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September 22, 2025

Via Electronic Mail

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RE: Proposed Amendments to Aviation Action Plan OAR 738-124

Dear Mr. Thomas and Members of the State Aviation Board:

This firm represents the Aurora Airport Improvement Association (AAIA), which is an association of private parties having significant business aviation interests and investments at the Aurora Airport. Please include this letter in the record of the proposed amendments to OAR 738-124. As drafted, the proposed amendments improperly (A) codifies standardless discretion for the Critical Oregon Airport Relief (COAR) program (75% of funds), and (B) eliminates the Aviation Review Committee's (ARC) statutory review and recommendation role for the State Owned Airports Reserve (SOAR) program (25% of funds reserved to state-owned airports). Respectfully, both defects conflict with ORS 319.023 and Oregon's rulemaking jurisprudence, and reflect poor public policy.

### **I. Executive Summary**

AAIA objects to the proposed amendments to OAR 738-124-0015, -0035, -0040, -0080, and -0090 because the amendments unlawfully undermine the Legislature's required advisory-committee check on grantmaking established in ORS 319.023, and—separately—unlawfully introduces unconstrained, wholly discretionary decision-making, divorced from any standards, undermining transparency and predictability in funding. The proposal unlawfully proposes to remove the meaningful role of the ARC that is established in and required by state law.

The role of the ARC in state law is not perfunctory as the proposed amendments reflect is ODAV's view. Rather, the legislature **expressly** assigned the ARC a specific role in aviation funding and demands fairness in funding by ensuring the composition of the ARC is diverse – members are “from each of the area commissions on transportation chartered by the Oregon Transportation Commission.” ORS 319.023(3)(a), (3)(c). The legislature expressly requires the diverse ARC it created to review and make grant funding recommendations to OAB and OAB is required to pay attention to those recommendations. But, here instead, ODAV/OAB proposes to replace that legislatively mandated role for ARC review and recommendations for SOAR funding, with ODAV, creating an alarming and unlawful policy echo chamber to hear only that

which ODAV wants to hear. The proposal is unlawful as contrary to ODAV/OAB's legislative mandates and OAB should REJECT the proposed amendments.

## **II. Statutory framework (COAR vs. SOAR)**

Oregon taxes aviation gasoline and jet fuel under ORS 319.020. ORS 319.023 sets an allocation program for distribution of Oregon aircraft fuel tax revenues. ORS 319.023 then singles out the incremental portion of those taxes—*i.e.*, any amount above 9¢/gal for avgas and any amount above 1¢/gal for jet fuel—for distribution under Oregon's Aviation System Action Program (ASAP). Those ASAP funds are in turn broken into COAR funding for 75% of the funds and SOAR funding for 25% of the funds. The proposed rule amendments propose to change the methodology for distribution of these monies in a manner that improperly introduces arbitrariness, unpredictability, undermines transparency and that significantly varies from statutory requirements.

The Legislature directs OAB to “establish by rule priorities” for the COAR 75% distribution. That means COAR funding priorities must be set by rule and that such rules must constrain later agency decisions. The Legislature also earmarks SOAR 25% to state-owned airports for safety improvements and infrastructure projects and requires the ARC to review SOAR applications and “recommend applications to the State Aviation Board for approval.” The proposal would not only invite arbitrary decision-making but also improperly remove the important role that the legislature assigned to the ARC.

### **II. COAR: The Proposal Improperly Codifies Standardless Decision-Making**

#### **1. The amendments propose reprioritization of funding decisions with free-floating, standardless weights (OAR 738-124-0035(6)).**

While the proposed amendments would improperly relegate the ARC to irrelevancy for SOAR funding (as explained below), the ARC remains marginally relevant for COAR funding decisions. However, even for COAR funding, after ARC scoring and the rule's “first prioritize” sequence, the draft proposes to authorize OAB to reprioritize using factors whose “weight of each factor being within the Board's discretion,” notwithstanding ARC scoring using statutory criteria. That proposed text supplies no weighting method, no decision-making rule, and no limiting standard—converting “priorities by rule” into ad hoc rescoring, that undermines the role of the statutory funding standards and ARC set by the legislature.

Further, Oregon law requires agencies to adopt rules that compartmentalize discretion, not rules that memorialize unfettered discretion. *Sun Ray Drive-In Dairy v. OLCC*, 16 Or App 63 (1973) (agency decisions cannot be based upon ad hoc “policies”), and *Megdal v. Bd. of Dental Examiners*, 288 Or 293 (1980) (same), requiring agencies to use rulemaking to channel broad delegations with ascertainable criteria, not to write rules that memorialize unlimited discretion. *See State v. Freeland*, 295 Or 367 (1983) (Oregon Constitution Art I, § 20 prohibits arbitrary administration of laws). On its face, the proposed reprioritization provision exceeds the statutory delegation to set priorities by rule and, respectfully, is invalid under ORS 183.400.

