above. Based on the *Revenue Summary* above, average certification fees for Corps removal projects will decrease by $3,675 per project, from $8,460 to $4,785, under the proposed schedule. The *Sector Comparison* shows that fees would increase for 11 of the Corps' 14 small and medium-sized projects and decrease for the other 3. Fees would decrease substantially for all 3 large projects, resulting in the net fee reduction for the Corps. ***Other Federal Agencies*:** Other federal agencies occasionally engage in removal and fill projects. The US Forest Service, US Coast Guard, US Bureau of Reclamation, and Bureau of Indian Affairs had projects in the Other Government sector in the fee revenue analyses above. Fiscal and economic impacts for these agencies are the same as those described for local governments above. Proposed changes in the certification fees for federal agencies are expected to have a relatively small impact on project costs.
State Agencies	
DEQ	Since the proposed fee changes are designed to be revenue neutral, they will not increase revenue for DEQ. Minimal costs will be incurred to implement the fee changes. The proposed rulemaking will have no other fiscal or economic impacts on DEQ.

Other State Agencies	Other state agencies occasionally engage in removal and fill projects. The Oregon Department of Transportation and Oregon Department of Fish and Wildlife had projects in the Other Government sector in fee revenue analyses above. Fiscal and economic impacts for these state agencies are the same as those described for local governments above.
Assumptions	• The 136 projects included in the fee revenue analyses relied on for this rulemaking represent the mix of future removal and fill projects and the level of staff and other resources DEQ will need to certify those projects. • DEQ's annual costs for certifying §401 fee-paying projects (excluding hydropower licensing) will include one Natural Resource Specialist 3-level FTE at approximately $8,000 per month or $98,000/ year, and $11,000/year for other direct costs, such as transportation for site visits and hearing room rentals, and indirect costs. DEQ's annual costs for certifying projects will total $109,000. • To certify a project of any size, DEQ will need a minimum of 16 hours for project evaluation, coordination, reporting, and administrative tracking.
Housing Costs	The proposed fee changes could have a measurable 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. For example, the fee for certifying a two-acre wetland fill in a 20-home development would increase by $450, from $500 to $950, or $23/home.
Advisory Committee	During the spring and summer of 2002, DEQ worked with a Technical Advisory Committee (TAC) representing the four sectors of §401 fee payers described above to help develop the proposed fee schedule. The following were represented on the TAC: US Army Corps of Engineers, Port of Coos Bay, Port of Astoria, Port of Portland, Oregon Ports Association, Centex Homes, W&H Pacific, Oregon Department of Transportation, Multnomah Drainage District and City of Eugene. DEQ consulted with a workgroup of hydropower project stakeholders to develop the procedural changes.

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State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Revisions to Clean Water Act §401 Certification Procedures and Fees

Land Use Evaluation Statement

1. Explain the purpose of the proposed rules.

The Oregon Department of Environmental Quality is proposing to amend the procedural rules and fees it charges for certifying that activities requiring federal licenses and permits comply with water quality requirements and standards. DEQ certifies compliance as authorized by §401 of the federal Clean Water Act. The proposed procedural changes conform DEQ's rules to more recent state and federal laws. The proposed fees apply to most river dredging, wetland filling, and other instream activities. The fees do not apply to hydropower licensing. The proposal also clarifies the fee that applies to activities other than dredging or filling.

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:
OAR 340-018-0030(5)(h), Certification of Water Quality Standards for Federal Permits, Licenses

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):**
A Land Use Compatibility Statement is required for §401 certifications.

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.**

_____ _____ _____

Division Intergovernmental Coord. Date

ORS 468B.040 and 468B.045

468B.040 Certification of hydroelectric power project; comments of affected state agencies. (1) The Director of the Department of Environmental Quality shall approve or deny certification of any federally licensed or permitted activity related to hydroelectric power development, under section 401 of the Federal Water Pollution Control Act, P.L. 92-500, as amended. In making a decision as to whether to approve or deny such certification, the director shall:

(a) Solicit and consider the comments of all affected state agencies relative to adverse impacts on water quality caused by the project, according to sections 301, 302, 303, 306 and 307 of the Federal Water Pollution Control Act, P.L. 92-500, as amended.

(b) Approve or deny a certification only after making findings that the approval or denial is consistent with:

(A) Rules adopted by the Environmental Quality Commission on water quality;

(B) Provisions of sections 301, 302, 303, 306 and 307 of the Federal Water Pollution Control Act, P.L. 92-500, as amended;

(C) Except as provided in subsection (2) of this section, standards established in ORS 543.017 and rules adopted by the Water Resources Commission implementing such standards; and

(D) Except as provided in subsection (2) of this section, standards of other state and local agencies that are consistent with the standards of ORS 543.017 and that the director determines are other appropriate requirements of state law according to section 401 of the Federal Water Pollution Control Act, P.L. 92-500, as amended.

(2) If the proposed certification is for the reauthorization of a federally licensed project, as defined in ORS 543A.005, or for a project that is subject to federal relicensing but that operates under a water right that does not expire, the director shall not determine consistency under subsection (1)(b)(C) and (D) of this section, but shall determine whether the approval or denial is consistent with the rules and provisions referred to in subsection (1)(b)(A) and (B) of this section, standards established in ORS 543A.025 (2) to (4), rules adopted by the Water Resources Commission implementing such standards and rules of other state and local agencies that are consistent with the standards of ORS 543A.025 (2) to (4) and that the director determines are other appropriate requirements of state law according to section 401 of the Federal Water Pollution Control Act, P.L. 92-500, as amended.

(3) If the proposed certification is for the reauthorization of a federally licensed project, as defined in ORS 543A.005, or for a project that is subject to federal relicensing but that operates under a water right that does not expire, the director shall act in accordance with the recommendation of the Hydroelectric Application Review Team, except as provided in ORS 543A.110. If the proposed certification is for a project that is subject to federal relicensing but that operates under a water right that does not expire, and the Hydroelectric Application Review Team develops a unified state position under ORS 543A.400 (4)(b), the director shall act in accordance with the recommendation of the Hydroelectric Application Review Team, except as provided in ORS 543A.110. [Formerly 468.732; 1993 c.544 §1; 1997 c.449 §40]

468B.045 Certification of change to hydroelectric power project; notification of federal agency. Within 60 days after the Department of Environmental Quality receives notice that any federal agency is considering a permit or license application related to a change to a hydroelectric project or proposed hydroelectric project that was previously certified by the Director of the Department of Environmental Quality according to section 401 of the Federal Water Pollution Control Act P.L. 92-500, as amended:

(1) The director shall:

(a) Solicit and consider the comments of all affected state agencies relative to adverse impacts on water quality caused by changes in the project, according to sections 301, 302, 303, 306 and 307 of the Federal Water Pollution Control Act, P.L. 92-500, as amended.

(b) Approve or deny a certification of the proposed change after making findings that the approval or denial is consistent with:

(A) Rules adopted by the Environmental Quality Commission on water quality;

(B) Provisions of sections 301, 302, 303, 306 and 307 of the Federal Water Pollution Control Act, P.L. 92-500, as amended;

(C) Except as provided in subsection (2) of this section, standards established in ORS 543.017 and rules adopted by the Water Resources Commission implementing such standards; and

(D) Except as provided in subsection (2) of this section, standards of other state and local agencies that are consistent with the standards of ORS 543.017 and that the director determines are other appropriate requirements of state law according to section 401 of the Federal Water Pollution Control Act, P.L. 92-500, as amended.

(2) If the proposed certification is for a change to a federally licensed project, as defined in ORS 543A.005, that has been reauthorized under ORS 543A.060 to 543A.300, or for a change to a project that is subject to federal relicensing but that operates under a water right that does not expire, the director shall not determine consistency under subsection (1)(b)(C) and (D) of this section, but shall determine consistency with the rules and provisions referred to in subsection (1)(b)(A) and (B) of this section, standards established in ORS 543A.025 (2) to (4), rules adopted by the Water Resources Commission implementing such standards and rules of other state and local agencies that are consistent with the standards of ORS 543A.025 (2) to (4) and that the director determines are other appropriate requirements of state law according to section 401 of the Federal Water Pollution Control Act, P.L. 92-500, as amended.

(3) On the basis of the evaluation and determination under subsections (1) and (2) of this section, the director shall notify the appropriate federal agency that:

(a) The proposed change to the project is approved; or

(b) There is no longer reasonable assurance that the project as changed complies with the applicable provisions of the Federal Water Pollution Control Act, P.L. 92-500, as amended, because of changes in the proposed project since the director issued the construction license or permit certification. [Formerly 468.734; 1993 c.544 §2; 1997 c.449 §40a]

State of Oregon

Department of Environmental Quality Memorandum

Date: March 18, 2004

To: Environmental Quality Commission

From: Stephanie Hallock, Director S. Hallock

Subject: Agenda Item C, Rule Adoption: Air Quality New Source Review and Modeling, OAR Chapter 340, Divisions 224 and 225, April 8, 2004 EQC Meeting

Department Recommendation

The Department recommends that the Environmental Quality Commission (EQC, Commission) amend the proposed New Source Review and Air Quality Analysis rules (Divisions 224 and 225) as a revision to the State Implementation Plan. These rules clarify the requirements for creating and using emission offsets without affecting the stringency. The proposed changes allow offsets to come from outside a designated maintenance area if the reductions creating the emissions offsets affected the same area as the proposed increase in emissions. The proposed changes are presented in Attachment A.

Background and Need for Rulemaking

Congress established the New Source Review (NSR) program as part of the 1977 Clean Air Act Amendments to ensure that (1) air quality does not worsen where the air is currently unhealthy to breathe, and (2) air quality is not significantly degraded where the air is currently clean. The fundamental philosophy underlying NSR is that a source should install modern pollution control equipment when it is built (for new sources) or when it makes a major modification that significantly increases emissions (for existing sources).

NSR requires a source to obtain a permit, and conduct an analysis of the effect on air quality to ensure air quality improves because of the new source, before construction begins to ensure appropriate emission controls. The NSR program is administered in Oregon by DEQ, except in Lane County where Lane Regional Air Pollution Control Authority has jurisdiction, and we are required to incorporate NSR requirements into the State Implementation Plan (SIP), Oregon's plan to ensure progress toward, or maintenance of, attainment of all National Ambient Air Quality Standards (NAAQS).

The proposed changes are needed as a follow-up to the air quality permit streamlining rules adopted in May 2001. That rulemaking included a

number of revisions to the NSR and air quality analysis provisions in the permitting rules. One of those revisions changed the method for determining if a major new or modified major source would harm air quality in an ozone nonattainment or maintenance area (an area that has violated the federal ambient air quality standard for ozone or smog). EPA objected to the old method because it did not adequately assess the effects of larger new emission sources that were further from the ozone area, which led to delays in issuing permits. The revised method, adopted in May 2001, uses size of the emissions increase and distance from the ozone area to evaluate the effect. Sources out to 100 kilometers from the area are subject to this evaluation. This change addressed EPA's concern and has enabled the Department to speed permit issuance.

Since the rule was adopted, the Department has been developing tools to simplify implementation of the revised air quality assessment method for major new or modified sources that may affect an ozone area. This includes guidance to assist the Department in reviewing assessments submitted by applicants as well as modeling studies to help identify areas where pollutants will and will not affect ozone areas. It also includes efforts to expand the availability of voluntary emission reductions that may be used as offsets when the air quality analysis shows that the increased emissions would affect an ozone area.

Much of this work to simplify implementing the revised air quality assessment method can be accomplished under the existing rules. However, a rule change is needed to allow offsets that provide a net air quality benefit in cases where the offsets come from outside of a designated ozone maintenance area. This change provides incentives for more voluntary emission reductions, by making reductions outside the area usable to offset effects inside the area, while expanding the pool of available offsets.

The proposed rule changes also clarify the air quality analysis requirements for NSR by making clear crosswalks between the NSR rules in Division 224 and air quality analysis rules in Division 225. Additional proposed changes include clarifying the rule language relating to creating and using offsets.

Effect of Rule

The major NSR and air quality analysis rules only apply to sources that plan to increase their emissions by a Significant Emission Rate as defined in OAR 340-200-0020. The proposed changes relating to ozone precursors only affect new and modified major sources of volatile organic compounds (VOC)

or nitrogen oxides (NOx) within 100 km of the Portland area and new or modified major sources of VOC only within 100 km of the Medford area. Specifically:

- The proposed changes allow offsets to come from outside an ozone maintenance area instead of only inside; therefore more offsets may be available.
- The proposed changes make clear connections between the NSR and air quality analysis rules.
- The proposed changes clarify the rules, but do not make them less stringent or change the universe of sources subject to these rules. Owners and operators will be able to understand the existing requirements more easily and reduce the time and effort associated with the permitting process.

Commission Authority

The Commission has authority to take this action under ORS 468.020.

Stakeholder Involvement

A formal advisory committee was not used to develop the proposed rule revisions because one was not needed to determine the directions of the proposed changes since this is a follow-up to prior rule changes and not a new concept. Stakeholders were involved both in this rulemaking and in the Air Quality permit streamlining rulemaking adopted in May 2001. This proposal is a follow-up on commitments made during the May 2001 rulemaking.

Public Comment

A public comment period extended from September 15, 2003 to October 30, 2003 and included public hearings in Portland and Medford. Written comments were received from two groups during the comment period. The comments generally supported the proposed rule revisions but suggested minor changes for clarity and consistency with federal requirements. Results of public input are provided in Attachment B.

Key Issues

No key issues were raised during the public comment period.

Next Steps

The proposed rule changes, if adopted, will be submitted to EPA as a revision to the Oregon SIP and implemented through the existing Air Contaminant Discharge Permit and Title V permitting programs. The proposed rule changes do not create any additional requirements on sources, but make emission offsets more consistently available. No training or mailing of notices to sources is anticipated, but sources that become subject to these rules will be informed about their options for offsets when they propose to submit a permit

application. Staff training will be conducted as needed to ensure consistent implementation of the rules.

Attachments

A. Proposed Rule Revisions
   1. Summary of Changes proposed in rule revisions
   2. OAR 340 division 224 (redline version)
   3. OAR 340 division 225 (redline version)
B. Summary of Public Comments and Agency Responses
C. Presiding Officer's Report on Public Hearings
D. Relationship to Federal Requirements Questions
E. Statement of Need and Fiscal and Economic Impact
F. Land Use Evaluation Statement

Approved:

Section:

Division:

Report Prepared By: David Kauth

Phone: 503-229-5655

Attachment A-1

SUMMARY OF CHANGES PROPOSED IN RULE REVISIONS
Air Quality New Source Review and Modeling
OAR 340 Divisions 224 and 225

340-224-0010 Applicability and General Prohibitions
Clarification added for determining which rules apply to each size of source.

340-224-0050 Requirements for Sources in Nonattainment Areas
Clarifies the size of sources that are subject to the specific provisions in the rule.

340-224-0070 Prevention of Significant Deterioration Requirements for sources in Attainment or Unclassified Areas
Clarifies the requirement to provide an Air Quality Benefit if the source affects an area that is designated nonattainment or maintenance.

340-224-0080 Exemptions
Changes "an applicable requirement" to " a National Ambient Air Quality Standard or applicable increment". This is for consistency with the federal requirements and to clarify the intent of the rule.

340-225-0020 Definitions
Clarification of definitions for consistency with the federal requirements and to detail the appropriate process for determining offset availability and requirements.

340-225-0090 Requirements for Demonstrating a Net Air Quality Benefit
Rule rewritten to clearly describe what is meant by Net Air Quality Benefit, when offsets are required and when growth allowance may be used.

DEPARTMENT OF ENVIRONMENTAL QUALITY

DIVISION 224

MAJOR NEW SOURCE REVIEW

340-224-0010

Applicability and General Prohibitions

(1) Within designated Nonattainment and Maintenance areas, t~~T~~his division applies to owners and operators of proposed major sources and major modifications of air contaminant sources. Within attainment and unclassifiable areas, this division applies to owners and operators of proposed Federal Major sources and major modifications at Federal Major sources. ~~It~~ This division does not apply to owners or operators of proposed non-major sources or non-major modifications. Such owners or operators are subject to other Department rules, including Highest and Best Practicable Treatment and Control Required (OAR 340-226-0100 through 340-226-0140), Notice of Construction and Approval of Plans (OAR 340-210-~~0200~~ 0205 through 340-210-0250), ACDPs (OAR 340 division 216), Emission Standards for Hazardous Air Contaminants (OAR 340 division 244), and Standards of Performance for New Stationary Sources (OAR 340 division 238).

(2) No owner or operator may begin construction of a major source or a major modification of an air contaminant source without having received an air contaminant discharge permit (ACDP) from the Department and having satisfied the requirements of this division.

[**NOTE:** This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the EQC under OAR 340-200-0040.]

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 468A.025
Hist.: DEQ 25-1981, f. & ef. 9-8-81; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 12-1993, f. & cert. ef. 9-24-93; Renumbered from 340-020-0220; DEQ 19-1993, f. & cert. ef. 11-4-93; DEQ 26-1996, f. & cert. ef. 11-26-96; DEQ 14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-028-1900; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01

340-224-0020

Definitions

The definitions in OAR 340-200-0020, 340-204-0010 and this rule apply to this division. If the same term is defined in this rule and OAR 340-200-0020 or 340-204-0010, the definition in this rule applies to this division.

[**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 468.020
Stats. Implemented: ORS 468A.025
Hist.: DEQ 14-1999, f. & cert. ef. 10-14-99

340-224-0030

Procedural Requirements

(1) Information Required. The owner or operator of a proposed major source or major modification must submit all information the Department needs to perform any analysis or make any determination required under this division and OAR 340 division 225. The information must be in writing on forms supplied by the Department and include the information for a ~~standard~~ Standard ACDP as detailed in OAR 340 division 216.

(2) Other Obligations:

(a) Approval to construct becomes invalid if construction is not commenced within 18 months after the Department issues such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within 18 months of the scheduled time. The Department may extend the 18-month period for good cause. This provision does not apply to the time period between construction of the approved phases of a phased construction project; each phase must commence construction within 18 months of the projected and approved commencement date;

(b) Approval to construct does not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the State Implementation Plan and any other requirements under local, state or federal law;

(c) Approval to construct a source under an ACDP issued under paragraph (3)(b) of this rule authorizes construction and operation of the source, except as prohibited in subsection (d) of this rule, until the later of:

(A) One year from the date of initial startup of operation of the major source or major modification; or

(B) If a timely and complete application for an Oregon Title V Operating Permit is submitted, the date of final action by the Department on the Oregon Title V Operating Permit application.

(d) Where an existing Oregon Title V Operating Permit would prohibit construction or change in operation, the owner or operator must obtain a permit revision before commencing construction or operation.

(3) Application Processing:

(a) Within 30 days after receiving an application to construct, or any addition to such application, the Department will advise the applicant of any deficiency in the application or in the information submitted. For purposes of this section, the date the Department received a complete application is the date on which the Department received all required information;

(b) Notwithstanding the requirements of OAR 340-216-0040 or OAR 340-218-0040, concerning permit application requirements, the Department will make a final determination on the application within six months after receiving a complete application. This involves performing the following actions in a timely manner:

(A) Making a preliminary determination whether construction should be approved, approved with conditions, or disapproved;

(B) Making the proposed permit available in accordance with the public participation procedures required by OAR 340 division 209 for Category IV. Extension of Construction Permits beyond the 18-month time period in paragraph (2)(a) of this rule are available in accordance with the public participation procedures required by Category II in lieu of Category IV.

[**NOTE:** This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the EQC under OAR 340-200-0040.]

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 468A.025
Hist.: DEQ 25-1981, f. & ef. 9-8-81; DEQ 18-1984, f. & ef. 10-16-84; DEQ 13-1988, f. & cert. ef. 6-17-88; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 12-1993, f. & cert. ef. 9-24-93; Renumbered from 340-020-0230; DEQ 19-1993, f. & cert. ef. 11-4-93; DEQ 24-1994, f. & cert. ef. 10-28-94; DEQ 22-1995, f. & cert. ef. 10-6-95; DEQ 26-1996, f. & cert. ef. 11-26-96; DEQ 14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-028-1910; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01

340-224-0040

Review of New Sources and Modifications for Compliance With Regulations

The owner or operator of a proposed major source or major modification must demonstrate the ability of the proposed source or modification to comply with all applicable air quality requirements of the Department.

[**NOTE:** This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the EQC under OAR 340-200-0040.]

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 468A.025
Hist.: DEQ 25-1981, f. & ef. 9-8-81; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 12-1993, f. & cert. ef. 9-

24-93; Renumbered from 340-020-0235; DEQ 26-1996, f. & cert. ef. 11-26-96; DEQ 14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-028-1920; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01

340-224-0050

Requirements for Sources in Nonattainment Areas

Proposed major sources and major modifications that would emit a nonattainment pollutant within a designated nonattainment area, including VOC or NO_x in a designated Ozone Nonattainment Area must meet the requirements listed below:

(1) Lowest Achievable Emission Rate (LAER). The owner or operator must demonstrate that the source or modification will comply with the LAER for each nonattainment pollutant emitted at or above the significant emission rate (SER).

(a) For a major modification, the requirement for LAER applies only to each emissions unit that emits the pollutant in question and was installed since the baseline period or the most recent New Source Review construction approval for that pollutant, and to each modified emission unit that increases actual emissions of the pollutant in question above the netting basis.

(b) For phased construction projects, the LAER determination must be reviewed at the latest reasonable time before commencing construction of each independent phase.

(c) When determining LAER for a change that was made at a source before the current NSR application, the Department will consider technical feasibility of retrofitting required controls provided:

(A) the change was made in compliance with NSR requirements in effect when the change was made, and

(B) no limit will be relaxed that was previously relied on to avoid NSR.

(d) Individual modifications with potential to emit less than 10 percent of the SER are exempt from this section unless:

(A) they are not constructed yet;

(B) they are part of a discrete, identifiable, larger project that was constructed within the previous 5 years and is equal to or greater than 10 percent of the SER; or

(C) they were constructed without, or in violation of, the Department's approval.

(2) Offsets and Net Air Quality Benefit. The owner or operator must obtain offsets and demonstrate that a net air quality benefit will be achieved as specified in OAR 340-225-0090.

(3) Additional Requirements for Federal Major Sources:

(a) The owner or operator of a ~~federal major~~ source that emits or has the potential to emit 100 tons per year of any regulated NSR pollutant must evaluate alternative sites, sizes, production processes, and environmental control techniques for the proposed source or modification and demonstrate that benefits of the proposed source or modification will significantly outweigh the environmental and social costs imposed as a result of its location, construction or modification.

(b) The owner or operator of ~~the~~a ~~federal major~~ source that emits or has the potential to emit 100 tons per year of any regulated NSR pollutant ~~-~~must demonstrate that all major sources owned or operated by such person (or by an entity controlling, controlled by, or under common control with such person) in the state are in compliance, or are on a schedule for compliance, with all applicable emission limitations and standards under the Act.

(c) The owner or operator of a federal major source must meet the visibility impact requirements in OAR 340-225-0070.

(4) Special Exemption for the Salem Ozone Nonattainment area. Proposed major sources and major modifications located in or that impact the Salem Ozone Nonattainment Area are exempt from OAR 340-225-0090 and section (2) of this rule for VOC and NO_x emissions with respect to ozone formation in the Salem Ozone Nonattainment area.

[**NOTE:** this rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the EQC under OAR 340-200-0040.]

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 468A.025
Hist.: DEQ 25-1981, f. & ef. 9-8-81; DEQ 5-1983, f. & ef. 4-18-83; DEQ 27-1992, f. & cert. ef. 11-12-92; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 12-1993, f. & cert. ef. 9-24-93; Renumbered from 340-020-0240; DEQ 19-1993, f. & cert. ef. 11-4-93; DEQ 10-1995, f. & cert. ef. 5-1-95; DEQ 22-1995, f. & cert. ef. 10-6-95; DEQ 26-1996, f. & cert. ef. 11-26-96; DEQ 16-1998, f. & cert. ef. 9-23-98; DEQ 1-1999, f. & cert. ef.1-25-99; DEQ 14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-028-1930; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01

340-224-0060

Requirements for Sources in Maintenance Areas

Proposed major sources and major modifications that would emit a maintenance pollutant within a designated maintenance area, including VOC or NOx in a designated ozone maintenance area, must meet the requirements listed below:

(1) Best Available Control Technology (BACT). Except as provided in section (5) of this rule, the owner or operator must apply BACT for each maintenance pollutant emitted at a SER.

(a) For a major modification, the requirement for BACT applies only to:

(A) Each new emissions unit that emits the pollutant in question and was installed since the baseline period or the most recent New Source Review construction approval for that pollutant; and

(B) Each modified emissions unit that increases the actual emissions of the pollutant in question above the netting basis.

(b) For phased construction projects, the BACT determination must be reviewed at the latest reasonable time before commencement of construction of each independent phase.

(c) When determining BACT for a change that was made at a source before the current NSR application, the technical and economic feasibility of retrofitting required controls may be considered, provided:

(A) The change was made in compliance with NSR requirements in effect when the change was made; and

(B) No limit is being relaxed that was previously relied on to avoid NSR.

(d) Individual modifications with potential to emit less than 10 percent of the significant emission rate are exempt from this section unless:

(A) They are not constructed yet;

(B) They are part of a discrete, identifiable larger project that was constructed within the previous 5 years and that is equal to or greater than 10 percent of the significant emission rate; or

(C) They were constructed without, or in violation of, the Department's approval.

(2) Air Quality Protection:

(a) Offsets and Net Air Quality Benefit. Except as provided in subsections (b), (c) and (d) of this section, the owner or operator must obtain offsets and demonstrate that a net air quality benefit will be achieved in the area as specified in OAR 340-225-0090.

(b) Growth Allowance. The requirements of this section may be met in whole or in part in an ozone or carbon monoxide maintenance area with an allocation by the Department from a growth allowance, if available, in accordance with the applicable maintenance plan in the SIP adopted by the Commission and approved by EPA. An allocation from a growth allowance used to meet the requirements of this section is not subject to OAR 340-225-0090. Procedures for allocating the growth allowances for the Oregon portion of the Portland-Vancouver Interstate Maintenance Area for Ozone and the Portland Maintenance Area for Carbon Monoxide are contained in OAR 340-242-0430 and 340-242-0440.

(c) In a carbon monoxide maintenance area, a proposed carbon monoxide major source or major modification is exempt from subsections (a) and (b) of this section if the owner or operator can demonstrate that the source or modification will not cause or contribute to an air quality impact equal to or greater than 0.5 mg/m3 (8 hour average) and 2 mg/m3 (1-hour average). The demonstration must comply with the requirements of OAR 340-225-0045.

(d) In a PM10 maintenance area, a proposed PM10 major source or major modification is exempt from subsection (a) of this section if the owner or operator can demonstrate that the source or modification will not cause or contribute to an air quality impact in excess of:

(A) 120 µg/m3 (24-hour average) or 40 µg/m3 (annual average) in the Grants Pass PM10 maintenance area, or

(B) 140 µg/m3 (24-hour average) or 47 µg/m3 (annual average) in the Klamath Falls PM10 maintenance area. The demonstration must comply with the requirements of OAR 340-225-0045.

(3) The owner or operator of a source subject to this rule must provide an air quality analysis in accordance with OAR 340-225-0050(1) and (2), and 340-225-0060.

(4) Additional Requirements for Federal Major Sources: The owner or operator of a federal major source subject to this rule must provide an analysis of the air quality impacts for the proposed source or modification in accordance with OAR 340-225-0050(3) and 340-225-0070.

(5) Contingency Plan Requirements. If the contingency plan in an applicable maintenance plan is implemented due to a violation of an ambient air quality standard, this section applies in addition to other requirements of this rule until the Commission adopts a revised maintenance plan and EPA approves it as a SIP revision.

(a) The requirement for BACT in section (1) of this rule is replaced by the requirement for LAER contained in OAR 340-224-0050(1).

(b) An allocation from a growth allowance may not be used to meet the requirement for offsets in section (2) of this rule.

(c) The exemption provided in subsection (2)(c) and (2)(d) of this rule for major sources or major modifications within a carbon monoxide or PM10 maintenance area no longer applies.

(6) Pending Redesignation Requests. This rule does not apply to a proposed major source or major modification for which a complete application to construct was submitted to the Department before the maintenance area was redesignated from nonattainment to attainment by EPA. Such a source is subject to OAR 340-224-0050.

[**NOTE:** This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the EQC under OAR 340-200-0040]

[Publications: Publications referenced in this rule are available from the agency.]

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 468A.025
Hist.: DEQ 26-1996, f. & cert. ef. 11-26-96; DEQ 15-1998, f. & cert. ef. 9-23-98; DEQ 1-1999, f. & cert. ef. 1-25-99; DEQ 14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-028-1935; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01; DEQ 11-2002, f. & cert. ef. 10-8-02

340-224-0070

Prevention of Significant Deterioration Requirements for Sources in Attainment or Unclassified Areas

Proposed new federal major sources or major modifications at federal major sources locating in areas designated attainment or unclassifiable must meet the following requirements:

(1) Best Available Control Technology (BACT). The owner or operator of the proposed major source or major modification must apply BACT for each pollutant emitted at a SER over the netting basis.

(a) For a major modification, the requirement for BACT applies only to:

(A) Each new emissions unit that emits the pollutant in question and was installed since the baseline period or the most recent New Source Review construction approval for that pollutant and

(B) Each modified emissions unit that increases the actual emissions of the pollutant in question above the netting basis.

(b) For phased construction projects, the BACT determination must be reviewed at the latest reasonable time before commencement of construction of each independent phase.

(c) When determining BACT for a change that was made at a source before the current NSR application, any additional cost of retrofitting required controls may be considered provided:

(A) The change was made in compliance with NSR requirements in effect at the time the change was made, and

(B) No limit is being relaxed that was previously relied on to avoid NSR.

(d) Individual modifications with potential to emit less than 10 percent of the significant emission rate are exempt from this section unless:

(A) They are not constructed yet;

(B) They are part of a discrete, identifiable larger project that was constructed within the previous 5 years and that is equal to or greater than 10 percent of the significant emission rate; or

(C) They were constructed without, or in violation of, the Department's approval.

(2) Air Quality Analysis: The owner of operator of a source subject to this rule must provide an analysis of the air quality impacts for the proposed source or modification in accordance with OAR 340-225-0050 through 340-225-0070. The owner or operator of any source subject to this rule that significantly affects air quality in a designated nonattainment or maintenance area must meet the requirements of net air quality benefit in OAR 340-225-0090.

(3) Air Quality Monitoring: The owner or operator of a source subject to this rule must conduct ambient air quality monitoring in accordance with the requirements in OAR 340-225-0050.

(4) The owner or operator of a source subject to this rule and significantly impacting a PM10 maintenance area (significant air quality impact is defined in OAR 340-200-0020), must comply with the requirements of OAR 340-224-0060(2).

[**NOTE:** This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the EQC under OAR 340-200-0040]

[Publications: Publications referenced in this rule are available from the agency.]

