

AIR TOXICS UPDATE 2016

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I. INTRODUCTION

2016 was an extraordinarily eventful year in air quality law and regulation in Oregon. In February, revelations about toxic hotspots throughout Portland brought intense media scrutiny on local companies and state regulators. This was the first in a series of events that included a change of leadership in the state environmental quality agency, the announcement of process to overhaul Oregon's air toxics program, several class action lawsuits, local officials publicly discussing the possibility of creating local air authorities, many new neighborhood level air quality advocacy organizations, a report about unfiltered diesel emissions as a major source of air toxics, a multi-million dollar state settlement over emissions fraud, and much more.

What follows is a non-exhaustive timeline of important events in air quality law and regulation in Oregon, a brief historical context to help make sense of this year's events, and a short list of relevant statutes and regulations.

II. TIMELINE OF IMPORTANT EVENTS IN 2016

Feb. 3 - Toxics hotspots for Arsenic and Cadmium are revealed by Forest Service moss data and released to the public by the Oregon Department of Environmental Quality (DEQ) hours before the *Portland Mercury* publishes an investigative report.¹

Feb. 18 - Multnomah County Chair Deborah Kafoury and Portland Mayor Charlie Hales send a letter to Governor Kate Brown declaring that they will pursue a local air pollution authority pursuant to ORS 468A.105 if the State of Oregon doesn't immediately begin rulemaking, revise Portland Air Toxics Solutions, create a statewide action plan on diesel, provide adequate funding for air monitoring and enforcement, and establish a clear timeline for regulatory strategies.²

March 1 - Oregon DEQ Director Dick Pedersen announces his departure (later replaced by interim director Pete Shepherd).

March 3 - Class action lawsuit against Bullseye Glass announced, containing claims of nuisance and common law trespass.³

¹ Dan Forbes, *State Finds Alarming High Arsenic, Cadmium Levels Near Two SE Portland Schools*, *Portland Mercury*, THE PORTLAND MERCURY, February 3, 2016, available at:

<http://www.portlandmercury.com/BlogtownPDX/archives/2016/02/03/arsenic-cadmium-levels-near-two-se-portland-schools-are-alarmingly-high-state-finds>

² Letter available at: <https://www.portlandoregon.gov/mayor/article/565561>

³ Rob Davis, *Neighbors file class-action suit against Bullseye Glass in air pollution scare*, THE OREGONIAN, March 3, 2016, available at:

April 6 - The Cleaner Air Oregon (CAO) industrial air toxics reform is announced (expected to result in new administrative rules by the end of 2017).
Materials available at: www.CleanerAirOregon.gov.

April 12 - Vigor Industrial, University Park Neighborhood Association, and Neighbors for Clean Air sign a good neighbor agreement with Vigor committing to incorporate voluntary air toxics emissions reductions into its Oregon Title V operating permit and regular, formal communications with neighborhood representatives.

April 21 - The Oregon Environmental Quality Commission (EQC) adopts temporary rules for Colored Art Glass Manufacturing (CAGM) Facilities.⁴

April 29 - DEQ announces the results of southeast Portland monitoring which reveals the presence of chromium concentrations in the ambient air above annual health-based targets, as well as high levels of selenium.⁵

May 19 - ORS 468.115 (Enforcement in Case of Emergency) is utilized through an order to Bullseye Glass to cease and desist lead emissions based on risks to public health (especially to children at a nearby daycare).⁶

May 20 - State air monitoring reveals a nickel hotspot near Precision Castparts' southeast Portland location.⁷

June 13 - Oregon Environmental Council releases the *Protecting Oregon from Dirty Diesel* report detailing the health and economic effects of dirty diesel in Oregon which causes up to 460 premature deaths in Oregon each year (more than traffic crashes), puts 90% of Oregonians at risk for cancer, burdens Oregon with up to \$3.5 billion a year in health care costs and lost productivity, is highest in neighborhoods with more low-income and people-of-color residents, and is the sole source of one of Oregon's worst toxic air pollutants (diesel particulates).⁸

http://www.oregonlive.com/environment/index.ssf/2016/03/neighbors_file_class-action_su.html

Complaint available at:

http://media.oregonlive.com/environment_impact/other/Complaint.pdf

⁴ See OAR 340-244-0010 *Air Quality 2016 Temporary Rules for Colored Art Glass Manufacturing*, available at:

http://arcweb.sos.state.or.us/pages/rules/bulletin/0616_bulletin/0616_ch340_bulletin.html

⁵ OHA News Release available at:

<http://www.oregon.gov/oha/news/Pages/Hexavalent%20chromium%20averages%20above%20annual%20targets,%20air%20data%20show.aspx>

⁶ Order available at: <http://www.deq.state.or.us/nwr/docs/metalsem/DEQ-Bullseye-order.pdf>

