State of Oregon
DEQ Department of Environmental Quality

Climate Protection Program EITE Rulemaking RAC 4 Memo on Proposed Rule Changes

Overview

The Climate Protection Program is designed to significantly reduce greenhouse gas emissions, support Oregon's economy and promote equitable outcomes for environmental justice communities.

DEQ aims to incentivize emission reductions at emissions-intensive, trade-exposed, EITE, and direct natural gas, DNG, sources while recognizing the special circumstances those sources face as trade-exposed, and the role they play in supporting Oregon's economy.

DEQ is requesting comment on proposed rule changes to the Climate Protection Program (OAR Chapter 340, Division 273) for EITE and DNG sources. DEQ is also requesting comment on corresponding proposed rule changes to the Enforcement Procedure and Civil Penalties (OAR Chapter 340, Division 12), Greenhouse Gas Reporting Program (OAR Chapter 340, Division 215), and Third Party Verification (OAR Chapter 340, Division 272) and.

DEQ staff have developed draft rules informed by listening sessions with interested parties, meetings with EITE and DNG sources, rulemaking advisory committee member and public comments, discussions with jurisdictions who have EITE programs, and review of emissions data and production levels.

These rules may change with new information and input as the rulemaking continues.

This memo discusses the updated draft rules, including:

1. Greenhouse gas emissions intensity benchmarks
2. Reduction schedules
3. Adjustments to reduction schedules
4. Significant production downturns
5. Compliance instrument distribution
6. Use of community climate investment credits
7. Applicability and cessation
8. Clarifications
9. Enforcement Procedure and Civil Penalties, Greenhouse Gas Reporting Program and Third-Party Verification

1. Greenhouse gas emissions intensity benchmarks (0320)

The language in the updated draft rules reflects a refinement of the proposal discussed at the third rulemaking advisory committee (RAC) meeting.

The updated draft rules direct DEQ to base benchmarks on average covered emissions intensities from 2023-2025, with the ability for sources to make the case these data years contain process upsets or operations that are not normal source operation.

The terms process upset and normal source operation are terms from DEQ's General Air Pollution Procedures and Definitions in OAR 340-200-0020:

“Process upset” means a failure or malfunction of a production process or system to operate in a normal and usual manner.

“Normal source operation” means operation that does not include such conditions as forced fuel substitution, equipment malfunction, or highly abnormal market conditions.

The draft rules outline a process for a source to request DEQ adjust the data years being considered for the benchmarks. If approved, DEQ has the discretion to use between two to five consecutive data years between 2021 and 2025. This is similar but not identical to the Washington State process in Washington Administrative Code 173-446-220. That approach uses an average of recent years, allows sources to propose data no more than three years earlier than the default, and requires three to five years of data, including at least three consecutive years.

In response to the RAC 3 discussion, the updated draft rules have a provision for revisiting benchmarks in the future if a source undergoes a significant change in production, product mix, manufacturing processes, or measurement methodology affecting its greenhouse gas emissions intensity, or if the source requests a shift between a source-wide benchmark and product-differentiated benchmarks. Sources could request a benchmark revisit, or DEQ could initiate such a process.

The updated draft rules generally follow the RAC meeting #3 draft about how new sources and new products and processes would be incorporated into the Climate Protection Program. Under the updated draft rules, products introduced in 2026 or later would not incur compliance obligations until the first year of the next compliance period. Benchmarks for new sources and products would follow a similar emissions-intensity approach applied to existing EITE and DNG sources, though be based on just two years of data.

Draft rules language is in the draft rules document, rule 340-273-0320.

Questions

a) Is using process upset and other than normal source operation the appropriate threshold for using non-standard data years?

b) What are your thoughts on the proposal for 2-5 consecutive years if not the standard years?

c) What are your thoughts on using 2021-2025 data for the non-standard years? Should DEQ consider earlier or later years, and why?

d) What are your thoughts on the provisions about revisiting benchmarks?

e) Do you have additional thoughts about the proposed process for incorporating new products or new production processes?

2. Reduction schedules (0330 and 9000)

The updated draft rules generally retain the approach from the third RAC meeting. These schedules are uniform across sources, paired with a process to apply for reduction adjustments. The rules retain the proposal for reduction schedules of 0% per year in 2028 and 2029, and 1.5% per year thereafter, with the ability to apply for adjustments.

As DEQ has previously noted, this annual reduction schedule is the second slowest among peer jurisdictions, though programs are not directly comparable. It is slower than California (roughly 3%) and Quebec (2.3%) and faster than Washington (0.75%).

Draft rules language is in the draft rules document, rule 340-273-0330 and rule 340-273-9000, Table 8.

Question

a) Do you have additional thoughts about the proposed 0% reduction for two years, then 1.5% per year thereafter?

3. Adjustments to reduction schedules (0330)

The language in the updated draft rules reflects a refinement of the proposal discussed at third RAC meeting. The updated draft rules retain the general reduction schedule adjustment approach from RAC 3 with changes to the feasibility analysis methodology, some clarifications and some modifications.