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 468A.025
Hist.: DEQ 25-1981, f. & ef. 9-8-81; DEQ 5-1983, f. & ef. 4-18-83; DEQ 18-1984, f. & ef. 10-16-84; DEQ 14-1985, f. & ef. 10-16-85; DEQ 5-1986, f. & ef. 2-21-86; DEQ 8-1988, f. & cert. ef. 5-19-88 (and corrected 5-31-88); DEQ 27-1992, f. & cert. ef. 11-12-92; Section (8) Renumbered from 340-020-0241; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 12-1993, f. & cert. ef. 9-24-93; Renumbered from 340-020-0245; DEQ 19-1993, f. & cert. ef. 11-4-93; DEQ 26-1996, f. & cert. ef. 11-26-96; DEQ 16-1998, f. & cert. ef. 9-23-98; DEQ 1-1999, f. & cert. ef. 1-25-99; DEQ 14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-028-1940; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01; DEQ 11-2002, f. & cert. ef. 10-8-02

340-224-0080

Exemptions

Temporary emission sources that would be in operation at a site for less than two years, such as pilot plants and portable facilities, and emissions resulting from the construction phase of a new source or modification must comply with OAR 340-224-0050(1), OAR 340-224-0060(1) or OAR 340-224-0070(1), whichever is applicable, but are exempt from the remaining requirements of OAR 340-224-0050, OAR 340-224-0060 and OAR 340-224-0070 provided that the source or modification would not impact a Class I area or an area with a known violation of ~~an applicable requirement~~a National Ambient Air Quality Standard (NAAQS) or an applicable increment as defined in OAR 340 division 202.

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

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468 & ORS 468A
Hist.: DEQ 25-1981, f. & ef. 9-8-81; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 12-1993, f. & cert. ef. 9-24-93; Renumbered from 340-020-0250; DEQ 19-1993, f. & cert. ef. 11-4-93; DEQ 22-1995, f. & cert. ef. 10-6-95; DEQ 14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-028-1950; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01

340-224-0090 [Renumbered to 340-225-0090]

340-224-0100

Fugitive and Secondary Emissions

Fugitive emissions are included in the calculation of emission rates of all air contaminants. Fugitive emissions are subject to the same control requirements and analyses required for emissions from identifiable stacks or vents. Secondary emissions are not included in calculations of potential emissions that are made to determine if a proposed source or modification is major. Once a source or modification is identified as being major, secondary emissions are added to the primary emissions and become subject to the air quality impact analysis requirements in this division and OAR 340 division 225.

[**NOTE:** This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the EQC under OAR 340-200-0040.]

Stat. Auth.: ORS 468 & ORS 468A
Stats. Implemented: ORS 468 & ORS 468
Hist.: DEQ 25-1981, f. & ef. 9-8-81; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 12-1993, f. & cert. ef. 9-24-93; Renumbered from 340-020-0270; DEQ 14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-028-1990; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01

340-224-0110 [Renumbered to 340-225-0070]

CMT Recommendation:
Implement Cross-Program Technical Assistance (TA)

Goal: Improve customer service and achieve greater coordination, communication, efficiency, and measurable environmental results through enhanced cross-program integration of agency business assistance efforts.

Benefits	▪ Initiates/advances more systematic cross-program coordination and collaboration. ▪ Creates expectations/benchmarks to integrate cross-program partnership approaches. ▪ Makes use of existing regional cross-program structures; does not require restructuring or a major investment of resources. ▪ Improves communication and coordination within and between programs. ▪ Provides forum for planning coordinated field strategies to implement agency priorities.	
Recommended Actions:	**1. Form an Agency TA Priorities Subcommittee.**	▪ Use for planning, information sharing, and for assisting in prioritizing field work, particularly related to the Toxics Strategy. ▪ Include TA representatives from media programs and regions, including water; assign a TA Priorities Subcommittee team leader.
	2. Designate a Management Level TA Champion.	▪ Provides for (executive) management leadership in the agency's TA efforts. ▪ Advocates for TA, promote direct management and DA support of cross program TA. ▪ Establishes regional TA partnership benchmarks and supports development of measures. ▪ May take lead in evaluating and developing centralized TA data system.
	3. Conduct routinely-scheduled meetings of all TA service providers.	▪ Focus on implementation issues, including case studies, training, strategizing, prioritizing efforts and various topics of interest (e.g., "getting your foot in the door"). ▪ Integrate expectations into Strategic Plan and work plans.
	4. Utilize/refine regional structure to implement cross program TA teams.	▪ Develop regional cross program TA teams /monthly meetings. ▪ Utilize existing cross program structures in regions; add members of programs outside of regional teams as necessary. ▪ Enlist Public Affairs assistance with marketing and promoting TA. ▪ Incorporate minimum performance expectations for cross program efforts into TA staff and managers' work plans.
	5. Measure results.	▪ Adopt measures that reflect all media.

DEPARTMENT OF ENVIRONMENTAL QUALITY

DIVISION 225

AIR QUALITY ANALYSIS REQUIREMENTS

340-225-0010

Purpose

This division contains the definitions and requirements for air quality analysis referred to in OAR 340 divisions 200 through 268. It does not apply unless a rule in another division refers the reader here. For example, divisions 222 (Stationary Source Plant Site Emissions Limits) and 224 (Major New Source Review) refer the reader to provisions in this division for specific air quality analysis requirements.

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 468A
Hist.: DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01

340-225-0020

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) "Allowable Emissions" means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(a) The applicable standards as set forth in 40 CFR parts 60 ~~and~~, 61 and 63;

(b) The applicable State Implementation Plan emissions limitation, including those with a future compliance date; or

(c) The emissions rate specified as a federally enforceable permit condition.

(2) "Background Light Extinction" means the reference levels (Mm-1) shown in the estimates of natural conditions as referenced in the FLAG to be representative of the PSD Class I or Class II area being evaluated.

(3) "Baseline Concentration" means:

(a) Except as provided in subsection (c), the ambient concentration level for sulfur dioxide and PM10 that existed in an area during the calendar year 1978. If no ambient air quality data is available in an area, the baseline concentration may be estimated using modeling based on actual emissions for 1978. Actual emission increases or decreases occurring before January 1, 1978 must be included in the baseline calculation, except that actual emission increases from any source or modification on which construction commenced after January 6, 1975 must not be included in the baseline calculation;

(b) The ambient concentration level for nitrogen oxides that existed in an area during the calendar year 1988.

(c) For the area of northeastern Oregon within the boundaries of the Umatilla, Wallowa-Whitman, Ochoco, and Malheur National Forests, the ambient concentration level for PM10 that existed during the calendar year 1993. The Department may allow the source to use an earlier time period if the Department determines that it is more representative of normal emissions.

(4) "Competing PSD Increment Consuming Source Impacts" means the total modeled concentration above the modeled Baseline Concentration resulting from increased emissions of all other sources since the baseline concentration year that are within the Range of Influence of the source in question. Allowable Emissions may be used as a conservative estimate, in lieu of Actual Emissions, ~~may be used if~~ in this analysis.

~~includes all emissions changes from all point, area, and mobile sources, otherwise Allowable Emissions must be used.~~

(5) "Competing NAAQS Source Impacts" means total modeled concentration resulting from allowable emissions of all other sources that are within the Range of Influence of the source in question.

(6) "FLAG " refers to the Federal Land Managers' Air Quality Related Values Work Group Phase I Report. See 66 Federal Register 2, January 3, 2001 at 382~~&endash~~ to ~~;~~383.

(7) "General Background Concentration" means impacts from natural sources and unidentified sources that were not explicitly modeled. The Department may determine this as site-specific ambient monitoring or representative ambient monitoring from another location.

(8) "Predicted Maintenance Area Concentration" means the future year ambient concentration predicted in the applicable maintenance plan. The future year (2015) concentrations to be used for Grants Pass UGB are 89 µg/m3 (24-hour average) and 21 µg/m3 (annual average). Future year (2015) concentrations to be used for Klamath Falls UGB are 114 µg/m3 (24-hour average) and 25 µg/m3 (annual average).

(9) "Nitrogen Deposition" means the sum of anion and cation nitrogen deposition expressed in terms of the mass of total elemental nitrogen being deposited. As an example, Nitrogen Deposition for NH4NO3 is 0.3500 times the weight of NH4NO3 being deposited.

(10) "Ozone Precursor ~~Significant Impact~~ Distance" means the distance in kilometers from the nearest boundary of a designated ozone nonattainment or maintenance area within which a major new or modified source of VOC or NOx is considered to significantly affect that designated area. The determination of significance is made by either the formula method or the demonstration method.

(a) The Formula Method.

(A) For sources with complete permit applications submitted before January 1, 2003:

D = 30 km

(B) For sources with complete permit applications submitted on or after January 1, 2003:

D = (Q/40) x 30 km

(C) D is the Ozone Precursor Distance in kilometers. The value for D is 100 kilometers when D is calculated to exceed 100 kilometers. Q is the larger of the NOx or VOC emissions increase from the source being evaluated in tons/year, and is quantified relative to the netting basis.

(D) If a source is located at a distance less than D from the designated area, the source is considered to have a significant effect on the designated area. If the source is located at a distance equal to or greater than D, it is not considered to have a significant effect.

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~~(a) 30 kilometers for sources with permit applications deemed complete before January 1, 2004 that would impact the nonattainment area or maintenance area and have proposed emissions increases above the Significant Emission Rates for VOCs or NOx. These emissions increases are quantified relative to the baseline year or the date of the last PSD approval.~~

~~(b) For sources with permit applications deemed complete on or after January 1, 2004, the distance in kilometers from the source being evaluated to the closest boundary of an ozone nonattainment area or ozone maintenance area and is defined as follows. This equation applies only to sources that would impact ozone concentrations in the nonattainment area or maintenance area and have proposed emissions increases above the Significant Emission Rates for VOCs or NOx. D = [(Q)/40]*30 km. (30 km. < = D < = 100 km.) where: Q = the larger of NOx or VOC emissions increase from the source being evaluated in tons/year. This emissions increase is quantified relative to the baseline year or the date of the last PSD approval occurring since the baseline year or the date of the last PSD approval. D = the Ozone Precursor Significant Impact Distance in kilometers. The minimum value for D is 30 kilometers when D is calculated to be less than 30 kilometers.~~

(b) The Demonstration Method.

An applicant may demonstrate to the Department that the source or proposed source would not significantly impact a nonattainment area or maintenance area. This demonstration may be based on an analysis of major topographic features, dispersion modeling, meteorological conditions, or other factors. If the Department determines that the source or proposed source would not significantly impact the nonattainment area or maintenance area under high ozone conditions, the Ozone Precursor ~~Significant Impact~~ Distance is zero kilometers.

(11) "Ozone Precursor Offsets" means the emission reductions required to offset emission increases from a major new or modified source located inside the designated nonattainment or maintenance

area or within the Ozone Precursor Distance. Emission reductions must come from within the designated area or from within the Ozone Precursor Distance of the offsetting source as described in OAR 340-225-0090. The offsets determination is made by either the formula method or the demonstration method.

(a) The Formula Method.

(A) Required offsets (RO) for new or modified sources are determined as follows:

(i) For sources with complete permit applications submitted before January 1, 2003:

RO = SQ

(ii) For sources with complete permit applications submitted on or after January 1, 2003:

RO = (SQ minus (40/30 * SD))

(B) Contributing sources may provide offsets (PO) calculated as follows:

PO = CQ minus (40/30 * CD)

(C) Multiple sources may contribute to the required offsets of a new source. For the formula method to be satisfied, total provided offsets (PO) must equal or exceed the required offset (RO).

(D) Definitions of factors used in paragraphs (A) (B) and (C) of this subsection:

(i) RO is the required offset of NOx or VOC in tons per year as a result of the source emissions increase. If RO is calculated to be negative, RO is set to zero;

(ii) SQ is the source emissions increase of NOx or VOC in tons per year above the netting basis;

(iii) SD is the source distance in kilometers to the nonattainment or maintenance area. SD is zero for sources located within the nonattainment or maintenance area.

(iv) PO is the provided offset from a contributing source and must be equal to or greater than zero;

(v) CQ is the contributing emissions reduction in tons per year quantified relative to contemporaneous pre-reduction actual emissions (OAR 340-268-0030(1)(b)).

(vi) CD is the contributing source distance in kilometers to the nonattainment or maintenance area. For a contributing source located within the nonattainment or maintenance area, CD equals zero.

(b) The Demonstration Method.

An applicant may demonstrate to the Department using dispersion modeling or other analyses the level and location of offsets that would be sufficient to provide actual reductions in concentrations of VOC or NOx in the designated area during high ozone conditions. The modeled reductions of ambient VOC or NOx concentrations resulting from the emissions offset must be demonstrated over a greater area and over a greater period of time within the designated area as compared to the modeled ambient VOC or NOx concentrations resulting from the emissions increase from the source subject to this rule. If the Department determines that the demonstration is acceptable, then the Department will approve the offsets proposed by the applicant. The demonstration method does not apply to sources located inside an ozone nonattainment area.

(~~11~~12) "Range of Influence (ROI)" means:

(a) For PSD Class II and Class III areas, the Range of Influence of a competing source (in kilometers) is defined by: ~~[Table not printed, See Ed. Note.]~~

(A) ROI (km) = Q (tons/year) / K (tons/year km).

(B) Definition of factors used in paragraph (A) of this subsection:

(i) ROI is the distance a source has an effect on an area and is compared to the distance from a potential competing source to the Significant Impact Area of a proposed new source. Maximum ROI is 50 km, however the Department may request that sources at a distance greater than 50 km be included in a competing source analysis.

(ii) Q is the emission rate of the potential competing source in tons per year.

(iii) K (tons/year km) is a pollutant specific constant as defined in the table below:

Pollutant	PM10	SOx	NOx	CO	Lead
K	5	5	10	40	0.15

(b) For PSD Class I areas, the Range of Influence of a competing source includes emissions from all sources that occur within the modeling domain of the source being evaluated. The Department determines the modeling domain on a case-by-case basis.

(~~12~~13) "Source Impact Area" means a circular area with a radius extending from the source to the largest distance to where predicted impacts from the source or modification equal or exceed the Significant Air Quality Impact levels set out in Table 1 of OAR 340 division 200. This definition only applies to PSD Class II areas and is not intended to limit the distance for PSD Class I modeling.

(~~13~~14) "Sulfur Deposition" means the sum of anion and cation sulfur deposition expressed in terms of the total mass of elemental sulfur being deposited. As an example, sulfur deposition for (NH4)2SO4 is 0.2427 times the weight of (NH4)2SO4 being deposited.

~~[ED. NOTE: Tables referenced in this rule are available from the agency.]~~

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 468A
Hist.: DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01; DEQ 11-2002, f. & cert. ef. 10-8-02; DEQ 12-2002(Temp), f. & cert. ef. 10-8-02 thru 4-6-03

340-225-0030

Procedural Requirements

Information Required. In addition to the requirements defined in OAR 340-216-0040, the owner or operator of a source (where required by divisions 222 or 224) must submit all information necessary to perform any analysis or make any determination required under these rules. Such information must include, but is not limited to:

(1) Emissions data for all existing and proposed emission points from the source or modification. This data must represent maximum emissions for the following averaging times by pollutant: [Table not included. See ED. NOTE.]

(2) Stack parameter data (height above ground, exit diameter, exit velocity, and exit temperature data for all existing and proposed emission points from the source or modification;

(3) An analysis of the air quality and visibility impact of the source or modification, including meteorological and topographical data, specific details of models used, and other information necessary to estimate air quality impacts; and

(4) An analysis of the air quality and visibility impacts, and the nature and extent of all commercial, residential, industrial, and other source emission growth, that has occurred since January 1, 1978, in the area the source or modification would significantly affect.

[ED. NOTE: The Table referenced in this rule is not printed in the OAR Compilation. Copies are available from the agency.]

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 468A
Hist.: DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01

340-225-0040

Air Quality Models

All modeled estimates of ambient concentrations required under this rule must be based on the applicable air quality models, data bases, and other requirements specified in 40 CFR Part 51, Appendix W, "Guidelines on Air Quality Models (Revised)" (July 1, 2000). Where an air quality impact model specified in 40 CFR Part 51, Appendix W is inappropriate, the methods published in the FLAG are generally preferred for analyses in PSD Class I areas. Where an air quality impact model specified in 40 CFR Part 51, Appendix W is inappropriate in PSD Class II and III areas, the model may be modified or another model substituted. Any change or substitution from models specified in 40 CFR Part 51, Appendix W is subject to notice and opportunity for public comment and must receive prior written approval from the Department and the EPA. Where necessary, methods like those outlined in the "Interim Procedures for Evaluating Air Quality Models (Revised)" (U.S. Environmental Protection Agency, 1984) provide guidance in determining the comparability of models.

[Publications: The publications referenced in this rule are available from the agency.]

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 468A
Hist.: DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01

340-225-0045

Requirements for Analysis in Maintenance Areas

Modeling: For determining compliance with the limits established in OAR 340-224-0060(2)(c) and (2)(d), NAAQS, and PSD Increments, the following methods must be used:

(1) A single source impact analysis is sufficient to show compliance with standards, PSD increments, and limits if modeled impacts from the source being evaluated are less than the Significant Air Quality Impact levels specified in OAR 340-200-0020, Table 1 for all maintenance pollutants.

(2) If the above requirement is not satisfied, the owner or operator of a proposed source or modification being evaluated must perform competing source modeling as follows:

(a) For demonstrating compliance with the maintenance area limits established in OAR 340-224-0060(2)(c) and (2)(d), the owner or operator of a proposed source or modification must show that modeled impacts from the proposed increased emissions plus Competing Source Impacts, plus predicted maintenance area concentration are less than the limits for all averaging times.

(b) For demonstrating compliance with the NAAQS, the owner or operator of a proposed source must show that the total modeled impacts plus total Competing NAAQS Source Impacts plus General Background Concentrations are less than the NAAQS for all averaging times.

(c) For demonstrating compliance with the PSD Increments (as defined in OAR 340-202-0210, Table 1), the owner or operator of a proposed source or modification must show that modeled impacts from the proposed increased emissions (above the baseline concentration) plus competing PSD Increment Consuming Source Impacts (above the baseline concentration) are less than the PSD increments for all averaging times.

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 468A, 468A.025, 468A.035
Hist.: DEQ 11-2002, f. & cert. ef. 10-8-02

340-225-0050

Requirements for Analysis in PSD Class II and Class III Areas

Modeling: For determining compliance with the NAAQS and PSD Increments in PSD Class II and Class III areas, the following methods must be used:

(1) A single source impact analysis is sufficient to show compliance with standards and increments if modeled impacts from the source being evaluated are less than the Significant Air Quality Impact levels specified in OAR 340-200-0020, Table 1 for all pollutants.

(2) If the above requirement is not satisfied, the owner or operator of a proposed source or modification being evaluated must perform competing source modeling as follows:

(a) For demonstrating compliance with the PSD Increments (as defined in OAR 340-202-0210, Table 1), the owner or operator of a proposed source or modification must show that modeled impacts from the proposed increased emissions (above the modeled Baseline Concentration) plus Competing PSD Increment Consuming Source Impacts (above the modeled Baseline Concentration) are less than the PSD increments for all averaging times.

(b) For demonstrating compliance with the NAAQS, the owner or operator of a proposed source must show that the total modeled impacts plus total Competing NAAQS Source Impacts plus General Background Concentrations are less than the NAAQS for all averaging times.

(3) Additional Impact Modeling:

(a) When referred to this rule by divisions 222 or 224, the owner or operator of a source must provide an analysis of the impairment to visibility, soils and vegetation that would occur as a result of the source or modification, and general commercial, residential, industrial and other growth associated with the source or modification. As a part of this analysis, deposition modeling analysis is required for sources emitting heavy metals above the significant emission rates as defined in OAR 340-200-0020, Table 2. Concentration and deposition modeling may also be required for sources emitting other compounds on a case-by-case basis;

(b) The owner or operator must provide an analysis of the air quality concentration projected for the area as a result of general commercial, residential, industrial and other growth associated with the source or modification.

(4) Air Quality Monitoring:

(a)(A) When referred to this rule by division 224, the owner or operator of a source must submit with the application an analysis of ambient air quality in the area impacted by the proposed project. This analysis, which is subject to the Department's approval, must be conducted for each pollutant potentially emitted at a significant emission rate by the proposed source or modification. The analysis must include continuous air quality monitoring data for any pollutant that may be emitted by the source or modification, except for volatile organic compounds. The data must relate to the year preceding receipt of the complete application and must have been gathered over the same time period. The Department may allow the owner or operator to demonstrate that data gathered over some other time period would be adequate to determine that the source or modification would not cause or contribute to a violation of an ambient air quality standard or any applicable pollutant increment. Pursuant to the requirements of these rules, the owner or operator must submit for the Department's approval, a preconstruction air quality monitoring plan. This plan must be submitted in writing at least 60 days prior to the planned beginning of monitoring and approved in writing by the Department before monitoring begins.

(B) Required air quality monitoring must be conducted in accordance with 40 CFR 58 Appendix B, "Quality Assurance Requirements for Prevention of Significant Deterioration (PSD) Air Monitoring" (July 1, 2000) and with other methods on file with the Department.

(C) The Department may exempt the owner or operator of a proposed source or modification from preconstruction monitoring for a specific pollutant if the owner or operator demonstrates that the air quality impact from the emissions increase would be less than the amounts listed below or that modeled competing source concentration (plus General Background Concentration) of the pollutant within the Source Impact Area are less than the following significant monitoring concentrations:

(i) Carbon monoxide ~~&endash;~~ 575 ug/m3, 8 hour average;

(ii) Nitrogen dioxide ~~&endash;~~ 14 ug/m3, annual average;

(iii) PM10 ~~&endash;~~ 10 ug/m3, 24 hour average.

(iv) Sulfur dioxide ~~&endash;~~ 13 ug/m3, 24 hour average;

(v) Ozone ~~&endash;~~ Any net increase of 100 tons/year or more of VOCs from a source or modification subject to PSD requires an ambient impact analysis, including the gathering of ambient air quality data. However, requirement for ambient air monitoring may be exempted if existing representative monitoring data shows maximum ozone concentrations are less than 50% of the ozone NAAQS based on a full season of monitoring;

(vi) Lead ~~&endash;~~ 0.1 ug/m3, 24 hour average;

(vii) Fluorides ~~&endash;~~ 0.25 ug/m3, 24 hour average;

(viii) Total reduced sulfur ~~&endash;~~ 10 ug/m3, 1 hour average;

(ix) Hydrogen sulfide ~~&endash;~~ 0.04 ug/m3, 1 hour average;

(x) Reduced sulfur compounds ~~&endash;~~ 10 ug/m3, 1 hour average.

(D) The Department may allow the owner or operator of a source (where required by divisions 222 or 224) to substitute post construction monitoring for the requirements of (4)(a)(A) for a specific pollutant if the owner or operator demonstrates that the air quality impact from the emissions increase would not cause or contribute to an exceedance of any air quality standard. This analysis must meet the requirements of 340-225-0050(2)(b) and must use representative or conservative General Background Concentration data.

(E) When PM10 preconstruction monitoring is required by this section, at least four months of data must be collected, including the season(s) the Department judges to have the highest PM10 levels. PM10 must be measured in accordance with 40 CFR part 50, Appendix J (July 1, 1999). In some cases, a full year of data will be required.

(b) After construction has been completed, the Department may require ambient air quality monitoring as a permit condition to establish the effect of emissions, other than volatile organic compounds, on the air quality of any area that such emissions could affect.

[ED. NOTE: Tables referenced in this rule are available from the agency.]

[Publications: Publications referenced in this rule are available from the agency.]

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 468A
Hist.: DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01; DEQ 11-2002, f. & cert. ef. 10-8-02

340-225-0060

Requirements for Demonstrating Compliance with Standards and Increments in PSD Class I Areas

For determining compliance with standards and increments in PSD Class I areas, the following methods must be used:

(1) Before January 1, 2003, the owner or operator of a source (where required by divisions 222 or 224) must model impacts and demonstrate compliance with standards and increments on all PSD Class I areas that may be affected by the source or modification.

(2) On or after January 1, 2003, the owner or operator of a source (where required by divisions 222 or 224) must meet the following requirements:

(a) A single source impact analysis will be sufficient to show compliance with increments if modeled impacts from the source being evaluated are demonstrated to be less than the impact levels specified in Table I below. [Table not printed. See Ed. Note.]

(b) If the above requirement is not satisfied, the owner or operator must also show that the increased source impacts (above Baseline Concentration) plus Competing PSD Increment Consuming Source Impacts are less than the PSD increments for all averaging times

(c) A single source impact analysis will be sufficient to show compliance with standards if modeled impacts from the source being evaluated are demonstrated to be less than the impact levels specified in OAR 340-200-0020, Table 1 for all pollutants.

(d) If the requirement of (2)(a) is not satisfied, and background monitoring data for each PSD Class I area shows that the NAAQS is more controlling than the PSD increment then the source must also demonstrate compliance with the NAAQS by showing that their total modeled impacts plus total modeled Competing NAAQS Source Impacts plus General Background Concentrations are less than the NAAQS for all averaging times.

[ED. NOTE: Table referenced in this rule are available from the agency.]

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 468A
Hist.: DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01; DEQ 11-2002, f. & cert. ef. 10-8-02

340-225-0070

Requirements for Demonstrating Compliance with AQRV Protection

(1) Sources that are not Federal Major Sources are exempt from the requirements of the remainder of this rule.

(2) Notice of permit application for actions subject to the requirements of divisions 222 and 224:

(a) If a proposed major source or major modification could impact air quality related values (including visibility) within a Class I area, the Department will provide written notice to the EPA and to the appropriate Federal Land Manager within 30 days of receiving such permit application. The notice will include a copy of all information relevant to the permit application, including analysis of anticipated impacts on Class I area air quality related values (including visibility). The Department will also provide at least 30 days notice to EPA and the appropriate Federal Land Manager of any scheduled public hearings and preliminary and final actions taken on the application;

(b) If the Department receives advance notice of a permit application for a source that may affect Class I area visibility, the Department will notify all affected Federal Land Managers within 30 days of receiving the advance notice;

(c) During its review of source impacts on Class I area air quality related values (including visibility) pursuant to this rule, the Department will consider any analysis performed by the Federal Land Manager that is received by the Department within 30 days of the notice required by subsection (a). If the Department disagrees with the Federal Land Manager's demonstration, the Department will include a discussion of the disagreement in the Notice of Public Hearing;

(d) As a part of the notification required in OAR 340-209-0060, the Department will provide the Federal Land Manager an opportunity to demonstrate that the emissions from the proposed source or modification would have an adverse impact on air quality related values (including visibility) of any federal mandatory Class I area. This adverse impact determination may be made even if there is no demonstration that a Class I maximum allowable increment has been exceeded. If the Department agrees with the demonstration, it will not issue the permit.

(3) Visibility impact analysis requirements:

(a) If divisions 222 or 224 require a visibility impact analysis, the owner or operator must demonstrate that the potential to emit any pollutant at a significant emission rate in conjunction with all other applicable emission increases or decreases, including secondary emissions, permitted since January 1, 1984 and other increases or decreases in emissions, will not cause or contribute to significant impairment of visibility on any Class I area. The Department also

encourages the owner or operator to demonstrate that these same emission increases or decreases will not cause or contribute to significant impairment of visibility on the Columbia River Gorge National Scenic Area (if it is affected by the source);

(b) The owner or operator must submit all information necessary to perform any analysis or demonstration required by these rules pursuant to OAR 340-224-0030(1).

(c) Determination of significant impairment: The results of the modeling must be sent to the affected Federal Land Managers and the Department. The land managers may, within 30 days following receipt of the source's visibility impact analysis, determine whether or not significant impairment of visibility in a Class I area would result. The Department will consider the comments of the Federal Land Manager in its consideration of whether significant impairment will result. If the Department determines that impairment would result, it will not issue a permit for the proposed source.

(4) Types of visibility modeling required. For receptors in PSD Class I areas within the PSD Class I Range of Influence, a plume blight analysis or regional haze analysis is required.

(5) Criteria for visibility impacts:

(a) The owner or operator of a source (where required by divisions 222 or 224) is encouraged to demonstrate that their impacts on visibility satisfy the guidance criteria as referenced in the FLAG.

(b) If visibility impacts are a concern, the Department will consider comments from the Federal Land Manager when deciding whether significant impairment will result. Emission offsets may also be considered. If the Department determines that impairment would result, it will not issue a permit for the proposed source.

(6) Deposition modeling may be required for receptors in PSD Class I areas where visibility modeling is required. This may include, but is not limited to an analysis of Nitrogen Deposition and Sulfur Deposition.

(7) Visibility monitoring:

(a) If divisions 222 or 224 require visibility monitoring data, the owner or operator must use existing data to establish existing visibility conditions within Class I areas as summarized in the FLAG Report.

(b) After construction has been completed the owner or operator must conduct such visibility monitoring as the Department requires as a permit condition to establish the effect of the pollutant on visibility conditions within the impacted Class I area.

(8) Additional impact analysis: the owner or operator subject to OAR 340-224-0060(3) or OAR 340-224-0070(2) must provide an analysis of the impact to visibility that would occur as a result of the

proposed source or modification and general commercial, residential, industrial, and other growth associated with the source or major modification.

(9) If the Federal Land Manager recommends and the Department agrees, the Department may require the owner or operator to analyze the potential impacts on other Air Quality Related Values and how to protect them. Procedures from the FLAG report should be used in this recommendation. Emission offsets may also be used. If the Federal Land Manager finds that significant impairment would result from the proposed activities and Department agrees, the Department will not issue a permit for the proposed source.

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 468A
Hist.: DEQ 18-1984, f. & ef. 10-16-84; DEQ 14-1985, f. & ef. 10-16-85; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 12-1993, f. & cert. ef. 9-24-93; Renumbered from 340-020-0276; DEQ 19-1993, f. & cert. ef. 11-4-93; DEQ 26-1996, f. & cert. ef. 11-26-96; DEQ 14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-028-2000; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01, Renumbered from 340-224-0110

340-225-0090

Requirements for Demonstrating a Net Air Quality Benefit

Demonstrations of net air quality benefit for offsets must include the following:

(1) Ozone areas (VOC and NOx emissions). For sources capable of impacting a designated ozone nonattainment or maintenance area;

(a) Offsets for VOC and NOx are required if the source will be located within the designated area or within the Ozone Precursor Distance.

(b) The amount and location of offsets must be determined in accordance with this subsection:

(i) For new or modified sources locating within a designated nonattainment area, the offset ratio is 1.1:1. These offsets must come from within either the same designated nonattainment area as the new or modified source or another ozone nonattaiment area (with equal or higher nonattainment classification) that contributes to a violation of the NAAQS in the same designated nonattainment area as the new or modified source.

(ii) For new or modified sources locating within a designated maintenance area, the offset ratio is 1.1:1. These offsets may come from within either the designated area or the ozone precursor distance.

(iii) For new or modified sources locating outside the designated area, but within the ozone precursor distance, the offset ratio is 1:1. These offsets may come from within either the designated area or the ozone precursor distance.

