

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle Washington 98101

Reply to

Attn of: AT-082

OCT 13, 1992

MEMORANDUM

SUBJECT: U.S. District court, District of Oregon, Order, Oregon Environmental Council and the Sierra Club v. Oregon Department on Environmental Quality

FROM: Christopher A. James, Senior Environmental Engineer
Air compliance and Permitting Section

Michael Lidgard, Senior Chemical Engineer
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TO: VOC Compliance Workgroup VOC Policy Workgroup NSR Workgroup

Attached is a September 24, 1992, decision from Judge Helen Frye, U.S. District Court, Ninth Circuit, District of Oregon, concerning a suit by the Oregon Environmental Council and the Sierra Club Legal Defense Fund v. the Oregon Department of Environmental Quality (DEQ).

Judge Frye ruled in favor of the plaintiffs and against the Oregon DEQ on each count. Of particular interest to EPA is that Judge Frye affirmed the EPA policy of "once in, always in" vis a vis compliance with RACT and NSR rules. For example, plaintiffs contended that the DEQ should have required new major sources which constructed without Part D permits to demonstrate LAER and to obtain offsets in order to comply with the SIP NSR rules. The DEQ, on the other hand, alleged that it acted properly in issuing permit amendments after-the-fact to new major sources to restrict their VOC emissions to less than 40 tons per year, making them in effect minor sources ("synthetic minors"). Judge Frye determined that DEQ acted improperly and should have instead required the sources to demonstrate LAER and to obtain offsets. The decision is therefore consistent with EPA's policies on major VOC sources and is precedential in establishing that a State cannot excuse a major source from compliance with VOC or NSR requirements merely by reducing its emissions to below de minimis levels.

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CLERK. US DISTRICT COURT
DISTRICT OF OREGON
PORTLAND OREGON

OCT 02 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON ENVIRONMENTAL COUNCIL)
and THE SIERRA CLUB,)
)
Plaintiffs,)
)
V.)
OREGON DEPARTMENT OF)
ENVIRONMENTAL QUALITY)
and FRED HANSON, Director,)
)
Defendants.)
_____)

Civil No. 91-13-FR
O R D E R

IT IS HEREBY ORDERED that plaintiff's motion for partial
summary judgment (#9) is GRANTED.

DATED this 24 day of September, 1992.

HELEN J. FRYE
United States District Judge

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CLERK. US DISTRICT COURT
DISTRICT OF OREGON
PORTLAND OREGON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON ENVIRONMENTAL COUNCIL)
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 V.)
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 ENVIRONMENTAL QUALITY)
 and FRED HANSON, Director,)
)
 Defendants.)
_____)

Civil No. 91-13-FR
O P I N I O N

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FRYE, Judge:

This is a citizens, suit brought under the Clean Air Act, 42 U.S.C. §§ 7401 et seq., by plaintiffs, the Oregon Environmental Council and the Sierra Club, against defendants, the Department of Environmental Quality of the State of Oregon and its director, Fred Hanson (collectively, the DEQ). The matter before the court is the motion of plaintiffs for partial summary Judgment (#9).

STATUTORY BACKGROUND

In the Clean Air Act, Congress charged the Environmental Protection Agency of the United States government (the EPA) with setting primary air quality standards for certain air pollutants in order to protect the public health. 42 U.S.C. § 7409(b)(1). Congress also charged the EPA with setting secondary air quality standards for certain air pollutants in order to protect. the public welfare. 42 U.S.C. § 7409(b)(2).

The Clean Air Act mandates each state to prepare a state implementation plan (a SIP) for achieving and maintaining the

air quality standards set by the EPA. 42 U.S.C. §7410(a)(1). Each state is required to submit its SIP to the EPA for approval. *Id.* The EPA will approve a SIP submitted by a state only if the SIP meets all of the requirements of the Clean Air Act. 42 U.S.C. §§7410(a)(3)(A), 7382(b). Once the EPA approves a SIP, the requirements and commitments contained in the SIP are binding as a matter of federal law upon the state which had submitted the SIP until that state submits a formal revision of the SIP and that formal revision is approved by the EPA. 42 U.S.C. § 7413(a)(2); American Lung Ass'n v. Kean, 871 F.2d 319, 322 (3rd Cir. 1989).