The adjustments to reduction schedule approach include an analysis of technological and economic feasibility of greenhouse gas emissions reduction strategies available to the source. Under the updated draft rules, this would start with a technological feasibility assessment of all potential reduction strategies. After assessing potential technology improvements, only technologically feasible improvements would be subject to an economic feasibility assessment.

The updated draft rules now allow for grouping of reduction methodologies and the omission from the analysis of a subset of emission sources that total up to 5% of the total source emissions. The lookout period was also updated from 20 years down to 10 years. The application period was further refined to be at least six months prior to the upcoming compliance period.

The updated draft rules include more detail in the definition of economic infeasibility, including external funding sources, the cost annualization methodology to use, and the discount rate to use in the cost annualization.

The updated draft rules retain the requirement for a Professional Engineer to review the application but relax the stipulations regarding the engineer's prior relationship to the owner or operator. The updated draft rules limit the oversight from the Professional Engineer to only the technological feasibility assessment.

The updated draft rules disallow banking and trading of compliance instruments given during the adjustment period unless explicitly authorized by DEQ.

Draft rules language is in the draft rules document, rule 340-273-0330(2).

Questions

a) What are your thoughts on changes to the feasibility analysis methodology?

b) What are your thoughts on the application period?

c) What are your thoughts on the lookout period?

4. Adjustment during significant production downturns (0330)

The updated draft rules still allow a source to apply for an adjustment to the compliance instrument distribution calculation when an unplanned process upset or other than normal source operation causes a substantial disruption to facility-wide production, resulting in an increase of at least 8% in emission intensity over the projected compliant levels.

These provisions rely on the definitions of process upset and normal operating conditions as described on page 1 of this memo. Examples of process upset or other than normal source operation include, but are not limited to, large market fluctuations, natural disasters, or major equipment failure, which could include cyber-attacks on control systems. The term catastrophic has been removed from this rule.

The updated draft rules provide sources eligibility to apply during the compliance period in which the event occurred, provided the source provides verifiable documentation demonstrating the event was an unplanned process upset or other than normal operating conditions. The updated draft rules now allow sources to apply when a facility's emission intensity increases by at least eight percent above its established benchmark and adjustment from reduction schedule, i.e. currently scheduled emissions intensity.

Under the updated draft rules a source must submit an application no later than 90 days prior to the compliance instrument distribution date for the year in which the adjustment will be applied.

The updated draft rules provide that if DEQ approves the application, compliance instruments distributed would be based on the forecasted emissions intensity data from the calendar year preceding the compliance year to which the adjustment applies. If the adjustment applies to both years of a compliance period, DEQ will determine each year's distribution using the forecasted emissions data from the calendar year preceding that respective compliance year.

The updated draft rules give DEQ discretion to authorize an adjustment up to the end of the compliance period in which the adjustment applies, a maximum of two years.

Draft rules language is in the draft rules document, rule 340-273-0330(3) and rule 0410, for verified data true-up.

Questions

a) Does the draft definition of an "unplanned process upset or other than normal operating condition" clearly capture the types of relevant events that may be experienced, or are there scenarios that should be added or clarified?

b) The draft rules require demonstrating at least an 8 percent increase in emissions intensity above the benchmark to qualify for an adjustment. Is this threshold workable, and does it accurately reflect when an increase to emission intensity becomes significant?

c) The application must be submitted no later than 90 days before the compliance instrument distribution date. Is this timeline realistic for assembling verifiable documentation following an unplanned event?

d) The adjustment uses forecasted emissions from the year prior for the compliance instrument distribution. Would this approach fairly reflect a source's compliance instrument needs during this scenario?

5. Compliance instrument distribution and holding compliance instruments (0410 and 0430)

The updated draft rules provide a slightly refined approach to compliance instrument distribution. The rules propose DEQ would distribute compliance instruments to EITE and DNG sources for each year based on last year's unverified production data and then return to true-up those compliance instruments once the year of compliance's actual production data are verified. This is similar to Washington's approach.

The updated draft rules have a provision limiting the banking or trading of compliance instruments for sources received under a reduction schedule adjustment or downturn allocation.

Draft rules language is in the draft rules document, rule 340-273-0410 and -0430

Question

a) Do you have any input on the proposed method for distributing and trueing up compliance instruments?

6. Use of community climate investment credits (0450 and 0020)

The updated draft rules continue to increase the percentage of community climate investment credits (CCI credits) EITEs and DNGs may use to meet their compliance obligations, from the current 20% limit that applies to other CPP-regulated parties up to 30% and potentially further up to 60% of their compliance obligation.

The updated draft rules allow EITEs and DNGs to meet up to 30% of their compliance obligation with CCI credits by default. The concept of requiring a spend-down of banked compliance instruments prior to using more than 20% CCI credits has been removed as commenters have noted sources almost certainly would not choose to earn additional CCI credits if they have banked compliance instruments.

DEQ is also considering allowing an EITE and DNG source the ability to meet its compliance obligation with a higher percentage of CCI credits, 60%, with certain requirements. Based on the RAC 3 discussion, an example of what DEQ is currently considering is the ability to use 60%, if the source has a community benefit agreement.

