State of Oregon Department of Environmental Quality

# Written Comments

## Air Quality Permitting Updates 2022 Rulemaking: Advisory Committee Meeting 1

This document is a compilation of written comments received related to the first meeting of the advisory committee for the Air Quality Permitting Updates 2022 Rulemaking held Dec. 16, 2021.

## Comments

January 12, 2022

Oregon Department of Environmental Quality
Attention: Jill Inahara

BY EMAIL TO: 2022.aqpermits@deq.oregon.gov

**RE: RAC 1 Comments of Environmental Advocates**

Dear members of the Environmental Quality Commission, Director Whitman, Ms. Inahara, and DEQ staff:

We, the undersigned, are members of the Air Permitting Rulemaking Advisory Committee who represent organizations and community leaders that advocate for clean air and environmental justice in Oregon. We jointly submit these comments in response to the questions posed to us by Ms. Valdez at Kearns and West in her December 22 email.

## INTRODUCTION

We are encouraged to see DEQ take significant steps towards revising Oregon's air permitting program, which currently lacks the necessary procedures and mechanisms for DEQ to review emissions from existing sources to ensure that the state meets its obligation under the Clean Air Act to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." 42 U.S.C. § 7401(b)(1). Oregon's permitting program, which gives industry a great deal of flexibility, has not produced the emissions reductions that Oregon needs or allowed DEQ to appropriately regulate existing sources.

For minor sources of air pollution, EPA's implementing regulations for the Clean Air Act make clear the DEQ has a duty to "set forth legally enforceable procedures that enable the State or local agency to determine whether the construction or modification of a facility, … will result in … [i]nterference with attainment or maintenance of a [NAAQS]." 40 C.F.R. 51.160(a). These legally enforceable procedures "must include [the] means by which the State … will prevent such construction or modification if … [i]t will interfere with the attainment or maintenance of a [NAAQS]." 40 C.F.R. 51.160(b). The procedures must "discuss the air quality data and the dispersion or other air quality modeling used." 42 U.S.C. § 7410(a)(2)(C). As a condition for issuance of any air permit, DEQ must require the owner or operator of a source to show to the satisfaction of the permitting authority that the project will comply with all Clean Air Act requirements. 42 U.S.C. § 7410(j). While DEQ can customize the requirements of its preconstruction permitting program for minor sources, the agency must ensure that minimum federal requirements are met. DEQ's current regulations for reviewing and approving the

construction or modification of sources lack sufficient legally enforceable procedures for ensuring that minor sources do not interfere with attainment or maintenance of a NAAQS.

Increases in pollution that fall short of the significant emission rate or a source's PSEL can still be significant from the perspective of public health and welfare. They can also threaten to cause an exceedance of the national ambient air quality standards (NAAQS). As DEQ pointed out in the RAC 1 materials, the significant emission rates and plant site emission limits (PSELs) were established before EPA promulgated one-hour NAAQS for NO2 and SO2, and may not be sufficient to ensure compliance with the short-term NAAQS or to address the impact of air pollution on environmental justice communities.

We urge DEQ to adopt regulations that will allow it to take a closer look at proposed modifications to existing sources likely to cause any increase in air pollution.

**QUESTION 1**

*Question 1: DEQ is proposing rules related to Notice of Intent to Construct, including a change that would eliminate a 10-day default approval and replace with a "notice and go" rule to streamline the process. This would apply to specific equipment. What criteria or indicators should DEQ use as it develops and assesses the list of equipment that would qualify under this new rule? What equipment should be included in a rule change?*

As we understand it, DEQ is considering a change to the Type 1 Notice of Intent to Construct framework in which Oregon's current 10-day default approval for Type 1 activities would be eliminated. In its place, qualifying equipment and construction activities would be subject to a new "notice and go" rule, under which facilities would no longer require DEQ approval before construction may commence for certain specified activities.

We are hesitant to support such a change. The new "notice and go" framework (as we understand it) would apply to, and streamline, construction activities that result in increased emissions in Oregon communities. The current 10-day waiting period provides a window for DEQ to review NC applications to ensure compliance with all relevant requirements. While DEQ staff has stated that this window is not long enough to provide a meaningful review of many Type 1 applications, we do not take lightly the prospect of eliminating an opportunity for agency review of emissions-increasing activities, particularly in vulnerable communities.

Nonetheless, we could potentially support DEQ's proposed change, subject to certain assurances. First, we wish to learn more about how DEQ will use any agency resources that are freed up by this proposed change. For example, if eliminating 10-day default approvals would allow DEQ to perform a more rigorous review of other (more significant) types of construction activity, then such a tradeoff could ultimately provide meaningful benefits to Oregon communities impacted by air pollution. We hope to hear more from DEQ staff on this subject—specifically, whether it believes this proposed change will enable it to provide additional scrutiny to facilities proposing more significant construction activities.

Further, the "notice and go" framework must be limited to construction activities resulting in a negligible increase in emissions. It remains essential that any equipment that could cause more than a *de minimis* increase must be subject to a meaningful DEQ review, with sufficient time and resources to do so.

Finally, the "notice and go" framework should not apply to the replacement or alteration of pollution control technologies. It is critical that DEQ perform a technology review when sources perform this type of modification. Other states, including Washington, grant permitting authorities the ability to require sources making these changes to employ RACT or other technology-based requirements. *See* WAC 173-400-114. This is entirely appropriate, and in no event should DEQ allow construction to commence on pollution control technologies without meaningful agency review.

We are declining to propose specific types of equipment that should appear on a "Notice and Go" list, but would welcome the opportunity to offer feedback if and when DEQ has formulated a potential list of specific equipment that would be subject to the new rule.

**QUESTION 2**

*Question 2: DEQ proposed policy changes to Type 2/3 NC's. What level of emissions should trigger the requirements of technology review and modeling for equipment with emissions that are less that the Significant Emission Rate?*

**A. All modifications that increase pollution by more than a *de minimis* amount should require technology review.**

DEQ should require technology review for all proposed physical changes or changes in operation that are not on the "Notice and Go" list but would increase the source's potential to emit by a more-than-*de-minimis* amount.

Even relatively small increases in air pollution can have a devastating cumulative impact on already overburdened environmental justice communities. Accordingly, DEQ should require sources proposing any modifications that will have more than a *de minimis* impact on air pollution to analyze the available technology to ensure that the source seizes all available opportunities to mitigate the impact of the modification on the public and the environment.

Massachusetts requires best available control technology (BACT) for all proposed modifications. *See* 310 CMR 7.02(4) (Limited Plan Application (LPA) for modifications that would increase emissions by less than 10 tons per year); 310 CMR 7.02(5) (Comprehensive Plan Application (CPA) for modifications that would increase emissions by 10 tons per year or more); 310 CMR 7.02(8)(a)(2) ("BACT is required of all LPA approvals and CPA approvals."). Oregon should follow suit.

**B. DEQ should require both technology review and modeling for modifications that would increase emissions above the source's PSEL, modifications that would increase a source's emissions by more than 10 tons per year of any single air pollutant, and modifications that might otherwise negatively impact air quality.**

There is no question that DEQ should require modeling for modifications that would increase a source's potential to emit by the significant emissions rate or higher. However, we believe requiring modeling at a much lower threshold is warranted.

In Massachusetts, proposed modifications that would increase a source's potential to emit by 10 tons per year or more of any single air pollutant or aggregated *de minimis* emissions of criteria or non-criteria pollutants must submit a Comprehensive Plan Application—rather than the Limited Plan Application reserved for less significant proposed modifications—and MassEPA may require air dispersion modeling as part of that application process. *See* 310 CMR 7.02(5)(a)(1); 310 CMR 7.02(5)(a)(6); 310 CMR 7.02(5)(c)(6).[1]

Massachusetts also reserves the right to require a Comprehensive Plan Application, which may include a modeling requirement, for any proposed modifications that MassDEP determines "has the potential for causing or contributing to a condition of air pollution." 310 CMR 7.02(5)(a)(10). Similarly, Colorado can require a source to model in circumstances where the source could still cause or contribute to an exceedance of the NAAQS despite being below the threshold for reasons including the location of the source (e.g., sources in areas with poor existing air quality), because modeling has never been done for that source (e.g., grandfathered sources), or because of poor dispersion characteristics (e.g., fugitive releases). *See* Colorado Department of Public and Environment, Air Pollution Control Division, Interim Colorado Modeling Guideline for Air Quality Permits, 17 (Oct. 2021) *available at* https://cdphe.colorado.gov/air-pollution-control-division-minor-source-permit-modeling.