In 1977, Congress amended the Clean Air Act to provide more stringent requirements for those geographical areas that had failed to meet federal standards (nonattainment areas) for pollution control. Pub. L. 95-95; 42 U.S.C. §§ 7501-08. In the 1977 amendment to the Clean Air Act, Congress required those states that had failed to meet federal standards for pollution control to submit revised SIPs to the EPA. 42 U.S.C. § 7502. In the revised SIPs, these states were to document all reasonably available measures for pollution control and meet all of the requirements set out in 42 U.S.C. § 7410(a)(2)(1).

Any state that had failed to meet federal standards for pollution control was instructed by the EPA to provide in its revised SIP for reductions in emissions sufficient to demonstrate that the primary standard for ozone would be achieved as expeditiously as practicable.

Just the New Source Review part
of the court order is included here.

C. New Source Review

The Amendments to the Clean Air Act; enacted in 1977 required that states with nonattainment areas must amend their SIPs to provide for new source review. 42 U.S.C. 7502(b)(6). It is uncontested that the SIP for the State of Oregon prohibits the construction of a major source of air contaminants or the major modification of a source of air contaminants without having first satisfied new source review rules. O.A.R. 340-20-220 through 276. Under the new source review rules, major new sources of air contaminants or major modifications of existing sources of air contaminants must meet the requirements listed in O.A.R. 340-20-240, including the following:

(1) Lowest Achievable Emission Rate. The owner or operator of the proposed major source or major modification must demonstrate that the source or modification will comply with the lowest achievable emission rate (LAER) for each nonattainment pollutant.

. . .

(3) Growth Increment or Offsets. The owner or operator of the proposed major source or major modification must demonstrate that the source or modification will comply with any established emissions growth increment for the particular area in which the source is located or must provide emission reductions ("offsets") as specified by these rules. . . .

(5) Alternative Analysis:

(a) An alternative analysis must be conducted for new major sources or major modifications of sources

emitting volatile organic compounds or carbon monoxide locating in nonattainment areas;

(b) This analysis must include an evaluation of alternative sites, sizes, production processes, and environmental control techniques for such proposed source or modification which demonstrates that benefits of the proposed source or modification significantly outweigh the environmental and social costs imposed as a result of its location, construction or modification.

These new source review requirements must be satisfied prior to the beginning of construction through a formal, public review process. O.A.R. 340-20-220(1). An applicant for a permit in the State of Oregon must first submit all relevant information concerning the construction or modification of a major source of air contaminants. O.A.R. 340-20-230(1). The DEQ is then obligated under the SIP to take the following steps: 1) to notify the public, local officials and the EPA of the permit application; 2) to make all relevant information available for public review; 3) to provide for public hearings if requested; 4) to consider all written comments; and 5) to formulate a written determination of whether the applicant meets all applicable new source review requirements. O.A.R. 340-20-230(3), 235. The DEQ may not issue a permit to a major new or modified source of volatile organic compounds in the Portland nonattainment area without complying with the pre construction review process. O.A.R. 340-20-230 (3) (G) .

Plaintiffs contend that the DEQ granted to the SSBO at Precision Castparts, to the Port of Portland Ship Repair Dock, and to Tektronix the right to operate major new or

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modified sources of volatile organic compounds without requiring them to comply with the rules mandated by the SIP for review of major new or modified sources of volatile organic compounds. Plaintiffs also contend that the DEQ has breached its duty under the SIP to require documentation of compliance with the new source review requirements and to make that documentation available for public review.

The DEQ contends that no violation of new source review rules has occurred, either because the necessity for new source review was never triggered, or if it was triggered, because the DEQ took appropriate action.

