

Notice of Intent to Construct IMD



**Air Quality Program
Operations**

700 NE Multnomah St.
Suite 600

Portland, OR 97232

Phone: 503-229-5001

800-452-4011

Fax: 503-229-6124

Contact: Jill Inahara

jill.inahara@deq.oregon.gov

www.oregon.gov/DEQ

DEQ is a leader in restoring, maintaining and enhancing the quality of Oregon's air, land and water.



State of Oregon
Department of
Environmental
Quality

DEQ can provide documents in an alternate format or in a language other than English upon request. Call DEQ at 800-452-4011 or email deqinfo@deq.state.or.us.

Disclaimer

This directive is intended solely as guidance for DEQ employees. It does not constitute rulemaking by the Environmental Quality Commission and may not be relied upon to create an enforceable right or benefit, substantive or procedural, enforceable at law or in equity, by any person. With written managerial approval, DEQ employees may deviate from this directive. DEQ anticipates revising this directive from time to time as conditions warrant.

Document Development

| | | |
|--------------|--|----------------------------|
| Prepared By: | <u>Dan DeFehr and Jill Inahara</u> | |
| Reviewed By: | <u><i>Mark Bailey</i></u> Mark Bailey (Feb 23, 2022 08:57 PST) Mark Bailey | <u>Feb 23, 2022</u> |
| | <u><i>Claudia J. Davis</i></u> Claudia J. Davis (Feb 24, 2022 19:19 PST) Claudia Davis | <u>Feb 24, 2022</u> |
| | <u><i>Matt Davis</i></u> Matthew Davis (Feb 28, 2022 10:04 PST) Matt Davis | <u>Feb 28, 2022</u> |
| | <u><i>Melissa Hovey</i></u> Melissa Hovey | <u>Mar 1, 2022</u> |
| | <u><i>Jaclyn Palermo</i></u> Jaclyn Palermo (Mar 1, 2022 14:51 PST) Jaelyn Palermo | <u>Mar 1, 2022</u> |
| Approved By: | <u><i>Ali Mirzakhali</i></u> Ali Mirzakhali (Mar 1, 2022 21:40 PST) Ali Mirzakhali | <u>Mar 1, 2022</u> Date |

Table of Contents

| | |
|---|---|
| 1. Intent/Purpose/Statement of Need | 1 |
| 2. Applicability | 1 |
| 3. Summary | 1 |
| 4. Background | 2 |
| 5. Directives | 2 |
| 5.1 Eligible Sources | 2 |
| Issue 1: “Default Approval” | 2 |
| Directive 1: | 4 |
| Issue 2: LUCS with NCs | 4 |
| Directive 2: | 7 |
| Issue 3: Change in SIC or NAICS | 7 |
| Directive 3: | 8 |
| 6. Acronyms Used in This Directive | 9 |
| 7. Record of Revisions to IMD | 9 |

1. Intent/Purpose/Statement of Need

The purpose of this IMD is to promote consistent construction approval through the Notice of Intent to Construct/Notice of Approval¹ (NC/NOA) process for sources permitted through Air Contaminant Discharge Permits and Title V permits, as well as new sources not otherwise required to obtain a permit. DEQ has identified three circumstances where the interpretation and implementation of NC rules have been inconsistent or need clarification. The issues addressed under this IMD are:

1. Default approvals of NCs.
2. When Land Use Compatibility Statements (LUCS) are required for Type 1 or Type 2 NCs.
3. Sources requesting a change in the SIC/NAICS codes through an NC.

This IMD provides detailed direction to staff on when a construction/modification project qualifies as a Type 1 NC or Type 2 NC and the process for that approval in alignment with DEQ's rules and statutes.

2. Applicability

This IMD is to be used by DEQ permit writers who are responsible to implement the requirements found in [OAR 340-210-0205 through 340-210-0250](#). The requirements are contained in OAR 340-210-0215 with emphasis added:

340-210-0215 Notice of Construction and Approval of Plans: Requirement

- (1) **New Sources**. No person is allowed to construct, install, or establish a new source that will cause an increase in any regulated pollutant emissions without first notifying DEQ in writing.
- (2) **Modifications to existing sources**. No person is allowed to make a physical change or **change in operation** of an existing source that will cause an increase, on an hourly basis at full production, in any regulated pollutant emissions without first notifying DEQ in writing.
- (3) **Air Pollution Control Devices**. No person is allowed to construct or modify any air pollution control device without first notifying DEQ in writing.

