APPENDIX Z

THE DEPARTMENT OF ENVIRONMENTAL QUALITY'S INTERNAL MANAGEMENT DIRECTIVE ON SELF-POLICING, DISCLOSURE, AND PENALTY MITIGATION

I. PURPOSE

This Internal Management Directive (Directive) is designed to enhance protection of human health and the environment by encouraging regulated entities to voluntarily prevent, discover, disclose, and correct violations of Federal, state and local environmental requirements. It also encourages facilities to create and maintain environmental management systems and to take other steps to review compliance within their operations. Benefits available to entities that make disclosures under this Directive include reduction or possible elimination of civil penalties and a determination not to recommend criminal investigation of the disclosing entities. The penalty provisions of this Directive apply only to violations for which the Department of Environmental Quality (Department) would have assessed a penalty had it discovered the violations.

II. AUTHORITY

Oregon Administrative Rule (OAR) 340-012-0160(2) provides that "the director may reduce any penalty by any amount the director deems appropriate if the respondent has voluntarily disclosed the violation to the department. In deciding whether a violation has been voluntarily disclosed, the director may take into account any considerations the director deems appropriate, including whether the violation was (a) Discovered through an environmental auditing program or a systematic compliance program; (b) Voluntarily discovered; (c) Promptly disclosed; (d) Discovered and disclosed independent of the government or a third party; (e) Corrected and remedied; (f) Prevented from recurring; (g) Not repeated; (h) Not the cause of significant harm to human health or the environment; and (i) Disclosed and corrected in a cooperative manner..

III. APPLICABILITY

1) This Directive applies to assessment of penalties for violations of all of the environmental statutes and rules administered by the Department.
2) The Directive is not final agency action and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.
3) This Directive applies to assessing civil penalties for both administrative and civil judicial enforcement actions, and for determining when criminal referral is appropriate. It is not intended for use in pleading, at hearing, or at trial.
4) This Directive applies only to violations disclosed after the effective date of this guidance.

IV. DEFINITIONS

"*Environmental audit*" means a voluntary, internal and comprehensive evaluation of one or more facilities or an activity at one or more facilities regulated under Oregon Revised Statute (ORS) 824.050 to 824.114 or ORS chapters 465, 466, 468, 468A, 468B or 825, or the Federal, regional or local counterpart or extension of such statutes, or of management systems related to such facility or activity, that is designed to identify and prevent noncompliance and to improve compliance with such statutes. An environmental audit may be conducted by the owner or operator, by the owner's or operator's employees, or by independent contractors.

"*Environmental audit report*" means a set of documents each labeled "Environmental Audit Report: Privileged Document," and prepared as a result of an environmental audit. An environmental audit report may include field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs and surveys, provided such supporting information is collected or developed for the primary purpose and in the course of an environmental audit. An environmental audit report, when completed, may have three components:

a) An audit report prepared by the auditor, which may include the scope of the audit, the information gained in the audit, conclusions and recommendations, together with exhibits and appendices;
b) Memoranda and documents analyzing portions or all of the audit report, perhaps discussing implementation issues; and
c) An implementation plan that addresses correcting past noncompliance, improving current compliance and preventing future noncompliance.

"*Gravity-based penalties*" means that portion of a civil penalty (determined pursuant to OAR 340-12-0045), but excluding the economic benefit portion of the civil penalty determination.

"*Knowingly*":

a) Has the meaning given that term in ORS 161.085; or
b) Means that a person acts with a conscious purpose to avoid knowledge of a conduct or a circumstance in violation of ORS 824.050 to 824.110 or ORS chapters 465, 466, 468, 468A, 468B or 825.

"*Regulated entity*" means any person, facility, or entity, including a Federal, state, or municipal agency, regulated under Federal, state, or local environmental laws.

"*Substantial harm to human health or the environment*" means:

a) Physical injury, as defined in ORS 161.015, to a human being or demonstrable substantial risk of serious physical injury, as defined in ORS 161.015, to a human being; or
b) Substantial damage to wildlife, flora, aquatic or marine life, to habitat or to livestock or agricultural crops.

"*Violation*" means a transgression of any statute, rule, order, license, permit, or any part thereof under the jurisdiction of the Department, and includes both acts and omissions.

V. DISCUSSION AND DIRECTIVE

In determining what, if any, action the Department should take regarding self-disclosed violations, the Director expects DEQ staff to apply the "Department Responses" below.

