State of Oregon Department of Environmental Quality

# Written Comments

## Air Quality Permitting Updates 2022 Rulemaking: Advisory Committee Meeting 4

This document is a compilation of written comments received related to the fourth meeting of the advisory committee for the Air Quality Permitting Updates 2022 Rulemaking held April 15, 2022.

## Comments

April 22, 2022

Oregon Department of Environmental Quality
Attention: Karen Williams and Jill Inahara

BY EMAIL TO: 2022.aqpermits@deq.oregon.gov

RE: Comments on Proposed Rules and RAC Meeting #4

Dear Commissioners, DEQ staff, and RAC members:

As we noted in our April 8 pre-meeting letter to DEQ, we were disappointed that the proposed revised rules did not contain any provisions that would expand community engagement in the air permitting process, require DEQ to incorporate an environmental justice analysis into its decision-making, or reduce emissions in overburdened communities. Throughout this RAC process, we have flagged these as critical aspects of any attempt to make Oregon's air permitting rules more equitable.

We are, however, grateful for DEQ's thorough unpacking of these policy choices at the fourth RAC meeting, and for the thoughtful discussion among RAC members about the best way to incorporate environmental justice considerations into DEQ's work.

In Section I of these comments, we offer a few new suggestions for how DEQ could incorporate additional environmental justice protections into the proposed rules, consistent with the scope of this rulemaking and with the Oregon legislature's directive to natural resource agencies to "ensure that all persons affected by decisions of the natural resource agencies have a voice in those decisions[.]" ORS 182.545.

In Section II, we offer our feedback on the proposed revised Notice to Construct rules, including the new Best Available Technology standard.

In Section III, we address the proposed rule revisions aimed at preventing NAAQS exceedances, including the requirement for air quality analysis for some NCs categories, and the provisions allowing DEQ to add additional permit limitations for sources that threaten to cause or contribute to a NAAQS exceedance.

In Section IV, we reiterate two of the more significant suggestions we made during the RAC process that are not reflected in the draft rules, including that PSELs be set below CTE, and that DEQ simplify its rule language to make the permitting framework and process more accessible.

In Section V, we reiterate our support for many aspects of the proposed rules.

## I. ADDITIONAL ENVIRONMENTAL JUSTICE PROTECTIONS NEEDED

We appreciate DEQ sharing some of the initiatives it is involved in outside of this rulemaking to better incorporate environmental justice into the agency's work. We understand that not every practice or guiding principle should be enshrined in rule language, but we still believe there are ways to better incorporate environmental justice into the rules that DEQ is currently revising.

DEQ has a long way to go to ensure that its actions reflect a commitment to environmental justice. Significant cultural change is needed within the industry. Rule revisions alone can't effectuate that change, but they are an important starting point for setting the tone for agency decision-making.

### A. Community Engagement

As several RAC members pointed out at the last meeting, simply having a public comment period is insufficient to engage members of directly impacted communities in DEQ's important air permitting work.

The legislature has made clear that DEQ must not only enable public participation by holding public comment periods and by making hearings accessible to impacted communities (*see* ORS ORS 182.545(2)), but must also actively "encourag[e] public participation" (*id.* at (4)(a)) and "engage in public outreach activities in the communities that will be affected by decisions of the agency" (*id.* at (3)).

DEQ can and should revise its rules to facilitate and encourage impacted communities' engagement with DEQ's air permitting work.

#### *1. New Process for Challenging Permit Conditions*

Although DEQ did not propose any new rules to facilitate or encourage greater community engagement in the air permitting process, it did revise the Division 209 Public Participation rules to allow regulated sources to contest individual permit conditions, and to provide for the possibility of a stay of the contested conditions during that challenge. *See* Revised OAR 340-209-0080(5)(b).

Creating new ways for regulated sources to push back on DEQ's permit decisions without providing similar new processes for impacted communities flies in the face of environmental justice principles. If regulated sources can delay implementation of important air quality protections by challenging permit conditions, then community members should also be able to challenge permit conditions that are not sufficiently protective of air quality.

Furthermore, in evaluating whether to grant a stay of a permit condition pending resolution of a regulated source's challenge, DEQ should consider not only the source's likelihood of success on the merits and the costs of compliance with the permit condition, but the costs that will be borne by the regulated source's neighbors by granting a stay.

DEQ should amend the revised rules as follows (amended language in red):

> (5)(a) Issuance of permit: DEQ will promptly notify the applicant **and the public** in writing of the final action as provided in OAR 340-011-0525 and will include a copy of the permit. If the permit conditions are different from those contained in the proposed permit, the notification will identify the affected conditions and include the reasons for the changes. The permit is effective on the date that it is signed, unless the ~~applicant requests a hearing to contest one or more provisions of the permit~~ **the effect of the contested conditions is stayed** as provided in subsection (b).
> (b) **The applicant or any interested party may request a hearing to contest one or more provisions of the permit.** The request for hearing must be in writing within 20 days of the date of ~~**mailing of**~~ **posting** the notification of issuance of the permit **online**. The ~~applicant~~ **challenger** must specify which permit conditions are being contested and why, including each alleged factual or legal objection.
> …
> (B) Upon such request for review, the effect of the contested conditions, as well as any conditions that are not severable from those contested, will be stayed only upon a showing that, during the pendency of the appeal, compliance with the contested conditions would require substantial expenditures or losses that would not be incurred if the applicant prevails on the merits of the review; and also that there exists a reasonable likelihood of success on the merits. DEQ ~~may~~ **must** require that the contested conditions not be stayed if it finds that substantial endangerment of public health or welfare would result from the staying of the conditions. DEQ must deny or grant the stay within 30 days.

### *2. Community engagement contact person*

Another small step DEQ could take to make its permitting functions more accessible to community and to open new lines of communication between DEQ and impacted communities would be to ensure that everything DEQ puts out publicly identifies a DEQ staff person whom community members can contact with questions or concerns about a particular facility or DEQ decision. While much more than this is necessary to make community members aware of areas of DEQ's work that directly affect them, simply listing a contact person for community would create better access to DEQ for community members who are already aware of DEQ's role but who do not have established lines of communication with the agency.

There are many rules governing what information DEQ must include in various documents it issues. There are rules specifying the content of Simple, Basic, Standard, General, and Short Term Activity permits and ACDP attachments; rules specifying the content of public notices; and rules specifying the content of notifications to regulated sources. There is no reason not to include in these rules a requirement that DEQ list the contact information for a community liaison.

B. Analysis of Impact of Permitting Decisions on Environmental Justice

DEQ's air permitting decisions can and should be guided by environmental justice considerations and should aim to eliminate the disparities that have led to some of Oregon's communities disproportionately carrying the burden of cumulative impacts from pollution from the stationary sources that DEQ regulates. But this will not happen without clear rule language weaving environmental justice into the framework for DEQ's permitting decisions.

We understand the industry RAC members' concerns that DEQ's air permitting decisions be consistent and objective. But the rules already give DEQ a lot of discretion as to what it can require with respect to any particular regulated source. DEQ staff have significant discretion with respect to what type of permit to require, discretion to require additional information or analysis in connection with a permit application or Notice to Construct application, and discretion to approve or disapprove permits or NCs or to attach conditions.

In exercising DEQ's ample discretion under the air permitting rules, it is entirely appropriate for environmental justice considerations to inform how DEQ exercises its discretion.

Indeed, it is not only appropriate, it is legally required. The legislature made clear that, "[i]n making a determination whether and how to act, [a natural resources agency must] consider the effects of the action on environmental justice issues." ORS 182.545(1). There is no basis for reading this broad directive as being limited to the agency's decisions about what rules to promulgate; by its plain language, it applies to all "determination[s] whether and how to act[.]"

DEQ should give effect to this legislative directive by adding a new provision to its air permitting rules that tracks the language of ORS 182.545: **"In exercising discretion conferred by these rules related to air quality and permitting, DEQ should consider the effects of its actions on environmental justice issues."**

C. DEQ Should Seek Additional Resources for Environmental Justice

We understand that DEQ's ability to hire staff to take on community engagement functions is constrained by the agency's budget and by the need to obtain legislative authorization for new positions.

If additional funds are needed to carry out DEQ's duty to encourage public participation, to consider environmental justice issues, and to study the effect of DEQ's decisions on communities traditionally underrepresented in public processes, *see* ORS 182.545(4), we urge DEQ to seek legislative authorization and funding necessary to fully staff this function within the agency.

We would happily support DEQ's request for additional funding to carry out this important work. Given the number of times industry RAC members raised questions about DEQ's

capacity, we hope that the regulated entities represented on the RAC would join in supporting such a request.

## II. REVISED NOTICE TO CONSTRUCT RULES

### A. Type I NCs

#### 1. *"Notice and Go" List*

The notice-and-go list includes several types of technology that we understand could produce significant emissions. High-emitting technologies deserve a closer look by DEQ, rather than automatic approval. DEQ should narrow the "notice and go" list as follows:

- "All process emission sources which are located at private, public, or vocational education institutions, where the emissions are primarily the result of teaching and training exercises, and the institution is not engaged in the manufacture of products for commercial sale"
    - It is unclear what it would mean for emissions to be "primarily the result of teaching and training exercises." Because this phrase does not seem to do any meaningful work narrowing the category of all process emissions sources at schools, it is overinclusive. Schools often use fairly large boilers in cafeterias and for heating that should not be on a notice-and-go list.
- "Equipment used for hydraulic or hydrostatic testing"
    - Not all hydraulic fluids are water-based. DEQ should narrow the category of non-water-based hydraulic fluids included on the notice-and-go list based on vapor pressure.
- "Storage tanks [. . .] where there is no generation of objectionable odor or airborne particulate matter"
    - DEQ should clarify that this category also excludes equipment that generates toxic air emissions by adding the phrase "or toxic air pollutants listed in OAR chapter 340, division 247" to the end of the sentence.
- "Operation, loading and unloading storage of butane, propane, or liquefied petroleum gas with a vessel capacity less than 40,000 gallons"
    - This category should be limited by annual throughput as well as vessel capacity. Even smaller vessels can generate considerable emissions if the materials are being frequently loaded and unloaded.
- "Conveying and storage of plastic pellets"
    - "Plastic pellets" is a broad category that could include materials that degrade easily and generate significant dust and fugitive PM emissions. DEQ should define this category to include only plastic pellets that don't break down or degrade, and should add limits on size and throughput.

2. *Type 1 projects not on the Notice-and-Go list*

We were surprised to see that, in the revised rules, the Type 1 category is not limited only to the equipment on the notice-and-go list. We understood the "notice and go" list to be designed to address the problem of some regulated sources improperly submitting their proposed construction, modifications, or replacements as Type 1 NCs and DEQ failing to catch this error before the construction is default-approved. While we are aware of the rule revision allowing DEQ to correct such errors even after automatic approval of a Type 1 NC, the revised rules should aim to *prevent* such errors, not just allow DEQ to correct them after the fact, if DEQ even detects them. To reduce the likelihood that regulated sources will improperly submit Type 2 projects as Type 1 NCs, the Type 1 category should be limited to only the equipment on the "notice and go" list.

