



# Five-year rule review

## 2011 review of rules adopted in 2006

### What is the intent of this review?

Starting with rules adopted in 2006, the Administrative Procedures Act, [ORS 183.405](#), requires the Department of Environmental Quality to review **new** rules within five years of the Environmental Quality Commission adoption date. After reviewing the 2006 rulemaking record, DEQ determined the APA:

- **Exempts** five-year review of rules adopted under eight EQC agenda items. An excerpt of ORS 183.405 exemptions and a list of exempt rules start on [page 2](#).
- **Requires** five-year review of rules adopted under six EQC agenda items. An excerpt of ORS 183.405 inclusions and the reviews start on [page 4](#).

### What happens to this review?

According to David E. Leith, Associate Attorney General and Chief General Counsel's office, agencies do not submit the 5-year reviews to any authority but they do need to let the original advisory committee know the results of the review.

If DEQ convened an advisory committee to help develop the 2006 rule, the program emailed the rule review to the committee members listed in the five-year review.

The agency rules coordinator will:

- Submit a copy of this report to DEQ's Executive Management Team,
- Post the review on DEQ's rulemaking website, and
- Maintain this review and the advisory committee notifications in the five-year rule review record.

## 2006 rules exempt from five-year review

DEQ determined rules approved under eight rulemakings during 2006 are exempt from the five-year review under:

ORS 183.405 (4) The provisions of this section do not apply to the **amendment or repeal** of a rule.

ORS 183.405 (5) The provisions of this section do not apply to:

- (a) Rules adopted to implement court orders or the settlement of civil proceedings;
- (b) Rules that adopt federal laws or rules by reference;
- (c) Rules adopted to implement legislatively approved fee changes; or
- (d) Rules adopted to correct errors or omissions.

### 1. PCB Rule

The EQC amended polychlorinated biphenyls rule to align with federal laws.

<b>Exempt</b>	183.405 (4) amendments
EQC	March 2006
OAR 340	Division110
Contact	Scott Latham

### 2. Environmental Cleanup Rule

The EQC amended rules to delete out-of-date numerical soil cleanup levels and correct a drafting error in the definition of acceptable risk level for populations of ecological receptors.

<b>Exempt</b>	183.405 (4) amendments, 183.405 (5)(d) errors or omissions
EQC	March 2006
OAR 340	Division122
Contact	Jeff Christensen

### 3. Federal Air Quality Regulations

The EQC adopted NSPSs and NESHAPs rules by reference, aligned DEQ definitions of VOC and HAP with EPA definitions and updated a general permit for chromium electroplating.

<b>Exempt</b>	183.405 (4) amendments, 183.405 (5)(b) adopted by reference
EQC	March 2006
OAR 340	Division200
Contact	Jerry Ebersole

#### 4. Oregon Title V Operating Permit Program CPI Fee Increase

The EQC amended Title V operating permit fees by the 2005 Consumer Price Index. Oregon statute establishes Title V permit fees and provides for annual inflationary adjustments.

<b>Exempt</b>	183.405 (4) amendments, 183.405 (5)(c) legislatively approved fee
EQC	June 2006
OAR 340	Division 220
Contact	Brandy Albertson

#### 5. Emission Control System Inspection Scope - Temporary

Rule expedited phase-out of the enhanced emission test from the Vehicle Inspection Program.

<b>Exempt</b>	temporary rule expired
EQC adopted	June 2006
OAR 340	Division 256
Contact	Gerry Preston

#### 6. NPDES Industrial Stormwater Permits

The EQC adopted industrial stormwater general permits 1200-Z, 1200-COLS and 1200-A, and eliminated the 1300-J permit.

<b>Exempt</b>	183.405 (5)(a) court order and settlement of civil proceedings
EQC adopted	August 2006
OAR 340	Division 045
Contact	Greg Geist

#### 7. Water Quality Permitting Fee Changes

The EQC amended fees for all National Pollutant Discharge Elimination System permit holders and Water Pollution Control Facility permit holders, except for suction dredge permittees and WPCF permits issued under DEQ's on-site (septic system) program.

<b>Exempt</b>	183.405 (4) amendments
	183.405 (5)(c) legislatively approved fee
EQC adopted	August 2006
OAR 340	Division 045
Contact	Sonja Biorn-Hansen

#### 8. Toxics Use and Hazardous Waste Reduction Rules Alignment

The EQC repealed six and amended eight toxics use and hazardous waste reduction rules to align with 2005 legislative changes to Oregon's Toxics Use Reduction and Hazardous Waste Reduction law.