A. Department Responses

This section identifies the major incentives provided to encourage self-policing, self-disclosure, and prompt self-correction. These incentives include, when appropriate, reducing gravity based penalties, declining to refer for criminal prosecution regulated entities that self-report violations, and refraining from routine requests for audits reports.

1. Reduction of Gravity-Based Penalties by 100%: The Department will reduce the gravity-based penalty assessment by 100% for violations of environmental statutes, rules, and permits if the regulated entity establishes that it satisfies all of the conditions of Section B of this Directive. That is, this incentive only applies to regulated entities that have performed environmental audits, or have initiated "systematic compliance" to assess ongoing environmental compliance.

2. Reduction of Gravity-Based Penalties by 50%: The Department will reduce the gravity-based penalty assessment by 50% for violations of environmental statutes, rules, and permits if the regulated entity establishes that it satisfies the conditions in Section B other than Paragraph B.1. That is, this incentive applies to regulated entities that self-report violations and meet the other conditions of this Directive but do not discover the violation(s) pursuant to an environmental audit or systematic compliance.

3. Additional Gravity-Based Penalty Reduction: The Department will consider reducing the gravity-based penalties assessed under paragraph 2 of this section up to 100% if the regulated entity demonstrates that it took, or is willing to take, exceptional measures to reduce or prevent pollution beyond a level otherwise required by law.

4. No Criminal Recommendations:
    a) The Department will not recommend to any prosecuting authority that criminal charges be brought against a regulated entity if the Department determines that Paragraphs B.2 through B.9 are satisfied, so long as the violation does not demonstrate or involve:
        i) A prevalent management philosophy or practice that concealed or condoned environmental violations; or
        ii) Knowing involvement in or deliberate ignorance of the violations by responsible corporate officials or managers; or
        iii) Substantial harm to human health or the environment.
    b) Whether or not the Department refers the regulated entity for criminal prosecution under this section, the Department may recommend prosecution of the criminal acts of individual managers, employees, or agents.

5. No Routine Request for Audits: The Department does not routinely request environmental audit reports to initiate administrative, civil, or criminal investigations of regulated entities. Any request by the Department for environmental audit reports is subject to applicable statutes, rules, and Department Directives.

B. Conditions for penalty mitigation and abstention from criminal recommendation

This section identifies the conditions that regulated entities must meet to qualify for the incentives, pursuant to the terms and conditions of this Directive. The Department retains sole authority and discretion in determining whether a regulated entity has met the relevant conditions. The Department's determination will be based on information readily available to the Department, including information provided by the regulated entity. For incentives to be applied, the following must occur:

1. **Discovery:** The violation is discovered through:

    a) An "environmental audit;" or
    b) "Systematic compliance" which means the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect, disclose, and correct violations through all of the following:
        i) Compliance policies, standards, and procedures that identify how employees and agents are to meet the requirements of statutes, regulations, permits, and other sources of authority for environmental requirements;
        ii) Assignment of overall responsibility to a person with authority to make decisions regarding environmental compliance for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;
        iii) Mechanisms for systematically assuring that compliance policies, standards, and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;
        iv) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents whose duties involve environmental compliance;
        v) Appropriate incentives to managers and employees to perform in accordance with compliance policies, standards, and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and
        vi) Procedures for the prompt and appropriate disclosure to the Department or the appropriate entity (e.g., the Oregon Emergency Response System), for the prompt and appropriate correction of any violations, and for any modification necessary to the regulated entity's program to prevent future violations.

2. **Voluntary Discovery:** The violation is identified voluntarily by the regulated entity and not through a mandated monitoring, sampling or auditing requirement prescribed by statute, regulation, permit, variance, judicial or administrative order, mutual agreement and order, or

consent agreement. This condition does not, however, exclude violations discovered through a routine environmental audit or systematic compliance established pursuant to a consent agreement, provided such an agreement is part of a voluntary program entered into between the regulated entity and the Department, or any Federal, state, or local unit of government.

"Voluntary Discovery" does not include:

a) Emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required by statute, rule, or permit; or
b) Violations of waste discharge requirements or National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring;
c) Spills of oil or hazardous materials that enter waters of the state; or
d) Violations discovered through a specific or one-time compliance audit required to be performed by the terms of a consent order, variance, or settlement agreement.

The voluntary requirement applies to discovery only, not reporting. That is, any violation that is voluntarily discovered is generally "voluntary discovery" regardless of whether reporting of the violation is required after it is found.

