

D R A F T

**INTERNAL MANAGEMENT
DIRECTIVE**



**SUBSTANTIAL AND NON-
SUBSTANTIAL PRETREATMENT
PROGRAM MODIFICATIONS**

April 26, 2005

INTERNAL MANAGEMENT DIRECTIVE ON SUBSTANTIAL AND NONSUBSTANTIAL MODIFICATIONS TO DELEGATED PRETREATMENT PROGRAMS [\[i\]](#)

The Oregon Department of Environmental Quality (DEQ) understands that delegated pretreatment programs are dynamic and must have the flexibility to revise their activities and regulatory approaches from time-to-time as circumstances change. The purpose of this internal management directive (IMD) is to instruct pretreatment and permits personnel on the process for modifying delegated pretreatment program modifications.

This IMD is consistent with U.S. EPA's rules on program modifications [see 40 CFR 403.18 promulgated on July 17, 1997 (62 *Federal Register* 38406).] These federal rules were proposed on July 30, 1996 (61 *Federal Register* 39804).

DEQ acknowledges that some of the contents of this Internal Management Directive closely follow the U.S. EPA's Region 8's guidance for delegated program modifications.

Questions about this IMD, or suggestions for improving or updating it should be referred to DEQ's Pretreatment Coordinator.

THE DEFINITION OF SUBSTANTIAL PRETREATMENT PROGRAM MODIFICATIONS

The following types of program modifications are considered substantial and require public involvement (notice and comment) prior to approval from DEQ and EPA:

1. Revisions that relax existing pretreatment-related legal authorities, except modifications that directly reflect categorical standards that are first relaxed by EPA.
2. Revisions that relax local limits, **except**: a) modifications that reset a local pH limit to no less than 5.0 S.U. or no greater than 12.5 S.U.; Or, b) reallocations of the Maximum Allowable Industrial Loading (MAIL) of a pollutant that do not increase the total industrial loadings for the pollutant which are reported pursuant to *Approval Procedures for Non-Substantial modifications* (§403.18(d)). The Maximum Allowable Industrial Loading means the total mass of a pollutant that all Industrial Users of a POTW (or a subgroup of Industrial Users identified by the POTW) may discharge pursuant to limits developed under §403.5(c).
3. Revisions that change the type or form of control mechanism used to regulate significant industrial users (SIUs) (e.g., using orders rather than permits, etc.).
4. Revisions to delegated pretreatment programs that decrease the frequency of industrial self monitoring and reporting less than the approved program.

5. Revisions to delegated programs that decrease the frequency of industrial user inspections or sampling less than the approved program.
6. Revisions that change the delegated program's confidentiality procedures in a manner that makes access to program information less accessible.
7. Revisions that DEQ believes are substantial based on the ability for the modification to have a significant impact on delegated program operations.

All other pretreatment program modifications are considered non-substantial program modifications and do not require public involvement unless the delegated program chooses to provide it.

PROCEDURES FOR LOCAL PUBLIC NOTICE AND COMMENT

Substantial program approvals are adopted, reviewed and approved in a 3 step process.

1. The delegated program must identify the proposed program modification;
2. The proposal must be subjected to public involvement (notice and comment); and,
3. The modification must be transmitted to DEQ for approval and inclusion in the delegated program's NPDES or WPCF permit.

DEQ encourages delegated programs to engage with DEQ's State Pretreatment Coordinator as early as possible in the modification process. Delegated programs should apprise the DEQ pretreatment coordinator of their intent to modify their program. Moreover, once a working draft is available, the delegated program is encouraged to seek a preliminary review from DEQ prior to proceeding to public comment. The central purpose of this early review is to ensure that the proposed modification is "approvable". The DEQ may also be able to determine if the proposed modification is considered substantial or non-substantial.

Once the DEQ "proposes to approve" the substantial modification it must be placed on public notice before it will be considered for final approval. Either DEQ or the delegated program may conduct this public involvement process. The DEQ's clear preference, however, is for the delegated program, as the proponent of the change, to undertake the public involvement responsibilities. Conversely, where DEQ has initiated a program modification, DEQ expects to be responsible for public involvement activities.

