

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. M129444  
(BALLOT MEASURE 37) OF )  
Bob G. Cicerchi, CLAIMANT )

Claimant: Bob G. Cicerchi (the Claimant)

Property: Township 5N, Range 2W, Section 1, Tax lot 600, Columbia County  
(the Property)

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

Claimant 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 Bob Cicerchi's division of the 39.70-acre subject property into six 5-acre parcels and one 6.6-acre parcel and development of a dwelling on each of the 5-acre parcels: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after December 14, 1992. These land use regulations will not apply to the claimant 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 on December 14, 1992. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 may not allow the claimant to use the subject property for the claimant's desired use.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on December 14, 1992. On that date, the property was subject to compliance with Goals 3 and 4, and OAR 660, divisions 5, and 6, as implemented through Columbia County's acknowledged FA-19 zone, and the applicable provisions ORS 215 then in effect.

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 claimant first obtains 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 property by the claimant 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 claimant to use the subject property, it may be necessary for him 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 claimant 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 claimant.

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:

  
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Lane Shetterly, Director  
DLCD  
Dated this 22<sup>nd</sup> day of November, 2006.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
\_\_\_\_\_  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 22<sup>nd</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 22, 2006

**STATE CLAIM NUMBER:** M129444

**NAME OF CLAIMANT:** Bob G. Cicerchi

**MAILING ADDRESS:** 65353 Olsen Road  
Deer Island, Oregon 97054

**PROPERTY IDENTIFICATION:** Township 5N, Range 2W, Section 1  
Tax lot 600  
Columbia County

**OTHER CONTACT INFORMATION:** Kevin V. Harker  
Vial Fotheringham LLP  
7000 SW Varns Street  
Portland, Oregon 97223

**DATE RECEIVED BY DAS:** June 2, 2006

**180-DAY DEADLINE:** November 29, 2006

**I. SUMMARY OF CLAIM**

The claimant, Bob Cicerchi, seeks compensation in the amount of \$900,000 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 claimant desires compensation or the right to divide the 39.70-acre subject property into six 5-acre parcels and one 6.6-acre parcel and develop a dwelling on each of the 5-acre parcels.<sup>1, 2</sup> The subject property is located at 65353 Olsen Road, near Deer Island, in Columbia County. (See claim.)

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<sup>1</sup> The claim also suggests that the claimant may desire to sell the newly created parcels for development. In effect, the claimant requests 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."

<sup>2</sup> In response to the draft staff report issued October 23, 2006, the claimant's attorney submitted a response, asserting that Mr. Cicerchi may desire another use of his property, and that the "Department's findings should reflect the fact that Mr. Cicerchi may choose to develop his property in any manner consistent with the zoning and laws in effect" when he acquired the property. Contrary to the attorney's assertion, ORS 197.352 does not remove or change zoning, and does not allow the claimant to pursue any use permitted when a claimant acquired the subject property. ORS 197.352 allows the department to waive regulations to allow "a use" that was permitted at the time the claimant

## 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 Bob Cicerchi's division of the 39.70-acre subject property into six 5-acre parcels and one 6.6-acre parcel and development of a dwelling on each of the 5-acre parcels: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33, enacted or adopted after December 14, 1992. These laws will not apply to the claimant 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 on December 14, 1992. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 may not allow the claimant to use the subject property for the claimant's desired use. (See the complete recommendation in Section VI of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On September 27, 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.

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acquired the property. If the claimant desires another use of this property than the use for which this waiver is granted, the claimant may file a new claim for that other use.

## **Findings of Fact**

This claim was submitted to DAS on June 2, 2006, for processing under OAR 125, division 145. The claim identifies provisions of the Columbia County Zoning Ordinance 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**

The claimant, Bob Cicerchi, originally acquired the subject property from his mother, Marianna Cicerchi, on May 24, 1963, as reflected by a deed included with the claim. Marianna Cicerchi acquired the subject property on May 24, 1950, as reflected by a deed included with the claim.<sup>3</sup> On March 3, 1971, the claimant conveyed a life estate in the property to Ettore E. Cicerchi. That conveyance granted Ettore Cicerchi the exclusive right to use the property during Ettore Cicerchi’s lifetime. The claimant retained no right to use the subject property during the term of Ettore Cicerchi’s life estate. Bob Cicerchi acquired his present interest and right to use the subject property on December 14, 1992, upon Ettore Cicerchi’s death.<sup>4</sup> The Columbia County Assessor’s Office confirms the claimant’s current ownership of the subject property.

## **Conclusions**

The claimant, Bob Cicerchi, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of December 14, 1992. Marianna Cicerchi is a “family member” of Bob

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<sup>3</sup> Marianna Cicerchi had previously acquired and sold the subject property prior to acquiring it in 1950.