(iv) Offsets from outside the designated area but within the Ozone Precursor Distance must be from sources affecting the designated area in a comparable manner to the proposed emissions increase. Methods for determining offsets are described in the Ozone Precursor Offsets definition (OAR 340-225-0020(11)).

(c) In lieu of obtaining offsets, the owner or operator may obtain an allocation at the rate of 1:1 from a growth allowance, if available, in an applicable maintenance plan.

(d) Sources within or affecting the Medford Ozone Maintenance Area are exempt from the requirement for NOx offsets relating to ozone formation.

(e) Sources within or affecting the Salem Ozone Nonattainment Area are exempt from the requirement for VOC and NOx offsets relating to ozone formation.

(2) Non-Ozone areas (PM10, SO2, CO, NOx, and Lead emissions)

(a) For a source locating within a designated nonattainment area, the owner or operator must:

(A) obtain offsets from within the same designated nonattainment area;

(B) provide a minimum of 1:1 offsets for emission increases over the Netting Basis;

(C) in the Medford-Ashland AQMA, provide reductions in PM10 emissions equal to 1.2 times the emissions increase over the Netting Basis from the new or modified sources;

(D) provide a net air quality benefit within the designated nonattainment area. "Net Air Quality Benefit" means a reduction in concentration at a majority of the modeled receptors and less than a significant impact level increase at all modeled receptors;

(E) provide offsets sufficient to demonstrate reasonable further progress toward achieving the NAAQS.

(b) For a source locating outside a designated nonattainment area but causing a significant air quality impact on the area, the owner or operator must provide offsets sufficient to reduce the modeled impacts below the significant air quality impact level (OAR 340-200-0020) at all receptors within the designated nonattainment area. These offsets may come from within or outside the designated nonattainment area.

(c) For a source locating inside or causing a significant air quality impact on a designated maintenance area, the owner or operator must either provide offsets sufficient to reduce modeled impacts below the significant air quality impact level (OAR 240-200-0020) at all receptors within the designated maintenance area or obtain an allocation from an available growth allowance as allowed by an applicable maintenance plan. These offsets may come from within or outside the designated maintenance area.

~~(1) Except as provided in section (4) of this rule, if divisions 222 or 224 require a demonstration of a net air quality benefit for offsets, the owner or operator must demonstrate that:~~

~~(a) Within a designated maintenance area for pollutants other than ozone, offsets for PM10, sulfur dioxide, carbon monoxide, nitrogen dioxide, lead, and other pollutants may be from inside or outside the maintenance area. Emission offsets for new or modified sources in a nonattainment area must come from sources located within the same nonattainment area and must be at least one for one and sufficient to demonstrate reasonable further progress. These emission offsets must provide for a net air quality benefit, and must show an actual improvement in air quality as demonstrated by the modeling analysis. The demonstration must show that there will be a reduction in modeled levels at a majority of modeling receptors and impacts below the significant air quality impact levels at all other receptors. The Department may also require that air quality modeling be conducted according to the procedures specified in this division for this demonstration.~~

~~(b) Within an ozone nonattainment or maintenance area, owners or operators of sources (where required by divisions 222 or 224) that emit VOC or nitrogen oxides must provide pollutant-specific emission reductions at a 1.1 to 1 ratio (i.e., demonstrate a 10% new reduction). Offsets~~

~~for VOC and nitrogen oxides must be within the same nonattainment or maintenance area as the proposed source, or from upwind nonattainment areas if emissions from those areas impact the area in which the new or modified source is locating, and the classification of the upwind area is equal to or more serious than the area in question. The offsets must be appropriate in terms of short term, seasonal, and yearly time periods to mitigate the impacts of the proposed emissions.~~

~~(c) Outside a designated ozone nonattainment or maintenance area, for VOC and NOx:~~

~~(A) For sources with permit applications deemed complete before January 1, 2004 that are capable of impacting the nonattainment area or maintenance area and have proposed emissions increases above the Significant Emission Rates for VOCs or NOx occurring since the baseline year or the date of the last PSD approval: Owners or operators of such sources within 30 kilometers of an ozone nonattainment area or ozone maintenance area shall provide reductions that are equivalent or greater than the proposed emission increases, unless the applicant demonstrates that the proposed emissions will not impact the nonattainment area or maintenance area.~~

~~(B) For sources with permit applications deemed complete on or after January 1, 2004 that are capable of impacting the nonattainment area or maintenance area and have proposed emissions increases above the Significant Emission Rates for VOCs or NOx occurring since the baseline year or the date of the last PSD approval: Owners or operators of such sources within 100 kilometers of an ozone nonattainment or maintenance areas that emit VOC or nitrogen oxides must provide offsets for both VOC and NOx within the nonattainment or maintenance area in the following amounts: required offset = [PSEL increase over the netting basis &endash; ((40/30) * d] tons per year, where "d" is the distance the source is from the nonattainment or maintenance area in kilometers. VOC and NOx emissions from sources more than 100 kilometers from the area are not deemed to impact the nonattainment or maintenance area.~~

~~(d) Outside a designated nonattainment area or maintenance area, for pollutants other then VOC, Owners or operators of proposed sources or modifications, must demonstrate that the pollutants will not have a significant air quality impact on the nonattainment area or maintenance area or must provide emission offsets sufficient to reduce impacts to levels below the significant air quality impact level within the nonattainment area or maintenance area. This demonstration may require that air quality modeling be conducted according to the procedures specified in this division; and~~

~~(e) In the Medford-Ashland AQMA, emissions offsets for PM10, must provide reductions in PM10 emissions equal to 1.2 times the emissions increase from the new or modified sources.~~

(~~2~~3) The emission reductions used as offsets must be of the same type of pollutant as the emissions from the new source or modification. Sources of PM10 must be offset with particulate in the same size range.

(~~3~~4) The emission reductions used as offsets must be contemporaneous, that is, the reductions must take effect before the time of startup but not more than two years before the submittal of a complete

permit application for the new source or modification. This time limitation may be extended through banking, as provided for in OAR 340 division 268, Emission Reduction Credit Banking. In the case of replacement facilities, the Department may allow simultaneous operation of the old and new facilities during the startup period of the new facility, if net emissions are not increased during that time period. Any emission reductions must be federally enforceable at the time of the issuance of the permit.

~~(4) Special Requirements for Medford Maintenance Area for Ozone. Requirements for NOx offsets in Section (1) of this rule do not apply to proposed sources or modifications located in or near this area.~~

(5) Offsets required under this rule must meet the requirements of Emissions Reduction Credits in OAR 340 division 268.

(6) Emission reductions used as offsets must be equivalent in terms of short term, seasonal, and yearly time periods to mitigate the effects of the proposed emissions.

[**NOTE:** This rule is included in the State of Oregon Clean Air Act Implementation Plan as adopted by the EQC under OAR 340-200-0040.]

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 468A.025
Hist.: DEQ 25-1981, f. & ef. 9-8-81; DEQ 5-1983, f. & ef. 4-18-83; DEQ 8-1988, f. & cert. ef. 5-19-88 (and corrected 5-31-88); DEQ 22-1989, f. & cert. ef. 9-26-89; DEQ 27-1992, f. & cert. ef. 11-12-92; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 12-1993, f. & cert. ef. 9-24-93; Renumbered from 340-020-0260; DEQ 19-1993, f. & cert. ef. 11-4-93; DEQ 4-1995, f. & cert. ef. 2-17-95; DEQ 26-1996, f. & cert. ef. 11-26-96; DEQ14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-028-1970; DEQ 14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-030-0111; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01, Renumbered from 340-224-0090 & 340-240-0260; DEQ 11-2002, f. & cert. ef. 10-8-02; DEQ 12-2002(Temp), f. & cert. ef. 10-8-02 thru 4-6-03

Summary of Public Comment and Agency Response

Air Quality New Source Review and Modeling:
Prepared by: David Kauth **Date: November 4, 2003**

Comment period

The public comment period opened on September 15, 2003 and closed at 5:00PM on October 30, 2003. DEQ held public hearings on October 21, 2003 at 3:00PM at the DEQ Northwest Region 4th floor conference room 2020 SW 4th Avenue, Portland and October 23, 2003 at 3:00PM at the Jackson County Courthouse Auditorium, 10 S. Oakdale, Medford, Oregon. Two individuals from the public attended each of the public hearings, but no oral comments were presented. Written comments were received from two groups during this period.

Organization of comments and responses

Summaries of individual comments and the Department's responses are provided below. The persons who provided each comment are referenced by number. A list of commenters and their reference numbers are listed below.

Reference #	Commenter	Date of Comments
1	Associated Oregon Industries	10/30/2003
2	Environmental Protection Agency	10/30/2003

Attachment B

Rule area	Affected Division/rule	Comments	Commenter ID(s)	DEQ response/proposed rule change
General Comments	224 and 225	Revising the requirements to allow for the use of offsets obtained outside of a non-attainment or maintenance area is good for the environment and good for Oregon business.	1	The Department appreciates the commentors support on this proposed rule making. It should be noted that the proposed rules only allow a source outside a nonattainment area to obtain offsets from outside the nonattainment area. Offsets for maintenance areas may come from inside or outside the maintenance area.
Non-attainment Area Requirements	224-0050	The Department proposes to revise "Additional Requirements for Federal Major Sources" to extend the alternatives analysis and the compliance certification to sources that do not necessarily meet the definition of a "federal major source". In January, EPA approved this rule in its current form into the SIP. We are not aware of EPA having disapproved the language DEQ proposed to change. Therefore, this change appears to be making the rules stricter for no specific reason. The commentor suggests that DEQ not adopt this change.	1	The Alternatives Analysis and Compliance Demonstration requirements of this rule are required by federal rule to apply to major sources as defined by the federal rules, not just to sources meeting the state definition of "federal major". The defined term was inappropriately used when these rules were changed in May 2001. The Department proposes changing the applicability to make it consistent with the federal requirements. When EPA approved the May 2001 rules into the Oregon SIP they assumed the term "federal major" meant "major" as defined in the federal rules. "Major" in the federal rules relates to sources of 100 tons/year, where as "federal major" in the Oregon rules relates to sources of 100 **or** 250 tons/year of emissions. This proposed change was requested by EPA to ensure Oregon rules are clearly consistent with the federal requirements.

Rule area	Affected Division/rule	Comments	Commenter ID(s)	DEQ response/proposed rule change
Exemptions from NSR	224-0080	The Department has proposed to revise OAR 340-224-0080 to clarify what it means to demonstrate that there are no known violations of an applicable requirement. We agree that it is appropriate to insert "National Ambient Air Quality Standard" in this rule in place of "applicable requirement". However, the Department also proposed to add a requirement to demonstrate that increment has not been exceeded. In previous discussions about this exemption, DEQ has indicated that increment is not relevant to a short term (2 year or less) source. The commentor agrees with this approach. Increment is a concern regarding long term airshed degradation. We believe that the requirement to model increment consumption is not appropriate for a temporary source and suggest that DEQ not add this requirement.	1	The Department agrees that the primary concern with increment is preventing long-term airshed degradation from permanent sources. However, it is also important to prevent temporary sources from affecting an area that is already violating a PSD increment, which is what the proposed language does.
Modeling	225	The commentor supports the changes to Division 225	1	The Department appreciates the support.
Major NSR	224	The requirements in 40 CFR 51.166(p)(1) to submit to EPA a copy of permit applications relating to each major stationary source or modification and to provide notice to EPA of every permit action should be in ODEQ's rules (for all sources, not just for sources impacting Class 1 areas). ODEQ has been complying with this requirement by following procedures in the EPA/ODEQ PPA, but this should be a regulatory requirement, not just a matter of operating procedures. While ODEQ may not want to include requirements that apply only to ODEQ in its regulations, there are several places in ODEQ's rules where this is the case, e.g., section 225-0070(2)(a), section 218-0200(2), and Division 209.	2	The Department's rules are normally written as requirements for regulated sources and not as instruction for Department actions. We believe the PPA is the appropriate place to detail required submittals from the Department to EPA.

Rule area	Affected Division/rule	Comments	Commenter ID(s)	DEQ response/proposed rule change
Applicability and General Prohibitions	224-0010	Currently this division does not apply to owners or operators of proposed major sources that are not Federal Major Sources and major modifications at sources that are not Federal Major in attainment and unclassifiable areas. The Clean Air Act (section 110(a)(2)(C)) and EPA's regulations (40 CFR Part 51, Subpart I) require states to have a "permit to construct" program for all stationary sources. In its SIP submittal, ODEQ must provide EPA with a description of how this category of sources is covered by a permit to construct program (ODEQ's PSEL rules are not considered a permit to construct program). The third sentence of this section should clarify that this division does not apply to these proposed major source that are not Federal Major Sources and major modifications at sources that are not Federal Major in attainment and unclassifiable areas.	2	The ACDP program through the use of the PSEL rules and the Notice of Intent to construct rules in Division 210 constitute a permit to construct program for the sources that are not subject to major NSR. Sources that are not subject to Division 224 still need to meet the requirements of the other Department rules. The proposed changes to the applicability in OAR 340-224-0010 clarify who is subject to the Division; they do not change the universe of sources to which the Division applies.
Competing PSD Increment Consuming Source Impacts definition	225-0020(4)	Actual emissions must always be used to determine increment consumption. ODEQ may allow allowables to be used as a conservative estimate, but ODEQ cannot require allowables to be used in lieu of actual emissions. We question why ODEQ is striking the phrase "emissions changes from all point, area, and mobile source". We recommend that ODEQ keep this language in the rule as these emissions changes should be included in the competing PSD increment consuming source impact analysis. The 5 tons per year cut-off in the last sentence is not approvable.	2	The rule language has been modified in the proposal for adoption to make it clear that allowable emissions may be used as a conservative estimate in lieu of using actual emissions. EPA would not approve rules that allow sources that are less than 5tpy to automatically be exempted from evaluation as competing sources. We wanted to add this language to the rules so there was a clear line drawn as to who is and is not included in the analysis. Since EPA objected, we will need to continue to make case-by-case determinations for competing sources, which in general will mean that 5 tpy sources do not get included. Bottom line, taking the 5tpy trigger level out of the rule will have little or no effect on sources.

Rule area	Affected Division/rule	Comments	Commenter ID(s)	DEQ response/proposed rule change
Competing NAAQS Impacts definition	225-0020(5)	Actual emissions cannot be used for demonstrating compliance with the NAAQS. Allowable emissions must be used. The 5 tons per year cut-off in the last sentence is not approvable.	2	The 5 ton per year cut-off language has been deleted in the rule language proposed for adoption.
Ozone Precursor Offsets definition	225-0020(11)(b)	It is unclear to us what the second sentence means (what is being compared to what). Specifically, it is unclear what is meant by "over a greater area and over a greater period of time". We also suggest that "emissions increase from the" be inserted before "source subject to this rule" to clarify what is being compared.	2	This subsection means that the modeled reduction in ambient concentrations of VOC or NOx must reduce concentrations of the pollutant(s) over a larger area and for a longer period of time than the modeled ambient increase in VOC or NOx concentrations from the proposed source. The rule language has been modified to clarify the meaning and intent of this subsection in the proposal for adoption.
Range of Influence definition	225-0020(12)	ODEQ should submit with its SIP submittal a description of how using this ROI equation compares to EPA's approach in terms of what sources get captured in the competing source analysis.	2	The ROI equation and constants are in the existing rule as adopted in May 2001. The proposed changes were inadvertently dropped when the Oregon Secretary of State updated the Oregon Administrative Rules. The proposed changes include only formatting and clarification. Therefore, further demonstration of equivalency to EPA's approach is unnecessary.

Attachment C

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

Date: November 4, 2003

To: Environmental Quality Commission

From: Randy Bailey – Portland
Tom Peterson – Medford

Subject: Presiding Officer's Report for Rulemaking Hearing
Title of Proposal: Air Quality New Source Review and Modeling

Hearing Date and Time: October 21, 2003, 3:00 PM
Hearing Location: DEQ Northwest Region Office fourth floor conference room, 2020 SW 4th Avenue, Portland, OR
Hearing Date and Time: October 23, 2003, 3:00 PM
Hearing Location: Jackson County Courthouse Auditorium, 10 S. Oakdale, Medford, OR

The Department convened rulemaking hearings on the proposal referenced above at 3:00 PM and closed it at approximately 3:30 PM each day. People were asked to sign registration forms if they wished to present comments. People were also advised that any formal oral testimony would be recorded.

Two people attended each of the hearings but nobody testified.

Before taking comments, David Kauth briefly explained the rulemaking proposal and procedures for the hearing.

No written or oral comments were received at the hearing.

Relationship to Federal Requirements

1. Are there federal requirements that are applicable to this situation? If so, exactly what are they?

Yes, the Federal Clean Air Act, New Source Review, State Implementation Plan (SIP) requirements, construction and operating permits are all federal requirements applicable to this situation. Oregon's New Source Review program is included in the federally approved SIP and implemented through the permit programs.

2. Are the applicable federal requirements performance based, technology based, or both with the most stringent controlling?

The applicable federal requirements are both performance and technology based with the most stringent controlling.

The federal program sets standards and allows flexibility on how a state can meet those standards. It does not dictate one particular system. The SIP is how the state intends to meet the requirements of the Environmental Protection Agency.

3. Do the applicable federal requirements specifically address the issues that are of concern in Oregon? Was data or information that would reasonably reflect Oregon's concern and situation considered in the federal process that established the federal requirements?

No. This rulemaking is a streamlining and clarification effort and does not incorporate new requirements.

The changes being proposed still comply with the federal standards and do not make the rules substantially different than they already were. In some cases, the proposed changes make the existing rules more similar to the federal requirements.

4. Will the proposed requirement improve the ability of the regulated community to comply in a more cost effective way by clarifying confusing or potentially conflicting requirements (within or cross-media), increasing certainty, or preventing or reducing the need for costly retrofit to meet more stringent requirements later?

Yes. The proposed rules will improve industrial source permit processing and construction approval efficiency. Procedural requirements for regulated industry are clarified.

5. Is there a timing issue which might justify changing the time frame for implementation of federal requirements?

NA

6. Will the proposed requirement assist in establishing and maintaining a reasonable margin for accommodation of uncertainty and future growth?

NA

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

NA

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

NA

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?

NA

10. Is demonstrated technology available to comply with the proposed requirement?

NA

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

NA

Attachment E

DEPARTMENT OF ENVIRONMENTAL QUALITY
Chapter 340
Proposed Rulemaking
STATEMENT OF NEED AND FISCAL AND ECONOMIC IMPACT
This form accompanies a Notice of Proposed Rulemaking

Title of Proposed Rulemaking:	Air Quality New Source Review and Modeling, Divisions 224 and 225
Need for the Rule(s)	The proposed changes are a follow-up to the adoption of the Air Quality permit streamlining rules of May, 2001. In the May, 2001 streamlining rules, the Department included a delayed effective date for extending the distance used when evaluating the effect of pollutants (ozone precursor distance) on ozone nonattainment and maintenance areas (ozone sensitive areas). This delayed date allowed the Department time to develop a better process for evaluating source affects on the ozone sensitive areas, by identifying areas where pollutants will and will not affect sensitive areas, or developing procedures to demonstrate affect or lack of affect on the areas. The proposed rule changes include clarifications to the requirements for New Source Review (NSR) by making clear crosswalks between the NSR and air quality analysis rules. Additional proposed changes include improvements to the rule language relating to offset creation and use to ensure consistent implementation and protection of Air Quality standards.
Documents Relied Upon for Rulemaking	The Department relied on internal agency comments and external stakeholder comments from the regulated community and others gathered during the implementation of the Air Quality permit streamlining rulemaking. The Department also relied on comments from stakeholders during development of the proposed rule amendments.
Fiscal and Economic Impact	
Overview	The proposed changes are intended to clarify the rules. The Department does not expect that the revisions will create a fiscal or economic burden for any regulated entity.
General public	The Department does not expect this rule to affect the general public.
Small Business	The proposed changes will make additional sources of offsets available for businesses subject to New Source Review. Clarification of requirements are intended to ensure consistent implementation and decreased workload for regulated businesses and the Department. No direct fiscal impact is expected from the proposed rule changes. Some savings may be realized by businesses through decreased time needed for rule interpretation.
Large Business	See explanation for small business, above.
Local Government	See explanation for small business, above.
State Agencies	
DEQ	The proposed changes will improve the agency's efficiency by making requirements clear and eliminating ambiguous interpretation.
Other agencies	The Department does not expect this rule to affect other state agencies.
Assumptions	The proposed changes will clarify the rules without making substantive changes to the existing requirements, while ensuring state rules meet requirements of the federal Clean Air Act.
Housing Costs	The Department has determined that this proposed rulemaking will not affect 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.
Administrative Rule Advisory Committee	A formal advisory committee was not used to develop the proposed rule revisions, but stakeholders were involved both in this rulemaking and in the Air Quality permit streamlining rulemaking adopted in May 2001.

Prepared by	David P. Kauth Printed name	9/11/2003 Date
Approved by DEQ Budget Office	Printed name	Date

7/22/02

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
New Source Review and Modeling, Divisions 224 and 225

Land Use Evaluation Statement

1. Explain the purpose of the proposed rules.
The proposed changes are a follow-up to the adoption of the AQ permit streamlining rules of May, 2001. In the May, 2001 streamlining rules, the Department included a delayed effective date for extending the distance used when evaluating the effect of pollutants (ozone precursor distance) on ozone nonattainment and maintenance areas (ozone sensitive areas). This date was set as January 1, 2003 to allow the Department time to develop a better process for evaluating source affects on the ozone sensitive areas. This means identifying areas where pollutants will and will not have an affect on the sensitive areas, or developing procedures to demonstrate affect or lack of affect on the areas.

The proposed rule changes include clarifications to the requirements for New Source Review (NSR) by making clear crosswalks between the NSR and air quality analysis rules. Additional proposed changes include improvements to the rule language relating to offset creation and use to ensure consistent implementation and protection of Air Quality standards.

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: ACDP and Title V permit programs; the existing permitting programs, including the associated construction approval process, will address the land use issues by continuing to require a Land Use Compatibility Statement from the affected local government before issuing an air quality permit. This is the same as the current practice.

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):

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.

NA

_____	__[signed: Roberta Young]___	_____
Division	Intergovernmental Coord.	Date

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of	)	
	)	FINAL ORDER
Currinsville Mobile Home Park LLC	)	
Request for Modification of WPCF	)	
Permit	)	
	)	

1. On April 8, 2004 the Environmental Quality Commission considered the request by Currinsville Mobile Home Park LLC (Permittee) for modification of its Water Pollution Control Facilities (WPCF) permit to upgrade the existing septic systems at the Currinsville Mobile Home Park. The Commission considered the Department of Environmental Quality (DEQ) staff report and related materials and heard a presentation by Department staff.

2. The existing septic systems at the Currinsville Mobile Home Park are failing or very near failing. The Permittee proposes to install a sewage treatment plant using alternative treatment technology (recirculating textile filters) ahead of the existing drainfields and, if needed, to install raised drip irrigation beds (subsurface) in the area of the larger drainfield. The expectation is that the existing drainfields will recover to the extent that they will no longer discharge to the surface after the sewage treatment plant is installed. There is, however, no area available for new or additional drainfield. The Permittee will install the drip irrigation system if the existing drainfields do not recover as expected.

3. The Commission finds that the proposed sewage treatment facility provides a preferable means of sewage collection, treatment and disposal as compared to individual on-site sewage disposal systems. The new facility will have less cumulative impact to groundwater than either the facility it replaces or individual on-site systems. For that reason, the Commission concludes that the proposed sewage treatment facility satisfies the three basin rule, specifically OAR 340-071-0350(8)(c)(B).

Dated this 10th day of May, 2004.

Stephanie Hallock

Stephanie Hallock, Director
Department of Environmental Quality
On behalf of the
Environmental Quality Commission

GENI9699

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of	)	
	)	FINAL ORDER
Big Valley Woods LLC	)	
Request for Modification of WPCF	)	
Permit	)	

1. On April 8, 2004 the Environmental Quality Commission considered the request by Big Valley Woods LLC (Permittee) for modification of its Water Pollution Control Facilities (WPCF) permit to upgrade the existing septic systems at the Big Valley Woods mobile home park (Park). The Commission considered the Department of Environmental Quality (DEQ) staff report and related materials and heard a presentation from Department staff.

2. There are five community septic systems and over 50 small septic systems at the Park. The existing community drainfields at the Park are believed to be at or near capacity and some of the smaller systems have failed or are at risk of failure. The Permittee is likely to need to make improvements. These may include installation of a central sewage treatment plant (recirculating textile filters) to serve the entire park. Discharge from the new treatment plant would be discharged back to the existing drainfields, which will be able to handle the treated effluent. In the alternative, if the Permittee does not install a central system for the entire Park, it may need to upgrade and expand the collector systems and/or drainfields for one or more of the five existing community septic systems to allow properties served by small septic systems to connect to the upgraded community septic systems, thereby allowing existing small septic systems to be decommissioned.

3. The Commission finds that both of the proposed sewage treatment facility alternatives (installation of central treatment plant or upgrade of one or more of the existing community septic systems) would provide a preferable means of sewage collection, treatment and disposal as compared to individual on-site sewage disposal systems. Either of the alternatives will have less cumulative impact to groundwater than the facility it replaces or individual on-site systems. For that reason, the Commission concludes that either of the proposed sewage treatment facility alternatives will satisfy the three basin rule, specifically OAR 340-071-0350(8)(c)(B).

Dated this 10th day of May, 2004.

Stephanie Hallock

Stephanie Hallock, Director
Department of Environmental Quality
On behalf of the Environmental Quality Commission

GENI9761

State of Oregon

Department of Environmental Quality Memorandum

Date: March 18, 2004

To: Environmental Quality Commission

From: Stephanie Hallock, Director S. Hallock

Subject: Agenda Item D, Action Item: Three Basin Rule Findings for Two Sources: Big Valley Woods Water Pollution Control Facilities (WPCF) Permit Modification and Currinsville Mobile Home Park WPCF Permit Modification April 8, 2004, EQC meeting

Purpose of Item

The Department requests that the Environmental Quality Commission (Commission) find that the proposals of Big Valley Woods LLC and Currinsville Mobile Home Park LLC to improve their existing wastewater treatment systems (facilities) in the Clackamas River subbasin satisfy the requirements of the three basin rule in OAR 340-041-0350(8)(c)(B), as described below. The three basin rule requires these findings before the Department can authorize system improvements and/or system expansion.

Three Basin Rule Background

The Commission originally adopted the three basin rule in 1977 (attachment A) to protect the pristine watersheds of the North Santiam, Clackamas, and McKenzie River subbasins, which provide drinking water for over seventeen percent of Oregon's citizens. The rule as amended in 1995 prohibits new or expanded wastewater discharges to these subbasins except as specifically allowed.

In January 2003, in consultation with the Department of Justice, the Department developed a three basin policy (attachment B) to clarify application of the three basin rule to permits. Before this policy, the Department permitted new or improved domestic sewage treatment facilities in the subbasins if they met groundwater protection requirements of the three basin rule. The new policy interprets the rule to also require a Commission finding that the proposed new, expanded or improved treatment facilities will provide a preferable means of sewage collection, treatment, and disposal as described below. This is the second permit action brought for Commission review under the new three basin policy; the Commission approved the first request in February 2004.

Big Valley Woods Background

Big Valley Woods is an existing mobile home park with land use approval for 161 spaces and 68 RV spaces. It also has 4 apartments, 3 laundromats and a small golf course. It is on a 200 acre parcel north of Hwy 211 and about a mile east of Eagle Creek, Oregon. Deep Creek, a tributary of the Clackamas River, flows through the property. There are five "community septic systems" serving large numbers of homes; and there are 50 or more small septic systems each serving one or two homes. DEQ issued the current WPCF permit to the park owner in 2003 so that about 100 rusting septic tanks could be replaced. The three basin rule and the three basin policy allow for replacement of system components without EQC review.

Based on information submitted by the permittee, the original WPCF permit was issued for 153 mobile homes and 67 RV spaces along with the apartments and laundromats. After the permit was issued, however, the permittee notified DEQ that there were 161 mobile homes and 68 RVs. Staff researched county land use findings for the facility and confirmed that land use approval was given for only 160 mobile homes and 68 RVs. The permittee states that the 161st mobile home is on property that was purchased later, added to the park, and turned into a golf course by the previous owner. The permittee has now submitted a land use approval allowing the existing uses.

In the process of replacing the rusting septic tanks, the permittee discovered that many of the aging drainfields had reached capacity and would no longer function. The rule and policy require that a proposal to install a treatment plant or to construct new drainfield trenches be reviewed by the EQC. The permittee originally submitted a permit modification proposal to increase the number of manufactured homes from 161 to 227, and to build an upgraded sewage treatment plant system to serve the expanded park. The permittee has not yet obtained county land use approval to increase the number of manufactured homes, however, and has not verified to DEQ that sufficient area exists for construction of the new septic system, for the primary drainfields and for a full replacement system of drainfields. The permittee recently requested to proceed in phases by repairing the park's existing sewage facilities in Phase 1 and expanding the park in Phase 2 (see attachment D for the revised request). Although the permittee has asked for approval of both phases, DEQ is recommending EQC review of only Phase 1 at this time to alleviate the potential public health hazard associated with the park's unrepaired septic systems.

Phase 1, Upgrade proposal: The permittee is proposing to upgrade (repair) the septic systems for the full park rather than only those drainfields which have failed. Septic tank effluent from all parts of the park will flow by gravity or be pumped to a central location where a sewage treatment plant will be constructed. The treatment plant will consist of recirculating textile filters, followed by distribution back to the existing drainfields. The permittee has abandoned an earlier plan to construct a number of treatment plants throughout the park, because it will be much less expensive to maintain a single plant in one location.

The original permit estimated projected flows at the park to be 44,950 gallons per day (gpd), based on information supplied by the applicant. Recent information, however, indicates that projected flows from the existing facilities total about 48,250 gpd. Approximately 16,000 lineal feet of drainfield would be needed to properly dispose of this amount of treated effluent. The five existing community septic system drainfields have a total of 16,784 lineal feet. Thus, we expect that the existing community drainfields will be able to dispose of the treated effluent discharged from the sewage treatment plant, and no new drainfields should be needed.

Flows will not be increased in this Phase 1 proposal. The improved treatment of the effluent prior to subsurface discharge will result in an estimated reduction of about 87% in pounds of 5-Day Biochemical Oxygen Demand (BOD_5), which is a measure of the nutrients in the discharge (see the revised permit evaluation report for more information, attachment E). The new facilities will improve wastewater treatment and reduce the potential impact to groundwater.

Public Process for Big Valley Woods

The Department published the originally proposed permit modification request from January 22, 2004, through February 23, 2004, to both improve sewage treatment and to enlarge the system to serve a proposed park expansion. The Department received comments from some of the tenants, requesting that the park not be expanded. See Attachment C for public comments received.