At a minimum the public notice must be properly titled as a "Notice of Request for Approval of Pretreatment Program Modification" and include the following elements:

1. A description of the proposed modifications along with supporting reasons for the change;

2. The Notice must include the following specific language:

- a. "This notice is intended to serve as the notice of request for approval of pretreatment program modification required by 40 CFR 403.18(b)(1)(ii) and 403.11(b)(1)(i). Anyone may submit comments to [CA] within 35 calendar days. If there is significant public interest in this proposal, a public hearing will be held by the delegated program, DEQ, or U.S. EPA pursuant to 40 CFR 403.11 if there is significant public interest (i.e. 10 or more persons request a hearing)";
- b. A statement that the delegated program will adopt the modification(s) and transmit it to DEQ without further public involvement if no substantive comments are received; and,
- c. A statement that the modifications will be approved by DEQ and submitted to the U.S. EPA for final approval if no substantial comments are received and no requests for a public hearing are received by the date specified in the notice.

The notice must be distributed to any persons or state and federal agencies wishing to be placed on a local mailing list for such notices as well as a newspaper in general circulation within the community. Where Threatened and Endangered species may be impacted as a result of the proposed modification, such as relaxing local limits, mailing notices of the request for approval must be sent to Federal and State fish, shellfish and wildlife resource agencies (unless such agencies have asked not to be sent the notices)

The public comment period for the proposed modifications must be *at least* thirty five (35) calendar days. DEQ encourages the delegated program to publicly notice the program change within all the affected community(s) and neighborhoods. If a hearing is requested by the public or affected industrial users, a hearing should be scheduled at the discretion of the delegated program (i.e. 10 or more persons request a hearing). DEQ will attend the hearing. In addition, the public notice must be extended at least 14 calendar days beyond the date of the last hearing.

If substantive issues are raised during the comment period, a concise summary of those issues and a brief description of the method(s) of resolving or avoiding the issues must be prepared by the delegated program. All of the documentation generated through the public notice process is available to members of the public requesting such documents.

THE ELEMENTS OF A DELEGATED PROGRAM MODIFICATION PACKAGE SENT TO DEQ

All substantial and non-substantial program modifications must be submitted to DEQ for approval. These submissions must include at least the following:

1. A detailed description of the proposed modification and rationale for the change;
2. A local determination whether the proposed modification is substantial or non-substantial;

3. A redline copy of revised legal authority that shows deletions (as strikethrough) and additions (by means of bolding) as well as a copy of the revised legal authority in its final format;
4. A copy of the new forms/procedures affected by the modification;
5. Any additional documentation required by DEQ after our initial review of the package;
6. A copy of the public notice and an affidavit of publication; and,
7. A concise description of the substantive issues that were raised during the public comment process along with a brief explanation regarding how these issues were resolved or avoided in the final proposal.

The submittal should be sent by certified mail to ensure DEQ receipt and to document the start of the 90 calendar day approval clock. Notice can also be accomplished using electronic mail (email) providing the original email is managed according to Oregon's Records Law. In either case, the 90 calendar day clock begins upon receipt by DEQ.

DEQ APPROVAL OF PROPOSED SUBSTANTIAL MODIFICATIONS

When DEQ receives a proposed program modification, the Department will perform a preliminary evaluation to determine whether the modification is substantial or non-substantial. Following this evaluation, DEQ will acknowledge the submission by email or U.S. mail and indicate the approximate time for taking final action on the package.

DEQ will process the proposed modification as soon as possible. However, as noted above, DEQ has up to 90 calendar days from receipt of the modification package to take final action (i.e., approval or denial). A DEQ request for additional information or clarification of the proposed modification stops the 90 calendar day clock until the information or clarification is submitted. Of course, DEQ and the delegated program can mutually agree that DEQ may take additional time beyond the 90 calendar days.

If no substantive comments were received during the delegated program's public comment process and the final modification is substantially the same as the proposed modification, then no further public notice is required by DEQ.

After DEQ reviews the final proposed modification and deems it approvable, the Department will transmit the proposal to EPA Region 10. EPA will have thirty (30) calendar days to object to the Department's proposed approval, in accordance with the requirements of 40 CFR 403.11(d) and the DEQ/EPA Memorandum of Agreement. If EPA files an objection, the objection must be in writing and accompanied with supporting reasons. EPA objections are considered final action on the proposed modification unless DEQ and the delegated program are able to resolve or avoid the EPA concerns and EPA's objection is withdrawn.

