

Oregon Department of Environmental Quality and Oregon Department of Agriculture

Memorandum of Understanding

Relating to

**Procedures for Mutual Cooperation, Coordinating Agency Authority, and Coordinating Investigations of
Agricultural Uses of Materials**

April 13, 2017

I. Parties

The Oregon Department of Environmental Quality (DEQ) and the Oregon Department of Agriculture (ODA) agree to honor and participate in this Memorandum of Understanding (MOU).

II. Purpose

This MOU arises from a shared goal of the agencies to clarify their approach to a statutory exclusion to DEQ's regulatory authority. A material used in an agricultural operation may fall under an exclusion from the definition of "solid waste" called the "Agricultural Use Exclusion" (AUE). A material that falls under the AUE is thus excluded from DEQ regulation under Oregon's solid waste laws even if that material would, under different circumstances, be "solid waste."

This MOU provides a framework and procedures DEQ and ODA will use to coordinate and cooperate when (i) evaluating existing, proposed and potential uses of materials that could be excluded under the AUE; and (ii) ensuring regulated entities' compliance with related solid waste management, water quality, and other laws implemented and enforced by DEQ or ODA.

III. Effective Date

This MOU is effective on the date it is signed by both parties.

IV. MOU Authority

The MOU is authorized by ORS 459.025 and ORS 561.240.

V. Delegated Authorities

This MOU does not create new delegated authorities or affect existing delegated authorities between DEQ and ODA.

VI. DEQ's and ODA's Regulatory Authorities

DEQ has expertise in and authority to regulate solid waste management, whereas ODA has expertise in and authority to regulate agricultural practices. Both DEQ and ODA retain authority to regulate the management of AUE-excluded materials under water quality, air quality, hazardous waste and other laws.

VII. Agricultural Use Exclusion

Oregon law [ORS Chapter 459 and OAR 340 Divisions 93 – 97] defines "solid waste" broadly and gives DEQ broad authority to regulate solid waste management activities. The AUE excludes certain materials used in agricultural operations from the definition of "solid waste."

Specifically the AUE excludes [OAR 340-093-0030 (91) (2016)]:

(b) Materials used for fertilizer, soil conditioning, humus restoration, or for other productive purposes or which are salvageable for these purposes and are used on land in agricultural operations and the growing or harvesting of crops and the raising of fowls or animals, provided the materials are used at or below agronomic application rates.

Because materials that fall within the AUE are not defined as "solid waste," DEQ lacks authority under Oregon's solid waste laws to regulate them. This includes, for example, issuing permits, requiring reporting, assessing solid waste fees.

DEQ understands the intent of the AUE, which dates back to the early 1970s, was, generally speaking, to exclude from regulation as solid waste the productive use in an agricultural operation of certain materials that might otherwise constitute solid waste.

Examples of materials that DEQ has found are covered by the AUE under appropriate conditions include: (i) crop and forest residues, boiler ash, industrial food processing wastes and waste water sludges applied to land as soil amendments; (ii) industrial food processing wastes and spent brewery grains fed to livestock; and (iii) wood wastes, straw, and yard debris used as livestock bedding

VIII. General DEQ and ODA Responsibilities

- DEQ and ODA will follow the procedures in this MOU to coordinate and fulfill their responsibilities when either agency becomes aware of a question about whether a potential, existing, or proposed use of a material falls under the AUE (e.g., is it an agricultural use; does it create a potential water quality violation).
- When DEQ or ODA becomes aware of such a question, that agency will promptly notify the other and engage in cooperation and consultation. The notification will include relevant documentation, such as complaint intake information and site and operational information. If the notifying agency has made initial findings on whether the material is or will be used for productive purposes in an agricultural operation (ODA) or is excluded under the AUE (DEQ), that information will also be provided.
- Upon notification, DEQ or ODA will assign staff to cooperate and coordinate on addressing the matter.
- DEQ, ODA, or both (depending on which agency(ies) performs the investigation or assessment) will provide written results of its evaluation to the agricultural operator, generator of materials for purported agriculture use, or proponent of a proposed use.

IX. DEQ Responsibilities

- DEQ will evaluate whether a material as used, potentially used, or proposed to be used either:
 - (a) falls under the AUE; or
 - (b) meets the definition of "solid waste" and is thus subject to DEQ regulation.

DEQ will use ODA in an advisory role for this evaluation.

- DEQ will regulate, as appropriate, a material that meets the definition of "solid waste," including enforcement action in accordance with DEQ's *Enforcement Guidance for Field Staff*.
- DEQ may provide technical assistance to help an agricultural operator, generator of materials, or proponent of a proposed use to timely meet water quality requirements.

- DEQ may also supplement ODA-led technical assistance to a regulated party to make changes to timely qualify its material use under the AUE.
- DEQ, under its water quality authority, will investigate and consider corrective action for violations of water quality requirements, including the uses of septage, sewage sludges, and biosolids generated under DEQ-issued water quality permits.
- DEQ will contact a complainant providing follow-up information about the results of an investigation and any enforcement or technical assistance actions planned or taken.