Moreover, because of the use of the connector "or" in the rule language, the Type 1 category seems to actually overlap with Type 2. Revised OAR 340-210-0225(1) lists four criteria for what makes something a Type 1 change. Subsections (a) through (d) are separated with an "or." Because of that "or," it appears that satisfying any one of these subsections would be enough to qualify a construction project for Type 1 review, meaning that any project that does not increase emissions from the source above any PSEL would be a Type 1 project (*see* subsection (c)), regardless of whether it also satisfied subsections (a), (b), or (d). This seems like it would swallow all of Type 2.

If DEQ does not restrict Type 1 to only projects on the "notice and go" list, DEQ should at least revise the Type 1 language to clarify that it applies only projects that either:

- appear in the notice-and-go list [subsection (d)], **OR**
- have emissions less than 10 lb/day [subsections (a)/(b)] **AND** would not increase emissions from the source above any PSEL [subsection (c)]

B. Type 2 NCs

1. *New BAT thresholds*

Throughout this rulemaking, we have raised concerns about DEQ's continued reliance on the Significant Emissions Rate as a meaningful threshold, given the fact that the SER is outdated and does not reflect scientific developments.

We appreciate DEQ's attention to the concern we raised in our pre-RAC meeting letter about the Type 2 category encompassing replacements of emissions units with very significant emissions—up to the Significant Emissions Rate—while exempting all Type 2 NCs from the new technology review requirement. We support the proposal DEQ described at the RAC

meeting to revise the Type 2 category to require technology review for Type 2 projects involving emissions units with emissions above the following thresholds:

- Carbon monoxide: 15 tpy
- NOx: 5 tpy
- PM10: 2 tpy
- Direct PM2.5: 2 tpy
- SO2: 5 tpy

2. *Confusing language about PSELs*

Revised OAR 340-210-0225(2)(b) states that Type 2 NCs are those where "such a change in criteria . . . (b) Would not increase any PSEL." Previously, (b) read "Would not increase **emissions from the source**" above the PSEL. DEQ should revert to the old language. It is not clear whether the new phrase ("would not increase any PSEL") has a different meaning from the former language. The new language also seems literally impossible to satisfy; nothing a regulated entity does can increase a PSEL; definitionally, only DEQ can increase a PSEL.

C. Best Available Technology

1. *Feasibility*

We understand that most existing forms of technology review involve some consideration of cost and that DEQ borrowed the phrase "Best Available Technology" from other jurisdictions. Nonetheless, we do not believe that the BAT rules, as drafted, will actually result in the "best available technology." It exempts sources from having to install the best available technology when it is uncommon or expensive, and gives DEQ seemingly unlimited discretion to deem technology infeasible. It is impossible to foretell whether DEQ staff's application of BAT will actually result in the best available technology or simply the cheapest and easiest. DEQ should also add sideboards to the rule to ensure that DEQ does not end up simply rubber stamping the decisions of the sources it is supposed to regulate.[1]

[1] We disagree with the suggestion of one industry RAC member that Oregon law prohibits DEQ from requiring anything more stringent than the Typically Achievable Control Technology (TACT) standard. That is plainly not what ORS 468A.025 says. As DEQ correctly noted, under both that statute and the existing TACT regulations, TACT applies only to sources that are not subject to other emission standards for a particular air pollutant. *See* ORS 468A.025(b); OAR 340-226-0130(1)(a).

2. *Presumptive BAT*

While we do not object in concept to the technologies on DEQ's list of Presumptive BAT, the language of these provisions requires some tightening to ensure that it does not inadvertently encompass inferior performing technologies.

- (a) and (b)—"Total enclosure"
    - DEQ must define what "total enclosure" means to ensure that this category reflects a high level of control and excludes inadequate enclosure methods. DEQ should revise these subsections to refer to "total enclosure meeting the performance specifications of EPA's Method 204."
- (c)—SCR
    - Because SCRs vary greatly in performance and control level and their use sometimes results in increases in other air pollutants, DEQ should narrow this provision to apply only to selective catalytic reduction for NOx control "where the control efficiency is 95% or greater."
- (d)—Diesel particulate filter
    - Diesel particulate filters also vary in performance. DEQ should narrow this category by specifying emissions limits or performance standards that reflect the best performing diesel particulate filters.
- (f)—Low-sulfur diesel fuels
    - "Ultra low" means different things in different states. DEQ should narrow this category by specifying that it only includes diesel fuels with a sulfur content below 15 parts per million.
- (g)—Oxidation catalysts
    - Again, oxidation catalysts vary in performance. DEQ should narrow this category by specifying a control efficiency.

In addition, DEQ should add a rule requiring the agency to review the list of Presumptive BAT technologies every 2 years and update it to remove technologies that have become outdated and to add newly available, high-performing technologies.

## III. **RULE REVISIONS AIMED AT PREVENTING NAAQS EXCEEDANCES**

DEQ's proposed rules include several new provisions aimed at preventing NAAQS exceedances at regulated facilities. While these proposals represent an important and sensible step forward in safeguarding Oregon's air quality, there are several instances where the rules should be strengthened to ensure all impacted communities are sufficiently protected.

A. NAAQS/Air Quality Analysis Modeling

DEQ has proposed several necessary changes that would incorporate additional air quality monitoring, modeling, and other analysis into Oregon's permitting process. It is critical that DEQ and Oregon communities obtain an accurate picture of emissions from all of Oregon's sources, and we believe DEQ's proposed revisions provide an important first step towards that goal. However, we urge DEQ to go further in certain specific respects, to ensure communities are adequately informed and protected.

First, we strongly support DEQ's proposal, in revised OAR 340-216-0040(1)(a)(O), requiring all new permit applicants to provide information demonstrating that the source's emissions are not causing or contributing to a NAAQS exceedance or violation.

But this requirement should be extended to the renewal of existing permits as well. As proposed, OAR 340-216-0040(2)(D) requires such information be provided as part of a permit renewal application only "if requested by DEQ." The permit renewal period is a natural moment to re-assess a source's air quality impact and NAAQS compliance; provision of an air quality analysis should be a standard component of all permit renewals and not dependent on a request from DEQ.

Next, for existing sources, revised OAR 340-226-0140(1) authorizes DEQ to conduct monitoring or modeling, or to require a source to conduct monitoring or modeling, to determine whether emissions from a particular source are causing or contributing to a NAAQS exceedance. We support this language clarifying that DEQ may use monitoring or modeling to support permit conditions designed to prevent NAAQS violations and exceedances.

Finally, revised OAR 340-214-0110 explicitly authorizes DEQ to request an air quality analysis, designed to assess whether a source's emissions could cause or contribute to a NAAQS exceedance or violation. We support this new provision, but we note that the proposed rules state only that the requested information be provided "in a reasonably timely manner." Rather than leaving this allowable response time open to interpretation, DEQ should identify a specific time limit for sources to respond to such a request, to ensure such an analysis is performed expeditiously, and should grant extensions not more than once and only for good cause.

Further, we believe it is essential that each existing source provide at least one report during each permit term on its throughput, emissions rates, and the efficiency of its pollution controls. This information would provide DEQ and frontline communities with critical data about whether existing sources are causing short-term spikes in pollution, or exceedances of short-term NAAQS.

B. Permit Conditions to Prevent NAAQS Exceedances

DEQ's proposed rules authorize the agency to include conditions in Simple and Standard ACDPs to ensure a source's emissions will not cause or contribute to a NAAQS exceedance or violation, including permit conditions that limit a source's short-term potential to emit. *See* revised OAR 340-216-0064(3)(c) (Simple ACDP); OAR 340-216-0066(3)(c) (Standard ACDP). We generally

support this authority, but believe this rule language should be revised to clarify that it applies to all permitted sources with Simple or Standard ACDPs. As drafted, these permit conditions are authorized only for sources "that require permit conditions to ensure the source's emission [sic] will not cause or contribute" to a NAAQS exceedance or violation. It is thus unclear exactly when these conditions would be authorized. We would not support this revised language if DEQ intends for these conditions to apply only where there has been a monitored violation or modeled exceedance. We believe permit conditions to limit short-term emissions—and ensure NAAQS compliance—may be necessary and appropriate for all sources, and urge DEQ to clarify its authority to include such conditions in any Simple or Standard ACDP.

## IV. PREVIOUS SUGGESTIONS THAT WERE NOT INCLUDED IN THE DRAFT RULES.

After reviewing the draft rules, we believe it is important to reiterate previous comments on two specific issues where DEQ has not addressed our concerns: DEQ's proposal to allow PSELs to be set at a source's Capacity to Emit (CTE) and DEQ's continued use of unnecessarily complex language.

### A. PSELs Set at Capacity to Emit

We continue to support DEQ's proposal to eliminate Generic PSELs for minor sources. However, we are disappointed to see that DEQ has moved forward with its proposal to set a source's annual PSEL at "the source's capacity to emit, potential to emit, netting basis or a level requested by the applicant…" Revised OAR 340-222-0041. We continue to believe that the possibility of a PSEL set at a source's CTE is contrary to the goals of this rulemaking. As we explained in previous comments, for many minor sources there will be a significant difference between CTE and PTE. By allowing for PSELs set at CTE, DEQ is proposing a system where sources could continue to be permitted at levels which they cannot reasonably emit. Permitting facilities at capacity will allow them to increase their actual emissions without having to modify their permits, which would reduce the opportunities for DEQ to assess short-term NAAQS compliance, and limit opportunities for the public to meaningfully engage. We continue to believe that permitting facilities at CTE would maintain a system that prioritizes industry flexibility over public health and transparency. We urge DEQ to eliminate the option of permitting at a source's CTE.

### B. Language Simplification

We continue to believe that DEQ's air permitting regulations use unnecessarily complex and confusing language. We appreciate DEQ staff's pledge during RAC Meeting #4 to develop a guide to help communities understand the permitting program, but we believe there are steps that can be taken immediately, within the proposed rules, to increase community understanding and involvement. This includes the renaming of permit categories, in a way that would allow the public to clearly understand the differences between the permits.

## V. RULE REVISIONS WE SUPPORT

We are encouraged by several of the proposed changes in the revised rules, and fully support the following changes:

A. PSELS
- The elimination of Generic PSELs for minor sources. *See* (deleted) OAR 340-222-0040; 340-200-0020(72).
- DEQ's strategy for setting PSELS at the capacity of the largest emitting source in the source category for a General ACDP. OAR 340-222-0020(4).