The proposed program modification is effective upon DEQ approval and notice of that action is received by the delegated program through either email or the U.S. mail system. If DEQ fails to take action by the 90th calendar day, the proposed modification will be deemed approved. In the event DEQ denies approval, it must do so in writing and provide the delegated program with supporting reasons. As with an EPA objection, DEQ's denial may be withdrawn if DEQ's concerns are satisfied by the delegated program.

DEQ PROCEDURES FOR APPROVING NON-SUBSTANTIAL PROGRAM MODIFICATIONS

The delegated program must submit non-substantial modifications at least 45 calendar days prior to implementing the proposed modifications. Unless an alternative timeframe is mutually agreed upon, DEQ must take action on the proposed modification within this same 45 calendar day period.

As with substantial modifications, the submittal should be sent by either certified mail to ensure that the 45 calendar day requirement is met, or by electronic mail (email) providing the original email is managed according to Oregon's Records Law. In either case, the 45 calendar day clock begins upon receipt by DEQ.

Delegated programs are discouraged from sending multiple non-substantial program modifications; rather, the DEQ strongly recommends that non-substantial modifications be bundled or combined into a single request. Similarly, non-substantial modifications may be submitted as a package containing one or more substantial modification requests.

DEQ will generally provide mail or email verification that the document has been received and provide a final determination whether the proposed modification is substantial or non-substantial. During the 45 calendar day Agency review period, the Department may request revisions or additional information in order to process a modification request. Alternatively, the DEQ may disapprove the modification request in writing until additional information is submitted or revisions to the original request are made.

The Department will act on the modification request as promptly as possible. However, if the DEQ does not:

- Take action within 45 calendar days; or ;
- Request additional information or revisions to the proposed modification; or,
- Determine that the proposed change is a substantial program modification.

The modification request is deemed approved and the delegated program may begin implementing the modification.

INCORPORATING PROGRAM MODIFICATIONS INTO THE NPDES PERMIT BY REFERENCE

All approved program modifications, whether substantial or non-substantial must ultimately be incorporated into the delegated program via inclusion in the program's NPDES or WPCF permit. Both substantial and non-substantial modifications are considered minor modifications of the permit (note: substantial program modifications are minor permit modifications because the public involvement process has already occurred prior to approval and need not be duplicated in the permit process).

Unless the NPDES or WPCF permit is up for re-issuance (see below), all program modifications will be incorporated into the permit by reference using a "Permit Action Letter" addressed to the delegated program. If the permit is expired and has been administratively extended by the Department, the Agency is prohibited from issuing a Permit Action Letter. In such circumstances the incorporation of the program modification must wait for the permit renewal process.

The DEQ recommends that all substantial and non-substantial approved program modifications be tracked by the delegated program in the Annual Pretreatment Report, Form 2 (3.) until these changes are incorporated into the NPDES or WPCF permit. This tracking will facilitate DEQ's incorporation into the permits and limit the need to prepare and process multiple Permit Action Letters.

Similarly, when submitting the application for permit renewal, it is the responsibility of the delegated program to clearly identify all changes that have not yet been incorporated into the permit as part of the permit application packet. DEQ will then document these changes in the facility evaluation report or fact sheet that is developed to document permit re-issuance decisions and incorporate these recent program modifications into the permit.

DEQ CONSIDERATION OF PROGRAM MODIFICATIONS AT THE TIME OF NPDES AND WPCF PERMIT RENEWAL [\[ii\]](#)

It is possible to combine the notice of pretreatment program modification with notice of renewal of the permit. EPA has acknowledged that these two public comment processes may be conducted simultaneously [See *53 Federal Register* 40578].

When a delegated program is strengthening its authorities in a way that is more stringent than its current program elements, the delegated program can elect not to submit the modification for approval until its permit is up for re-issuance. Since the new program requirement is more stringent, DEQ is not likely to object to it. However, until DEQ approval, neither the Department nor EPA will be able to enforce these new requirements.

Note that where a delegated program proposes to weaken its Approved Pretreatment Program, it may not implement these less stringent requirements until it receives DEQ

approval. Implementing these less stringent requirements prior to approval will be considered to be a permit violation.

[i] USEPA - Region VIII Industrial Pretreatment Program, VIII GUIDANCE ON DEFINING AND PROCESSING APPROVED PROGRAM MODIFICATIONS through the Washington Department of Ecology, *Pot of Gold*, Knight, 2004

[ii] USEPA MEMORANDUM RE: 40 CFR 403.18 Pretreatment Program Modifications, Cynthia C. Dougherty, Director Permits Division, 7/22/93