

State of Oregon
Department of Environmental Quality

Memorandum

Date: Sept. 20, 2019

To: Environmental Quality Commission

From: Richard Whitman, Director

Subject: Agenda item D, Informational item: Permit modifications and changes in operation requirements
Sept. 26-27, 2019, EQC meeting

Why this is important Facilities that hold DEQ permits often need to update their permits, or specific permit conditions, when there are changes to the operations at the facility. Facility changes are a type of action that could require a permit modification, an administrative process by which DEQ can update or otherwise change the terms and conditions of a permit.

Background DEQ will present information about the agency's processes for modifying permits, in air, land or water, and how changes to a facility's operations may, or may not, require updates to their permits.

The discussion and presentation will be based on the information contained in the memo, created by DEQ staff, attached to this report and noted below.

Attachments A. Memo: Change in Operation Requirements

EQC involvement This informational item was requested by commissioners at a recent EQC meeting. DEQ will provide information and follow-up on these issues as requested by the commission.

Report prepared by Stephanie Caldera
Commission assistant

State of Oregon
Department of Environmental Quality

Memorandum

Date: Sept. 16, 2019
To: Leah Feldon, Deputy Director
From: Kieran O'Donnell, OCE Manager; Nina DeConcini, NWR Administrator
Subject: MEMORANDUM: Change in Operation Requirements

Question Presented:

What is required of a permittee that changes its operation?

Short Answer:

If a permittee changes its operation it may be required to notify DEQ of the change. Air and land quality have generally applicable notification rules that require the permittee to alert DEQ to the permittee's change in operation. The water quality program does not have a generally applicable notification requirement. However, specific types of water quality permittees are required to notify DEQ of changes and many permittees have permit conditions requiring notification for some operational changes.

DEQ's response to a notification of a change in operation may vary significantly based on the type of change. Some changes in operation may require a permitting action while others may not. However, a failure to notify DEQ of a change, when notification is required, is a violation that may result in an enforcement action. In addition, if a regulated entity changes its operation in a manner subject to permitting and not authorized by its permit and fails to apply for a permit or a permit modification, it will be in violation of either its permit or rules or statutes requiring it to operate pursuant to a permit. Operating without a permit is typically a more serious violation that may result in an enforcement action and the assessment of civil penalties.

Changes in operation may also trigger a review of the facility's land use or additional public process. Generally, the more significant the change in operation requiring a permitting action, the more DEQ will engage the public in the permitting process.

Discussion:

Media Considerations

Air

DEQ's air quality rules require sources of air contaminants to notify DEQ for certain facility changes. An existing source, whether permitted or not, must submit to DEQ a notification in writing if a physical change (new equipment) or a change in operation will cause an increase in any regulated pollutant emissions, OAR 340-210-0215(2), or for any construction or modification of an air pollution control device. OAR 340-210-0215(3). The notification to DEQ is called a Notice of Intent to Construct (NC). For example, installing a new boiler or emergency

backup engine at any location throughout the state; upgrading a rock crusher system (motor, conveyor, crusher head) to allow an increase in production capacity; or installing a new baghouse or electrostatic precipitator would all require a NC prior to construction.

The NC gives DEQ the opportunity to evaluate the change in operation to determine if the source needs to apply for a new permit or a permit modification. NCs are divided into four categories, Type I through Type IV. Type I and II NCs capture increases in emissions below the de minimis amount and between the de minimis amount and the significant emission rate (SER), respectively. A source may proceed with construction if DEQ does not respond to the NC with an approval letter or a request for additional information within 10 days for Type I and 60 days for Type II. Type III and Type IV NCs often result in the source submitting an application for a new permit or a permit modification. If DEQ approves the NC without requiring a permit application, the source must submit to DEQ a notification of construction completion.

An increase in or addition of a new regulated pollutant emission may subject a source to new requirements, require an unpermitted source to obtain a permit, or may require an already permitted source to obtain a different permit. For example, a permitted source adding equipment (boiler or engine) that increases annual emissions above the plant site emissions limits would require a different permit or a permit modification. Or, an existing auto body shop that starts using different coatings may become subject to federal regulations and permitting. The notice requirement for a change in operation cited above is also included as a general condition of every General, Simple, and Standard Air Contaminant Discharge Permit.

In addition, sources permitted under DEQ's Title V permitting program must obtain written approval from DEQ prior to the construction or modification of any stationary source or any air pollution control device. OAR 340-218-0190. Changes to a facility authorized to discharge under a Title V permit, may require a permit modification or a construction permit and review of the impact emissions will have on the airshed if the increase in emissions rise above an established threshold. Some changes to Title V sources also require notification to EPA, additional fees, and public notice with opportunity to comment.

