



Oregon Department of Environmental Quality

Dec. 11-12, 2013

**Oregon Environmental Quality Commission meeting
Rulemaking, Action item: D**

Updates to OAR Chapter 340, Divisions 011, 012 and 200

DEQ recommendation to EQC

DEQ recommends that the Oregon Environmental Quality Commission:

Adopt the proposed PERMANENT rules in Attachment A as part of chapter 340 of the Oregon Administrative Rules. Approve incorporating these rule amendments into the Oregon Clean Air Act State Implementation Plan under OAR 340-200-0040.

Overview

Short summary

DEQ proposes the following changes to chapter 340 of the Oregon Administrative Rules.

- Division 011 amendments would:
 - Align with the Oregon Attorney General Model Rules under OAR 340-003-0501 through 0690. The Model Rules that apply to Environmental Quality Commission proceedings became effective Jan. 31, 2012.
 - Address procedures for filing and serving documents in contested cases and other general contested case proceedings.
 - Establish a new fee for onsite septic system program public records requests. This would allow DEQ to recover the costs of fulfilling such requests.
 - Repeal OAR 340-011-0605 that became obsolete in 2007 with the passage of Measure 49. Measure 49 substantially reduced the impact of Measure 37 and the required director's review.
 - Make minor housekeeping changes, including clarification of the lay representative rule at OAR 340-011-0510(1).
- Division 012 amendments would implement 2009 Oregon legislation that increased DEQ's civil penalty statutory maximums, many last updated in 1973. Other proposed changes include aligning violation classification and magnitudes with DEQ program priorities, providing greater mitigating credit for correcting violations, and housekeeping that includes eliminating duplicative text.
- Division 200 amendments would update the Oregon Clean Air Act State Implementation Plan. Section 110 of the Clean Air Act, 42 U.S.C. §7410 requires state and local air

pollution control agencies to adopt federally-approved control strategies to minimize air pollution. The resulting body of regulations is a State Implementation Plan or SIP. By incorporating updated civil penalties and violations, these proposed rules would be a revision to Oregon's SIP. DEQ must submit rule changes to EPA and EPA must approve the rules as meeting the requirements of the Clean Air Act. If the Oregon Environmental Quality Commission amends the proposed rule, DEQ will submit SIP revisions to EPA for approval.

Key Proposed Amendments

If approved, this proposal would:

Civil penalty matrices (OAR 340-012-0140)

- Increase the top base penalty in the current \$8,000 penalty matrix to \$12,000
- Increase the top base penalty in the current \$6,000 penalty matrix to \$8,000
- Increase the top base penalty in the current \$2,500 penalty matrix to \$3,000
- No changes to the current \$1,000 penalty matrix

Change to factors in the civil penalty formula (OAR 340-012-0145) by:

- Increasing credit for the "C" factor to apply mitigating credit for a violator's efforts to correct violations
- Expanding the use of the "M" factor to assign a broader range of penalty aggravation when considering the mental state of the violator

Increase additional or alternate penalties for violations that pose an extreme hazard to public health or cause extensive environmental damage (OAR 340-012-0155)

Base penalties in this category would increase from \$50,000 to \$100,000 to a new range of \$100,000 to \$200,000 depending on whether violations are caused intentionally, recklessly or flagrantly.

Increase administrative penalty maximums to \$100,000 for certain spill violations of oil or hazardous materials

Penalties for intentionally or negligently spilling hazardous materials into waters of the state, or intentionally or negligently failing to clean up spills of oil or hazardous materials would increase from a maximum of \$10,000 per day to a maximum of \$100,000 per day. Penalties for intentionally or negligently spilling oil into waters of the state would increase from a maximum of \$20,000 per day to a maximum of \$100,000 per day. Final penalties would be determined according to a new formula and additional factors not in the current rule.

Establish a base fee for onsite septic system program public records requests

Currently, DEQ may only charge for public records requests if they require more than 15 minutes of staff time. DEQ estimates that public records requests in the onsite septic system program require 50 to 75 hours of staff time per month. Few requests exceed the 15-minute threshold; therefore, DEQ receives little revenue to cover the costs for this work. This amendment would allow DEQ to recover the costs for fulfilling these public records requests.

Regulated parties

The proposed changes do not impose any new requirements upon regulated entities. Division 011 includes rules that supplement the Oregon Attorney General Model Rule for administrative procedures. Division 011 applies to any person involved in a contested case proceeding in front of the Environmental Quality Commission. The rules outline the contested case hearings processes. Division 012 outlines the processes DEQ must follow in assessing penalties or issuing other formal enforcement actions. These rules do not contain any requirements for regulated entities.

Statement of need

1. Division 011

What problem is DEQ trying to solve?

Division 011 no longer aligns with the Oregon Attorney General Model Rules. The affected rules address procedures for filing and serving documents for contested cases and other general contested case proceedings. OAR 340-011-0009 incorporates the Model Rules.

The onsite septic system program does not receive revenue from records request fulfillment despite a significant amount of work done each month.

How would the proposed rule solve the problem?

Aligning Division 011 to the Oregon Attorney General Model Rules would eliminate confusion and provide clear direction to DEQ staff and the public for filing and service of documents and other contested case proceedings.

DEQ would be able to recover the costs for fulfilling public records requests in the onsite septic system program.