On February 18, 2003, the permittee requested to take a phased approach to the project (attachment D). The Permit Evaluation Report and final WPCF permit modification have been revised to cover only Phase 1, upgrade of sewage treatment to serve the existing park uses. They are included as attachments E and F, respectively.

The Department is not required to place the modified Phase 1 proposal on another public notice because no expansion of the park or sewage system is proposed in this phase, and because the permittee is not requesting a concentration limit variance. Neither the three basin rule nor general water quality permitting rules (Division 45) requires public notice in this situation.

Major Issues For Big Valley Woods

The major environmental issue is that many of the existing septic systems at the facility are no longer working. As interim measures to protect human health, the permittee has connected some of the homes with failed drainfields to one of the community drainfields. A permanent solution is needed, however.

The proposed, logical location of the sewage treatment plant is on a terrace about 100 feet from Deep Creek. The permittee will need to include measures to protect the plant from damage or disruption if the creek should overflow. The Department has not identified any other potential environmental impacts from the proposed wastewater treatment facilities.

Currinsville Mobile Home Park Background

Currinsville Mobile Home Park is a 30 space mobile home park that has operated for over 40 years. It sits on a three-acre parcel south of Eagle Creek on Eagle Creek Road. The original WPCF permit was issued in 2001 to Currinsville Mobile Home Park LLC (Ed Neiger) so that Mr. Neiger could replace a collapsed dosing tank. The need to replace the dosing tank triggered the requirement for a WPCF permit; however, the three basin rule and the three basin policy allow for replacement of system components without EQC review. The permit was issued and Mr. Neiger replaced the dosing tank. In 2002, Mr. Neiger passed away.

Last summer, the park's two septic systems, which handle projected flows of approximately 7,500 gpd, experienced difficulties and now are failing or very near failing. There is no area available for a new or expanded drainfield. Mrs. Neiger's consultant is proposing to install a sewage treatment plant—recirculating textile filters—ahead of the existing drainfields, anticipating that the improved effluent quality will allow the existing drainfield trenches to recover and accept wastewater again. This type of upgrade proposal has worked in other instances.

Public Process for Currinsville Mobile Home Park

The three basin rule does not require public notice or hearing unless there is a concentration limit variance request. Division 45 does not require public notice for a minor modification of a permit. Since this is a minor permit modification (no request for increased discharge) and there is no request for concentration limit variance, the proposed permit action was not put on public notice. The evaluation report and proposed permit modification are included as attachments G and H respectively.

Major Issues for Currinsville Mobile Home Park

The major environmental issue is that the existing septic systems at the facility are no longer working. Aside from installing the proposed treatment plant, there is very little that the permittee can do as interim measures to protect human health.

Findings Requested for Each Permittee

The Department cannot issue the proposed WPCF permit modifications to either permittee for the new wastewater treatment facilities without a Commission finding that the proposed facilities will provide a means of sewage collection, treatment, and disposal preferable to individual onsite wastewater disposal systems in accordance with the criteria in OAR 340-071-0350(8)(c)(B). Specifically, the Department requests the Commission find for Big Valley Woods LLC and for Currinsville Mobile Home Park LLC that:

- The proposed wastewater treatment facilities will have less cumulative impact to groundwater than either the facilities they replace or individual onsite systems.

Both permittees are proposing the same type of sewage treatment plant: recirculating textile filters to treat the septic tank effluent before it is discharged back to existing sewage disposal trenches. This type of treatment plant will reduce cumulative impacts on groundwater by improving wastewater treatment. The treatment plant will remove an estimated 80 to 90% of nutrients from wastewater.

The Department has determined that the application of each permittee has satisfied all other applicable requirements of the three basin rule, described in OAR 340-041-0350(8)(c)(A) and (C), which do not require Commission findings. The current permit for Big Valley Woods LLC requires the permittee to submit a Preliminary Groundwater Assessment and Hydrogeologic Characterization Report by July 21, 2004, to assure that all groundwater quality protection requirements of OAR 340-040-0030 have been met. Each permittee has an individual permit; the permit allows only residential-strength discharges,

which will not incapacitate the treatment systems; and the permit requires annual certification of operations and maintenance by a properly qualified person. The requirements in subparagraph (8)(c)(C)(iii) of the rule do not apply.

Analysis of Requested Findings

As noted above, the proposed facilities will improve wastewater treatment and reduce potential groundwater impacts. The Department has not identified any negative environmental impacts from the proposed new treatment plants.

Department Recommendation

The Department has determined that each permittee has satisfied applicable requirements for the proposed permit in the three basin rule at OAR 340-041-0350(8)(c). The Department recommends that the Commission make the finding requested for issuance of the permit modification for Big Valley Woods LLC and for Currinsville Mobile Home Park LLC.

Attachments

Attachment A: Three Basin Rule, OAR 340-041-0350
Attachment B: DEQ Policy, 3-Basin Rule Implementation
Attachment C: Comments on Big Valley Woods' Proposed Upgrade/Expansion Request
Attachment D: Permittee's Amended Modification Request (Big Valley Woods)
Attachment E: Revised Permit Evaluation Report (expansion proposal dropped) (Big Valley Woods)
Attachment F: Final WPCF Permit Modification (Big Valley Woods)
Attachment G: Permit Evaluation Report (Currinsville Mobile Home Park)
Attachment H: Draft Permit Modification (Currinsville Mobile Home Park)

Approved:

Section: Neil Mullane

Division:

Report Prepared By: Anne Cox, RS
Phone: (503)229-6653

Attachment A

Agenda Item D

340-041-0350

The Three Basin Rule: Clackamas, McKenzie (above RM 15) & the North Santiam

(1) In order to preserve or improve the existing high quality water for municipal water supplies, recreation, and preservation of aquatic life, new or increased waste discharges must be prohibited, except as provided by this rule, to the waters of:

(a) The Clackamas River Subbasin;

(b) The McKenzie River Subbasin above the Hayden Bridge (river mile 15);

(c) The North Santiam River Subbasin.

(2) Except as otherwise provided for in this rule, this rule becomes effective and applies to all permits pending or applied for after the date of filing with the Secretary of State.

(3) Special Definitions. The following special definitions apply to this rule:

(a) "Waste Discharges" are defined to mean any discharge that requires and NPDES permit, WPCF permit, or 401 Certification. Individual on-site sewage disposal systems subject to issuance of a construction-installation permit; domestic sewage facilities that discharge less than 5,000 gallons per day under WPCF permit; biosolids land applied within agronomic loading rates pursuant to OAR chapter 340, division 50; and reclaimed domestic waste water land applied at agronomic rates pursuant to OAR chapter 340, division 55 are excluded from this definition.

(b) "Existing Discharges" are defined as those discharges from point sources which existed prior to January 28, 1994;

(c) "Existing Facilities" are defined as those for which construction started prior to January 28, 1994. Where existing facilities are exempted from requirements placed on new facilities, the exemption applies only to the specific permit(s) addressed in the subsection which allows the exemption;

(d) "New" NPDES and WPCF permits are defined to include permits for potential or existing discharges which did not previously have a permit, and existing discharges which have a permit, but request an increased load limitation;

(e) "Agronomic Loading Rate" means the application of biosolids or reclaimed effluent to the land at a rate which is designed to:

(A) Provide the quantity of plant nutrients, usually nitrogen, needed by a food crop, feed crop, fiber crop, cover crop or other vegetation grown on the land; and

(B) Minimize the quantity of nitrogen or other nutrients from land applied materials that pass below the root zone of the crop or vegetation grown on the land to groundwater.

(f) "Biosolids" means solids derived from primary, secondary, or advanced treatment of domestic wastewater which have been treated through one or more controlled processes that significantly reduce pathogens and reduce volatile solids or chemical stabilize solids to the extent that they do not attract vectors. This term refers to domestic wastewater treatment facility solids that have undergone adequate treatment to permit their land application;

(g) "Reclaimed Wastewater" means treated effluent from a domestic wastewater treatment system which, as a result of treatment, is suitable for a direct beneficial purpose or a controlled use that could not otherwise occur.

(4) To respond to emergencies or to otherwise avoid imminent serious danger to public health or welfare, the Director or designee may allow lower water quality on a short-term basis.

(5) The Director or a designee may renew or transfer NPDES and WPCF permits for existing facilities. Existing facilities with NPDES permits may not be granted increases in their permitted mass load limitations. The following restrictions and exceptions apply:

(a) The Department may conduct an inspection prior to permit renewal. Existing sources with general permits that are found not to qualify for a general permit, and who wish to continue discharging, must apply for an individual permit;

(b) Fish hatcheries (General Permit 300) and log ponds (General Permit 400) are required to apply for an individual permit at the time of permit renewal;

(c) Additional industrial, confined animal feeding operations, or domestic waste loads that are irrigated on land at agronomic rates or that otherwise meet the conditions of section (7) of this rule is not be considered to be an increase in the permitted wasteload.

(6) The Director or a designee may issue the following General Permits or Certifications subject to the conditions of the Permit or Certification:

(a) Stormwater construction activities (General Permits 1200C and 1200CA);

(b) Underground storage tank cleanups using best available treatment technology (General Permit 1500);

(c) Non-contact cooling water (General Permit 100);

(d) Filter backwash (General Permit 200);

(e) Boiler blowdown water (General Permit 500);

(f) Suction dredging (General Permit 700) only in portions of the basins that are not designated as Scenic Waterways under ORS 390.805 to 390.925;

(g) Federal Clean Water Act Section 401 water quality certifications.

(7) Long-term general and individual stormwater permits may be allowed as required by State and/or Federal law. The following requirements apply:

(a) New stormwater discharge permit holders must maintain a monitoring and water quality evaluation program that is effective in evaluation of the in-stream water quality impacts of the discharge; and

(b) When sufficient data is available to do so, the Department will assess the water quality impacts of stormwater discharges. Within a subbasin, if the proportion of total degradation that is contributed by the stormwater is determined to be significant compared to that of other permitted sources, or if the Department determines that reducing degradation due to stormwater is cost-effective when compared to other available pollution control options, the Department may institute regulatory mechanisms or modify permit conditions to require control technologies and/or practices that result in protection that is greater than that required Statewide.

(8) Industrial waste discharge sources, confined animal feeding operations, and domestic sewage treatment facilities must meet the following conditions:

(a) No NPDES permits for new industrial or new confined animal feeding operation waste discharges, or new domestic sewage treatment facilities may be issued, except as allowed under sections (3), (4), (5), and (6) of this rule;

(b) The Department may issue WPCF permits for new industrial or confined animal feeding operation waste discharges provided:

(A) There is no waste discharge to surface water; and

(B) All groundwater quality protection requirements of OAR 340-040-0030 are met. Neither the Department nor the Commission may grant a concentration limit variance as provided in OAR 340-040-0030, unless the Commission finds that all appropriate groundwater quality protection requirements and compliance monitoring are met and there will be no measurable change in the water quality of the surface water that would be potentially affected by the proposed facility. For any variance request, a public hearing must be held prior to Commission action on the request.

(c) The Department may issue WPCF permits for new domestic sewage treatment facilities provided there is no waste discharge to surface water and provided:

(A) All groundwater quality protection requirements of OAR 340-040-0030 are met. Neither the Department nor the Commission may grant a concentration limit variance as provided in OAR 340-040-0030, unless the Commission finds that all appropriate groundwater quality protection requirements and compliance monitoring are met and there will be no measurable change in the water quality of the surface water that would be potentially affected by the proposed facility. For any variance request, a public hearing must be held and the permit application will be evaluated according to paragraphs (B) and (C) of this subsection;

(B) The Commission finds that the proposed new domestic sewage treatment facility provides a preferable means of sewage collection, treatment and disposal as compared to individual on-site sewage disposal systems. To be preferable, the Commission must find that one of the following criteria applies:

(i) The new sewage treatment facility will eliminate a significant number of failing individual on-site sewage disposal systems that cannot be otherwise reliably and cost-effectively repaired; or

(ii) The new sewage treatment facility will treat domestic sewage that would otherwise be treated by individual on-site sewage disposal systems, from which the cumulative impact to groundwater is projected to be greater than that from the new facility; or

(iii) If an individual on-site sewage disposal system, or several such systems, would not normally be utilized, a new sewage treatment facility may be allowed if the Commission finds that the social and economic benefits of the discharge outweigh the possible environmental impacts.

(C) Applicants for domestic wastewater WPCF permits must meet the following requirements:

(i) Application must be for an individual permit; and

(ii) The proposed discharge must not include wastes that incapacitate the treatment system; and

(iii) The facility must be operated or supervised by a certified wastewater treatment plant operator as required in OAR 340-049-0015, except as exempted by ORS 448.430; and

(iv) An annual written certification of proper treatment and disposal system operation must be obtained from a qualified Registered Sanitarian, Professional Engineer, or certified wastewater treatment system operator.

(9) The Environmental Quality Commission may investigate, together with any other affected State agencies, the means of maintaining at least existing minimum flow during the summer low flow period.

(10) In order to improve water quality within the Yamhill River subbasin to meet the existing water quality standard for pH, the following special rules for total maximum daily loads, waste load allocations, load allocations and program plans are established:

(a) After completion of wastewater control facilities and program plans approved by the Commission under this rule and no later than June 30, 1994, no activities may be allowed and no wastewater may be discharged to the Yamhill River or its tributaries without the authorization of the Commission that cause the monthly median concentration of total phosphorus to exceed 70 ug/1 as measured during the low flow period between approximately May 1 and October 31*** of each year;

(b) Within 90 days of adoption of these rules, the Cities of McMinnville and Lafayette must submit a program plan and time schedule to the Department describing how and when they will modify their sewerage facility to comply with this rule;

(c) Final program plans will be reviewed and approved by the Commission. The Commission may define alternative compliance dates as program plans are approved. All proposed final program plans must be subject to public hearing prior to consideration for approval by the Commission;

(d) The Department will within 60 days of adoption of these rules distribute initial waste load allocations and load allocations to the point and nonpoint sources in the basin. These allocations are considered interim and may be redistributed based upon the conclusions of the approved program plans. ***Precise dates for complying with this rule may be conditioned on physical conditions (i.e., flow, temperature) of the receiving water and may be specified in individual permits or memorandums of understanding issued by the Department. The Department may 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.

Stat. Auth.: ORS 468.020, 468B.030, 468B.035, 468B.048
Stats. Implemented: ORS 468B.030, 468B.035, 468B.048
Hist.: DEQ 17-2003, f. & cert. ef. 12-9-03

Attachment B
Agenda Item D

Three Basin Rule

OAR 340-041-470
1/28/03

Summary

DEQ has not always implemented the Three Basin Rule (3-B Rule) with respect to permitting of large onsite systems in the Three Basin areas. The rule, as interpreted and consistent with the plain language reading and the informal input from the Assistant Attorney General, requires EQC review of all "new" or expanded or improved WPCF-OS treatment facilities proposals. DEQ has not wanted to take all new or increased on-site systems to the Environmental Quality Commission (EQC) in cases of potential public health hazards and because of the perception that the EQC review process would be time consuming for permits that should have limited or no environmental impact.

History and Background

The 3-B Rule originally addressed only surface water discharges in the three sub-basins: Clackamas, McKenzie and North Santiam. The rule was substantially rewritten during 1994 and was adopted by the EQC on February 16, 1995. The reworked version included regulations for WPCF as well as NPDES permits.

During the same time period, Division 71 on-site rules were also being extensively rewritten, with a new provision that put large septic systems >2500 gallon per day or combination of systems on the same property with a total flow of >2500, as well as repaired or expanded large septic systems under DEQ operational WPCF permits and it moved WPCF regulations into Division 71. These reworked Division 71 rules took effect on April 1, 1995, two months after the EQC adopted the 3-B Rule. Prior to April 1, 1995, the owners of existing large facilities with multiple systems of <5000 each but with total flows > 5000 gallon per day not under WPCF permit could repair their failing septic systems through a county-issued, construction installation permit. These sewage treatment facilities would not have been subject to the 3-B Rule.

Discussion

Renewed or transferred NPDES or WPCF Permits
The 3-B Rule already allows DEQ to renew or transfer NPDES or WPCF permits without going through EQC review.

New Expanded or Improved NPDES or WPCF Permits
The 3-B Rule requires EQC review of all applications for new or expanded or improved domestic sewage treatment facilities large enough (5000 gpd) to be subject to the 3-B rule. The Assistant Attorney General's informal view was that there is a substantial risk that DEQ would lose in court if the Department were to approve a WPCF system on behalf of the Commission

without the benefit of a formal written delegation. However, there may be some latitude available in making a determination of which applicants are subject to the part of the rule requiring EQC review.

The 3-B rule requires EQC review, not necessarily for new WPCF permits, but for new sewage treatment facilities over 5000 gpd. The Assistant Attorney General suggested that existing treatment plants could be placed under WPCF permit without EQC review. He also said that repairs of system components could also be authorized without EQC review. However, a plant upgrade, expansion, or rebuild in another area would require EQC review. Since failed septic systems are normally "repaired" by building new drainfield and/or a treatment plant, most "repair" WPCF applications would in fact require EQC review. Likewise, any improvements to treatment at a WPCF-permitted existing plant would need prior EQC review.

3 BASIN RULE SUMMARY OAR 340-041-0470

Specifically prohibited permits: New NPDES permits for Industrial, CAFO or Domestic STPs (7)(a)	Exceptions: • Short-term lowering of WQ to respond to emergency situations, • Individual NPDES permits for existing log ponds and fish hatcheries at time of renewal of general permits 300 & 400 • Industrial, CAFO or domestic waste land application at agronomic rates • New General Permits 1200C, 1200CA, 1500, 100, 200, 500, 700 (outside designated scenic waterways) • CWA Section 401 Certifications • General and individual stormwater permits
Specifically prohibited permits: NPDES permits that allow increased mass load limitations for existing sources (2)(d), (7)(a)	Existing means construction was started before 1/28/1994
Specifically allowed permit actions by DEQ: Renewal or transfer of existing NPDES or WPCF permits, New WPCF permits for STPs less than 5000 gpd, Individual onsite systems (2)(a)	
Permits DEQ may issue without approval by EQC: New industrial or CAFO WPCF permits (7)(b)	Conditions: • No discharge to surface water and • Meet all GW requirements
Permits DEQ may issue after approval by EQC: New domestic STP/WPCF	Conditions: • No discharge to surface water, • EQC finding that STP is a preferable to individual

(7)(c)	onsite systems, and • Individual permit • Certified operator • Annual reporting
Permits not specifically addressed: Repair of individual onsite system (>5000 gpd) under WPCF, Improved treatment at STP	EQC should review and approve these permits per AG

In order for DEQ to issue some permits, the EQC must make specific findings. In order to get a decision from the EQC, the draft permit and recommendations for findings should be treated within DEQ as if it were a standard agenda item for the EQC. This means that it will likely take about 6 months after the permit is finalized before it can be issued. Attached is a flow chart of the internal process.

3 Basin Permit Approval Process

Develop Permit Proposal — **Planning Timeframes**

- Gather data and resolve issues
- Consult
- Draft permit
- Schedule public comment (hearings optional)
- Prepare Notice package

1 - 12 months

Provide Notice of Proposed Permit

- Prepare and review draft Notice pckg
- Publish notice of proposed permit
  - Mail to lists & interested parties
- Conduct comment process (hearings optional)
- Revise permit in response to comment

2 - 7 months

Approve Permit

- Prepare and review draft EQC staff report
- Director approves EQC staff report
- Submit EQC Staff Report & attachments to EQC
- EQC approves permit

2 - 6 months

Total Time — **5 - 25 months**

1/03

Attachment C
Agenda Item D

To: State of Oregon,
Department of Environmental Quality,
Clackamas County

18 February 2004
Boring, Oregon
Big Valley Woods

Attention: Anne Cox, R.S.

Regarding: Proposed WPCF Permit Modification
Big Valley Woods (Mobile/Mfgd. Home Park)
32700 SE Leewood Lane
Boring, OR

Commentary:

The original construction of this Park was not done properly. Every effort to save trees, retain woodland beauty, and rusticness, was made. However, not enough care was given to the construction and effects of sanitary waste handling and disposal, as well as drainage, and erosion controls. The Park is old. It has a live waterway, Deep Creek, which runs through it.The Park water supply is by wells drilled into a shallow aquifer supplied by this surface stream, springs and runoff. The old and poorely constructed sewage system(s) have leaked, overflowed and otherwise impacted the area for a long time. Maintenance has been minimal. This area should be rested.

The topography and soils are such, that all surface and subsurface flows and migration, and soil hydraulics,
carry into shallow and lower aquifers, definitely imacting Deep Creek. This in turn effects any wells downstream as well as those of the Park. In construction, trees were stumped subsurface, they have now deteriorated, their long root networkst provide subsurface conduiting of flows. Much, undesirable materials, was buried, left to "rot." The lensing of clays, old loams, detrious, gravel and rockbeds, creates a general soil mechanics not necessarily appropriate to safe waste disposal. These conditions cause subsurface ponding, a hold and release under pressures affect to the hydraulics of the area. Flows move fast, sometimes rise to the surface and enter runoff. It makes it very difficult to predict laminar flow and percolation, and aquifer separation. Determination of safe disposal is very difficult. The exhisting condition is questioable. The real quality of water unknown, or doubtful. Some reported tenant illnesses may be attributed. Standing tap water produces algae bloom.

All of this can only be worsened by increased density of population. Even after intended improvements are completed, the type of intended treatment must be tightly monitored, and maintained. History indicates this usually deteriorates with time and economics.This system can easily reach it's limits, causing new problems.

I can only believe the necessity of coordinated review, planning and control of water, sewage, drainage, and erosion, are near mandatory! The various Permit Processes should also consider and reflect this.

These concerns represent my educated and professional impressions and observations, and interest in the environment in general, and as a tenant in the park.

Sincerely,

Ric Conover

Thomas R. (RIC) Conover, CE - (BS, MS)
(Retired, USFS - Civil Engineer - Sites and
Improvement & Water and Sanitation Engineer, Special and Environmental
Projects Engineer)

Sunday, February 15, 2004

Anne Cox, R.S.
Water Quality/Northwest Region
Department of Environmental Quality
2020SW Fourth Avenue #400
Portland, OR 97201

RE: Public Notice, Request for Comments. Big Valley Woods, LLC. Application 983862.

Dear Ms. Cox:

We are absolutely mortified to learn that the new owner of Big Valley Woods Mobile Home Park is proposing to expand the park with 49 additional mobile homes and multi-family housing (i.e., apartments).

As homeowners in this park we wish to go on record opposing permit modification for said expansion based on the following DEQ issues:

1) Domestic water supplies (from pump filled, non-protected, cisterns) are already maxed out. Even as of this writing, we are not allowed the use of summertime landscape water or golf course irrigation. Water pressure varies with the time of day use.
2) Existing effluent pumping station has overflow outlet, which discharges into Deep Creek.
3) Permittee has NOT operated in compliance to DEQ permit. Our own septic system has discharged effluent directly onto ground surface (and into run-off watershed) since we moved here in July 2002. We have observed at least three other sites with similar discharges. Additionally, permittee pumps water, in summertime, from Deep Creek to two ponds and allows the fowl fecal contaminated pond water to return directly into Deep Creek.
4) Air Quality will be affected by the additional vehicle traffic. An estimated 60 to 80 home owner vehicles, plus visitors will be making multiple daily trips through the park. Already, we experience exhaust fumes in our residence from existing traffic.

Other non DEQ issues that should impact the park expansion are: Only a single entrance/exit exists in this park of 153 mobile homes and 68 RV spaces – emergency evacuation is already a critical concern – additional vehicles would gridlock the road; Park operator does not enforce park rules – speeders and unmufflered vehicles run through the park at all hours of the day/night – how much worse will it be with fifty more residents who won't obey the rules; Compliance to meet all the sewer and water requirements will raise rent to prohibitive amounts; Peace of mind and tranquility of the park will be destroyed by overcrowding.

Anne, please weigh the foregoing issues when considering this permit modification.

Thank you,

Tom and Shirley

Tom Newell/ Shirley Nelson
32700 SE Leewood Lane Space 46
Boring, OR 97009
503 668-5944

Anne Cox, R.S.

Dear Anne,

I have tried to email you as I feel this is so handy this day and age. Since I have a fax machine, (not dedicated) I will attempt that method. By the way, feel free to reach me either at our home phone (503) 668-5758, or email me at: grammyjaynie@earthlink.net . Perhaps you will be more successful than I was.

I am a resident at Big Valley Woods, in Boring, Oregon.

I am very concerned about the proposed WPCF permit modification for Big Valley. We have lived here over 16 years now, and things have deteriorated drastically the last few years. Most of us who do live here are permanent residents. We don't live "cheek by jowl" as most other Mobile home parks have to. But, the amount that Big Valley has put in for to modify and increase flows etc. The drain fields are certainly not up to snuff. It is very disconcerting to me since they have yet to finish taking care of business, as they should have to finish what they started on several septic tanks. We still have an open hole leading to the septic tank. I have asked 3 times if someone can either come finish the job or cover it up so it doesn't smell. They have removed boards to our deck, (and haven't put them back, making getting into our shed very difficult. We laid them down and haven't nailed them yet as some of the ditch that was dug is also under those boards. Our upper deck going into our home specifically is now some 3" away from the house itself. That was not the case before they started digging. Some days the smell from that area is worse than other times. I have also since found out from our neighbor Larry Alexander that the proposed modification is now more than this original document suggests.

I would ask that everything be done to promote the existing repairs, and to be very careful about approving anything else.

Please feel free to email me at the above address, and I will respond accordingly.

Sincerely,
Jayne Quigley Space 67 in Big Valley

COX Anne

From: COX Anne
Sent: Friday, February 20, 2004 2:42 PM
To: 'Barbara Ellis'
Cc: COX Anne
Subject: RE: Sewer improvement proposal at Big Valley MHP

I have received your comments. Thank you for writing.

Anne Cox, R.S.
(503) 229-*6653*
Fax (503) 229-*6957*

-----Original Message-----
From: Barbara Ellis [mailto:bjellis30@hevanet.com]
Sent: Wednesday, February 18, 2004 6:50 AM
To: COX Anne
Subject: Sewer

Hello Ann, Iam writing about the modified measure for more sewers, wells and homes in the Big Valley Woods and R.V. Park in Boring, OR. Things are a mess in this Park and they certainly should be fixing what is there before trying to add more. There is a fear of contamination of the water. Thanks for listening. Barbara Ellis
bjellis_30@hevanet.com

COX Anne

From: Jlstarkey@aol.com

Sent: Wednesday, February 18, 2004 5:16 PM

To: COX Anne

Subject: Proposed WPCF Permit Miodification for Big Valley Woods

I am a tenant of Big Valley Woods. I share a concern for the proposed plans for Big Valley. I am very concerned about some of the work that is taking place in this park. Many septic and sewer lines have been opened and have remained so, since the beginning of the work (last summer). Some of them are near tenants homes. An elderly woman in this park has contracted Hepatitis A. We do not know if the ground water could be the source of her contamination. We are concerned about all the digging in the park and whether some water lines could have been violated.

The owners invited the tenants to a meeting, last night. They told us that the work on the sewers would continue (even thought it has been going on since last. summer) and we must continue to bear the inconvenience and mess for quite some time. They also told us they had computed the costs so far, to over $3,000. per home site. When I asked if that cost was not also for the proposed expansion. They denied it and said they had to tell the county that to allow for future expansion. The credibility of these people is highly suspect, therefore, I (and a number of other tenants) are worried about what they may be doing to our water. For the entire summer (an extremely dry one) they had a hose (the size of a fire hose) diverting water from Deep Creek, into one of their ponds and they were diverting water in other places also. I heard they did not have water rights to do that. Do you really trust these people? We get our water from wells and I am concerned about our water. If fifty more homes are added to this park, it will change the whole character of everything around here. If many of the trees are cut down (and they will have to be to add that many home sites), it will certainly impact the water shed (adjacent to Deep Creek). These people are not residents. They live in California. They will not live with the results of these radical changes. Please consider the tenants. Many of them do not have E-mail capability, but they are also very concerned. We are not land owners, but we are long time residents (I have lived here for twenty-three).

Sincerely, Joan Starkey, Big Valley Woods Space #77

Attachment D
Agenda Item D

CAPITAL INVESTMENT NETWORK INC.
INVESTMENT / DEVELOPMENT / FINANCE

VIA FAX & UPS OVERNIGHT
(503)229-5263

February 18, 2004

Anne Cox, R.S.
Department of Environmental Quality
Northwest Region
2020 SW 4th Avenue, Suite 400
Portland, OR 97201-4987

RE: WQ - Clackamas County
Big Valley Woods
File No. 112246
Permit No. 102680
Proposed System Upgrade

Dear Ms. Cox:

Big Valley Woods, LLC is requesting a modification to the referenced WPCF permit. Several of the individual septic systems have failing components, so it is our intention to eliminate all individual systems and provide secondary treatment prior to subsurface disposal. In addition, we are proposing an expansion to the system to accommodate additional manufactured home units. Please note that this plan includes replacement drainfields for the entire community and reduces the environmental impact by incorporating secondary treatment, even though we are proposing adding users.

The requested changes will eliminate all individual septic systems. Effluent will be transported through zonal collection systems to secondary treatment plants. The effluent will be treated, and then discharged into subsurface drainfields for disposal. The secondary treatment will be accomplished with recirculating engineered textile filter systems configured using Orenco AdvanTex AX 100's. The AdvanTex systems provide treatment far superior to the standard septic systems currently in use, but they do require a substantial capitol investment. Income from the additional home sites will assist to off-set the considerable expenditure required for the improvements.

The work proposed in this WPCF modification request will be performed in two phases. The first phase will include the existing 161 manufactured home sites, 68 RV sites, 4 apartment units, 3 coin operated laundry facilities, the picnic building, and the office. During phase II the number of manufactured home sites will be increased by 66 to 227 total sites. Phase II will be developed only after the necessary land use approval and DEQ construction-document approval have been attained. We are requesting that DEQ approve this WPCF modification request in its entirety, with the condition that land use approval will be attained prior to any on-site-system user additions.

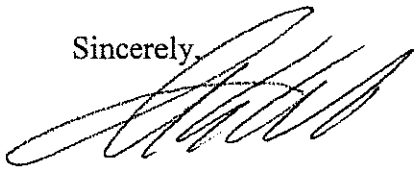
Usage after system expansion is limited to 227 manufactured home (MH) sites and 68 RV sites, 3 laundries, the picnic building, the office, and 4 apartments.

The current WPCF permit allows 153 manufactured homes, and 67 RV sites. Clackamas County has permitted 160 manufactured home sites and 68 RV sites. It is believed that the County permit was issued prior to a previous owner acquiring the tract of land that now is the golf course. That tract of land has one additional manufactured home on it, bringing the total to 161 manufactured homes and 68 RV sites.