Failing to notify DEQ for physical changes or changes in operation, as required by the rules cited above, is itself a violation. However, a source may also commit the violation of constructing or operating a source without a permit, depending on whether the change triggers a permitting requirement. For example, a Basic ACDP rock crusher has established limits for allowable amounts of crushed rock per year. Installing an additional rock crusher at the source without notification is a violation. Additionally, if the increase in production crosses the threshold allowed by the Basic ACDP, the source would also commit the violation of operating without the required General ACDP.

Land

Solid waste disposal sites are regulated by DEQ under a permitting program. No person may establish, operate, maintain or substantially alter a disposal site, or change the method or type of disposal without a permit from DEQ. ORS 459.205. In addition, a permitted disposal site must submit a permit modification application to DEQ for "any change in the nature of the activities

or operation from those of the last application including modification or expansion of the disposal site or a change in the method or type of disposal.” OAR 340-093-0070(6). In addition, DEQ has incorporated the permit modification rule cited above into Section 10 of its Solid Waste Disposal Site Permit template.

A failure to request a permit modification from DEQ may result in a violation and an assessment of civil penalties. For example, DEQ issued a Notice of Civil Penalty Assessment and Order to a permitted composting facility and included a violation (without civil penalty) for accepting a Type III feedstock when it was only permitted to accept Type I and Type II feedstock. The facility failed to apply for a permit modification before its change in the type of disposal.

Small and large quantity generators of hazardous waste are required to obtain an ID number from DEQ and report annually to DEQ on their generation and disposition of hazardous waste. ORS 466.075 and OAR 340-102-0041. In this way, DEQ is notified annually of increased amounts of waste generated, changes in type of wastes, or changes in methods of management and disposal at regulated hazardous waste generators. Permits are required for hazardous waste storage, treatment, and disposal facilities (TSDs), and permittees are required to report on their activities to DEQ. ORS 466.095, 466.105, 466.150, OAR Chapter 340, Division 104. Permitted TSDs must modify permits pursuant to 40 CFR 270.40-.43, as adopted by OAR 340-100-0002. Failing to accurately report or operating without a permit are violations that can be cited and penalized.

Water

ORS 468B.050(1)(d) prohibits any person from modifying an industrial activity without a permit, where the modification would cause an increase in the discharge of wastes to waters of the state or alter the physical, chemical or biological properties of any waters of the state in any manner not already lawfully authorized.” Therefore, although there is no obligation on the permittee to notify DEQ of a change at the facility, if the change results in an increase in the discharge of wastes or alteration of properties of the receiving waterbody, the permittee may be liable for a violation of ORS 468B.050(1)(d) and subject to civil penalties.

Unlike the air quality and solid waste permitting programs, there is no generally applicable rule requiring all water quality permittees to notify DEQ of a change in facility operation. However, specific types of changes in operation or classes of permittees are subject to notification requirements.

- OAR 340-052-0015 requires (with limited exemptions) plans, specifications, and data for proposed **construction, installation, or modification project involving disposal systems, treatment works, sewerage systems or common sewers** to be submitted for DEQ approval prior to commencing the project. DEQ has incorporated this requirement into section D1 of schedule F of many applicable permits.
- Permittees that manage biosolids must have an enforceable **biosolids management plan**, which must include a description of the methods of solids removal, wastewater treatment process, quantities of solids generated, and the means of pathogen reduction. OAR 340-050-0031(5). The permittee must keep the biosolids plan current. OAR 340-050-0031(3).

Therefore, a permittee must notify DEQ of changes to its facility that are subject to its biosolids management plan.

- Permittees required to hold **other plans** are required to notify DEQ prior to changes in operation, which may be specific to the facility or the plan type. These include, recycled water use plans, mercury minimization plans, emergency response and public notice plans, and hauled waste plans
- When applicable, Permittees must also develop and submit for DEQ approval all elements of a federally equivalent **Industrial Pretreatment program**. Applicability is determined through industrial user surveys and consultation with statewide pretreatment coordinator. Prior to the full program submittal, the permittee must also submit a plan of study regarding the local limits technical evaluation, for review by DEQ. Upon DEQ approval, the permittee will immediately implement the approved program

DEQ responds to notifications of change in operation on a case by case basis and may initiate a permit modification pursuant to the procedure in OAR 340-045-0055. A failure to notify, when notification is required, is a violation of Oregon law and may result in the assessment of civil penalties.