B. Notice of Construction and Approval of Plans
- The exclusion of pollution control technologies from the Type 1 "Notice and Go" list. *See* OAR 340-210-0225(d).
- The notification requirement for any physical change or change in operation of any air pollution control device. OAR 340-210-0215(3).
- The expanded NC application requirements, including the requirement to submit a Land Use Compatibility Statement or a LUCS equivalent from the local governing jurisdiction. *See* OAR 340-210-0230.
- The requirement that construction or modification be performed in accordance with approved plans and specifications. OAR 340-210-0240.
- The requirement that construction must be commenced within 18 months of approval, and termination of approval when construction is discontinued for a period of 18 months or more or is not completed within 18 months of the anticipated date of completion. OAR 340-210-0240(5).
- Additional requirements for Notice of Completion. OAR 340-210-0240(6).
- Limits on extensions for construction commencement. OAR 340-210-0240(5)(b). On this point, we believe that DEQ should document its reasons for granting an extension request, and make that documentation publicly available.

C. Excess Emissions
- The requirement that a source reduce or cease operations immediately when an excess emissions event occurs. OAR 340-214-0330(2).
- The requirement that DEQ consider, in determining whether to allow continued operation during an excess emissions event, whether the emissions resulting from immediate repair would be greater than the emissions likely to result from delay of repair. OAR 340-214-0330(2)(c).

D. Permits
- Inclusion of rule language explicitly stating that no person may violate the conditions of an ACDP. OAR 340-216-0020(8).
- Provisions allowing DEQ to change the type of permit a source must obtain, and to base this decision on considerations including the source's emissions, the complexity of the source and its emission controls, the threat to human health and the environment, and the source's compliance history. OAR 340-216-0025(7).

- 10-year expiration dates for General, Basic, and Simple ACDPs. *See* OAR 340-216-0056(2)(d); OAR 340-216-0060(1)(b)(D); OAR 340-216-0064(3)(d).

E. Application Requirements
- Requirement to submit information using electronic forms. OAR 340-216-0040(1)(a).
- Expanded application requirements for new and renewed permits and for permit modifications. *See* OAR 340-216-0040. On this point, we urge DEQ to also require, for renewal applications, that a source submit source tests and actual emissions data, if available.

F. Visible Air Contaminant Limitations
- We support the more stringent opacity limit in OAR 340-208-0110(3), but urge DEQ to eliminate the exceptions for certain wood-fired boilers.

## VI. CONCLUSION

Thank you in advance for your consideration of our comments and for the opportunity to participate on the Rulemaking Advisory Committee. We look forward to continuing to work with you to protect Oregon's air and all who breathe it.

Sincerely,

[listed in alphabetical order by organization]

Lisa Arkin, *Executive Director*
**Beyond Toxics**

Molly Tack-Hooper, *Supervising Senior Attorney*
Ashley Bennett, *Senior Associate*
**Earthjustice**

Mary Peveto, *Executive Director*
**Neighbors for Clean Air**

Jonah Sandford, *Executive Director*
**Northwest Environmental Defense Center**

Sergio Lopez, *Energy, Climate and Transportation Coordinator*
**Verde**

Northwest Pulp & Paper
ASSOCIATION

Sent via: 2022.aqpermits@deq.oregon.gov

April 22, 2022

Oregon Dept. of Environmental Quality
Attn: Jill Inahara
700 NE Multnomah St., Room 600
Portland, OR 97232-4100

RE: **Comments on Fourth Meeting of Oregon Air Quality Permitting Updates 2022 Rulemaking Advisory Committee**

Ms. Inahara,

Thank you for the opportunity for the Northwest Pulp & Paper Association (NWPPA) to participate in the Rulemaking Advisory Committee (RAC) and provide comments on Oregon Department of Environmental Quality's (DEQ) Air Quality Permitting Rules Update.

**INTRODUCTION**

NWPPA represents ten member companies and 14 mills in Oregon, Washington and Idaho, 5 of which are located in Oregon and are in more rural communities. Our members are state and federally recognized essential businesses who keep vital paper products available across the United States and abroad. Without fail, our Oregon mills' essential workers have been making vital paper products we all use every day to help fight against COVID-19. Oregon mills provide 4,000 union-backed, family wage jobs in some of Oregon's more rural, economically distressed communities. Mills provide a 3:1 job multiplier and are often the single largest taxpayer in these communities, a large portion of which is distributed as funding for schools and emergency services. Our members hold various permits issued by DEQ including permits for Title V Air Operating Program and the Air Contaminant Discharge Program.

NWPPA members are at the forefront of Oregon air quality improvement efforts. Our members have embraced technically advanced and scientifically sound controls on air emissions over the past 20 plus years. We are proud of our dedication to efficient and environmentally sound processes and reduction of emissions over time. We are committed to the hard work and discipline it takes to be contribute to our communities.

NWPPA has long-standing-stakeholder participation in numerous DEQ advisory committees including groups on establishing regulatory programs, administrative rules and program improvement efforts. Our staff and members have participated in the development of rules in previous RACs including NWPPA President, Brian Brazil, who is participating in the current DEQ Air Quality Permitting RAC.

NWPPA and its members appreciate DEQ's goal to adopt rules that ensure Oregon's businesses are protective of short-term air quality standards. NWPPA's principle concerns however relate to DEQ's addition of numerous and duplicative requirements, often divorced from the concerns being addressed. For example, while we acknowledge that modeling short-term emissions makes sense, DEQ takes a shotgun approach that requires a facility conduct modeling over-and-over again without a link to increased emissions or risk. DEQ's suggestions for BAT applicability and NOC modifications, meanwhile, put significant responsibility on DEQ staff without a direct relation to increased emissions from a facility. Importantly, DEQ can achieve the goals of this rulemaking without creating significant permitting uncertainty.

These comments are not necessarily presented in order of importance, but, rather, are sorted by categories presented in the RAC process. Further, our comments below represent an initial response to DEQ's proposals from the April 15th meeting and will likely be supplemented when NWPPA and its members have had an appropriate amount of time to review rules in draft form and respond fully.

## GENERAL COMMENTS

### NAAQS Air Quality Analysis

While NWPPA acknowledges the benefits and value of performing air quality analyses (i.e., dispersion modeling), the draft rules do not provide sufficient certainty or predictability as to when and how a modeling requirement would be applied to a permit modification or ACDP renewal. NWPPA suggests DEQ provide certainty in the form of a clear and streamlined process for modeling that only requires modeling at New Source Review and actions that increase emissions at a facility, or at a minimum requires repeat modeling only in specific circumstances moving forward under reduced or simplified standards. As proposed, OAR 340-216-0040(3)(d) would grant DEQ the discretion to require modeling for any permit modification, even if the modification does not include an increase in emissions or otherwise suggest a threat to NAAQS attainment. The same would be true at permit renewal. As environmental justice considerations are a large factor in DEQ's rulemaking process, DEQ should critically consider that additional process requirements affects our members' (often the largest job creators in the community) ability to plan for the future and to sustain or increase jobs. When a mill cannot explain the requirements or timeline for a permit action (or when permitting is overly expensive or onerous) that often translates into funding for projects going elsewhere. DEQ's proposal to include repeated air quality analysis subverts its stated environmental justice goals. NWPPA suggests simplifying the criteria for when modeling is required to accommodate these environmental justice principles and to provide mills more certainty and ability to plan for the significant expenditure required to perform modeling analyses.

NWPPA suggests that after initial modeling is done at a facility, DEQ should reduce the circumstances triggering repeat modeling only to: (a) there is a reasonable basis to believe that a NAAQS exceedance might occur and (b) the source is requesting an increase in plant site emission limits. Type 2 changes that neither threaten a NAAQS exceedance nor increase emissions should not trigger additional modeling requirements.

NWPPA also proposes reducing the circumstances triggering repeat modeling by limiting modeling for new or modified emission units *to pollutants that increase above a significance threshold*, such as *de minimis*, to avoid modeling for pollutants with only minor increases resulting from the project. The language of the proposed rule suggests a Type 3 change triggers modeling for all criteria pollutants. Our proposed change provides clarity, is consistent with the current short-term NAAQS modeling guidance,

and would be similar to current Type 4 changes where only pollutants that exceed the netting basis by more than the SER trigger modeling.

Similarly, DEQ should consider allowing abbreviated modeling protocols and reports for subsequent modeling demonstrations that only require identifying items that have changed since the last demonstration. At a minimum, DEQ should streamline the modeling process by developing modeling resources available to facilities and consultants. For example, presumptive meteorological datasets for use anywhere in the state and co-contributing source inventories. Other states have these resources available, and it can save significant time and money for model development.

Two stated goals of this rulemaking are to increase permitting issuance efficiency and to increase regulatory certainty. Given existing staff constraints around modeling requirements for Cleaner Air Oregon (CAO), it is beneficial to DEQ staff to specify when the additional component of modeling would apply and when the proposed modeling requirement would be required from an applicable source. We propose DEQ clarify that the initial modeling requirements under these rules will occur at the next permit renewal, unless the renewal occurs within 18 months (or a comparable time period) of the effective date of the proposed rule.

Best Available Technology (BAT)

*Defining BAT*

Despite DEQ attempts to clarify during the RAC meeting, NWPPA remains unclear on the meaning and applicability of BAT, and seeks clarification on the definition of BAT. For example, how will BAT compare to BACT? While DEQ classifies BACT as an EPA requirement for major sources that trigger Prevention of Significant Deterioration, DEQ is looking to create a new classification through the implementation of a BAT requirement that is a state requirement for minor sources triggering Type 2 and Type 3 notice of constructions (NOCs). As written, NWPPA is concerned that the proposed BAT is applying BACT to minor permit changes—causing uncertainty in process and increasing costs with little to no clear impact on emissions from a facility. The rule as proposed would subject almost every project and the majority of minor sources in Oregon to BACT when this is not required in other states. To distinguish BAT from BACT, NWPPA suggests a cost-effectiveness threshold above which additional controls for BAT would not be required.

While NWPPA appreciates the use of a dollars/ton threshold to clarify where BACT satisfies BAT, NWPPA strongly opposes DEQ's suggestion that dollar thresholds from the South Coast Air Quality Management District be applied to Oregon feasibility standards for BAT or BACT. First, South Coast AQMD encompasses a non-attainment area, which invokes different requirements under the CAA. It is not appropriate to compare the requirements and standards of a non-attainment area to the entire state of Oregon and the rules to apply to its various airsheds. Adopting statewide feasibility standard dollar amounts comparable to Southern California's is not warranted in most airsheds in Oregon, and it is not practical from a DEQ management perspective.

As written, BAT limitations include an emissions limit, emission control measure, design standard, equipment standard, work practice standard or other operational standard, or a combination thereof. Under this definition, it appears that BAT would be required for all pollutants for which the facility has a potential to emit of a significant emissions rate or greater. This suggests BAT applies at *every* permit renewal, at *every* opportunity – which adds a significant time and potential cost burden. This creates uncertainty and a lack of transparency in the permitting process. For clarity, NWPPA suggests DEQ clarify that a BAT analysis is only required for new or modified emission *units* proposed with a Type 3 change, rather than all emission units at the facility at every renewal.