The proposed modifications will reduce environmental impacts even though there will be an additional 66 manufactured home sites when the project is completed. According to research data published by Orenco Systems, biochemical oxygen demand (BOD) will be reduced by 95 percent and total suspended solids (TSS) reduced by 91 percent. Unfiltered effluent is transported directly to subsurface drainfields in the current system. The proposed system includes filtration at the septic tank, and secondary treatment preceding subsurface disposal in the existing drainfields. Per the Orenco reference, the current system yields BOD in a range between 180 -190 mg/L and TSS in 80-85 mg/L range, which would produce 73 to 77 lbs. of BOD per day and 32 to 35 lbs. of TSS per day. The modified system will produce less than 5 mg/L of BOD (3 lbs.) and 5 mg/L of TSS (3 lbs) per day. The net result of the modification is an average reduction of 72 lbs. of BOD and 30 lbs. of TSS per day discharged to the drainfields.

The changes outlined in this proposal will allow Big Valley Woods & RV Resort to operate in a more environmentally friendly manner, while providing for some modest expansion. We think the reduction in environmental impact is significant and we are eager to begin system design as soon as DEQ approval can be obtained. To expedite the approval of this proposal, we want to waive the 14-day owner review. Thank you for taking the time to review this proposal. If you have any questions or comments about the technical data presented in this proposal, please call John McGee at (541) 928-2583.

Sincerely,



Steve Wise

Cc.: John McGee, K & D Engineering

Attachment E
Agenda Item D

State of Oregon

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY
LARGE ONSITE WPCF PERMIT MODIFICAITON
REVISED EVALUATION
March 1, 2004

Permittee:	Big Valley Woods LLC 414 Walnut Avenue Huntington Beach CA 97648 File Number: 112246	Manager Approval Initials:	
Source Contact:	Steven Wise, Manager	Telephone Number: (714) 969-6969	
Source Location:	Big Valley Woods, 32700 SE Leewood Lane, Boring OR		
County:	Clackamas		
Permit Writer:	Anne Cox	NWR Office	
Proposed Action, Revised:	Permit Modification, existing usages, improved sewage treatment	Application No.: 983862	Date Received: 11/13/2003

Introduction
Under Oregon Administrative Rule Chapter 340 Division 71 Section 130 (15)[OAR 340-71-130(15)], any system with a projected daily flow greater than 2,500 gallons a day is required to be operated under a WPCF permit from the Department of Environmental Quality. OAR 340-71-130(16) states that owners of existing systems, except holding tanks, are not required to apply for a WPCF permit until such time as a system repair, correction, alteration, or expansion is necessary.

This is an existing mobile home park in the Clackamas Sub Basin. The facility must also comply with the special regulations of the "Three Basin Rule." See OAR 340 Division 41. The initial WPCF permit was issued July 21, 2003, so that the new owner could replace a number of deteriorated septic tanks. The "Three Basin Rule," requires review by the Environmental Quality Commission (EQC), not necessarily for new WPCF permits, but for new sewage treatment facilities over 5,000 gpd. Both the DEQ permit and the replacement of system components (such as septic tanks) could be authorized without EQC review. However, in the proposed permit modification, the permittee is requesting approval for a new wastewater treatment system to provide improved sewage treatment and disposal for the entire, existing facility, and this requires EQC review under the Three Basin Rule.

Upgrade Proposal
As the permittee began replacing septic tanks in 2003, it became apparent that many of the smaller systems would no longer function if the deteriorated tanks were replaced by water tight tanks. Several drainfields were found to be at their end of service. Rather than proposing to fix

only some of the systems, the permittee is proposing to collect all of the sewage (septic tank effluent) generated at the park, treat the effluent through the installation and use of recirculating textile filters, and to discharge the treated effluent back to the existing large drainfields.

Facility Description

Current Facility	48,250 Gallons per day—161 mobile homes and 68 RV spaces, 4 apts and 3 laundries
Current sewage disposal systems	Five (5) large "community septic systems" and 50 or more smaller septic systems, all standard sewage disposal
Proposed Upgrade	New sewage treatment plant to treat all wastewater to BOD/TSS concentrations of 20 mg/l with discharge back to the five existing community drainfields for final disposal.
Water Supply Source	2 Wells (there are a total of 4 wells on the property)

Reduced impact on the environment. The improved treatment of the effluent prior to subsurface discharge will result in a lessening of the amounts of contaminants discharged to the soils. This will result in a reduction in pollutant loading. The treatment plant will reduce 5-Day Biochemical Oxygen Demand (BOD_5) from an estimated 160 mg/l to 20 mg/l. Total Suspended Solids (TSS) of an estimated 150 mg/l will also be reduced to 20 mg/l. Taking BOD_5 as an example, the current septic tank effluent flows of 48,250 gpd would deliver daily an estimated 64.39 pounds of BOD_5 for drainfield disposal. Following treatment through the recirculating textile filters to a concentration of 20 mg/l, the final daily discharge would contain 8.05 pounds of BOD_5 for a reduction of about 87%. Total TSS would be similarly reduced. The installation of the textile filters will result in a substantial total reduction in pounds of BOD_5 and TSS delivered to the soils.

Total nitrogen would not be significantly reduced by the proposed treatment method, but it would be changed through aeration to nitrate, which is a form more easily assimilated by plant roots and soil bacteria.

Expansion Proposal

The permittee originally proposed to also enlarge the upgraded sewage system to serve an increased number of mobile homes. In November, the proposal was to increase the capacity of the sewage system to serve a total of 202 mobile homes. In February, the permittee amended the increase to a total of 227 mobile homes. The permittee has subsequently modified its request to a "phased" approach, with Phase 1 being the upgrade to serve existing facilities, and Phase 2 being approval of the expansion. However, the expansion phase cannot be considered even conceptually until the permittee demonstrates the following:

Land Use Approval. The permittee must submit a signed statement from the Clackamas County Planning Department allowing the development to have 227 mobile homes, 68 RV spaces, 4 apartments, 3 laundries, and any other proposed new use changes or increases.

Full replacement area. The permittee needs to completely demonstrate that there is sufficient area available on the property to build a full complement of replacement drainfields meeting site and soils criteria for the expanded system, in the unlikely event that any or all of the current drainfields were to fail. A full, code replacement area is a requirement for proposed facility expansions under Division 71 onsite regulations.

Groundwater
As part of this permit evaluation, a groundwater prioritization screening was done. The results of this screening is as follows:

For new and existing drainfield systems (confirm all statements given as true or false:	
1. Based on the depth to the water table underline the applicable statement and confirm it as either true or false: A. Depth to water table is less than 100 feet: System design flow is less than 5,000 gpd. B. Depth to water table is between 100 and 300 feet; system design flow is less than 10,000 gpd. C. Depth to water table is greater than 300 feet; system design flow is less than 15,000 gpd.	False
2. System is not located in Groundwater Management Area where an identified contaminant of concern may be associated with domestic wastewater.	True
3. Drainfield is not located within: 1000 feet of an existing public or private drinking water supply well or a designated Wellhead Protection Area, And, all land within 1000 feet of the system is zoned such that no drinking water wells are likely to be installed in the future.	False
4. No industrial sources discharge to the system	True
5. There are no exceptional situations under which the system may require further groundwater review to determine the likelihood of an adverse impact.	True

If all answers are true, then no further information is needed.

If any answers are false, has additional information been gathered to satisfy the permit writer and groundwater reviewer that the facility actually has a low potential to adversely impact groundwater? **No.** The applicant did not provide any groundwater information with the original permit application, but the issued permit requires the permittee to submit a Preliminary Groundwater Assessment and Hydrogeologic characterization Report within 12 months of the permit issue date (by July 21, 2004).

The Department of Human Services (formerly the Oregon State Health Division) drinking water records indicate that the park is served by two wells. Water tests show that coliforms are absent and that nitrates have for the most part been around 1.1 to 1.2 mg/l. The permittee has provided a map which locates the wells providing the drinking water for the park.

The Oregon Water Resources Division well logs indicate that there are around 80 wells in the two sections occupied by the mobile home park. The well depths in the area range from 20 feet to over 1,300 feet, with most wells between 100 and 300 feet deep. Due to the confining layers found in the soil profile and the relatively wide distribution of effluent, it is unlikely that the current systems have the potential to adversely impact groundwater. If and when the new treatment system is built, the potential for adverse impact will be substantially lessened because of improved treatment of effluent and equalized distribution of that effluent for final subsurface disposal.

Pending Issues
The following issues must be addressed before DEQ can take final action on the request for permit modification to construct a new sewage treatment plant to serve the existing facility:

Three Basin Rule. The rule requires that the Environmental Quality Commission review this proposed upgrade and expansion. The proposal can be approved if the Commission finds that the new sewage treatment facility provides a preferable means of sewage collection treatment and disposal.

Compliance History
The permittee has operated the facility in compliance with the permit, other than some sewage exposures due to the tank replacement process, and the discovery of failed or nonexistent septic systems. No Notices of Noncompliance have been sent. The permittee has attempted to provide interim sewage disposal by connecting a few more homes to one of the community drainfields, but a permanent solution must be found.

PERMIT MODIFICATION DISCUSSION

Schedule A – Waste Disposal Limitations
Schedule A contains the following limitations for each system:

- The permittee is authorized to have 161 mobile homes, 68 RVs, 4 apartments, and 3 laundries. Design capacity is 48,250 gpd.
- BOD5, TSS limited to 20 mg/l, TN (Total Nitrogen) limited to 30 mg/l
- Prohibition of discharges to surface waters
- Prohibition of discharge of detrimental substances to system
- Groundwater restrictions.

Schedule B – Minimum Monitoring and Reporting Requirements
Monitoring parameters and frequencies are based on the Department monitoring matrix. Any modifications are listed as follows:

- Monitoring requirements for the existing facility are continued until the upgrade is constructed, approved and in use.

- After construction, monitoring of the new treatment and disposal system begins. Sewage flows are measured monthly, and twice yearly the final wastewater is analyzed for BOD_5, TSS, nitrate, ammonia, and total nitrogen.

Schedules C, D and F continue unchanged.

WATER POLLUTION CONTROL FACILITIES PERMIT MODIFICATION

Department of Environmental Quality
Northwest Region
2020 SW Fourth Avenue, Suite 400, Portland, Oregon 97201
Telephone: (503) 229-5263

Issued pursuant to ORS 468B.050

ISSUED TO:

Big Valley Woods LLC
414 Walnut Avenue
Huntington Beach CA 97648

SOURCES COVERED BY THIS PERMIT:

Type of Waste	System	Method of Treatment/Disposal
Domestic Sewage	several	Recirculating gravel or Textile filters, followed by Subsurface disposal

SYSTEM TYPE AND LOCATION:
Recirculating gravel or textile filters
Big Valley Woods
32700 SE Leewood Ln, Boring, OR

Located on: T 2S – R 4E - Sect. 20&21 @
Lat: 45.3838N, Long: -122.3360W

RIVER BASIN INFORMATION:
Basin: Willamette
Sub-Basin: Clackamas
LLID: 1224320453894
County: Clackamas

Nearest surface stream which would receive waste if it were to discharge: Deep Creek at RM 5.7243

Issued in response to Application No. 983862 received November 13, 2003.
This permit is issued based on the Land Use Compatibility Statement issued by Clackamas County dated February 3, 2004.

Neil Mullane, Administrator
Water Quality Program, Northwest Region

Date

Addendum No. 1

This addendum shall be attached to and made part of Permit No. 102680. Schedules A and B have been modified as follows:

SCHEDULE A

Waste Disposal Limitations

1. The permittee is authorized to operate and maintain domestic sewage treatment and disposal facilities consisting standard soil absorption drainfields, to serve Big Valley Woods. Any system construction or modification shall be constructed **in accordance with plans and specifications approved by the Department.**

2. Projected daily sewage flow for this facility is 48,250 gpd, based on 161 mobile home spaces, 68 RV spaces, 3 laundromats, 4 apartments. No changes in use or additional connections to any system shall be made without prior written DEQ approval.

3. After the treatment plant is constructed and operating, the **effluent** from the treatment plant to the drainfield(s) shall not exceed the following maximum concentrations

:

Parameter	Limitation
BOD_5	20 mg/l
TSS	20 mg/l
TN	30 mg/l

4. No discharge to surface waters is permitted. All wastewater shall be distributed into a soil absorption facility so as to prevent:

   a. Surfacing of wastewater on the ground surface, surface runoff or subsurface drainage through drainage tile.

   b. The creation of odors, fly and mosquito breeding and other nuisance conditions.

   c. The overloading of land with nutrients or organics.

5. No cooling water, air conditioner water, water softener brine, groundwater, oil, hazardous materials, roof drainage, storm water runoff, or other aqueous or non-aqueous substances which are, in the judgment of the Department, detrimental to the performance of the system or to groundwater, shall be discharged into the sewage treatment system, unless specifically approved in writing by the Department.

6. No Activities shall be conducted that could cause an adverse impact on existing or potential beneficial uses of groundwater.

SCHEDULE B

Minimum Monitoring and Reporting Requirements

1. System Monitoring Requirements
The permittee shall monitor the operation and efficiency of all treatment and disposal facilities. Sampling and measurements taken as required herein shall be representative of the nature of the wastewater, and shall be taken at peak usage during operation of the system. Unless otherwise agreed to in writing by the Department of Environmental Quality, data collected, and submitted shall include but not necessarily be limited to the following parameters and minimum frequencies:

a. **Septic system Operations---current systems in operation**

Item or Parameter	Minimum Frequency	Type of Sample
Water usage, GPD	Monthly Average	Measurement or calculation based on meter readings
Flow Meter Calibration	Annually	Verification
BOD_5 (RV park systems)	Semi-annually	Grab
TSS (RV park systems)	Semi-annually	Grab
TKN (RV park systems)	Semi-annually	Grab
Number of MH vacancies	Monthly	Count
Number of RV vacancies	Monthly	Count
Inspection of all drainfields	Quarterly	Visual

b. **Septic system Operations—after the treatment upgrade is constructed**

Item or Parameter	Minimum Frequency	Type of Sample
Effluent flow from the treatment plant	Monthly Average	Measurement or calculation based on meter readings
Flow Meter Calibration	Annually	Verification
Number of MH vacancies	Monthly	Count
Number of RV vacancies	Monthly	Count
Inspection of all drainfields	Quarterly	Visual

c. **Sampling Requirements for Treated Effluent from Sewage Treatment Plant beginning three months after it is placed in operation**

Item or Parameter	Minimum Frequency	Type of Sample
BOD_5	Every six months	Grab
TSS	Every six months	Grab
NO_3-N	Every six months	Grab
NH_3-N	Every six months	Grab
TN	Every six months	Grab

d. **Operations and Maintenance Activities**
The permittee shall record in writing all observations of operation and maintenance activities, as required by the Department approved Operation and Maintenance manual, on a monthly basis.

e. **Solids Management**
The permittee shall maintain a record of the pumping dates and quantity (in gallons), of solids/wastewater pumped, and what licensed sewage disposal service company pumped the solids/wastewater, as well as the final disposal location and transfer locale (if applicable).

2. Reporting Procedures
Monitoring, maintenance practices, solids handling, and results shall be reported on Department approved forms. The reporting period is the calendar year. Reports must be submitted to the DEQ office listed on the face page of this permit by **January 15 following the reporting period.**

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY
LARGE ONSITE WPCF PERMIT MODIFICATION EVALUATION
March 1, 2004

Permittee:	Currinsville Mobile Home Park LLC 8900 SW 17th Avenue Portland, Oregon 97219 File Number: 111405		Mgr. Approval:
Source Contact:	Shirley Neiger	Telephone Number: (503) 246-0885	
Source Location:	Currinsville Mobile Home Park, 28388 SE Eagle Creek Road		
County:	Clackamas		
Permit Writer:	Anne Cox	NWR Office	
Proposed Action:	Modification without influent increase	Application No.: xxxxx	Date Received: xxxxx

Introduction
Under Oregon Administrative Rule (OAR) Chapter 340 Division 71 Section 130 (15), any system with design flow greater than 2,500 gpd shall be regulated under a WPCF permit from the Department of Environmental Quality.

The original date of installation of the two septic systems is not known. The park is more than 40 years old. The system was last repaired under a construction installation permit issued by Clackamas County in 1981. The original DEQ permit was required because of an onsite rule change in 1995: As per OAR 340-71-130(16), the owner of an existing facility is required to obtain a WPCF permit when a repair becomes necessary. Mr. Neiger (Currinsville Mobile Home Park LLC) obtained a WPCF permit in 2001 in order to replace a rusted dosing tank. Mr. Neiger passed away in 2002.

In 2003, Mrs. Neiger began to have trouble with the septic systems at the park. For a few months, the systems seemed to be back under control, but with the onset of winter weather, both systems are failing or very close to it.

Facility Description

Total Design Flow of Systems	7,500 gpd. There are two septic systems. 27 homes and one space are on one system, and 2 homes are on the smaller system
Date Constructed	Not known
Type of Drainfields	Existing

Upgrade Proposal

The permittee is proposing to install one or more recirculating textile filters ahead of the drainfields, with the expectation that the drainfields will recover somewhat and no longer discharge to the surface when dosed with treated effluent. The drainfield serving the two units will be taken out of service. The treatment plant can be built to provide some denitrification of the wastewater to further reduce the impact on the environment. Residential sewage typically has a nutrient concentration of around 160 mg/l of 5-Day Biochemical Oxygen Demand (BOD5). The textile filters can be expected to reduce BOD5 to 20 mg/l, which represents an 87% removal. Total Suspended Solids (TSS) are similarly reduced.

There is no area available for new drainfield or additional drainfield. If the existing drainfields do not recover, the permittee may need to install raised drip irrigation beds (subsurface) in the area of the larger drainfield.

Groundwater

As part of this permit evaluation, a groundwater prioritization screening was done. The results of this screening is as follows:

1. Based on the depth to the water table, underline the applicable category, and make a determination of true or false for the system design flow associated with that category: a. Depth to water table is less than 100 feet; System design flow is less than 5,000 gpd. b. Depth to water table is between 100 and 300 feet; System design flow is less than 10,000 gpd. c. Depth to water table is greater than 300 feet: system design flow is less than 15,000 gpd.	False
2. System is not located in Groundwater Management Area where an identified contaminant of concern may be associated with domestic wastewater.	True
3. Drainfield is not located within: 1000 feet of an existing public or private drinking water supply well or a designated Wellhead Protection Area, And, all land within 1000 feet of the system is zoned such that no drinking water wells are likely to be installed in the future.	False
4. No industrial sources discharge to the system	True
5. There are no exceptional situations under which the system may require further groundwater review to determine the likelihood of an adverse impact.	True

If all answers are true, then no further information is needed.

If any answers are false, has additional information been gathered to satisfy the permit writer and groundwater reviewer that the facility actually has a low potential to adversely impact groundwater? The park is served by a well that is 75 feet deep, drilled in 1974. The water system is a public community system under OSHD. Coliform bacteria summary data from OSHD

indicates very few total coliform and no fecal coliform violations from 1995 to the present. Nitrate levels indicate a high of 4.6 mg/l in 1986.

Compliance History

Mr. Neiger turned in a monitoring report for 2001. When none was received for 2002, Department staff contacted Mrs. Neiger in early 2003 and learned that Mr. Neiger had passed away. Mrs. Neiger had not been aware of the reporting requirements. She submitted a report for 2002 and in January 2004 she submitted the report for 2003.

PERMIT MODIFICATION DISCUSSION

Schedule A – Waste Disposal Limitations

Schedule A contains the following limitations for the system:

- x System Maximum Daily flow
- x Concentration limits on final treated effluent of 20 mg/l for BOD_5 and TSS; and Total Nitrogen not more than 30 mg/l
- x Prohibition of discharges to surface waters
- x Prohibition of discharge of detrimental substances to system
- x Groundwater restrictions.
- x Requirement for annual evaluation of the system by a Registered Sanitarian or Professional Engineer.

Schedule B – Minimum Monitoring and Reporting Requirements

Monitoring parameters and frequencies are based on the Department monitoring matrix. Any modifications are listed as follows:

Monthly measurement of flows
Annual sampling for BOD_5, TSS, NO_3-N, NH_3-N, reporting of TN and TKN

Schedules D and F – remain unchanged

Attachment H
Agenda Item D

Expiration Date: 31-Jul-2008
Permit Number: 102315
File Number: 111460

WATER POLLUTION CONTROL FACILITIES PERMIT MODIFICATION

Department of Environmental Quality
Northwest Region
2020 SW Fourth Avenue, Suite 400, Portland, Oregon 97201
Telephone: (503) 229-5263

Issued pursuant to ORS 468B.050

ISSUED TO:

Currinsville Mobile Home Park LLC
8900 SW 17th
Portland OR 97219

SOURCES COVERED BY THIS PERMIT:

Type of Waste	System	Method of Treatment/Disposal
Domestic Sewage	002	Recirculating textile or gravel filters or the equivalent And subsurface disposal trenches

SYSTEM TYPE AND LOCATION:
Recirculating textile or gravel filters
28388 SE Eagle Creek Road, Estacada

Located on: T3S R4E S8, Tax Lot# 3800 @ Lat: 45^0 19' 03"N, Long: 122^0 20' 25"W

RIVER BASIN INFORMATION:
Basin: Willamette
Sub-Basin: Clackamas
LLID: 1223628453445
County: Clackamas

Nearest surface stream which would receive waste if it were to discharge: Currin Creek at RM 2.3197

Issued in response to Application No. xxxx received xxxxxxxx.

This permit is issued based on the Land Use Compatibility Statement issued by Clackamas County dated August 2, 2001.

Neil Mullane, Administrator
Water Quality Program, Northwest Region

Date

Addendum No 1

This addendum shall be attached to and made part of Permit No. 102315. Schedules A and B have been modified as follows:

SCHEDULE A

Waste Disposal Limitations

1. The permittee is authorized to operate and maintain the existing domestic sewage treatment and disposal facility to serve Currinsville Mobile Home Park, a 30 space mobile home park with laundromat. Any system construction or modification shall be constructed in accordance with plans and specifications approved by the Department.

2. The average daily sewage flow to the drainfields should be approximately fifty percent (50%) of the maximum daily or peak flow to the treatment system. The maximum daily flow shall not exceed 7,500 gpd unless otherwise approved by the Department. No changes in use or additional connections to a system shall be made without prior written DEQ approval.

3. After the treatment plant is in operation, the final **effluent** from the treatment plant and prior to subsurface disposal shall not exceed the following maximum concentrations:

Parameter	Limitation
BOD_5	20 mg/l
TSS	20 mg/l
TN	30 mg/l

4. No discharge to surface waters is permitted. All wastewater shall be distributed into a soil absorption facility so as to prevent:

   a. Surfacing of wastewater on the ground surface, surface runoff or subsurface drainage through drainage tile.

   b. The creation of odors, fly and mosquito breeding and other nuisance conditions.

   c. The overloading of land with nutrients or organics.

5. No cooling water, air conditioner water, water softener brine, groundwater, oil, hazardous materials, roof drainage, storm water runoff, or other aqueous or non-aqueous substances which are, in the judgment of the Department, detrimental to the performance of the system or to groundwater, shall be discharged into the sewage treatment system, unless specifically approved in writing by the Department.

6. No Activities shall be conducted that could cause an adverse impact on existing or potential beneficial uses of groundwater.

7. The permittee shall have the sewage system inspected annually by a qualified Registered Sanitarian, Professional Engineer, or certified wastewater treatment system operator and certified that the system is operating properly.

SCHEDULE B

Minimum Monitoring and Reporting Requirements

1. System Monitoring Requirements
The permittee shall monitor the operation and efficiency of all treatment and disposal facilities. Sampling and measurements taken as required herein shall be representative of the nature of the wastewater, and shall be taken at peak usage during operation of the system. Unless otherwise agreed to in writing by the Department of Environmental Quality, data collected, and submitted shall include but not necessarily be limited to the following parameters and minimum frequencies:

a. **Effluent to the drainfield(s)**

Item or Parameter	Minimum Frequency	Type of Sample
Flow, GPD	Monthly	Measurement or calculation based on meter readings
Flow Meter/Pump Calibration	Annually	Verification
BOD_5	Annually	Grab
TSS	Annually	Grab
TN	Annually	Grab
NO_3-N	Annually	Grab
NH_3-N	Annually	Grab

b. **Operations and Maintenance Activities**
The permittee shall record in writing all observations of operation and maintenance activities, as required by the Department approved Operation and Maintenance manual, on a monthly basis.

c. **Solids Management**
The permittee shall maintain a record of the pumping dates and quantity (in gallons), of solids/wastewater pumped, and what licensed sewage disposal service company pumped the solids/wastewater, as well as the final disposal location and transfer locale (if applicable).

2. Reporting Procedures
Monitoring, maintenance practices, solids handling, and results shall be reported on Department approved forms. The reporting period is the calendar year. Reports must be submitted to the DEQ office listed on the face page of this permit by **January 15 following the reporting period.**

State of Oregon

Department of Environmental Quality Memorandum

Date: March 18, 2004

To: Environmental Quality Commission

From: Stephanie Hallock, Director

Subject: Agenda Item E, Informational Item: Update on proposed revisions to the Onsite Sewage Disposal Rules and status of the La Pine National Demonstration Project, April 8, 2004 EQC Meeting

Purpose of Item	Commissioners have requested an informational item on proposed revisions to the onsite rules (OAR chapter 340, divisions 071 and 073) and a status update on the La Pine National Demonstration Project. The purpose of the item is to inform the Commission on the general concepts of the rule revisions in preparation for considering rule adoption later this year. A status report on the La Pine project will be provided to update Commission members on the progress as well as the next steps of the project prior to its completion in June 2005.
Background on the Onsite rules	The Department of Environmental Quality (Department) administers the oversight and permitting of onsite (septic tank) wastewater systems in Oregon. The Department contracts the onsite program to 22 counties and provides direct service to the remaining 14 Oregon counties. Services provided by this program include: issuing permits for the installation of onsite systems, site reviews, licensing septic tank pumpers and installers, providing technical assistance and training to counties, and approving new onsite technologies. Over 30%, or more than one million, of Oregon's citizens are serviced by onsite systems. This program is somewhat unique at the Department in that it is one of the few programs that involve directly regulating individual homeowners. The Department is proposing revisions to the onsite system disposal rules to modernize and simplify permitting requirements of the state's onsite wastewater management program. The proposed rule revisions incorporate recommendations provided to the Department from our external onsite improvement advisory committee and contain several customer service oriented revisions that were developed by DEQ onsite staff. Public comment on the rule ended in mid-January and resulted in approximately 350 combined comments. We are currently drafting responses to the comments and moving forward with the rule making process. The Department anticipates submitting a proposed rule to the Commission for consideration sometime later this year.

	Proposed changes would allow more alternative treatment technologies to be used in Oregon, simplify permitting for onsite systems using alternative technologies, provide third-party certification of onsite system installers and service providers, change from annual to multi-year licenses for onsite system installers and pumpers, update technical requirements for onsite systems, and make the rules more readable. Fee changes are also proposed to implement these program improvements. In general, revenue to the onsite program will slightly decline in order to be consistent with the required level of effort necessary to implement the program.
Background on the La Pine Project	The La Pine National Demonstration Project is a collaborative effort by the Department, Deschutes County and the US Geological Survey to assess water quality issues associated with onsite wastewater systems while providing for continued development in the La Pine sub-basin. The $5.5 million federal allocation for the La Pine project is a component of the National Community Decentralized Wastewater Demonstration Project, which also includes funding for two other projects in Vermont and Rhode Island. The La Pine project consists of eight major tasks to achieve the project objectives. The goal is to complete these tasks by June 2005 with all groundwater and system sampling to end in December 2004. The major responsibilities of the project include: • The installation of new and retrofitting of existing systems with innovative onsite systems. A subset of these systems is being monitored intensively for three years as a field test program for onsite wastewater treatment systems. • The establishment of a regional monitoring well network. This network supports both the innovative system field test program and the 3-dimensional modeling work. • The establishment of an onsite system maintenance structure. • The development of a funding program to assist in low-interest loans for onsite system repair and/or replacement using the appropriate onsite wastewater technology. • The collection and analysis of field data on new and retrofitted onsite systems and from the groundwater monitoring network. This work directly supports the innovative system field test program and the three-dimensional (3-D) modeling work. • Laboratory analytical testing of onsite system effluent and groundwater samples. This data is used to evaluate the onsite treatment systems and to develop the 3-D model scenarios.

	• Completion of 3-D flow and nitrate fate and transport modeling, lot size optimization modeling for nitrate loading reduction, and identify areas and/or neighborhoods of concern for development of a comprehensive groundwater protection strategy. • Prepare quarterly progress reports and a final project report. To date, approximately 49 innovative or alternative onsite systems have been installed, several of which are performing remarkably well and producing highly quality effluent. Monitoring has shown elevated nitrate in groundwater monitoring wells and limited concentrations in area drinking water wells. Results suggest that onsite wastewater systems are the primary contributor to these impacts. The La Pine area has approximately 13,000 lots that may be served by onsite wastewater systems. Of these, at least 1,800 lots have water tables two feet or less below the surface.
EQC Involvement	The Department plans to bring the proposed rules to the Commission for adoption later this year.
Attachments	Please see Attachment A, *"Summary of proposed revisions to the Onsite Sewage Disposal Rules (OAR Chapter 340, Division 71&73),"* regarding information on the proposed onsite rule revisions.
Available Upon Request	Proposed revisions to OAR chapter 340, divisions 071 and 073.

Approved:

Section: Mark Cullington

Division:

Report Prepared By: Mark Cullington

Phone: (503) 229-6442

Attachment A - Summary of proposed revisions to the Onsite Sewage Disposal Rules (OAR Chapter 340, Division 71&73)

The Department of Environmental Quality (Department) is proposing rule revisions in OAR chapter 340, divisions 071 and 073 in part to modernize and simplify permitting requirements of the state's onsite wastewater management program. The proposed rule revisions incorporate recommendations provided to the Department from the Onsite Program Improvement Advisory Committee and contain several customer service oriented revisions that were developed by Department onsite staff. Proposed changes will allow more alternative treatment technologies to be used in Oregon, simplify permitting for onsite systems using alternative technologies, provide third-party certification of onsite system installers and service providers, change from annual to multi-year licenses for onsite system installers and pumpers, update technical requirements for onsite systems, and make the rules more readable. Fee changes are also proposed to implement these program improvements. In general, revenue to the Water Quality program will slightly decline which will be consistent with the required level of effort necessary to implement the onsite program as the result of the rule revisions. More specifically, the following were recommended by the Onsite Program Improvement Advisory Committee and are included among the proposed changes:

- Streamline the permitting and approval process for alternative onsite systems.
  - Establish standards for onsite systems using alternative treatment technologies (ATTs), including criteria for approving and listing ATTs. Apply the existing fee for approval of other innovative technologies to the process used for ATTs.
  - Repeal standards for aerobic treatment units (ATUs), which may be permitted under the new ATT standard.
  - Allow, but not require, four types of alternative systems to be constructed under construction-installation (CI) permits instead of the more complex Water Pollution Control Facilities (WPCF) permits: recirculating gravel filters (RGFs), commercial sand filters (CSFs), alternative treatment technologies (ATTs), and holding tanks (HTs). Establish CI-permit and annual reporting fees for these systems.
- Repeal the process for permitting experimental systems, which will be permitted as ATTs or through a revised innovative technology approval process.
- Reduce the fee for renewing authorizations for hardship exceptions for temporary dwellings.
- Establish a new flat fee for major repair permits for commercial systems to replace the existing fee structure. (Flat fee will be lower for a few commercial systems and the same for all other systems.)
- Modify the fee categories for the annual compliance determination fee for onsite systems under WPCF permits. (Fees will be lower for a few systems and the same for all others.)
- Repeal a redundant site evaluation fee for variances in designated rural areas.