How will DEQ know the problem has been solved?

DEQ is required to use the Attorney General Model rules, and the Division 011 changes adopt those required rules. Adopting the changes should reduce possible confusion over having two sets of rules with different requirements.

The onsite septic system program tracks the time spent to fulfill public records requests and the revenue received for the various services that are provided. DEQ will be able to track the time and cost of the work and compare it to the revenue received from the new fee to determine if the costs are being covered.

2. Division 012

What problem is DEQ trying to solve?

Division 012 does not reflect DEQ's current civil penalty statutory maximums.

How would the proposed rule solve the problem?

The rules would implement the 2009 Senate Bill that increased civil penalty maximums.

How will DEQ know the problem has been solved?

Depending on the factual circumstances of each case, DEQ will use the new penalty rules that are likely to increase some penalties consistent with the new statutory maximums.

Request for other options

During the public comment period, DEQ requested input on whether to consider other options for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

Rules affected, authorities, supporting documents

Lead division	Program or activity
Office of the Director	Office of Compliance and Enforcement

OAR Chapter 340 action – Division 011, 012 and 200

Amend	340-011-0005, 340-011-0010, 340-011-0024, 340-011-0029, 340-011-0046, 340-011-0053, 340-011-0061, 340-011-0310, 340-011-0330, 340-011-0340, 340-011-0360, 340-011-0370, 340-011-0380, 340-011-0390, 340-011-0500, 340-011-0510, 340-011-0515, 340-011-0520, 340-011-0525, 340-011-0530, 340-011-0535, 340-011-0540, 340-011-0545, 340-011-0550, 340-011-0555, 340-011-0565, 340-011-0570, 340-011-0573, 340-011-0575, 340-011-0580, 340-011-0585, 340-012-0026, 340-012-0027, 340-012-0028, 340-012-0030, 340-012-0038, 340-012-0041, 340-012-0045, 340-012-0053, 340-012-0054, 340-012-0055, 340-012-0060, 340-012-0065, 340-012-0066, 340-012-0067, 340-012-0068, 340-012-0071, 340-012-0072, 340-012-0073, 340-012-0074, 340-012-0079, 340-012-0081, 340-012-0082, 340-012-0083, 340-012-0097, 340-012-0130, 340-012-0135, 340-012-0140, 340-012-0145, 340-012-0150, 340-012-0155, 340-012-0160, 340-012-0162, 340-012-0165, 340-012-0170 and 340-200-0040
-------	---

Repeal	340-011-0605
--------	--------------

Statutory authority

ORS 183.335, 183.341, 183.452, 192.410-505, 195.305, 454, 454.050, 454.625, 459.045, 459.376, 459.995, 459A.585, 459A.590, 465.280, 465.400-410, 466, 466.070-080, 466.625, 466.720, 466.746, 466.882, 466.858-994, 467, 467.030, 468.020, 468.065, 468.090-140, 468.996, 468A, 468A.025, 468A.045, 468A.327, 468B, 468B.015, 468B.035, 468B.350, and 783.620-992

Statutes implemented

ORS 183.025, 183.090, 183.335, 183.341, 183.390, 183.410, 183,413, 183.415, 183.425, 183.440, 183.450, 183.452, 183.457, 183.460, 183.464, 183.470, 183.480, 183.482, 183.484, 183.745, 183.090, 192.410-440, 192.501, 192.502, 197.352, 454, 454.635, 454.645, 459, 459.205, 459.376, 459.705-790, 459.992, 459.995, 459A.580-585, 459A.590, 459A.665, 459A.660, 459A.685, 465, 465.021, 465.210, 465.900, 465.992, 466, 466.210, 466.255, 466.265-270, 466.530, 466.635-680, 466.706-835, 466.858-895, 466.990-994, 467.050, 467.990, 468, 468.020, 468.035, 468.070, 468.090-140, 468.996, 468A, 468A.020, 468A.025, 468A.060, 468A.990, 468A.992, 468B, 468B.025, 468B.220, 468B.305, 468B.450, 783.620, and 783.992

Documents relied on for rulemaking

ORS 183.335(2)(b)(C)

Document title	Document location
Oregon Attorney General Model Rules	Oregon Department of Justice website
Senate Bill 105A	Oregon State Legislature website
Oregon Revised Statutes	DEQ statutes webpage
Oregon Administrative Rules, Chapter 340 Divisions 011 and 012	DEQ administrative rules webpage
Water Quality Policy Option Package #120	DEQ's Governor's Balanced Budget 2013-15

Fee Analysis

Oregon Environmental Quality Commission approval of this rule proposal would establish new fees. EQC authority to act on the proposed fees is ORS 192.410 - ORS 192.505 and ORS 468.020.

Brief description of proposed fees

The proposed rules would establish a \$7.50 base fee for onsite program public record request.

Reasons

The proposed fees would address 12 counties where DEQ operates the onsite program. DEQ maintains records in Warrenton, Coos Bay, Medford and Pendleton field offices. DEQ estimates it takes 50 to 75 hours of staff time per month to respond to public requests for septic system records. The proposed \$7.50 base fee for record requests would help maintain staff support to provide these records. Currently, DEQ may only charge for public records if they require more than 15 minutes of staff time, but few requests exceed that timeframe.