DEQ should conduct hypothetical modeling to determine whether a proposed modification that would increase a source's emissions by less than 10 tons per year of any regulated pollutant could cause or contribute to an exceedance of the NAAQS—including the short-term NAAQS—in Oregon.[2] DEQ should set the modeling threshold low enough to ensure that any potential NAAQS exceedances are nipped in the bud. If DEQ's modeling suggests that emissions less than 10 tons per year is not likely to cause a NAAQS exceedance, then we urge DEQ to follow Massachusetts' lead and require modeling whenever a proposed modification would increase a source's emissions by 10 or more tons per year or when DEQ otherwise has reason to believe the

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[1] Additionally, Connecticut requires a demonstration of NAAQS compliance for all modifications to minor sources that will increase the source's potential emissions by 15 tons per year or more. RCSA Section 22a-174-3a(a)(1)(D); RCSA Section 22a-174-3a(a)(1)(E); RCSA Section 22a-174-3a(d)(3)(C).

[2] Colorado developed a short-term modeling threshold of 0.46 pounds per hour for SO2 and NO2 based on analysis by the state's Modeling and Emissions Inventory Unit (MEIU), which conducted hypothetical modeling runs and determined that NO2 or SO2 emissions of 40 tons per year (the significant emission rate) were likely to cause exceedances of the 1-hour NAAQS, and that a much lower hourly limit was necessary to ensure compliance with the short-term NAAQS. Special Assistant Attorney General for Colorado, Public Report of Independent Investigation of Alleged Non-Enforcement of National Ambient Air Quality Standards by the Colorado Department of Public Health and Environment 26-7 (Sept. 2021) *available at* https://drive.google.com/file/d/11eLkOMD-r7vEnJkhwCJtHhj7ZrNLzdb_/view.

proposed modification might negatively impact air quality, especially in environmental justice communities.[3]

We also urge DEQ to require technology review and modeling for any proposed modification that would increase a source's emissions above its permit limits (PSELs), requiring an upward adjustment of the limits DEQ already imposed on the source. Oregon's PSELs are already excessively high and may allow emissions far above what the source is likely to generate. To protect public health and welfare, including of the environmental justice communities disproportionately affected by air pollution, any source proposing to make a physical change or change in operation that would potentially increase emissions above the limits DEQ previously imposed should have to undertake a technology review and submit modeling demonstrating that the proposed modification will not cause or contribute to a NAAQS exceedance.

**QUESTION 3**

*Question 3: Based on a review of the technical clarifications presented at the meeting, do you have additional comments, questions, suggestions for DEQ consideration?*

We support many of the proposed technical clarifications reflected in the redlines DEQ circulated as part of the RAC 1 materials:

- 340-210-0230(1)(o); 340-215-0040(1)(a)(K)—We support the requirement to submit an analysis equivalent to a LUCS application where a LUCS is not required, as well as the clarification that projects that are denied a Land Use Compatibility Statement (LUCS) will not be approved by DEQ. Although LUCS are unfortunately often granted when they should not be, in rare cases, as in the case of Zenith, a LUCS denial can serve as an important safeguard against projects that undermine public health and welfare.

- 340-210-0240(2); 340-216-0020(3)(a)—We support the clarification that sources must undertake any approved construction in accordance with the approved plans. The approval process would be meaningless if sources were not bound to construct in accordance with what DEQ actually approved. It is our understanding that this additional language will allow DEQ to pursue enforcement action for noncompliance with approved plans, and we urge DEQ to use that enforcement authority.

- 340-216-0020(8); 340-218-0240(1)—While it should go without saying, we support the clarification that no person may violate the conditions of a permit, and applaud DEQ for taking steps to make enforcement of Oregon's air pollution laws easier.

- 340-216-0040(1)(a)(L), 340-218-0040(3)(c)(M)—We support the requirement to submit the most recent information reported to EPA through the Toxics Release Inventory program. We note that one of Oregon's most notoriously non-compliant sources of air

[3] DEQ should also consider using even lower thresholds for modeling for proposed projects in nonattainment or sustainment areas where the NAAQS are already in jeopardy.

pollution, Owens-Brockway, was cited by EPA for submitting inaccurate information to the TRI, and we encourage DEQ to take a look at this information for all sources.

We have some concerns about other proposed redlines:

- 340-210-0230(1); 340-216-0040(1)(a); 340-216-0064(3)(c); 340-216-0066(3)(c)—With respect to the edits specifying that various submissions must be on a "paper or electronic" DEQ form, we question whether there is any basis for allowing paper submittals without an accompanying electronic copy in 2022. Paper submittals will consume DEQ resources scanning the submittals in order to make them publicly available. It is also harder for the public to copy information from a scanned document than from a document produced electronically. We urge DEQ to require all electronic submittals in order to improve public access to regulated entities' submissions.

- 340-216-0040(11)—While we support the sideboards requiring that extensions be for good cause, we note that there now appears to be no outer limit on what DEQ may set as the initial deadline to submit requested information. The lack of any constraint on the initial deadline seems like a loophole that could undermine DEQ's effort to eliminate unwarranted delay. We urge DEQ to specify that DEQ will "provide the applicant with a written request to provide such information by a date certain, ***not to exceed a 90-day period***."

- 340-210-0225(4)—The description of Type 4 NCs is confusing, and the proposed edits only introduce further confusion. Among other problems, the redline now refers to changes that "would increase the PSEL" but of course only DEQ can increase a PSEL; a source can only increase emissions. If this redlined language is not vitiated by additional substantive changes that DEQ is planning to make, we urge DEQ to clarify what projects that fall into Type 4 and revise this provision to be more intelligible.

**QUESTION 4**

*Question 4: Any additional or general comments based on the topics discussed at RAC Meeting #1?*

We wish to offer feedback to make the RAC process more effective. In our pre-RAC interviews, several of us urged the RAC facilitators and DEQ to provide, before each meeting, as much detailed information as possible about the policy proposals that would be the focus of the RAC meetings, with sufficient time for RAC members to perform a thorough assessment of each proposed change. We would like to renew that request here.

On December 2, DEQ sent RAC members several PDFs containing redlined regulatory changes, which we believed represented DEQ's most up-to-date thinking on the changes DEQ planned to make, particularly regarding changes to Notice to Construct rules. As a result, we spent substantial time reviewing and assessing those changes in preparation for the meeting.

It was not until December 14, when we received the draft slides for the first RAC meeting—which outlined the proposed "policy changes" for Type 1, 2, and 3 NCs— that we realized that the redlined changes we had received nearly two weeks earlier were not in fact DEQ's vision for a final rule, and in fact were somewhat inconsistent with the redlines RAC committee members reviewed.

Again, we believe the RAC would greatly benefit from members receiving sufficient information before each meeting to allow for informed and thoughtful input. If DEQ plans to circulate any more partial redlines, it would be helpful to advise the RAC that additional substantive changes to those same provisions are forthcoming.

Moreover, we urge DEQ to more fully flesh out its proposed policy changes—including drafting possible regulatory language—in the materials provided before each meeting. We will be better equipped to comment on DEQ's proposed policy changes when we have actual language we can read and react to.

Thank you in advance for your consideration of our comments and for the opportunity to participate on the Rulemaking Advisory Committee. We look forward to working with you to protect Oregon's air and all who breathe it.

Sincerely,

Lisa Arkin, *Executive Director*
**Beyond Toxics**

Molly Tack-Hooper, *Supervising Senior Attorney*
Ashley Bennett, *Senior Associate*
**Earthjustice**

Mary Peveto, *Executive Director*
**Neighbors for Clean Air**

Jonah Sandford, *Staff Attorney*
**Northwest Environmental Defense Center**

Sergio Lopez, *Energy, Climate and Transportation Coordinator*
**Verde**

January 11th, 2022

DEQ Air Quality Permit Staff

Thank you for the opportunity to participate and comment on the materials and topics presented at the December 16th, 2021 Rulemaking Advisory Committee (RAC) meeting. As a public health representative on the committee, we support air permitting programs and rules that result in reductions of human exposure to emissions of air contaminants.

Multnomah County sees the highest cancer risk from air pollution in the state, with an estimated, cancer risk from air toxics of 36.5 in 1 million[1]. Data for 2012-2016 show disparities by race and ethnicity in deaths from causes related to air pollution. These disparities were most pronounced between Black and white residents, with higher death rates among Black residents from diabetes (2.7 times), cancer (1.4 times), and stroke (1.5 times).[2] Industrial pollution is an important contributor, as is increasingly evident as we learn more from the Cleaner Air Oregon process. This is especially true in areas near large emitters where localized impacts are greater.[3] As we continue through the development of updated draft rules for DEQ's air permitting programs, avoiding any regulation that exacerbates or perpetuates disproportionate pollution exposure, especially in low income neighborhoods and communities of color, will support our goal of health equity.