[NOTE: OAR 340-210-0215(2) also includes changes in operation, not just physical changes.]

3. Summary

DEQ approves construction/modification changes for sources through the Notice of Intent to Construct rules for all sources, both permitted and unpermitted. Clarification of the rules is needed to ensure consistent implementation across the state. Some previously approved NCs have allowed construction/modification where a permit modification should have been required. Staff at all levels have been required to address these matters so additional clarification will prevent further issues.

¹ This document addresses construction at both ACDP and Title V sources through NCs and NOAs but "NC" will be used throughout for simplicity.

This IMD will aid in providing directives to staff to help avoid issues that have arisen in the past, facilitate consistent statewide application of the rules, and generally clarify staff’s process for approval of construction/modification changes.

4. Background

The Notice of Construction (NC) rules in [OAR 340-210-0205 through 340-210-0250](#) apply to the following sources:

- All new sources not otherwise required to obtain a permit under OAR chapter 340, division 216 or 218;
- Modifications (see definition below) at existing sources, including sources that have permits under OAR chapter 340, division 216 or 218; and
- All sources that use air pollution control devices to comply with emissions limits or to avoid Title V applicability or Major New Source Review applicability.

(93) "Modification," except as used in the terms "major modification" "permit modification" and "Title I modification," means any physical change to, or change in the method of operation of, a source or part of a source that results in an increase in the source or part of the source's potential to emit any regulated pollutant on an hourly basis. Modifications do not include the following:

- (a) Increases in hours of operation or production rates that do not involve a physical change or change in the method of operation;
- (b) Changes in the method of operation due to using an alternative fuel or raw material that the source or part of a source was physically capable of accommodating during the baseline period; and
- (c) Routine maintenance, repair and like-for-like replacement of components unless they increase the expected life of the source or part of a source by using component upgrades that would not otherwise be necessary for the source or part of a source to function.

5. Directives

5.1 Eligible Sources: Any existing or proposed source that submits a Type 1 or Type 2 NC, including sources not required to obtain a permit.

Issue 1: “Default Approval”

The division 210 rules allow owners/operators to proceed with construction for Type 1 and Type 2 changes 10 days and 60 days after application submittal to DEQ, respectively, if DEQ has not issued a decision to deny or approve construction. This “default approval” rule was designed to ensure that backlogged work at DEQ did not delay approval of construction/modification for certain limited changes. This pathway has caused the review of NCs to receive a lower priority by permit writers

resulting in many Type 1 NCs and some Type 2 NCs proceeding with construction without DEQ issuing decisions on the NCs.

Complicate the renewal process: While this process has helped with short-term workloads, it has complicated the permit renewal process by requiring review and assessment of possibly several NCs at a later date for which DEQ previously had not issued approval(s), and DEQ determining that requisite changes to the permit and applicable requirements are necessary years after the project has been completed.

Project Specific Conditions Needed: When DEQ reviews and approves an NC, the approval is issued as a department order. This ensures that the conditions included with the approval are enforceable. This also gives sources the opportunity to request a hearing pursuant to ORS 468A.055(5), and the public to file a Petition for Reconsideration pursuant to OAR 137-004-0080 or to file a petition for review in circuit court pursuant to ORS 183.484. Generic NC approval conditions include requirements that the owner/operator of the construction/modification project:

- Construct in conformance with the plans sent to DEQ;
- Obtain approval from all requisite city/state/county officials;
- Comply with all DEQ permit conditions and requirements;
- Operate and maintain all processes at the highest practical efficiency and effectiveness to minimize emissions of air pollution; and
- Prevent nuisance occurrence.