Fee proposal alternatives considered

DEQ considered maintaining the status quo as an alternative to establishing a \$7.50 base fee. The result would be reduced support staff to respond to onsite septic system public record requests.

Fee payer

The fee payer would be any member of the public seeking septic system records, including homeowners, pumpers, installers and realtors.

Affected party involvement in fee-setting process

The proposed fee went through the legislative process in 2012.

Summary of impacts

The impact of establishing this fee may reduce the number of records sought. It may be an incentive to find other sources of the records such as asking the septic system installer to provide the record.

Fee payer agreement with fee proposal

There was no opposition testimony to establishing the base fee presented during the legislative hearing.

Links to supporting documents for proposed fees

[2013-2015 DEQ Agency Budget Request](#)

How long will the proposed fee sustain the program?

The current fee proposal is expected to sustain the program for the 2013-2015 biennium.

Expected change in revenue (+/-)	+\$8,370	0.003%
Min GF required by statue/rule to fund program	n/a	0%
Proposed fee allows General Fund replacement	n/a	0%
Expected effective date	01/02/2014	

Transactions and revenue

	Number of transactions	Number of Fee Payers	Impact on revenue (+/-)	Total revenue (+/-)
Current biennium	1,116	1,116	\$8,370	\$8,370
Next biennium	1,488	1,488	\$11,160	\$11,160

Fiscal and Economic Impact

This proposal would not have an economic impact on businesses, individuals or government entities unless they violate Oregon's environmental regulations. There would be a minimal economic impact on individuals or entities that request onsite septic system public records.

The proposal would raise most penalties and entities penalized under these rules would likely experience an economic impact. The amount of impact would depend on the type of entity, the type of violation, and surrounding circumstances, as specified in OAR 340-012-0140.

Penalties:

- Would likely increase by 50 percent for the following entities:
 - The largest businesses, including business with a Tier 1 industrial National Pollutant Discharge Elimination System wastewater discharge permit, owner of more than ten underground storage tank facilities or a large-quantity generator of hazardous waste,
 - The largest municipalities, those with municipal sewage treatment facility with a flow of more than five million gallons per day, and
 - State agencies.
- Would likely increase by 25 percent to 33 percent for smaller businesses and smaller municipalities.
- Would not increase for individuals in the public and specified small businesses, including homeowner open burning, homeowner asbestos, homeowner onsite sewage, owner of one underground storage tank, owner of a heating oil tank and dry cleaning businesses.

Applying the maximum 50 percent increase to the 382 violations assessed penalties in 2011 and 2012 under the Division 12 matrices, the proposal would increase the average penalty from \$4,250 to \$6,375. Penalties that DEQ assesses outside the Division 12 assessment process, including expedited enforcement offer, field citation or mutual agreement and order, are lower than the penalties calculated under Division 12 and, if included, would significantly lower the above averages.

There would also be an economic impact to any entity penalized for an intentional, reckless or flagrant violation that results in or creates the imminent likelihood for an extreme hazard to the public health or that causes extensive damage to the environment. Amendment to OAR 340-012-0155(1)(a) would increase such penalties by 100 percent to a maximum of \$200,000. DEQ assesses few of these penalties, and there were none in 2011 or 2012.

The proposal increase penalties to entities penalized for specified spill violations would increase the economic impact to these entities. The maximum penalty for negligent or intentional discharge of hazardous materials into waters of the state and the maximum

penalty for negligent or intentional failure to clean up spills of oil or hazardous materials spilled into waters of the state would increase from \$10,000 to \$100,000. The maximum penalty for negligent or intentional discharge of oil into waters of the state would increase from \$20,000 to \$100,000. DEQ did not assess any penalties for these types of violations during 2011 or 2012.

There would be payment of a \$7.50 base fee for onsite septic system program public records requests. This fee is the minimum amount that would be paid for each public records request. The total amount could exceed \$7.50 if substantial support staff time is needed to fulfill the request or if there is a large number of documents that are being copied. Existing records request fees in Division 011 would apply in these cases, but would be rare for onsite septic system program public records requests.

Statement of Cost of Compliance

Impacts on public

There would be minimal fiscal or economic impact to the public in the form of payment of a \$7.50 base fee for onsite septic system program public records requests. Prospective buyers typically request these records when looking for information about the property. These requests are at the will of the prospective buyer or their real estate agent. The other rule amendments do not impose regulatory requirements, obligations or restrictions on the public, individuals, government or businesses. The rules define DEQ's civil penalty process and determine DEQ's civil penalty calculations for violations of Oregon's environmental regulations.

Impact on other government entities other than DEQ

- a. **Local governments:** In most cases, there would be no fiscal or economic impact. The rules do not impose regulatory requirements, obligations or restrictions upon local governments. The exception would be for a government entity that violates Oregon's environmental regulations where the proposed rules could result in a larger penalty depending on the specific facts of the case. If a local government is requesting onsite septic system program records, it might have to pay the \$7.50 base fee.
- b. **State agencies:** In most cases, there would be no fiscal or economic impact. The rules do not impose regulatory requirements, obligations or restrictions upon state agencies. The exception would be for a state agency that violates Oregon's environmental regulations where the proposed rules could result in a larger penalty depending on the specific facts of the case. If a state agency is requesting onsite septic system program records, it might have to pay the \$7.50 base fee.
- c. **Impact on DEQ:** The fiscal or economic impact to DEQ is unknown at this time for the majority of the proposed rule amendments, but there would likely be no fiscal or economic impact. There is a possibility of a slight increase in DEQ resources if increased penalty calculations result in a greater number of civil penalty appeals that proceed to a formal contested case hearing. There would be a positive fiscal impact on DEQ with the \$7.50 base fee for onsite septic system program public records requests, as DEQ receives little compensation for the majority of these requests. DEQ would be better able to cover the costs associated with fulfilling these requests.