Feedback, reflections, and clarification requests on discussions presented for future policy draft rules and technical changes to draft rules presented at the first RAC meeting are below.

**Notice of Intent to Construct (NCs)**

When discussing the current rules around NCs, it was mentioned that many of the Significant Emission Rates (SERs) were set off of modeled data in the 1980s. This brings up a concern around current research and evidence on pollutants, exposure and impacts compared to information modeled 40 years ago. Significant emission rates are not currently the most health protective option nor consistent with the currently set NAAQS, due to their annual emissions limits and no account for short term variabilities in emissions/operations. It was noted that some SERs have been updated (for example GHG in the 2000s) but not all. If policy changes are dependent on levels outlined in the SERs, a more thorough review of updates for each regulated pollutant is warranted, in addition to assigning more

[1] EPA, NATA 2018
[2] Oregon Death Certificates 2012-2016
[3] Oregon Department of Environmental Quality summary of 2017 National Emissions Inventory data, 2020

NAAQS appropriate threshold comparisons (ie: 24hrs for PM) so short spikes and acute health effects may be accounted for. We recommend DEQ consult and engage the Oregon Health Authority in this rulemaking to provide additional context and analysis on more protective SERs. This would support DEQ's goal of "enhanced community protection".

***Policy Change NC Type 1***

We are generally supportive of eliminating the 10-day default approval for Type 1 NCs. As presented, this change is more likely to allow DEQ to catch construction that in the past has been default approved, despite not qualifying as a type 1. When thinking about criteria or indicators DEQ should use as it develops and assesses a list of equipment that would qualify under this new rule, equipment that adds no emissions or is not in need of routine inspection and maintenance seem appropriate. Not enough information was provided on the development of de minimis thresholds to confidently add it as a threshold. However, if it is included in draft rule, DEQ should consider whether or not there would be instances where cumulative impact of multiple de minimis sources from the "notice and go" list could together create impacts to a community/neighborhood (for example, multiple small generators in a small area). In this case, it may be beneficial to include other factors beyond just emissions to qualify as "notice and go", for example also distance to sensitive receptors.

***Policy Changes NC Type 2 / 3 NC's***

When considering what level of emissions should trigger the requirements of technology review and modeling for equipment with emissions less than the SER, the most health protective action would be to require both technology and modeling review for any new or equipment modification above de minimis levels. We are supportive of requiring at a minimum a technology review for Type 2, and if deemed by DEQ within the sixty days as needed, also require modeling for equipment with emissions less than the SER in Type 2/3 NCs. The Type 2 sixty day clock would start anew.  Type 3 should require both technology and modeling.

We are in general support of adding expiration dates to NCs and construction approvals, to ensure the conditions and technologies available and reviewed at the time of application most closely resemble those at construction and commission. For a new Source an 18 month deadline feels appropriate, with one good cause 18 month extension. This would give a source a maximum of three years. For existing sources, the same rules should apply, with the exception of voluntary emission control equipment receiving one additional good cause extension. Expiration dates allow for changes at a source to be more accurately accounted for and emissions best understood.

**Technical Clarifications and Typos**

## Environmental Health

Based on the technical clarifications presented at the meeting, we are in general support of the changes with the exception of two items that need further clarification.

One technical change suggests the removal of the measurement of fugitive emissions. If this is removed, where else are these captured? Human health risk is all exposure.

Second, a technical change was suggested around renewal applications and increasing the amount of information collected so permit writers are able to make more timely and informed decisions. We are supportive of this change however there is no clarity on what a “full” application would be, and as a result, this feels like more than just a technical clarification, with examples of proposed application elements to include needed to ensure they are in fact comprehensive.

**Other Comments**

DEQ should continue to simplify language for public consumption and accessibility. This includes a consideration and recommendation by another RAC member in renaming permit types, even if embedded in rules. Alternatively, DEQ could develop a comprehensive glossary that translates these terms and make it widely available through the permitting website and other venues as appropriate. Please continue to work to post meeting materials and meeting summaries as early as possible for both RAC members and interested community members.

We urge DEQ to continuously prioritize and protect community health while implementing a transparent permitting process and spurring a vibrant economy. Thank you for the opportunity to provide written comments in response to this RAC’s first meeting.

Nadège Dubuisson, MPH
Program Specialist Sr. , Multnomah County Environmental Health
*RAC Member*

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January 12, 2022

Oregon Dept. of Environmental Quality
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Portland, OR 97232-4100

RE: **Air Quality Permitting Update RAC Meeting #1 Comments**

Ms. Inahara,

Thank you for the opportunity for the Northwest Pulp & Paper Association (NWPPA) to participate in the Rulemaking Advisory Committee (RAC) and provide comments on Oregon Department of Environmental Quality's (DEQ) Air Quality Permitting Rules Update.

**INTRODUCTION**

NWPPA is a 65-year-old regional trade association representing 10-member companies and 14 pulp and paper mills and various forest product manufacturing facilities in Oregon, Washington and Idaho. Our members hold various permits issued by DEQ including permits for Title V Air Operating Program and the Air Contaminant Discharge Program.

NWPPA members are at the forefront of Oregon air quality improvement efforts. Our members have embraced technically advanced and scientifically sound controls on air emissions over the past 20 plus years. We are proud of our dedication to efficient and environmentally sound processes and reduction of emissions over time. We are committed to the hard work, expense and discipline it takes to be contribute to our communities.

NWPPA has long-standing-stakeholder participation in numerous DEQ advisory committees including groups on establishing regulatory programs, administrative rules and program improvement efforts. Our staff and members have participated in the development of rules in previous RACs including NWPPA President, Brian Brazil, who is participating in the current DEQ Air Quality Permitting RAC.

Oregon's pulp and paper sector has been recognized as an essential business by state and federal governments. Without fail, our Oregon mills' essential workers have been making vital

paper products we all use every day to help fight against COVID-19. Our essential paper products are used by Oregon consumers as well as being distributed within the Western US and abroad.

NWPPA supports comments presented by Tom Woods of Stoel-Rives LLP for the Coalition of businesses that he represents. NWPPA is a member of that Coalition, so those comments should be included in our comments as well.

**DEQ Questions for RAC Members**

Following the December RAC meeting, DEQ specifically asked for input on the following four questions. NWPPA's response follows each question below.

**Question 1**: DEQ is proposing rules related to Notice of Intent to Construct, including a change that would eliminate a 10-day default approval and replace with a "notice and go" rule to streamline the process. This would apply to specific equipment.

- What criteria or indicators should DEQ use as it develops and assesses the list of equipment that would qualify under this new rule?
- What equipment should be included in a rule change?
- We are including a link to Washington State regulations for New Source Review as a resource mentioned at the RAC meeting

**NWPPA Response to Question 1**

NWPPA believes that adding a list of pre-approved projects that can be performed with only a "notice and go" would be useful. A list of such projects could begin with the Washington Department of Ecology list of insignificant activities at WAC 173-400-110(4) as shown on the link provided by DEQ. The list might more appropriately be based on the already defined Oregon list of Categorically Insignificant Activities at OAR 340-200-0020(23). As such, the addition of a pre-approved activities list to the existing Type 1 NC process is supported by NWPPA.

Elimination of the existing Type 1 notice to construct (NC) process and forcing extensive agency review for very minor projects that meet the de minimis levels as defined in OAR 340-200-0020 is not appropriate. Making de minimis projects follow extended permitting under a process similar to the current Type 2 or Type 3 review would significantly delay these very minor projects with little or no benefit to air quality. As such, NWPPA is opposed to elimination of the Type 1 NC.

**Question 2**: DEQ proposed policy changes to Type 2/3 NC's. What level of emissions should trigger the requirements of technology review and modeling for equipment with emissions that are less that the Significant Emission Rate?

**NWPPA Response to Question 2**

NWPPA does not believe it is necessary or reasonable to add additional technology review requirements beyond those already required for Type 2/3 NCs. The existing rules allow DEQ to require "Typically Available Control Technology" now. Any review beyond what is currently

required is not needed. Any addition of more technology review will unnecessarily extend review timelines for minor changes that qualify as Type 2/3 NCs.