- Revise technical requirements for onsite systems to improve performance and make the requirements more workable.

- Require the owner of real property served by an onsite system using alternative treatment technologies to have the system evaluated before transferring the property.

- Clarify the process the Department uses to approve innovative technologies, materials, and designs for onsite systems.

- Lengthen from 1 to 3 years the term of the license required for persons who install and pump onsite systems and adjust the annual fees for the new 3-year license to accommodate this shift. Increase the amount of the surety bond required for each license.

- Authorize the Department to implement a program to certify onsite system installers and alternative system service providers through agreement with another governmental entity (e.g., a community college). Require alternative systems service providers to be certified and establish a deadline for becoming certified. Establish a new surcharge on each certification to fund the Department's oversight of the certification program.

State of Oregon
Department of
Environmental
Quality

Umatilla Chemical Demilitarization Program
Status Update
Environmental Quality Commission
April 9, 2004
(Agenda Item H)

Umatilla Chemical Demilitarization Program (CDP)

Permit Modification Requests (PMRs):

Changing the Emissions Compliance Point to the Exit of the Carbon Filters
The public comment period for PMR UMCDF-03-041-PFS(3) to change the air emissions point of compliance to the exit of the carbon filters of the pollution abatement systems of the four incinerators at the Umatilla Chemical Agent Disposal Facility (UMCDF) concluded on March 1, 2004. The Department is reviewing the comments received and preparing a staff report for consideration by the EQC. A decision on this PMR will be an action item for the May 2004 EQC meeting in Hermiston.

Other PMRs Under Review

- BRA (Brine Reduction Area) Performance Test Plan
- LIC1 (Liquid Incinerator # 1) GB Agent Trial Burn Plan
- Contingency Plan Update

Recently Approved PMRs

- Umatilla Chemical Depot (UMCD) Secondary Waste – Remaining Depot secondary wastes have been incorporated into the UMCDF hazardous waste permit and feed rates have been established for each waste stream, with the exception of multi-agent contaminated wastes. A condition has been added to the UMCDF Hazardous Waste (HW) Permit requiring the Permittees to submit a PMR before the start of the second agent campaign for treatment of multi-agent contaminated wastes. Other than the multi-agent contaminated waste, spent carbon remains the only secondary waste without a permitted treatment method. Before the start of agent operations, the Permittees must submit a progress report on their technology for treatment of spent carbon.
- Agent Collection System Management Practices – Approval has been given to use the larger (approximately 1,000 gallon capacity) of the two agent collection tanks as the primary chemical agent feed tank to the liquid incinerators. The smaller agent collection tank (approximately 500 gallon capacity) and one of the spent decontamination liquid holding tanks (approximately 2,100 gallon capacity) will provide emergency back-up storage. The HW Permit originally required the smaller

agent tank to be used for feeding the liquid incinerators and the large one was held in reserve as back-up.

- Incinerator Carbon Filters Agent Monitors – The monitoring procedures for chemical agent in the carbon filters have been changed to provide for monitoring upstream and downstream of the carbon filters with ACAMS (Automatic Continuous Air Monitoring System) and procedures have been established for determining how much adsorptive capacity remains on the filters before a carbon change-out is required.
- Munitions Demilitarization Building and Laboratory Ventilation Carbon Filter System Monitoring/Change-out – Additional agent sampling and monitoring was provided, leak test requirements were reduced, and carbon change-out criteria were revised.

Agent Operations Authorization Process/Time Frame

UMCDF hopes to be prepared to begin agent destruction in July 2004. Washington Demilitarization Company (WDC) plans to complete its Operational Readiness Review in April. The Department will observe UMCDF's Integrated Operations Demonstrations (IODs) on March 31 – April 9, 2004. The IODs are various activities that will be conducted at UMCDF to demonstrate their ability to safely conduct normal agent operations (such as processing rockets) and respond appropriately to various "contingencies" (upset conditions, such as an alarm indicating the detection of chemical agent in a plant stack).

The Department will issue a fact sheet and an initial compliance assessment (an evaluation of UMCDF's compliance status with all requirements for the start of agent operations) to initiate the public comment period on authorization of agent operations on or about April 20, 2004. The initial compliance assessment will include various items that must be completed prior to the EQC's decision to authorize the start of agent operations. The EQC will hold its scheduled May 20 – 21, 2004 meeting in Hermiston and will conduct a public hearing on the evening of May 20 to receive input regarding the authorization of agent operations.

Subsequent to the close of the public comment period on or about June 4, the Department will review all comments received and prepare a staff report for the EQC with a recommendation regarding the start of chemical agent operations. The final assessment will indicate resolution of all issues that must precede EQC's decision.

If all necessary actions by UMCDF and the Army can be concluded in sufficient time, the EQC may make the decision on authorizing the start of agent operations at its July 2004 meeting. If not, then the decision will be deferred to the September 2004 meeting.

Enforcement Actions

On February 10, 2004 the Department issued a Notice of Violation (NOV) and Assessment of Civil Penalty to the U.S. Army Program Manager for Elimination of Chemical Weapons (PMECW) and WDC for violations of the UMCDF Hazardous Waste (HW) Permit. The PMECW and WDC were fined $4,800 each for failure to notify the Department prior to modification of a permitted hazardous waste tank system and $9,600 each for altering a hazardous waste tank system without prior Department approval. Both violations related to WDC beginning construction of a load-out system for the transfer of brines from one of the BRA

storage tanks to tanker trucks on June 12, 2002 without notification to and approval by the Department. The Permittees have filed an Answer, Request for Hearing, and Request for Informal Discussion regarding the NOV.

On March 18, 2004 the Department issued an NOV and Assessment of Civil Penalty to PMECW and WDC for violations of the UMCDF HW Permit. The PMECW and WDC were fined $16,800 each for feeding hazardous waste into Liquid Incinerator 1 at UMCDF on four separate days in late September 2002 during a shakedown testing period while required Rolling One Hour Average (ROHA) monitoring instrumentation was disabled. The disabled instruments would have monitored the feed rates of surrogate materials and process water/spent decontamination solution into the incinerator. Those instruments were necessary for the proper operation of the Automatic Waste Feed Cut-off (AWFCO) systems. The AWFCOs discontinue the feed of materials to the incinerator if feed rates exceed permit limits. The HW Permit requires proper operation of the ROHA instrumentation and AWFCO systems during shakedowns, trial burns, and post-trial burn periods.

Surrogate Trial Burn (STB) and Shakedown Status

Deactivation Furnace System

On December 19, 2003 the Department notified the Permittees that an additional STB must be conducted on the Deactivation Furnace System (DFS) to demonstrate compliance with the HW Permit limits at the existing compliance point (i.e. inlet to the carbon filters). Based upon subsequent discussions with the Permittees and consideration of alternatives, the Department has determined that, if PMR UMCDF-03-041-PFS(3) is approved by the EQC, no additional STB testing will be required for the DFS. However, if the PMR is not approved, the Department will require an additional DFS STB to demonstrate compliance with the current HW permit limits at the inlet to the carbon filters.

In lieu of performing an additional STB at this time, the Permittees have been required to provide information to the Department that resolves issues related to internal DFS kiln damage discovered after completion of the STB. The Permittees have provided information regarding the extent of damage to the furnace, the scope of repairs made, evaluations of the cause(s) of the observed damage, and any limitations upon operating conditions that should be imposed due to the damage that occurred or the repairs that were made.

The Permittees believe they have demonstrated that, subsequent to the repairs made to the DFS, the furnace can operate safely and under operating conditions similar to those demonstrated during the STB completed on October 13, 2003.

Metal Parts Furnace

The metal parts furnace STB was completed on February 1, 2004 and UMCDF is still preparing the trial burn report for submittal to the Department.

Liquid Incinerator 2

UMCDF plans to conduct the STB for the Liquid Incinerator 2 in May or June 2004.

Brine Reduction Area (BRA)

UMCDF began shakedown of the BRA on March 17, 2004. This was approximately six weeks later than anticipated at the last EQC meeting. The BRA Performance Test is currently scheduled to be conducted in late June. UMCDF is making a presentation to the EQC on April 9, 2004 regarding their progress in complying with the HW Permit requirements regarding brine management. The permit requires the BRA to be operational and ready to treat brines prior to the start of agent operations. It is also requires the Permittees to minimize brine generation and maximize BRA processing and/or storage capacity.

On March 30, 2004 the Department provided written clarification to UMCDF regarding its expectations related to brine management at the facility, including expectations that must be satisfied prior to the start of agent operations and after agent operations begin. A copy of that correspondence was provided to each member of the EQC.

Other Topics of interest

Umatilla Chemical Depot (UMCD) Storage Permit:

The Department expects to issue the hazardous waste storage permit for UMCD in Spring 2004.

Portable Air Lock for UMCD

On two occasions in December 2003, UMCD detected GB agent in the ambient air outside a storage igloo in K-Block. The detections occurred during UMCD's efforts to locate and identify leaking munitions inside an igloo with an unusually high concentration of the nerve agent GB (Sarin). In order to prevent future releases of chemical agent during such activities, UMCD has contracted for development and construction of a prototype portable air lock that can be attached to storage igloos. The new airlock is scheduled for delivery and testing at UMCD in May. It will reduce the risk of releases of chemical agent into the surrounding atmosphere as personnel enter and exit an igloo with a high concentration of chemical agent. It is also designed to allow decontamination of personnel to be performed inside a contained area when they exit an igloo that has a high air concentration of chemical agent.

Legal Proceedings

GASP III

In the GASP III trial, in response to the plaintiffs' motion for sanctions against the Army for its efforts to prevent an Army employee from offering opinion testimony at trial, Judge Marcus ruled that the Army's conduct was not sanctionable misconduct. However, he did indicate that, as part of his final order in this case, he would consider whether an adverse inference could be drawn against the Army based on its refusal to allow the witness to offer opinion testimony.

Judge Marcus also established a schedule for submittal of all closing argument documents that ends on July 14. He stated he would not entertain any requests for extensions to this schedule and he expects to issue a decision shortly after all closing documents have been submitted.

GASP II

The Court of Appeals has issued an order in GASP II. The court granted the State's motion to determine subject matter jurisdiction, but declined to dismiss the petitioners' appeal. The court concluded that it has jurisdiction over the appeal because petitioners timely filed notice of appeal from a final judgment entered by the circuit court. With respect to the State's claim that the circuit court lacked jurisdiction, the court wrote:

> "The argument respondents made goes to the merits of the appeal. If we ultimately determine that respondents are correct, we will not dismiss the appeal, but, rather, we will affirm the circuit court's judgment. Conversely, if we ultimately determine that appellants are correct, then we will reverse the judgment and remand the case to the circuit court."

In other words, the court has invited the State to raise the issue in its brief as an alternative ground for affirming the trial court's judgment. The State's brief on the merits is currently due May 4, 2004, but at least one extension will be requested before the Attorney General files the brief.

Status of other Chemical Demilitarization Sites

Tooele Chemical Agent Disposal Facility

The Tooele Chemical Agent Disposal Facility (TOCDF) in Utah expected to begin its metal parts furnace trial burn for the nerve agent VX in early April 2004.

Based upon waste characterization analyses that have identified high levels of mercury in some of the mustard agent munitions and bulk storage containers, TOCDF will be expending $50 to $55 million on modifications to the facility. The modifications will allow TOCDF to drain and wash out high-mercury content mustard agent from bulk containers. The drained agent will be filtered to remove mercury and the filtered agent will be incinerated. The washout water will be neutralized and subjected to a mercury removal process. Finally, the washout water will be incinerated. Incineration of high mercury content mustard agent at TOCDF would have resulted in unacceptable air emissions.

Anniston Chemical Agent Disposal Facility

As of mid-March, the Anniston Chemical Agent Disposal Facility (ANCDF) in Alabama had destroyed more than half of its GB rockets (approximately 21,000 rockets) and has completed its GB agent trial burns for the liquid incinerator and for drained GB rockets in the deactivation furnace system. ANCDF was expected to conclude agent trial burns for crystallized and/or gelled GB rockets in early April.

ANCDF failed to meet EPA requirements during its initial PCB trial burn and recently repeated the trial burn. On March 31, the Anniston Star reported that ANCDF satisfactorily demonstrated compliance with the 99.9999% destruction efficiency requirement during the re-test.

In early February two technicians involved in a "hot entry" at ANCDF were exposed to chemical agent (GB). While working in protective clothing, the technicians got GB on their hands and did not decontaminate immediately, allowing the GB to spread to other areas of their DPE (demilitarization protective ensemble) suits. Despite going through

decontamination procedures, the technicians somehow transferred GB onto the clothing they were wearing beneath their DPE suits. The employees were taken to the ANCDF clinic where blood tests have not indicated any measurable health effects from the exposure. As a result of this incident, ANCDF identified new safety measures to avoid a recurrence of worker contamination and are retraining all site workers to utilize the new measures.

In February, ANCDF had its first detection of chemical agent inside an EONC (enhanced on-site container) delivered to the facility from the Anniston Chemical Depot. According to the Alabama Department of Environmental Management, the rockets inside the EONC were safely removed and processed.

On March 2, the Anniston Chemical Depot detected chemical agent (GB) outside a storage igloo while responding to a leaking projectile inside the igloo. Earlier releases had occurred in November 2003 and in 1995. Since 1982, the Anniston Chemical Depot has detected 897 leaking munitions in its storage igloos. (As a comparison, since October 1984, the Umatilla Chemical Depot has detected 159 leaking munitions and bulk containers.)

On February 15, 2004 the Chemical Weapons Working Group sent a letter to the Pentagon calling for an immediate halt to operations at ANCDF, an investigation of facility operations, and correction of identified safety deficiencies before operations are allowed to resume. No response has been issued from Pentagon.

Pine Bluff Chemical Agent Disposal Facility
The Army expects the Pine Bluff Chemical Agent Disposal Facility (PBCDF) in Arkansas to begin chemical agent operations in July.

Aberdeen Chemical Agent Disposal Facility
Workers at the Aberdeen Chemical Agent Disposal Facility (ABCDF) in Maryland resumed draining mustard agent containers on January 15, 2004 following an eight-week "operational pause" to examine and repair areas of the glove boxes in which the draining takes place. The operational pause was initiated after a low-level mustard vapor leak was detected on November 14, 2003 in the glove box sump piping of one of the drain stations during the rinsing of an agent container. Further examination of all three drain station glove boxes identified some corrosion in the piping and in the glove box sump.

As of March 2004, ABCDF had neutralized the mustard agent in 152 of the 1,817 ton containers stored at Aberdeen. ABCDF started operations on April 23, 2003.

Newport Chemical Agent Disposal Facility
The Newport Chemical Agent Disposal Facility (NECDF) in Indiana is still struggling in its efforts to find a publicly acceptable means to dispose of hydrolysate to be generated from its neutralization of VX. After plans fell through to send the hydrolysate to a treatment facility near Dayton, OH, the Army was hopeful of sending the hydrolysate to DuPont's Secure Environmental Treatment plant in South Jersey, NJ. DuPont would treat the hydrolysate and discharge its treated effluent into the Delaware River. However, a significant amount of public opposition has been expressed at recent public meetings in New Jersey and Delaware.

On March 31 the Delaware State Senate passed a resolution in opposition to shipment of the hydrolysate to the DuPont facility. The Army had originally hoped to begin neutralization operations at NECDF in the next few months, but it's not known whether their plans will be delayed until a more publicly acceptable approach to management of the hydrolysate can be determined. According to an Associated Press article on April 1, the Army has stated that it "plans to begin destroying VX nerve agent at the Newport Chemical Depot in about two months." Reportedly, the Army will begin agent destruction even if plans to ship the hydrolysate to New Jersey fall through.

Pueblo Chemical Agent Disposal Facility

On March 19, 2004 the Colorado Department of Public Health and Environment issued a Notice of Completeness for the Phase I RD&D Permit Application for the Pueblo Chemical Agent-Destruction Pilot Plant (PCAPP). The CDPHE is currently preparing a draft permit for the Phase I PCAPP construction activities and plan on opening a 45-day public comment for the draft permit beginning on April 9, 2004.

Blue Grass Chemical Agent Disposal Facility

It appears that the Department of Defense is re-analyzing the design concept of accelerated agent destruction plans for neutralization facilities to be built at Blue Grass, KY and Pueblo, CO. This is a response to concerns regarding cost impacts of the accelerated destruction approach. Design work has not stopped and funding for federal FY04 has not been changed for the two sites, but the Department of Defense is looking for ways to redistribute some of the front end costs over future years in the life cycle of the projects and still accomplish the goals of the accelerated destruction plan.

State of Oregon
Department of Environmental Quality Memorandum

Date: March 18, 2004

To: Environmental Quality Commission

From: Stephanie Hallock, Director S. Hallock

Subject: Agenda Item I, Informational Item: Proposed Noise Rules for Wind Energy Facilities and Public Testimony
April 9, 2004 EQC Meeting

Purpose of Item

The purpose of this item is to: (1) brief the Environmental Quality Commission (EQC) on the Oregon Department of Energy's (Energy) and Department of Environmental Quality's (DEQ) rulemaking proposal to make application of noise standards to wind facilities more streamlined and easier to administer, and (2) take public testimony on the proposed rules.

At the meeting, Energy Director Michael Grainey will brief the Commission on the wind energy facilities rulemaking, and Assistant Attorney General Larry Knudsen will give a history of the noise rules and the status of the program.

Essentially, the EQC did not consider the special characteristics of wind energy facilities when the noise control rules were adopted in 1974. Under the existing noise rules, demonstrating compliance is more complicated and costly for wind energy facilities than it is for other regulated industrial sources and competing types of electric generating facilities. Consequently, the standards are difficult to administer for wind facilities. The proposed rules will maintain the public policy of protecting noise sensitive properties from excessive noise emissions without unnecessarily constraining the development of renewable energy sources. Wind and other renewable energy can reduce the amount of pollution that otherwise would occur by using fossil-fueled power plants.

Background

In 1971, the state legislature directed DEQ to establish noise control regulations for categories of noise emission sources, including motor vehicles and aircraft (ORS 467.030). The policy behind developing standards for noise emissions included:

- Providing protection of the health, safety and welfare of Oregon citizens from the hazards and deterioration of the quality of life

imposed by excessive noise emissions.
- Facilitating cooperation among state and local governments in establishing and supporting noise control programs and to encourage the enforcement of local noise control regulations.

The regulations also establish standards, provide exception and variance procedures, and authorize enforcement.

In 1991, DEQ stopped administering the Noise Control Program. The agency was faced with a significant reduction in General Fund support, and, as a result of negotiations, the Legislature approved an agency budget that did not include funding for the noise program. Although DEQ's Noise Control Program has been suspended, the noise statutes and administrative rules remain in force. Regulated noise sources are legally responsible for complying with the state noise laws. Enforcement now falls under the responsibility of local governments, and in some cases, other agencies. For example:

- Local governments may enact and enforce the state standards, or they may adopt their own standards and enforcement as long as the standards are consistent with or exceed the state standards.
- The Energy Facility Siting Council (EFSC), under the Department of Energy, is authorized to approve the siting of large energy facilities in the state. In general, before a large energy facility may be built in Oregon, the developer must apply for a site certificate from EFSC. The applicant must show that it will comply with all applicable statutes and administrative rules, including DEQ's noise rules. EFSC's unique siting authority includes the ability to determine the facility's compliance with most other applicable state agency regulations. Generally, agencies process their respective approvals or permits related to the source within EFSC's process and timeframes. In the case of noise regulations, however, DEQ no longer has a program. Therefore, EFSC directly administers DEQ's noise rules. Smaller energy facilities that are exempt from EFSC's authority may be subject to county noise regulations, and they must comply with the state regulations.

Energy is conducting the rulemaking because of its role in administering and enforcing DEQ's noise rules in the energy facility siting process established by statute. Because DEQ's Noise Program has been suspended, DEQ lacks authority and funding to work on noise-related issues.

Key Issues

Key issues include:

1. Satisfying two noise standards tests for new sources on new sites, known as the "Table 8 test" and the "ambient degradation test."
    a. The Table 8 test – Table 8 (provided in Attachment C) of the noise control rules lists maximum statistical noise levels for industrial sources in areas that have competing sources of noise. These include specified levels for daytime hours and for night time hours. The measurement point is 25 feet from the most distant identified noise sensitive property (property used for sleep and schools, churches, hospitals, and public libraries). The noise levels represent a fixed decibel volume that maximum noise output may not exceed and is expressed in percentage of time increments.
    b. The Ambient Degradation test – This standard relates to how much a new source can increase the level of noise above the established background level. The increased level is limited to 10 dBA (decibel; subjectively equivalent to a doubling in loudness).

    Both of these tests present hurdles for developers of wind energy facilities that developers of other types of power plants or other industrial sources do not face. For other industrial noise sources and power plants, the effect of the wind itself is not a factor in producing the noise impact. In contrast, wind energy facilities produce noise only when winds are strong enough for the turbines to generate electricity. To demonstrate compliance with the noise rules, the developer of a wind energy facility must provide noise measurement data under very specific wind conditions. It is impossible to predict when those conditions will occur, and therefore very difficult to know when to send noise consultants out to the field to collect noise data.

2. Modifying the ambient degradation test for wind energy facilities based on the consent of a property owner as long as standards are still met for neighboring noise sensitive properties. This would allow an additional level of degradation for the property owner. The proposed rule would establish the terms and conditions under which a landowner could give consent and define what makes a landowner eligible to give such consent. The consent would be recorded with the property title and "run with the land," i.e., it would serve as an easement

binding on future landowners of the same property.

3. Determining how to model pre-existing and expected conditions and how to measure actual operation of wind energy facilities to determine compliance with Table 8 and applicable ambient noise degradation requirements. The proposed rule would establish a standard protocol for purposes of determining compliance with Table 8 and establish a minimum ambient background noise level of 26 dBA for wind facilities. It is difficult to measure noise below 26 dBA, which is less than a soft whisper from 5 feet away. Energy has determined that requiring measurement below 26 dBA is unnecessary, given the unlikely benefit and degree of difficulty in measuring accurately at that level.

4. Informing local governments and the public about the status of DEQ's noise program. Informing the public that the EFSC, not the EQC or DEQ, administers the noise rules with respect to specific large wind energy facilities.

Next Steps

Energy is in the process of finalizing the Hearings Officer report, which explains the changes made to the initially proposed rules based on public comments received thus far. Within the next week we will send you the final Hearings Officer report as an addendum to this staff report.

After the close of comment period, Energy will summarize the comments and make a recommendation to DEQ. DEQ will review the recommendation and plans to bring the rules for adoption at the May 2004 EQC meeting. Once the rules are adopted, EFSC would apply the amended noise rules as part of its review of a site certificate application for a proposed wind energy facility.

EQC Involvement

Energy and DEQ plan to bring the rules to the EQC for adoption in May 2004.

Attachments

A. Revised Proposed Noise Rules for Wind Energy Facilities
B. Fiscal and Economic Impact Statement
C. Table 8 – Statistical Noise Limits for Industrial and Commercial Sources

Available Upon Request

A. Public Notice Package

OREGON DEPARTMENT OF ENERGYand DEPARTMENT OF ENVIRONMENTAL QUALITY
Chapter 340
Proposed Rulemaking
STATEMENT OF NEED AND FISCAL AND ECONOMIC IMPACT

Title of Proposed Rulemaking:	Noise Control Regulations for wind energy facilities
Need for the Rule(s)	The current noise rules were developed initially in 1974 at a time when significant large-scale, commercial wind energy development did not exist in Oregon. The proposed amendments simplify the applicable regulations and reduce the cost of compliance. The goals are to provide noise regulations specific to wind energy facilities consistent with public policy, to improve the application of the rules to these facilities and to provide a greater degree of certainty to the process. The Oregon Department of Energy (Energy) will conduct the rulemaking. The Energy Facility Siting Council has the authority to administer other agency rules which affect energy facilities subject to the Council jurisdiction.. Because of the termination of DEQ's Noise Program in 1991, DEQ does not have authority or funding to work on noise-related issues.
Documents Relied Upon for Rulemaking	▪ ORS Chapter 467 ▪ DEQ Noise Control Regulations Table 8 ▪ DEQ Sound Measurement Procedures Manual (NPCS-1) ▪ Memorandum from Director to Environmental Quality Commission, dated September 4, 1974 regarding the initial adoption of DEQ rules relating to noise pollution from industrial and commercial sources. Copies of the documents relied upon in the development of this rulemaking proposal can be reviewed at the Department of Energy, 625 Marion Street NE, Salem, Oregon. Please contact Kathy Stuttaford (503-378-4128) for times when the documents are available for review.
Statutory Authority and Statute the Rule is Intended to Implement	ORS 467.030 directs the Environmental Quality Commission to adopt rules relating to the control of levels of noise emitted into the environment of this state.
Fiscal and Economic Impact	
Overview	The proposed amendments apply to wind energy facilities. "Wind energy facilities" are energy facilities defined in ORS 469.300(10)(a)(J) or that are otherwise subject to the jurisdiction of the Energy Facility Siting Council (Council) under ORS 469.320(9). The rulemaking may also affect smaller wind power projects under local ordinances that incorporate the DEQ noise control regulations by reference. Under ORS 469.320, a site certificate is required before construction of a wind energy facility. Under ORS 469.421, an applicant for a site certificate must pay all expenses incurred by the Council, Energy and the Oregon Department of Administrative Services related to the Council's review and decision of the council. The proposed amendments would not increase these costs. The proposed amendments would eliminate the need for a site certificate applicant to conduct measurement and analysis of background ambient noise levels. Under the existing rules, such measurement is necessary to demonstrate compliance with the noise standards. Elimination of this requirement would reduce the overall costs to industry. Smaller wind power projects that are not under the jurisdiction of the Council must receive local land use approval before construction. In any local government jurisdiction that has adopted the DEQ noise control regulations by reference in local land use ordinances, the proposed rules would eliminate the need to conduct measurement and analysis of background ambient noise levels. Elimination of this requirement would reduce the overall costs to industry. The proposed rules would also allow certain affected property owners to agree to a higher noise level than current rules provide. Under ORS 183.335(2)(b)(G) we request public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.
General public	The costs associated with the existing and proposed noise rules do not adversely affect the general public.
Small Business	Small wind energy projects (up to 35 megawatts average electric generating capacity) are excluded from the definition of "wind energy facilities" and are outside the jurisdiction of the Council, but are subject to the state noise statutes and rules. The effects of the proposed amendments on small wind energy projects is dependent upon whether the local government chooses to adopt, administer and enforce the DEQ rules and amendments

	through a local ordinance. In the case where the local government has adopted the DEQ noise rules, the proposed amendments would reduce the cost of demonstrating compliance with noise control regulations compared to current costs, by eliminating the need to measure background ambient noise levels. Neither DEQ nor Energy has information available on which to base a precise estimate of the potential incremental savings to developers of wind energy facilities. However, one industry representative has estimated the cost of noise studies in the range of $10,000 to $15,000 for one project.
Large Business	For large wind energy facilities subject to the Council's jurisdiction, the proposed amendments would reduce the cost of compliance with noise control regulations compared to current costs, by eliminating the need to measure background ambient noise levels. Neither DEQ nor Energy has information available on which to base a precise estimate of the potential incremental savings to developers of wind energy facilities. However, one industry representative has estimated the cost of noise studies in the range of $10,000 to $15,000 for one project.
Local Government	Local governments that have adopted the DEQ noise rules in local land use ordinances, and that choose to adopt the proposed rules, should find the proposed rule amendments simpler to administer for the reasons identified above. However, there may be no significant reduction in the overall administrative costs for land use review. Where the local government has not adopted the DEQ noise rules, the proposed rules would have no effect on local government.
State Agencies	Energy and the Council apply the noise rules through the administration of the energy facility siting law (ORS 469.300 et seq.). The proposed amendments would be simpler to administer than current rules because they would eliminate the need to verify analysis of ambient background noise measurements. In addition, the proposed amendments would establish other standard conditions for determining whether a proposed or existing wind energy facility would comply with the ambient degradation and Table 8 tests. These changes would eliminate uncertainty under the existing rules, which do not specify the conditions for making determinations. However, there may be no significant reduction in the overall administrative costs of reviewing a site certificate application. Neither DEQ nor Energy anticipates any fiscal or economic impacts from this proposed rulemaking on other state agencies.
DEQ	The amendments would have no fiscal impact on DEQ staffing, revenues or expenses because DEQ's noise program was terminated in 1991.
Assumptions	All cost assumptions are addressed above.
Housing Costs	The amendments would 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.
Administrative Rule Advisory Committee	Energy did not use a formal advisory committee in the development of this rulemaking. Instead, an informal public comment period preceded this notice of proposed rulemaking. To begin the informal comment period, Energy sent a notice by e-mail to all county planning departments and to a list of persons interested in wind energy permitting issues that included wind energy developers, labor unions, the League of Oregon Cities, the Oregon Department of Land Conservation and Development, the Oregon Farm Bureau and other interested persons. In addition, Energy mailed the notice to a list of 109 city planning departments. The notice explained the rulemaking process, provided background information on the noise rules and how they apply to wind energy facilities, explained the need for considering changes to the noise rules to better address the characteristics of wind energy facilities and invited participation in an informal, non-representative "advisory group." In addition, Energy posted similar information about the proposed rulemaking on its Internet website, providing contact information for any member of the public to join the group or submit comments. Further, Energy sent a special e-mail notice to representatives of ten environmental public interest groups in September, informing them of the ongoing discussion of possible amendments to the noise rules and inviting their comments. During the informal comment period (August through October 2003), Energy hosted a discussion of possible changes the noise rules via e-mail. Energy reviewed and considered approximately 400 e-mail messages about the noise rules during this informal discussion period. In addition, Energy conducted two workshops that were open to the public. Energy has continued to post information on its website about the rulemaking process. Energy has also continued to receive and consider comments on the noise rules since the conclusion of the informal comment period at the end of October. The comments Energy has received regarding the noise rules have significantly influenced the proposed rules.

_____

Signed and Dated

_____

Printed name

Attachment A

Rule Changes Proposed by the Hearing Officer for Final Action by the Commission

DEPARTMENT OF ENVIRONMENTAL QUALITY

DIVISION 35
NOISE CONTROL REGULATIONS
Proposed Amendments
(Affected rules only: additions are underlined; no proposed deletions.)

340-035-0035
Noise Control Regulations for Industry and Commerce

(1) Standards and Regulations:

(a) Existing Noise Sources. No person owning or controlling an existing industrial or commercial noise source shall cause or permit the operation of that noise source if the statistical noise levels generated by that source and measured at an appropriate measurement point, specified in subsection (3)(b) of this rule, exceed the levels specified in Table 7, except as otherwise provided in these rules.

