

DEQ/OHA - Cleaner Air Oregon Rules Advisory Committee Meeting

Air Toxics Programs Alignment and Updates Rulemaking Meeting 2, Session 1: February 2, 2021

Facilitator's Summary of the Work Session

Purpose of Meeting

On February 2, 2021, DEQ/OHA convened a meeting of the Cleaner Air Oregon (CAO) Rules Advisory Committee via Zoom Webinar/Conference. The purpose of the meeting was to clarify certain CAO requirements for facilities and address inefficiencies in the risk assessment process.

Meeting Attendees

The meeting attendees included members of the CAO Rules Advisory Committee (RAC) (see Attachment 1 for RAC members in attendance), staff members from Oregon Department of Environmental Quality (DEQ), Oregon Health Authority (OHA), members of the public, and the facilitation team.

Welcome and Introductions

Donna Silverberg, facilitator from DS Consulting, welcomed everyone to the meeting. Donna reviewed the agenda and meeting protocols for the meeting.

Opening Remarks

Ali Mirzakhaili, DEQ's Air Quality Administrator, welcomed RAC members to the session and thanked them for their time and commitment to the process. He noted that their input is truly valued. It is important for DEQ to make sure rules are working effectively and efficiently, and that they reflect lessons learned as DEQ implements the program. This, in turn, can lead to better assessments at lower cost and better outcomes for the whole process. DEQ has considered the input previously provided by RAC members and this session has been designed to insure there is adequate discussion time for additional input.

Gabriela Goldfarb, OHA's Environmental Public Health Manager, also thanked the RAC members for their time. She noted that OHA and DEQ are continuing with their good partnership. She also noted that DEQ staff would present this session's discussion and OHA toxicologists will share more information at session 2 on Friday.

Meeting 2 Overview and Materials

Hannah Wilkinson, CAO Program Coordinator, walked the group through the materials provided to RAC members in advance of the session; these included a rulemaking guide to the proposed rules, a table of all Division 245 proposed rule updates and draft rule language, and a table of housekeeping updates for Division 245 tables. She emphasized that no chemicals are being added or removed, and no TRVs are changing during this rule-making. All of the materials are located on the [CAO website](#).

Keith Johnson, DEQ's CAO Program Manager, provided an overview of the day's session. He noted that staff appreciated and has carefully reviewed the feedback RAC members provided after the first RAC meeting in November. As a reminder, he reviewed the goals of the rulemaking: 1) to establish a process to update health-based standards for toxic air contaminants; 2) to harmonize Divisions 245 and 246; and 3) to clarify the rules and address inefficiencies in the risk assessment process based upon lessons learned in implementation. He also noted that, to allow more time for discussion on the proposed rule changes, DEQ has deferred the fiscal impact discussion until the spring.

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Keith stated that RAC members' feedback after the November 2020 meeting indicated that certainty in the rules is important. DEQ's intent with the proposed rules is to strike a balance in improving program efficiency for the agency and facilities while maintaining some flexibility. RAC members' feedback also noted that CAO should be a strong program, DEQ and facilities should identify and act upon risks quickly, and assessments should be thorough and science-based, with standards based on the best science available.

He explained that the proposals for Division 245 are informed by implementation experience. As such, DEQ seeks to clarify or update requirements that are: 1) confusing or ambiguous to DEQ and sources; 2) have led to unintended outcomes in process, or assessments that are not representative; and 3) can improve program efficiency for agency and facilities.

Keith also noted that some RAC members mentioned that some of the proposed updates are beyond the advertised scope of rule-making charter. He explained that, given the expense and time involved in rule-making, the agency wanted to take advantage of the opportunity to make important changes that address unintended gaps or slow the process down; however, DEQ is not proposing wholesale changes to the program. Keith reviewed the types of changes DEQ is seeking, which include alignment, clarification, consistency, correction, housekeeping, redundancy, and unintended gaps/outcomes.

Division 245 Proposed Updates

J.R. Giska, CAO Program Engineer, presented on the five proposed updates to Division 245. These include:

1. New vs. Existing Source Determination
2. Submittal Timelines for Existing Sources
3. Toxic Emissions Units: Aggregated and Exempt
4. Post-Permit and NSR Modifications
5. Immediate Curtailment Requirements.