Additionally, NWPPA proposes a significance threshold for pollutants associated with the new or modified emission units for which BAT is required. For example, only pollutants that are emitted at greater than *de minimis* levels from the new or modified emission units should require BAT. This will reduce the scope and cost of case-by-case analyses. *See* OAR 340-210-0235(1)(a). Again, NWPPA strongly opposes DEQ's imposition of low percentage numerical thresholds. The suggested threshold percentages are not warranted in most Oregon airsheds, and are potentially not even feasible in practice (i.e. limiting CO emissions to 15% of SER to avoid triggering BAT for minor modifications). NWPPA urges DEQ to find an alternative and less restrictive proscriptive numerical threshold here.

*Presumptive BAT*

NWPPA is interested in understanding the rationale for the narrow list of select pollutants and emissions unit types included in presumptive BAT. The proposed list does not represent all of the viable technologies. In determining *why* a presumptive BAT is necessary, NWPPA urges DEQ to take a more holistic approach to setting these standards. Controls for the sake of controls may cause more energy use and environmental impact. Additionally, we request that DEQ consider expanding BAT to include any technology required by a RACT, BACT, BART or LAER determination or standard. These determinations are source specific and indicate stringent controls. Requiring a source to undergo BAT when it already employs such controls is not time well spent.

Lastly, NWPPA proposes keeping BAT as a case-by-case determination based on technical and economical feasibility without presumptive BAT. For example, modeled impacts should be a consideration for BAT. If the impact from the proposed project is below the SIL, then no additional analysis for determining BAT should be required.

<u>Notice of Construction (NOC)</u>

The proposed changes to criteria for types of construction and modification are significant. Presently, DEQ staff have difficulty processing modifications under the current rules. The proposed rule changes significantly increase DEQ staff's workload (without an increase in protection to the environment).

Sources must be able to make timely changes. The proposed changes are likely to push projects into higher modification categories, which will take longer to process. The revisions to Type 1 can reasonably be expected to increase efficiency for processing, but the revisions to Types 2 and 3 do not. With this in mind, NWPPA suggests DEQ move forward with proposed changes to Type 1, but leave Types 2 and 3 unchanged. Additionally, processes for timelines such as the 60-day approval clock should be clarified in order to achieve predictability.

NWPPA also proposes limiting the applicability of emission increases to criteria pollutants rather than regulated pollutants. HAPs and TACs are regulated pollutants but do not have established SERs. Therefore, any project that includes an increase in HAPs or TACs would be above the SER and regulated as a Type 3 change. HAPs and TACs are already regulated under Cleaner Air Oregon, and thus NWPPA would seek clarification as to why it is necessary to address these regulated pollutants in this rulemaking.

<u>Unplanned Upset (Excess Emissions – EE) Provisions</u>

NWPPA has concerns regarding the proposed changes to the rules governing unplanned upsets, as the proposed changes will require sources to immediately reduce or cease operations during an excess emissions event with limited exceptions. In no case would operation be allowed to continue for more than an hour unless procedures for minimizing emissions are approved by DEQ. There are numerous instances where the cause of an excess emissions (EE) event is not clearly understood. The conditions

could be caused by monitoring instrument failure and are not actual emissions. Some requirements take an hour or three hours to determine (i.e. SO2 short-term monitoring intervals).

Under the current rule, a source could operate for up to 48 hours unless the DEQ determined that immediate cessation was necessary. However, this does not mean that a source can emit carte blanche. The current rules allow for evaluation on a case-by-case basis, rather than assuming all upsets require a shut down until proven otherwise, but they still allow DEQ discretion to require immediate shutdown if necessary.

While our members would prefer DEQ remove the proposed revisions to OAR 340-214-0330, NWPPA can appreciate DEQs desire for more process clarity regarding emissions during unplanned upsets. Rather than removing the EE provisions, NWPPA recommends including additional authorization for operating pursuant to an approved Malfunction Emission Minimization Plan during excess emissions situation. The proposed changes eliminate certainty of operations in emergency situations.

**SPECIFIC COMMENTS**

Technical Changes

NWPPA provides the following suggestions and/or comments on the proposed redlined draft of proposed changes to the OAR, which are arranged by section reference(s) in the draft.

OAR 340-200-0020(84) and 340-220-180(1)

The proposed change to 340-200-0020(84) and 340-220-180(1) from "postmarked" to "received" is both inappropriate and a substantial change. Simply because DEQ has created the Your DEQ On-line (YDO) system that doesn't have the ability to account for postmarks is absolutely the WRONG reason to suggest this change. DEQ CANNOT expect that sources will submit fee payments for substantial permit fees on-line. DEQ also must not ignore postmarks that prove large checks for fees were submitted on time.

In fact, at OAR 340-216-0084, DEQ relies upon the postmark for establishing an effective date for permit modifications. It is likely that there are other places in these regulations where DEQ also relies upon a postmark. Therefore, NWPPA suggests that this change should not be made at all.

If DEQ must create language that addresses YDO, language similar to how EPA recognizes timely submissions in 40 CFR Part 70 would be the CORRECT way to accomplish this. Our suggested language (if DEQ continues to believe a change must be made to accommodate YDO payments is required: "…postmarked or time stamped on an electronic submission through YDO...".

OAR 340-208-0110(1) and 340-234-0210(4)

The proposed addition of 340-208-0110(1)(b) does not actually include all the sources exempt from the rule under 340-234-0210(4). As such, 340-208-0110(1)(b) should read: "Kraft mill" sources regulated for visible emissions (i.e. opacity) under 340-234-0210(4)". "Emissions from each Kraft mill source" are regulated for opacity under 340-234-0210(4) and, therefore, should not be included under 340-208-0110. Clarification at 340-234-0210(2)a(c) that Recovery furnaces are exempt from the opacity standards at 340-208 is a good improvement. DEQ should also clarify at 340-234-0210(4) that "Kraft mill" sources are exempt from the opacity standards at 340-208.

OAR 340-210-0215(3)

OAR 340-210-0215(3) replaces "modify" with "make a physical change or change in operation" of air pollution control devices in the requirement to provide written notice of the change to the DEQ. This

will expand the applicability of notifications because it removes the concept of an emissions increase inherent in the term modification. As written, it would apply to all physical or operational changes regardless of whether it results in an emissions increase.

OAR 340-210-0230(1)(o)(B)

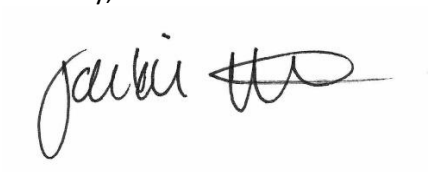
The proposed addition of section (B) requiring a source and DEQ to perform an artificially created Land Use Compatibility analysis is excessive and unnecessary. If the local planning jurisdiction does not require a review, which in itself constitutes approval, then recognition that there is no need to review the project is by default, an approval. The same applies for the planning jurisdiction declining to review the application. That in itself is acknowledgment by the planning jurisdiction that review is unnecessary. NWPPA opposes the addition of this section to the rules.

NWPPA also supports comments presented by Tom Wood of Stoel-Rives LLP for the coalition of businesses that he represents. NWPPA is a member of that coalition, so those comments should be included in our comments as well.

**CONCLUSION**

NWPPA appreciates the opportunity to participate in the Air Quality Permitting Rules Update as a RAC participant, and for the opportunity to submit these written comments for the rulemaking record. We look forward to continued discussions as the rulemaking process continues

Sincerely,



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April 22, 2022

Jeffrey L. Hunter

**VIA ELECTRONIC MAIL ONLY**

Ms. Jill Inahara
Oregon Department of Environmental Protection
700 NE Multnomah Street, Suite 600
Portland, OR 97232

**Re: Comments on Oregon Air Quality Permitting Updates Rulemaking Advisory Committee Meeting 4, April 15, 2022**

Dear Ms. Inahara:

Thank you for the opportunity to comment on the Department of Environmental Quality's (DEQ) fourth Air Quality Permitting Updates Rulemaking Advisory Committee (RAC) meeting and the draft proposed rules that DEQ circulated in advance of the meeting. Please note the comments expressed herein are my comments as an advocate for industry as a whole. My comments and views may not be fully supported by all owners/operators that hold Air Contaminant Discharge Permits and are subject to DEQ's air regulations.

**Proposed Rules**

Deletion of the Generic Plant Site Emissions Limits (PSELs)

We continue to struggle to understand the rationale behind DEQ's push to eliminate Generic PSELs. Generic PSELS are a win for all for the following reasons:

- Due to their conservative nature, Generic PSELs allow DEQ to ensure and clearly communicate to the public that a facility is not exceeding a certain amount of the respective pollutants.

- Generic PSELs have been used for years to cap respective pollutants to a certain level at which DEQ staff did not spend valuable time calculating and processing permits for pollutants that are emitted at less than significant levels.

- We disagree with DEQ's assertion that Generic PSELs discourage reductions of those pollutants. Qualifying for Generic PSEL status is a powerful incentive to discourage those facilities from increasing those pollutants as permitting an increase is difficult.

- We also disagree that eliminating the Generic PSELs address environmental justice concerns.

- Attempting to substitute Generic PSELs with a calculated capacity to emit or a potential to emit (PTE) will result in increased cost and permit complexity for DEQ staff, the source and the regulated community and could actually result in greater emissions. For existing sources, eliminating the Generic PSELs will require an extensive amount of work by DEQ staff and sources as all emission inventories and permits will need major overhauls. This will be a very substantial, costly, and time-consuming endeavor with little or no environmental benefit.

At a minimum, DEQ should consider maintaining the Generic PSEL for at least General and Simple permits. If DEQ is concerned the Generic PSELs overestimate emissions, which we do not believe is correct, DEQ could consider reducing the Generic PSEL for certain criteria pollutants such as carbon monoxide.

OAR 340-209-0080

Under the proposed provisions regarding a request for a stay of contested conditions, DEQ has included new requirements that the applicant seeking a stay must demonstrate that:

> Compliance with the contested conditions would require substantial expenditures or losses that would not be incurred if the applicant prevails on the merits of the review; and
>
> There exists a reasonably likelihood of success on the merits.

This sets too high of a bar for seeking a stay of contested conditions. DEQ does not describe what constitutes "substantial" expenditures or losses and seems to have complete discretion as to what it considers "substantial." While the cost of compliance should be a factor, other factors may also be relevant to the analysis including the timing to implement the contested condition, the public health and welfare benefits of the contested condition and other mitigating factors including whether the source could implement other measures during the pendency of the appeal. Please consider the following edits:

> Upon such request for review, the effect of the contested conditions, as well as any conditions that are severable from those contested, may be stayed, during the pendency of the appeal, based on the following factors:
>
> the timing of implementation of the contested condition;
>
> the costs or losses that would not be incurred if the applicant prevails on the merits of its review;
>
> the additional impacts public health or welfare if the contested condition is stayed during the pendency of the appeal; and

the likelihood of success on the merits of the review which shall only require a prima facie showing of the possibility of success.