Community benefit agreement is currently defined as below:

(5) “Community benefit agreement” means a written and executed agreement between a source and its local community. To qualify as a community benefit agreement:

(a) The local community must be represented by a local government or a coalition of community groups that represent people who live or work in proximity to the source; and

(b) The agreement must provide benefits that mitigate the harmful impact of air emissions on the local community in which the source is located including such items as source-provided amenities, impact mitigations, community investments, or a community workforce agreement.

Draft rules language is in the draft rules document, rule 340-273-0450, and definitions, rule 340-273-0020.

Questions

a) Do the draft rules balance providing more compliance options for sources while reducing emissions and supporting equitable community outcomes?

b) What should DEQ consider if we were to propose a second option for a source to meet more than 30% of its compliance obligation with CCI credits?

7. Applicability (0110) and cessation (0130)

The updated draft rules retain the requirement that a source be above the 15,000 MTCO2e emissions threshold for two consecutive years before becoming an EITE or DNG source, while

adding the ability for DEQ to remove an EITE source with just one outlying year above the threshold from the program.

DEQ did receive comments that applicability be determined in other ways, such as combining emissions across multiple in-state sources to meet the 15,000 MTCO2e threshold. DEQ has already proposed a lower threshold for EITE applicability when compared to programs in Washington, California and Quebec and has concerns about equitable treatment of other sources under the threshold.

The draft rules also propose a source would cease to be an EITE or DNG source if covered emissions are zero MTCO2e for four years (as opposed to the current six years). If covered emissions are less than 15,000 MTCO2e for four years, the source could apply for cessation or DEQ could determine the source would cease to be an EITE or DNG source.

Draft rules language is in the draft rules document, rule 340-273-0110 and -0130.

8. Clarifications (0020, 0110, 8110 and 9000)

These updated draft rules include other small changes or clarifications for EITE and DNG sources.

- Define product, production, and production unit. This incorporates production processes, to reduce confusion in the future. Therefore, production measurements can include items such as wafer moves.
- Clarify the definition of DNG source in OAR 340-273-0020 excludes being an EITE source. That is, if a source is an EITE as defined in that rule, it is not a DNG source.
- Explicitly provide DEQ the ability to adjust permitting deadlines for Climate Protection Program under OAR 340-273-0150, by adding permitting to the deadline adjustment rule language in OAR 340-273-8110.

9. Changes to Enforcement Procedure and Civil Penalties, Greenhouse Gas Reporting Program and Third-Party Verification

DEQ is proposing amendments to three other divisions of DEQ rules: the Enforcement Procedure and Civil Penalties (OAR chapter 340, division 12), Greenhouse Gas Reporting Program (OAR chapter 340, division 215) and Third-Party Verification (OAR chapter 340, division 272) rules. This supports the Climate Protection Program's emissions-intensity framework for EITE and DNG sources and the need for production data collection and verification.

Changes to OAR 340-12, Enforcement Procedure and Civil Penalties

OAR 340-012-0150 (Determination of Economic Benefit)

The updated draft rules detail how DEQ might determine the economic benefit gained from Climate Protection Program violations. The revisions specify DEQ may base economic benefit on either the Community Climate Investment credit contribution amount or price of traded compliance instruments when such data is available. These changes provide clearer, program-specific valuation methods to ensure consistent and accurate assessment of economic benefit.

Changes to OAR 340-215, Greenhouse Gas Reporting Program (GHGRP)

OAR 340-215-0042 (Recordkeeping Requirements)

The updated draft rules add in section (12) for regulated entities subject to division 273 to develop and retain a written production data monitoring plan. This plan must document product types, units of production, data sources, quality assurance and quality control practices, handling of missing data, assigned responsibilities, record retention, and internal verification procedures.

OAR 340-215-0044 (Emissions Data Reports)

Section (3)(g) is revised to require EITE sources and DNG sources to report production data, including product types, quantities, and production units, consistent with CPP permit conditions. This expands reporting beyond emissions data to include production information needed for emissions intensity calculations as required by the permit requirements described in OAR 340-273-0150.

Changes to OAR 340-272, Third-Party Verification (3PV)

OAR 340-272-0430 (Data Checks)

The updated draft rules include production data in verification activities. The new subsection (4)(d)(E) requires verification teams to identify and document any discrepancies found specifically in production data when comparing their calculated results to the reported information. This addition ensures that production data is reviewed with the same level of scrutiny as emissions data, strengthening overall data accuracy and compliance oversight.

OAR 340-272-0460 (Material Misstatement Assessments)

The updated draft rules require verification teams must conduct separate material misstatement assessments for both emissions data and production data. This includes new requirements to evaluate discrepancies, omissions, and misreporting in production data and introduces an equation to determine percent error for production data misstatements.

Question

a) Do you have any comments or proposed edits to the other division rules changes?

Additional information

For updates on the EITE rulemaking, please subscribe for email updates and visit the EITE rulemaking web page.

Please visit the program web page for more information on the Climate Protection Program.

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