1. Precision Castparts

It is undisputed that the permit issued to Precision Castparts for its SSBO does not comply with either the lowest achievable emissions rate, growth increments or offsets, or alternative analysis requirements set forth in O.A.R. 340-20-240(1),(3),(5). The DEQ, however, contends that the SSBO of Precision Castparts was not a "major modification" requiring new source review.

For purposes of the new source review rules, a "major modification" is:

any physical change or change of operation of a source that would result in a net significant emission rate increase . . . for any pollutant subject to regulation under the Clean Air Act. This criteria also applies to any pollutants not previously emitted by the source. Calculations of net emission increases must take into account all accumulated increases and decreases in actual emissions occurring at the source since (the

baseline year, either) January 1, 1978, or the time of the last construction approval issued for the source pursuant to the New Source Review Regulations for that pollutant, whichever time is more recent. If accumulation of emission increases results in a net significant emission rate increase, the modification causing such increases become subject to the New Source Review requirements including the retrofit of required controls.

O.A.R. 340-20-225(15). A "significant emission rate" for volatile organic compounds is 40 tons per year. Id. Thus, any physical or operational alteration of a source of pollutants which results in a net increase in emissions of volatile organic compounds of 40 tons per year over its actual emissions since the baseline year is a "major modification" triggering the new source review requirements. Id.

On October 31, 1979, the DEQ issued Precision Castparts a permit for construction of the facility housing its SSBO. The permit did not provide for the emissions of volatile organic compounds. This permit was issued before the final approval by the EPA of the new source review regulations of the State of Oregon on November 5, 1981. 46 Fed. Reg. 54950 (1981). Thus, the approval of the DEQ for the construction of the facility housing its SSBO was not issued pursuant to new source review regulations. Accordingly, the baseline year for Precision Castparts is 1978, and the actual emissions of volatile organic compounds from its facility housing the SSBO in the year prior to the construction of the facility were zero.

On September 15, 1989, Precision Castparts disclosed

that its annual emissions of volatile organic compounds were approximately 303 tons, thereby exceeding the net increase of 40 tons per year that defines a "major modification." Consequently, Precision Castparts was subject to the new source review regulations applicable to major modifications. Nevertheless, on August 27, 1990, the DEQ issued Precision Castparts a new permit for its SSBO which did not require Precision Castparts to demonstrate compliance with the new source review requirements.

The DEQ offers two reasons why the SSBO of Precision Castparts was not subject to new source review requirements prior to the issuance of the permit in 1990 to Precision Castparts. First, the DEQ argues that irrespective of its actual emissions of volatile organic compounds at the time it was issued the permit, the potential of Precision Castparts to emit volatile organic compounds was less than 40 tons per year, and this figure is dispositive in determining whether the SSBO is a potential "major source" of pollutants or a "major modification." The DEQ bases its conclusion that the potential of the SSBO to emit volatile organic compounds at the time of the issuance of the permit was less than the "Significant emission rate" for volatile organic compounds the fact that the permit contained a schedule of compliance requiring Precision Castparts to limit its annual emissions rate of volatile organic compounds to 39.9 tons within 460 days of issuance. The compliance schedule specifically requires Precision

Castparts to add certain equipment for emissions control in order to reduce emissions of volatile organic compounds to the appropriate level, and according to the DEQ, "the phrase 'potential to emit' includes air pollution control equipment" Defendants' Memorandum in Opposition, p. 43 (citing O.A.R. 340-20-225(19)).

Regardless of whether the DEQ has appropriately defined the phrase "potential to emit" within the meaning of the SIP for the State of Oregon⁸, the DEQ has neglected the language of the SIP by defining a "major modification" in terms of "potential to emit, and not in terms of "actual emissions." The new source review regulations are triggered by major modifications when net emissions, which are calculated by accounting for "all accumulated increases and decreases in actual emissions occurring at the source since January 1, 1978," result in a "net significant emission rate increase." O.A.R. 340-20-225(15) (emphasis added). The DEQ disregarded the "actual emissions" of the SSBO of Precision Castparts in determining that emissions of volatile organic compounds from the source would not rise above the "significant emission rate." The determination of the DEQ is, therefore,