For each, J.R. reviewed the challenges that DEQ would like to address in this rulemaking, input received from RAC members following the November 2020 meeting, and DEQ's initial and revised proposals. (See [CAO website](#) for the PowerPoint Presentation for the 2/2/21 RAC meeting).

1. New vs. Existing Source Determination

Challenge: More clarity is needed for determining when a source is considered "New" vs. "Existing"

Under the current rules, an "existing facility" is a facility that has commenced construction or submitted a complete Permit application that was approved by DEQ prior the CAO Rule adoption on November 16, 2018. A "new" facility is a facility that did not meet these criteria (i.e. not an existing source).

DEQ's initial proposal also included "relocation and a change in primary operations as indicated by SIC/NAICS code changes in the new source definition."

DEQ received feedback from the committee that supported keeping relocation of an existing facility in the new source definition. Other feedback raised concerns that the proposed definition relating to new activities might unintentionally consider some facilities new.

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As such, DEQ revised the proposal to include only relocation in the revised new source definition. J.R. noted that DEQ will continue to monitor changes in primary operations on a case-by-case basis.

RAC Member Questions/Comments:

A RAC member asked, what would happen if an existing source expands their manufacturing process to include a new SIC code on the same property (for example, industries that are utilizing that same materials, but for different purposes)? Examples might be a landfill that decides to build a trash incinerator, or a sawmill that wants to build a biomass facility in the same footprint.

- J.R. responded that, because the facility already had been constructed and permitted, DEQ would continue to look at it as an existing facility. If a facility were to expand or have a very large project, there are rules relating to reconstructed sources and capital costs that would address those situations. Keith noted that the latter situation might need more clarification in the future.

A RAC member asked, how many facilities does DEQ estimate could be affected by this change?

- While an accurate estimate is not possible, J.R. noted that, since the adoption of the rules, only two facilities have relocated. One was determined to be new and one was not determined not to be new. Typically, it is small to medium-sized companies that are making the move, rather than larger industrial facilities.

Some RAC members shared their perspective that there should be a presumption that a change in 'SIC code' is a significant change by the facility which would then lead it to being treated as a new source. A member suggested that the burden should be on the facility owners to provide clear information that it is not a significant change. There was a concern that by not including code change language in the rule, it could result in less transparency. Another RAC member suggested DEQ could include the change in SIC code language and add the words "subject to DEQ review" to allow for flexibility.

J.R. noted that facilities still are required to provide code updates. Additionally, while there are many cases where a change in code may be relevant to a change in emissions and operations, there are also some cases where those changes may not correspond to a change in emissions or operations. DEQ's concern is that the change in code language might lead to unintended outcomes for some facilities that should not be considered new. However, this does not mean that DEQ does not want to examine these types of changes.

- DEQ is interested in obtaining more data and experience with these facilities and is seeking to maintain flexibility within the rules.

Another RAC member asked why the 'reconstruction provision' was not adequate to address a source that changes location, but does not change its processes? There was concern that assessing a source that moves as a new source will create a more stringent set of requirements for that source, which may be moving because housing is encroaching upon them. Additionally, it was noted that a source that is moving to a new location may not be amendable to new control scenarios or new equipment and there was a concern that this rule change could be a disincentive for smaller and mid-sized manufacturing facilities to move away from population centers. In contrast, other RAC members noted that these are health-based regulations and, when a facility moves to a new neighborhood, that is a new source of emissions to that neighborhood; this language should be considered through the lens of what the neighborhood is being exposed to, not to what the facility had been allowed to do elsewhere.

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- J.R. noted that reconstruction typically is based on a project at an existing source and the capital costs of that project. A source that moves from where they were previously located would be considered a different source and DEQ has opted for considering it as a new source. When a facility moves, it also may provide an opportunity for that facility to design, build, and reconstruct in a way that may allow for controls or minimization of emissions that were not possible in the previous facility. Additionally, J.R. noted that residential areas are the most stringent exposure locations and a facility that moves due to encroachment will likely find that its risk goes down and it can meet the rules easier.