<b>Exempt</b>	183.405 (4) amendments and repeals
EQC adopted	August 2006
OAR 340	Division 135
Contact	David Livengood

## **Five-year review required in 2011**

For 2011, DEQ determined six 2006 EQC Agenda Items require a five-year review to meet the APA requirements under:

- OAR 183.405 (1) Not later than five years after adopting a rule, an agency shall review the rule for the purpose of determining:
  - (a) Whether the rule has had the intended effect;
  - (b) Whether the anticipated fiscal impact of the rule was underestimated or overestimated;
  - (c) Whether subsequent changes in the law require that the rule be repealed or amended; and
  - (d) Whether there is continued need for the rule.
- OAR 183.405 (2) An agency shall utilize available information in complying with the requirements of subsection (1) of this section.
- OAR 183.405 (3) If an agency appoints an advisory committee pursuant to ORS 183.333 for consideration of a rule subject to the requirements of this section, the agency shall provide the advisory committee with a report on a review of the rule conducted under this section.

## 1. Environmental Procedure and Civil Penalties

Rule number OAR 340-012-0135  
Adoption date **March 2, 2006**  
Review date **Feb. 15, 2011**  
Reviewers Les Carlough, Office of Compliance and Enforcement  
Maggie Vandehey, agency rules coordinator

**183.405(1)(a)** The intended effect of adopting OAR 340-012-0135 was to ensure that DEQ enforcement processes and penalty calculation for violations of Oregon environmental regulations and statutes were equitable, consistent and understandable. The new rule was part of a larger overhaul of the enforcement and penalty rules in Division 340-012.

The adopted rule achieved the intended effect. It clarified the penalty calculation process through better organization of the text, improved the ability of the penalty calculation to consider violator sophistication, and re-aligned the violation classifications according to DEQ and environmental priorities.

**183.405(1)(b)** The 2006 anticipated fiscal impact showed little or no impact on the general public or housing, allowed small businesses to correct violations without penalty, decreased civil penalties for local government violations, and had potential to decrease state revenue with fewer cases referred to enforcement.

The actual fiscal impact indicates the 2006 fiscal impact was likely correct. The rules allow small businesses to correct most violations without penalty and decrease civil penalties for smaller and local governments. There is no statistical mechanism to measure the marginal effect on state revenues attributable to the rule changes, so that effect is not known.

**183.405(1)(c)** No subsequent change in the authorizing law *requires* the rule be repealed or amended. However, Senate Bill 105 (2009) increased the maximum statutory penalties applicable to most violations, which creates the possibility of future rule amendments.

**183.405(1)(d)** There is still a need for the additions and amendments to OAR Division 340-012, including 340-012-0135.

**183.405(2)** Reviewers used available information allowed to meet the requirements of ORS 183.405(1).

## **Environmental Procedure and Civil Penalties** continued

**183.405(3)** DEQ convened an advisory committee in the 2006 rulemaking process. The committee members were: Richard Angstrom, Aaron Courtney, Janet Gillaspie, Rich Barrett, Roger Dilts, Sarah Doll, Jeff Dresser, Bob Emrick, Don Haagensen, Jim Jones, Karen King, Rhett Lawrence, Christopher Rich, Cliff Olson, Robert VanCreveld, Kathryn Van Natta, Bob Westcott, Dave Bennett, Robert Koster, Mike Slater, Jane Hickman, Susan Greco, Mark Riskedahl, Kevin Shanilec and John Morrisey.

DEQ emailed a copy of this report to the members or the interest group they represented on Feb. 15, 2011.

## 2. Delegation of EQC Authority to Decide Measure 37 Claims

Rule number OAR 340-011-0605  
Adoption date **April 28, 2006**  
Review date **March 17 2011**  
Reviewers Michael Kucinski, Onsite Manager  
Maggie Vandehey, Agency Rules Coordinator

**183.405(1)(a)** The intended effect of adopting OAR 340-011-0605 was to authorize the Director to review and approve or deny Measure 37 claims.

The rule achieved the intended effect of delegating authority to the Director. The Director did not approve or deny any Measure 37 claims.

**183.405(1)(b)** In 2006, the anticipated fiscal impact stated the proposed rule did affect the 2004 Oregon Ballot Measure 37 fiscal and economic impacts because they are procedural in nature.

The 2006 fiscal impact was underestimated. DEQ did incur staff costs to manage Measure 37 claims and Department of Justice cost to litigate denials.

**183.405(1)(c)** Passage of Measure 49 in 2007 eliminated Measure 37 provisions that included compensation but protected some existing claims.

**183.405(1)(d)** There is no longer a need for OAR 340-011-0605 and DEQ will repeal the rule.

**183.405(2)** DEQ used available information to analyze ORS 183.405(1).

**183.405(3)** DEQ did not convene an advisory committee in the 2006 rulemaking because the rule simply clarified an internal DEQ process.