3. **Prompt Disclosure** Except as provided in this section, the regulated entity fully discloses in writing to the Department the specific violation within 21 days (or within such shorter time as may be required by law) after it discovered that the violation occurred, or may have occurred.
   a) Full disclosure requires detailed documentation of the facts surrounding the violation, including, at a minimum, written information on the type of violation, location where the violation occurred, duration of the violation, and any underlying discharge, monitoring, sampling, operation, or permit data upon which the regulated entity relied to determine that a violation occurred. For suspected violations, the regulated entity must provide to the Department the rationale and relevant data for such suspected violation(s). If more than 21 days would be needed to prepare the detailed documentation of the facts surrounding the violation, the regulated entity may disclose the specific violation within 21 days in writing to the Department, and as part of the same disclosure propose a longer period of time to provide to the Department the detailed documentation of the facts.
   b) The Department will accept disclosures later than 21 days as "prompt" when the regulated entity demonstrates, to the satisfaction of the Department, that the additional time is reasonably needed to determine compliance status and did not cause significant harm, or pose significant risk of harm, to human health or the environment.
   c) Disclosures made pursuant to this Directive and any compliance agreements reached under this Directive, are subject to the Oregon Public Records Law.

4. **Discovery and Disclosure Independent of Government or Third Party:** The violation is identified and disclosed by the regulated entity prior to discovery or disclosure of the violation through:
   a) The commencement of a Federal, state, or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity;

b) Notice or commencement of a citizen suit;
c) Commencement of litigation by a third party;
d) The reporting of the violation to the Department (or other government agency) by a "whistle blower" employee, rather than by one authorized to speak on behalf of the regulated entity; or
e) Discovery of the violation by a regulatory agency.

For entities that own or operate multiple facilities, the fact that one facility is already the subject of an investigation, inspection, information request or third-party complaint does not preclude the Department from exercising its discretion to make this Directive available for violations self-discovered at other facilities owned or operated by the same regulated entity.

5. **Correction and Remediation:** To the extent that a violation can be corrected, the regulated entity satisfactorily corrects the violation as promptly as practicable, certifies in writing that violations have been corrected, and takes appropriate measures to remedy any significant harm, or significant risk of harm to human health or the environment. The Department may require that, to satisfy conditions 5, 6, and 8, a regulated entity enter into a publicly-available written agreement, administrative consent order, variance, or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required. In meeting this condition, the regulated entity does not need Department approval before correcting the violation; however, the Department retains sole discretion to determine whether the regulated entity has satisfactorily corrected the violation.

6. **Prevent Recurrence:** At the request of the Department, the regulated entity agrees, in writing, to take steps to prevent a recurrence of the violation. Such steps may include improvements to its environmental auditing or systematic compliance efforts.

7. **No Repeat Violations:**
   a) The regulated entity must not have received notice from the Department (i.e., through a warning letter or formal Department enforcement action) that indicates that the regulated entity committed the same violation at the same location or distinct facility within the past three years from the date the warning letter or formal enforcement action was issued
   b) The violation must not be a part of a series or pattern of similar Federal, state, or local violations by the regulated entity, which occurred within the past three years, and which reflect a prevalent management philosophy or practice that concealed or condoned environmental violations or knowing or negligent involvement in or deliberate ignorance of the violations by high-level corporate officials or managers. The Department will consider all the facts and circumstances relating to any prior violation in determining whether it is a repeat violation.

8. **Other Violations Excluded:** The violation is not one that: i) resulted in significant harm, or posed significant risk of harm, to human health or the environment, or ii) violated the specific terms of any judicial or administrative order, variance, mutual agreement and order, or consent agreement.

9. **Cooperation:** The regulated entity cooperates as requested by the Department and provides information as necessary and requested by the Department to determine compliance with this Directive. Cooperation includes, at a minimum, providing all requested documents, except documents subject to a state statutory or common law privilege, access to employees, and assistance in further investigations into the violation and other compliance issues of the regulated entity related to the disclosure.

C. ECONOMIC BENEFIT

The Department retains discretion to recover any economic benefit gained by the regulated entity as a result of noncompliance so that violating entities do not gain a competitive advantage over complying entities.

D. INTERPRETATION

The terms and provisions of this Directive are subject to reasonable interpretations of the Department.

E. EFFECTIVE DATE

THIS DEPARTMENT OF ENVIRONMENTAL QUALITY DIRECTIVE IS EFFECTIVE AS OF:

TBD June 2, 2005
Date

SIGNED BY:

/s/
Stephanie Hallock, Director
Department of Environmental Quality
Pursuant to OAR 340-12-0045 (3)