2. Submittal Timelines for Existing Sources

Challenge: Adjust submittal timelines to better match with observations from implementation.

J.R. reviewed the steps in the CAO implementation process (See Summary from 11/17/20 RAC session). He noted that both new and existing facilities are required to go through the same process, but timelines only apply to existing facilities. J.R. first reviewed the initial proposals that were presented during the 11/17/20 RAC session and then noted which proposals had been revised based on feedback after the November session. (See Presentation Slides on CAO website) He noted, the initial changes proposed were based on program implementation observations that the majority of work (emissions inventory, modeling protocol, and risk assessment work plan) has been completed prior to the submittal of the final risk assessment. Facilities can still request extensions for these submittals.

DEQ proposed that the risk assessment work plan for a Level 4 Risk Assessment Level be increased from 60 days after the emissions inventory is approved to 90 days. DEQ did not receive any comments relating to relating to this proposal and this proposal remains unchanged.

For the risk assessment itself, DEQ initially proposed to condense all timelines to 30 days for Levels 1 through 4 (based on observation that the majority of work had been completed before this stage). However, DEQ received feedback that 30 days was not sufficient for facilities to make the changes DEQ may have required at a Level 1 or Level 2 after the modeling protocol, or Level 3 or Level 4 after the risk assessment work plan.

- Consequently, DEQ revised its proposed timeline to allow 60 days for the Risk Assessment to be submitted at Levels 1, 2, and 3, and 90 days for Level 4.

Finally, DEQ proposed to reduce the time that the risk reduction plan would need to be submitted after the final risk assessment was approved, from 120 days to 45 days. DEQ did not receive any comments relating to relating to this proposal and this proposal remains unchanged.

RAC Member Questions/Comments:

One RAC member noted that the deadline seemed much more achievable. Another RAC member questioned why DEQ was giving extra time for the Level 4 facilities, which appear to be higher risk facilities?

- J.R. noted that DEQ will not actually know what the risk is until the facility has gone through a risk assessment; however, DEQ would require a Level 4 risk assessment if it suspects that the facility is emitting certain toxic air contaminants that bio-accumulate or would have different exposure pathways. DEQ proposed the increase in time based on the reality that it is going to take more time for both the facility and DEQ to do the work. If DEQ learns through investigation during a risk assessment that a facility's risk is drastically understated, it has authority to require quicker action to reduce that risk.

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A RAC member asked, did DEQ consider a limit on the amount of extensions that can be requested and whether granting extensions makes sense if a facility will be given extra time in the revised rules?

- While DEQ has not considered the number of extensions that may be requested, it has outlined the criteria required for an extension, which includes that the facility demonstrates it is making an effort. DEQ has denied a few extension requests where facilities could not substantiate why the extension should be granted.

A RAC member raised concerns about a perceived lack of progress by some facilities that have been called into CAO and a need for public accountability.

- J.R. noted that many of the existing facilities going through the process are complicated facilities and DEQ is asking for more detailed information than had previously been required. DEQ is also working to ensure transparency by making sure that the web pages with facility submittals are up-to-date and by mobilizing community engagement.
- J.R. offered to follow-up offline concerning specific facilities.

3. Toxic Emissions Units: Aggregated and Exempt

Challenge: How Exempt and Aggregated Toxic Emissions Units (TEUs) are accounted for in the risk assessment process.

J.R. reviewed the designations for Exempt and Aggregated TEUs. He noted that Exempt TEUs are activities at a source that do not contribute significant toxic air contaminant emissions in significant amounts and are not related to the primary production activities at the source. These activities are not included in the risk assessment and facilities do not have to report the types of Exempt TEUs. Aggregated TEUs are activities with low risk contributions to the overall risk from a facility. Several of these activities may be aggregated as a single emissions unit if the combined risk from these activities remains below the aggregate TEU levels for new or existing facilities. Currently, the rules do not include the risk from Aggregated TEUs in the final source risk calculations and they are also exempt from TBACT or TLAER assessments when a facilities' source risk exceeds those levels. If the risk from facilities is over one of those thresholds which would require controls or an analysis of controls, Aggregated TEUs would not be considered in that analysis and would not be required to have their emissions controlled.