⁸ The SIP of the State of Oregon defines "potential to emit" as "the maximum capacity of a source to emit a pollutant under its physical and operational design." O.A.R. 340-20-225(22). Pollution control equipment that is to be added to a source is arguably not part of the source's "physical and operational design." Thus, it may be incorrect to account for any control equipment not currently in place when determining a source's potential to emit."

flawed. A source's potential to emit volatile organic compounds may not be used to excuse a source from new source review rules if its actual emissions so require, see, United States v. Louisiana-Pacific Corp., 682 F .Supp. 1122, 1133 (D. Colo. 1987), and it is uncontested that the actual emissions of volatile organic compounds from the SSBO of Precision Castparts exceeds the 40-ton per year emission rate increase that requires compliance with the new source review rules.

The second contention of the DEQ is that the permit originally issued to Precision Castparts by the EPA was issued prior to the approval of the new source review program of the State of Oregon, thereby exempting Precision Castparts from the new source review regulations of the State of Oregon. Although the DEQ had no federally enforceable new source review rules when it issued the original permit to Precision Castparts, such rules were in existence and were federally enforceable in 1990 when the DEQ issued a new permit to Precision Castparts for its SSBO.

The court finds that the DEQ violated the SIP for the State of Oregon and the Clean Air Act by issuing Precision Castparts a permit in 1990 that failed to require Precision Castparts to demonstrate its compliance with the lowest achievable emission rate and offset requirements or to submit an alternatives analysis as described in the new source review regulations.

2. Tektronix

Plaintiffs next contend that the DEQ allowed Tektronix to increase its emissions of volatile organic compounds by 140 tons per year above the baseline levels without requiring Tektronix to comply with new source review requirements. The DEQ contends that 1) this issue is moot; 2) no major modification was authorized; and 3) even if a major modification was authorized, the lowest achievable emission rate was required.

On November 12, 1985, the DEQ issued to Tektronix a modification to an existing "minimal source" permit thereby allowing Tektronix an annual increase of 140 tons in emissions of volatile organic compounds above its baseline rate. Although authorized by the modification to increase its emissions of volatile organic compounds by 140 tons, Tektronix never did so. Consequently, when the minimal source permit came up for renewal in 1990, the DEQ exercised its power under Condition 6 of the minimal source permit to reclaim the increase of 140 tons that it had allocated to Tektronix. Additionally, the DEQ issued a new permit on November 13, 1991, which returned limits on the emissions of volatile organic compounds to the baseline level. In light of the new permit of November 13, 1991, the DEQ contends that "even if the permit originally was issued inappropriately, the issue is moot." Defendants Memorandum in Opposition, p. 52.

In order to render an action under the Clean Air Act moot, [t]he defendant must demonstrate that it is absolutely

clear that the allegedly wrongful behavior could not reasonably be expected to recur." Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 66 (1987) (quoting United States v. Phosphate Export Ass'n, 393 U.S. 199, 203 (1968)) (emphasis in Gwaltney). Thus, defendants may not evade sanctions under the doctrine of mootness "by predictable 'protestations of repentance and reform.'" Gwaltney, 484 U.S. at 67 (quoting United States v. Oregon State Medical Soc'y, 343 U.S. 326, 333 (1952)). The DEQ maintains that it was justified in issuing the modification to the existing "minimal source" permit, thereby allowing an increase in the emissions of volatile organic compounds, the "allegedly wrongful behavior." The fact that the DEQ believes it was justified in issuing the modification to the existing "minimal source" permit is evidence indicating that the conduct of the defendants will recur, and therefore this claim is not moot.

The DEQ next contends that the sanctioned increase in emissions of volatile organic compounds by Tektronix was not a "major modification" requiring new source review. The DEQ points out that "[t]here were no physical modifications or operational changes at Tektronix resulting in a net increase of more than 40 tons above the baseline level." Defendants, Memorandum in Opposition, p. 50. The SIP for the State -of Oregon defines a "major modification" as many physical change or change of operation of a source (of pollutants) that would result in a net significant emission rate increase." O.A.R.