OAR 340-210-0225(1) - Type 1 Changes

DEQ's proposed revisions to Type 1 changes would eliminate a number of small projects that have no realistic impact on compliance with the NAAQS or the regulated community. A source that wants to replace a device, process or activity that may result in emissions of greater than 3,650 lbs. per year would automatically be forced into a Type 2 change regardless of whether the source's actual emissions are well below its PSEL and regardless of compliance with the NAAQS. This is going to result in increased cost for DEQ staff and the source and is wasteful of resources. DEQ should increase the Type 1 change actual emission threshold to 5 tons per year for the criteria pollutants. To qualify for a Type 1 change, sources will still need to demonstrate that the increase in emissions will not result in an exceedance of the source's PSEL.

OAR 340-210-0225(2) - Type 2 Changes

During RAC Meeting 4, DEQ proposed making further changes and requiring sources with increased actual emissions of 2 tons or more per year would be required to demonstrate Best Available Technology ("BAT"). We strongly urge DEQ not to adopt any further revisions to Type 2 changes. A Type 2 change should not trigger a BAT analysis or any modelling. DEQ should also include under OAR 340-210-0225(2) an additional criteria that a Type 2 change does not qualify as a Type 1 change.

OAR 340-210-0235

While we disagree with DEQ's proposed requirement for a BAT analysis for Type 3 changes, to the list of presumptive BAT, DEQ should include:

- for fuel combustion devices, the use of Low-NOx burners

- for PM emissions, the use of scrubbers or electrostatic precipitators.

For the factor identified under OAR 340-210-0235(3)(a)(B), we understand that compliance with the NAAQS (including short-term NAAQS) would demonstrate the "overall health and environmental impacts of emissions from the facility." If that is the case, DEQ should not use narrative terms with subjective criteria. DEQ should specify that achieving compliance with the NAAQS may be a factor for determining BAT.

OAR 340-210-0240

For Type 2 changes, DEQ should be required to conduct a completeness review within 15 calendar days of receipt of a notice and the applicable fees and any request for additional information must be sent within 30 calendar days after DEQ receives the notice and applicable fees. DEQ should not be able to wait till the end of the 60-day approval period to make up a deficiency and delay the automatic approval. If DEQ is concerned that it will not receive the appropriate information, it should update its forms.

DEQ is proposing an expiration date on construction approvals of 18 months with one 18-month extension for good cause. Construction approvals should not be treated as PSD permits. There could be construction delays due to events and circumstances outside of the facility's reasonable control. Sources should have at least a full permit term to implement the approved change.

OAR 340-216-0020(2) and 0025(7)

If a source otherwise qualifies for a General or Basic Permit, DEQ should not have the authority, based on undefined and subjective criteria, to decide the source needs a Simple or Standard Permit. DEQ has failed to justify why this revision is necessary or how this addresses any of proposed purposes for the rulemaking.

OAR 340-216-0040

DEQ's proposed revisions to the application would require a BAT analysis for each new, modified, or replaced emission units. Emission units are defined broadly under the regulations as any part or activity of a source that emits or has the potential to emit any regulated air pollutant. OAR 340-200-0020(57). This could also be interpreted as including emissions from categorically insignificant activities and the proposed revisions do not clarify that such activities are exempt. Further, there are many small emission units including air handling or comfort heating units that have negligible emissions. While we disagree (in total) with DEQ's proposal requiring a BAT analysis, DEQ should expressly exempt from the BAT analysis categorically insignificant activities and emission units that are below certain thresholds. Further, the proposed revisions do not differentiate between the various types of Air Contaminant Discharge Permits. If required at all, the BAT analysis should only be required for new Standard Permits.

We appreciate DEQ's consideration of prior comments on the proposed revisions to OAR 340-216-0040(2) regarding renewal applications. DEQ should further clarify that the BAT analysis and air quality analysis is not required for each renewal application if a BAT analysis and air quality analysis were previously submitted and no additional changes have been made.

OAR 340-216-0064(c), OAR 340-216-0066(c) and OAR 340-218-0050(b)

In each of these sections, DEQ is proposing a new provision regarding additional permit conditions that DEQ may include. Presumably, this is to address sources that could have exceedances of the short-term NAAQS. As discussed in previous RAC meetings, modelling a potential exceedance of the short-term NAAQS and an actual exceedance of the short-term NAAQS are not the same. A source with a modelled exceedance should have the ability to demonstrate through monitoring that there are no actual exceedances of the short-term NAAQS before additional permit conditions are imposed. A source should also have the ability to propose permit conditions in situations where the modelling shows an exceedance of the short-term NAAQS and the source declines to conduct monitoring. Because of these proposed additions, requiring BAT on all new permits, potentially permit renewal and Type 3 changes seems superfluous.

Revisions to OAR 340-216-8010 Table 1

DEQ needs to seriously consider the impact of its proposed changes to Categories 79 and 86. Inserting "if the source were to operate uncontrolled" under Category 79 creates the same ambiguity as the current text of Category 85. Both categories should be based on actual emissions and the phrase "if the source were to operate uncontrolled" should be deleted from both. If this change is implemented, there is a potential for many small sources (bakeries, restaurants, small manufacturers, universities and even theoretically residential buildings) that have actual emissions well below 10 tons per year to be required to obtain a permit just because their PTE (based on 8,760 hours per year) could be 10 tons per year. Those sources do not operate their respective ovens, furnaces, hot water heaters and other natural-gas fired equipment 24/7/365 and it is illogical to assume they would. Trying to capture these small sources is a mistake, is an inefficient use of DEQ's resources and is not going to have a measurable impact on air quality.

OAR 340-226-0140(1)

In the proposed revisions, DEQ can complete, or require a source to complete, modelling **or** monitoring to determine whether the source's emissions are causing or contributing to an exceedance or a violation of an ambient air quality standard. DEQ should only require such modelling or monitoring if there is a reasonable basis to conclude the source's actual emissions are causing or contributing to an exceedance or a violation of an ambient air quality standard. Sources that have Basic, General or Simple Permits should not be subject to additional modelling or monitoring absent actual evidence that the source's actual emissions are causing an exceedance of the NAAQS. Finally, sources should first have the ability to model whether exceedances have occurred before being required to conduct actual monitoring.

**Conclusion**

I appreciate the opportunity to offer comments on the Air Quality Permitting Updates Meeting 4 and look forward to engaging in this rulemaking as it moves forward. Please contact me if you have any questions regarding these comments.

Sincerely,

Perkins Coie LLP

Jeffrey L. Hunter
Partner

JLH:jlh

cc: E. Porter (via electronic mail only)

760 SW Ninth Ave., Suite 3000
Portland, OR 97205

THOMAS R. WOOD

April 22, 2022

**VIA EMAIL (2022.AQPERMITS@DEQ.OREGON.GOV)**

Jill Inahara
Oregon Department of Environmental Quality
700 NE Multnomah Street, Suite 600
Portland, OR 97232

**Re: Comments on Fourth Meeting of Oregon Air Quality Permitting Updates 2022 Rulemaking Advisory Committee**

Dear Ms. Inahara:

We are writing as the spokespersons for a broad coalition of business and manufacturing associations including Oregon Business & Industry and many others (the "Coalition"). Collectively, the Coalition represents approximately 1,700 businesses in Oregon that employ approximately 300,000 workers, including nearly 75,000 workers in the manufacturing sector. The Oregon businesses making up the Coalition hold air permits and are covered by the regulations arising from ORS 468A. These companies have tremendous experience implementing Oregon's air quality regulatory program, and they stand for a program that is successful for all Oregonians. A successful air quality program is one that is fair, based on good policy and makes efficient use of agency and regulated entity resources. We appreciate DEQ involving the Coalition in this dialogue about potential changes to the program.

In preparation for the fourth Rulemaking Advisory Committee ("RAC") meeting, we reviewed the draft rules in detail. We wish to express our appreciation to the Department for those aspects of the draft rules where our prior comments have been considered and addressed. The comments below primarily focus on aspects of the draft rules where we continue to have concerns about the ideas being considered or the language employed. Our comments are not necessarily presented in order of importance, but, rather, follow general themes established in the RAC process.

Construction Approvals

Several of our comments relate to construction approval requests which we generically refer to here as Notice of Construction ("NOC") regardless of whether they arise in the ACDP or Title V program.

*Air pollution control devices as NOC trigger events*

The Coalition suggests that the Department not proceed with the proposed change to OAR 340-210-0215(3) relating to air pollution control devices as they will make the rules less clear and less objective. The current rule language states that the construction or modification of an air pollution control device triggers the need for an NOC. "Modification" and "construction" are both defined terms under OAR 340-200-0020 and so it is clear what the rule requires. The Department is proposing to change from the defined term "modify" to an undefined term "physical change or change in operation." This proposed language change would shift the rules from being more precise to being less precise. We do not believe that such a change advances the goals of the program and recommend that OAR 340-210-0215(3) remain unchanged.

*Air pollution control devices not used to comply with limits*

The Coalition does not believe that it is beneficial to revise the longstanding language in OAR 340-210-0205(1)(c) to extend the NOC program to air pollution control devices not used to comply with any emission limit. "Air pollution control device" is not a defined term in DEQ's rules. As a result, the term is generally applied expansively. Regulated sources use a broad variety of air pollution controls devices that are not relevant to air permit compliance or compliance with any standards. For example, HVAC systems include filters that remove air contaminants such as pollen and other atmospheric particulates. These HVAC system filters are clearly removing pollutants, but no facility submits an NOC before modifying its HVAC system and DEQ would be overwhelmed if such was the requirement.

If DEQ were to remove the language limiting the NOC program to devices used to comply with air permit emission limits and standards for regulated air pollutants, DEQ would exceed its jurisdiction as it seeks to regulate devices not associated with emissions to atmosphere. Even where emissions do reach atmosphere, if the device is not related to compliance with air permit emission limits or standards, there is no reason to add regulatory requirements where none have ever existed. Where a facility is not using an air pollution control device to comply with air permit emission limits or standards, the facility should not have to file an NOC before constructing or modifying such a device.

*Replacements as NOC trigger events*

The Coalition questions the Department's choice to add a new category of changes to the portion of the rules specifying actions that can trigger filing of an NOC. As noted in the prior comment, the obligation to submit an NOC at an existing source is triggered by a modification to an existing device that increases the hourly capacity to emit, or construction of a new device. Replacement of an existing device is not a trigger event unless it constitutes a modification. The definition of "modification" states that certain replacements (*e.g.*, like-kind replacements) are not modifications. This is a necessary qualification to the requirement for an NOC. For example, if

a silo has a simple filter that is used to minimize dust when the silo is filled, the proposed rule changes would, for the first time, require an NOC prior to the like-kind replacement of the filter media—a step that would be a tremendous waste of DEQ resources. Similarly, as proposed, a source would need to file an NOC before engaging in routine maintenance that involved the like-kind replacement of a part in an air pollution control device. DEQ's proposal to add "replacements" in the description of what constitutes a Type 1, Type 2, or Type 3 change would be impractical and serve no environmental purpose (other than to negatively impact environmentally beneficial maintenance programs). In short, we believe that this change would add confusion to the rules as it contradicts the language in OAR 340-210-0215 and introduces an undefined term. In order to promote rule clarity and to ensure that key terms are defined in the rules, we suggest removal of the word "replacement" from the proposed changes to OAR 340-210-0225. This will enhance clarity and consistency within the rules and not harm source's ability to expeditiously implement routine maintenance activities.

