

**MEMORANDUM OF AGREEMENT
BETWEEN
THE OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY,
LANE REGIONAL AIR POLLUTION AUTHORITY
AND
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
CONCERNING
REGULATORY INNOVATION AND THE OREGON GREEN PERMITS
PROGRAM**

I. Statement of Intent

The United States Environmental Protection Agency Region 10 (EPA), the Oregon Department of Environmental Quality (ODEQ) and the Lane Regional Air Pollution Authority (LRAPA) agree on the need to experiment with new regulatory approaches to improve environmental quality. These new approaches can help identify cleaner, cheaper, and smarter ways to ensure that all Oregonians enjoy a clean environment and healthy ecosystems. The Agencies are committed to working in an open and collaborative atmosphere to encourage, pursue, and test new ideas that work towards achieving these goals.

This Memorandum of Agreement (MOA) between EPA Region 10, LRAPA and ODEQ (henceforth, known collectively as the Agencies) will guide the working partnership of the Agencies in fulfilling the objectives of the Oregon Green Permits Program. The purpose of this MOA is to facilitate the development, testing, evaluation and use of innovative approaches to improving the effectiveness and efficiency of environmental regulation.

This partnership is intended to foster an environment in which ODEQ and LRAPA innovations are supported and encouraged in order to develop better ways of achieving environmental and ecosystem goals. As implementing agencies for federally approved, authorized, or delegated environmental programs, ODEQ and LRAPA have first-hand knowledge of environmental problems, facility issues, and community concerns within the State. EPA seeks to support ODEQ and LRAPA's efforts with timely input and consultation that demonstrates openness, assistance and flexibility while meeting applicable requirements of the federal statutes.

The Agencies agree that the implementation of this agreement will be one of continual improvement, assessment, and adjustment. It will require on-going communication and cooperation to ensure the success of innovation efforts.

Implementation of this MOA will be conducted in a manner consistent with ODEQ and LRAPA's responsibilities under approved, authorized, or delegated federal programs. This

agreement will remain in effect for the duration of the Oregon Green Permit Program, or until modified or terminated by one or more of the signatories. This agreement does not alter the existing authorities or responsibilities of the Agencies, nor is it intended to supersede any other agreement between the Agencies or restrict their independent enforcement authorities.

II. Principles for Agency Regulatory Innovations

The Agencies agree to the set of principles set forth in the Joint State/EPA Agreement to Pursue Regulatory Innovation between the Environmental Council of the States (ECOS) and EPA (available electronically at: <http://www.epa.gov/reinvent/ecos/ecos498a.htm>) The Agencies agree to use these principles to guide the partnership as they develop, implement and evaluate regulatory innovations. In summary, these principles are:

Experimentation: Innovation involves new ideas, experimentation, changes and some risk of failure. Experiments that may help us better achieve environmental goals are worth pursuing when the objectives are clearly defined, costs are reasonable, and environmental and public health protections are maintained and improved.

Environmental Performance: Innovations seek more efficient and effective ways to achieve our environmental and programmatic goals, with the objective of achieving a cleaner, healthier environment and promoting sustainable ecosystems.

Smarter Approaches: Regulators may seek creative ways to remedy environmental problems and improve the environmental protection system. In doing so, they should be receptive to innovative and more effective approaches.

Stakeholder Involvement: Effective stakeholder involvement produces better understanding among participants and improves the effectiveness of environmental efforts. Stakeholders must have an opportunity for meaningful involvement in the design, implementation and evaluation of innovation projects. Stakeholders may include other government agencies, the regulated community, citizen organizations, environmental groups, and individual members of the public. Stakeholder involvement should be appropriate to the type and complexity of the innovation proposal.

Measuring and Verifying Results: Innovation efforts are more effective when based on measurable goals and objectives. Effective measurement and monitoring allows regulators and stakeholders to monitor progress, analyze results, and respond appropriately.

Accountability/Enforcement: Innovators must be accountable to the public. Current systems of data collection, reporting and enforcement will remain in place unless modifications are part of the innovation. When innovations involve changes to existing reporting or enforcement, appropriate alternatives are needed to ensure that public health and environmental protections are

maintained.

EPA-State-Local Partnership: The Agencies will support innovations at all levels to increase the efficiency and effectiveness of environmental programs. This is best accomplished by working together in the design, implementation, and evaluation of innovative ideas and programs.