(b) New Noise Sources:

(A) New Sources Located on Previously Used Sites. No person owning or controlling a new industrial or commercial noise source located on a previously used industrial or commercial site shall cause or permit the operation of that noise source if the statistical noise levels generated by that new source and measured at an appropriate measurement point, specified in subsection (3)(b) of this rule, exceed the levels specified in Table 8, except as otherwise provided in these rules. **For noise levels generated by a wind energy facility, subparagraph(1)(b)(B)(iii) applies.**

(B) New Sources Located on Previously Unused Site:

(i) No person owning or controlling a new industrial or commercial noise source located on a previously unused industrial or commercial site shall cause or permit

the operation of that noise source if the noise levels generated or indirectly caused by that noise source increase the ambient statistical noise levels, L_{10} or L_{50}, by more than 10 dBA in any one hour, or exceed the levels specified in Table 8, as measured at an appropriate measurement point, as specified in subsection (3)(b) of this rule, **except as specified in subparagraph (1)(b)(B)(iii).**

(ii) The ambient statistical noise level of a new industrial or commercial noise source on a previously unused industrial or commercial site shall include all noises generated or indirectly caused by or attributable to that source including all of its related activities. Sources exempted from the requirements of section (1) of this rule, which are identified in subsections (5)(b) - (f), (j), and (k) of this rule, shall not be excluded from this ambient measurement.

(iii) For noise levels generated or caused by a wind energy facility:

(I) The increase in ambient statistical noise levels is based on an assumed background L_{50} ambient noise level of 26 dBA or the actual ambient background level. The person owning the wind energy facility may also conduct measurements to determine the actual ambient L_{10} and L_{50} background level .

(II) The "actual ambient background level" is the measured noise level at the appropriate measurement point as specified in subsection (3)(b) of this rule using generally accepted noise engineering measurement practices. Windspeed measurements at the nearest wind turbine location, synchronized with background noise measurements, shall be obtained at the appropriate measurement point. "Actual ambient background level" does not include noise generated or caused by the wind facility.

(III) The noise levels from a wind energy facility may increase the ambient statistical noise levels L_{10} and L_{50} by more than 10 dBA, as measured at an appropriate measurement point specified in subsection (3)(b) of this rule, if the

person who owns the noise sensitive property gives consent. The limits as specified in Table 8 will continue to apply.

The person(s) owning or controlling the wind energy facility(ies) shall have a copy of the property owner's written consent which is recorded in the records of deeds of real property in the county where the property is located before beginning construction of turbines that would increase the ambient statistical noise levels, L_{10} or L_{50} by more than 10 dBA at the appropriate measurement point. The memorandum must state that the property owner has consented to construction of a wind energy facility that will increase ambient noise levels by more than 10 dBA, and that the Table 8 maximum noise limitations at the appropriate measurement point of the property remain in effect.

(IV) For purposes of determining whether a proposed wind energy facility would satisfy the ambient noise standard where a landowner has not waived the standard, noise levels at the appropriate measurement point are predicted assuming that all of the proposed wind facility's turbines are operating between cut-in speed and the wind speed corresponding to the maximum sound power level.

These predictions must be compared to the highest of either the assumed ambient noise level of 26 dBA or to the actual ambient background noise level, if measured. The facility complies with the L_{10} and L_{50} noise ambient background standard if this comparison shows that the increase in noise is not more than 10 dBA over this entire range of wind speeds between cut-in speed and the wind speed corresponding to the maximum sound power level.

(V) For purposes of determining whether an existing wind energy facility complies with the ambient noise standard where a landowner has not waived the standard, noise levels at the appropriate measurement point are measured when the facility's nearest wind turbine is operating over the entire range of wind

speeds between cut-in speed and the windspeed corresponding to the maximum sound power level and no turbine that could contribute to the noise level is disabled.

(VI) For purposes of determining whether a proposed wind energy facility would satisfy the Table 8 standards, noise levels at the appropriate measurement point are predicted by using the turbine's maximum sound power level following protocols established by an independent standards organization, including IEC 61400-11, and assuming that all of the proposed wind facility's turbines are operating at the maximum sound power level.

(VII) For purposes of determining whether an existing wind energy facility satisfies the Table 8 standards, noise generated by the energy facility is measured at the appropriate measurement point when the facility's nearest wind turbine is operating at the maximum sound power level established by an independent standards organization, including IEC 61400-11, and no turbine that could contribute to the noise level is disabled.

(c) Quiet Areas … (no changes)

340-035-0110
Suspension of Commission and Department Responsibilities

In 1991, the Legislative Assembly withdrew all funding for implementing and administering ORS Chapter 467 and the Department's noise program. Accordingly, the Commission and the Department have suspended administration of the noise program, including but not limited to processing requests for exceptions and variances, reviewing plans, issuing certifications, forming advisory committees, and responding to complaints. Similarly, the public's obligations to submit plans or certifications to the Department are suspended.

Oregon Department of Energy Rulemaking Proceeding
Oregon DEQ Noise Control Regulations

"Table 8"

Statistical Noise Limits for Industrial and Commercial Sources

Statistical Descriptor	Maximum Permissible Statistical Noise Levels (dBA)	
	Daytime (7:00 AM - 10:00 PM)	**Nighttime (10:00 PM - 7:00 AM)**
L_{50}	55	50
L_{10}	60	55
L_1	75	60

The hourly L_{50}, L_{10} and L_{01} noise levels are defined as the noise level equaled or exceeded 50 percent, 10 percent and 1 percent of the hour, respectively.

State of Oregon

Department of Environmental Quality Memorandum

To: Environmental Quality Commission **Date:** March 23, 2004

From: Mikell O'Mealy, Assistant to the Commission and Director

Subject: Supplement for Agenda Item I: Proposed Rules for Wind Energy Facilities

Enclosed is a supplement to Agenda Item I, Proposed Rules for Wind Energy Facilities, that includes a report on the public hearings held on the proposed rules and a summary of comments received to date. The Oregon Office of Energy is in the lead on this rulemaking because it administers the noise rules for wind energy facilities and DEQ no longer has the authority or funding to work on noise-related issues.

At the Commission meeting on April 9, Larry Knudsen, Assistant Attorney General, and Mike Grainey, Director of the Oregon Office of Energy, will give an overview of the need to revise the noise rules prior to inviting public comment on the rules. The stakeholders that have participated in this rulemaking asked to speak directly to the Commission about the proposed rules before adoption, and the Office of Energy extended the public comment period through the April EQC meeting to accommodate their request. Energy plans to bring the proposed rules to the Commission for adoption at the May 20-21 meeting in Hermiston.

If you have any questions about this item or the EQC meeting generally, please contact me at 503-229-5301, or toll-free at 1-800-452-4011 ext. 5301 in the state of Oregon.

I look forward to seeing you soon.

Oregon
Theodore R. Kulongoski, Governor

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Draft Hearings Officer Report to the
Oregon Environmental Quality Commission
On Noise Rulemaking Standards for Wind Energy Facilities

(amending OAR 340-035-0035 and adopting new OAR 340-035-0110)

by
Michael W. Grainey, Director
Oregon Department of Energy
March 17, 2004

I. INTRODUCTION

Nature of This Rulemaking

This is a joint rulemaking by the staff of the Oregon Department of Energy (ODOE) and the Oregon Department of Environmental Quality (DEQ) to amend the existing noise control regulations of the Environmental Quality Commission (the Commission) to explicitly address requirements and standards for wind energy facilities.

As a result of an inter-agency agreement between ODOE and DEQ, staff from ODOE prepared the first draft of the rules; ordinarily, DEQ would staff a rulemaking proceeding for the EQC. However, at present, DEQ does not have authority or funding to work on noise-related issues. More than 12 years ago, the Legislature eliminated funding for the program, and DEQ enforcement of the State noise program was suspended.

Before beginning the formal rulemaking, ODOE staffed an informal period of comment and discussion with interested parties. The informal phase began in August 2003 and continued through October 2003. The proposed rules were submitted to the Secretary of State's Office and were posted on the ODOE website on 12/15/2003; they are referred to as the 12/15/03 proposed rules in this report. The 12/15/2003 proposed rules were published for hearing in the Secretary of State's Bulletin on January 2, 2004. ODOE staff conducted hearings and prepared this Hearings Officer report for the Commission to consider.

Summary of Hearings Officer Recommendations

As a result of the record developed in this proceeding, I recommend that the Commission adopt noise rules specific to wind energy facilities. I also recommend changes in the 12/15/03 proposed rules based on information provided by written and oral comments. Briefly, the revised rules proposed in this Hearing Officer's report would do the following:

1) Maintain the Commission's Table 8 limits on all wind energy facilities.
2) Provide that the background baseline is 26 dBA for ambient wind energy facility noise.
3) Provide that any willing landowner may waive the ambient noise degradation standard for his or her property, while maintaining the Table 8 limits; such waiver must be recorded with the county to accompany the legal title to the property;
4) Create a standard protocol based on IEC 61400, developed by the International Electrotechnical Commission, the recognized international body for standards development activities. This standard would be used for modeling and measuring noise impacts from wind energy facilities to ensure compliance with the Commission's standards.
5) Add a provision clarifying the Commission's suspension of the administration of the noise program.

The reasons for my recommendations are explained below, along with a more complete description of the changes. Also included in this package is a set of the revised proposed changes to the Commission's rules. A summary of all the written and oral comments is provided as an attachment to this report.

II. BACKGROUND AND REASON FOR RULEMAKING

Energy Facilities and the Commission's Noise Standards

The Commission determines the level of allowable noise impact through the noise regulations adopted in OAR Chapter 340, Division 35. The rules in OAR 340, Division 35, make up a statewide program of noise control to protect the health, safety and welfare of Oregon citizens from the hazards and deterioration of the quality of life imposed by excessive noise emissions. These rules implement Oregon law under ORS Chapter 467.

The Energy Facility Siting Council (EFSC) makes decisions whether to approve large energy facilities. EFSC's review process is a centralized process, consolidating the permits which would otherwise be issued by other state and local agencies. In addition to standards developed by EFSC, Oregon law gives EFSC authority to apply the standards of other state agencies, including the Commission's state noise rules, in the siting of energy facilities. "Energy facilities,"which are within EFSC's jurisdiction as defined by ORS 469.300, include electric generation facilities above specified generation capacities. ODOE provides staff services to EFSC, including the technical review of applications for EFSC approval.

When a proposed facility is within the jurisdiction of EFSC, the developer must obtain a site certificate from EFSC before beginning construction of an energy facility. To issue a

site certificate, Oregon law requires EFSC to apply the Commission's noise standards to the proposed facility and decide whether the facility would comply with those standards.

In general, wind power projects that have an average electric generating capacity less than 35 megawatts do not need site certificate approval from EFSC. EFSC does not administer or enforce the noise control regulations for these smaller wind power projects. Instead, local land use approval is typically required before construction. Local governments may address noise impacts from smaller wind power projects under their land use ordinances.

ODOE is staffing the rulemaking proceeding under an interagency agreement.

Why ODOE Believes Wind Energy Facilities Need a Specific Noise Standard Provision

ODOE supports the development of electric generation from the state's wind resources as part of Oregon's energy policy goal in ORS 469.010: "to promote the efficient use of energy resources and to develop permanently sustainable energy resources." Wind energy facilities create no polluting emissions. Greater use of wind instead of fossil-fueled power plants can avoid the pollution created by use of oil, coal and natural gas to generate electricity.

Wind energy facilities are also generally quieter than fossil-fueled power plants, and other industrial facilities. However, wind energy facilities, if improperly sited, can produce noise in excess of the noise levels allowed under the Commission noise standards. Wind energy facilities generate noise from the turbine generator and gearbox as well as from the effect of the turbine blades cutting through the air.

Although the rules that are currently in place address noise emissions from industrial noise sources, the dependence of a wind energy facility on wind speed, both to generate power and to generate noise, makes wind energy facilities different from other types of industrial facilities. The Commission did not consider wind energy facilities as a potential noise source when it initially adopted the rules in 1974. The Commission has not amended the rules to address wind energy facilities before now.

The purpose of this rulemaking proceeding is to recognize the special characteristics of wind energy facilities while protecting the public from unreasonable or harmful noise levels.

Application of the Current Noise Standards to Wind Energy Facilities

Under the current rules, a new noise source on a previously unused site must comply with two standards. These two standards are known as the "Table 8 test" and the "ambient degradation test."

The Table 8 test refers to a table that lists maximum permissible statistical noise limits. Noise emitted from industrial sources must not exceed the Table 8 limits. In addition, under the ambient degradation test, noise from industrial sources must not increase ambient noise levels by more than 10 dBA (decibels) in any one hour at the noise sensitive property.

To determine whether a new noise source meets the ambient degradation test, the rules require measurement of the *background* ambient noise level; that is, the ambient noise at the noise sensitive property without the new noise source present. The background level is then compared with the new ambient noise level, which includes the noise from the new noise source. By comparing these two ambient noise levels, one can determine whether the noise from the new source has increased the ambient noise level by more than 10 dBA.

Under the current rules, measurement of background ambient noise levels must conform to the Sound Measurement Procedures Manual (NPSC-1), which specifies that measurements "shall not be taken when the wind speed exceeds 10 mph" at the noise sensitive property. For most industrial noise sources, measuring ambient levels under low-wind conditions is not complicated.

The current noise rules do not address a source of noise that is dependent on, and varies with, the wind. Unlike other industrial noise sources, wind energy facilities produce noise only when the wind speed is high enough at the wind turbine to allow the turbine to begin generating electricity. This is called the wind turbine "cut-in speed." As the wind speed increases up to a certain point, turbines produce higher noise levels. At very high wind speeds, turbines automatically shut down to avoid turbine damage ("cut-out speed"). Thus, noise emissions that may be subject to the existing noise control regulations occur only under those wind conditions that are within the operating range of the wind turbine.

To demonstrate compliance with the ambient noise rules, the developer of a wind energy facility must provide noise measurement data under very specific wind conditions. It is difficult to predict when those conditions will occur. Collecting the data needed for demonstrating compliance with the current noise standards is complicated and more expensive for a wind energy facility than it is for a gas-fired power plant.

The Stateline Wind Project in Umatilla County is the only wind energy facility in Oregon that has applied to EFSC for a site certificate. EFSC has approved a site certificate for Stateline and has approved two subsequent amendments that added to the total number of wind turbines that can be built at Stateline. In addressing the noise issue, EFSC applied the current noise rules for a "new industrial source located on a previously unused site" (OAR 340-035-0035). Testimony in this rulemaking proceeding indicated that the current ambient noise rule required the Stateline developer to reduce the number of wind turbines installed, without any benefit to residences or landowners.

III. RULEMAKING PROCESS

Four hearings were held on the 12/15/03 proposed rules. Hearings were held in Portland and The Dalles on February 9, 2004, in Tillamook on February 23, 2004, and in Pendleton on March 9, 2004. Public comment was accepted on the 12/15/03 proposed rules through March 12, 2004. The comment period was extended through the Commission's meeting of April 8 and 9, 2004 so that rulemaking participants could address the Commission directly and give their comments on this Hearing Officer report and the proposed changes to the 12/15/03 version of the rules.

IV. SUMMARY OF THE DECEMBER 2003 PROPOSED RULES

The 12/15/03 rules proposed by ODOE recommended the following changes in the current noise rules:

1) In determining the increase in the ambient statistical noise level, the background baseline is assumed to be 26 dBA. The wind developer would have the option to show that actual ambient background level is greater than 26 dBA.

2) The "actual ambient background level" is the measured noise level at the noise sensitive property, when the nearest turbine's hub-height wind speed is at turbine cut-in speed. This would establish a standardized protocol: i.e., a wind speed equal to the speed which starts the turbine (cut-in speed) at the turbine nearest the noise sensitive property.

3) The noise levels from a wind energy facility may increase the ambient statistical noise level by up to 15 dBA if the landowner where the wind turbine would be located consents. The consent must be in writing describing the increased condition of environmental noise due to the wind energy facility. The property where the wind turbine would be located must be the same parcel of land owned by the landowner who is agreeing to the increased noise level. This proposal was intended as a compromise to allow landowners some ability to waive ambient noise standards. Combined with the new exception provided in 6) below, the 12/15/03 proposed rules would provide more flexibility for landowners than current noise standards provide, while still complying with Table 8 limits.

4) For determining compliance with the ambient degradation noise standards the noise levels are predicted assuming that all turbines in the wind energy facility are operating at cut-in speed. This provision establishes a standardized protocol for modeling the expected noise levels and for determining compliance after a wind energy facility has been built.

5) For determining compliance with Table 8, a wind energy facility is modeled and monitored for compliance at a hub-height wind speed of 16 meters per second (about 35 mph). This establishes a uniform method of determining compliance and takes into account the variation in turbine height and size that now exist.

6) An exception which can be issued by DEQ (if DEQ were implementing the program, and by EFSC for large wind facilities) for ambient noise levels exceeding 10 dBA up to 15 dBA is authorized for a landowner where the wind turbine is not located on the landowner's property. To request this exception, landowner written consent must be provided as in (3) above. In contrast to (3) above, an exception under this paragraph would have to be granted by DEQ (or by EFSC for large facilities) for the landowner's consent to become operative.

7) A provision is added clarifying the Commission's suspension of its administration of the entire noise program, including processing requests for exceptions, variances and other administrative procedures. This provision was included at DEQ's request.

V. SUMMARY OF KEY COMMENTS

Introduction

The testimony largely fell into three broad categories. Most people who testified supported establishing noise standards for wind energy facilities, but felt that the 12/15/03 rules only partially accomplished the necessary changes. Some persons testified in support of the changes proposed in the 12/15/03 draft but they also believed that further changes beyond the 12/15/03 draft were not necessary to accommodate wind. A third perspective was that the current Commission noise rules were adequate and that wind needed no special rules; these persons opposed any rules changes including the 12/15/03 draft. Each of these perspectives is summarized in more detail below.

Testimony of Those Supporting New Standards for Wind Energy Facilities

Most people who testified, including wind energy supporters, farmers, ranchers and environmental organizations, supported the purpose of the rulemaking to establish more workable standards for wind energy facilities, but they believed that changes in the 12/15/03 draft did not effectively accomplish this goal. They supported the establishment of a baseline at 26 dBA and some of the other changes in the 12/15/03 draft. However, they believe that the rules should be amended further to provide the following:

1) any owner of property impacted by noise may consent to waive the ambient degradation rule on their property. The increase in ambient degradation can exceed 10 dBA up to any level so long as the levels in Table 8 continue to be met. Any affected landowner, whether or not the wind turbines would be located on that land, may exercise this waiver. The waiver would be recorded as an easement on the property and would not require a separate memorandum describing environmental conditions required by the 12/15/03 draft;

2) the existing ambient rule of a 10dBA limit would apply to any landowner who did not wish to waive the ambient rule;

3) the Table 8 maximum limits would still apply to all wind energy projects.

These wind energy supporters also believe that the rules should address the pre-project L10, background level. (L10 refers to a noise level that is exceeded 10% of the time. L50 is a noise level exceeded 50% of the time.) They support deleting the L10 portion of the ambient degradation standard for wind project for two reasons: 1) the continuous nature of the noise source for wind facilities and; 2) meeting the L50 limit also meets the L10 requirements.

These wind energy supporters oppose the 12/15/03 rules' exception process from the noise rules. The exception would have to be approved by EFSC for large facilities, or by DEQ for small facilities, if the landowner gives written consent which must be recorded with the property deed. The exception would allow an increase in noise level of 15 dBA, resulting in a maximum noise level of 41 dBA.

These commenters believe that the exception is not helpful for providing certainty to wind developers because the exception is discretionary, i.e. an exception may not necessarily be granted even if the landowner is willing to agree. They believe that their proposal to allow any affected landowner to agree to waive the noise ambient standards as long as the Table 8 limits are met is more workable and provides regulatory certainty for wind developers.

They are also concerned that the exception process would not be available as a practical matter since the 12/15/03 rules also provide that DEQ has suspended all requests for exceptions (as well as other procedures) under the noise program because of the lack of funding. They believe it is doubtful whether counties are delegated the authority to grant such exemptions in making local land use determinations.

Wind developers and their supporters also believe that the 12/15/03 draft provision to determine compliance by establishing a wind speed of 16 meters per second (35 mph) at hub height is not workable because sound power data at that wind speed are generally not available from the manufacturer. They believe sound power levels established according to IEC 61400 at the standard wind speed of 8 m/sec at 10 meter height are sufficient to determine compliance with Table 8. They indicate that turbine sound power levels determined in accordance with IEC 61400 are readily available from all manufacturers. They also suggest some clarification of compliance measurement conditions, so that noise generated by the wind alone (and not by the energy facility), does not constitute non-compliance; and they believe that references to "indirect noise" are vague and should be eliminated.

Testimony of Those Supporting the 12/15/03 Draft Rules.

Some persons supported the 12/15/03 draft rules as more than adequate to take wind's uniqueness into account; they would not support the changes proposed by the prior group of commenters on the 12/15/03 draft rules. They also believe that a waiver of the ambient noise standards by individual landowners through agreements with developers is not justified. They further believe that the existing process the Commission has to grant an exemption is a practical and workable alternative and provides greater protection to the public.

One witness had worked for DEQ for many years and is now consulting for private industry on noise compliance issues. He supports the 12/15/03 draft rules as a reasonable accommodation to wind, while maintaining the basic DEQ noise rules. He proposed two amendments: 1) to clarify that the DEQ rules apply to large wind energy facilities sited by

EFSC and to smaller wind energy facilities sited by local governments. Only residential scale wind turbines should be exempt from the DEQ noise standards. 2) to determine compliance the proposed rules require determination only at 16 meters/sec (35mph). He also suggested the rules should indicate a specified height level and a wind speed "not to exceed 16 meters/sec".

Another witness who is an acoustical engineer also supports the 12/15/03 draft in general but supports some other changes. He suggested that tests to determine compliance with the ambient standard be conducted at a range of 14-16 meters/second rather than just at 16 meters/second. He also supports a local government option to grant an exception to the ambient noise standard under the same conditions as provided for EFSC and DEQ in the 12/15/03 draft. He also suggested that DEQ provide guidance as to how local governments can use the noise standards, given the suspension of Commission and DEQ responsibilities in OAR 340-035-0110. He further believes the exception should have a requirement explaining why the noise regulation cannot be met in order for an exception to be granted.

In general, he supports the requirement that DEQ must issue an exception through an administrative process as the 12/15/03 draft provides, for a waiver of the ambient noise standard. He believes that the administrative process through DEQ provides added protection to the general public which would not be present in a private agreement between any landowner and a developer. He believes that the limited waiver provided to the landowner on whose land the turbine would be located as proposed in the 12/15/03, draft provides enough flexibility for wind and should not be expanded to any affected landowners as some commenters suggested.

Testimony of Those Not Supporting Separate Noise Standards for Wind

Some persons who testified felt that wind should be treated the same as other industrial noise generators and that there was no justification for any rule changes to treat wind differently. Two acoustical engineers and an energy architect provided testimony from this perspective.

One acoustical engineer stated that Oregon's current noise standards are some of the best in the country. He sees no need to make any changes in Oregon's noise standards. He does not support any of the changes in the 12/15/03 draft. He believes that the current Commission exception process adequately provides flexibility for increases of noise levels; he believes there is no justification to treat wind facilities different from other industrial facilities or other energy facilities which create noise. He believes that noise levels for wind can be accurately monitored and the ambient levels determined. As such there would be no justification for assuming the background of 26 dBA proposed by the 12/15/03 draft. He also indicated that the current process of variances from noise standards is workable, both for DEQ and for local governments.

Neither acoustical engineer supports the proposal to let landowners waive noise standards. They believe that waiver could have adverse impacts on neighboring persons. They also

do not support any of the provisions in the 12/15/03 draft establishing special measuring requirements and procedures for measuring wind noise. They believe that all industrial commercial facilities have nuances of their operations that need to be taken into account in measuring noise levels. They believe that the current Commission rules provide for those nuances and wind facilities are no different than other facilities and should not be given special treatment compared to other industrial noise sources.

An architect involved in energy efficiency design and other energy projects also opposes any changes to the current noise rules. He believes that adverse environmental and health impacts may have been caused by wind projects. He claimed there have been numerous complaints about noise from people living near wind energy facilities. He also questions whether wind can be a reliable energy technology, and encourages greater reliance on energy efficiency to avoid the need for wind energy facilities. Because of the adverse impacts of wind and the lack of reliability of wind, he does not support any of the proposed changes to the noise standards for wind energy.

Other persons provided similar written comments opposing any changes in the current noise standards. They believe that there is no justification for treating wind energy facilities different from other industrial noise sources.

VI. HEARING OFFICER'S RECOMMENDATIONS: RESPONSE TO COMMENTS

The revised rules proposed in this Hearing Officer's report would do the following:

1) Maintain the Commission's Table 8 limits on all wind energy facilities.
2) Provide that the background baseline is 26 dBA for ambient wind energy facility noise.
3) Provide that any willing landowner may waive the ambient noise degradation standard for his or her own property. Such waiver must be recorded with the county to accompany the legal title to the property.
4) Create a standard protocol based on IEC 61400 for modeling and measuring noise impacts from wind energy facilities to ensure compliance with the Commission's standards.
5) Add a provision clarifying the Commission's suspension of DEQ's administration of the noise program.

Each of these issues is discussed below.

1) Maintain the Commission's Table 8 limits on all wind energy facilities.

Virtually everyone who testified urged continued applicability of the Table 8 standard for wind energy facilities. No one urged that Table 8 not continue to apply to wind. In particular, the L50 level of 50 dBA was supported by everyone, including those who wished to have the ability to waive the ambient standards, those who supported the

12/15/03 draft, and those who opposed any changes in the Commission's current noise rules. There is no reason, based on the hearing record, to change the applicability of Table 8 to wind or to modify the provisions in Table 8 for wind energy facilities.

2) Provide that the background baseline is 26 dBA for ambient wind energy facility noise.

This was proposed in the 12/15/03 rules. Establishing a base line of 26 dBA provides a uniform approach in determining impacts of wind energy facilities. It also addresses the problem of measuring a background where windspeed may be less than the speed necessary to start a wind energy facility (cut-in speed). This provision also eliminates technical difficulties of incurring wind noise at very low levels. Only one person of the more than 60 persons who testified opposed establishing a baseline of 26 dBA as a minimum ambient sound level. All of the other witnesses who addressed this issue either expressly supported 26 dBA or had no objection to it. While one acoustical engineer said that it was possible to measure at a lower level, he believed that 26 dBA is a reasonable level to assume as the minimum ambient sound level.

The level of 26 dBA is less than a soft whisper from 5 feet away (source: Beranek 1998). Requiring actual levels of measurement below this level is unnecessary, given the unlikely benefit and the degree of difficulty in measuring accurately at those low levels. I believe that 26 dBA is a reasonable assumption for baseline of background levels. Where there is evidence that the actual background is higher, the proposed rules would provide an applicant the opportunity to demonstrate the actual minimum level.

3) Provide that any willing landowner may waive the ambient noise degradation standard for his or her property. Such waiver must be recorded with the county to accompany the legal title to the property.

The draft of 12/15/03 provided that a waiver by the landowner where the wind turbines would be located could waive the ambient degradation rule up to a 15 dBA increase over background. This would effectively allow a qualifying landowner to raise the noise level up to 41 dBA. Other landowners who also wished to allow noise from wind machines to affect their property could agree to a similar increase, but only upon approval of an exception by EFSC or DEQ. The 12/15/03 draft suggested that a 15 dBA increase was effectively a tripling of noise levels, and a 10 dBA increase a doubling of noise levels.

However, most people who commented, including landowners, renewable resource advocates and wind developers, believe the waiver should be afforded to any landowner, as long as the limits of Table 8 are maintained. I agree and recommend this position to the Commission.

Since the waiver by the landowner is voluntary, the ambient noise degradation requirements would continue to apply unless a landowner agreed to a waiver. I see no reason to distinguish between a landowner who owns the land where the turbines would be

located and any other landowner impacted by the noise standards. If all affected landowners have the option to enter into a consent agreement with the wind developer, this provides certainty and a simpler process than the 12/15/03 draft proposal. The landowner who is unwilling to enter into such agreement still has the full protection of the ambient noise degradation standard, regardless of what his/her neighbor has done. It would make no difference to the level of protection of the ambient noise degradation standard whether the neighboring landowners who do waive the standard own the land where the wind turbines are located or not.

There is also a question whether the proposal to allow landowners to seek an exemption from DEQ is practical. As the new provision 340-035-0110 indicates, neither the Commission nor DEQ will process any requests for exemptions or other administrative actions related to the noise standard. While EFSC may be able to grant exemptions for large wind facilities, smaller facilities would be approved by local governments. Not all local jurisdictions have adopted the Commission's noise standards. Even for those which have, it is not clear whether they may grant an exemption from the Commission rules.

I also agree that all affected landowners willing to waive the noise ambient standard should be able to do so as long as the Table 8 limits are maintained. The 12/15/03 draft allows only an increase in ambient noise of 15 dBA through the consent agreement waiver. While an increase of 15 dBA may be a tripling of heard noise, the 41 dBA provided in the draft 12/15/03 still constitutes a very low level of noise, the average of a living room library (Beranek 1998). The Table 8 level of 50 dBA is well below any impact on health. 50 dBA is about the level of light traffic 100 feet away, rainfall or noise in a private business office. If landowners want to agree to this level of noise for compensation, I see no reason to deny them this ability to do so.

I also believe that requiring a written waiver to be filed with the county office which records deeds is sufficient notice of the waiver. Such a waiver "runs with the land" and becomes a legally binding easement on future landowners of the affected property. I do not see merit in the extra requirement (in the 12/15/03 proposed rules) of a memorandum which describes the environmental conditions of increased noise due to the wind energy facility. The language in question is vague and confusing. A waiver that indicates the decibel level agreed to should be sufficient to put potential future landowners on notice of the noise easements and covenants in force.

Finally, a number of speakers indicated that most states, including neighboring states, do not have ambient noise levels at all for wind energy. Instead, those states require a total noise level similar to current Table 8. People who supported waiving the ambient degradation standard testified that these states recognize the difficulty of measuring ambient levels for wind energy facilities, and they provide greater encouragement for wind by not requiring an ambient noise standard.

The rules proposed with this Hearings Officer report do not go as far as these other states, since Oregon would still maintain the noise degradation standard of 10 dBA for a

landowner not willing to waive this standard. However, the proposed rules would allow a willing landowner to waive those rules with the Table 8 limits in effect. I believe that this is a reasonable compromise since it provides some flexibility for wind for willing landowners, while maintaining the noise degradation standard for those unwilling to waive this standard.

4) *Create a standard protocol based on IEC 61400 for modeling and measuring noise impacts from wind energy facilities to ensure compliance with the Commission's noise standards.*

I recommend the use of a standard protocol based on IEC 61400, for determining compliance with the Commission's noise standards. This will simplify the methodology and assure more uniformity in evaluating the noise impact of wind energy facilities.

