Beyond Toxics Comment on Cleaner Air Oregon Rulemaking

Division 245

Submit comments here:
online: https://www.oregon.gov/deq/Regulations/rulemaking/Pages/ccleanerair2017.aspx

To: The Oregon Environmental Quality Commission and the Department of Environmental Quality
Date: 8/1/2018
From: Lisa Arkin, Executive Director, Beyond Toxics

Beyond Toxics submits these comments on behalf of thousands our members and followers. The goal of Beyond Toxics is to provide leadership for a clean and just Oregon. We work to protect vulnerable Oregonians – especially people of color, undocumented workers and children – who are disproportionately impacted and harmed by pollution in their communities and at work. We seek solutions to the root causes of pollution and advocate for environmental health and justice.

The DEQ declared in their Public Notice of Proposed Rule Making (6/25/2018) that the new Cleaner Air Oregon law, SB 1541 adopted by the State Legislature in 2018:

> "set benchmarks for excess lifetime cancer risk and non-cancer risk in statute at levels higher than what DEQ and OHA originally proposed. Based on those higher risk levels, there will be potentially less fiscal impact on regulated businesses and potentially greater costs related to public health since not as much risk reduction will be realized."

It is clear that the EQC and the DEQ must adopt risk levels that are truly protective of public health. Polluters should not be able to contaminate our air at the expense of public health! Beyond Toxics offers the following critiques and solution-oriented recommendations that we urge the EQC and DEQ to incorporate into the Cleaner Air Oregon Rules Division 245.

1. Setting Health Protective Toxicity Risk Values for Children's Health

- CRITIQUE: At stake is the health of our State's children, whose capacity to receive air toxics through inhalation, absorption and even consumption is greater than an adult. Children are more vulnerable to serious health risks from exposure to air toxics than adults, and they are more likely to suffer both acute and chronic impacts.

California's OEHHA states:

> "…children's exposures to contaminants in our air, water, and food are higher than an adult in the same setting. Because children are still growing and developing, they can be more sensitive to the adverse health effects of chemicals than an adult. In some cases, the effects are irreversible. It is increasingly recognized that exposures early in life affect adult health." [https://oehha.ca.gov/risk-assessment/childrens-health]

  - SOLUTION: It is critical that the rules adopted by the Environmental Quality Commission are based on the special vulnerability of children, are strongly health-based, follow the Precautionary Principle and uphold principles of Environmental Justice to protect vulnerable communities. Within Division 245, the EQC has the authority to establish protective

standards to reduce the environmental burden on the health of Oregon's children. We recommend that the EQC use the "Uncertainty Factor" that refers to the explicitly supported the use of a 10-fold safety factor in the presence of adequate toxicity risk data derived from human studies and an additional 10-fold safety factor in the absence of adequate toxicity data, for an overall safety factor of 100. This is entirely necessary because it can be difficult to pinpoint a single cause and effect relationship resulting from a fetus', an infant's or a child's exposure to one toxic chemical emitted by an industrial facility. The Uncertainty Factor can help establish a protective guideline particularly in the case of unknown outcomes for exposure to multiple toxic chemicals in the air during childhood development. Children may also experience negative developmental outcomes because developmental sequences can be altered during a child's growth and may subsequently lead to multiple negative health outcomes. For example, a child exposed to air toxics and small particulate is more likely to develop smaller lungs and reduced lung function, which may have lifelong impacts to the quality of that person's life. Furthermore, if a fetus or child is exposed to one or more air toxic chemicals during a critical window of development, the possibility of life-long disabilities should not be underestimated when setting Toxicity Reference Values (TRV). The EQC and DEQ should take into account the potential exposures to environmental toxicants during preconception, prenatal and all stages of childhood development and set TRV levels to protect children from the relevant adverse health outcomes that may occur as a result of such exposures. We recommend:

- TRV levels are set using the "Uncertainty Factor" with a 10-fold safety factor in the presence of adequate toxicity risk data and an additional 10-fold safety factor in the absence of adequate toxicity data, for an overall safety factor of 100, and;
- Cancer Lifetime Risk levels for children be set at no higher than 2 excess cancers per million people, and;
- Hazard Index for children be absolutely no higher than HI1. *Anything over HI1 constitutes a health hazard for developmental exposures to functions carried out by processes within reproductive, nervous and cognitive, respiratory, immune, renal, hepatic, cardiovascular, and endocrine systems.*

2. Environmental Justice

- CRITIQUE: **The proposed draft rules fail to include guidance, standards or best practices for protecting vulnerable populations.** Despite the Agency's intention to protect health, we see that the commitment needs clearer and more specific requirements. For example, the topic of Environmental Justice is covered on page 10-11 of the Proposed Draft Rules. Performing a word search in the Proposed Draft Rules revealed that the word "vulnerable" is used once and the words "equitable" "fair" "frontline" "equity" were not used at all. The strategy around pursuing an Environmental Justice lens needs more specificity. This is true in light of the way SB 1541 mandates unreasonably high upper limits on the cancer and non-cancer risk benchmarks. Holding true to environmental justice principles and criteria is an effective means of achieving meaningful and health-protective levels.