### 3. Oregon Low Emissions Vehicles

Rule numbers	OAR 340-012, 340-256, 340-257
Adoption date	<b>June 22, 2006</b>
Review date	<b>March 15, 2011</b>
Reviewers	Dave Nordberg, Air Quality Planner Maggie Vandehey, Agency Rules Coordinator

- 183.405(1)(a)** The intended effect of adopting emissions standards for light duty vehicles sold in Oregon was to:
- Meet federal low emission vehicle standards starting with the 2009 model year.
  - Reduce greenhouse gas emissions 30 percent when fully implemented in 2016.
  - Reduce emission of pollutants that cause ground level ozone.
  - Promote development and commercialization of zero emission vehicles.

The rule is achieving the intended effect. The Oregon Department of Transportation requires all new light duty vehicles demonstrate they are certified to meet the correct standards before registration. Manufacturers issue annual reports to DEQ. A three-year average, adjusted by credit trading provisions, determines compliance; therefore, compliance will not be fully assessed until after mid 2012.

- 183.405(1)(b)** In 2006, the anticipated fiscal impact projected the cost of new vehicles would increase by \$200 to \$1200 from 2009 through 2016. The increased cost would be more than offset by savings associated with more efficient vehicles. The estimated gasoline price used to develop the 2006 fiscal impact statement was \$1.74 per gallon.

There has been no analysis of the actual fiscal impact this early in the implementation. With much higher fuel costs, it is reasonable to expect new vehicle owners are experiencing a greater savings than the 2006 projection.

- 183.405(1)(c)** No subsequent change in the authorizing law *requires* the rule be repealed or amended.

- 183.405(1)(d)** There is still a need for OAR 340-257-0010 to 0160 because Oregon has not yet achieved its greenhouse gas reduction goals.

- 183.405(2)** DEQ used available information to analyze ORS 183.405(1).

- 183.405(3)** DEQ did not directly use an advisory committee to develop the proposed rules in the 2006 rulemaking process.

#### 4. Ambient Benchmarks for Air Toxics Program

Rule number OAR 340-246-0090  
Adoption date **Aug. 15, 2006**  
Review date **Feb. 28, 2011**  
Reviewers Gregg Lande, Senior Air Quality Planner  
Maggie Vandehey, Agency Rules Coordinator

**183.405(1)(a)** The intended effect was to append 51 ambient benchmark concentrations to OAR 340-246-0090. Ambient benchmark concentrations are reference values used to identify, evaluate and address air toxics problems.

The rule achieved the intended effect. The ambient benchmark concentrations have allowed the DEQ to identify air pollutants that may be causing serious health effects in Oregon communities. DEQ and a citizen advisory committee are developing a strategy to reduce the concentrations of 19 of these pollutants in the Portland area and reach the air quality goals that these benchmarks represent.

**183.405(1)(b)** In 2006, DEQ anticipated the adoption of the benchmarks would not have a direct fiscal impact. DEQ acknowledged setting benchmarks would facilitate separate DEQ actions that would likely have an impact.

The actual fiscal impact indicates the 2006 fiscal impact was correct.

**183.405(1)(c)** There has been no subsequent change to the authorizing law that would require the repeal or amendment of the rule.

In August 2010, after consultation with the Air Toxics Science Advisory Committee and public notice and comment, the benchmark concentrations for lead and manganese were lowered, a new benchmark concentration for ethyl benzene was added, and the benchmark for mercury was modified to make it clear that it applied only to elemental mercury.

**183.405(1)(d)** There is still a need for OAR 340-246-0090 because ongoing scientific investigations are determining if these air pollutants are present at concentrations that are a threat to public health.

**183.405(2)** DEQ used available information under ORS 183.405 (2) to analyze ORS 183.405(1).

**183.405(3)** DEQ convened an Air Toxics Science Advisory Committee that reached a consensus. Committee members were William Lambert (Chair), Brian Patterson, Candice Hatch, Kent Norville, Natalia Kreitzer and David Stone. DEQ sent a copy of this report to the members on March 17, 2011.

## 5. Toxics Use and Hazardous Waste Reduction Rules Alignment

Rule number	OAR 340-135-0055, 340-135-0105
Adoption date	<b>Aug. 10, 2006</b>
Review date	<b>June 15, 2011</b>
Reviewers	David Livengood, Toxics Reduction and Innovations Maggie Vandehey, Agency Rules Coordinator

- 183.405(1)(a)** The intended effect of adopting OAR 340-135-0055 and 340-135-0105 was to align Division 340 with 2005 legislative changes to Oregon’s Toxics Use Reduction and Hazardous Waste Reduction law to:
- Require businesses to summarize and report successes, challenges and opportunities to reduce toxic chemicals and hazardous waste and for DEQ to share those summaries on the Web.
  - Ensure that businesses know about available technical assistance.
  - Limit enforcement action to very specific, defined conditions.