- d. Impact on large businesses (all businesses that are not small businesses below):
In most cases, there would be no fiscal or economic impact. The rules do not impose regulatory requirements, obligations or restrictions. The exception would be for a business that violates Oregon’s environmental regulations where the proposed rules could result in a larger penalty depending on the specific facts of the case. If a large business is requesting onsite septic system program records, it would pay the \$7.50 base fee.

Impact on small businesses (those with 50 or fewer employees) [ORS 183.336](#)

In most cases, there would be no fiscal or economic impact. The rules do not impose regulatory requirements, obligations or restrictions. The exception would be for a small business that violates Oregon environmental regulations where the proposed rules could result in a larger penalty depending on the specific facts of the case. If a small business requests onsite septic system program records, it would pay the \$7.50 base fee.

a) Estimated number of small businesses and types of businesses and industries with small businesses subject to proposed rule.

Every small business in Oregon subject to DEQ regulatory requirements could be subject to the proposed rules. However, these rules only affect small businesses assessed a penalty for violating Oregon environmental regulations or those that must file or serve documents for a contested case hearing.

b) Projected reporting, recordkeeping and other administrative activities, including costs of professional services, required for small businesses to comply with the proposed rule.

No additional activities are required to comply with the proposed rules.

c) Projected equipment, supplies, labor and increased administration required for small businesses to comply with the proposed rule.

No additional resources are required to comply with the proposed rules.

d) Describe how DEQ involved small businesses in developing this proposed rule.

DEQ included small business representatives on its advisory committee during the rulemaking process.

Document title	Document location
Oregon Revised Statutes	DEQ statutes webpage
Oregon Administrative Rules Chapter 340 Divisions 011, 012 and 200	DEQ administrative rules webpage

Advisory committee

DEQ appointed an advisory committee for Division 012 and considered the committee's recommendations on this fiscal and economic impact statement. In compliance with [ORS 183.333](#), DEQ asked for the committee's recommendations on:

- Whether the proposed rules would have a fiscal impact,
- The extent of the impact, and
- Whether the proposed rules would have a significant impact on small businesses and complies with [ORS 183.540](#).

The committee reviewed the fiscal impact statement and documented its recommendation in the approved minutes dated April 5, 2013.

The committee agreed with the fiscal impact statement and had no further comments or suggestions. In compliance with [ORS 183.540](#), the committee considered how to reduce the economic impact on small business and determined that Division 012 already accounts for costs to small business by placing smaller, less sophisticated violators on lower penalty matrices. The Division 012 rules only apply to businesses and individuals that violate Oregon's environmental regulations and are subject to subsequent civil penalties. The rules impose no new regulatory obligations or fees.

DEQ did not appoint an advisory committee for Division 011. Proposed changes to this rule reflect changes to align with the current Oregon Attorney General Model Rules, and the Water Quality Policy Option Package #120 that was approved by the 2013 Oregon Legislature.

Housing cost

To comply with [ORS 183.534](#), DEQ determined the proposed rules would have minimal effect on the development cost of a 6,000-square-foot parcel and construction of a 1,200-square-foot detached, single-family dwelling on that parcel. The rules impose no new regulatory obligations but do require payment of a \$7.50 base fee if development of the property includes submittal of an onsite septic system program public records request.

Federal relationship

"It is the policy of this state that agencies shall seek to retain and promote the unique identity of Oregon by considering local conditions when an agency adopts policies and rules. However, since there are many federal laws and regulations that apply to activities that are also regulated by the state, it is also the policy of this state that agencies attempt to adopt rules that correspond with equivalent federal laws and rules..."

Relationship to federal requirements

DEQ determined this rule proposal is “in addition to federal requirements” as required under [ORS 468A.327\(1\)\(a\)](#) and [OAR 340-011-0029\(1\)\(a\)](#).

The proposed amendments to Division 011 implement changes to the Department of Justice’s Oregon Attorney General Model Rules.

The proposed amendments to Division 012 implement the increased civil penalty maximums authorized by Senate Bill 105A and Oregon statutes, and define DEQ’s civil penalty process and penalty calculations.

What alternatives did DEQ consider if any?

Division 011: DEQ did not consider other alternatives since the Division 011 rules must align with the Oregon Attorney General Model Rules, and because the onsite program is a fee-supported program with a fee for service design.

Division 012: DEQ developed the proposed amendments through advice from the rulemaking committees. During that process, many alternatives were considered regarding whether and how to implement the statutory penalty maximums increased by Senate Bill 105A (2009). Other alternatives considered include not modifying the penalties at all, modifying the base penalties in the penalty formula by different amounts, and changing penalty formula factors in different ways.

Land use

“It is the Commission's policy to coordinate the Department's programs, rules and actions that affect land use with local acknowledged plans to the fullest degree possible.”