340-20-225(15) (emphasis added). Therefore, a "major modification" under the SIP need not actually result in a "net significant emission rate increase;" rather, a physical or operational change with the potential to result in a net significant emission rate increase constitutes a "major modification."

The DEQ asserts that the modification of the permit in 1985 only authorized increases in emissions of volatile organic compounds resulting from increases in production, thereby not meeting the definition of "major modification" under the SIP, which requires a physical change or a change in operation. However, the permit, after being modified, granted to Tektronix the right to increase its emissions of volatile organic compounds by 140 tons, without limiting the manner in which such increases in emissions might arise. Tektronix was not prohibited from making physical or operational changes.

Moreover, the DEQ itself has referred to the permit modification granted to Tektronix in 1985 as a "major modification" within the meaning of the SIP. The DEQ responded to the letter of plaintiffs when they gave notice of their intent to file suit by stating that "the modifications [at Tektronix] were treated as 'major modifications' under the rule and were subject to the new source requirements. The emissions increase was permitted in accordance with the new source review rules." Exhibit E of Parties' Joint Exhibits, p. 6. Thus, the DEQ is estopped to argue now that the increase

in emissions of volatile organic compounds at Tektronix was not a "major modification", subject to the new source review requirements.

Finally, the DEQ contends that any "major modification" authorized pursuant to the permit modification of 1983 satisfied the new source review requirements. However, the DEQ has failed to provide sufficient evidence to support its claim. The DEQ has presented no documentary evidence to show that it conducted an alternatives Analysis or required Tektronix to submit one as mandated by O.A.R. 340-20-240(5). The new source review rules contained in the SIP for the State of Oregon are requirements, and the failure to comply with those rules is a violation of the SIP for the State of Oregon and the Clean Air Act.

3. Port of Portland

Plaintiffs contend that the DEQ issued a permit to the Port of Portland on June 9, 1986 authorizing an annual increase in the emissions of volatile organic compounds of 228 tons over the baseline levels, without requiring the Port of Portland to demonstrate compliance with new source review rules. The DEQ contends that 1) the construction giving rise to the increased emissions of volatile organic compounds occurred before the State of Oregon had a federally enforceable new source review program; 2) the requirements of the new source review program only apply to applicants for permits to construct a major new or modified source

of volatile organic compounds; and 3) even if the Part of Portland was subject to the requirements Of the new source review program in 1966, compliance with those requirements would have been futile.

As the court found with respect to Precision Castparts, the relevant time for determining the enforceability of the new source review requirements is not the time of the construction of the source of emissions of the volatile organic compounds. The relevant time is the time when the permit to construct the source of emissions of the volatile organic compounds is issued. On June 9, 1986, the DEQ issued to the Part of Portland a permit incorporating emissions of volatile organic compounds from the fourth dry dock, which was an unpermitted construction in 1979, and at this time the State of Oregon had federally enforceable new source review rules.

Similarly, the claim of the DEQ that the Part of Portland is exempt from the new source review requirements because the fourth dry dock had been constructed at the time when the permit application was submitted is meritless. The DEQ argues that "the New Source Review requirements are Pre-construction requirements [and more specifically that] [t]here is nothing in the rules to suggest that an alternative analysis should be conducted after construction." Defendants, Memorandum in Opposition, p. 54. The only support for the position of the DEQ is the phrasiology found at page 40 of Plaintiffs' Memorandum. in Support of Motion for Partial Summary Judgment,

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whereby "pre-construction review" is the label plaintiffs bestow'-upon the SIP-mandated process designed to ensure compliance with the new source review requirements. However, a label cannot compel an interpretation different from the express language of the SIP.