III. The Oregon Green Permits Program

This MOA defines how the Agencies will work together in developing and implementing innovations under the Oregon Green Permits Program ("Program"). This section of the MOA sets forth the goals of the Program. The text of the Program's enabling law (ORS 468.501 *et seq.*) and rules (OAR 340-014.0100 *et seq.*) are provided in Attachments 1 and 2, respectively. LRAPA has adopted state rules by reference.

The Green Permit Program tests the use of regulatory incentives to encourage higher levels of environmental performance and the adoption of environmental management systems (EMS). The Program is based on the use of EMSs such as ISO 14001, and a "tiered", or multi-level system in which greater demonstrated environmental performance is acknowledged with increasing regulatory flexibility and other "benefits" to the facility.

The rules allow "green environmental management system", or GEMS, permits to be issued to facilities demonstrating required elements such as an effective EMS, performance reporting, and effective stakeholder involvement. Incentives for facilities in the Program include public recognition, a single point of contact with ODEQ or LRAPA, an emphasis on system correction in the event of unintentional noncompliance, and the potential for more effective and efficient permit conditions through modifications or waivers of certain regulatory requirements.

Green permit rules also provide for granting a limited "custom waiver" of permit conditions for facilities without EMSs if the waiver is necessary to achieve overall environmental results significantly better than required by law. No other incentives are available to facilities requesting a custom waiver permit.

With both GEMS and custom waiver permits, the objective is to obtain environmental outcomes significantly better than otherwise required by law from applicant facilities demonstrating better overall environmental performance. A facility's current level of environmental performance, past improvements, and changes in production will be factors in judging better overall environmental performance.

The green permit rule was established with the goals of:

- improving protection of public health and the environment;
- encouraging facilities to systematically assess, prioritize and measurably improve environmental performance in their regulated and unregulated environmental activities;

- rewarding companies that demonstrate superior environmental performance, thereby encouraging similar efforts by a broader segment of the business community;
- improving the quality of environmental performance information and its accessibility by the Agencies and the public;
- improving the generation, use and transfer of environmental performance information by the private sector;
- encouraging facilities to work directly with communities;
- encouraging efficient public management strategies for environmental protection;
- improving the efficiency and effectiveness of Agency actions; and
- enhancing trust between government, facility owners/operators and the public.

These goals provide direction for the Agencies in developing systems of environmental protection that are more effective and efficient than existing programs alone. The goals are consistent with the principles set forth in the ECOS/EPA regulatory innovation agreement and with the Oregon Green Permits statute (ORS 468.501). The Oregon Green Permits Program is also consistent with the Performance Partnership Agreement in effect between EPA Region 10 and ODEQ and LRAPA.

IV. Roles and Responsibilities of the Agencies

ODEQ and LRAPA will implement the Green Permits Program within their respective authorities. ODEQ and LRAPA will administer the program in conjunction and coordination with their roles and responsibilities in administering existing environmental programs. ODEQ and LRAPA will interact directly in cases involving facilities in Lane County to determine appropriate roles and interactions. ODEQ and/or LRAPA will issue the Green Permits. In cases where a proposed Green Permit provision affects requirements of a federally approved, authorized, or delegated program, EPA actions may be necessary to enable ODEQ or LRAPA to issue those provisions in the Green Permit. Additionally, in cases where a proposed Green Permit provision affects federal program requirements not authorized or delegated to the state, EPA actions will be required to implement those provisions of the Green Permit. The Agencies will follow the process described in Section V of this MOA to define any necessary federal actions and ensure that EPA is prepared to implement those actions.

ODEQ and LRAPA will determine which facilities participate in the Green Permits Program, following applicable state rules and guidance pertaining to eligibility in the Program. EPA will be provided with a copy of Green Permits applications, including any requested waivers or modified permit conditions along with ODEQ's or LRAPA's assessment of the need for federal action to implement the waivers or modifications. EPA will review the application and inform ODEQ and LRAPA of factors it believes should be considered in the selection process, including enforcement and compliance-related matters, the facility's performance, and the need for federal actions necessary to implement the proposed waivers and modifications.

When EPA determines that a federal action is necessary before an incentive such as a waiver or modification may be included in a Green Permit, EPA will decide, after consultation with ODEQ and LRAPA, if it is prepared to initiate that action and what is required in order to take such action. The Agencies will emphasize early and frequent communication, cooperation, and partnership in such discussions. The Agencies agree that expedited decision-making is essential to this effort, and commit, in lieu of mandated time frames, to pursue resolution to Green Permits questions and issues in an expedited manner.

