

LEXSEE 39 OR. OP. ATT'Y GEN. 770

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF OREGON

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REQUESTBY:

[*1] Mr. William H. Young
Director
Department of Environmental
Quality

OPINIONBY:

JAMES A. REDDEN, Attorney General

OPINION:

[770] FIRST QUESTION PRESENTED**

What is the existing authority of the State of Oregon to regulate disposition of the solid and semi-solid byproducts, such as leaves, stalks, rinds, seeds and pulp, of the processing of food products from harvested field crops and what state agency is responsible for such regulation?

ANSWER GIVEN

The Oregon Department of Agriculture has authority under *ORS 616.700* to enforce sanitation requirements, including those for the handling of all waste, on the food processing premises and adopt rules necessary therefor.

To the extent that such by-products are solid waste, as defined in *ORS 459.005(11)*, their disposition is subject to regulation by the Oregon Environmental Quality Commission (EQC) and Department of Environmental Quality (DEQ) pursuant to ORS chapter 459, relating to solid waste control. In addition, the EQC/DEQ have authority under ORS chapter 468, relating to pollution control, to regulate the disposition of such byproducts to prevent air contamination, from fumes, gases, odors and vapors, and to prevent water pollution.

[771] [*2] SECOND QUESTION PRESENTED**

Are such byproducts solid waste?

ANSWER GIVEN

Yes, if they are useless or discarded and not used for fertilizer or are not salvageable for use on land in agricultural operations and the growing or harvesting of crops and the raising of fowls or animals.

THIRD QUESTION PRESENTED

Does application of such byproducts to land constitute that land a solid waste disposal site subject to regulations under ORS chapter 459?

ANSWER GIVEN

YEs, to the extent such byproducts are deemed solid waste.

FOURTH QUESTION PRESENTED

Can a food processing industry be required by the EQC to submit to DEQ for approval a solids management plan if a considerable proportion of such byproducts constitutes solid waste?

ANSWER GIVEN

Yes, upon adoption by the EQC of rules relating to solid waste management by the food processing industry.

FIFTH

Are fumes, gases, odors and vapors from such byproducts exempt from air pollution control because of the agricultural operations exempted of *ORS 468.290(1)*?

ANSWER GIVEN

Yes, if such byproducts are actually normally used in agricultural operations and the growing or harvesting of crops and the raising of fowls or animals.

SIXTH [*3] QUESTION PRESENTED

Are National Pollutant Discharge Elimination System (NPDES) and Water Pollution Control Facilities (WPCF) permit requirements applicable to a food processing business?

ANSWER GIVEN

Yes, if wastes are discharged by the food processing business into regulated waters.

SEVENTH QUESTION PRESENTED

May cities, counties and metropolitan service districts regulate the disposition of such byproducts?

ANSWER GIVEN

Yes, consistent with regulation by the EQC/DEQ and to the extent of the police powers of the cities, counties and metropolitan service districts.

[**772] DISCUSSION

Food processors receive harvested crops from the fields, strip them of excess vegetable matter, and wash, chop, shred, cook, freeze, can or otherwise process or package the food therefrom before distributing it in commerce.

The wastewater from the processes is treated and discharged, regulated by the EQC/DEQ through a NODES or WPCF permit.

The solid and semi-solid byproducts, such as leaves, stalks, rinds, seed and pulp, resulting from the processes are disposed of in various ways. Some are ground up and used as silage for cattle feed. Others are incorporated into the land as fertilizer [*4] or soil conditioner. Sometimes these byproducts are disposed of in landfills.

The food processors dispose of these byproducts themselves or through others, to whom the byproducts are given or sold or contracted for disposal. If improperly stored or applied to the land, these byproducts will decay, causing nuisance conditions such as odors, insects and rats to develop and giving rise to complaints of improper handling.

The questions presented have arisen in part from legislative discussion of HB 2310 which purports to exempt materials produced by mechanical processing of crops from solid waste disposal statutes.

What, then, is the existing authority of the State of Oregon to regulate the disposition of these food processing byproducts and what state agency is responsible for such regulation?

The Department of Agriculture is directed by *ORS 616.700* to enforce a requirement that food establishments (defined in *ORS 616.695(2)* to include places where food is processed) be maintained in a clean, healthful and sanitary condition. This expressly includes disposal of all waste and sewage material. The Department of Agriculture is required to adopt rules necessary for such enforcement [*5] and it has adopted OAR 603-23-371, relating to waste handling on the food processing premises.

In addition to the Department of Agriculture's authority to regulate the on-site handling of wastes of food processing, the EQC/DEQ can regulate under ORS chapter 459, relating to solid waste control, those food processing byproducts which are solid waste as defined in *ORS 459.005(11)*. However, byproducts cannot be waste, solid or other-

wise, if they are not useless or discarded materials. *ORS 459.005(14)*. Further, they cannot be solid waste if they are "[m]aterials 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 fowls or animals." *ORS 459.005(11)(b)*. A factual determination must be made by the EQC/DEQ that the disposition of these byproducts shows them to be useless or discarded and not used for fertilizer or other productive purposes in agricultural operations, in order for the EQC/DEQ to regulate such disposition under ORS chapter 459. If a determination is made that such byproducts are solid waste, then their application to land would [*6] constitute that land a solid waste disposal site subject to [**773] regulation under ORS chapter 459. *Ors 459.005(4)*.

If a considerable proportion of such byproducts would constitute solid waste and thus be subject to EQC/DEQ regulation under ORS chapter 459, the EQC could adopt rules relating to solid waste management which would require a food processing industry to submit for approval to the EQC/DEQ a solids management plan and conform to the approval plan. *ORS 459.045*.

In addition, the EQC/DEQ have authority under ORS chapter 468, relating to air and water pollution control, to regulate the disposition of such byproducts to prevent air contamination, including that caused by fumes, gases, odors and vapors, and to prevent water pollution. But agricultural operations are exempted from Oregon's air pollution control laws by *ORS 468.290(1)*. Thus, if the EQC/DEQ determine that such byproducts are actually and normally used in agricultural operations, such disposition is free of EQC/DEQ air pollution control regulation.

Food processing businesses are subject, as are all others in Oregon, to the federal and EQC/DEQ requirements for NPDES permits and WPCF permits if their wastes [*7] are discharged into regulated waters. OAR ch 340 divs 14 and 45; *ORS 468.700 to 468.740*.

Further, the disposition of by-products which are solid waste may be regulated by cities, counties and metropolitan service districts under their police or plenary powers, but such regulation may not conflict with rules of the EQC (*ORS 459.095*) for the legislature has found that solid waste disposal is a matter of state-wide concern. *ORS 459.065*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Energy & Utilities Law Gas Industry General Overview Environmental Law Solid Wastes Disposal Standards Government-
s Local Governments Police Power