The SIP imposes without exception the new source review requirements on all "[n]ew major sources and major modifications which are located in designated nonattainment areas." O.A.R. 340-20-240(1). The DEQ concedes that the construction of the fourth dry dock was a "major modification" within the meaning of the SIP. Parties' Stipulated Statement of Facts, p. 16. The SIP does not exempt a source of pollutants from the new source review requirements simply because the "major modification" was constructed prior to the issuance of a requisite permit.

Moreover, if such an exemption were allowed, a windfall would be created for those major new or modified sources that disregarded the SIP-mandated requirements. The SIP provides, in pertinent part, that "[n]o owner or operator shall begin construction of a major source or a major modification of an air contaminant source without having received an Air Contaminant Discharge Permit from the Department of Environmental Quality and having satisfied (new source review requirements]." O.A.R. 340-20-220(1). If the court was to accept the argument of the DEQ, an air contaminant source which neglected the requirements under O.A.R. 340-20-220(1)

would escape the exemptionless new source review requirements contained in O.A.R. 340-20-240. The State of Oregon could not have intended to create such a loophole for industrial sources of pollutants to avoid compliance with its SIP.

Additionally, in the SIP itself, the state of Oregon acknowledges that compliance with new source review requirements is a requirement for existing constructions that meet the definition of "major modifications." O.A.R. 340-20-225(15) provides that all "major modifications" are "subject to the New Source Review requirements including the retrofit of required controls." That the retrofitting of controls is among the new source review requirements indicates that these requirements apply to air contaminant sources already constructed.

Lastly, the DEQ contends that even if the construction of the fourth dry dock was subject to new source review requirements, its failure to require post-construction compliance with the new source review rules is excusable since it would have been futile to require compliance with these rules. The DEQ focuses on the futility of the alternatives analysis and outlines why no alternatives exist for each of the SIP-mandated areas of evaluation -- source site, size, production processes, and environmental control techniques. However, the DEQ's post hoc analysis is not a proper substitute for an alternatives analysis conducted prior to the issuance of a permit. Furthermore, the DEQ's post hoc

alternatives analysis is flawed since many of the findings of futility are premised on the-fact that the fourth dry dock had already been constructed. If this court was to accept post hoc findings of futility, it would create an incentive, whereby exemption from feasible provided new source review requirements that air contaminant sources commence major construction projects without applying for mandatory permits. Such a result is contrary to the SIP for the State of Oregon and the Clean Air Act' which provide, without exception, for the application of new source review to those sources which trigger it.

The SIP for the State of Oregon requires that an air contaminant source subject to new source review must demonstrate compliance with each of the requirements before receiving a permit to construct anew or modify. O.A.R. 340-20-220(1). The construction of the fourth dry dock was a "major modification" subject to new source review; thus, the alternatives analysis should have occurred prior to the time the DEQ granted the permit in 1986.

Though the DEQ claims to have required the lowest achievable emission rate at the Port of Portland, it neither required the Port of Portland to demonstrate compliance with the growth increment requirement, nor did it conduct or require the Port of Portland to conduct an alternatives analysis before issuing to the Port of Portland a permit for a "major modification." Thus, the DEQ has violated the SIP for the State of Oregon and the Clean Air Act.

D. Highest and Best Practicable Treatment and Control

The third contention of plaintiffs is that the DEQ failed to provide for the "highest and best practicable treatment and controls in all cases involving emissions of volatile organic compounds in the Portland nonattainment area. Specifically, plaintiffs argue that the DEQ has failed 1) to require compliance with reasonably available control technology emission standards and limitations; 2) to define and enforce reasonably available control technology emission standards and limitations for manufacturing processes for which the EPA has not published control technology guidelines; 3) to enforce new source review rules; and 4) to require state of the art controls at non-major new or non-major modified sources of volatile organic compounds.

The DEQ contends that 1) the standard of the "highest and best practicable treatment and control" is not an enforceable emission standard under the SIP; and 2) even if the standard of the "highest and best practicable treatment and control" is an enforceable emission standard under the SIP, that standard has been fully implemented since a) reasonably available control technology is required at all major sources of volatile organic compounds for which the EPA has published control technology guidelines; b) the SIP does not require reasonably available control technology at sources of volatile organic compounds not covered by EPA-approved control technology guidelines; c) new source review requirements have

been enforced; and d) state of the art controls are required at non-major new sources of volatile organic compounds and nonmajor modifications of existing sources of volatile organic compounds.

