TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

PH 86-2020
CHAPTER 333
OREGON HEALTH AUTHORITY
PUBLIC HEALTH DIVISION

FILING CAPTION: Correction to temporary rules related to COVID-19 to implement the Governor’s Executive Orders

EFFECTIVE DATE: 12/24/2020 THROUGH 06/15/2021

AGENCY APPROVED DATE: 12/18/2020

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NEED FOR THE RULE(S):
The Governor has declared an emergency due to the public health threat posed by coronavirus disease 2019 (COVID-19) and issued several Executive Orders that have been designated as public health laws. They include prohibitions on onsite consumption of food or drink unless the establishment operates in a county in a designated risk level that allows it and complies with Oregon Health Authority (Authority) guidance. In addition, establishments offering or providing food or drink must comply with certain conditions and Authority guidance. The Governor has also issued Executive Orders that establish other community mitigation strategies including but not limited to, prohibitions and limitations on social and recreational gatherings, required physical distancing when outside the home, and closure of certain businesses. These Executive Orders are public health laws. The Authority previously adopted these rules to allow the Authority or a local public health authority to enforce the Orders if necessary, as long as the Executive Orders are in effect.

On December 2, 2020, the Governor issued Executive Order 20-66, which adjusted the framework for the community mitigation strategies from a phased approach to a county-by-county metrics approach. These temporary rules amend existing rules to adjust the requirements and provisions to the new metrics approach. The revisions allow the Authority or a local public health authority to issue civil penalties and enforce the provisions of the Executive Orders, but only as long as the underlying Executive Orders are in effect. The rules also clarify the Authority or local public health authority authorization to act under their licensing authorities for food establishments and tourist facilities to enforce applicable Executive Order and Authority guidance requirements, including through closures, suspension, revocation, and civil penalty.

This filing is to correct errors in OAR 333-003-1031 and OAR 333-003-3020 that were filed and effective December 18, 2020 (PH 82-2020).

JUSTIFICATION OF TEMPORARY FILING:
The Authority finds that failure to act promptly will result in serious prejudice to the public interest, the Authority, and all Oregonians that may be affected by the transmission of novel infectious coronavirus (COVID-19). These rules need to be amended promptly to ensure that the Authority and local public health authorities have the ability to conduct enforcement in the event that facilities or individuals refuse to comply with the Governor’s Executive Orders.

The Governor’s Executive Orders were issued to help limit the spread of COVID-19 in Oregon. The community mitigation strategies including mask requirements, physical distancing, and in some instances closure of certain businesses, are necessary to preserve and protect public health. For example, food establishments have been ordered to close their dining rooms and provide only takeout or delivery services to the public unless they are operating in a county that has been approved to offer or allow on-premises consumption of food or drink based upon the designated risk level and if they comply with Authority guidance. The rules for enforcing these requirements must be amended to adjust for the change to the county-by-county metrics approach in Executive Order 20-66 and facilitate Authority and local public health authorities’ ability to enforce the requirements. Current rules do not clearly facilitate all potential mechanisms for enforcement. Without the rules, the public would suffer if the Authority and local public health authorities are not fully able to enforce the community mitigation requirements. These temporary rules facilitate enforcement and help to avoid and mitigate that risk.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:
Governor’s Executive Orders available at https://www.oregon.gov/gov/admin/Pages/executive-orders.aspx

RULES:
333-003-1031, 333-003-3020

AMEND: 333-003-1031
SUSPEND: Temporary 333-003-1031 from PH 82-2020

RULE SUMMARY: Amend OAR 333-003-1031: Clarifies how non-compliance with OAR 333-003-1021 may serve as the basis for the Oregon Health Authority or the local public health authorities to assess civil penalties up to $1000 per day per violation. Enforcement or licensing action may not be taken under this rule if the Governor has terminated the Executive Order underlying the prohibition or requirement that serves at the basis for the violation. Correction is being filed to add ORS 624.992 as statutory authority.