These type of changes, by nature, will not increase emissions above the significance level and therefore should not require any modeling. The only situation where modeling might be required is if the source making the Type 2/3 change were located in a non-attainment area. In that extremely rare instance, DEQ already has the authority to require modeling. NWPPA does not support DEQ making any changes to Type 2/3 notification requirements that would require modeling.

**Question 3**: Based on a review of the technical clarifications presented at the meeting, do you have additional comments, questions, suggestions for DEQ consideration?

**NWPPA Response(s) to Question 3**

NWPPA provides the following suggestions and/or comments on the proposed redlined draft of proposed changes to the OAR, which are arranged by section reference(s) in the draft.

OAR 340-200-0020(73)

ORS 468A.020(3)(a) states:

> Except to the extent necessary to implement the federal Clean Air Act (P.L. 88-206 as amended), the air pollution laws contained in ORS 468A.025, 468A.030, 468A.035, 468A.040, 468A.045 and 468A.300 to 468A.330 do not apply to carbon dioxide emissions from the combustion or decomposition of biomass.

As such, NWPPA believes the removal of OAR 340-200-0020(73)(b) is both unnecessary and inappropriate. State law requires that GHG be regulated only "to the extent necessary to implement the federal Clean Air Act". That is what the existing language OAR 340-200-0020(73)(b) accomplishes and, therefore, NWPPA is opposed to any attempt to remove OAR 340-200-0020(73)(b).

OAR 340-200-0020(84) and 340-220-180(1)

The proposed change to 340-200-0020(84) and 340-220-180(1) from "postmarked" to "received" is both inappropriate and a substantial change to 50+ years of history. This is not a "correction" of a typo as stated by DEQ in the explanation of changes. Simply because DEQ has created the Your DEQ On-line (YDO) system that doesn't have the ability to account for postmarks is absolutely the WRONG reason to suggest this change. DEQ CANNOT expect that sources will submit fee payments for Title V permit fees for tens of thousands of dollars on-line. They also must not ignore postmarks that prove these large checks were submitted on time.

NWPPA suggests that language similar to how EPA recognizes timely submissions in 40 CFR Part 70 would be the CORRECT way to accomplish this. Our suggested language (if DEQ continues to believe a change must be made to accommodate YDO payments is: "…postmarked or time stamped on an electronic submission through YDO...". If DEQ has not setup the YDO system to timestamp payments, than that is an error DEQ must correct.

OAR 340-200-0210 (throughout the section)

The proposed addition of "potential" before "emissions" throughout 340-200-0210 is confusing and incorrect. There is no defined term of "potential emissions" in OAR 340-200-0020. The nearest definition is for "potential to emit' or PTE. However, "potential emissions" is not being used in this context as PTE. That makes this language misleading since the Plant Site Emission Limit ("PSEL") serves as a federally enforceable limit on PTE. NWPPA opposes adding the word "potential" in this section of the rules without definition of what this term actually means.

OAR 340-208-0110(1) and 340-234-0210(4)

The proposed addition of 340-208-0110(1)(b) does not actually include all the sources exempt from the rule under 340-234-0210(4). As such, 340-208-0110(1)(b) should read: "Kraft mill sources regulated for visible emissions (i.e. opacity) under 340-234-0210(4)".

Also, the addition of "Fugitive emissions must meet the requirements of OAR 340-208-0210" in 340-234-0210(4) is duplicative, unnessary, and should be deleted from this draft. All Kraft mills in Oregon are Title V sources and, therefore, must have all applicable rule requirements included in their permits. Addition of this language to the rule does not accomplish anything that is not already included in the rules and the Kraft mill's operating permits. NWPPA does not support adding this unnecessary language to the Kraft mill rules, unless DEQ includes similar redundant language for all sources in the State at 340-208-0110(1)(b).

OAR 340-210-0230(1)(o)(B) and OAR 340-226-0040(1)(a)(K)

The proposed addition of section (B) requiring a source and DEQ to perform an artificially created Land Use Compatibility analysis is excessive and unnecessary. If the local planning jurisdiction does not require a review, which in itself constitutes approval, then recognition that there is no need to review the project is by default, an approval. The same applies for the planning jurisdiction declining to review the application. That in itself is acknowledgment by the planning jurisdiction that review is unnecessary. NWPPA opposes the addition of these sections to the rules.

OAR 340-226-0130(3)

The proposed change from "may supply DEQ with additional information" to "must supply DEQ with additional information" does not actually include any requirement for DEQ to tell the source what "additional information" it wants or needs. This requires the source to either guess at what "additional information" DEQ wants, or spend effort to find out from DEQ while using up part of the timeline set by DEQ. If DEQ intends to ***require*** "additional information", this section should read "… must supply DEQ with additional information, if requested by DEQ, by a reasonable date…"

**Question 4**: Any additional or general comments based on the topics discussed at RAC Meeting #1?

NWPPA provides the following comments related to some of the questions and or possible proposals asked by DEQ at the first RAC meeting on December 16, 2021.

Resetting the clock for reviewing applications every time DEQ asks for additional information

NWPPA does not support the concept of resetting the application review timeline back to zero every time an additional piece of information is received upon an application that is in the NC process. This would essentially eliminate all deadlines for permit issuance and halt any approvals simply because additional information was requested. Even halting the review timeline for the time that a source is preparing a response to a DEQ question is not appropriate and will result in excessive delays.

Expiration of NCs

NWPPA does not support the concept of putting deadlines on NCs to begin construction. If DEQ believes this is necessary, there must be a process to wrap NCs into the Title V or ACDP Operating Permit of a Source, which allows the NC to remain available to the Source for the duration of the Operating Permit.

**CONCLUSION**

NWPPA appreciates the opportunity to participate in Air Quality Permitting Rules Update as a RAC participant, and by submitting these written comments for the rulemaking record.

Sincerely,

Brian Brazil
President
Northwest Pulp & Paper Association

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January 12, 2022

Jeffrey L. Hunter

**VIA ELECTRONIC MAIL ONLY**

Ms. Jill Inahara
Oregon Department of Environmental Protection
700 NE Multnomah Street, Suite 600
Portland, OR 97232

**Re: Comments on Oregon Air Quality Permitting Updates Rulemaking Advisory Committee Meeting 1, December 16, 2021**

Dear Ms. Inahara:

Thank you for the opportunity to comment on the Department of Environmental Quality's (DEQ) first Air Quality Permitting Updates Rulemaking Advisory Committee (RAC) meeting. Please note the comments expressed herein are my comments as an advocate for industry as a whole. My comments and views may not be fully supported by all owners/operators that hold Air Contaminant Discharge Permits and are subject to DEQ's air regulations.

## General Comments

While the regulated community also shares DEQ's goal of protecting air quality and addressing disparate impacts on communities of color and low-income, DEQ has not reasonably demonstrated how the proposed changes to the Notice of Intent to Construct (NIC) provisions will streamline the permitting process, protect air quality or address the potential environmental justice concerns raised by DEQ. As shown in DEQ's slides presented at the December 16, 2021 RAC meeting, nearly all of the NIC applications are Type 1 and Type 2 changes (less than 2% of the applications received over the **past 21 years** are Type 3 or Type 4 changes). Narrowing the scope of the Type 1 changes will shift a significant number of Type 1 applications to Type 2 applications. Type 1 and Type 2 changes do **not** have significant air impacts and are often pollution control projects designed to reduce a source's overall emissions or the repair/replacement of necessary equipment to allow the source to continue to operate without any material changes in permitted emissions. DEQ's proposed changes will require DEQ to provide additional resources to review the increased number of Type 2 applications which may result in delays. If DEQ moves forward with the proposed change, DEQ should ensure the regulated community that it has the resources to timely and efficiently process Type 2 applications.

Additionally, DEQ is proposing undefined technology reviews and potential modelling for compliance with the National Ambient Air Quality Standards (NAAQS) for Type 2 applications. As Type 2 changes (1) **cannot** result in an increase in permitted emissions, (2) any increase in

emissions **must be below** the Significant Emission Rate (SER) and (3) **cannot** trigger a permit modification, imposing additional requirements on approval is neither necessary nor warranted and will result in delays in approval of Type 2 changes since DEQ will likely request additional information. Further, as DEQ is proposing in its technical clarification, the NIC applications apply to the individual emissions unit being constructed, replaced or modified--not the source. Modelling compliance with the NAAQS for an individual emissions unit especially new pollution control equipment does not really make any sense nor does it address any environmental justice issues. Finally, a number of the so called "technical clarifications" are also unnecessary and not warranted.