*Presumptive Type 1 actions*

The Coalition supports the idea of identifying certain actions that are presumptively classified as Type 1 NOCs. As was discussed by the RAC, the concept of a list of presumptive Type 1 NOC activities makes practical sense. However, we believe that the list is not inclusive enough and contains multiple activities that would never trigger the need for an NOC in the first place. We suggest that DEQ expand its presumptive Type 1 NOC list consistent with the Washington Department of Ecology's set of emission units and activities exempt from air permitting requirements. *See* WAC 173-400-110(4) (https://app.leg.wa.gov/WAC/default.aspx?cite=173-400-110&pdf=true). Another list worth consulting is the list of activities for which no NOC is required by the Puget Sound Clean Air Agency found at PSCAA Regulation 1, Section 6.03(b) and (c) (https://pscleanair.gov/DocumentCenter/View/339/1-6-PDF?bidId=). There is no need for DEQ to develop a new list where there are existing lists developed based on years of experience by comparable air permitting agencies facing comparable issues.

At the very least, the list of presumptive Type 1 NOCs should include the installation of control devices that do not result in a greater than *de minimis* increase in the emission of any pollutant. The Department should not be in the position of making it more difficult or time consuming for sources to enhance and expand their air pollution control devices. If, for example, a source wants to add a baghouse to an existing source, the only outcome is an environmental benefit. No environmental benefit is gained by shifting such an installation to the more laborious, slower Type 2 process. The only result of such a change is to delay installation of the air pollution control device and thus delay the environmental benefits. Therefore, we recommend that the Department add to the list in the purposed OAR 340-210-0225(1)(d) "Air pollution control devices where the installation and operation of the device will not result in a greater than *de minimis* increase in the emission of any regulated air pollutant."

*60 day approval clock of Type 2 changes*

The Coalition believes that the proposed changes to OAR 340-210-0240(1)(b) should clarify that if additional information is requested by DEQ in response to a Type 2 NOC, that only tolls the 60 day clock and does not restart it. ORS 468A.055(4) establishes that if the Department does not act on an NOC application within 60 days, the source may proceed with construction consistent with the application. The proposed revisions to OAR 340-210-0240(1)(b) generally are consistent with the statute. However, if additional information is requested to evaluate the application, ORS 468A.055 mandates that the 60 day clock be tolled and restarted where it left off upon the source's submittal of the requested information. Any other approach would render the statutory protection of ORS 468A.055 meaningless.

Best Available Technology

*BAT is inconsistent with DEQ's statutory authority*

The Coalition is concerned that DEQ is overstepping its regulatory authority in proposing a new and unprecedented in Oregon control technology program that would apply widely to industrial sources. ORS 468A establishes the authority of DEQ to regulate stationary sources. DEQ cannot exceed the authority thereby granted to the agency by the Legislature. In 1993, the Legislature granted the Department authority to require Typically Available Control Technology ("TACT") of new and existing sources. The situations where it could be required and the specific limitations on the program are enumerated in ORS 468A.025. Now, without any advance discussion in the RAC meetings or, more importantly, new authorizing legislation, DEQ is proposing a Best Available Technology ("BAT") program for new and existing sources. In doing so, DEQ is sidestepping the constraints imposed by statute to establish an entirely new and different program that will render the statutorily-established TACT program essentially irrelevant. If, after 29 years, the Legislature thought that DEQ should change and massively expand the nature of controls imposed on new and existing sources (in particular, minor sources), the Legislature could make its desires known, and DEQ could act accordingly. The Legislature, however, has not acted to authorize DEQ in this regard. The proposed rules' end run around the TACT program and the legislative constraints placed in statute subverts the Legislature's clear intent and exceeds the Department's authority. As such, the BAT program elements must be dropped from the rule proposal.

Notwithstanding the fact that the BAT program exceeds DEQ's statutory authority, we are obliged to make the following comments on the program as proposed.

*New source BAT*

The Coalition is concerned that the applicability of BAT to new sources is not structured to focus the substantial efforts associated with the program on emission points of significance. As

proposed, OAR 340-210-0235(1)(c) requires BAT for any new source required to obtain a permit under Division 216. To the extent the source does not propose presumptive BAT, the proposed OAR 340-210-0235(3)(b) requires that the source submit a BAT analysis as part of its application. The proposed rules in Division 210 give little indication of the breadth of that analysis, but the proposed OAR 340-216-0040(1)(a)(P) states that a BAT analysis is required "for each new, modified, or replaced emission unit for all regulated air pollutants that are not toxic air contaminants." As far as we can discern, there is no *de minimis* threshold and the BAT analysis must include every criteria pollutant.

The Coalition recommends several improvements to the proposed rule language. First, emission units with less than *de minimis* emissions should not be subject to a BAT analysis requirement. As proposed, a new source would have to perform BAT analyses for every gas-fired water heater and propane space heater on the premises regardless of how minimal its emissions would be. Significant effort would be focused on devices with an insignificant potential to emit. This makes no policy sense and is inconsiderate of limited source and DEQ resources, so we recommend that the Department clarify that BAT is only required for devices that are not categorically insignificant and that have the potential to emit a criteria pollutant over the *de minimis* levels. If a criteria pollutant will not be emitted from a device above the *de minimis* levels, it does not make policy sense to require that device to undergo the BAT process.

Second, the Coalition recommends that the BAT requirement be specifically limited to criteria pollutants, as opposed to extending to all regulated pollutants other than toxic air contaminants ("TACs"). BAT is defined at proposed OAR 340-200-0020(18) to apply solely to criteria pollutants. But that limitation of BAT to criteria pollutants is less clear elsewhere in DEQ's proposed BAT rules. The scope of all regulated pollutants is immense, even if TACs are excluded. To require that a BAT analysis address each of the hundreds of regulated pollutants for every device on the premises would pose nearly insurmountable logistical, administrative and technical problems. BAT has been floated as a tool to reduce the potential for the exceedance of ambient air quality standards. By extending BAT to cover regulated pollutants such as refrigerants, greenhouse gases, Hazardous Air Pollutants ("HAPs") and Risk Management Program pollutants (which, in the main, are already subject to specific, separate regulatory requirements) goes well beyond that stated goal. To help address these concerns, DEQ should clearly limit the BAT program for new and existing sources to criteria pollutants, consistent with the definition of BAT proposed in OAR 340-200-0020(18).

Third, there are some places where BAT is identified as applying to modified or new emission units (*e.g.*, proposed OAR 340-216-0040(a)(P)) and other places where BAT is discussed as applying to the process or device being modified or installed (*e.g.*, proposed OAR 340-210-0225(3)). We believe that the intent is to require that BAT be installed where equipment is modified or newly constructed. Given that a single emission unit can include multiple devices or processes, we suggest that the Department be consistent in applying BAT to the device or process and not generalize to emission units.

*Existing source BAT for Type 2 NOCs*

The Coalition is concerned that the Department chose to change the proposed existing source BAT requirements between the time that the draft regulations were circulated for review and the time of the RAC meeting. In the March 15, 2022 memorandum to the RAC, DEQ describes BAT as applying to Type 3 NOCs. However, at the April 15, 2022 RAC meeting DEQ proposed a different approach whereby BAT (and NAAQS modeling) would apply to Type 2 NOCs where the uncontrolled potential to emit of the equipment being modified exceeded certain thresholds. This last minute change merits several comments.

First, we do not believe that it is necessary or appropriate to require BAT for a Type 2 NOC. Type 2 NOCs are for facilities making smaller changes and not requiring any change to the PSEL. In addition, Type 2 NOCs require processing within the 60 day statutory deadline. Adding a complex control technology assessment to such construction approvals is inconsistent with the statutory timeline and totally impractical given the constraints on agency staffing.

Second, the proposed BAT thresholds aired for the first time at the fourth RAC meeting are too low. If BAT is required for Type 2 NOCs (and we do not believe that it can or should be) it must be tied to situations where the proposed modification threatens NAAQS compliance. As was discussed at the RAC meeting, the BAT thresholds bear no relationship to the emission rate that would potentially cause a NAAQS exceedance. For example, a 15 ton source of CO would be in no danger of causing or contributing to a NAAQS exceedance.

Third, if BAT is required for some Type 2 NOCs, the BAT thresholds should not be based on uncontrolled potential to emit, as suggested, but on controlled actual emissions. If BAT is required for certain Type 2 NOCs, many sources would be incentivized to voluntarily add controls if it allowed them to avoid the significant permitting (and attendant project) delays inherent in such a case-by-case technology evaluation. Sources would similarly limit their actual emissions for the same reason. If the BAT thresholds are compared to uncontrolled potential to emit, then sources will have every reason to propose no controls and see what the BAT process results in. This is both inefficient for DEQ and for the sources and loses a pollution prevention opportunity.

Fourth, there is no reason to include BAT thresholds based on $PM_{2.5}$ precursors. The conversion ratios for $PM_{2.5}$ precursors are so large that any source that triggered BAT would be triggering based on the direct SO2 or NOx emissions. In addition, $PM_{2.5}$ formed as the result of NOx and SO2 emissions is not formed at the stack and so would not be amenable to the addition of stack controls.

*Existing Source BAT and Permit Renewals*

The Coalition is concerned that the proposed revisions to OAR 340-216-0040(2), which addresses ACDP renewal applications, would require a source to undergo facility-wide BAT evaluation at every renewal. This concern arises from the requirement under the existing rules that each ACDP renewal application include all of the information in section (1) of OAR 340-216-0040. DEQ is proposing to revise OAR 340-216-0040(1) to include the requirement for a BAT analysis ((1)(a)(P)). As currently proposed, therefore, each renewal would require submittal of a BAT analysis for the entire facility and for all pollutants, which would represent a monumental undertaking. We believe that this was not intended and suggest that the proposed rule language expressly exclude BAT analyses from the renewal application requirements.

*Scope of existing source BAT*

The Coalition is concerned that the proposed language is not clear as to the scope of the BAT analysis for an existing source subject to BAT. Given the policy underlying BAT, the BAT analysis should be limited in scope to the devices undergoing a physical change as those are the devices for which it is appropriate and timely to evaluate changes in control. In addition, BAT should only be required to be evaluated for those criteria pollutants that are increasing by more than a *de minimis* amount as a result of the proposed physical change. We believe that this approach was intended by the Department, but believe that the rule language could be revised to clarify this intent.