Both rules achieved the intended effects evidenced by the number of businesses that have fully complied with the requirements. Of the 537 businesses in the program, all but 13 have fully complied. The program is following up with those businesses.

- 183.405(1)(b)** In 2006, the anticipated fiscal impact was none or minimal as the program anticipated completing this work with existing resources.

The 2006 fiscal impact underestimated the cost associated with developing and managing the electronic reporting system. The program absorbed these costs through workload reductions for the program coordinator and all program staff including those in field offices. These reductions delayed the implementation of some of the program elements including posting the implementation summaries on the Internet.

- 183.405(1)(c)** No subsequent change in the authorizing law *requires* the rule be repealed or amended.

- 183.405(1)(d)** There is still a need for OAR 340-135-0055 and 340-135-0105. Businesses that meet the threshold requirements continue entering the Toxics Use Reduction and Hazardous Waste Reduction Program. More than 95 percent of businesses in the program have used DEQ technical assistance to develop the required reduction plan or environmental management system and complete implementation summaries.

## **Toxics Use and Hazardous Waste Reduction Rules Alignment** continued

With its limited resources, DEQ continues to actively develop a clearinghouse to post summaries on the Internet. Numerous businesses in two groups that completed implementation summaries reported approximately \$20.5 million in savings while reducing 87.8 million pounds of toxics used and hazardous waste generated.

**183.405(2)** DEQ used available information to analyze ORS 183.405(1).

**183.405(3)** In 2004, DEQ convened an advisory committee for a program review and the 2006 rulemaking. A copy of this report was sent on May 15, 2011 to the following members on that committee: Jim Craven, Keith Eager, Stephen G. Edward, Barbara Crest replaced Deb Elkins, Stephen Olson replaced Frances Hartwell, Bruce Johnson, Irma Salazar replaced Todd Kirkendall, David Rosenfeld replaced Rhett Lawrence, Dave Lyon replaced Marvin Lewallen, Sean Akers replaced Donald Ludwig, John Huntington replaced Steve McCoy, Teresa Conger, Lisa Arkin replaced David Monk, Todd Kushner replaced Lori Patterson, Andy Poynter, Morgan Rider, Kathryn VanNatta, Renee Hackenmiller-Paradis replaced Laura Weiss, Tom Zelenka.

## 6. Utility Mercury Rule and Federal Air Quality Regulations

Rule number OAR 340-228-0600 through 340-228-0639  
Adoption date **Dec. 15, 2006**  
Review date **April 25, 2011**  
Reviewers Jerry Ebersole, Air Toxics Specialist  
Maggie Vandehey, Agency Rules Coordinator

**183.405(1)(a)** The EQC adopted mercury emission limits for coal-fired power plants (i.e., PGE Boardman). The compliance date is July 1, 2012; therefore, DEQ does not know whether the rule will achieve the intended effect.

**183.405(1)(b)** In 2006, the anticipated fiscal impact was an increase in electricity rates of as much as 0.53 percent. PGE estimated that the rate increase could be as much as 1.1 percent based on a single bid from a contractor for proposed mercury controls at an East Coast coal-fired power plant, not from a bid specifically for the Boardman plant. The compliance date is July 1, 2012; therefore, DEQ does not know whether the estimated fiscal impact was an underestimate, overestimate or about right.

The EQC adopted mercury rules implement and go beyond the federal clean air mercury rule. The federal clean air mercury rule was vacated by a federal court on Feb. 8, 2008. Oregon rules were amended on Dec. 12, 2008 to remove mercury trading provisions vacated by the federal court ruling. This change will not impact DEQ's 2006 estimate, because DEQ assumed that PGE would not be able to offset the fiscal impact by buying or selling mercury credits.

**183.405(1)(c)** There has been no subsequent change to the authorizing law that would require the repeal or amendment of the rule.

**183.405(1)(d)** There is still a need for the adopted rules because EPA will adopt federal mercury emission limits in the future.

**183.405(2)** DEQ used available information to analyze ORS 183.405(1).

**183.405(3)** DEQ convened a fiscal impact advisory committee in the 2006 rulemaking process and sent a copy of this report to the following members on April 26, 2011: Bob Anderson, AJ Auto Repair; Michael Early, Industrial Customers of Northwest Utilities; OSPIRG; Eric Fruits, ECONorthwest; Randy Dahgren, PGE; Friends of the Columbia River Gorge; Chris Rich, Oregon Business Oregon PUC.