Oregon
Theodore R. Kulongoski, Governor

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September 21, 2007

To: Interested Persons

From: Lane Shetterly, Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M131109

Claimant: Chris Muller

Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (ORS 197.352), is the Final Staff Report and Recommendation of the Department of Land Conservation and Development, and the Final Order.

This Final Staff Report and Recommendation and the Final Order constitute the final decision on this claim. No further action will be taken on this matter.

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. M131109
(BALLOT MEASURE 37) OF	)	
Chris Muller, CLAIMANT	)	

Claimant: Chris Muller (the Claimant)

Property: Township 7S, Range 6W, Section 1, Tax lots 700 and 703
Polk 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 Chris Muller's development of a rock quarry on the subject property: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660-006-0025(5)(a). 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 November 12, 1955.

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 November 12, 1955.

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 subject 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.

6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

This Order is entered by the Acting 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 Manager for the Measure 37 Services Unit 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:

Cora R Parker

Cora R. Parker, Acting Director
DLCD
Dated this 21st day of September, 2007.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Carla Ploederer

Carla Ploederer, Manager
DAS, Measure 37 Services Unit
Dated this 21st day of September, 2007.

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

September 21, 2007

STATE CLAIM NUMBER:	M131109
NAME OF CLAIMANT:	Chris Muller
MAILING ADDRESS:	16985 Brown Road Dallas, Oregon 97338
PROPERTY IDENTIFICATION:	Township 7S, Range 6W, Section 1 Tax lots 700 and 703 Polk County
OTHER CONTACT INFORMATION:	Stephen F. Mannenback, AAL PO Box 220 Dallas, Oregon 97338
DATE RECEIVED BY DAS:	November 21, 2006
DEADLINE FOR FINAL ACTION:[1]	May 14, 2008

I. SUMMARY OF CLAIM

The claimant, Chris Muller, seeks compensation in the amount of $28 million 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 develop a rock quarry on the 106.94-acre subject property.[2] The subject property is located at 15753 Salt Creek Road), northwest of Dallas, in Polk County. (See claim).

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[1] ORS 197.352, as originally enacted, required that final action on claims made under Measure 37 be made within 180 days of the date the claim was filed. In response to the large volume of claims filed in late 2006, the Oregon legislature passed House Bill 3546, which became effective on May 10, 2007. This legislation increased the amount of time state and local governments have to take final action on Measure 37 claims filed on or after November 1, 2006, by 360 days, to a total of 540 days.

[2] The subject property includes two tax lots. Tax lot 700 consists of 66.89 acres and tax lot 703 consists of 40.05 acres. The claim, as originally filed, indicated that the claimant desired to both develop the property as a rock quarry and to divide the property into twenty-two, 5-acre parcels for residential development. In response to the department's letter dated July 9, 2007, requesting clarification of the claimant's desired uses of the subject property, the claimant's agent submitted a letter, dated July 11, 2007, requesting to eliminate from the claim the claimant's desired residential division and development. Accordingly, this claim is evaluated based only on the claimant's desire to develop the property as a rock quarry.

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 Chris Muller's development of a rock quarry on the subject property: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660-006-0025(5)(a). 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 in 1955. (See the complete recommendation in Section VI. of this report).

III. COMMENTS ON THE CLAIM

Comments Received

On June 25, 2007, 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, two written comments were received in response to the 15-day notice.

The comments do not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letters in the department's claim file).

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 November 21, 2006, for processing under OAR 125, division 145. The claim identifies ORS 215.298 and Polk County's 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, Chris Muller, acquired the subject property on November 12, 1955, as reflected by a recorded warranty deed included with the claim. On April 18, 1990, the claimant transferred the subject property to a revocable trust, the Muller Family Revocable Trust, with himself as a trustee, as evidence by findings contained in Polk County's report and decision for this claim.[3] The Polk County Assessor's Office confirms the claimant's current ownership of the subject property.

Conclusions

The claimant, Chris Muller, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of November 12, 1955.

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 develop a rock quarry on the subject property, and that ORS 215.298 and Polk County's zoning regulations restrict his desired use.

The claim is based, in part, on the applicable provisions of state law that allow mixed agriculture-forest zoning and restrict uses on land zoned mixed agriculture-forest. The claimant's property is zoned Farm/Forest (F/F) by Polk County. The county's F/F zone is a

[3] Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

mixed agricultural and forest land zone, in accordance with Goals 3 and 4, as implemented by OAR 660-006-0050. Goals 3 and 4 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned for farm uses and that forest lands under Goal 4 be zoned for forest uses. OAR 660-006-0050 authorizes local governing bodies to establish mixed agriculture-forest zones in accordance with both Goals 3 and 4 and OAR 660, divisions 6, and 33. Under OAR 660-006-0050(2), effective on February 5, 1990, and subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993), uses allowed in Exclusive Farm Use (EFU) zones under Goal 3 and forest zones under Goal 4 are allowed in mixed agriculture-forest zones.

ORS 215.283(2), ORS 215.296 ORS 215.298, ORS 215.780 and OAR 660-006-0025, enacted or adopted pursuant to Goals 3 and 4, establish standards for development of aggregate mining operations on farm or mixed farm-forest-zoned land.