When an NC is reviewed, these generic conditions can be included with the approval and sent to the applicant or modified as appropriate for the specific project. Projects constructed without DEQ issuing an approval do not receive any conditions of approval, generic or otherwise, but are required by rule to comply with any existing permit conditions and other applicable rules. Review of an NC may indicate that the construction/modification change does not qualify as a Type 1 NC and must be processed as a Type 2 NC, or even require a permit modification. This review can also demonstrate that additional specific requirements are appropriate.

For example, a source requests approval of installation of a regenerative thermal oxidizer (RTO) on a veneer dryer. If there are no RTOs in the existing permit, the permit must be modified under OAR 340-216-0030(3) which requires a moderate technical modification to add a simple compliance method or monitoring for an emission point or control device not previously addressed in a permit. Because the RTO will be an environmental benefit, approval should take place as soon as possible. This can be expedited by using a two-step process: NC approval that allows immediate construction with a condition to submit a timely permit modification that allows operation and incorporates required permit conditions. If the permit already includes an RTO with appropriate monitoring, recordkeeping and reporting requirements for an existing veneer dryer, additional explicit requirements are likely not needed, and the RTO can be approved with an NC alone.

Doing the review work upfront, upon receipt of the NC application when the source has not yet begun construction, is the most appropriate time to ask questions, assess the impacts of the project, confirm emissions changes, and establish applicable requirements. This review and approval takes staff time,

which is a workload concern, but will make permit renewals easier since NC conditions can be readily incorporated into the renewal. Additionally, a review at this stage ensures that the source has provided all the required information and has applied for the appropriate NC type.

Inappropriate Facility Changes: Allowing construction to proceed under the rules without DEQ issuing approval decisions has provided an avenue for facilities to make changes where the NC application was incomplete or where a permit modification should have been required. Examples of inappropriate facility changes include:

- Physical expansion on the existing property without a LUCS. See Issue 2 below for further clarification;
- The source may be claiming unreasonable or unsupported efficiencies for their pollution control device and manufacturer specifications should be included with the application; and
- Larger projects can be broken down into smaller projects which are submitted for approval piecemeal through the NC approval process (e.g., change in raw materials, change in primary SIC/NAICS codes). See Issue 3 below for further clarification.

Directive 1:

- Review all NCs upon receipt to ensure that they are complete. Approve or deny the NCs within the appropriate timeline and do not allow default approvals of Type 2 NCs at any time. Do not allow default approvals of Type 1 NCs whenever possible. Staff who receive NC applications and anticipate not being able to review/respond to the NC application should discuss default approval with their manager as soon as possible. Managers shall reassign the work to avoid default approvals.

Issue 2: LUCS with NCs

In some cases, NCs were default approved when a new LUCS should have been submitted, and the source constructed without DEQ confirming compliance with statewide land use planning goals and local governments' acknowledged comprehensive plans.

The State Agency Coordinating (SAC) program document² establishes that a construction notification application may need to include a LUCS. "Approval of Notice of Construction" is explicitly listed as a DEQ land use action in OAR 340-018-0030(1)(c). A prior LUCS issued to the source may be used only if it includes approval for the construction or modification requested in the NC application, including the area where the construction or modification will occur. If the prior LUCS does not include such an approval, then the applicant must provide a new LUCS for the proposed construction or modification described in the NC application.

² The SAC Program requires DEQ to act in accordance with Oregon land use planning goals and approved city and county comprehensive land use plans. DEQ's air quality program administers its part of the State land use program through permitting and construction approvals. Details surrounding DEQ's SAC program can be found in OAR chapter 660, divisions 30 and 31 as well as OAR chapter 340, division 18.

The following table summarizes when a new LUCS is or is not required.

| Rule Citation | Situation | LUCS Required? |
|--|---|----------------|
| OAR 340: 216-0040(1)(a)(K), 216-0040(2), 216-0040(3), or 218-0040(3)(p) | Previous LUCS did not authorize the proposed construction/modification or is not clear on what equipment/processes is approved. | Yes |
| OAR 340-018-0030(1)(c) | Installation that requires use of additional property [expansion onto new, separate parcels of land not identified as part of the source (usually identified as defined by tax lot) in the prior LUCS] | Yes |
| OAR 340-018-0030(1)(c) | Installation that requires physical expansion on existing property that was not identified as part of the source in the prior LUCS | Yes |
| OAR 340-018-0030(1)(c) | Installation on existing property, such as inside a building or within the source’s current developed footprint and that is included in the approved activities described in the prior LUCS [and therefore, not a substantial modification or intensification of the permitted activity] | No |
| SAC program document (Section III.3 “Air Quality Division,” part 3, p. 26) | Installation or replacement of pollution control equipment and there is no operational change ³ | No |