This court has determined that an alleged violation of the "highest and best practicable treatment and controls rule is sufficient to establish the subject matter jurisdiction of this court since the "highest and best practicable treatment and control" rule meets the definition of an emission standard or limitation under the Clean Air Act. Oregon Env'tl. Council, 775 F. Supp. at 361-62. Accordingly, the DEQ is foreclosed from relitigating this issue.

That the "highest and best practicable treatment and control" rule is an enforceable emission standard has been decided; however, the parties disagree on the level of control of emissions required by O.A.R. 340-20-001. Plaintiffs argue that "[a]t a minimum, the 'highest and best practicable treatment and control, standard requires the use of reasonably available control technology, at [all] existing sources [of volatile organic compound in the Portland nonattainment a, and]...[i]t is undisputed that [the] DEQ has failed to require that all major sources of [volatile organic compounds]in Portland comply with [reasonably available control technology]." Plaintiffs' Reply Memorandum, pp. 39-40 (emphasis in original).

On the other hand, the DEQ contends that 1) it has

required reasonably available control technology at all existing sources of volatile organic compounds covered by an EPA issued control technology guideline; and 2) the rule requiring the highest and best practicable treatment and control does not require that reasonably available control technology be employed at sources not covered by an EPA-issued control technology guideline.

The court has heretofore determined that the DEQ did not require compliance with reasonably available control technology standards at all sources of volatile organic compounds for which the EPA has published a control technology guideline. Thus, the DEQ has violated the SIP for the State of Oregon and the Clean Air Act by failing to require compliance with O.A.R. 340-20-001, which mandates the application of reasonably available control technology at these sources.

The court is not compelled to address whether the emission controls required by O.A.R. 340-20-001 are applicable to an air contaminant source for which the EPA has not published a control technology guideline. Similarly, the court is not compelled to address claims that the DEQ has not enforced new source review rules and failed to require state of the art controls at all new or modified sources.

E. Plant Site Emission Limits

The final contention of plaintiffs is that the DEQ failed to provide for and enforce short-term plant site emission limits on emissions of volatile organic compounds as required

by the SIP. A plant site emission limit imposes a cap on emissions over a period of time, and the SIP mandates that "[plant site emission limits] shall be established on at least an annual emission basis and a short term period emission basis that is compatible with source operation and air quality standards." O.A.R. 340-20-310(2).

The EPA has set the national ambient air quality standard for ozone at 0.12 parts per million. This standard is attained when the "expected number of days per calendar year with maximum hourly average concentrations above 0.12 part per million . . . is equal to or less than 1." 40 C.F.R. § 50.9 (1988). Plaintiffs argue that the SIP contemplates hourly plant site emission limits for sources of ozone, since the short-term period is to be compatible with air quality standards. Plaintiffs contend that the DEQ has failed to comply with the SIP by not establishing hourly plant site emission limits for sources of ozone.

The DEQ does not dispute that the SIP requires the establishment and the enforcement of short-term plant site emission limits; however, the parties disagree on the duration of term and the means by which sources of pollutants may demonstrate Compliance with these limits.

Initially, the position of the DEQ was that compliance with hourly or daily plant site emission limits would be demonstrated by dividing the plant's total annual emissions of volatile organic compounds by the number of hours or days

the plant was in operation in that year. The DEQ later acknowledged that this method of computation provided no means to detect if a source was exceeding its short-term emission limits. Accordingly, the DEQ amended the permits held by several sources to require the monitoring and the reporting of short-term emissions. Plaintiffs no longer consider these sources to be in violation of the SIP. However, plaintiffs contend that the DEQ remains in violation of the SIP and the Clean Air Act, since all of the permits issued to sources of volatile organic compounds in the Portland nonattainment area have not been amended "to require compliance with or allow for the enforcement of short-term (plant site emission limits]." Plaintiffs, Reply Memorandum, p. 52. Specifically, plaintiffs argue that the DEQ has not imposed monitoring and reporting requirements on plants operated by Intel and Tektronix.