2. “Maximum grant” with a boundless exception (OAR 738-124-0040(1)(b)).

The draft purports to set a \$150,000 maximum for COAR funding but then immediately authorizes the Board to exceed it whenever a larger award would “serve the purposes of the program,” without any articulation of criteria that would drive such a variance from the “maximum.” A maximum that is limitless is not a “maximum” at all and is certainly not a “maximum” that is “established by rule.” Under *Sun Ray/Megdal*, if flexibility is needed, then the variance criteria must be codified and written findings must be required to tie any departures from the \$150,000 maximum, to the statutory/rule factors. However, as written, OAR 738-124-0040(1)(b) exceeds ODAV/OAB’s statutory authority and invites arbitrary, inconsistent decisions, which is prohibited by ORS 183.482(8)(b)(B)/183.484(5)(b).

3. Proposed Reprioritizing Provisions for COAR Funding

The proposed amendments to OAR 738-124-0035 (Board Review and Project Selection) would improperly (i) elevate “recommendations made by any other stakeholder and advocate entities” to the same level of importance as ARC’s recommendations, and (ii) authorize post-scoring “reprioritization” of ARC funding recommendations, in OAB’s unfettered discretion.

In this regard, OAR 738-124-0035(2)(c)–(d) invites recommendations from “any other stakeholder and advocate entities” and “interested persons and groups” alongside ARC’s recommendation. Without an anchoring weighting method, this further diffuses the role of the rule-based priorities. The proposed amendments essentially purport to untether OAB from funding priority criteria, in favor of standardless decision-making.

As mentioned above, new OAR 738-124-0035(6) would allow the Board, after the “first prioritize” step, to reprioritize “based on a consideration of all or any of [the listed] factors, the weight of each factor being within the Board’s discretion.” That text creates no pre-set weighting or decision rule, letting the Board reshuffle rankings notwithstanding the tiers—functionally turning standards into flexible “considerations.” That structure invites end-runs around the ARC process that the Legislature mandated and undermines the express statutory program that ARC first reviews and recommends and then and only then does the Board then approve using priorities it has established by rule. ORS 319.023 expressly allows the Board to set priorities for all Critical Oregon Airport Relief (COAR) program funds distributions – including SOAR funds - by rule, but it does not authorize the Board to sidestep or downgrade the ARC’s recommendation role or the statutory factors in ORS 319.023(3).

**III. SOAR: The Proposal Dilutes the ARC’s Statutory Role And Suggest Improperly Delegating OAB Authority to Remove the 25% SOAR Allocation**

ORS 319.023 requires OAB to use an Aviation Review Committee (ARC)—which is composed of members from each Area Commission on Transportation—to review applications for distributions “pursuant to this section” and to “recommend applications to the State Aviation

*Board for approval.*” (Emphasis supplied.) The statutory text is mandatory: “The review committee shall recommend applications to the State Aviation Board for approval.” *Id.*

The proposed amendments to OAR 738-124-0090(2) (SOAR Program) improperly replace the legislature’s directive to OAB that the ARC “shall recommend to the Board the approval or rejection of each project” with language stating that only ODAV will “provide the Board the SOAR project list.” That proposed amendments eliminate the legislatively required review and recommendation step for SOAR funds distributions—the 25% of ASAP funds for state-owned airports—and thereby directly and improperly conflicts with ORS 319.023(3), which applies to all distributions made “pursuant to this section.” The proposed amendments improperly weaken the important statutory check designed to ensure reasoned, statewide, criteria-driven vetting for aviation funding projects and are beyond OAB’s authority

The bottom line is that the Legislature required ARC review and recommendation before OAB acts—for all funds - COAR and SOAR alike. Any rule that writes the ARC out of the process or at best converts it to a mere courier of lists, is clearly beyond OAB’s authority and is ultra vires.

This problem causes the proposal to be contrary to ORS 183.400. Under ORS 183.400, a rule is facially invalid if it exceeds statutory authority, violates constitutional provisions, or was adopted without required procedures; review is limited to the face of the rule and the law pertinent to it. Rules that purport to “establish” standards while simultaneously disclaiming any binding standard codify ad hoc decision making and exceed delegated authority—especially where the statute itself directs the agency to adopt priorities by rule. *Sun Ray Drive-In Dairy supra*, and *Megdal, supra*.