*BAT triggered by PSEL increase*

The Coalition is concerned that the cumulative impact of deleting the Generic PSEL rules while also requiring BAT and modeling for any PSEL increase are not adequately considered. As the rules are currently structured, PSEL increases are unusual events meriting permitting through the Type 3 NOC process. As the Department noted at the first RAC meeting, it currently only processes, on average, two Type 3 NOCs per year statewide. But, at the April 15, 2022 RAC meeting, you stated that the Department "couldn't begin to guess at how many BAT analyses would be required" as a result of the proposed rule changes. However, with the proposed elimination of Generic PSELs, any increase of 1 ton or more would require a PSEL change and, therefore, a Type 3 NOC. Type 3 NOCs already typically take the Department at least 9 to 12 months to process. Adding in the requirement for a BAT analysis and NAAQS modeling will likely double the permitting time required (Type 4 NOCs, which include permitting requirements largely equivalent to what is being proposed for Type 3 NOCs, are rarely completed in less than two years). For example, a source with a boiler emitting 29 tons per year of CO that was considering installing low NOx burners would likely choose not to do so if the resulting small, but greater than *de minimis*, increase in CO would expose the facility to two years of permitting, NAAQS modeling and BAT for all pollutants emitted by the boiler. Thus, there is a realistic

possibility that what DEQ is proposing will make air quality worse in Oregon. We do not believe that it serves Oregon well to make it so difficult to make small PSEL increases and/or to have BAT attach to every Type 3 NOC; instead, if BAT is required, that should only apply to NOCs that would increase emissions by an SER or more (and only for the particular emission units from which emissions increases would occur).

*Presumptive BAT*

The Coalition supports the concept of including certain technologies as presumptive BAT as is proposed in OAR 340-210-0235(2). However, we are concerned with the narrowness of the enumerated technologies as well as some of the terminology used.

We first encourage the Department to expand the enumerated BAT to include any technology required by a RACT, BACT, TACT, BART or LAER determination or standard. Such determinations are source specific and represent stringent controls. Requiring a source to undergo BAT when it already employs such controls is not time well spent. In addition, if the device at issue is subject to an NSPS or NESHAP that requires controls, requires work practice or other operational standards, or imposes a substantive limit, then the device should be considered presumptively to have BAT in place.

Second, we encourage the Department to revise the wording of its proposed presumptive BAT types. As proposed, OAR 340-210-0235(2)(a) and (b) require a "total enclosure of the equipment exhaust". This phrase jumbles concepts and will create great confusion if adopted. A "total enclosure" refers to a building or room meeting the requirements of EPA Method 204. Referring to a "total enclosure of the equipment exhaust" makes no sense. We suggest that these two be revised to read "equipment vented to a baghouse, fabric filter…." and "equipment vented to a thermal oxidizer or regenerative thermal oxidizer…"

Third, we are concerned that the proposal is too narrow in its enumeration of specific control technologies and does not represent all of the viable technologies such as biofilters, ceramic filtration units, scrubbers, selective noncatalytic reduction systems, biofilters, low-NOx burners flares, ozone injection carbon adsorption and electrostatic precipitators. Any device that is controlled by such devices should not have to assess other technologies to prove that it is well controlled. AS discussed at the RAC meeting, while we do not object to including specific technologies in the rule as presumptive BAT, DEQ should allow room to expand that list as new technologies are developed without the need for reopening the rule.

*Construction and contracting dates*

The Coalition is concerned that the proposed addition of OAR 340-210-0230(1)(p) through (r) imposes impossible and possibly illegal requirements on sources preparing an NOC application. These provisions require the source to identify a date that it will "commit" to constructing the

proposed change, the date that it expects to break ground, and the date construction will be completed. A source cannot state any of these dates with certainty as it depends on the processing of the NOC application. We recognize that the NCO paperwork has long requested estimates for these dates, but the proposed rule changes impose new consequences if the dates are off given that the NOC will expire. In light of the proposed addition of a requirement that construction start within 18 months or the NOC is lost, we do not see the need to require that sources guess at when their NOC will be processed and identify a start date. Similarly, completion dates vary with the approval date and can change dramatically if a construction or in-water work or other window of opportunity is missed. We suggest that estimated construction completion date not be required at time of application.

*Cost of Control*

Coalition members were greatly concerned by the Department suggesting that the South Coast Air Quality Management District ("SCAQD") cost effectiveness thresholds were relevant to BAT analyses (or any other type of analysis) in Oregon. SCAQMD applies a technology requirement called "Best Available Control Technology" but, as review of the definition in SCAQMD Rule 1302(h) makes clear, this requirement is profoundly different from what is referred to as BACT in Oregon. SCAQMD's BACT requires any technology, regardless of cost, be installed if it has been achieved in practice by, or required for, any other source. Cost-effectiveness is applied only if a technology which has not been achieved in practice or otherwise required is suggested. This program is significantly more strict than the Oregon program and for good reason, given the unique air quality challenges in the Los Angeles Basin. We do not believe that it was appropriate to reference such thresholds in relation to the BAT program.

<u>NAAQS Modeling</u>

The Coalition is on record as to its concerns about the need for all sources to model NAAQS compliance and the Department's ability to review so much modeling when its modelers are already overwhelmed by the Cleaner Air Oregon program. With that concern in mind we were pleased to see that the proposed rule language requires modeling at ACDP renewal and at modification only if requested by DEQ. While we believe this is an improvement, we believe that both as a legal and a practical matter it is necessary to add some objective criteria to the rule to guide when modeling can be required. For example, as proposed, OAR 340-216-0040(3)(d) states that DEQ can require modeling for any permit modification even if the modification does not involve an increase in emissions and there is no suggestion of an issue. The same would be true at permit renewal. We believe that it would be appropriate to state in the rule that modeling can only be required if (a) there is a reasonable basis to believe that a NAAQS might be exceeded and (b) the source is requesting an increase in emissions. Without such criteria, DEQ is requesting unbridled discretion beyond anything contemplated by the Legislature. We support

the idea of there being some discretion for the Department to act, but believe all would be served better by including clear criteria for where modeling is not appropriate.

*Limits*

The Coalition is concerned about the proposed language in OAR 340-216-0064(3)(c), -216-066(3)(c) and -218-0050(1)(b) suggesting that DEQ could unilaterally impose limits on a source that conducted modeling. This concern was heightened at the April 15, 2022 RAC meeting where DEQ suggested adding language requiring limits if a source's modeling indicated that the combination of the source's impacts and background were 75 percent or more of the NAAQS. Such a suggestion is unnecessary and unduly punitive to existing sources for multiple reasons.

First, we want to be clear that we recognize that it is the foundation of air permitting that a source cannot cause or contribute to a NAAQS exceedance. For decades DEQ has implemented this doctrine by requiring sources to propose and accept such limits as are necessary to avoid an exceedance. However, what DEQ is considering goes far beyond this by imposing limits if a source's impacts, plus background, equal 75 percent of the NAAQS. There is no basis for the Department to impose source specific limits where the combination of background plus the source's modeled impacts (already a very conservative way of evaluating NAAQS compliance) results in worst case impacts of only 76 percent of the NAAQS. The problem with this approach becomes immediately apparent with $PM_{2.5}$ where the background value in the Portland area is, by itself, roughly 75 percent of the NAAQS. Again, we recognize that conditions must be accepted to prevent an *exceedance*, but there is no basis to impose conditions where this conservative analysis demonstrates not only that there is no exceedance, but that worst case impacts (which almost certainly will never occur) are only 76 percent of the standard.

Second, even in those situations where a limit is appropriate, it is the source, not DEQ, that should propose any limit. Obviously, any limit must be acceptable to the Department, but it should be the source, not the agency, that proposes how a source would limit its ambient impacts. We believe that may have been the intent of the Department, but the proposed rules are not clear in this regard and so we suggest the following revisions to the proposed language to clarify this point:

> For sources <u>where modeling or monitoring demonstrates</u> that permit conditions are necessary to ensure the source's emissions will not cause or contribute to an exceedance or violation of an ambient air quality standard adopted under OAR chapter 340, division 202, at the request of the owner or operator, DEQ may include any physical or operational limitation, including use of control devices, restrictions on hours of operation or on the type or amount of material combusted, stored, or processed as permit conditions to limit short term potential to emit; and ***

*Permit Renewals*

The Coalition is concerned that the proposed rule language allowing DEQ to require that a source perform modeling as part of a permit renewal does not take into account the timing for renewal submittals and the importance of the application shield. As stated above, we do not think that modeling should be a part of permit renewal unless (a) there is a reasonable basis to believe that a NAAQS might be exceeded, and (b) the source is requesting an increase in emissions. If modeling can be required for any renewal, a source will not know that it is required to submit modeling in advance of renewal submittal. As currently written, a source would potentially not know of the obligation to submit modeling as part of its renewal application up until the date that the renewal application is due. This creates an unacceptable risk to the source's ability to submit a timely renewal application and violates fundamental principles of fairness. We do not believe that it is the Department's intent to create such issues so we suggest that the rules include language clarifying the limited circumstances where modeling can be required at renewal.

Generic PSELs

The Coalition is concerned that the Department has defended the elimination of Generic PSELs as a means to ensure short term NAAQS are protected, but the proposed rule language goes far beyond what is necessary to achieve that goal. No Coalition member believes that it is appropriate to violate a NAAQS. We understand the Department's concern that if a source appears at risk of exceeding a short term NAAQS, automatically granting them a Generic PSEL could result in an issue. However the number of sources in this position is a small percentage of the overall number of sources that hold PSELs. In addition, the short term NAAQS concern only relates to three of the criteria pollutants, not all of them. Converting all of the Generic PSELs to source-specific PSELs will consume substantial Department resources. Addressing the permit changes required for minimal increases in PSELs (the issue that the Department previously addressed by creating Generic PSELs) will similarly consume massive resources on a going forward basis. Therefore, the proposed solution is far more than what is needed to address the perceived problem while needlessly consuming a tremendous amount of Department resources. The end result will be an exacerbation of DEQ's failure to meet timeliness goals, needless impacts on Oregon's ability to compete and a decrease in the Department's ability to recognize and address real problems.

The Coalition recommends that the Generic PSELs be maintained except where it is demonstrated through modeling or monitoring that there is a concern with a facility threatening NAAQS compliance. Consistent with discussion at the April 15, 2022 RAC meeting, we could see the Department limiting Generic PSELs to sources whose modeled emissions do not exceed 75 percent of the NAAQS. Where a source's ambient impacts, when added to background, are approaching the NAAQS, establishing source specific PSELs at less than the SER may be reasonable and appropriate. Outside of those circumstances, it is not.

New Air Permit Application Requirements

The Coalition is concerned by the changes proposed to the new permit application requirements. Specifically, DEQ is proposing to revise OAR 340-216-0040(1)(a)(E) to require a plot plan showing "the location and height of all devices, activities, process, including any pollution control devices". While we can understand the possible need to know the location and height of buildings and stacks, we do not see the need to show the precise location within a building of each piece of equipment and the height of that piece of equipment situated within a building. We suggest that this requirement be corrected to match the information needed and not the unnecessary information it is requiring.