⁷ Fedor Zarkhin, *State finds nickel in air near Precision Castparts above health benchmarks*, THE OREGONIAN, May 20, 2016, available at:

http://www.oregonlive.com/environment/index.ssf/2016/05/state_finds_nickel_in_air_abov.html

⁸ Report available at: <http://oeonline.org/protecting-oregon-from-dirty-diesel/>

June 28 - Governor Kate Brown and Attorney General Ellen Rosenblum announce that Oregon will receive more than \$85 million as part of state and federal settlements with Volkswagen as a result of the discovery that the company programmed its NOx emissions controls to turn on during government tests and switch off during normal road conditions, which resulted in emissions greater than 40 times the legal limit.⁹ Roughly \$68 million is expected to be dedicated to an environmental mitigation fund to incentivize the use of clean diesel technology in Oregon.¹⁰

July 12 - Class action lawsuit against Precision Castparts is announced, containing claims of nuisance and common law trespass.¹¹

June & July - The CAO Technical Workgroup convenes for 4 sessions in Portland, OR. Materials, notes, and final report available at: <http://www.oregon.gov/deq/RulesandRegulations/Pages/2017/cleanerair2017w.aspx>

Sept. 29 - The EQC adopts permanent CAGM rules.¹²

Oct. 4 - The EQC appoints Richard Whitman as interim director of Oregon DEQ.

Sept. & Oct. - CAO Policy Forums conducted in Medford, Bend, Pendleton, and Portland, OR. Materials available at: <http://cleanerair.oregon.gov/participate/survey/>

Oct. 18 - First meeting of CAO Advisory Committee.

III. REGULATORY CONTEXT AND IMPORTANT EVENTS IN RECENT HISTORY

2003 - The Environmental Quality Commission adopts new air toxics program that includes ambient benchmark concentrations for 51 air toxics¹³, the geographic program¹⁴, the safety net program¹⁵, and the source category program¹⁶.

⁹ Talia Richman, *Oregon gets \$85 million in VW emissions settlement*, THE OREGONIAN, June 28, 2016, available at: http://www.oregonlive.com/environment/index.ssf/2016/06/oregon_gets_85_million_in_vw_e.html

¹⁰ DEQ Volkswagen Diesel Litigation Settlements Fact Sheet available at: <http://www.deq.state.or.us/aq/vwsettlementfs.pdf>

¹¹ Aimee Green, *Precision Castparts neighbors sue, demand company to stop polluting*, THE OREGONIAN, July 12, 2016, available at: http://www.oregonlive.com/portland/index.ssf/2016/07/precision_castparts_neighbors.html
Complaint available at: http://media.oregonlive.com/portland_impact/other/pcc.pollution.pdf

¹² See OAR 340-244-9000 through 340-244-9090. Staff report available at: <http://www.deq.state.or.us/about/eqc/agendas/2016/09292016-StaffReport.pdf>

¹³ OAR 340-246-0090.

¹⁴ OAR 340-246-0130.

¹⁵ OAR 340-246-0190, 340-246-0210.

¹⁶ OAR 340-246-0110

2008 - USA Today releases *The Smokestack Effect* investigative report revealing the extent to which people are exposed to air toxics in the United States.¹⁷ Many schools in the Portland Metro area ranked in the bottom 10% of all schools in the nation in exposure to industrial sources of hazardous air pollution. Chapman Elementary in NW Portland ranked in the bottom 2% of schools. No school ranked better than the bottom 30%.

2009 - 2011 - DEQ applies the geographic program through the Portland Air Toxics Solutions Advisory Committee (PATSAAC) project to work with local communities to develop air toxics reduction strategies for the Portland region, including portions of Multnomah, Washington, and Clackamas Counties. PATSAAC and DEQ develop a framework for next steps including: a priority list of air toxics source categories; white papers that lay an initial technical foundation for future emission reductions strategies; definition of key considerations; future steps for technical analysis; and future steps for stakeholder involvement, including representation and consideration of environmental justice issues. Next steps never occur due to funding considerations, though DEQ currently refers to PATSAAC as an ongoing program in public presentations. Materials available at: <http://www.deq.state.or.us/aq/toxics/pats.htm>

IV. RELEVANT STATUTES AND REGULATIONS

Clean Air Act - 42 USC. chp. 85, subchp. 1; 40 CFR. subchp. C, parts 50-97

Oregon Revised Statutes, Air Quality - ORS chp. 468A

Oregon Air Toxics Program - OAR chp. 340, div. 246

¹⁷ *The Smokestack Effect: Toxic Air at America's Schools*, USA TODAY, 2009, available at: <http://content.usatoday.com/news/nation/environment/smokestack/index>