The permit writer should closely review the prior LUCS and the proposed construction or modification to determine whether a new LUCS is required. If the permit writer has any question about whether a new LUCS is required, the permit writer should consult with their manager, and potentially with legal counsel or the local government planning department regarding the scope of the prior LUCS. If a new LUCS is required, it should be submitted with the NC application. A complete LUCS should include a description of the tax lot(s) and emission unit(s) and activities that are covered under the LUCS and that information should be included in the Review Report.

Physical expansion on existing property means construction on land that had no improvements or that had improvements only to the surface (e.g., gravel, asphalt or concrete pad). The developed footprint would be existing buildings or areas that have gravel, asphalt, or a concrete pad. An example of a physical expansion on existing property could be installation of a new wood chip dump or installation of a new fuel unloading system on an area that must be cleared of vegetation.

³ “Operational change” is not defined but should be interpreted to have the same meaning as “change in the method of operation.”

OAR 340-210-0230 includes a list of information that is required when submitting an NC. This list includes a “Land Use Compatibility Statement signed by a local (city or county) planner either approving or disapproving construction or modification to the source if required by the local planning agency.” The ‘if required’ part of this rule has led to confusion and misunderstandings regarding when a LUCS is required for an NC. See the [LUCS Requirements](#) document on the Permit Writers Resource Center for further clarification.

In some instances, the local planning jurisdiction may state that they will not provide land use approval; this happens most often with a county planning jurisdiction when the proposed project is on Federal land located within the county. There may be other instances in which a local planning jurisdiction will state that they cannot or will not provide the applicant a completed (approved or denied) LUCS. In these cases, the applicant will be required to review Statewide Land Use Planning goals and provide DEQ an assessment of those goals and their proposed project, as described below:

| <u>Responsible Party</u> | <u>Step or Requirement</u> |
|---------------------------------|---|
| Applicant | Review all Statewide Planning Goals and clearly identify those that are implicated by the project. |
| Applicant | Review Statewide Planning Goal requirements and write-up findings to explain why and how the project complies with those goals. On federal lands, this must include documentation that a federal agency has authorized the project. |
| Applicant | Submit findings and associated materials from rows (1) and (2) of this table to DEQ. |
| DEQ Staff | Provide copies of applicant-submitted materials to Oregon DOJ air quality contact counsel and DLCD (contact to be determined) for review and advice about whether or not the project is compliant with Statewide Planning Goals. |
| DEQ Staff | Upon consideration of advice from DOJ and DLCD, if DEQ determines the project is compliant, notify the applicant and continue processing the application. |
| DEQ Staff | Upon consideration of advice from DOJ and DLCD, if DEQ determines the project is noncompliant, notify the applicant and do not continue processing the application. |
| DEQ Staff | Retain findings, materials, and advice from DOJ and DLCD in the source file as appropriate. |

Sources that have crossover with the energy grid or a significant amount of backup power (e.g., data centers, solar projects, etc.) are often regulated by Oregon Department of Energy (ODOE). Some facilities are required to obtain a site certification; this is done via approval from the Oregon Energy Facility Siting Council, which is directly associated with ODOE. If you permit or work with these types of facilities (including processing Notices of Intent to Construct (NC)), please refer to the [Tip of the Week #36 Department of Energy Site Certification and LUCS](#).

Directive 2:

- Notify the source, within the appropriate timeline, that the construction/modification cannot be approved as a Type 1 or 2 NC if the required LUCS is not submitted when required, as specified in the table above. Staff should consult with their manager to determine whether the construction/modification is authorized by a previously submitted LUCS if the situation is not clear.