X. ODA Responsibilities

- ODA will perform an advisory role for DEQ in investigations and assessments of existing, potential and proposed uses of materials on agricultural lands when such uses could be excluded under the AUE.
- ODA will provide an investigation or assessment of an existing, potential, or proposed agricultural use whenever DEQ asks ODA for such an investigation or assessment. ODA will not otherwise be obligated to routinely provide such assessments in ODA's regular interactions with agricultural operators.
- In conducting an assessment or investigation, ODA will cooperate and coordinate with DEQ, including inviting DEQ to participate in the assessment or investigation through, for example, document reviews and site visits. Upon completion of the assessment or investigation, ODA will provide DEQ with a written report of its findings on whether the existing or potential use of a material meets the criteria for the productive use in an agricultural operation under the AUE.
- An ODA assessment or investigation of whether a material as used qualifies for an AUE, will include but not be limited to the following:
 - Whether the material is used for a productive purpose in an agricultural operation or is salvageable and used for these purposes. In evaluating whether a use is part of an agricultural operation, ODA will consider whether the agricultural use is also a "farm use" as defined in ORS 215.203;
 - Whether the material is used on land in an agricultural operation for growing or harvesting of crops or raising fowls or other animals;
 - Whether the material is used for a productive purpose in an acceptable agricultural use or practice with material storage and use at or below agronomic application rates. In assessing a material use, ODA will consider a violation of applicable water quality requirements as strong evidence against a use being productive.
- If ODA determines that an existing or potential use of a material does not meet the criteria for the productive use in an agricultural operation under the AUE, ODA will refer the matter to DEQ to address potential solid waste and water quality issues.
- ODA may also, in cooperation and consultation with DEQ, provide technical assistance to help an agricultural operator, generator of materials, or proponent of a proposed use make changes to timely qualify for exclusion under the AUE.
- ODA may also provide technical assistance to help an agricultural operator, generator of materials, or proponent of a proposed use to timely comply with water quality regulations.

- ODA will also pursue enforcement action for water quality violations, such as violations of CAFO permits, under its authority.

XI. No Third Party Rights

Nothing in this MOU constitutes or creates a third party claim or defense on behalf of a regulated party.

XII. Resolution of Disagreements Regarding the Interpretation and Application of this MOU

As needed to timely resolve a disagreement regarding the interpretation or application of this MOU, DEQ and ODA staff will elevate the disagreement to their respective Directors or Directors' designees for resolution.

XIII. Modification of the MOU

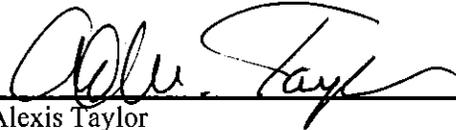
This MOU may be modified at any time by written agreement of DEQ and ODA.

XIV. Termination of the MOU

This MOU may be terminated at any time and by either party after 60 days advance notice of intent to terminate. The notice will be provided in writing and served on the Director of DEQ by the Director of ODA or vice versa.



Richard Whitman
Director of DEQ



Alexis Taylor
Director of ODA

5/17/17

Date

5/17/17

Date

Appendix

I. Definitions

The following are excerpts of definitions referenced in the MOU.

“Solid Waste” – ORS 459.005 (2016)

(24) “Solid waste” means all useless or discarded putrescible and nonputrescible materials, including but not limited to garbage, rubbish, refuse, ashes, paper and cardboard, sewage sludge, septic tank and cesspool pumpings or other sludge, useless or discarded commercial, industrial, demolition and construction materials, discarded or abandoned vehicles or parts thereof, discarded home and industrial appliances, manure, vegetable or animal solid and semisolid materials, dead animals and infectious waste as defined in ORS 459.386. “Solid waste” does not include:

(b) Materials used for fertilizer or for other productive purposes or which are salvageable as such materials are used on land in agricultural operations and the growing or harvesting of crops and the raising of animals.

“Solid Waste” – OAR 340-093-0030 (2016)

(91) “Solid Waste” means all useless or discarded putrescible and non-putrescible materials, including but not limited to garbage, rubbish, refuse, ashes, paper and cardboard, sewage sludge, septic tank and cesspool pumpings or other sludge, useless or discarded commercial, industrial, demolition and construction materials, discarded or abandoned vehicles or parts thereof, discarded home and industrial appliances, manure, vegetable or animal solid and semi-solid materials, dead animals and infectious waste. The term does not include:

(b) Materials used for fertilizer, soil conditioning, humus restoration, or for other productive purposes or which are salvageable for these purposes and are used on land in agricultural operations and the growing or harvesting of crops and the raising of fowls or animals, provided the materials are used at or below agronomic application rates

“Farm Use” – ORS 215.203 (2016)

(2)(a) . . . “farm use” means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof*

II. Enforcement Guidance

Enforcement actions initiated by DEQ will be undertaken in accordance with DEQ’s Internal Management Directive, *Enforcement Guidance for Field Staff*. Two common violations related to the agricultural use exclusion are identified in OAR 340-012-0065(1)(a) & (c). Enforcement procedures are identified throughout the Enforcement Guidance and specifically for solid waste violations, in Table 5 (see excerpt below).

Table 5
Solid Waste Management Violations Guidance (OAR 340-012-0065)
including a table of specific guidance for e-cycles violations

Div. 12 Cite.	Div. 12 Violation Language	Guidance Language
<i>CLASS I SOLID WASTE MANAGEMENT VIOLATIONS</i>		
SW 0065(1)(a)	Establishing or operating a disposal site without first obtaining a registration or permit;	Send WL if there is low or no risk of public health impact or environmental harm (see examples in under the important notes beginning this guidance). If not low risk, send PEN.
SW 0065(1)(c)	Disposing of or authorizing the disposal of a solid waste at a location not permitted by DEQ to receive that solid waste;	Send WL if there is low or no risk of public health impact or environmental harm (see examples in under the important notes beginning this guidance). If not low risk (examples given in the Important Notes above) send PEN.