  - SOLUTION: **Identify, address and take action to protect the health of the most vulnerable, front-line community members who currently bear the greatest burden of exposure to air toxics.** These three components of equitable health protections must be incorporated into the rules at OAR 340-245-0120. The DEQ must provide a definition of "vulnerable community" in the list of vocabulary. The DEQ must require community engagement

meetings for new, reconstructed and existing sources if the owner or operator requests Source Risk Limits greater than any of the Community Engagement Levels (in Section 2(a) change the word "may" to "shall").The rules must include requirements for making notices available in the multiple languages used by the impacted community. The rules also must clearly commit to ensuring that community input will be taken seriously, and applied to air toxics regulatory permitting in a meaningful way.

- CRITIQUE: Unlike the original DEQ proposed rules, polluters are no longer required to engage with impacted communities about the impacts to community airshed and public health. Instead, SB 1541 places that responsibility on the Agency. We support the Agency's proposal to hire a Community Engagement Coordinator, and ask the EQC to give weight and authority to this position.

    - SOLUTION: Community engagement is paramount to creating a successful Cleaner Air Oregon program. The EQC must ensure that the community has access to both a Community Engagement Coordinator and an Environmental Justice Liaison to ensure meaningful community engagement of this aspect of the program. The EQC can adopt rules that require the DEQ to pursue community engagement whenever the Risk Action Levels exceed health benchmarks. Engagement materials produced by the polluter must explain in common terms the before and after impacts to health that will result from their new facility, or the negatives impacts to community health if the polluter requests any permit modifications or conditional permit language that reduces air toxic control measures. The DEQ should build into the Fee Schedule enough funding for the Community Engagement Coordinator and other staff to review these materials for accuracy, factual basis and readability. All printing costs and costs of translating community materials must be paid for by the air permit holder or applicant.

- CRITIQUE: SB 1541 is vague about how to engage a community in a meaningful way, so let's make sure to spell out the protocols and include benchmarks in air toxics permitting process.
    - SOLUTION: Follow the Environmental Justice "Meaningful Involvement" guidelines published on the DEQ own website.
    - Follow guidelines in the Environment Justice Task Force manual.
    - Metrics are necessary! The Agency has proposed a 5-year evaluation of its ability to carry out "robust community engagement (see page 10 of the Proposed Draft Rules). Definitions and benchmarks are needed to measure the success of this plan.
    - How can the EQC ensure that protocols are put into place so that the 5-year evaluation is guided by impacted and overburdened communities?
    - "Meaningful involvement means that:
        i. Potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment or health;
        ii. The public's contribution can influence the agency's decision;
        iii. The concerns of all participants involved will be considered in the decision-making process
        iv. The decision-makers seek out and facilitate the involvement of those potentially affected."

3. General Human Health

Governor Brown has promised the people of Oregon that Cleaner Air Oregon would be health-based. In May of 2018, Dr. Christopher Wild, the director of IARC stated, "***Our conclusion is that this (air pollution) is a leading environmental cause of cancer deaths."*** This definitive statement on the origins of cancer needs to be lifted and centered in all policy decisions regarding air toxics regulations under the promised goals of Cleaner Air Oregon.