OAR 340-018-0010

Land-use considerations

To determine whether the proposed rules involve programs or actions that are considered a *land-use action*, DEQ considered:

- Statewide planning goals for specific references. Section III, subsection 2 of the DEQ State Agency Coordination Program document identifies the following statewide goal relating to DEQ's authority:

Goal	Title
------	-------

5	Open Spaces, Scenic and Historic Areas, and Natural Resources
6	Air, Water and Land Resources Quality
11	Public Facilities and Services
16	Estuarial resources
19	Ocean Resources

- [OAR 340-018-0030](#) for EQC rules on land-use coordination. Division 18 requires DEQ to determine whether proposed rules will significantly affect land use. If yes, how will DEQ:
 - Comply with statewide land-use goals, and
 - Ensure compatibility with acknowledged comprehensive plans, which DEQ most commonly achieves by requiring a [Land Use Compatibility Statement](#).
- DEQ's mandate to protect public health and safety and the environment.
- Whether DEQ is the primary authority that is responsible for land-use programs or actions in the proposed rules.
- Present or future land uses identified in acknowledged comprehensive plans.

Determination

DEQ determined that the proposed rules listed under the Chapter 340 Action section above do not affect existing rules, programs or activities that are considered land-use programs and actions in OAR 340-018-0030 or in the DEQ State Agency Coordination Program.

Stakeholder and public involvement

Public hearings and comment

DEQ held one public hearing. The comment period closed Sept. 20, 2013, at 5 p.m. DEQ received nine public comments. The summary of comments and DEQ responses section below addresses each public comment. The commenter section below lists all people who provided comments on this proposal.

Advisory committees

DEQ convened two advisory committees for this rulemaking. One committee focused on implementation of the statutory penalty increases related to spills of oil or hazardous materials. The other advised DEQ on all the potential amendments to Division 012 including the recommendations from the spill advisory committee. DEQ did not convene an advisory committee for the Division 011 or 200 portions of this rulemaking.

The Spill Advisory Committee met Oct. 12, 2010, and Jan. 22, 2013, and also reviewed a final draft of the proposed rules. Members attending at least one of the meetings included:

- Jess Brown, Hazardous Materials Transportation Specialist, Oregon Department of Transportation
- Eliza Dozono, attorney, Miller Nash LLP, representing Western States Petroleum Association
- Brian Doherty, attorney, Miller Nash LLP, representing the Western States Petroleum Association
- Debra Dunn, President, Oregon Trucking Associations
- Jeff Fishel, Spill Enforcement Coordinator, Washington Department of Ecology
- Miles Johnson, attorney, Columbia Riverkeeper
- Tim Parker, owner, Northwest Green Products/BioBlend
- C. Kent Roberts, attorney, Schwabe, Williamson & Wyatt, representing the maritime industry
- Bob Salinger, Conservation Director, Audubon Society of Portland
- Kate Spaulding, Compliance Officer, Environmental Protection Agency
- Michael Titone, Executive Director in 2013, Columbia River Steamship Operators Association
- Captain Jim Townley, Executive Director in 2010, Columbia River Steamship Operators Association
- Richard Vincent, Vice President, Port of Portland
- Derek White, Emergency Management Coordinator, Columbia County (2010); Hydro Emergency Services Manager, PacifiCorp (2013).

The Division 12 Advisory Committee met Nov. 28, 2012, and April 5, 2013, and also reviewed a final draft of the proposed rules. Attendees included:

- Aubrey Baldwin, attorney, Earthrise Law Center
- Matthew Criblez, Environmental Compliance Manager, Portland Bureau of Environmental Services
- Don Haagensen, attorney, Cable Huston, Benedict, Haagensen & Lloyd LLP, representing Associated Oregon Industries

- Merlyn Hough, Agency Director, Lane Regional Air Protection Agency
- Phil Houk, Mayor, Pendleton
- Courtney Johnson, attorney, Crag Law Center
- Paul Koprowski, Air Program Coordinator, Oregon Operations, US Environmental Protection Agency
- Gerald P. Linder, attorney, Clean Water Services, representing Oregon Association of Clean Water Agencies,
- David Misel, representing Rejuvenation, Inc.
- Mike O'Connor, owner, Continental Cleaners
- Christopher Rich, attorney, Perkins Coie law firm

EQC prior involvement

DEQ shares general rulemaking information with EQC when adding a rulemaking to the DEQ Rulemaking Plan and monthly status reports. DEQ shared information about this rulemaking with the EQC in the Director's Report on June 20, 2013. At EQC's request, DEQ presented an informational item to the commission about the rulemaking Oct. 17, 2013. DEQ shared information about the 2013 legislative session that included Water Quality Policy Option Package #120 during the Dec. 7, 2012 EQC meeting. Rulemaking to implement Package #120 commenced after legislative approval on June 26, 2013. The \$7.50 base fee for onsite septic system public records requests was included in Package #120.