IEC stands for the International Electrotechnical Commission, which is the recognized international body for standards development activities. IEC 61400-11, "Wind turbine generator systems –Part 11: Acoustic noise measurement techniques" establishes the noise levels by rating the individual turbine from cut-in wind speed up to 95% of its electrical rated power level.

The 12/15/03 draft rules proposed the following standard protocol for modeling and measuring noise impacts, to ensure compliance with the Commission's standards: (a) the use of a hub-height wind speed of 16 meters/second; (b) variable speed turbines and cut-in wind speeds; (c) waiver of L10; and (d) non-turbine related noise and indirect noise. Based on public comment discussed below, I believe that the IEC 61400 protocol is preferable.

4a) the use of a hub-height wind speed of 16 meters/second.

The 12/15/03 draft rules provide that for purposes of predicting compliance with the Table 8 noise levels from proposed wind facilities, the appropriate measurements must assume the facility's turbines are operating at a hub-height of 16 meters/second (about 35 mph). To determine actual compliance with Table 8 noise levels, operating wind facility noise levels must also be measured based on the turbine operating at 16 m/sec.

ODOE staff believed that 16 m/sec represents a reasonable basis for determining the sound when the wind turbines are operating at full power generation. Speeds above 16 m/sec would likely create substantial noise from the wind itself, making it difficult to measure the actual noise created by the wind energy turbines. By establishing the measurement at hub-height, ODOE staff also believed that an accurate reading would be made regardless of the size and height of the turbine.

Some commenters suggested that 16 m/sec was not the right basis for determining noise. One acoustical engineer said that there was no reason to make a change to the current Commission rules to explicitly measure wind speed in this way (or to include other

parameters different from other industrial facilities for measuring wind turbines). He believed that wind engineers could accurately make assumptions and take into account differences as they do for other industrial facilities.

Another witness expressed concern that wind speeds could be much higher, as high as 100 mph. He also objected to the use of hub-height since the noise level at a tower could be very different from noise levels at ground level. Instead, he encouraged numerous measurements at different locations and at different heights to determine noise level compliance.

One acoustical consultant suggested that the measurement protocol should specify a height level and require that the measurement occur when the wind speed does not exceed 16 m/sec. Another one suggested that there should be a range of measurements in the range of 14-16 m/sec to determine compliance.

A group of wind developers objected to the use of hub-height wind speeds. Instead, they suggested that the IEC 61400 ratings, assuming 8 m/sec at 10 meter height, be used, since turbine sound power levels that have been determined in accordance with IEC 61400 are readily available from all major manufacturers. One sound engineer objected to testing turbines at 8 m/sec at 10 meter height, since the turbines vary substantially in height and are much higher than 10 meters.

I recommend that the rule use the established maximum sound power level as determined by IEC 61400 or similar rating by another independent rating organization. Currently IEC is the only organization providing such ratings, but the rules would allow any rating developed by any independent rating organization to qualify, should one develop in the future.

The maximum sound power level rating established by the IEC 61400 protocol does not mean that measurement is made at 8 m/sec and 10 meter height which was ascribed to that protocol by some commenters. The IEC rates each individual turbine at hub-height to determine maximum sound power levels. The 10 meter height is part of the IEC's calculation to standardize the results for comparison of different turbines.

Use of the IEC maximum sound power level provides the following:

- The power curve relates the turbine's electrical output power to the wind speed averaged over the rotor swept area. The wind speed can be determined from the measured electric power output. This is IEC's preferred method over wind speed measurements using anemometers.
- Sound measurements as a function of wind speeds are taken by recording the electrical power produced by the turbine and then calculating what the average wind speed over the rotor swept area must have been by using the electric power output curve.
- Correlation between measured sound power level and wind speed based on the measured electric power is very high, up to the point of maximum power.

- Because most turbines reach the maximum electrical power output around 12 to 15 m/s at hub height, sound power levels are not measured beyond that wind speed range (such as the 16 m/s as proposed in the 12/15/03 rules). Thus, turbine manufacturers are unable to provide noise data for wind speeds at 16 m/sec as a matter of course.
- Measurements show that the sound power levels generally do not increase beyond the 95% maximum power level. This can be explained because the noise emitted by a wind turbine generator system is predominantly determined by the aerodynamic noise of the rotor blades, which is directly dependent on the blade tip speed. These blade noises grow with increasing wind speed until the maximum rotor speed (and thus power level) is reached. The wind speed still increases beyond that point but the rotational speed of the rotor, and thus the noise does not increase. However, some turbines with variable speed operation are sometimes being controlled in such a way as to limit noise generation. Therefore the use of the established maximum sound power level makes the most sense.

Using the IEC 61400 or similar protocol would allow wind developers to provide sound power level information that is readily available for each model turbine using the IEC rating. At the same time, because IEC evaluates each turbine model individually, the impacts of different of hub-heights are also taken into account in determining maximum sound power level up to 95% power levels.

I also believe that the assumptions for wind measuring should not be left to the discretion of sound engineers, as was suggested by one commenter. Uniform guidance should be provided so the wind industry and affected citizens have certainty as to what the noise requirements are and how they are interpreted.

I also see no benefit to requiring a range of wind speeds as two other witnesses suggested to the extent that it differs from the IEC protocol. This approach lacks the certainty that is provided by the use of a standard independent rating based on actual power level.

4b) Variable Speed Turbines and Cut-in Wind Speeds

A related issue was whether noise levels for wind turbines with variable wind speeds can be accurately measured under the protocols established by the 12/15/03 proposed rules, which required measurement of wind turbine noise levels at cut-in speed. The sound level of variable turbines increases rapidly with only slight changes in wind speed from the cut-in wind speed, compared to wind turbines with constant speed.

The concern was raised that predicting or measuring the noise levels of variable speed turbines with the measurement requirements of the 12/15/03 proposed rules might significantly underestimate the noise level with slightly higher than cut-in wind speeds. I agree with that concern and have included a change to the 12/15/03 proposed rules. The use of the IEC 61400 maximum sound power level, as explained above, will address this issue.

One commenter suggested that adoption of rules be delayed so that the working group could evaluate this issue. However, I believe such a delay is not necessary. The IEC protocol does evaluate noise levels of variable windspeed turbines as well as those with constant speeds. The IEC process takes into account the quick rise in noise levels and accurately rates the maximum sound power levels of variable turbines. The IEC protocol will result in a conservative method for both constant and variable speed turbines.

4c) waiver of L10

Wind developers also expressed concern about the pre-project L10 noise level and suggested that the L10 portion of the ambient degradation rule for wind projects be eliminated. They believe that the continuous noise created by wind justifies waiver of the L10 standard for wind facilities, as well as the fact that historical analysis of the L10 requirement indicates that if the L50 requirement is met, the L10 requirement is also satisfied.

With the adoption of 26 dBA as the assumed background, the concern raised in those comments is addressed in part, i.e., use by a wind developer of 26 dBA as background will reduce the need for pre-project monitoring for background noise.

However, if these commenters suggest a waiver of the L10 portion of the Table 8 standard, I do not agree with this recommendation. As noted previously, L10 refers to a noise level that is exceeded 10% of the time, and L50 is a noise level exceeded 50% of the time. Table 8 establishes separate daytime and nighttime maximum L10 and L50 limits for noise levels. The L10 nighttime limit is 55 dBA and the L50 nighttime limit is L10 dBA.

While in most cases the L10 limits of Table 8 would not be exceeded if the L50 limits are met, there may be circumstances where the L10 limit is the controlling factor. The L50 limits in Table 8 means the noise levels are exceeded 50 % of the time, and the L10 limits means noise levels are exceeded 10% of the time. The L10 limits because of their low frequency are higher than the L50 limits.

The revised rules proposed by this Hearing Officer's report allow a willing landowner to waive the ambient degradation rule with the Table 8 limits in effect. However, the 12/15/03 proposed rules retain the ambient degradation rule for those persons not willing to waive that rule. Background is assumed at 26 dBA unless a higher baseline is proven. In most cases a 10 dBA ambient limit where a landowner does not waive the standard would limit noise levels to 36 dBA, well below the Table 8 limits for L 50 and L10. However, if the baseline were proven to be higher than 26 dBA, the L10 and L50 limits might be impacted. A landowner not willing to waive the ambient degradation rule would have the protection of both the L10 and L50 limits of Table 8 and the 10 dBA ambient degradation limit in that case.

4d) non-turbine related noise and indirect noise

The 12/15/03 proposed rules referred to indirect noise from wind facilities. Concern was raised that the noise standards for wind energy facilities do not clearly state that the noise limits are noise levels attributed only to the wind machines; that noise from wind which is greater than the cut-in speed of the turbine not be incorrectly attributed to the noise created by the turbine rather than to the wind itself. Concern was also raised that the phrase "noise generated or indirectly caused by the wind energy facility" creates confusion and could lead to attribution to wind turbines noise not caused by them. I agree. The words "indirectly caused" have been dropped from the proposed rules and other language is included to clarify that the Table 8 application to wind energy facilities means the noise caused only by the wind energy facilities.

5) Add a provision clarifying the Commission's suspension of DEQ's administration of the noise program.

This provision was added at the request of DEQ to reflect the inability of the Commission and DEQ due to lack of funding to actively administer the noise program. There was no adverse comment by anyone on including this provision in the Commission's rules, although some expressed concern that DEQ was unable to actively administer the noise program. This rule provides useful clarification of the active administration of the noise rules and I recommend its adoption.

A number of people also suggested that the rules should provide for a role for local governments in making noise determinations for wind facilities. I do not recommend provisions to explicitly address the role of local governments, because existing state law already provides that determination. For large energy facilities, EFSC would determine compliance with the Commission's noise standards as it does for all applicable standards of other state agencies.

For wind energy facilities which are smaller than 35 megawatts and which are not subject to EFSC's jurisdiction, EFSC does not administer or enforce the noise control regulations for these smaller wind power projects. Instead, local land use approval is required before construction. Local governments may address noise impacts from wind power projects under their land use ordinances. Depending on the jurisdiction, local ordinances might or might not incorporate the state noise rules.

Amendment of the rules as proposed by this draft Hearings Officer report would not change local land use approval procedures. Local governments would continue to apply local ordinances in making land use decisions on small wind power projects. Not all local governments have adopted the state noise rules. In any county that has adopted the state noise regulations by reference in their local ordinances, the amended rules may apply. In those counties where the state noise regulations apply, the amended rules would simplify the noise impact analysis. The amended rules would not affect local government land use decisions in those jurisdictions that have not adopted the state noise rules in their land use ordinances.

VII. ATTACHMENT: DETAILS OF COMMENTS

Portland Hearing, February 9, 2004

The hearing ran about two hours; about 20 people attended the hearing and 14 testified. They are listed below and the major points of their comments are briefly summarized.

Ann English Gravatt, representing Renewable Northwest Project (RNP): supports general effort to establish separate noise standards for wind energy facilities; supports right of landowners to waive ambient degradation rule up to Table 8 limit of 50 decibels (dBA) – such a waiver would be recorded as an easement that applies to the property for as long as specified in the easement agreement; supports the provision of the 12/15/03 draft rules that the assumption for noise evaluation purposes that pre-project ambient noise level is assumed to be 26 dBA. (See written testimony summary below for more issues covered).

Jerry Wilson: supports the 12/15/03 draft rules with a few changes including a definition of wind energy facilities covered by the rule and specifying requirements for operational oversight; does not support the right of a landowner to waive ambient degradation rule; believes that DEQ noise standards are important and should be made known to the public and local governments—i.e. 340-035-0110 should not be the basis for ignoring noise standards even if DEQ lacks the budget authority to actively enforce them. (See also written comments below.)

Andy Linehan, with CH2MHill: believes the 12/15/03 draft is an improvement but does not go far enough to make wind facilities competitive in Oregon with other states; supports right of landowners to waive ambient noise standards up to Table 8 limit of 50 dBA;

Rhett Lawrence, OSPIRG: supports right of landowners to waive ambient noise standards up to Table 8 limit; believes that benefits of wind energy outweigh any increased noise impact.

Peter Mostow: supports right of landowners to waive ambient noise standards up to Table 8 limit; believes that the use of easement restrictions is appropriate for wind noise like other issues including nuisances which property owners address through easements.

Roby Roberts, PPM Energy: supports right of landowners to waive ambient noise standards up to Table 8 limit; believes that this approach is comparable to what is allowed in other states.

Virinder Singh, Pacificorp: development of renewables is important to Pacificorp, which is relying heavily on renewables in meeting its energy needs in the next ten years; supports maximum flexibility in developing renewable resources, including landowners rights to waive ambient noise level.

Russell Altermatt, of Altermatt Associates: indicates that Oregon's current noise standards are very good and sees no need to make changes in Oregon's noise standards; believes there is no justification to treat wind facilities different from other industrial facilities which create noise. – see also written comments below.

Scott Kringon, Vestas Wind Systems: supports right of landowners to waive ambient noise standards up to Table 8 limit; notes that wind facilities can't use noise mitigation measures, so there must be flexibility if wind facilities will be developed.

Mark Bastasch: with CH2Mhill and a noise consultant on wind energy projects, supports right of landowners to waive ambient noise standards up to Table 8 limit; believes that Massachusetts is only other state with ambient noise standards for wind, and has caused adverse impacts on wind development.

John DeMoss: represents a number of farmers and ranchers who want the flexibility to waive ambient noise standards; believes that noise levels above 50 dBA could be acceptable.

Brett Gray: supports right of landowners to waive ambient noise standards up to Table 8 limit;

Kerry Standlee, acoustical engineer: supports the 12/15/03 draft with some changes; suggests that tests to determine compliance with the ambient standard be conducted at a range of 14-16 meters/second rather than just at 16 meters/second; also supports a local government option to grant an exception to the ambient noise standard under the same conditions as provided for DEQ in the 12/15/03 draft; believes the exemption should have a requirement explaining why the noise regulation cannot be met.

Mr. Standlee supports the requirement that DEQ must issue an exemption through an administrative process as the 12/15/03 draft provides, for a waiver of the ambient noise standard;. believes that the administrative process through DEQ for exemptions provides added protection to the general public which would not be present in a private agreement between any landowner and a developer; believes that the limited waiver provided to the landowner where the turbine would be located as proposed in the 12/15/03 draft provides enough flexibility for wind and should not be expanded to all affected landowners.

Mr. Standlee also suggests that DEQ provide guidance as to how local governments can use the noise standards, given the suspension of Commission and DEQ responsibilities in OAR 340-035-0110; also suggests dropping the use of the word "existing" to describe wind energy facilities in OAR 3440-035-0035 as it is confusing; "existing" could be understood to refer to pre-1975 facilities when the current noise rules were adopted by the Commission.

Sean Harding: supports development of wind and believes noise issues can be addressed without overly restrictive noise standards; recently developed residential-scale windpower in Tillamook County.

The Dalles Hearing, February 9, 2004

The hearing went about ninety minutes, with 30 people in attendance. Twenty-two people testified; they are listed below.

Mike McArthur, Sherman County Judge and Gary Thompson, Sherman County Commissioner: wind energy is very important to Sherman County; they believe that landowners should have the right to waive ambient noise standards up to the 50 dBA limit of Table 8; also believes that local planning commissions should have greater latitude to deal with these issues.

Ann English Gravatt, referenced comments at Portland hearing and written comments.

Dan Erickson: Wasco County Judge: agrees with Judge McArthur on ambient noise standards and the need for greater ability of local jurisdictions to adjust noise standards.

Kent Thomas: supports right of landowners to waive ambient noise standards.

Barbara Gray: supports right of landowners to waive ambient noise standards.

John Fields: supports right of landowners to waive ambient noise standards.

David Beasley, Superintendent-elect of Sherman County schools: wind energy development is important to Sherman County economically; supports right of landowners to waive ambient noise standards.

Paul Woodin; current rules are too restrictive and have adversely affected wind projects in Oregon; supports right of landowners to waive ambient noise standards.

Darrel Hart: supports right of landowners to waive ambient noise standards.

Allan Peterson: supports right of landowners to waive ambient noise standards.

Carole McKinster: supports right of landowners to waive ambient noise standards.

Melva Thomas: supports right of landowners to waive ambient noise standards.

Nancy Fields: supports right of landowners to waive ambient noise standards.

Sharon Spencer: supports right of landowners to waive ambient noise standards.

Don Hildebrand: supports right of landowners to waive ambient noise standards.

Mark Jackson: supports right of landowners to waive ambient noise standards.

Brett Gray: supports right of landowners to waive ambient noise standards.

Sandy McNabb: supports right of landowners to waive ambient noise standards.

Mark Bastasch, CH2MHill: supports right of landowners to waive ambient noise standards; also believes Oregon's current standard is too strict for wind development compared to Washington and other states.

Roby Roberts, PPM Energy: believes that wind developers need certainty, supports right of landowners to waive ambient noise standards up to 50 dBA limit in Table 8.

John DeMoss: supports right of landowners to waive ambient noise standards up to at least 50 dBA limit in Table 8.

Tillamook Hearing, February 23, 2004

The hearing ran about 45 minutes. Twelve people attended, and 9 persons spoke. They are listed below.

Mary Ann Sweet supports the development of wind energy, and supports using Table 8 limits without a separate ambient noise standard as the basis for wind energy facilities in Oregon. She also provided a written statement.

Larry Stein: believes that global warming from fossil fuels presents real risks and dangers; believes that wind energy has environmental benefits and should be encouraged through modifying the Commission's noise standards. He also provided a written statement.

Barry White: represents the United Brotherhood of Carpenters. He supports the effort to amend the noise standards for wind energy resources.

Tom Bender, an energy architect from Manzanita: expressed a number of concerns about wind energy facilities and their noise impacts; believes that the proposed noise standards do not take into account the interaction of wind noise with other noise; expressed concern about deterioration of wind energy equipment in Hawaii and elsewhere.

Mr. Bender supports renewable energy but believes that wind energy must be sited carefully to avoid adverse impacts; believes that energy efficiency should be a much higher priority and would reduce the need for new wind and other electricity resources; and also believes that more emphasis on clean energy needs to be placed on cars and other mobile sources of pollution, not power plants.

Shirley Kalkhoven: who is on the Nehalem City Council, requested clarification of the legal significance and who would enforce new noise standards for wind energy facilities, given the fact that DEQ and the Commission are not actively administering or implementing the noise standards.

Ann Gravatt, Renewables Northwest Project (RNP), gave a brief summary of RNP's position provided at previous hearings: i.e. she supports the ability of any landowner to waive ambient limits up to the Table 8 limits for wind energy facilities; is proposing no change to Table 8 for wind energy facilities.

Sean Harding: believes that wind energy can be an important factor in bringing new jobs to Tillamook County; believes that the benefits of wind energy outweighs any adverse noise impacts; supports the use of the Table 8 limits as the noise limits for wind energy resources. He also provided a written statement and a report by the National Renewable Energy Lab on the noise impacts of wind energy facilities.

Mark Bastasch, works for CH2Mhill: supports right of landowners to waive ambient noise standards up to Table 8 limit; .believes that newer wind turbines are quieter than older models; believes that the Table 8 limits are adequate to protect health impacts and take into account the cumulative impacts of noise.

John DeMoss: believes landowners should be able to waive the ambient standard, Oregon's maximum Table 8 noise level is restrictive enough, as Washington allows up to 70 dBA, which is 20 dBA higher than Table 8. He has a farm under some existing windfarms and has no problems with the noise levels there.

Pendleton Hearing, March 9, 2004

The hearing ran about an hour and 20 minutes. Nine persons spoke at the hearing. They are listed below.

Matt Wood: lives at the current Stateline Windfarm, about 1,00 feet away from the nearest turbine; has no problems with noise from the wind turbines and has seen minimal effect on wildlife, including birds and coyotes, from the turbines.

Jim Williams: lives in Helix and farms near the first wind project in the area; has seen no impact from noise and has seen benefits from wind through tax payments used to help the fire district.

Monty Hixson: has been a construction contractor on a number of wind facilities, supports wind development and believes noise is not an issue from wind machines; hears more noise from passing cars than from wind turbines.

Cliff Bracher: a landowner inside the Stateline Windfarm, leases farmland to Matt Wood; also supports wind energy development.

Dave Campbell: owns property at Stateline and has reseeded the land while wind turbines are operating; has had no problems with noise; one residence on his property has also not complained about noise.

Anne Walsh, FPL Energy: developed the Vansycle Ridge wind energy project; supports wind energy development, believes that willing landowners should be able to waive the ambient rule while maintaining Table 8 limits; also supports use of 26 dBA as background level; supports other changes in wind energy rules advocated by RNP to make wind energy easier to site in Oregon.

Mike McKay: has done electrical work on wind projects; believes that wind is much quieter than other power plants and supports wind development.

Kerrie Standlee: previously supported the 12/15/03 draft rules, but now believes they do not adequately take into account the noise levels from variable wind speed turbines; believes that witnesses who say noise levels of existing turbines is not a problem demonstrate that the existing noise levels are workable and will not prevent wind development; urges delay in adoption of the rules to further examine the impacts of variable windspeed turbines; see also written testimony provided at this hearing summarized below.

John DeMoss: disagrees with Mr. Standlee and supports the landowners' right to waive ambient noise standards; opposes a delay in adoption of new wind rules.

Written Comments

David Stewart-Smith, Oregon Department of Energy: 2/6/04, memo explaining the ODOE staff proposed amendments. Most of the points covered in the memo are incorporated in the prior sections of this Hearing Officer report entitled "Introduction", "Energy Facilities and Commission Noise Standards", "Why ODOE Believes Wind Energy Facilities Need a Specific Noise Standard Provision", "Application of the Commission's Noise Standards to Wind Energy Facilities" and "Initial ODOE Draft Proposal of 12/15/03".

Tillamook County Commissioner Tim Josi: 2/24/04, supports this rulemaking to make noise standards suitable for wind energy; supports establishing a minimum background level of 26 dBA and the compliance wind speed of 16 m/sec as more reasonable than high wind conditions.

Russell N. Altermatt, P.E., Altermatt Associates: 2/9/04, comments indicate that Oregon's current noise standards are some of the best in the country; sees no need to make any changes in Oregon's noise standards; believes that current EQC exemption process adequately provides flexibility for increases of noise levels; believes there is no

justification to treat wind facilities different from other industrial facilities or other energy facilities which create noise.

He does not support any of the changes in the 12/15/03 draft. He believes that current Commission exemption process adequately provides flexibility for increases of noise levels; believes there is no justification to treat wind facilities different from other industrial facilities or other energy facilities which create noise. He believes that noise levels for wind can be accurately monitored and the ambient levels determined. As such there would be no justification for assuming the background of 26 dBA proposed by the 12/15/03 draft.

Mr. Altermatt also believes that the current process of variances from noise standards is workable, both for DEQ and for local governments. He does not support the proposal to let landowners waive noise standards and believes that such power could have adverse impacts on neighboring persons; does not support any of the provisions in the 12/15/03 draft establishing special measuring requirements and procedures for measuring wind noise; believes that all industrial commercial facilities have nuances of their operations that need to be taken into account in measuring noise levels, the current Commission rules provide for those nuances; and wind facilities are no different than other facilities in this regard.

Ann English Gravatt, Renewable Northwest Project, (RNP): 2/9/04, supports some of the provisions of the draft proposed amendments, including the assumption for noise evaluation purposes that pre-project ambient noise level is assumed to be 26 decibels (dBA); believes that affected landowners should be able to waive the ambient degradation rule for their property; believes that there should be no restrictions on the landowner's right to waiver as long as the noise level complies with the limits of the existing. Table 8 rule (the most stringent limit of which is 50dBA).

Ms. Gravatt also believes that the rules should be amended to provide the following:

1) any owner of property impacted by noise may consent to waive the ambient degradation rule on their property. The increase in ambient can exceed 10 dBA up to any level so long as the levels in Table 8 continue to be met. Any affected landowner, whether or not the wind turbines would be located on that land, may exercise this waiver. The waiver would be recorded as an easement on the property and would not require a separate memorandum describing environmental conditions required by the 12/15/03 draft;
2) the existing ambient rule of a 10 dBA limit would apply to any landowner who did not wish to waive the ambient rule;
3) the Table 8 maximum limits would still apply to all wind energy projects.

Ms. Gravatt also supports deleting the L10 portion of the ambient degradation for wind project for two reasons: 1) the continuous nature of the noise source for wind facilities and; 2) that meeting the L50 limit also meets the L10 requirements. She also opposes the

12/15/03 draft proposal for an exemption process from the noise rules; she believes that the exemption is not helpful for providing certainty to wind developers because the exemption is discretionary, i.e. an exemption may not be granted even if the landowner is willing to agree. She believes that the proposal to allow any affected landowner to agree to waive the noise ambient standards up to the Table 8 limits is more workable and provides regulatory certainty for wind developers.

Ms. Gravatt is also concerned that the exemption process would not be available as a practical matter since the 12/15/03 rules also provide that DEQ has suspended all requests for exemptions (as well as other procedures) under the noise program because of the lack of funding; it is doubtful whether counties are delegated the authority to grant such exemptions in making local land use determinations.

Ms. Gravatt also believes that the 1/1/04 draft provision to determine compliance by establishing a wind speed of 16 meters per second (35 mph) at hub height is unnecessary, since the IEC 61400 wind speeds (8 m/sec at 10 meter height) are sufficient to determine compliance with Table 8. Turbine sound power levels determined in accordance with IEC 61400 are readily available from all manufacturers. She also suggests some clarification of compliance measurement conditions, so that noise generated by the wind alone (and not by the energy facility), does not constitute non-compliance; and she believes that references to "indirect noise" are vague and should be eliminated.

Proposed Rule Language for Oregon Noise Regulation of Wind Projects, received Feb. 24, 2004, by Ms. Gravatt of RNP, based on previous written testimony.

John V. Stahl, Pacific Wind Power LLC: February 9, 2004, support the RNP comments, especially the right of any landowner to waive ambient noise standards up to the Table 8 limit; supports the 26 dBA pre-project assumed noise level in the 12/15/03 draft rules, and supports making the regulation applicable to local jurisdictions.

Maureen Kirk, OSPIRG: supports wind development for economic benefits to consumers and for environmental reasons; supports the RNP proposals, including right of the landowners to waive ambient noise standards.

Mary Ann Sweet: supports the right of landowners to waive ambient noise standards and believes changes in the noise standards are necessary to encourage wind energy.

Larry Stein: supports the right of landowners to waive ambient noise standards and believes changes in the noise standards are necessary to encourage wind energy; believes that wind can help avoid reliance on fossil fuels and their adverse impacts on global warming.

Sean Harding: supports the right of landowners to waive ambient noise standards and use of Table 8 limits for wind energy facilities. Mr. Harding also provided a report prepared by the National Renewable Energy Lab (NREL): "Acoustic Tests of Small Wind

Turbines" by P. Migliuri, J. van Dam, and A. Hurley, NREL Report # AIAA 2004-1185. The report provides information on noise monitoring and evaluation of a number of small wind energy facilities capable of operating at very low wind speeds.

Tom Bender: raised a number of concerns about the noise impacts of wind energy facilities; including operational history in Hawaii and Wisconsin, adverse environmental and health impacts that may have been caused by wind projects, numerous complaints from people living near wind energy facilities. He also questions whether wind can be a reliable energy technology, and encourages greater reliance on energy efficiency to avoid the need for wind energy facilities. He does not support any of the proposed changes to the noise standards. He also objects to some of the current provisions in the existing noise rules which were not proposed for change in this rulemaking proceeding. These included definitions of "noise sensitive properties" and "quiet areas" and the peak response levels for impulse sounds among other issues.

John Hector: opposes changes to allow any landowner to waive ambient standards up to Table 8 limits, believes the 12/15/03 draft provides enough flexibility with some minor amendments, and believes that further loosening of noise standards for wind development is not justified.

Jerry Wilson: February 9, 2004, supports the 12/15/03 draft rules with a few changes including a definition of wind energy facilities covered by the rule and specifying requirements for operational oversight; also provides extensive background of the work done by the informal advisory committee before the 12/15/03 draft rules were issued; he believes that this draft with minor changes adequately takes into account the special features of wind energy facilities.

John Guynup, Currydale Farms: March 9, 2004, believes development of wind is very important for economic development, supports more flexible standards for noise to encourage wind energy development, including the ability to waive ambient noise levels and other provisions recommended by RNP.

Kerry Standlee, March 8, 2004, recommends a delay in adoption of the rules so that the informal working group can be reconstituted to evaluate remaining technical issues; he is particularly concerned that the 12/15/03 draft rules which he previously supported do not adequately address the noise levels from newer variable speed wind turbines; both the provisions on ambient noise levels and Table 8 limits may be accurately determined for constant speed turbines in the 12/15/03 draft rules, but not the impact of variable speed turbines; he also disagrees with RNP's analysis that the ambient degradation rule is not needed to protect public health; reliance solely on Table 8 limits could result in higher noise levels than USEPA's recommended health and safety levels.

Mark Bastasch, March 12, 2004, opposes delaying adoption of the rules and believes reconstituting the informal advisory group would not result in consensus; also disagrees with other portions of Mr. Standlee's comments.

Tom Hare, US Bureau of Land Management, January 27, 2004, supports the proposed rulemaking changes to encourage wind energy development.

Tom McClara: February 15, 2004, has concerns about the noise created by a lumber mill in southern Oregon and seeks help to enforce noise standards.

Ann Gravatt, Renewable Northwest Project, March 12, 2004, opposes any delay in taking action on noise standards for wind energy facilities; believes that the rulemaking record has been sufficiently thorough for action to be taken;

A number of emails in correspondence, March 10, 2004 through March 12, 2004 between Mark Bastasch and Kerrie Standlee further explaining their most recent respective statements.

Carol Dillin, Portland General Electric: March 11, 2004, supports making changes in the noise standards to encourage wind energy development.

Katie Fast, March 12, 2004, supports wind energy development, supports allowing any landowner to waive the ambient noise degradation rules; believes the waiver in the 12/15/03 draft of the rules is too restrictive.

Ken Thompson, opposes changes in the noise rule to make it easier to site wind in rural areas, believes that there is too much industrialization occurring in exclusive farm use areas. Mr. Thompson provided three attachments to his written testimony: an East Oregonian 2004 calendar cover, showing many wind machines on farmland; an excerpt from the National Wind Coordinating Committee "Permitting of Wind Energy Facilities Handbook" and the Umatilla County Wind Utilization Process", October 2002, by Mr. Thompson.

Catharine Lawton: March 11, 2004, opposes changes in the current noise rules; opposes the 12/15/03 draft rules; believes noise from wind turbines should be limited to a maximum of 40 dBA, or no more than 5 dBA over background ambient noise levels which a number of European countries have done; believes wind turbines present health hazards from excessive noise, opposes allowing landowners to waive ambient noise degradation standards; opposes making special noise rules for wind energy facilities; suggests that South Australia's noise guidelines be considered for adoption.; also encourages international certification of wind turbines.

Ann Vileisis, Kalmiopsis Audubon Society: opposes changes to treat wind different from other industrial facilities.