CHANGES TO RULE:

333-003-1031
COVID-19 Related Requirements: Disciplinary Action for Violation of an Executive Order or Authority Guidance
(1) Violation of OAR 333-003-1021 constitutes a violation of the Oregon Food Sanitation Rules OAR 333-150-0000.¶

(2)(a) The requirements and prohibitions of OAR 333-003-1021 and Authority guidance applicable to food establishments are “priority items” as that term is used in OAR chapter 333, divisions 150 and 157. ¶
(b) As used in ORS chapter 624 and OAR chapter 333, divisions 150 and 157, violations of OAR 333-003-1021 and applicable Authority guidance, including but not limited to, failure to implement mask, face covering, face shield requirements, failure to comply with maximum capacity or party size limitations, failure to implement physical distancing requirements, or failing to comply with a prohibition on on-site consumption as applicable, may constitute:¶
(A) Critical violations that are a potential danger to the public health; and¶
(B) Critical violations that create an imminent or present danger to public health.¶
(C) The Authority or the local public health authority shall determine whether a violation of OAR 333-003-1021
or of Authority guidance constitutes a critical violation creating a potential danger to public health or creating an imminent or present danger to public health by reviewing the information available to the Authority or the local public health authority at the time and the scope of the violation, including any known mitigating or aggravating factors.

Violation of OAR 333-003-1020 may serve as the basis for the Authority, or its designee, to take any enforcement or licensing action permitted under ORS chapter 624 against any food establishment as defined in OAR 333-150-0000(4)(q) regulated by the Authority, including but not limited to:

(a) Restaurants;
(b) Bed and breakfast facilities;
(c) Mobile food units;
(d) Commissaries;
(e) Warehouses;
(f) Vending machines;
(g) Traveler’s accommodations; or
(h) Organizational camps.

In addition to the bases for imposing civil penalties under OAR 333-157-0045, a local public health authority may impose civil penalties against any food establishment as defined in OAR 333-150-0000(4)(q) regulated by the Authority for any violation of OAR 333-003-1021 or applicable Authority guidance that poses an imminent and present danger to public health.

Civil penalties imposed under this section may be up to $1000 per day per violation.

Any enforcement or licensing action taken under this rule shall be taken in accordance with ORS chapter 183.

Enforcement or licensing action may not be taken under this rule if the Governor has terminated the Executive Order underlying the prohibition or requirement that serves at the basis for the violation.

Note: Authority guidance is available at: https://govstatus.egov.com/OR-OHA-COVID-19

Statutory/Other Authority: ORS 433.441, ORS 413.042, Governors Executive Orders relating to COVID-19 including but not limited to EO 20-59, 20-66, ORS 624.992

Statutes/Other Implemented: ORS 431A.005, ORS 431A.010, ORS 624.020, ORS 624.041, ORS 624.355, ORS 624.415, Governors Executive Orders relating to COVID-19 including but not limited to EO 20-59, 20-66
AMEND: 333-003-3020
SUSPEND: Temporary 333-003-3020 from PH 82-2020
RULE SUMMARY: Amend OAR 333-003-3020 - Clarifies the authority to impose civil penalties for tourist facilities that fail to comply with applicable requirements of the Governor’s Executive Orders or Authority guidance. Correction is being filed to change the Class violation in section (4) from a Class III Violation to a Class I Violation.

CHANGES TO RULE:

333-003-3020
Disciplinary Action or Civil Penalties for Tourist Facilities During Declared Emergency
(1) The Authority, or its designee, may deny, suspend, or revoke the license of a subject tourist facility, or impose civil penalties against a subject tourist facility for failing to comply with any applicable requirement imposed by a Governor’s Executive Order that is designated as a public health law as defined in ORS 431A.005 and any provision of Authority guidance implementing such an Executive Order.¶
(2) Any action taken under this rule shall be taken in accordance with ORS chapter 183.¶
(3) No action under this rule shall be taken if the Governor has terminated the Executive Order underlying the prohibition or requirement that serves as the basis for the violation.¶
(4) Violation of a Governor's Executive Order, any provision of Authority guidance implementing such an Executive Order, or OAR 333-003-3010 is a Class I violation as described in OAR 333-029-0130.¶
Note: Authority guidance is available at: https://govstatus.egov.com/OR-OHA-COVID-19¶
Copies of the Executive Orders are available at: https://www.oregon.gov/gov/admin/Pages/executive-orders.aspx
Statutory/Other Authority: ORS 413.042, ORS 433.441, ORS 446.310 - 446.350, Governors Executive Orders relating to COVID-19 including but not limited to EO 20-59, 20-66
Statutes/Other Implemented: ORS 431A.005, ORS 431A.010, ORS 446.310, ORS 446.324, ORS 446.340, ORS 446.347 - 446.349, Governors Executive Orders relating to COVID-19 including but not limited to EO 20-59, 20-66