The CAO program also has a designation of 'significant TEUs', which are activities that emit toxic air contaminants at higher levels and have risks that must be included in a source's final risk calculations. These significant TEUs are subject to TBACT and TLAER analysis, which means DEQ would need to review them to see if they have controls, or could require controls, if risks are above certain levels.

DEQ's initial proposal was to include the risk from Aggregated TEUs in source risk calculations for the final risk. DEQ would also allow facilities to choose how they would like to include that risk in their final risk calculations, either at the modeled risk or the aggregate TEU level itself.

- J.R. noted that DEQ received feedback from RAC members that TEU's should be included in the final source risk calculations and that this might make having minor modifications in the future challenging for some facilities. This proposal remains unchanged.

For Exempt TEUs, the initial proposal was to:

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- Ensure consistency with EPA regulations for “significant” HAP emissions.
- Review and revise list of production activities that qualify as Exempt TEUs.
- Provide discretion to ensure significant TAC emissions are included in risk assessment.

After the November session, DEQ received feedback both in support and opposition from RAC members. Members expressed concerns that the revisions might increase the burden on facilities to account for a large number of small emission sources, which may be difficult to control.

- Consequently, DEQ revised its proposal and removed the proposal to “Ensure consistency with EPA regulations for ‘significant’ HAP emissions.” DEQ determined this proposal was out of the scope of current rulemaking. DEQ may address this in a future rulemaking, if necessary.

With regard to the list of production activities that qualify as Exempt TEUs, DEQ reviewed and curated the list from the ‘categorically insignificant activity’ definition in Division 200 and put the curated list directly into Division 245 rules. DEQ also wanted to ensure that activities that are producing significant toxic air emissions, such as diesel generators, are included in the risk assessments. Even though DEQ has removed some activities from the ‘categorically insignificant’ activity list, a facility could still provide evidence or substantiation to DEQ that the activity should be considered exempt.

RAC Member Questions/Comments:

A RAC member noted that the current rules appeared to be protective and wanted to understand: what necessitated the change?

- J.R. noted that DEQ has found that some facilities will be all right at those risk action levels and inclusion of risks from some of these smaller units is something DEQ needs to consider here. Jill Inahara, the original rule writer for the CAO rules, discussed the writing of the original CAO rules. She noted that CAO developed the concept of Aggregated TEUs because it knew there were going to be some TEUs where the risk was so low that the program did not want facilities to install TBACT or TLAER controls. However, the Aggregated TEUs were left out of the source risk limit by mistake. Jill explained that, originally, the Aggregate TEU level was one in a million and later changed to 2.5 in a million; however, the 2.5 in a million risk was mistakenly not included in the total risk limits for a facility.
- It was never CAO’s intent to leave this out of the total risk of the facility.

RAC members also raised concerns around the removal of the 10-day notification process from the rules. It was noted that the 10-day deadline will keep the process moving in DEQ. J.R. noted that because DEQ is now looking at risk, it is moving away from automatic approvals of exempt TEUs. Keith explained that it is a priority for permit writers to look at those notices and not necessarily do automatic approvals. However, the intent is to support the facility being able to move forward with minor changes.

Another RAC member supported the inclusion of Aggregated TEUs in source risk calculations, noting the risk of cumulative impacts from those Aggregated TEUs.

There were questions regarding why DEQ proposed some activities be removed from the curated categorically insignificant activities list. Some RAC members noted that seeking to have an activity reviewed as an exempt TEU involves additional time and energy focused on a small amount of risk. That focus instead should be on the major emission units of concern.

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- J.R noted that there might be some emerging evidence for emissions from those activities and DEQ is proposing to remove the automatic exemptions to ensure that they consider activities with regard to accurate toxicity values. He noted that these activities were based on a different part of the air quality program and, during implementation, DEQ found it did not make sense for the activities to be on the list for the CAO program.