With these general comments, this responds to the specific questions presented in the December 22, 2021 electronic communication from Kearns & West following the first RAC meeting. For your convenience, the question is repeated followed by our response.

**Questions Presented**

**Question 1**: DEQ is proposing rules related to Notice of Intent to Construct, including a change that would eliminate a 10-day default approval and replace with a "notice and go" rule to streamline the process. This would apply to specific equipment.

What criteria or indicators should DEQ use as it develops and assesses the list of equipment that would qualify under this new rule?

**Response**:

Rather than eliminating Type 1 applications, DEQ should create a new category for the "notice and go" changes. This would streamline the permitting process and shift a number of the current Type 1 applications to the new "notice and go" category while keeping Type 1 applications for projects that would not qualify under the new category.

What equipment should be included in a rule change?

**Response**:

Pollution control projects and/or equipment designed to reduce a source's overall emissions should be included in the "notice and go category." This would include the installation of bag houses, electrostatic precipitators, Low-$NO_x$ burners, wet scrubbers and similar equipment.

Other projects and equipment that do not result in an increase of emissions above the de minimis levels should also be included in the new "notice and go" category. This could include physical changes that do not result in material changes to emissions, instrumentation upgrades and new or replaced equipment. This is consistent with Washington's program which exempts from New Source Review construction of a new emissions unit that has a potential to emit and

modifications or replacements of an existing emissions unit that increases the unit's **actual emissions** below specifically enumerated levels (e.g., Washington's de minimis levels). WAC 173-400-110(5). Note that for certain criteria pollutants, Washington's de minimis levels are greater than DEQ's de minimis levels. In this rulemaking, DEQ **should increase** the de minimis levels under OAR 340-200-0020 for carbon monoxide, nitrogen oxides, sulfur dioxide and volatile organic compounds to align with Ecology's regulations.

**Question 2**: DEQ proposed policy changes to Type 2/3 NC's. What level of emissions should trigger the requirements of technology review and modeling for equipment with emissions that are less than the Significant Emission Rate?

**Response**:

DEQ has not explained the basis or purpose of the "technology review" for Type 2 or Type 3 changes. To qualify as a Type 2 change, the change must **not** require a Typically Achievable Control Technology (TACT) determination under OAR 340-226-0130 or a Maximum Achievable Control Technology determination under OAR 340-244-0200. OAR 340-210-225(2)(e). In contrast, Type 3 changes expressly require such a determination. OAR 340-210-225(3)(d). Therefore, it is not clear what additional "technology review" DEQ is seeking for Type 2 or Type 3 changes. Type 2 and Type 3 changes are significantly different and are treated differently under the regulations. Further, if DEQ limits Type 1 changes, then changes that previously would have qualified for a Type 1 will now be shifted to Type 2. DEQ should not require technology reviews or create similar criteria for current or future Type 2 changes.

One of the important distinctions between Type 2 and Type 3 changes is whether there is an increase in emissions from any new, modified, or replaced device by more than or equal to the Significant Emission Rate (SER). To qualify as a Type 2 changes, the increase in emissions **cannot** be more than or equal to the SER. OAR 340-210-225(2)(c). In contrast, Type 3 changes authorize an increase in emissions by more than the SER. OAR 340-210-225(3)(b). This distinction is important. By requiring modelling for Type 2 changes, DEQ is blurring the lines between Type 2 and Type 3 changes.

Modelling is expensive, time consuming and many Type 2 changes do not significantly impact a source's overall emissions. In many instances, sources need to replace or repair a piece of equipment as soon as possible to maintain operations. DEQ should not establish an arbitrary threshold that would require certain Type 2 changes to model compliance with the short-term NAAQS. Requiring modelling for Type 2 changes, even above a certain threshold (e.g. more than 50% of the SER) will result in unnecessary delays in approvals. In addition, it is not clear whether modelling emissions from a new or replaced emissions unit for compliance with the short-term NAAQS will not provide any meaningful data. This would simply be a needless "check the box" exercise.

**Question 3**: Based on a review of the technical clarifications presented at the meeting, do you have additional comments, questions, suggestions for DEQ consideration?

**Response**:

Applicability of the NIC Rules

Agree with DEQ that the NIC regulations only apply to the emissions unit being constructed or modified, not the source.

Actual vs. Potential To Emit

For Type 1 changes, emissions should be based on **actual** anticipated emission, not potential to emit (PTE). A baghouse could have the potential to emit more than 1 ton per year of PM if theoretically operated 8,760 hours. DEQ's proposal clarifying that emissions are based on PTE not actual emissions would automatically shift any new bag house or pollution control equipment to a Type 2 change since it would not meet the criteria for a Type 1 change.

For Type 2 changes, DEQ should differentiate between new equipment and modified/replaced equipment. For new equipment, it may be appropriate to use PTE to determine whether the change qualifies as a Type 2 change. However, if a source is replacing/modifying existing equipment and the newer equipment/component has slightly different emissions, the comparison for determining whether the change qualifies as a Type 2 change should be based on the change in **actual emissions** taking into consideration any existing operating conditions or limits in the permit. If there are no existing operating conditions or limits in the permit, then the change in actual emissions would be the PTE.

Request for Information for Type 2 Applications

We understand that DEQ is concerned that there is no specific provision in the current regulations that allow DEQ to request additional information on a Type 2 application. While the regulations may be silent on DEQ's ability to request additional information, in practice DEQ has requested additional information on Type 2 applications and in our experience the sources have typically provided the requested information in a timely manner. In most cases, sources are submitting a Type 2 application so they can continue to operate. It is not clear that this is a problem that needs to be solved. If DEQ believes that it needs additional information, DEQ can update its Forms for Type 2 applications.

DEQ should not be allowed to wait until the 59th day to request additional information. If DEQ is going to make revisions to the regulations, DEQ should include a completeness review within 15 days following receipt of a Type 2 application. If DEQ fails to notify the source within 15 days, the application is deemed complete and DEQ should not be able to require additional information. Sources should have adequate time (at least 30 days) to respond to the information

requests and should have an opportunity to request extensions when warranted. Depending on the request, 30 days may not be sufficient to respond. Finally, Type 2 applications should only be rejected if DEQ fails to receive the additional information after some period of time following the due date and after written notice from DEQ that the application will be rejected.

Expiration Dates

DEQ is proposing expiration dates on construction approvals. Regardless of whether DEQ makes revisions to the Type 1 changes, there should be no expiration date on those types of changes. For other construction approvals, a source should have at least a full permit term to implement the approved change and should have the ability to seek extensions. Typically, sources are not going to place orders for equipment until after the source has received all required approvals--DEQ construction approvals as well as any local government permit requirements. Given the on-going pandemic, there have been significant delays in procuring equipment as well as labor shortages. There could be construction delays due to events and circumstances outside of the facility's reasonable control. Having a full permit term to implement the approved change is reasonable.

DEQ should also differentiate between completion of construction and commissioning of the equipment. There may be business reasons why equipment is installed but not fully commissioned. DEQ should not have the ability to withdraw the approval after a source has completed construction but has decided to not yet operate the equipment.

Violation of Permit Conditions

DEQ's proposed addition to OAR 340-216-0020 to add a statement that no person may violate the conditions of an Air Contaminant Discharge Permits is not necessary. OAR 340-012-0054(b) expressly includes violating the terms or conditions of a permit as a Class II violation. Exceeding emission limits are identified as Class I violations under OAR 340-012-0054(a). The absence of this statement in OAR 340-216-0020 has not prevented DEQ for enforcing violations under the air permitting program. If DEQ makes this revision, DEQ should revise Division 12 to clarify that a duplicative violation cannot be asserted if a source violates a condition of its permit.

Construction in Accordance with Approved Plans and Specifications

DEQ's proposed addition to OAR 340-216-0020 to add a statement that the permittee **must construct** their facility in accordance with approved plans and specifications is too broad. An application may include the construction of multiple equipment or two separate processing lines. For business reasons, a permittee may decide to not construct all of the equipment or delay construction of certain equipment. As drafted, this provision could be read as requiring the permittee to fully construct all equipment in the application. In addition, changes could occur

during construction that have no impact on emissions. OAR 340-216-0020(3)(a) should be revised to read as follows:

**If constructed**, the permittee must construct their facility **in substantial** accordance with the approved plans, specifications and any corrections or revisions thereto or other information, if any, previously submitted in the application required under OAR 340-216-0040 **or in subsequent communications with the Department**.