- CRITIQUE: SB 1541 (and the DEQ) watered down the approach to achieving T-BACT (Technical Best Achievable Control Technology) for existing facilities by introducing loopholes and equivocations. For example, polluters can claim that air pollution control technology is not "cost effective" yet Cleaner Air Oregon has not set lower and upper limits for the meaning of "cost effective." Nor has the Agency identified a mechanism to evaluate cost effectiveness from the lens of public health. Public health is also a cost, particularly when it comes to the business cost of supporting workers whose health is harmed by air toxic exposure while at work.
    - SOLUTION: Any cost-benefit analysis for deferments, exemptions or conditional permits must have a transparent process to determine what is "cost effective," and the process must also include equations for the burden of harm to nearby communities, to the environment and to public health. Health costs analysis must include cancer and non-cancer illnesses. All equations must factor in additional precautions for exposures to prenatal, children, the elderly and vulnerable communities. The DEQ states that there is a lot of uncertainty around air toxic exposure and negative health outcomes such as chronic diseases (cancer, heart disease, stroke, asthma, neurological damage, etc.) and acute diseases (allergies, rashes, headaches, sore throat, etc.). If that is true, then more emphasis must be placed on developing the transparent and community-health based protocols to factor health costs into any decision about granting permits. No matter if DEQ or OHA does not have exact formulas to attribute each chemical to a health outcome and its associated health care and quality of life costs - it must establish a process and use the most up-to-date data available. Importantly, the TRV must account for the uncertainty of acute and lifetime risks for children's exposures to air toxics.

- CRITIQUE: Setting stringent levels for the Toxics Reference Values and the Risk Based Concentrations are the lynchpins to achieving health-based regulations. However, the DEQ has not yet committed to use the lowest protective benchmarks to determine what constitutes compliance with a health-based regulation.
    - SOLUTION: The agencies of the federal government – EPA, CDC, ATSDR – are no longer funded to stay abreast of the best science available on toxicity and human health. Their benchmarks are outdated. Throughout the Cleaner Air Oregon TAC and RAC, the CalEPA/OEHHA was repeatedly mentioned as "the Gold Standard" for setting regulatory benchmarks. DEQ should rely on the CalEPA/OEHHA and also consider and incorporate stricter air toxics standards from European Union.

4. Implementation

- Key Point: The DEQ should maintain strict technical standards as outlined in 340-245-0050 Source Risk Assessment. DEQ must not equivocate or lower the standards for requiring Toxics monitoring, installation of Toxics Best Available Control Technology (TBACT) and adhering to Risk Reduction Plan. The Agency should evaluate their Risk Reduction Plan requirements minimally every 5 years to ensure that requirements for control technology are modernized,

updated and provide the highest level of benefit and impact for public health, particularly for vulnerable communities.

- CRITIQUE: The Agency has described potential impacts to small businesses, but hasn't clarified if the Small Business Exemption trumps the requirements in Cleaner Air Oregon regulations. Will business employing less than 50 people be able to evade stricter air quality regulations? We support options for providing assistance to small businesses to adhere to Cleaner Air Oregon regulations, as long as the air toxics requirements are not watered down and as long as Risk Action Levels are not set too high.
    - SOLUTION: The small business exemption must be eliminated for Cleaner Air Oregon. Small business is often as big a polluter as a larger facility depending on the age of the facility, what is being manufactured and the manufacturing process. Facilities such as Bullseye Glass in Portland and Seneca Sustainable Energy in Eugene are cases in point.

- CRITIQUE: We support the requirements of Section 5, Determining Compliance with Risk Source Limits. The DEQ and OHA have laid out a set of metrics for a facility to demonstrate comprehensive risk reduction plan and compliance including current pollution levels, emission reporting compliance, materials balancing, estimates of health impacts from air toxics, reduction goals, equipment upgrades, agency monitoring. What is needed now are firm timelines, less off-ramps and fewer opportunities to apply for delays.
    - SOLUTION: Set firm timelines for completing the risk reduction actions. For extenuating circumstances, do not issue more than one extension and for no more than 24 months.

- CRITIQUE: Cleaner Air Oregon still fails to adopt a consistent emission reduction framework. For example, regulations do not yet take into account the interactions between criteria air pollutants, air toxics, weather and climate. Throughout the CAO-RAC process, there were attempts to discuss the relationship between criteria air pollutants and air toxics, but these were deflected by DEQ staff. Both types of air pollution, air toxics and criteria air pollutants, contribute to health risks and are responsible for multiple pathways of exposure. For example, air toxic molecules can be carried on the surfaces of small particles, (particles are a criteria air pollutant); thus, increases in small particle pollution increases exposure to air toxics. Furthermore, some air toxics are also Hazardous Air Pollutants, another class of criteria air pollutants. Generic PSEL's (Plant Site Emission Limits) for the criteria air pollutants are not health-based, and they are not technology-based. Generic PSEL's set an arbitrary upper limit above which a facility may not pollute; however, the limits are generic and not based on reducing air pollutants, using the most effective technology or protecting health.
    - SOLUTION: As part of the CAO regulatory framework, Oregon must stop issuing permits allowing generic PSEL's for PM, NOx, SO2, CO, lead, HAP's; instead polluters must also be required to achieve the lowest possible emissions for criteria air pollutants. Furthermore, Cleaner Air Oregon regulations must require T-BACT and LAER (lowest achievable emissions rate). Taken together, reducing and regulating criteria air pollutants along with air toxics will improve Oregon's air quality more effectively, more quickly and provide the best health outcomes.