ORS 215.283(2)(b)(B) allows "mining, crushing or stockpiling of aggregate and other mineral and other subsurface resources subject to ORS 215.298." In addition, all uses allowed under ORS 215.283(2) are also subject to compliance with ORS 215.296.[4] ORS 215.298 requires a local land use permit for mining more than 1,000 cubic yards of material or excavation preparatory to mining of a surface area of more than one mile, and allows permits only on proposed mining or aggregate site that are included on an acknowledged inventory. [5]

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[4] ORS 215.296 allows uses permitted under ORS 215.283(2) to be approved only when the local governing body or designate determines that "the use will not: (a) force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or (b) significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

[5] Operations for the exploration, mining and processing of aggregate and other mineral resources or other subsurface resources have been allowed uses on land zoned EFU since SB 101 was enacted on October 5, 1973 (chapter 503 Or Laws 1973). In 1989, ORS 215.213(2) was amended to delete the previous review standard "if the use meets reasonable standards adopted by the governing body" and replaced it with the current standards for review under ORS 215.296 for uses and activities listed in ORS 215.213(2) or 215.283(2) (Sections 1, 2 and 6 of chapter 861 Or Laws 1989, HB 2682). The 1989 Act also amended ORS 215.213 and 215.283 to require that the mining of aggregate under ORS 215.213(2) (d) and 215.283(2) (b) be subject to the conditions under ORS 215.298 (Section 7 of chapter 861 Or Laws 1989, HB 2682).

The claimant's desired use is permitted in Polk County's F/F zone as a conditional use.[6]

The claimant acquired the subject property on November 12, 1955, prior to the adoption of statewide planning goals and their implementing statutes and regulations.

Conclusions

The current zoning requirements, and development standards established under Goals 3 and 4, ORS 215 and OAR 660, division 6, for aggregate mining and mining operations on land zoned for mixed agriculture-forest use, were enacted or adopted after the claimant acquired the subject property in 1955 and restrict the use of the subject property relative to the uses allowed when the claimant acquired the property.

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 claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to 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.

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 $28 million as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired development of a rock

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[6] Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces), also enacted in 1975, establishes procedures and criteria for inventorying and evaluating Goal 5 resources and for developing land use programs to conserve and protect significant Goal 5 resources. Aggregate and mineral resources are resources that are subject to the provisions of Goal 5 and the Goal 5 administrative rule (OAR 660-023-0180). In 1981, the Commission adopted OAR 660, division 16, establishing the process for applying Goal 5 to significant aggregate sites. In 1996, the Commission adopted OAR 660, division 23, replacing OAR 660, division 16, with a new process for inventories, evaluating, and designating significant aggregate sites under Goal 5. The rule was later amended in 2004. The intent of Goal 5 and the implementing regulations is to identify and protect significant resources, including mineral and aggregate resources, to allow their use. The rule also protects significant resources (including aggregate sites) from conflicting uses associated with uses on neighboring properties.

OAR 660-023-0030 (2) through (6) are the general rules governing the inventory process used to locate, evaluate resources, determine significance, and develop a program to protect Goal 5 resources. The rules specify that local governments are to apply the criteria in OAR 660-023-0180(3) or (4), whichever is applicable, rather than OAR 660-023-0030(4), in determining whether an aggregate resource site is significant (OAR 660-023-0180(2)(b)). The claimant's property has not been determined to be a significant aggregate resource site by the county and, therefore, OAR 660-023-0030(2) through (6) do not apply to the use of this site by the claimant for the mining of aggregate.

quarry on the property. This amount is based on a civil engineer's assessment of the property's value, included with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimant is Chris Muller who acquired the subject property on November 12, 1955. 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 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 $28 million.

Without an appraisal or other documentation, and without verification of whether or how the state land use regulations enacted or enforced since the claimant acquired the property actually decrease the property's value, 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 may have been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

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, division 6, which Polk County has implemented through its F/F zone. All of these land use regulations were enacted or adopted after the claimant 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 development of a rock quarry on the subject property were in effect when the claimant acquired it in 1955. As a result, those laws that restrict the claimant's desired use relative to the uses allowed at the time he acquired the property are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, particularly OAR 660-006-0027, -0029 and -0035, include fire protection standards for dwellings and structures in forest and mixed agriculture-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. . . ." Accordingly, the siting standards for structures in forest zones in ORS 215.730 and in forest and mixed agriculture-forest zones in OAR 660, division 6, are exempt under ORS 197.352(3)(B), as are the fire protection provisions under OAR 660-006-0025(5)(b).[7]

There may be other laws that continue to apply to the claimant'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 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 use 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 the 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.

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 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 $28 million. 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

[7] Laws administered by other state agencies that are not identified in this claim may come under this exemption, including but not limited to, laws administered by the Department of Geology and Mineral Industries, laws related to access, laws relating to removal or fill of material from waters of the state and laws relating to water quality or threatened or endangered species. This claim does not seek a waiver of any laws enforced by these agencies, and to the extent they apply to the claimant's desired use, nothing in the department's action on this claim affects these laws.

standards in effect when he acquired the property and whether the laws currently in effect actually reduce the property's fair market value. 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 Chris Muller to use the subject property for a use permitted at the time he acquired the property on November 12, 1955.

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 Chris Muller's development of a rock quarry on the subject property: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660-006-0025(5)(a). 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 November 12, 1955.

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 November 12, 1955.

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 subject 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.

6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 14, 2007. 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. Comments received have been taken into account by the department in the issuance of this final report.