Full vs. Streamlined Applications

DEQ should not consider any revisions to OAR 340-216-0040(2). For renewals of Standard ACDPs where there are no significant edits, using a streamlined process is efficient and allows DEQ to quickly review and renew the permit. Requiring sources to re-submit full applications to renew a Standard ACDP is not necessary and will lead to unnecessary delays in the renewal.

Elimination of 90 Days to Submit Additional Information

DEQ should not consider any revisions to OAR 340-216-0040(11) or (12). The revisions are not necessary, have no relationship to the protection of air quality and do not advance any environmental justice goal. The current regulations clearly state that the application is not considered complete until the additional information is received and the application will be considered withdrawn if the information is not received within 90 days of the request. Sources have no incentive to further delay the review process in our experience most sources work cooperatively with DEQ to timely submit the requested information. DEQ should not make assumptions on response deadlines and requiring sources to justify extensions when the response deadline cannot be met is wasteful of DEQ's and the source's resources.

Revisions to OAR 340-216-8010 Table 1

DEQ needs to seriously consider the impact of its proposed changes to Categories 79 and 86. Inserting "if the source were to operate uncontrolled" under Category 79 creates the same ambiguity as the current text of Category 85. Both categories should be based on actual emissions and the phrase "if the source were to operate uncontrolled" should be deleted from both. If this change is implemented, there is a potential for many small sources (bakeries, restaurants, small manufacturers, universities and even theoretically residential buildings) that have actual emissions well below 10 tons per year to be required to obtain a permit just because their PTE (based on 8,760 hours per year) could be 10 tons per year. Those sources do not operate ovens, furnaces, hot water heaters and other natural-gas fired equipment 24/7/365 and it is illogical to assume they would. Trying to capture these sources is a mistake, is an inefficient use of DEQ's resources and is not going to have any impact on air quality.

**Question 4**: Any additional or general comments based on the topics discussed at RAC Meeting #1?

**Response:**

*See* the general comment above.

**Conclusion**

I appreciate the opportunity to offer comments on the Air Quality Permitting Updates Meeting 1 questions and look forward to engaging in this rulemaking as it moves forward. Please contact me if you have any questions regarding these comments.

Sincerely,

Perkins Coie LLP

Jeffrey L. Hunter
Partner

JLH:jlh

cc: E. Porter (via electronic mail only)

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January 12, 2022

**VIA EMAIL (2022.AQPERMITS@DEQ.OREGON.GOV)**

Ms. Jill Inahara
Oregon Department of Environmental Quality
700 NE Multnomah Street, Suite 600
Portland, OR 97232

**Re: Comments on First Meeting of Oregon Air Quality Permitting Updates 2022 Rulemaking Advisory Committee Meeting 1**

Dear Ms. Inahara:

We are writing as the spokespersons for a broad coalition of business and manufacturing associations including Oregon Business & Industry and many others (the "Coalition"). Collectively, the Coalition represents approximately 1,700 businesses in Oregon that employ approximately 300,000 workers, including nearly 75,000 workers in the manufacturing sector. The Oregon businesses making up the Coalition hold air permits and are covered by the regulations arising from ORS 468A. These companies have tremendous experience implementing Oregon's air quality regulatory program, and they stand for a program that is successful for all Oregonians. A successful air quality program is one that is fair, based on good policy, and makes efficient use of agency and regulated entity resources. We appreciate DEQ involving the Coalition in this dialogue about potential changes to the program. Based on the first Rulemaking Advisory Committee ("RAC") meeting, we have concerns about some of the ideas being considered and the suggested direction of the rule revisions. To present our concerns, we provide the following comments using the question structure provided by Ms. Valdez in her December 22, 2021 email. We note that our comments are necessarily preliminary as the Department has not yet proposed draft rule language for all of the ideas being considered.

**Comments**

RAC members were provided with each of the following questions from DEQ and asked to respond in light of the first RAC meeting. Each DEQ question is reproduced verbatim below in italics and the Coalition's comments in response follow.

> *Question 1: DEQ is proposing rules related to Notice of Intent to Construct, including a change that would eliminate a 10-day default approval and replace with a "notice and go" rule to streamline the process. This would apply to specific equipment.*
>
> - *What criteria or indicators should DEQ use as it develops and assesses the list of equipment that would qualify under this new rule?*
> - *What equipment should be included in a rule change?*

DEQ is considering fundamental changes to the state's longstanding notice to construct ("NC") rules. At the RAC meeting, DEQ discussed replacing the Type 1 NC rules with a structure that would move many Type 1 NCs into the Type 2 review process, with limited categories of construction approval requests being converted into a new, "notice and go" approach. The Coalition believes that the existing NC rules work well and, as explained below, requests that DEQ not pursue the changes to those rules discussed at the RAC meeting.

DEQ premised its NC rule change discussion on the presumption that the Type 1 NC presents an unmanageable administrative burden. More specifically, DEQ indicated that its staff lack the capacity to review all of the Type 1 NCs submitted to the agency to ensure that each submittal meets the Type 1 criteria. Coalition members have questions about the premise underlying the NC rule change DEQ is considering. DEQ stated in the RAC slides that it receives, on average, just 93 Type 1 NC applications per year. This equates to an average of 1.8 Type 1 NCs per week or fewer than 8 applications per month, statewide. Based on the data DEQ presented at the RAC meeting, we do not see that the administrative burden from the existing Type 1 rules requires or justifies any change to those rules.

DEQ's proposal to eliminate the Type 1 NC approach would, however, create its own set of problems for both regulated sources and the Department. Shifting the majority of Type 1 NCs to being subject to the Type 2 requirements will decrease flexibility and increase cost for Oregon businesses. Now is the wrong time to impose any new burdens on Oregon manufacturers, which face serious supply-chain disruptions and longer-than-normal lead times and increased costs for all manner of materials and equipment, even basic commodities (*e.g.*, steel). Such a shift will also slow down most companies' ability to comply with the Division 210 regulations without any commensurate environmental benefit.

In addition, it will be difficult to identify or classify activities eligible for the "notice and go" approach being considered. While some activities might be readily identifiable by the

Department as suitable for notice and go, many Oregon companies have unique processes that cannot be defined on a classification schedule. At the RAC meeting, we discussed that other states completely exempt a broad array of activities from minor new source review. These other states' programs typically include complete exemptions for such activities, not mere "notice and go" provisions. For example, Washington's Department of Ecology ("Ecology") minor new source review regulation exempts a broad array of specific activities. See, WAC 173-400-110. However, recognizing that it could not identify all of the appropriate activities for exemption from minor new source review, Ecology also included emission thresholds. If a project consists of installing an emissions unit with the potential to emit less than the values in Table 110(5), that project is exempt from minor new source review.

In sum, DEQ has not yet shown the RAC why its review of Type 1 NCs presents an unworkable administrative constraint. Regardless, if Department resources really are constrained by the need to review Type 1 NCs, the Coalition would support DEQ adding staff to address that problem. Ensuring that the Department has sufficient staff resources to administer Oregon's air quality program is essential to the program's success. However, making wholesale changes to the Type 1 NC structure is no way to address the Department's resource constraints. That is because reclassifying most Type 1 NCs as Type 2s will demand more DEQ attention to and resources for the very projects that, due to their insignificance, do not warrant that. In 1999, when DEQ informally proposed the tiered NC structure that is in the current rules, DEQ specifically reserved the Type 1 NC process for "insignificant activities," which included "pollution control equipment and *de minimis increases*." As DEQ observed at that time, the advantage of the multi-tiered NC structure is that it "[p]rovides a variety of construction approval tools to fit the situation and timeline required." Accordingly, to conserve the Department's limited resources, the Coalition strongly believes that the Type 1 NC structure should be retained and adequate implementation resources dedicated to the program.

If DEQ decides to proceed with an approach to replace Type 1 NCs with a new structure, we encourage the Department to draw on Ecology's rules. Specifically, like Ecology, we encourage DEQ to (a) make a qualifying project exempt from any obligation to notify the Department and (b) include both a list of presumptively exempt activities akin to that in WAC 173-400-110(4) and exempt emissions thresholds equivalent to those in WAC 173-400-110(5).

