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1 Toxic substances may not be introduced above natural background levels in waters of the  
2 state in amounts, concentrations, or combinations that may be harmful, may chemically  
3 change to harmful forms in the environment, or may accumulate in sediments or  
4 bioaccumulate in aquatic life or wildlife to levels that adversely affect public health, safety,  
5 or welfare or aquatic life, wildlife or other designated beneficial uses.<sup>175</sup>

6 As Mr. Feldman testified to during the hearing, WET testing is necessary to ensure compliance  
7 with this narrative criteria because neither EPA nor DEQ has set numeric water quality criteria for all  
8 toxic parameters that may be included in a discharge, therefore the toxic effect of the effluent as a  
9 whole would not be captured by regular effluent sampling.<sup>176</sup> Additionally, WET testing helps identify  
10 when two or more parameters that may be measured in levels that do not, on their own, have the  
11 reasonable potential to cause or contribute to a water quality criteria exceedance might combine to  
12 create a synergistic effect that does result in an exceedance.<sup>177</sup>

13 To ensure compliance with its obligations under the federal regulations, DEQ has developed  
14 guidance for permit writers to look to when evaluating whether WET requirements should be included  
15 in the permit.<sup>178</sup> Specifically, where the risk of aquatic toxicity exists, DEQ must evaluate WET testing  
16 data “to assess the reasonable potential for the effluent to cause toxicity and, therefore, exceed the  
17 narrative toxics criteria.”<sup>179</sup> Where DEQ does not have WET testing data from a facility, the permit  
18 writer must “require semiannual (yearly for smaller sources) WET testing for [the] duration of [the]  
19 permit.”<sup>180</sup> With respect to the Permit at issue in this case, in alignment with DEQ’s guidance, because  
20 Bio-Oregon is considered a minor source, they were required to conduct WET testing annually.<sup>181</sup>

21 Because DEQ was acting pursuant to its legal obligation under the federal regulations to ensure  
22 Bio-Oregon’s effluent—which is known to contain toxic pollutants—does not have the reasonable  
23

24  
25 \_\_\_\_\_  
26 <sup>175</sup> OAR 340-041-0033(1).

27 <sup>176</sup> Testimony of David Feldman, February 28, 2023 (Recording 2 of 2).

<sup>177</sup> *Id.*

<sup>178</sup> *See* Exhibit A11 at 97.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 98-99.

<sup>181</sup> *See* Exhibit A1 at 8 (Table B1).