Public notice

The Secretary of State published the Notice of Proposed Rulemaking with Hearing for this rulemaking in the September 2013 *Oregon Bulletin*. DEQ also:

- Posted notice on DEQ's webpage <http://www.deq.state.or.us/regulations/proposedrules.htm> Aug. 15, 2013.
- E-mailed notice Aug. 15, 2013 to:
 - Interested parties through GovDelivery
 - Interested parties on file with DEQ that are not on GovDelivery lists
 - The following key legislators required under ORS 183.335:
 - Jackie Dingfelder, Chair, Environment and Natural Resources Committee
 - Alan Olsen, Vice-Chair, Environment and Natural Resources Committee
 - Jules Bailey, Chair, Energy and Environment Committee
 - Deborah Boone, Vice-Chair, Energy and Environment Committee
 - Mark Johnson, Vice-Chair, Energy and Environment Committee
 - Chris Edwards, Co-Chair, Ways and Means, Subcommittee on Natural Resources
 - Ben Unger, Co-Chair, Ways and Means, Subcommittee on Natural Resources
 - Members of the advisory committee
- Hard copies of notices were posted through the U.S. Mail Aug. 15, 2013, to those interested parties for whom DEQ had no email address
- Emailed notice to the US. Environmental Protection Agency Aug. 1, 2013

- Published notice in The Oregonian Aug. 15, 2013

Presiding Officers' Record

At the beginning of the hearing, the presiding officer summarized procedures for the hearing including notification that DEQ was recording the hearing. The presiding officer asked that anyone wanting to present verbal comments to complete, sign and submit a registration form. The presiding officer adjourned the hearing 20 minutes after it was convened because no members of the public attended the hearing.

According to [Oregon Administrative Rule 137-001-0030](#), the presiding officer summarized the content of the notice given under [Oregon Revised Statute 183.335](#). Because there were no attendees at the hearing, there is no attendees list to add to DEQ's interested parties list for this rule or to the commenter section of this staff report.

Summary of comments and DEQ responses

The following table organizes the public comments received by the close of the public comment period into nine categories with cross references to the commenter number. DEQ's response follows the summary. Original comments are on file with DEQ.

- | | | |
|---|----------------|---|
| 1 | Comment | Approval of the rulemaking process and general agreement with proposed rule changes.

Commenters numbers: 1, 3 and 4 listed in the <i>Commenter</i> section below |
| | Response | DEQ appreciates the collegial atmosphere that the members of the advisory committees brought to the meetings and the thoughtful and objective discussions about how DEQ should implement the statutory penalty increases through the proposed rules. |
| 2 | Comment | The rules should not specify that “The EB [economic benefit] <i>will</i> be determined using the U.S. Environmental Protection Agency's BEN computer model” (<i>emphasis applied</i>) because there are circumstances where BEN does not capture economic benefit. In those cases, other tools should be used.

Commenter number: 2 listed in the <i>Commenter</i> section below |
| | Response | The rule would not preclude alternative means of estimating economic benefit when appropriate. The term “will” indicates that DEQ intends to use BEN unless there is a situation in which it would be inappropriate. The rule does not specify that DEQ's intent is to use <i>only</i> BEN, so DEQ could use BEN for the avoided and delayed costs and use other calculations and experts to calculate indirect benefits like advantage-of-risk, competitive advantages or illegal profits. However, because those indirect benefits are speculative and difficult to estimate, DEQ would rarely, if ever, assess them. DEQ asserts that clarifying its intent to use BEN improves certainty in the penalty assessment and hearing process. |
| 3 | Comment | Proposed rule OAR 340-012-0160(4) states “Regardless of any other penalty amount listed in this division, the director has the discretion to increase the penalty |

to \$25,000 per violation per day of violation based upon the facts and circumstances of the individual case.” EPA relies on that rule in finding that the penalty provisions in Division 12 are consistent with EPA requirements for authorized programs.

Commenter number: 2 listed in the *Commenter* section below

Response DEQ understands that retaining flexibility for the director to issue the maximum penalty in any given situation is important to EPA’s determination that Oregon meets minimum requirements of the federally delegated programs. The only proposed changes to this rule are (i) to reflect that the current statutory maximum penalty is \$25,000 and (ii) a renumbering of the paragraph.

4 Comment DEQ’s penalty rules should adequately address potential spills of coal, liquefied natural gas and crude oil near the Columbia River.

Commenter numbers: 3 and 4 listed in the *Commenter* section below

Response Oregon Senate Bill 105A (2009) increased the statutory penalty maximums for negligent or intentional spills of oil or hazardous materials into state waters and for negligent or intentional failures to clean up such spills. The new maximum penalty was designed to address larger, more-damaging spills, which could include the types of spills to which the commenters refer. Under the proposed penalty rules related to these spills, a penalty could be as much as \$100,000 per violation per day, depending on a variety of factors and circumstances set forth in proposed rule OAR 340-012-0155(b). In addition, if the circumstances of the spill met the criteria set forth in proposed rule OAR 340-012-0155(1)(a), DEQ could assess a penalty of up to \$250,000.

5 Comment Proposed OAR 340-012-0140(3)(a)(K) places spills “occurring during a commercial activity” in the \$8,000 penalty matrix. The rule may be unclear that spills from derelict commercial vessels are also in that matrix because they might not occur “during” a commercial activity.