<sup>4</sup> I response to the October 23, 2060 draft staff report, the claimant’s attorney submitted an objection to the department’s conclusion regarding the date of the claimant’s acquisition of the property. He asserts that the retention of the life estate “only gave Mr. Cicerchi’s mother an ‘exclusive right to use’ the property,” which, “by implication” gave Mr. Cicerchi “ownership” of it. However, until Mr. Cicerchi’s mother’s death, the claimant did not have any right to use the subject property. Under ORS 197.352 an “owner” must have an ownership interest that can be restricted by land use regulations. Until his mother’s death, Mr. Cicerchi had a future interest in the property, which interest could not be restricted by land use regulations. Upon his mother’s death, Mr. Cicerchi had a present right to use the property that could be restricted by land use regulations and, therefore, became “owner” for purposes of ORS 197.352.

Cicerchi as defined by ORS 197.352(11)(A). The property has been owned continuously by a family since May 24, 1950.

## **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 claimant's 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 claimant or a family member acquired the property.

### **Findings of Fact**

The claim indicates that the claimant desires to divide the 39.70-acre subject property into six 5-acre parcels and one 6.6-acre parcel and develop a dwelling on each of the 5-acre parcels, and that the property's current zoning prohibits the desired use.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) and forest land zoning. The claimant's property is zoned by Columbia County as Forest-Agriculture (FA-19). The FA-19 zone is a mixed agricultural and forest land zone, as provided for by Goal 4 and the implementing provisions of OAR 660, division 6 (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>5</sup> Depending on the predominant use on January 1, 1993, the property is subject to either the requirements for dwellings applicable under EFU 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 minimum lot size specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Columbia County's FA-19 zone is 80 acres. ORS 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993).

The claimant's family first acquired the subject property on May 24, 1950, prior to the adoption of statewide planning goals and their implementing statutes and regulations.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established pursuant to Goal 4 for lands zoned for mixed farm-forest use and the statutory and rule restrictions under applicable provisions of ORS 215 and OAR 660, divisions 6, and 33, were enacted or adopted

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<sup>5</sup> No information was provided to the department regarding the predominant use of the subject property on January 1, 1993.

after the claimant's family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimant's family acquired the property.

### **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 \$900,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is based on a real estate agent's comparative market analysis included with the claim.

#### **Conclusions**

As explained in Section V.(1) of this report, the claimant is Bob Cicerchi whose family acquired the subject property in 1950. Under ORS 197.352, the claimant is 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 the claimant's family acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations on the fair market value of the subject property is a reduction of \$900,000.

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 that 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 the claimant's family 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, including applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Columbia County has implemented through its current FA-19 zone. All of these land use regulations were enacted or adopted after the claimant's family acquired the subject property.

#### **Conclusions**

It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimant's family acquired the

property on May 24, 1950. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimant's family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

The department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. 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 claimant's 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).

## **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 current 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 the claimant'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 \$900,000. 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 claimant's desired use of the subject property was allowed under the standards in effect when the claimant's family 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 Bob Cicerchi to use the subject property for a use permitted at the time he acquired the property on December 14, 1992.

At the time the claimant acquired the subject property on December 14, 1992, it was subject to Columbia County's acknowledged FA-19 zone.<sup>6</sup> When the claimant acquired the subject property, his desired use of the property would have been governed by the county's acknowledged FA-19 zone and the applicable provisions of ORS 215 then in effect.<sup>7</sup> The claim does not establish whether or to what extent the claimant's desired division and development of the subject property was allowed under the standards in effect when he acquired the property on December 14, 1992.

In addition to the applicable provisions of Goals 3 and 4 and ORS 215 and in effect on December 14, 1992, there may be other laws that apply to the claimant's 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 claimant 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).

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 uses that the claimant has 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 claimant should be aware that the less information he has provided to the department in his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his 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 Bob Cicerchi's division of the 39.70-acre subject property into six 5-acre parcels and one 6.6-acre parcel and development of a dwelling on each of the 5-acre parcels: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted

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<sup>6</sup> Columbia County's FA-19 zone was acknowledged by the Commission for compliance with Goals 3 and 4 on August 9, 1985. The FA-19 zone established a 19-acre minimum lot size for new lots or parcels.

<sup>7</sup> After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

In 1992, ORS 215.263 (1991 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan. ORS 215.283(1)(f) (1991 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

after December 14, 1992. These land use regulations will not apply to the claimant 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 on December 14, 1992. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 may not allow the claimant to use the subject property for the claimant's desired use.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on December 14, 1992. On that date, the property was subject to compliance with Goals 3 and 4, and OAR 660, divisions 5, and 6, as implemented through Columbia County's acknowledged FA-19 zone, and the applicable provisions ORS 215 then in effect.

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 claimant first obtains 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 property by the claimant 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 claimant to use the subject property, it may be necessary for him 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 claimant 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 claimant.

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

The department issued its draft staff report on this claim on November 3, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's 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. No comments were received.