The Agencies will work to ensure that all inspection and enforcement actions regarding Green Permit facilities are understood by and coordinated with the other agencies. The Agencies understand and agree that ODEQ and LRAPA maintain primary responsibility for monitoring compliance and taking enforcement actions for programs for which they are approved, authorized, or delegated. EPA will continue to carry out its enforcement responsibilities, in accordance with federal requirements and the *EPA and State Regulatory Framework for EMS Pilot Projects* agreement (Attachment 3) signed by EPA and several states on May 14, 1998. EPA retains the right to inspect green permit facilities and bring enforcement actions in appropriate circumstances, but will not increase its targeting or enforcement scrutiny of a company on the basis that it has applied for or been issued a Green Permit.

EPA will consult with ODEQ and LRAPA before taking any action concerning a facility operating under a Green Permit. ODEQ and LRAPA will regularly inform EPA of non-compliance situations and will convey how each facility proposes to address the situation. The agencies' enforcement offices will consult regarding their respective courses of action. ODEQ and LRAPA will keep EPA informed throughout the course of any compliance schedule negotiated with the company.

In cases involving issues such as wastewater pretreatment, habitat management and tax incentives, other agencies or levels of government may have authorities relevant to a permit applicant. The Agencies recognize that GEMS or Custom Waiver permits may be enhanced by the involvement of these agencies if the applicant desires such involvement. In cases where such involvement is requested, ODEQ and LRAPA will serve as the primary contacts with these agencies for purposes of obtaining and maintaining a Green Permit or Custom Waiver. These additional agencies may, at their request, directly participate in discussions with EPA, ODEQ and LRAPA.

ODEQ and LRAPA will take the lead in developing protocols for measuring the success of the Green Permit Program with EPA and external stakeholders providing input.

V. Agency Cooperation and Coordination on Programmatic Issues and Implementation of Individual Green Permits

Overview of the Process

The Agencies will establish a Green Permits Team (Team) to coordinate communication and collaboration on the Green Permit Program. The Team will have co-chairs from each agency to ensure that interagency issues of concern are effectively addressed. Team co-chairs will be responsible, within their respective agencies, for ensuring prompt and effective involvement, communication and resolution of issues. Team co-chairs will report to the Director and Regional Administrator or their designees, and will involve appropriate program offices from each agency. The Team will work on two tracks. 1) It will address and seek a common understanding on programmatic issues such as regulatory flexibility mechanisms (including related state authorization issues), enforceable permits, enforcement and compliance and public involvement. 2) It will serve as the forum for interagency communication and deliberations during the selection, negotiation, and implementation of individual Green Permits.

Programmatic Issues

The Agencies recognize that successful implementation of Green Permits will require agreement on how to address a number of programmatic issues. Some of these issues can be identified in advance, and some will be identified during implementation. Team co-chairs will be responsible for assuring that any issues of concern are addressed by the appropriate Agency representatives in a timely manner. The following are considered key issues.

Regulatory flexibility - Oregon's Green Permit regulations allow for waivers and modifications to environmental regulations, policies, guidance, and practices. When waivers are proposed that seek to modify a federally approved, authorized, or delegated program or a federal program requirement not authorized or delegated to the state, the Agencies will consult to ensure that the modifications do not compromise delegation, authorization or enforcement agreements, and that the modifications are implemented in ways that are consistent with the discretion allowed under federal and Oregon statutes.

In general, the required implementation steps will depend on the nature and magnitude of the proposed waiver or modification. ODEQ and LRAPA have some discretion to change implementation of their currently authorized or delegated programs, without requiring federal action. If the Agencies agree that a Green Permit involves an ODEQ or LRAPA policy, practice or interpretation falling within this range of discretion, the Agencies agree that no federal action will be necessary. Additionally, no federal action will be necessary for waivers to state-only programs that do not affect federally approved, authorized, or delegated programs. ODEQ and LRAPA will indicate to EPA which proposed modifications ODEQ and LRAPA view will require no federal action.

More substantial waivers or modifications may effectively constitute a modification of the approved, authorized or delegated program, for purposes of federal law (even if ODEQ or LRAPA do not formally handle the project as a modification or submit it to EPA as such). In such cases federal action would be required to ensure that waivers or modifications are consistent with the federal program. Additionally, in some cases, EPA may have to modify the federal program vis-a-vis a rule change in order to implement the waiver or modification. For proposed waivers and modification that seek to modify a federal program requirement not authorized or delegated to the state, EPA may have to issue a site-specific rule or other action that ensures the modification is legal and enforceable under federal law. In all such cases, EPA would have to conclude that the change was justified as a policy matter and was consistent with statutory requirements, including following federal statutory procedures for adopting the change.