    - CRITIQUE: SB 1541 Section 5 and 6 outline various guidelines for Toxics Best Available Control Technology. Much of the language is overly focused on establishing an "after the fact" technology standard. However, there is still much the EQC can do to embed

toxics reduction and health-based standards into the Cleaner Air Oregon legal mandates.

- SOLUTION: We recommend the EQC delve deeper into *proactive* procedures for clean air, not only control technology. To spark more creative approaches, a few solution-oriented additions to Cleaner Air Oregon rules are discussed:
    - Section 6(a)B(c) states "**Toxics best available control technology may be based on a design standard, equipment standard, work practice standard or other operational standard, or a combination thereof."** We question this limited approach to achieving cleaner and healthier air.
    - CAO's focus need not be solely on the control of air toxics; requirements can also include reducing the hazardous materials brought onsite and used in manufacturing. This is referred to as implementing Toxics Use Reduction strategies. Under Oregon's Toxics Use and Hazardous Waste Reduction Act, The EQC could add requirements for industrial polluters to implement an "upstream" toxic use reduction strategy in addition to "downstream" control technology. Reducing toxic chemicals upstream in the manufacturing process is not in conflict with the restrictions in Section 5(a).
  - SOLUTION: Section 6(a)C(c) tries to limit how the Agency determines economic impacts of improving control technology to "**only the economic impacts and benefits associated with controlling toxic air contaminants.**"
    - The EQC can endorse and legitimize the use of data related to the economic impacts and benefits of health determinants as part of the equation to determine cost-effectiveness of reducing air toxics. There is nothing in this section that precludes assessing "economic impacts and benefits" to those experiencing the pollution, including workers. Economic impacts and benefits are not limited solely to polluters.
  - SOLUTION: Section 7 attempts to limit the EQC's efforts to adjust benchmarks for excess non-cancer risks to no less than a Hazard Index of 3.
    - This effort to set artificial benchmark limits excludes consideration of vulnerable populations whose members experience health risk hazards to a greater degree than the average population. Such arbitrary limits are prejudiced against fetuses, infants, children, the elderly and impacted and vulnerable communities. Under Section 7(3)(B), the EQC should search for greater latitude to set adjusted health benchmarks based on the vulnerability of the impacted community. For example, the EQC could adopt a strictly health-protective definition of "other severe health effects" in Section 7(1)(b). The EQC could also rely on Oregon's Environmental Justice policies and guidelines to inform your interpretation of Section 7. The EQC can also adopt lower TRV based on the Uncertainty Factor for children.
    - The EQC should immediately adopt Oregon's Hazardous Index benchmark to be equal to HI1 effective 2029. Let's not put this off until 2028!

- CRITIQUE: Under OAR **340-245-0130 (6) t**he DEQ has allowed too much latitude for facilities to implement their Risk Reduction Plans. There is a potential for a polluter to be granted as long as 5 years to implement their Risk Reduction Plan. Meanwhile a community breathing the air will continue to bear the overburden of exposure to air toxics.

- SOLUTION: The EQC should limit delay to no more than two years, period. This strict timeline will benefit industry and public concern by providing clear requirements and timelines.

- CRITIQUE: Cleaner Air Oregon proposed rules fall short of providing scientific information to the public which can be used for meaningful and data-driven community input.
  - SOLUTION: The Toxics Emissions Inventory needs to be more user-friendly. The public should also get to see a list of which industries have not submitted their reports or have incomplete reports. Industries must be required to verify their Inventory Reports with purchasing and production data. Furthermore, air monitoring should be mandatory and done on a surprise basis. Requiring air monitoring is the first step in restoring public trust. If we don't know what we are breathing and how much, how is any rule going to be effective? It will also be a good comparison for the emissions inventories and a way to see if results line up in terms of what industry says they are emitting and what they are actually are emitting.

Beyond Toxics sat on the CAO Policy Advisory Committee during the 18+ months of work to establish rules for CAO. We took an active role commenting on CAO during the 2018 Legislature. We have taken great care to write these comments for the EQC and DEQ to consider as you further clarify the rules of CAO. Thank you for the opportunity to share our critiques, assessments and recommendations. We have consistently highlighted the need to protect children and vulnerable communities with an environmental justice framework. We look forward to further discussion and a response to our detailed comments.