Commenter numbers: 3 and 4 listed in the *Commenter* section below

Response DEQ agrees that spills from derelict commercial vessels should be in the \$8,000 penalty matrix regardless of whether the spill occurred “during” a commercial activity. DEQ asserts the most appropriate way to address this concern is by amending the proposed classification to specifically include all derelict vessels over 35 feet in length, regardless of whether there is proof that the vessel is currently or was involved in a commercial activity. DEQ recommends the threshold for this category because derelict vessels greater than 35 feet in length:

- (1) Are more likely to have been used for commercial purposes than for personal or recreational purposes;
- (2) Are less easily hauled out of the water and cannot be pulled with a regular boat trailer, making cleanup more difficult;
- (3) Are more likely made of metal than wood or fiberglass and more likely to be scrapped, which leads to releases of oil and hazardous materials;
- (4) Carry more fuel than smaller boats; and

(5) Are the focus of the Oregon State Marine Board Derelict Vessel Task Force.

DEQ recommends the following redline modification of proposed rule OAR 340-012-0140(3)(a)(K) to implement the commenters' suggestion:

“Any violation of an oil and hazardous material spill and release statute, rule, or related order committed by a person other than a person listed in OAR 340-012-0140(2)(a)(N) occurring during a commercial activity **or involving a derelict vessel over 35 feet in length.**”

Derelict vessels 35 feet and under would be in the lower \$3,000 penalty matrix.

6 Comment The “H” factor (history of correcting prior violations cited in formal enforcement actions) in the penalty formula rules at proposed rule OAR 340-012-0145(3)(a) should not reduce a current penalty just because the person merely complied with a previous order. Penalty reduction under the “H” factor should only be given when the person took action substantially beyond the previous order.

Commenter numbers: 3 and 4 listed in the *Commenter* section below

Response There are two related penalty factors at issue with this comment. The “P” factor is related to the number of violations previously cited in recent formal enforcement actions and the “H” factor is related to whether the person corrected those prior violations. The “H” factor reduces the effect of the “P” factor when assessing a penalty for a current violation, only if the person corrected the prior violations. Pursuant to 340-012-0145(3)(d), the combination of the “P” and “H” factors *cannot reduce the base penalty*. If the person showed extraordinary efforts to correct the prior violations, the combination of the “P” and “H” factors will be zero, but will not reduce the base penalty.

7 Comment The “H” factor (history of correcting prior violations cited in formal enforcement actions) in the penalty formula rules at proposed rule OAR 340-012-0145(3)(a) should increase a penalty if the person did not respond to the previous order – otherwise the “H” factor creates a windfall and no disincentive for not following orders.

Commenter numbers: 3 and 4 listed in the *Commenter* section below

Response As discussed in comment six above, if a person has previous violations cited in a formal enforcement action, the combined effect of the “P” and “H” factors will generally be to increase a penalty for a current violation. If the person has not complied with a past order, there will be little or no mitigation of the “P” factor with the effect that the current penalty will be increased. In addition, outstanding compliance issues from a past order are typically addressed with additional penalties for the ongoing or repeated violation of the statute, rule or permit. The current enforcement action may also or instead include a penalty for violation of the previous order. These subsequent penalties for continuing violations likely would be higher than the original penalty because the “P” factor, the “M” factor (mental state), “O” factor (occurrences or duration), “C” (efforts to correct), and EB (economic benefit) would all likely be higher.

8 **Comment** The “C” factor (efforts to correct or mitigate the violation) in OAR 340-012-0145(6) should not be used to mitigate a current penalty based on the person merely doing what they are required to do. Mitigation for “extraordinary” efforts is warranted, but the value of the mitigation should be lower than in proposed rule OAR 340-012-0145(6)(a) and (b).

Commenter numbers: 3 and 4 listed in the *Commenter* section below

Response The proposed changes to the mitigation and aggravation effects of the “C” factor improve the existing penalty formula. Of the factors in the penalty formula, only the “C” factor can reduce the penalty below the base penalty. The proposed rule offers a smaller reduction for smaller efforts and larger reductions for increasingly larger efforts, and it increases the penalty if appropriate efforts are not taken. We believe this approach creates an incentive for quicker corrective action, creates an incentive for sharing information about the violation and corrective action, helps rebuild DEQ’s relationship with the regulated party, and better addresses the total circumstances of the situation. It also aids in settlement, when appropriate, which conserves state resources.

9 **Comment** OAR 340-012-0160(2), which allows mitigation of the penalty for violations that are “voluntarily disclosed,” lacks sufficient detail. For example, it doesn’t specify whether penalties would be reduced for voluntary disclosure when the party was already required to disclose and it doesn’t specify the amount of the penalty reduction. In addition, there should be a way to increase a penalty for violations that are not reported or are covered up.

Commenter numbers: 3 and 4 listed in the *Commenter* section below

Response OAR 340-012-0160(2) supplements the DEQ director’s discretion in choosing which violations will receive penalty and determining the appropriateness of any penalty. The rule lists the factors that the director will consider in deciding whether a violation was voluntarily disclosed. Based on a similar EPA policy, the director has directed staff on how to apply that discretion. A document describing the director’s general intent for implementing this rule is entitled “The Department of Environmental Quality’s Internal Management Directive on Self-policing, Disclosure and Penalty Mitigation,” and is available at <http://www.deq.state.or.us/programs/enforcement/SelfPolDisPen.pdf>. Notably, the director will not consider mitigation for most voluntary reporting if the self-reporting was otherwise required.