4. Post-Permit and NSR Modifications

Challenge: DEQ is reviewing requirements for:

- Public Notice and Fees for permit modifications after a CAO Toxics Air Contaminant Permit Addendum (TACPA) has been issued.
- Major modifications requiring New Source Review (NSR).

DEQ's initial proposal sought to adjust the levels of Public Notice and Fee requirements to allow for a wider range of modification types DEQ did not receive any feedback regarding adjusting the fee requirements. DEQ's revised proposal for the Public Notice and Fees specifies the types of risks and risk levels that would require Category III Public Notice and the Complex Technical Modification Fee. DEQ wanted to make sure it would have the flexibility to ensure that there would not be a lengthy and expensive process for what would be considered a small modification.

Additionally, DEQ proposed to have all new source reviews, including Type B State NSR modifications, trigger the requirement to do complete a risk assessment. However, DEQ would retain the discretion to exempt some facilities from the risk assessment requirement where if it finds an assessment to be unnecessary. Finally, DEQ proposed to remove the deadline for this risk assessment process for existing facilities. This is because these facilities are similar to new facilities in that, to get their modification approved, they must get their risk assessment approved. This new source review only applies to existing facilities that have not yet gone through the CAO process. DEQ did hear feedback that the inclusion of the Type B State NRS modifications would be burdensome and slow down the work for the CAO staff. DEQ's revised proposal for the NSR modifications maintains the proposal that all Type A, Type B and federal NSR be included. However, instead of requiring or waiving a full risk assessment, DEQ is proposing to require that facilities submit an Emissions Inventory that would be reviewed by DEQ to determine if a risk assessment is necessary and then require a risk assessment at that time. DEQ must approve the modification based on the Emissions Inventory or the Risk Assessment. The deadlines for this process would be removed.

J.R. noted that DEQ has performed a prioritization process for all the existing facilities to provide the public and businesses with certainty of when they are going to be called into the process. These changes will allow DEQ to review the emissions inventory and consider whether it changes where the facility stands in terms of prioritization.

RAC Member Questions/Comments:

A RAC member raised concerns about DEQ's discretion and noted the lack of timelines or criteria related to this proposal. Keith noted that the DEQ review would be calibrated around significant changes with regard to a modification.

5. Immediate Curtailment Requirements

Challenge: Clarify requirements and risk reduction procedures for facilities above the Immediate Curtailment Risk Action Level (RAL).

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DEQ's initial proposal was to:

- 1) Require immediate reduction of risk to below the Immediate Curtailment RAL; and
- 2) Add a section to Risk Reduction Rule that provides the minimum requirements for this report and allow DEQ to set interim risk levels for continuing operations.

J.R. noted that DEQ mainly received positive comments regarding these proposed clarifications. The revised proposal is to add a section to the Risk Reduction Rule that:

- Establishes a timeline of 10 days for full implementation of the Immediate Curtailment Risk Reduction Plan (ICRRP);
- Requires the ICRRP to remain in effect until the risk reduction plan is implemented; and
- Provides the minimum requirements for the ICRRP.

DEQ did not carry forward the proposal to allow DEQ to set interim risk levels for continuing operations.

RAC Member Questions/Comments:

A RAC member inquired: what would DEQ's options be if a company couldn't comply with a risk reduction plan within the 10-day period? Would DEQ issue a cease-and-desist order? What if a facility were to threaten legal action within the 10-day timeline rather than engage in immediate curtailment? Finally, there also was a desire to understand what public engagement would occur during this timeframe, and to see community meetings and input specified in the rule. It was noted that the terminology "immediate curtailment" can convey the perception that the facilities will immediately stop their activities, which is not the case.

- Keith and J.R. noted that only the Governor has the authority to initiate and issue a cease-and-desist order and the bar for issuing such an order is quite high. With these proposed changes, DEQ seeks to better define what curtailment would look so that DEQ can take more affirmative and clear actions. J.R. noted that the CAO community engagement rules allow DEQ to call public meetings for any permitting action, including this situation. DEQ will consider whether to specify requirements for public engagement in such situations.

