

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,  
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF  
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR ) FINAL ORDER  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M129333  
(BALLOT MEASURE 37) OF )  
Gladys Pond-Dalgity and Gordon Dalgity, CLAIMANTS )

Claimants: Gladys Pond-Dalgity and Gordon Dalgity (the Claimants)

Property: Township 6S, Range 8W, Section 2, Tax lots 100 and 200, Yamhill County  
(the Property)

Claim: The demand for compensation and any supporting information received from the  
Claimants by the State of Oregon (the Claim).

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimants' division of the 55.33-acre subject property into 5-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goals 3, 4 and 14, ORS 215 and OAR 660-004-0040 and 660, divisions 6, and 33, enacted or adopted after each claimant acquired the subject property. These land use regulations will not apply only to the extent necessary to allow Gladys Pond-Dalgity to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on July 31, 1969. These land use regulations will not apply only to the extent necessary to allow Gordon Dalgity to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on September 10, 2002. The department acknowledges that the relief to which Gordon Dalgity is entitled under ORS 197.352 will not allow him to use the subject property for the claimants' desired use.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect when

Gladys Pond-Dalgity acquired the property on July 31, 1969, and when Gordon Dalgity acquired the property on September 10, 2002. On September 10, 2002, the property was subject to the applicable provisions of Goals 3, 4 and 14, ORS 215 and OAR 660-004-0040 and 660, divisions 6, and 33.

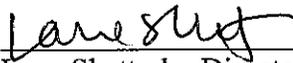
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

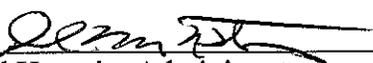
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND  
CONSERVATION AND  
DEVELOPMENT COMMISSION:

  
\_\_\_\_\_  
Lane Shetterly, Director  
DLCD

Dated this 6<sup>th</sup> day of November, 2006.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
\_\_\_\_\_  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 6<sup>th</sup> day of November, 2006.

## **NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF**

You are entitled, or may be entitled, to judicial remedies including the following:

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

### **FOR INFORMATION ONLY**

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**  
**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**  
**Final Staff Report and Recommendation**

November 6, 2006

**STATE CLAIM NUMBER:** M129333

**NAMES OF CLAIMANTS:** Gladys Pond-Dalgity  
Gordon Dalgity

**MAILING ADDRESS:** PO Box 385  
Grand Ronde, Oregon 97347

**PROPERTY IDENTIFICATION:** Township 6S, Range 8W, Section 2  
Tax lots 100 and 200  
Yamhill County

**DATE RECEIVED BY DAS:** May 16, 2006

**180-DAY DEADLINE:** November 12, 2006

**I. SUMMARY OF CLAIM**

The claimants, Gladys Pond-Dalgity and Gordon Dalgity, seek compensation in the amount of \$280,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 55.33-acre subject property into 5-acre parcels and to develop a dwelling on each parcel.<sup>1</sup> The subject property is located on SW Hebo Road, near Grand Ronde, in Yamhill County. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimants' division of the 55.33-acre subject property into 5-acre parcels and to

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<sup>1</sup> The claim also indicates that the claimants desire to transfer the newly created parcels for development. In effect, the claimants request that a decision of the department to "not apply" (waive) certain laws as set forth in this report be transferable with the property. ORS 197.352 only authorizes a state agency to waive a law in order to allow the current owner a use of the property permitted at the time that owner acquired the property. A determination of transferability is beyond the scope of relief that the department may grant under ORS 197.352. The Oregon Department of Justice has advised the department that "[i]f the current owner of the real property conveys the property before a new use allowed by the public entity is established, then the entitlement to relief will be lost." Therefore, the relief granted in this report cannot and does not create a transferable waiver.

their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands), 4 (Forest Lands) and 14 (Urbanization), ORS 215 and Oregon Administrative Rules (OAR) 660-004-0040 and 660, divisions 6, and 33, enacted or adopted after each claimant acquired the subject property. These laws will not apply to Gladys Pond-Dalgity only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property in 1969. The laws will not apply to Gordon Dalgity only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property in 2002. The department acknowledges that the relief to which Gordon Dalgity is entitled under ORS 197.352 will not allow him to use the subject property for the claimants' desired use. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On September 15, 2006, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments were received in response to the 10-day notice.

### **IV. TIMELINESS OF CLAIM**

#### **Requirement**

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

#### **Findings of Fact**

This claim was submitted to DAS on May 16, 2006, for processing under OAR 125, division 145. The claim identifies local zoning ordinances as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

#### **Conclusions**

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

## V. ANALYSIS OF CLAIM

### **1. Ownership**

ORS 197.352 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

### **Findings of Fact**

Claimant Gladys Pond-Dalgity acquired the subject property on July 31, 1969, as reflected by a warranty deed included with the claim. Claimant Gordon Dalgity acquired an interest in the subject property from his wife Gladys Pond-Dalgity on September 10, 2002, as reflected by a deed submitted with the claim. The Yamhill County Assessor’s Office confirms the claimants’ current ownership of the subject property.

### **Conclusions**

The claimants, Gladys Pond-Dalgity and Gordon Dalgity, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C). Gladys Pond-Dalgity has been an owner since July 31, 1969. Gordon Dalgity has been an owner since September 10, 2002. Gladys Pond-Dalgity is a “family member” of Gordon Dalgity, as that term is defined by ORS 197.352(11)(A).

### **2. The Laws That are the Basis for This Claim**

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimants’ use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants or a family member acquired the property.

### **Findings of Fact**

The claim indicates that the claimants desire to divide the 55.33-acre subject property into 5-acre parcels and to develop a dwelling on each parcel. It indicates that local zoning ordinances prevent the desired use.