Several processes escalate enforcement of violations that are not reported or are covered up. First, in cases where there was a requirement to report the violation, the failure to report is subject to possible penalty in addition to the violation itself. Second, evidence that a person has withheld required information or not corrected violations will generally increase the “O” (ongoing or repeated), “M” (mental state), and “C” (efforts to correct) factors and therefore increase the size of the penalty. Last, while DEQ is not a criminal law enforcement agency, falsifying required reports, intentional omissions from required reports, and covering up violations can subject the person to possible criminal investigation by the Oregon State Police, EPA’s Criminal Investigation Division, or other criminal investigatory agency.

10 **Comment** OAR 340-012-0145(4) (the Occurrences “O” factor) impermissibly allows DEQ to treat violations occurring on different days as a single violation because ORS 468.140(2) states “Each day of violation under [these penalty statutes] constitutes a separate offense.

Commenter numbers: 3 and 4 listed in the *Commenter* section below

Response ORS 468.140(1) and (2) and OAR 340-012-0145(4) specify that each day of violation is a separate offense for which a separate penalty may be assessed. However, neither the statutes nor rules require DEQ to issue a separate penalty for each separate day of violation. Instead, ORS 468.130(2)(e) specifies that the penalty rules must consider “whether the violation was repeated or continuous.” OAR 340-012-0145(4) implements that statute, giving DEQ the ability, in its discretion, to determine whether separate penalties should be assessed for each occurrence or whether a penalty assessed for one occurrence should be aggravated when the violation was repeated or continuous. Eliminating the “O” factor would be inconsistent with the statutory directions and take away a useful penalty factor.

Commenters

Comments received by close of public comment period

The table below lists four people and organizations that submitted comments on the proposed rules by the deadline for submitting public comment. Original comments are on file with DEQ.

- | | | |
|---|------------------|--|
| 1 | Commenter | Gerald P. Linder, attorney for Clean Water Services and ACWA representative, and Janet A. Gillaspie, Executive Director |
| | Affiliation | Oregon Association of Clean Water Agencies |
| | | This commenter submitted comments under category 1 in the <i>Summary of comments and DEQ responses</i> section above. |
| 2 | Commenter | Paul Koprowski, Air Program Coordinator |
| | Affiliation | Oregon Operations, U.S. Environmental Protection Agency |
| | | This commenter submitted comments under categories 2 and 3 in the <i>Summary of comments and DEQ responses</i> section above. |
| 3 | Commenter | Miles Johnson, Clean Water Attorney |
| | Affiliation | Columbia Riverkeeper |
| | | This commenter submitted comments under categories 1, 4, 5, 6, 7, 8, 9 and 10 in the <i>Summary of comments and DEQ responses</i> section above. |
| 4 | Commenter | Marla Nelson, Legal Fellow |
| | Affiliation | Northwest Environmental Defense Center |
| | | This commenter submitted comments under categories 1, 4, 5, 6, 7, 8, 9 and 10 in the <i>Summary of comments and DEQ responses</i> section above. |

Implementation

Notification

The proposed rules would become effective upon filing with the Oregon Secretary of State after EQC adoption.

Division 011 amendments:

- Parties affected by the onsite records fee will be notified when they request records and when affected parties review the fee schedule on the DEQ website.
- DEQ staff who oversee septic system records have been notified of the upcoming change and will receive additional training on implementing the new fee. Several counties also charge a fee for septic records and DEQ staff can learn from their experiences on what works best. DEQ is also exploring ways to make the onsite records request process easier for affected parties such as the acceptance of credit card payments, and the delivery of records via email or fax.
- Parties affected by changes to the other public records fees will be notified about the current fees as part of the estimate when they make the request.
- Parties affected by changes in the contested case procedural rules will be notified during the contested case process.
- No other notices are necessary for these rules.

For Division 012 amendments, staff from DEQ's Office of Compliance and Enforcement will do the following:

- DEQ staff who conduct inspections and use Division 012 have been previously involved and notified of the proposed changes. Upon adoption, staff from DEQ's Office of Compliance and Enforcement will work with staff and managers to update the expected enforcement response for the new classifications. Those changes in how DEQ will employ its enforcement discretion will be recorded in an update to DEQ's internal management directive, called the *Enforcement Guidance*. Staff will be notified and trained on the revisions.
- The Office of Compliance and Enforcement will update its website to include the updated information and links to resources related to the updates. It will also notify potentially affected party groups through informational letters to the relevant trade associations and other groups and making descriptions of the changes available to trade or other publications interested in the penalty issues.
- Office of Compliance and Enforcement staff will begin using the updated Division 012 rules upon their effective date for the purposes of calculating and assessing civil penalties and other formal enforcement actions.
- Parties subject to penalties will be notified of the new rules as part of their formal notice when a contested case process is initiated.

For Division 200, DEQ will notify EPA that the state implementation plan rules have been updated to include the revised Division 012 penalty rules. No other notifications are necessary.

Five-year review

Requirement [ORS 183.405](#)

The state Administrative Procedures Act requires DEQ to review **new** rules within five years of the date the EQC adopts the proposed rules. Though the review will align with any changes to the law in the intervening years, DEQ based its analysis on current law.

Exemption

The APA exemptions from the five-year rule review under ORS 183.405(4) and 183.405(5) do not apply to the proposed rules.