> *Question 2: DEQ proposed policy changes to Type 2/3 NC's. What level of emissions should trigger the requirements of technology review and modeling for equipment with emissions that are less than the Significant Emission Rate?*

The Coalition does not believe that it is necessary or appropriate for DEQ to impose new control technology review requirements as components of any NC other than as already specified in the existing Division 224 rules (*e.g.*, Type A and Type B State NSR). Since 1993, DEQ's rules have specified that DEQ has the authority to impose operating, work practice and maintenance requirements as part of an NC approval. See OAR 340-226-0120(1)(a). In 1993, DEQ also

added rules requiring that new or modified sources must demonstrate their emissions will be equivalent to those "achieved by well controlled new or modified emissions units similar in type and size that were recently installed." OAR 340-226-0130. This Typically Available Control Technology ("TACT") requirement applies to all sources not subject to more stringent levels of review such as Best Available Control Technology ("BACT") or Lowest Achievable Emission Rate ("LAER") or that are not already covered by industry specific standards (*e.g*, federal New Source Performance Standards) for all of the pollutants emitted. In other words, the existing regulations already provide DEQ authority to require a TACT review where a source is not being proposed with adequate controls. In our experience, DEQ has rarely required TACT reviews, indicating that DEQ has been comfortable that industrial sources have proposed changes with adequate emission controls. The level of control technology review authority found in OAR 340-226-0120 and -0130 is specifically authorized by and derives directly from statute (ORS 468A.025). The proposed amendments lack such direct statutory authorization. Therefore, the amendments suggested, whereby a greater level of control review would be required as part of the Type 2 and Type 3 NC process, are not only unnecessary, but also inconsistent with the Legislature's clear directive and the plain meaning of the statute.

The Coalition similarly does not believe that it is necessary or appropriate for DEQ to impose new modeling obligations as components of any NC other than as already specified in the existing Division 224 rules (*e.g.*, Type A and Type B State NSR). Modeling is an expensive and time-consuming exercise. DEQ currently charges $9,000 (in addition to all other fees) for reviewing a source's modeling. This substantial fee is indicative of the large amount of work on DEQ's part associated with modeling review. For a source, engaging a qualified consultant to execute the complex computer models needed to estimate ambient air quality impacts, and to respond to DEQ's questions about the consultant's work, typically costs tens of thousands of dollars. In addition, the process of modeling involves multiple time-consuming steps including gathering meteorological data, obtaining DEQ approval of a modeling protocol, and having DEQ review and approve final modeling. Coalition members have routinely experienced the modeling process taking 6 to 9 months.

We do not see a basis for requiring that a source model impacts from a Type 2 or Type 3 NC project. At the RAC meeting, DEQ suggested modeling of Type 2 or Type 3 NC project emissions might help the agency identify and prevent potential ambient air quality standard exceedances. However, DEQ did not provide any real-world examples of Type 2 or Type 3 NC projects that actually caused air quality standard exceedances, let alone problems sufficient to justify a profound restructuring of DEQ's NC rules to impose modeling requirements on all manner of those project types. Imposing such requirements will seriously harm Oregon's manufacturers, in that projects will not be able to be timely implemented and, as a result, risk being rendered infeasible. New modeling requirements will slow the installation of new control devices, process improvements and projects intended to reduce greenhouse gas emissions and improve air quality (both indoors and out), to name just a few examples of significant harm.

In response to the question of what level of emissions should trigger modeling and technology review beyond that already contemplated for all new projects, we believe that the current rules are adequate. DEQ's regulations stipulating when modeling and technology reviews are necessary were extensively overhauled in 2015. Multiple new categories of areas were added to the rules (*e.g.*, sustainment and reattainment) and enhanced modeling and control technology review (*e.g.*, for Type A and B State NSR projects) was a primary aspect of the changes. Given that DEQ only recently added extensive additional requirements related to NC approvals, we see no good policy basis for further expanding those requirements at this stage. DEQ itself took this very same position back in 2015 when, in response to comments from activists seeking more extensive revisions to DEQ's air quality program rules, DEQ concluded that:

> "Oregon maintains a successful, established, demonstrated and mature program that has contributed to the ability to attain and maintain National Ambient Air Quality Standards" * * *
>
> "DEQ's air quality program has been very successful at protecting air quality in the state."

We agree.

The current approach in the rules for evaluating the need for modeling or control technology review in relation to the Significant Emission Rates ("SERs") is sound and based on a long history of technical and policy considerations. The key permitting thresholds in DEQ's current rules are the SERs. As was discussed in the RAC meeting, the SERs derive from the D.C. Circuit decision in *Alabama Power* where the court held that EPA need not regulate trivial (de minimis) actions. In response to this mandate, EPA extensively studied what emission increases would result in minimal impacts to ambient air quality. Studying a collection of 37 sources in a mid-western metropolitan area, EPA modeled the impacts of incremental emission increases from all 37 sources simultaneously. EPA concluded that "The maximum change in the 24-hr. concentration from all sources making a 50-ton/yr change would be 1.5 $\mu g/m^3$."[1] At 40 tons/year, the SER for NOx, $SO_2$, and VOC, the urbanwide 24-hour concentration increased only 1.2 $\mu g/m^3$."[2] In other words, if all 37 sources simultaneously increased NOx emissions by the SER (*i.e.*, 40 tons/year), the increase in the average 24-hour concentration would be 0.6 percent of the 1-hour $NO_2$ standard and 16 percent of EPA's Interim 1-hour $NO_2$ Significant Impact Level. While we recognize that there is a difference between 24-hour impacts and 1-hr impacts, there is no reasonable example of a manufacturing process that emits gaseous pollutants for an hour or so a day and then does not operate the remainder of the day. That is not how manufacturing equipment works.

[1] *Impact of Proposed and Alternative <u>De Minimis</u> Levels for Criteria Pollutants*, EPA-450/2-80-072 (June 1980) at 66.
[2] *Id.*

Calling into question the use of the SERs as permitting thresholds just a few years after DEQ greatly expanded its Division 224 State New Source Review ("NSR") rules in reliance on the SERs is not justified. Especially not where DEQ, through the 2015 rulemaking, considered and affirmed the state's NSR rules – as expanded. In the course of the 2015 rulemaking, DEQ specifically "determined that the benefits of Oregon's New Source Review/Prevention of Significant Deterioration program far outweigh any advantages of [even] the federal program."

As we noted above, DEQ stated at the RAC meeting that it lacks the resources to review 93 Type 1 NCs annually to see if they were properly filed as such. But we fail to see how DEQ will be able to function better if it moves many Type 1 NCs into the Type 2 category and then requires vastly more regulatory process for and DEQ involvement with Type 2 and Type 3 NCs. DEQ appears to be asking the RAC to endorse fixing a minor problem (the need to confirm that Type 1 NCs were properly filed) by creating a bigger problem (shifting approximately 150 NCs per year into a massively more complex and labor-intensive review process). DEQ should consider whether, if it lacks the time or resources to review less than two Type 1 NCs (statewide) a week, it would be able to conduct the incredibly resource intensive ambient air quality modeling review and BACT analysis for roughly 150 projects annually. Given that this proposal appears destined to make the NC process less workable, more labor intensive for DEQ and more burdensome for Oregon companies without demonstrable environmental benefit, we strongly suggest that DEQ not pursue it further.

> *Question 3: Based on a review of the technical clarifications presented at the meeting, do you have additional comments, questions, suggestions for DEQ consideration?*
>
> *Question 4: Any additional or general comments based on the topics discussed at RAC Meeting #1?*

Based on our review of the limited materials shared with the RAC, we have the following additional comments that we believe are responsive to both Questions 3 and 4.

<u>Changing the Statutory Deadline for DEQ's Completion of Review</u>

To accommodate the time that it will take DEQ to review projects, DEQ floated the concept at the RAC meeting of changing the rules so that the Type 2 NC 60-day clock would reset at "0" each time DEQ asks a question. That would be bad policy as it would create enormous new authority (without justification) for DEQ to ask a new question every 59 days so as to extend the approval clock indefinitely. We do not believe that this approach is consistent with the mandates in ORS 468A.055 that any information requests must be made by DEQ within 30 days of receipt of the application (*see*, ORS 468A.055(2)) and that DEQ complete its review within 60 days of receipt of the application (*see*, ORS 468A.055(4)). Accordingly, we recommend that DEQ not

proceed with the discussed rule changes to alter the deadlines for DEQ's completion of Type 2 reviews, as such changes are inconsistent with ORSA 468A.055.