The DEQ contends that the SIP does not require compliance with a short-term plant site emission limit -- an hourly or daily limit -- at the Intel and Tektronix plants, since such compliance would be incompatible with source operations. Specifically, the DEQ asserts that "[f]or these sources, annual (plant site emission limits] may be the only standards compatible with their large and complex source operations [and] [n]o meaningful method of measuring emissions from such sources on an hourly or daily basis has been discovered." Defendants' Memorandum in Opposition, p. 70.

Plaintiffs agree that compatibility with the operation

of the source is a prerequisite for imposing a short-term plant site emission limit on a particular source. Plaintiffs also concede that the "DEQ offers a plausible explanation . . . for why the SIP may not require compliance with a daily [plant site emission limit] at Tektronis and Intel. Plaintiffs Reply Memorandum, p. 52. Although both plaintiffs and the DEQ state that short-term plant site emission limits may not be required at these sources, neither party disputes that final resolution of this issue requires additional analysis of the operation at these sources. Since additional analysis is required, this issue is not ripe for summary adjudication.

Plaintiffs next contend that the DEQ has failed to require compliance with short-term plant site emission limits at three sources of volatile organic compounds in the Portland nonattainment area: Continental Can, the Port of Portland, and Pacific Coatings. It is undisputed that the DEQ has not established a daily plant site emission limit at Continental Can. Rather, the DEQ has instituted a monthly plant site emission limit, which applies only during the slimmer season. It is further undisputed that the DEQ has not amended the permits held by the Port of Portland and Pacific Coatings to require monitoring and reporting of daily emissions. Parties' Stipulated Statement of Facts, pp. 19-20.

The DEQ argues that "allowing a limited number of sources to determine their short-term [plant site emission limit] is a perfectly legitimate construction of the rule which

allows [plant site emission limits] to be set as 'compatible with source operation.'" Defendants' Memorandum in Opposition, p. 73. However, unlike the situations at Tektronix and Intel, the DEQ does not claim that operations at the Port of Portland are so complex that a short-term plant site emission limit -- hourly or daily -- is inappropriate. Instead, the DEQ indicates that an analysis of short-term reporting possibilities at the Port of Portland will occur during the implementation of the miscellaneous 100-ton source [reasonably available control technology] rules adopted by the Environmental Quality Commission on May 15, 1991. Parties' Stipulated Statement of Facts, p. 20. Similarly, the DEQ does not contend that a short-term plant site emission limit is incompatible with operations at Pacific Coatings.⁹

The DEQ, as the agency responsible for enforcing the SIP for the State of Oregon, must ensure that short-term plant site emission limits are not exceeded, so long as such limits are compatible with source operations and air quality standards O.A.R. 340-20-310(2). However, the DEQ has acknowledged that, absent short-term monitoring or reporting of emissions, it is incapable of determining if short-term plant site emission limits are being exceeded. Moreover, the

⁹ Operations at Pacific Coatings ceased in 1991, but its permit remains in effect. The parties dispute whether the closure of the Pacific Coatings plant moots the issue regarding its permit. The court agrees with plaintiffs that this issue is not moot, since plaintiffs are seeking prospective relief.

DEQ has made no showing that compliance with short-term plant site emission limits is incompatible with the operations at Continental Can, the Port of Portland, or Pacific Coatings. Thus, the DEQ is violating the SIP and the Clean Air Act by 1) failing to require the Port of Portland and Pacific Coatings to monitor or report their short-term emissions; and 2) by failing to establish an hourly or daily plant site emission limit at Continental Can.

CONCLUSION

The motion of plaintiffs for partial summary judgment (#9) is granted.

DATED this _____ day of September, 1992.

HELEN J. FRYE
United States District Judge