Division 245 Proposed Updates - Open Discussion

J.R. then invited RAC members to have an open discussion regarding any of the proposed updates to Division 245. RAC members raised questions regarding the following proposed changes in Division 245 Rules:

- With regard to proposed changes to the section on new or modified TEU requirements ((345-245-0060 (4)(b)): a RAC member noted that facilities may need to make a small change, or sometimes are required by rule to incorporate or install equipment, or to make changes. Under the proposed changes, the facility would not be able to make the modification until receiving DEQ approval and this could hold up processes needed for operation or which may be required by another rule.
 - J.R. noted that the intent of the proposed change is to clarify that the facility needs to include the risk in the risk assessment, not to delay construction or the addition of a modified TEU. DEQ will clarify this in the final proposed rules.
- How will DEQ define what is allowed in an Emissions Inventory?
 - DEQ's proposed updates clearly outline the reference materials facilities must provide to DEQ in order to approve a risk assessment. DEQ dedicates significant time to the technical review of that data to ensure that it is the most accurate and representative data.

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- With regard to proposed changes in OAR 345-245-0100 (8)(a) (F), requiring a source to submit an application for modification no later than 60 days after zoning or land use changes: does 60 days provide enough time? Also, what geographic scope should be considered?
 - J.R. noted that the intent is to capture changes that are very near to the facility as most of the effects of the toxic air contaminants happen locally and close to the facility. CAO has created a form for facilities to identify any changes in their annual report and the timeline is intended to reinforce the form.
 - RAC members suggested that DEQ consider creating guidance documents for land-use planners or include a requirement that land-use planning agencies notify DEQ of changes within a certain radius of a facility.

RAC Roundtable Discussion

RAC members shared their thinking and reflections regarding the proposed rule changes. Themes from their comments are summarized below. RAC members were encouraged to submit written input to DEQ directly. *(Note: we based the following summary on **individual** comments and, as such, it is not a recommendation nor views held by all group members.)*

- Facilities need clarity and certainty; continued rulemaking makes it difficult for facilities to have certainty about what is required of them.
- The community also needs certainty. Longer timelines provide little community benefit and the longer the process draws out, the more difficult it is to sustain engagement.
- Transparency and communication are shared goals between industry and the community.
- The rulemaking needs to provide transparency and confidence about health protection. There are still some gaps, from the point of view of public health.
- The focus should not be on the source, but where the source is (e.g. the community).
- It is important to ensure equitable access and ability to engage with the rulemaking; consider providing compensation to community members to enhance participation;
- On a broader level, has DEQ created a hard line that is reducing toxic air emissions?
- There is a concern that the rule changes are not actually streamlining the process and may be slowing the process down.
- Might it be possible to do a streamlined assessment for an emergency situation?

Closing Remarks and Next Steps.

Keith thanked the RAC members for their input and noted that the next session will occur on February 6, 2021. Hannah reminded the group that the deadline for written feedback from committee members is February 26, 2021.

With that, Donna adjourned the meeting.

This summary is respectfully submitted by impartial facilitation team from DS Consulting. Suggested edits are welcome and may be sent to Nancy Pionk (nancy@dsconsult.co)

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Attachment 1

Cleaner Air Oregon Rules Advisory Committee Members in Attendance for all or part of 2/2/2021 Rules Advisory Committee Meeting	
Steven Anderson	City of Salem Neighborhood Associations
Jessica Applegate	Eastside Portland Air Coalition
Lisa Arkin	Executive Director, Beyond Toxics
Chad Darby	Maul, Foster and Alongi
Linda George	Professor of Environmental Science, PSU
Kathleen Johnson	Washington County
Christine Kendrick	Air Quality Lead/Smart Cities Coordinator, City of Portland
Bryan Lewallen	Alternate for Daniel Lee, Cascade Steel Rolling Mills
Ellen Porter	Alternate for Sharla Moffett, Oregon Business & Industry
Mary Peveto	President, Neighbors for Clean Air
Mark Riskedahl	Northwest Environmental Defense Center, Oregon Environmental Justice Task force/Vulnerable Communities representation
Diana Rohlman	Oregon Public Health Association
Kathryn VanNatta	Northwest Pulp and Paper Association
Thomas Wood	Co-Chair Air and Energy Committee, Oregon Business & Industry