Because the necessary EPA actions are very specific to the nature of the waiver or modifications, the Agencies agree to work closely to determine what if any implementing steps are necessary.

Assuring that Green Permits are legally binding and enforceable - The Agencies intend that Green Permits will be constructed in a manner that is legally binding, providing clarity and assurances to the company and enforceability to the Agencies. The Green Permit elements will become the requirements applicable to and legally binding upon the facility after all applicable procedures necessary to effectuate such a change have been completed. In order to ensure this, where such an element substitutes for or modifies the terms of a permit, the Agencies agree to follow the applicable procedures including those applicable to permit issuance or modification under a federally approved, authorized or delegated program. Agencies may follow new or modified procedures that the agencies develop and agree to employ on an experimental basis, consistent with federal and Oregon statutes and the principles in the ECOS/EPA Agreement. The Agencies agree that each Green Permit between ODEQ or LRAPA and a facility that would affect requirements under a federally approved, authorized or delegated program will be developed so that it constitutes a permit or permit modification that is valid and enforceable under federal law.

Furthermore, where a Green Permit would affect the regulatory requirements of a federally approved, authorized or delegated program, the Agencies agree to follow the applicable federal procedures for rule or program changes. New or modified procedures the agencies develop and agree to employ on an experimental basis that are consistent with federal and Oregon statutes and the ECOS/EPA Agreement may be used. In this way, the Agencies intend that any such change will be consistent with Oregon's responsibilities under approved, authorized, or delegated programs and federally enforceable.

Compliance and Enforcement - The Agencies agree to the following enforcement and compliance principles in addressing facilities participating in the GEMS Permits program (though not custom waiver Green Permits):

- A. facilities with poor compliance histories will not be approved for GEMS permits (except under special circumstances);
- B. when noncompliance is reported in accordance with ODEQ's self-reporting policy, and corrected, ODEQ and LRAPA will use discretion in mitigating gravity-based penalties provided the EMS is modified to prevent recurrence;
- C. the Agencies maintain their ability to conduct compliance inspections, but will generally consider participating facilities to be a low risk of non-compliance, absent information to the contrary; and
- D. Green Permit termination may occur if violations are not promptly corrected, the EMS is not sufficiently modified or repeat violations indicate fundamental deficiencies in a facility's EMS.

Public Involvement in Developing, Piloting, and Evaluating Innovations - The Agencies will consult on an ongoing basis about the public involvement strategies employed in conjunction with the Green Permits Program, assessing the extent to which they are consistent with the goals of the Program and the principles set forth in the State/EPA Joint Agreement to Pursue Regulatory Innovation, and evaluating strategies for improving their effectiveness.

Agency Coordination on Individual Green Permits

For purposes of this MOA, the process for developing and implementing Green Permits is divided into three phases: (1) review of facility application, (2) negotiating and issuing the Green Permit, and (3) administering the Green Permit. The Agencies will work together during each of these phases as set forth below. EPA's level of involvement, and thus the level of Team activities, will vary depending on the types of incentives or waivers (if any) proposed for a Green Permit facility and the extent to which these actions affect federal requirements. In some instances, EPA may have no involvement. Each of the Agencies may identify, initially and/or through experience, standard or default terms and conditions that may improve the efficiency of agency coordination on Green Permits.

Phase 1: Review of Facility Application

The Agencies agree to the need for clear and early communication about the merits and challenges of potential Green Permit facilities. When ODEQ or LRAPA receive an application from a facility and determines it is worth pursuing, they will forward a copy to the EPA Team co-chair, and to each other in the case of applications that will involve both ODEQ and LRAPA. ODEQ or LRAPA will identify all the requested waivers or modified permit conditions in the application and will provide a written assessment on whether or not federal actions will likely be needed to implement the proposed waivers or modifications.

EPA will promptly review the application and conduct a compliance screen to identify any recent or pending actions regarding the facility. EPA's review may include, but is not limited to: the facility's compliance status and environmental performance, identification of proposed waivers or modifications that will likely need federal actions to implement, the various steps and time frames of the likely federal actions, a preliminary assessment of EPA's willingness to proceed with any necessary federal actions and under what conditions, and areas where more information is needed in order to assess needed federal actions. The EPA co-chair will provide the ODEQ or LRAPA co-chair written comments within a one month target time frame in order to assist the facility and ODEQ or LRAPA in deciding to proceed with the draft Green Permit.