The claim is based generally on the applicable provisions of state law that require mixed farm-forest zoning and restrict uses on land zoned mixed farm-forest and on the applicable provisions of state law that regulate rural residential zoning.

A portion of the subject property, including tax lot 100 and the northern half of tax lot 200, is zoned AF-80 by Yamhill County. The AF-80 zone is a mixed agricultural and forest land zone, as required by Goal 4 and the implementing provisions of OAR 660-006-0050 (effective on February 5, 1990), subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Goals 3 and 4 are allowed in mixed agriculture and forest zones except that for dwellings, either the Goal 3 or 4 standards are

applicable based on the predominant use of the tract on January 1, 1993.<sup>2</sup> Depending on the predominant use on that date, the property is subject to either the requirements for dwellings applicable under exclusive farm use zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the 80-acre minimum lot size specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Yamhill County's AF-80 zone is 80 acres. The claimants' property cannot be divided into parcels smaller than 80 acres.

The remainder of the subject property, consisting of the southern half of tax lot 200, is zoned AF-10 by Yamhill County. The AF-10 zone is a rural residential zone, consistent with Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses. The county's AF-10 zone was adopted on February 11, 1976, and requires a minimum of 10 acres for the creation of a new lot or parcel.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,<sup>3</sup> the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000. The rule states that if a county rural residential zone in effect on October 4, 2000, specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size that is already in effect (OAR 660-004-0040(7)(c)). Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). The rule also provides that a county's minimum lot size requirement in a rural residential zone shall not be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)). Because Yamhill County's AF-10 zone was in effect on October 4, 2000, and requires a minimum lot size of 10 acres, the minimum lot size for any new lot or parcel must equal or exceed 10 acres.

Gladys Pond-Dalgity acquired the subject property in 1969, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the subject property in 1969.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established under Goals 3 and 4 for lands zoned for mixed farm-forest use and Goal 14 for lands zoned for rural residential use, and the statutory and rule restrictions under applicable provisions of ORS 215 and OAR 660-004-0040 and 660, divisions 6, and 33, were enacted or adopted after Gladys Pond-Dalgity acquired the subject property in 1969. These laws restrict the use of the subject property relative to the uses allowed when Gladys Pond-Dalgity acquired the property.

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<sup>2</sup> No information was provided to the department regarding the predominant use of the property on January 1, 1993.

<sup>3</sup> *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property, based on the use that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

### **3. Effect of Regulations on Fair Market Value**

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulations (described in Section V.(2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein."

#### **Findings of Fact**

The claim includes an estimate of \$280,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on the claimants' estimate of the sales of comparable properties in the vicinity of the subject property.

#### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Gladys Pond-Dalgity who acquired the subject property on July 31, 1969, and her husband Gordon Dalgity. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since Gladys Pond-Dalgity acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$280,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since Gladys Pond-Dalgity acquired the property.

### **4. Exemptions Under ORS 197.352(3)**

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

## **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the subject property, relative to the uses permitted when Gladys Pond-Dalgity acquired the property, including applicable provisions of Goals 3, 4 and 14, ORS 215 and OAR 660-004-0040 and 660, divisions 6, and 33, which Yamhill County has implemented through its AF-80 and AF-10 zones. All of these land use regulations were enacted or adopted after Gladys Pond-Dalgity acquired the subject property.

## **Conclusions**

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that none of the general statutory, goal and rule restrictions on division and development of the claimants' property were in effect when Gladys Pond-Dalgity acquired the subject property in 1969. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when Gladys Pond-Dalgity acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. The provisions include fire protection standards for dwellings and for surrounding forest zones. ORS 197.352 (3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." To the extent they are applicable to the claimants' property, the siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

There may be other laws that continue to apply to Gladys Pond-Dalgity's use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When Gladys Pond-Dalgity seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

## **VI. FORM OF RELIEF**

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

## **Findings of Fact**

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict Gladys Pond-Dalgity's desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$280,000. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when Gladys Pond-Dalgity acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Gladys Pond-Dalgity to use the subject property for a use permitted at the time she acquired the property on July 31, 1969, and to allow Gordon Dalgity to use the subject property for a use permitted at the time he acquired the property on September 10, 2002.

At the time Gordon Dalgity acquired an interest in the subject property in 2002, it was zoned AF-80 and AF-10, and subject to the current laws in effect, as described in Section V.(2) of this report.

In addition to the applicable provisions of Goals 3, 4, and 14, ORS 215 and OAR 660-004-0040 and 660, divisions 6, and 33, in effect when Gordon Dalgity acquired the property on September 10, 2002, there may be other laws that apply to his use of the property that have not been identified in the claim.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the use that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

## **Conclusions**

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimants' division of the 55.33-acre subject property into 5-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goals 3, 4 and 14, ORS 215 and OAR 660-004-0040 and 660, divisions 6, and 33, enacted or adopted after each claimant

acquired the subject property. These land use regulations will not apply only to the extent necessary to allow Gladys Pond-Dalgity to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on July 31, 1969. These land use regulations will not apply only to the extent necessary to allow Gordon Dalgity to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on September 10, 2002. The department acknowledges that the relief to which Gordon Dalgity is entitled under ORS 197.352 will not allow him to use the subject property for the claimants' desired use.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect when Gladys Pond-Dalgity acquired the property on July 31, 1969, and when Gordon Dalgity acquired the property on September 10, 2002. On September 10, 2002, the property was subject to the applicable provisions of Goals 3, 4 and 14, ORS 215 and OAR 660-004-0040 and 660, divisions 6, and 33.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on October 17, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.