Note: The LUCS required for these NCs are for the specific changes, not the entire facility. The LUCS submitted with the original permit application would describe the entire facility or operations, and must include or attach findings made by the local government demonstrating compliance with the goals and compatibility with the acknowledged plan.

- Review the [LUCS document](#) on Permit Writer Resource Center.
- Keep all LUCS in the permit files going forward, not archived, just as all permits are kept in the permit file. If an archived LUCS is needed for a land use issue that arises, then the LUCS should be obtained from the archived files and kept in the permit file.
- Follow the table steps outlined above when an applicant states that a local planning jurisdiction will not provide a completed LUCS review.
- Upon request by an applicant, review a final signed Oregon Energy Facility Siting Council site certificate (and any subsequent signed amendments) and make a determination regarding its equivalency of the LUCS requirements for the application.

Issue 3: Change in SIC or NAICS

If the individual emissions unit/device/activity/process approved under the NC is not similar to an individual emissions unit/device/activity/process already included in the permit or is not used to support the major industrial grouping, then a change in Standard Industrial Classification (SIC) or North American Industrial Classification System (NAICS) codes may be required. In addition, the change in the SIC/NAICS code may require land use approval to ensure consistency with local comprehensive plans.

OAR 340-200-0020(166) "Source" means any building, structure, facility, installation or combination thereof that emits or is capable of emitting air contaminants to the atmosphere, is located on one or more contiguous or adjacent properties and is owned or operated by the same person or by persons under common control. The term includes all air contaminant emitting activities that belong to a single major industrial group, i.e., that have the same two-digit code, as described in the Standard Industrial Classification Manual, U.S. Office of Management and Budget, 1987, or that support the major industrial group⁴.

⁴ Each operating establishment is assigned an industry code on the basis of its primary activity, which is determined by its principal product or group of products produced or distributed, or services rendered. Ideally, the principal product or service should be determined by its relative share of value added at the establishment. In practice, however, it is rarely possible to

Although it is the source's responsibility to change their SIC/NAICS, permit writers should require the source to do so if the NC application is for something unlike individual emissions unit/device/activity/process already included in the permit and there is reason to believe that the source may now be "primarily engaged in" a process or activity different than what is listed in the permit. It may be appropriate to ask the source to confirm they are still primarily engaged in the same activity/process when reviewing the NC. Instead of an NC, a change to the two-digit SIC code or the addition of a new SIC code that includes changes to operations requires a new or modified permit, depending on the type of changes needed, and a new LUCS. The source number should stay the same for historical purposes.

Directive 3:

- Notify the source, within the appropriate timeline, that a change in the primary SIC/NAICS code for a source or the addition of a new SIC/NAICS code cannot be approved under a Type 1 or Type 2 NC. Inform the source that it must:
 - Request a permit modification if the new SIC clearly supports the permitted major industrial group; or
 - Submit a new permit application if the new activity (i.e., different primary SIC/NAICS) does not satisfy the criteria of "source" in the current permit but keep the source number the same; and
 - Submit a new LUCS.

obtain this measure for individual products or services; typically, it is necessary to adopt some other criterion which may be expected to give approximately the same results in determining the primary activity of an establishment.

6. Acronyms Used in This Directive

| | |
|-------|---|
| ACDP | Air Contaminant Discharge Permit |
| CAO | Cleaner Air Oregon |
| DEQ | Oregon Department of Environmental Quality |
| DLCD | Department of Land Conservation and Development |
| DOJ | Department of Justice |
| EQC | Environmental Quality Commission |
| IMD | Internal Management Directive |
| LUCS | Land Use Compatibility Statement |
| NAICS | North American Industrial Classification System |
| NC | Notice of Intent to Construct |
| NOA | Notice of Approval |
| OAR | Oregon Administrative Rules |
| ORS | Oregon Revised Statute |
| RTO | Regenerative thermal oxidizer |
| SAC | State Agency Coordinating |
| SIC | Standard Industrial Classification |
| TBD | To be determined |
| TEU | Toxics Emissions Unit |

7. Record of Revisions to IMD

| Revision | Date | Changes | Editor |
|----------|------|---------|--------|
| | | | |