Similarly, we suggest that DEQ re-examine the proposed changes to OAR 340-216-0040(1)(a)(F) and (G) which include requiring that the make and model of every device be included in an application. The precise make and model of every device is frequently not known at the time that the application is submitted. Given the tremendous permitting delays associated with air permitting in Oregon, it is typical to submit applications before all such details are determined. In fact, it is often required to do so as the permitting process could dictate what model of equipment is required. By revising the existing rules in the manner proposed, DEQ is making it so that an application that did not have a make and model for every device would be rejected as incomplete. Such specificity is difficult and contradicts the intent of the review process.

DEQ is proposing to eliminate agency accountability

The Coalition is concerned that, in the name of streamlining, DEQ is proposing to eliminate its accountability to regulated industry and the public. In its revisions to OAR 340-216-0040(10)(a), DEQ is proposing to delete the requirement for agency staff to promptly review air permit applications for completeness within 15 days of receipt. The requirement for timely DEQ action is important to the program and it contradicts DEQ's assertions of wanting to make the program more accountable, transparent, and robust. We request that DEQ eliminate this proposed revision and keep a clear timeline in the rules for review of applications for completeness.

Unplanned Upset Provisions

The Coalition continues to have serious concerns that DEQ is misstating the current wording and the Department's longstanding understanding of the upset rules in OAR 340-214-0330. By its terms, OAR 340-214-0330 applies exclusively to unplanned upsets. At the RAC meetings, DEQ expressed concern that sources thought that they could operate for 48 hours as they wished and with impunity if they experienced an upset or breakdown resulting in ongoing excess emissions. The regulated community unanimously called that reading of the rules into question. As further

demonstration that what was explained to the RAC is inconsistent with Department practice, we reproduce below the relevant condition from the current Department permit template reflecting the requirements of OAR 340-214-0330.

> If there is an ongoing excess emission caused by an upset or breakdown, the permittee must immediately take action to minimize emissions by reducing or ceasing operation of the equipment or facility, unless doing so could result in physical damage to the equipment or facility, or cause injury to employees. In no case may the permittee operate more than 48 hours after the beginning of the excess emissions, unless continued operation is approved by DEQ in accordance with OAR 340-214-0330(4).

This permit language underscores that the current rule language and its application does not grant a source carte blanche to emit for 48 hours during an upset resulting in excess emissions.

The proposed revisions to the rule add requirements that do not make sense and that will not be capable of being complied with for many sources. For example, if there is an unplanned upset, the proposed language would require shutting down immediately, but in no case longer than one hour, unless procedures approved in advance by the Department are followed. Several issues are presented by the proposed changes. First, large pieces of equipment often cannot be shut down within one hour so the proposed language mandating complete shutdown within one hour is inappropriate as it will often prove impossible. Second, OAR 340-214-0330 applies to unanticipated upsets and emergencies. Planned events are covered in other portions of Division 214 not reproduced in the draft rule package and so not available to the typical reader for context. If the excess emissions are due to a planned and anticipated event, it makes sense, as the rules already require, for a source to obtain advance approval from DEQ. However, where an unanticipated upset is involved, such advance approval is typically impossible to obtain.

We appreciate the Department adding consideration of whether immediate repair would result in higher emissions. However, as presently proposed, that consideration would only be relevant where a source is seeking advance approval of procedures and would be of no relevance if an unanticipated upset occurred. The Coalition continues to believe that considering whether immediate shutdown and repair would result in higher emissions is an appropriate and necessary response to excess emission conditions, regardless of whether an upset was evaluated, and responsive actions approved by DEQ in advance of the event.

For these reasons, we request that DEQ drop the proposed revisions to Division 214 and focus on demonstrated issues.

Short Term Activity ACDPs

The Coalition supports the proposed addition of Short-Term Activity ACDPs in OAR 340-216-0054. We believe that this is a constructive change to the rules. However, we are concerned that there could be activities appropriate for coverage under a Short-Term Activity ACDP that cannot be reasonably accomplished in 120 days (*i.e.*, the initial term plus the single allowed extension). For example, an extended pilot study of an innovative control device can often take longer than 120 days and yet is not appropriate for coverage under any other type of ACDP. For this reason, we suggest that DEQ draft the rules so that it is able to grant, at a minimum, two 60-day extensions and, preferable, up to one year of aggregate coverage under a Short-Term Activity ACDP. The Department can approve or disapprove of an extension depending on the need. However, limiting the permit to a 60-day period and single 60 day extension unnecessarily constrains the agency's discretion.

Expiration of NOC Approvals

The Coalition believes that some, but not all, of the proposed revisions to OAR 340-210-0240(5) are appropriate. This section of the proposed revisions would require construction to start within 18 months, not pause for longer than 18 months and reach completion within 18 months of the projected completion date. We are not fundamentally opposed to the idea of NOC approvals having a deadline for commencement of construction given provisions, like those proposed, for seeking extensions under extenuating circumstances. However, we are greatly concerned by the idea of an NOC expiring if the project takes 18 months longer to complete than was initially contemplated. Innumerable examples exist of projects that have taken longer to finish than thought before ground was broken. Delays can be attributable to pandemics, unforeseen soil stability issues, or delays in non-DEQ permitting processes or labor shortages or disputes, just to name a few. No business will delay a project unnecessarily as time is money and delaying a return on capital is never desired. Therefore, we urge DEQ to eliminate the expiration of an NOC 18 months after the anticipated construction completion date. At the very least, the ability to obtain an extension should be included in the rules—as proposed, extensions are only available for delay in the start of construction. However, there is no good policy served by having an NOC expire where construction started in a timely fashion, but completion has been delayed.

Change in Definition of "Greenhouse Gases"

The Coalition is concerned with the proposed change in definition of "greenhouse gases" in OAR 340-200-0020(73)(a). The proposed changes to the definition would delegate the authority to determine what constitutes a greenhouse gas in Oregon to EPA. This is neither appropriate nor legal. There is well established case law that it is a violation of the Oregon Constitution for an agency to prospectively adopt changes to federal rules. As proposed, the definition of "greenhouse gases" would run afoul of this constitutional prohibition. We recommend that DEQ

not revise the "greenhouse gas" definition in OAR 340-200-0020(73)(a) as doing so will call into question years of permitting based on the current definition.

Change to Definition of "Significant Emission Rate"

The Coalition is concerned that DEQ is making a significant change to the definition of "significant Emission Rate" or "SER" without adequate process, explanation, or policy basis. Significant emission rates are used in many manners in the regulations, including determining the type of NOC a facility is required to submit. SERs are established for some of the regulated pollutants, but not for the majority of them. OAR 340-200-0020(161)(v) enables DEQ to determine an SER where one is not listed. DEQ is proposing to simply set the SER at "zero" for any pollutant not listed. The proposed approach does not make good policy sense as Oregon has myriad regulated air pollutants for which SERs have not been established and it is critical that DEQ have the ability to determine an SER for such a pollutant if necessary to do so as part of a permitting action. Automatically and irrevocably setting SERs to "zero" for these pollutants is an abdication of DEQ's permitting responsibilities. For this reason, we suggest that DEQ drop this proposed revision.

Removal of tert butyl acetate Exemption Status

The Coalition is concerned that DEQ is reversing a prior determination as to the exempt status of tert butyl acetate without undergoing the appropriate analysis. The current definition of VOC in OAR 34-200-0020(191) exempts tert butyl acetate for the purposes of VOC emissions limitations and VOC content requirements, while leaving this chemical regulated as a VOC for other purposes. DEQ is proposing to change that regulatory status without explanation or justification. We do not believe that this is merited or proper and request that DEQ not change the definition of VOC as it relates to tert butyl acetate without adequate analysis and process—neither of which have been shared in the context of this rulemaking.

Changes to Permit Appeal Rights

The Coalition objects to certain of DEQ's proposed changes to its rules governing the timing and procedure for an applicant to request a hearing in response to DEQ's issuance of an air permit.

As to timing, DEQ's proposed OAR 340-209-0080(5)(b) would require that any request for hearing in response to a permit's issuance be made "in writing within 20 days of the date of mailing of the notification of issuance of the permit." DEQ's proposal contravenes Oregon's Administrative Procedures Act, at ORS 183.415, which governs the contested case hearing process and requires that all parties be afforded an opportunity for hearing "after reasonable notice, served personally or by registered or certified mail." To the extent that proposed -0080(5)(b) intends to authorize DEQ to notify an applicant of permit issuance by first class mail or by electronic communication, such notice would not be effective. Moreover, fairness dictates

that the time to request a contested case hearing in response to permit issuance should not begin to run until the applicant has actually received the permit, as issued.

As to procedure, proposed OAR 340-209-0080(5)(b) would require an applicant requesting a contested case hearing in response to a permit's issuance to "specify which permit conditions are being contested and why, including each alleged factual or legal objection". Through this proposed language, DEQ plainly seeks to limit in advance the issues that may be considered in any contested case hearing that is brought in response to a permit's issuance. But DEQ lacks authority to unilaterally define or constrain the set of issues or evidence considered in a contested case hearing. Instead, as Oregon's Administrative Procedures Act makes clear at ORS 183.417, it is solely for the presiding officer of the contested case hearing to determine the issues and evidence before them. To avoid undermining the statutory authority of the presiding officer in a contested case brought in response to a permit's issuance, DEQ should delete the second sentence in proposed OAR 340-209-0080(5)(b) in its entirety.

DEQ's proposed language for considering stays to contested permit conditions, at OAR 340-209-0080(5)(b)(B), also requires revision for consistency with Oregon's Administrative Procedures Act. The Act, at ORS 183.482(3), specifies the criteria that the agency must apply when considering a request to stay enforcement of a final order (*e.g.*, an air permit denial or issuance) that has been issued following a contested case proceeding and has been appealed for judicial review. To be lawful, the criteria or "test" for DEQ's issuance of a stay set out in proposed -0080(5)(b)(B) must be revised so to be no more restrictive than ORS 183.482(3). For example, whereas -0080(5)(b)(B) would require permittees to demonstrate to DEQ's satisfaction "a reasonable likelihood of success on the merits," ORS 183.482(b)(3)(a) merely requires a showing of a "colorable claim of error".

## Conclusions

All Coalition members are committed to maintaining the clean air that we have in Oregon. The vast majority of Oregon, including all of its major metropolitan areas, are in compliance with all of the National Ambient Air Quality Standards and have been for many years. To the extent that there have been elevated days in recent years, the elevated values have been directly attributable to regional forest fires. DEQ modeling has demonstrated that industrial sources are a minor source of air pollution in Oregon—dwarfed by mobile and nonroad sources. Industry supports changes to the regulations that streamline processes and reduce inefficiencies as that frees up DEQ staff time and avoids expensive efforts that do not have commensurate environmental benefits. However, many of the regulatory changes proposed to date are expected to increase regulatory burden without a meaningful increase in environmental protection.

We look forward to further discussions as this rulemaking process continues. Please do not hesitate to call if you have any questions about these comments.

Sincerely,

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