General Considerations

Land Use and Permitting

DEQ requires a land use compatibility statement (LUCS) for nearly all DEQ permits and certain approvals of plans or related activities that affect land use.¹ A permit applicant must submit a copy of an affirmative LUCS signed by local planning agency prior to the issuance of a new permit for activities that affect land use. Permit renewals or modifications require a LUCS if:

- The permitted source or activity relates to the use of additional property or a physical expansion on the existing property. The LUCS applies to physical changes on the property, not to existing permit conditions.
- The permitted source or activity involves a significant increase in discharge to state waters or into the ground.
- The permitted source or activity involves the relocation of an outfall outside of the source property.
- For a major modification of an air contaminant discharge permit which means any physical change or change of operation of a source that results in a net significant emission rate increase as defined in OAR 340-020-0225(25).

A change in operation does not always mean a change in land use. For example, a permittee may change the type of wastewater treatment system, requiring DEQ approval, but may not change the approved land use. Under this circumstance, DEQ would review the existing LUCS and

¹ A detailed list of DEQ activities requiring a LUCS may be found in OAR 340-018-0030 and on the DEQ Land Use Compatibility Statement form.

consult with the local government to determine if it remains valid under the changed in operation.

DEQ may conclude that the local government's review of a LUCS is not legally sufficient. If a local government land use compatibility determination or underlying land use decision is appealed subsequent to DEQ's receipt of the LUCS, DEQ will continue to process the action unless ordered otherwise by the Land Use Board of Appeals (LUBA) or a court of jurisdiction. If a LUCS is successfully appealed after DEQ has issued a permit, DEQ may either proceed to revoke or suspend the permit or may decide to wait until the land use appeals process is exhausted.

Land use is a significant component of Oregon's environmental cleanup law (ORS 465 and 466) and associated regulations (OAR 340-122) which address the investigation and cleanup of historical releases of hazardous substances from facilities. Confirmed or suspected releases of petroleum from leaking underground storage tanks must be reported to DEQ which oversees and approves the site investigation and cleanup. Historical releases of other hazardous substances are generally not required to be reported to DEQ. Instead, DEQ strives to identify these sites through our Site Assessment program, referrals from EPA, and information provided by the public. Approximately 9,000 petroleum leaking underground storage tank sites and 6,400 other hazardous substance release sites have been identified to date. (This does not include heating oil tank sites.)

For sites involving DEQ oversight, DEQ issues a No Further Action (NFA) letter document that site conditions are protective of human health and the environment. The NFA letter explicitly states that DEQ's determination may not be valid if "new or previously undisclosed information becomes available, or there are changes in site development or land and water uses, or more contamination is discovered."

Depending on site-specific conditions, DEQ may determine that a formal deed restriction is needed to achieve protection of human health and the environmental. Deed restrictions may limit or restrict land use such as a change from commercial to residential use. Deed restrictions, typically in the form of an easement and equitable servitudes, run with the land. The property owner may request a release of the conditions or restrictions contained in a deed restriction by submitting evidence that the conditions or restrictions are no longer necessary to protect human health and the environment. The owner must also notify DEQ if the property is sold or transferred to another party and the new owner may not develop the property in a manner that is inconsistent with the deed restrictions.

Public Process and Permitting

Generally, a permit issuance or modification includes some form of public notice or involvement. The scope of the public involvement and applicable timeframes are established by rule. DEQ may also engage in public involvement beyond what is required by rule. Public engagement includes:

- Meeting informally with interested parties,

- A public notice with a public comment period,
- A public notice with a public comment period and a public hearing, and
- A combination of the above practices.

Generally, the public engagement will increase for more significant permit issuances or modifications. A modification of a facility name change does not require a public process. However, the following scenarios require differing levels of public engagement:

- A water quality permittee discharging wastewater to a nearby river proposes to change its manufacturing process and discharge a new pollutant that DEQ did not evaluate during the issuance of the permittee's existing permit.
- A composting facility requests to take additional feedstock is not necessarily a change in operation, but does represent a modification. The request to add food waste as a feedstock to a compost operation that currently only takes manure.
- An air quality permit modification for a potato processor that installed a new boiler, new production line, and an anaerobic digester.

DEQ may initiate any type of public process associated with a modification of a permit after considering the following factors (this analysis may differ from program to program):

- Extent of change proposed in the modification,
- Level of stakeholder interest,
- Compliance history of the facility, and
- Any statutory or rule requirement for the type of permit.