NC Expiration Dates

The Coalition has significant concerns with DEQ's proposal to impose an expiration date for NCs. Currently, if a facility receives an NC, there is no obligation to start construction by any particular date. DEQ is considering changes such that, if the recipient of NC approval does not begin construction within 18 months of the date that construction is approved, that NC expires unless an extension is obtained. At the RAC meeting, DEQ also raised the idea of setting deadlines for commissioning equipment once constructed. DEQ has regulated sources of air emissions in the state for over 50 years. Throughout that entire time sources have been subject to the requirement to obtain NCs. Except for Federal Major Sources (Type 4 NCs), these NCs have never included a construction or commissioning expiration date and no problems have ever been identified with this structure. During the RAC meeting DEQ could identify no specific example of where a source delaying installation of equipment had harmed the air permitting program or caused an issue for air quality. The only potentially relevant example related to a Type 4 NC source which was already subject to the 18-month clock. We recommend that DEQ not pursue this rule revision.

Expanded Renewal Application Requirements

The Coalition is also concerned about DEQ significantly changing what is required in a renewal application, and DEQ's classification of that change as a "technical clarification." As was stated at the RAC meeting, the proposed new renewal application requirements are not mere technical clarifications but, in fact, amount to a substantial expansion of the permitting requirements. The proposal will have the effect of slowing the renewal permitting process, without justification, and with the effect of making it more burdensome for manufacturers and DEQ alike. As they currently stand, DEQ's rules allow a source that has not changed significantly since the last permit was issued to complete a form to confirm that information and to proceed with its renewal application. In addition, the existing rules allow DEQ to require additional information without any rule change. The Coalition sees sound public policy in the existing regulatory structure: A renewal application for a facility at which little or nothing has changed should be simple and streamlined, but DEQ should be able to ask such facility for additional information where case-specific circumstances require. The proposed changes would greatly increase the burden on DEQ and Oregon businesses seeking to continue operating in the state, and would bog down the air permit renewal process, without associated environmental benefit.

Change to Definition of "Greenhouse Gases"

The Coalition has two concerns regarding the proposed revisions to the definition of "greenhouse gases" in OAR 340-200-0020(73). First, DEQ proposes to remove the language from the

greenhouse gas definition clarifying that for purposes of Divisions 216, 218 and 224, carbon dioxide emissions from the combustion or decomposition of biomass are not regulated. This significant change to the rule is classified by DEQ as part of the "typos & non-technical clarifications." This change appears to go well beyond a "typo." The Coalition supports clarifying the greenhouse gas definition by more clearly aligning it with ORS 468A.020(3) and removing the limitation of the biomass exemption to Divisions 216, 218 and 224. Nothing in 468A.020 supports such a limitation. However, simply removing reference to the statutory exemption creates confusion and is misleading in light of the clear exemption for biomass set forth in ORS 468A.020(3).

The Coalition has a separate concern that the proposed changes to the greenhouse gas definition violates the Oregon Constitution by delegating authority to revise Oregon's regulations to the EPA. As proposed, the definition of greenhouse gases would include "other fluorinated gases or fluorinated GHG as defined in 40 C.F.R. part 98." This language contravenes Article I, section 21, of the Oregon Constitution, which prohibits laws that include by reference future adoptions by another governmental entity. This language is unconstitutional as it would cause Oregon law to vary with language that EPA adopts in the future. *See Advocates for Effective Regulation v. City of Eugene,* 160 Or App 292, 981 P2d 368 (1999) (holding that Article I, section 21, of the Oregon Constitution does not allow a state law to "incorporate future federal regulations not yet promulgated at the time of enactment * * * *"). Because this proposed change is not authorized by Oregon's Constitution, it should be deleted or revised.

Confusion as to Potential to Emit

The Coalition is concerned about misleading language proposed to be added to the Division 210 NC provisions. Specifically, in Oregon the Plant Site Emission Limit ("PSEL") serves as a federally enforceable limit on potential to emit ("PTE"). Therefore, as a matter of law, a source's potential emissions cannot exceed the PSEL. Given this, the proposed revision to OAR 340-210-0225(1)(b) and (2)(b) which would add the word "potential" before the word emissions for evaluation of whether the change fits the Type 1 or 2 NC thresholds is inaccurate and misleading. We believe the word "potential" should not be added in this portion of the rules.

Revision to Significant Emission Rate ("SER") Definition

DEQ proposes to revise the definition of SER in two ways, one of which Coalition members supports and the other we oppose. First, DEQ proposes to revise the descriptive language relating to "Fluorides" to clarify that this listing is limited to inorganic fluoride compounds, excluding hydrogen fluoride, as measured by EPA Method 13A or 13B. We support this revision as the proposed additional language incorporates EPA's longstanding guidance on fluorides and brings greater clarity to the regulations.

Coalition members are concerned about the proposed deletion to OAR 340-200-0020(161)(v) of the language "unless DEQ determines the rate that constitutes an SER." Making the proposed edit would change the rules in a substantial manner. This language would establish as zero the SER for the regulated pollutants not listed in -0020(161)(a) through (u), with no potential for an alternate number, as is currently allowed under the rules. We request that DEQ remove this change from the proposed rulemaking as it is neither to correct a "typo" nor a "non-technical clarification."

Confusion as to Operating Authority

DEQ has proposed as a "typo & non-technical clarification" to revise OAR 340-210-0250(3)(a) to state that new sources can obtain operating approval for a Type 3 or 4 change via a Construction ACDP. This proposed change is inaccurate, confusing, and does not fix a "typo" or make a "non-technical clarification." First, the proposed change would strongly suggest that a Type 3 change can be addressed through a Construction ACDP, which contradicts the requirements for Construction ACDPs in Division 216. For example, OAR 340-216-0052(1) is explicit that Construction ACDPs are limited to Type 3 changes. In addition, OAR 340-216-0052(1) is clear that Construction ACDPs are a means to obtain construction approval and not operating approval. The proposed change would confuse rule readers who would wrongly conclude, based on the proposed language, that Construction ACDPs offer both construction and operating approval. This proposed change should be deleted.

Change to LUCS Requirements

DEQ has also proposed (once again as "typos & non-technical clarifications" as well as "technical changes") significant changes to the Land Use Compatibility Statement ("LUCS") requirements in OAR 340-216-0040(1)(a)(K). The intent of DEQ requiring a LUCS is to ensure that DEQ does not contravene local land use planning requirements. To meet that objective, DEQ's rules at -0040(1)(a)(K) require a LUCS "if required by the local planning agency." DEQ is considering changing the rules, at -0040(1)(a)(K) and -0230(1)(o), to require that the source develop its own analysis of compliance with statewide planning goals and the local jurisdiction's comprehensive plan and land use regulations "[i[f the local planning jurisdiction does not require approval or disapproval or declines review…." These changes to the LUCS rules are inconsistent with DEQ's current rules as well as the purpose of ORS 197.180, which directs state agencies to coordinate with local planning agencies to ensure agencies' actions are authorized by local land use laws. The local planning agency with jurisdiction, not DEQ, is in the best position to determine whether and what review is required. Where that local planning agency determines that LUCS review is not required, it is not for DEQ to contravene that determination to require an individual source to prepare its own review.

Title V Permit Fee Due Date

DEQ additionally proposes to change the deadline for submittal of Title V fees, characterizing this change as a "typo" or "non-technical clarification." DEQ's regulations currently state that Title V late fees are imposed if the payment submittal is postmarked more than a certain number of days after the due date. DEQ is proposing to change this deadline from date of postmark to date of receipt. This proposed change is not to address a typo or make a non-technical clarification—it is a substantive change that seeks to shift the burden of uncertainties with the postal system from DEQ to the source. DEQ should delete the proposed modification.

PM Air Quality Analysis

The Coalition supports the proposed change to OAR 340-222-0041(4)(b)(B) that total particulate matter ("PM") is not subject to air quality analysis as there are no ambient air quality standards for PM. However, the proposed language appears to be missing a few words. Our suggested edits are as follows:

> (B) An increase in the PSEL for particulate matter (PM) is not subject to the air quality analysis but an air quality analysis may be ~~is~~ required for PM10 or PM2.5 PSEL increases, if applicable.

**Conclusions**

The businesses making up the Coalition are proud of their longstanding and cooperative work with DEQ to reduce air emissions and implement Oregon's air permitting program. However, those businesses are deeply concerned about the proposed revisions to the program in ways that will make permitting in Oregon less efficient without commensurate or even demonstrable improvements in air quality protection.

For the reasons stated above, we encourage the Department to revise the rule proposal to reflect the comments stated in this letter and to focus on rule improvements that will streamline and improve Oregon's air permitting process, so that Oregon's air regulatory program supports manufacturing businesses across the state, and the high-quality jobs they provide, without compromising our environment. Such amendments will result in a better program that better serves DEQ and the regulated community. We look forward to working with DEQ as this rulemaking process continues.

Please do not hesitate to call if you have any questions about these comments.

Sincerely,

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