When a final decision has been made to accept an application to begin negotiating the draft Green Permit, ODEQ or LRAPA will provide a public notice of its decision and will forward the notice to the EPA Team co-chair.

Phase 2: Negotiating and Issuing the Green Permit

The Agencies agree that for Green Permits to succeed, resolution of regulatory issues must proceed expeditiously through the negotiation phase. The objective for this phase is to reach agreement on environmental performance and regulatory incentives that can work from the standpoint of the facility, stakeholders, and government agencies.

ODEQ and LRAPA will take the lead in drafting the Green Permit, including specifically defining the purpose and details of any proposed waivers or modifications. The Agency co-chairs will ensure that the appropriate program offices and staff of ODEQ, LRAPA, and EPA are involved in detailed review and negotiation of proposed modifications being considered for the Green Permit. Team members from the Agencies will meet as necessary to identify the most efficient mechanisms consistent with federal and state law for implementing specific modifications in the Green Permit. To facilitate this process, ODEQ and LRAPA will share working drafts of the Green Permit and supporting material with EPA.

The Co-chairs and Team members will ensure that heads of relevant program offices, the EPA Region 10 Administrator, and the Director of ODEQ or LRAPA are kept abreast of the negotiations and are prepared to make decisions whether or not to proceed with the necessary mechanisms to implement the Green Permit. After the specific EPA actions are identified to implement the waivers or modification in the Green Permit, EPA will convey in writing to the ODEQ or LRAPA its decision on whether or not EPA will proceed with initiating those actions.

To the extent possible, the Agencies will identify and decide whether to proceed with initiating the necessary EPA actions prior to ODEQ or LRAPA's issuance of the draft Green Permit for public comment. When EPA actions are required to implement provisions of the Green Permit, ODEQ or LRAPA will not issue those provisions in the final Green Permit until the EPA actions are completed. The Agencies also agree to coordinate and conduct required federal and state public review processes concurrently when possible for actions necessary to implement

provisions of the Green Permit.

The Agencies agree that Green Permits may be approved on a partial basis; that is, that a Green Permit may be issued with some, but not all, of the proposed modifications or waivers, and may be amended later to include modifications for which agreement is subsequently reached. This approach would allow Green Permits to be issued in a timely fashion containing those elements for which there is agreement among the Agencies. For those modifications that can be agreed upon quickly, the Agencies agree to let these take effect under the Green Permit while continuing to seek timely resolution on remaining proposed provisions. Elements requiring more detailed investigation or negotiation will be addressed as promptly as possible and amended to the Green Permit once the Agencies are in agreement.

Phase 3: Administering the Green Permit

ODEQ or LRAPA will take the lead in administering the Green Permit, including monitoring compliance with the terms and conditions of the Green Permit. In situations where EPA has taken actions to modify a federal program requirement not authorized or delegated to the state, EPA will be responsible for ensuring compliance with those modified requirements.

The Agencies agree that each agency will participate, as appropriate and helpful, in the public involvement program for each Green Permit facility. ODEQ and LRAPA will provide EPA with a copy of the Green Permits approval checklist (including significant elements of the facility's EMS) and the annual Green Permit performance report from each facility. The agencies will work to develop a system for identifying Green Permit facilities in relevant databases and tracking systems so that all Agency program offices will be aware of a facility's status as a Green Permit holder. The Agencies' programs should see Green Permits as opportunities to identify new options to achieve greater environmental performance.

The Team will discuss modifications, renewals, or proposed terminations of Green Permits prior to ODEQ or LRAPA making a final decision on these actions.

VI. Evaluation of Lessons Learned and Replication of Successful Innovations

The Agencies agree that, as emphasized in the Joint State/EPA Agreement to Pursue Regulatory Innovation, evaluating Green Permit facilities and the processes by which the permit conditions are implemented is an integral step in making systemic improvements to environmental regulatory programs. To this end, the Agencies will collaborate in evaluating the working relationship of the Agencies under this MOA, the success of the overall Green Permit program, and the success of individual projects.

Chuck Clarke - Regional Administrator, EPA Region 10	Date
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(Original signed by Chuck Clarke on May 22, 2000)

Langdon Marsh - Director, ODEQ	Date
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(Original signed by Langdon Marsh on May 26, 2000)

Brian L. Jennison, Director, LRAPA	Date
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(Original signed by Brian Jennison on June 1, 2000)

Attachments:

Attachment 1: ORS 340-014-0100 through 340-014-0165

Attachment 2: OAR 468.501 through 468.521

Attachment 3: EPA and State Regulatory Framework for EMS Pilot Projects, May 14, 1998