#### **IV. Proposal to Eliminate ARC Review and Recommendations on Soar Funding Contrary to Legislature’s Wishes**

ODAV took a run in the 2025 legislature to make the change they now seek to make in the proposed rule amendment. The **legislature rejected ODAV’s invitation**. Specifically, during the 2025 Regular Session, HB 2153 was introduced by ODAV with draft text that would have deleted the sentence requiring the ARC to “recommend applications to the State Aviation Board for approval,” but that bill **did not pass** and remained in committee upon adjournment. Rejected HB 2153 is Exhibit 1. The current legislative mandate to OAB in ORS 319.023(3)(c) remains in place as a directive that the ARC review and recommend COAR/SOAR funding.

#### **V. Proposed Amendments Apparently Contemplate Allowing OAB to Ignore the State Law Required 25% Allocation of Fuel Tax Monies for SOAR Projects.**

ORS 319.023(6) requires that 25% of the distributable aviation-fuel-tax moneys “shall be distributed to state-owned airports” (*i.e.* SOAR funding) for safety improvements and infrastructure projects. It is true that the proposed amendments do not explicitly amend OAR 738-124-0010—the rule that implements the statute’s 75% COAR / 25% SOAR split and the SOAR-only purposes (safety and infrastructure at state-owned airports). However, the proposal

proposes to alter OAR 738-124-0090 (SOAR) to (i) route a “SOAR project list” to the ARC (to do essentially nothing with it) and (ii) allows OAB to increase or decrease dollar amounts for projects on that list for whatever reason OAB sees fit. Proposed OAR 738-124-0090(1) requires ODAV prepare a list of projects that “serve at least one of the purposes described in OAR 738-124-0010.” Because OAR 738-124-0010 contains both the COAR purposes and the SOAR purposes, that phrasing suggests that SOAR purposes can be totally ignored – which if that is intended is well past ODAV’s and OAB’s authority. At a minimum OAR 738-124-0090(1) should be rewritten to refer to “\*\*\* projects that serve the purposes described in OAR 738-124-0010(3).” This is necessary because ODAV/OAB does not have authority to change the 25% SOAR funding distribution.

## **VI. The proposal is Invalid on its Face**

Under ORS 183.400, the Court of Appeals evaluates a rule’s validity on its face—examining the rule, the enabling statutes, and procedural compliance. A rule is invalid if it exceeds statutory authority or violates constitutional provisions. The provisions removing the ARC’s role in making recommendations to OAB concerning SOAR funding, reprioritization and boundless-maximum clauses fail on the face of the rule.

## **VII. The Proposal Should be Rejected, but if not Rejected, Then Text Changes are Necessary**

If the proposal is not rejected outright as it should be, then the following changes should be made.

A. SOAR Funding - Restore the ARC’s statutory role and fix the purpose reference so that the SOAR 25% allocation is retained in all funding decisions.

1. OAR 738-124-0090(2): Replace the draft sentence with:

“Applying the criteria in OAR 738-124-0060(2)(b), the ARC shall recommend to the Board the approval or rejection of each project on the SOAR project list.”  
This restores current text and tracks ORS 319.023.

2. OAR 738-124-0090(1): Narrow the cross-reference to only SOAR projects as required:

“\*\*\* projects that serve the purposes described in OAR 738-124-0010(3).”

B. Replace standardless flexibility with standards.

1. OAR 738-124-0035(6) (reprioritization): Either delete the free-floating weighting clause, or replace it with:

“After prioritizing under (6)(a)–(c), the Board may adjust ranking only upon written findings that identify (i) the specific factor(s) in ORS 319.023(3)(b)(A)–

(B) and OAR 738-124-0060(5) supporting the adjustment; (ii) the weighting method used; and (iii) why the adjustment better satisfies the rule-established priorities.”

2. OAR 738-124-0040(1)(b) (maximum grant variances): Replace with:

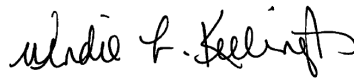
“Notwithstanding (a), the Board may exceed the maximum only upon written findings, adopted at a public meeting, that (i) specified criteria in this rule are met, and (ii) like applicants will be treated alike.” (Add the criteria list in rule text.)

Conclusion.

AAIA supports transparent, criteria-driven allocation of ASAP funds. The COAR changes should be revised to replace boundless discretion with rule-level standards and findings. The SOAR changes should be revised to preserve ARC’s statutory recommendation role and to clarify that the 25% SOAR allocation remains inviolate and shall be allocated for SOAR-only purposes.

Thank you for the opportunity to comment.

Very truly yours,



Wendie L. Kellington

WLK:wlk  
Exhibit 1  
CC: Clients